

OLQE Examiners' Comments 2016

Head VI: Hong Kong Constitutional Law

Question 1:

This question concerned application of Mainland laws in the HKSAR. The overall standard of answers was lower, I think, than last year. However, bearing in mind the standard of "day 1 solicitor", and the fact that constitutional law is essential "background" knowledge, rather than something which junior solicitors are likely to encounter in their day-to-day practice, I found that the great preponderance of candidates were worthy of pass marks. The majority were aware of the essential points - BL 18 and Annex III, as well as the interpretation power of the SCNPC and the possibility of BL amendment. That is to their credit and was normally enough for a pass mark.

If there was a problem, it was in the similarity of the answers. Perhaps they were influenced by a common source. One can hardly blame candidates for relying on "nutshells" or "canned" notes, especially in an open book exam. However, the accuracy of those source(s), if they exist, may be suspect. Certain oddities and outright mistakes cropped up repeatedly. Some candidates even appeared to be copying out a model answer to a similar question on last year's paper. I'm sure the Law Society has already "covered" itself by disavowing approval of any particular course or material provider, so the problem must lie with the candidates themselves.

Question 2:

This question was designed to elicit knowledge and understanding of the relationship between various sources related to constitutional law and interpretation. It was divided into three parts.

In the first part, candidates were required to investigate the relationship between a legislative provision (Section 5(1)(a) of the Sex Discrimination Ordinance) and an article of the Basic Law (Article 40). Surprisingly, this part was in general poorly answered. Of particular concern was the frequently made assertion that an article of the Basic Law would be read subject to the provision of a potentially inconsistent statutory provision. A significant number of candidates failed to sufficiently acknowledge the hierarchical relationship between the Basic Law and Ordinances. There might of course be situations in which the statutory provision might assist the court in its interpretation of an article of the Basic Law, and candidates were rewarded for noting that Article 40 protects "lawful" traditional rights and interests, which may be interpreted to exclude acts and omissions in contravention of provisions such as section 5(1)(a) of the Sex Discrimination Ordinance. However, in general the Basic Law prevails as the formally superior source of law.

In the second part, candidates were required to investigate the relationship between an extrinsic material (the Preparatory Committee's report) and an article of the Basic Law (Article 40). This was rather better answered, with most candidates understanding that the Preparatory Committee's report was a post-enactment text and the consequence of that for interpretation. Answers to this part were generally of a satisfactory quality.

In the third part, candidates were required to investigate the relationship between two respective articles of the Basic Law (Articles 25 and 40). The quality of answers to this part was more variable, though a substantial number of candidates persuasively engaged with

forms of constitutional interpretation, such as a purposive approach and what this might mean in the specific context of the question. A number of candidates also noted and explained the interpretation of articles of the Basic Law in accordance with common law principles. Some candidates also noted the apparently greater specificity of Article 40 over Article 25 and its potential consequences for interpretation. As this part of the question was more open-ended and contentious, candidates were rewarded for a range of answers of satisfactory quality. A number of candidates unpersuasively alleged a need for an interpretation by the Standing Committee of the National People's Congress, based on a fundamental misunderstanding of Article 158 of the Basic Law.

Though answers were primarily marked on the basis of their quality, some candidates offered so little in the way of quantity as to be incapable of reasonably attracting all or most of the available marks for each part of the question.

Question 3

This question was split into two parts. The first part (worth 15 marks) required the candidates to advise on the possible legal basis to challenge an order for deportation in a refugee and 'split families' scenario, based on rights contained in the Basic Law and Hong Kong Bill of Rights Ordinance (Cap. 383). Here, candidates were invited to draw from established jurisprudence such as *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717 and *Hai Ho-tak and others v Director of Immigration* [1994] 2HKLR 202. The second part (worth 10 marks) tested the candidates' ability to apply key constitutional provisions and case law dealing with socio-economic rights to a factual scenario involving an individual's application for public housing. Such authorities included *Kong Yunming v Director of Social Welfare* [2013] HKEC 1995, *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 and *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409.

The general standard was satisfactory, with most candidates being able to address the core issues in each sub-question. On 3(1), most candidates correctly identified the scope of *non-refoulement* as a constitutional principle in Hong Kong, citing relevant case-law. However, many candidates omitted any analysis of the right to family life as a possible basis to resist deportation, even if only to reject this possibility. Given the factual matrix, those candidates should have at least addressed the relevance of family life. In this respect, some of the stronger candidates assessed such facts according to the proportionality or reasonableness test. On 3(2), most candidates correctly identified the current judicial approach to socio-economic rights, recognising the potential applicability of the margin of appreciation doctrine. However, there was a tendency in 3(2) for candidates to simply outline relevant case-law, where greater application to the facts was necessary.

A small fraction of candidates misconstrued this question in part and addressed peripheral issues such as the procedure to apply for judicial review.

Question 4

This question was the least popular, and was answered by fewer candidates than any other question. However it was generally well-answered, and there were few failures, perhaps because only those who were relatively confident about the issues, chose to answer this question.

The question was split into two parts. The first part (worth 10 marks) involved offering advice to a civil servant and businessman who have been summoned to appear before a Select

Committee of the Legislative Council and are seeking legal grounds to resist attending. This part of the question was closely modelled on the case of *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555, and candidates who correctly cited this case generally received high marks. However even those who did not specifically cite this case were mostly able to achieve respectable pass marks by applying general principles of interpretation of the relevant Basic Law provisions. Most candidates also correctly cited Article 48(11), which is very relevant to the question as it allows the Chief Executive to prevent civil servants from being summoned to testify before the Legislative Council or its committees.

The second part (worth 15 marks) also produced generally good answers. Most candidates were able to articulate the non-intervention principle under which the courts are generally reluctant to intervene in the internal procedures of the Legislative Council, and cite relevant case law such as *Leung Kwok Hung v President of the Legislative Council* (No 1) (2014) 17 HKCFAR 689. However only a few noted the possible distinction between the facts of those cases, and the more extreme actions of the Legislative Council President described in this question.

Most candidates also demonstrated an understanding of the distinction between pre- and post-enactment challenges, with the latter far more likely to succeed in this case. The last issue in this case was closely modelled on the case of *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, and many candidates correctly identified this.

The only relatively frequent failing was a tendency to recite the details of the proportionality test at length, including those aspects of the principle which were hardly relevant to the question. This failure was particularly notable among the relatively weaker candidates, who showed a tendency to recite general principles (which are easily copied from source materials brought into the exam) rather than specifically address the facts of the question.

Question 5

This question was split into two parts and candidates generally answered it fairly well. The first part (which was worth 15 marks) tested candidates on the division of the power to interpret the Hong Kong Basic Law between the Hong Kong courts and the National People's Congress Standing Committee. Most candidates demonstrated that they understood the law and were able to apply it to this part of the question. However there was relatively more coverage of relevant case law and some candidates paid less attention to the five interpretations issued by the Standing Committee.

The second part of the question (which was worth 10 marks) tested candidates on the principle of separation of power and its application, in particular the legal nature of an executive order issued by the Chief Executive under Article 48(4) of the Hong Kong Basic Law. This part of the question was often answered less well, with a significant number of candidates failing to spot the right issue and neither discussing relevant case law nor applying them to the question.

OLQE Head VI Panel, February 2017.