

OLQE Examiners' Comments 2018

Head VI: Hong Kong Constitutional Law

Question 1:

This question was the most popular, being attempted by all 144 candidates who sat the exam. It also had the highest pass rate of any question, at 89%.

The question was divided into three parts and required candidates to write a briefing note for a group of overseas clients who are about to pay their first visit to Hong Kong and seek your advice on Hong Kong's status with the People's Republic of China.

Answers were generally adequate and most achieved a pass mark. However there were very few really good answers. The main problem was that many candidates had a rather rough and superficial understanding of the issues involved and were unable to answer the three parts of the question in a targeted way.

In relation to part 1 of the question on the nature of the structure of the Chinese state (which carried 5 marks), an alarmingly large number of candidates failed to mention that China is a unitary state. In relation to part 2 of the question (which carried 12 marks), many were not well aware of the division of powers between the central authorities and the HKSAR under One Country Two Systems, and resorted to guesswork. In relation to part 3 of the question which required two specific examples of the exercise of powers by the central authorities to intervene in the running of the HKSAR (which carried 8 marks), many failed to read the question properly and cited only one such example (usually interpretation of the Hong Kong Basic Law).

In future, candidates would be advised to better prepare for questions in this area and to read such questions more carefully.

Question 2:

This question was the second most popular, being attempted by 130 candidates. However it had the lowest pass rate, at 48.5%.

The question was generally modelled on the Legislative Council oath-taking controversy and the cases of *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 144 and *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 417.

In relation to part (1) of the question (which carried 15 marks), a considerable number of candidates gave general commentary on the power of the NPCSC to issue interpretations. Some included in that commentary observations on how that power may or may not represent a threat to the separation of powers and the rule of law in general. Relatively few candidates answered the part of the question referring to the issuing of such an interpretation "before judgment is given in the second set of judicial review proceedings", which raised the important issue of the timing of

NPCSC interpretations, and the potential impact of their timing on the separation of powers and the rule of law. Some candidates identified parallels with the Legislative Council oath-taking controversy, though many candidates did not which was surprising given its constitutional significance.

In relation to part (2) of the question (which carried 10 marks), this part generally appeared to be better answered, though many candidates did not fully answer the question resulting in loss of marks. Some candidates gave a balanced answer, though did not offer sufficient detail, analysis or context which could attract the full range of marks on offer. The case of *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 417 was again relevant, though few candidates recognised this.

Question 3

This question was relatively popular, being attempted by 120 candidates. It also had a relatively high pass rate of 73%.

This was a very practical question concerning the right to trial without delay in the context of a criminal case. The facts posited a client who had been in custody for 4 years waiting trial, judicial review, appeal and ultimately retrial. Many (if not most) candidates took a rather academic approach. That would perhaps be fully excusable with fresh law graduates, but was a negative factor in applying the standard of a day 1 solicitor.

Question 3(1):

Candidates were asked whether the client's rights had been infringed. The relevant provisions of the ICCPR and HKBOR concerning delay were set out in the question. Some candidates were astute enough to mention art 87(2) of the Basic Law (not mentioned in the question), which contains a similar provision. Many candidates discussed other rights such as the right to a fair trial (relevant, but unnecessary when a specific delay right exists) and the right to be provided with an interpreter (an issue which on the facts had already been dealt with). Some even did so to the exclusion of discussion the delay right. Perhaps they were relying on pre-prepared answers. Fortunately, most were aware of the distinction between derogable and non-derogable rights, and the need for a proportionality analysis in the case of prima facie breach of the former. It was very disappointing that many candidates (perhaps the majority) found it necessary to consider whether client's status as a foreign domestic helper would somehow deprive her of the usual rights in the criminal process.

Question 3(2):

Here candidates were asked to advise client which remedy or remedies to seek. It was disappointing that many failed to mention any remedy which could have resulted in release of client, whether that be bail, stay of proceedings or judicial review with a view to quash the decision to continue with the prosecution. Far too many candidates would have sought a declaration by way of judicial review and/or damages, while client (apparently) languished in custody. True enough, this is a paper on

constitutional law not criminal procedure, but the day 1 solicitor needs to know how constitutional points arise in all manner of cases clients may face.

Question 3(3):

Candidates were asked in which forum the remedy should be sought. Most candidates correctly answered that constitutional rights may be ventilated in any court or tribunal in proceedings in which they arise, citing the relevant provision of the HK Bill of Rights. However, too many of them went on to contradict themselves by suggesting that somehow the CFI would be the only appropriate forum in this case, ignoring the fact that the District judge dealing with client's case has full power to consider the delay point and grant an appropriate remedy. Similar wording was used by most of those candidates, citing the same authority (Latker). This suggests they were copying from pre-prepared answers.

Many candidates did not apply knowledge that they surely must have of the court structure and jurisdiction. Common mistakes were (i) suggesting that an originating application for judicial review be made direct to the Court of Appeal or the Court of Final Appeal; (ii) suggesting judicial review of the Court of Appeal's decision to order a retrial; and (iii) suggesting an appeal, or judicial review, of denial of bail, rather than making a fresh application based on change of circumstances.

Question 4

This question was the second least popular, being attempted by only 96 candidates. However it had the second highest pass rate, at 76%.

In the first part of the question (which was worth 20 marks), most candidates successfully identified the engagement of constitutional rights under the Basic Law. Most candidates also identified the application of the proportionality test although in some cases there was a distinct lack of application of this test to the facts at issue. That said, the general standard was satisfactory; a handful of answers were excellent.

Candidates also fared generally quite well on the second part of the question (worth 5 marks) concerning the amenability of prosecutorial decisions to judicial review. While a minority of candidates missed the point of the question, or applied seemingly irrelevant precedent, the general response was satisfactory.

There were also a number of candidates who did not attempt an answer to this question at all, or were only able to attempt an answer to 4(1) but not 4(2). This perhaps indicates poor time management generally, or a need for candidates in the future to prepare, to a greater extent, from that part of the syllabus concerning fundamental human rights and judicial review under the Basic Law.

Question 5

This question was the least popular, most likely because candidates were not expecting a question in this area, and was attempted by only 84 candidates. It also had the second highest pass rate at 55%.

The question was divided into two parts. Part 1 was worth 15 marks and required candidates to address two separate issues. The first was to advise on relevant provisions in the Hong Kong Basic Law concerning Hong Kong's future after 30 June 2047, with particular references to any provisions relevant to the continuation of government land leases beyond that date (with a maximum of 10 marks being awarded for answers on this issue). Although Article 5 and 123 are particularly relevant here, answers which put forward reasoned arguments in relation to other provisions in the Hong Kong Basic Law were also given good marks. One problem which arose in a number of answers was to (mis)interpret the question as simply requiring candidates to copy out the text of such provisions without providing any analysis or explanation of their content. Since a real legal advice would not consist of simply copying out a list of statutory provisions, candidates who adopted this approach were penalized.

The second issue in Part 1 concerned whether it would be possible to initiate an amendment to the Hong Kong Basic Law under the circumstances stated in the question (with a maximum of 5 marks being awarded for answers on this issue). Good answers required an understanding of which parties have the power to initiate such an amendment under Article 159(2) of the Hong Kong Basic Law, and this was lacking in some answers.

Part 2 of the question was worth 10 marks and required candidates to identify a procedural defect in an amendment to the Hong Kong Basic Law and advise on whether this issue would be subject to the jurisdiction of the Hong Kong courts. This was generally well answered, with most candidates spotting the failure to consult the Committee for the Basic Law (as required under Article 159(3) of the Hong Kong Basic Law) prior to the adoption of the amendment. Wide leeway was given to candidates in addressing the issue of whether or not this issue would be subject to the jurisdiction of the Hong Kong courts. However, candidates were expected to cite relevant case law, which was lacking in some answers.

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