

OLQE Examiners' Comments 2017
Head VI: Hong Kong Constitutional Law

Question 1:

In the first part of the question (which was worth 10 marks), most candidates successfully identified that it is not possible to appeal a case from the Court of Final Appeal to the NPCSC. The majority of candidates who identified this did so by reference to the Basic Law. However, several candidates failed to refer to the Sino-British Joint Declaration in their answers as required by the question. A relatively small number of candidates appeared either to regard this part of the question as more difficult than it in fact was, or were unclear on the basic relationship between the Court of Final Appeal and the NPCSC, in asserting that it was not clear whether Brian could appeal the case to the NPCSC. Fortunately, the majority of candidates did not misunderstand that relationship.

A range of answers was offered to the second part of the question (which was worth 15 marks). Many of these answers showed good understanding of the issues and candidates were appropriately rewarded where the law was correctly understood and feasible arguments/counter-arguments offered in either direction. Article 158 of the Basic Law was clearly relevant. Some candidates regarded the resolution of Brian's rights of freedom of speech, assembly and demonstration – in the context in which they arose – as raising issues concerning the relationship between the Central Authorities and the HKSAR, therefore requiring an interpretation from the NPCSC. Other candidates regarded the determination of those rights as within the autonomy of the HKSAR and therefore not requiring an interpretation from the NPCSC. Whilst the latter was probably the more intuitive argument, candidates who used the former argument were also appropriately rewarded where their answer was cogent and feasible.

Question 2:

This question was divided into two parts. The first part of the question (which was worth 10 marks) required candidates to discuss the correct forum for raising a defence to the facts stated in the question, and demonstrate an awareness that human rights and other constitutional points can be raised in any court or tribunal in Hong Kong in any proceedings in which they arise.

The second part of the question (which was worth 15 marks) required candidates to demonstrate a basic understanding of, among other matters, the fact that the Bill of Rights and International Covenant on Civil and Political Rights generally take precedence over legislation and the manner in which administrative powers are exercised.

The standard of the candidates answering this question came as a pleasant surprise. The great majority of them clearly understood the approach which the courts take on such issues. That enabled the bulk of them to advise the client on the pros and

cons of the constitutional issue raised in the question. As a result there were few failing marks on this question, and a good number of higher marks.

Question 3

This question tested candidates' understanding of the provisions on political structure in Chapter IV of the Hong Kong Basic Law, with particular reference to how far these provide for a system of separation of powers. Candidates were expected to cite relevant case law and discuss how far the "non-intervention principle" was applicable to the facts stated in the question. These facts were modelled on actual events in 2010 when the administration accused the Legislative Council of acting ultra vires in repealing an order relating to the Tseung Kwan O landfill, although candidates were not required to demonstrate any knowledge of these events in answering the question.

Answers to Part 1 were generally satisfactory, with most candidates demonstrating a reasonable understanding of the relevant provisions in Chapter IV of the Hong Kong Basic Law, although some answers displayed a tendency to recite them without providing any substantive analysis. Answers to Part 2 were more mixed. There were some excellent answers, and most candidates were able to make at least some reference to the "non-intervention principle". The majority of candidates also correctly cited the leading case of *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689. However all too often no reference was made to other important cases in this area (such as *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555) and many candidates lost marks as a result.

Question 4

This question was divided into 3 parts. Part 1 (which carried 5 marks) tested candidates' knowledge about the different approaches to interpretation of the Hong Kong Basic Law adopted by the National People's Congress Standing Committee and the Court of Final Appeal. This part of the question was generally well answered, although some answers were rather too brief and made insufficient reference to relevant case law [e.g. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211].

Part 2 (which carried 10 marks) tested candidates' understanding of the position of the Court of Final Appeal in relation to the binding effect of Standing Committee interpretations. Once again, it was essential to cite relevant case law such as *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 and *Chong Fung Yuen*. Answers to Part 2 were more variable. While there were some good answers, other answers missed the main point of this part of the question and sometimes wrote about issues which were barely relevant (e.g. a long description of the principles of proportionality).

Part 3 (which also carried 10 marks) tested candidates' understanding of the reviewability of Standing Committee Decisions, with particular reference to the 31st August 2014 Decision on universal suffrage. It was important to cite the *obiter* in *Ng Ka Ling* and the majority of candidates were able to do so. However, once again, some entirely missed the main point of this part of the question, and a small number

appeared confused about the distinction between Decisions and Interpretations of the Standing Committee.

Question 5

This question was also divided into three parts. Part 1 (which carried 5 marks) required candidates to consider whether the non-resident in the question is able to initiate judicial review and was generally well answered.

Part 2 (which carried 10 marks) focused on the issue of margin of appreciation. Answers to this part were more mixed with stronger candidates referring to cases such as *W v Registrar of Marriage* (2013) 16 HKCFAR 112; *W v Registrar of Marriage* [2010] HKEC 1518 and the “core values” analysis of the Chief Justice in *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409. However a significant minority of candidate missed the point of this part of the question altogether.

Part 3 (which also carried 10 marks) required candidate to identify rights that might be restricted by the facts stated in the question and apply the steps outlined in *Hysan DevelopmentCo Ltd and Others v Town Planning Board* (FACV 21/2015), to determine whether any such restrictions would be likely to be upheld. This was generally well answered although, perhaps indicating poor time management, there were many cases where answers were too brief and did not go into sufficient detail.

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