

OLQE Examiners' Statement 2019

Head VI: Hong Kong Constitutional Law

Question 1:

This question was the most popular, being attempted by 150 out of the 154 candidates who sat the exam. It had the second highest pass rate of any question, at 89%.

The question required candidates to write a legal opinion for a foreign business client explaining the background to the establishment of the Hong Kong Special Administrative Region, its status under the Hong Kong Basic Law with reference to specific provisions in this document, the differences between a high degree of autonomy and independence, and whether there is any realistic prospect of Hong Kong becoming a separate country.

Answers were generally adequate and most achieved a pass mark. The main problem was that some candidates did not directly address the points specifically raised in the question and instead wrote general answers, or simply repeated various provisions in the Hong Kong Basic Law without making any significant effort to provide the analysis that would be expected in a legal opinion for a client. In some cases, this led to candidates failing to achieve a pass mark.

Question 2:

This question was relatively less popular, being attempted by 121 of the 154 candidates who sat the exam. It had a pass rate of 77%.

This question was divided into two parts, with part (1) being generally less well answered than part (2). Although part (2) carried 15 marks, while part (1) carried only 10 marks, it was surprising to see a significant number of candidates evidently spending more time on part (1) than on part (2), and/or giving insufficient detail or analysis in part (2). Candidates should pay more attention to the division of marks in a question as an indicator of how they might most profitably divide their labour.

Part (1) required candidates to demonstrate an understanding of Basic Law provisions that served as evidence of an executive-led system (or otherwise), but it required more than a mere listing of those provisions without elaboration. A number of candidates adopted this unelaborated approach which would, in itself, be insufficient to obtain a pass mark on this part. Insufficient elaboration and/or analysis was the principal defect in answers to part (1).

Part (2) was generally better answered, with most candidates who attempted this part grasping the key issues and reasoning to a logical conclusion, though again this would have benefited from improved detail and analysis.

Question 3

This question was moderately popular, being attempted by 130 out of the 154 candidates. It had the highest pass rate, at 95%.

Candidates were required to write a research note on constitutional protection of freedom of expression with reference to a specific case described in the question. The overall performance of candidates was very good, as reflected in the 95% pass rate for this question. Nonetheless there were a number of serious errors in some answers. In particular, this year as in the previous year, there were candidates who took the view that constitutional rights depend on immigration status. Some referred to the "immigration reservation" (in the HK Bill of Rights Ordinance). These candidates thought that the client's right to freedom of expression depended on whether he was a Hong Kong permanent resident. Last year they thought that the right of a person charged with a criminal offence to trial without undue delay depended on whether the person was a permanent resident. Candidates may have been taught this by one of the course providers, but this is no excuse. The idea that only permanent residents are entitled to fundamental rights is so abhorrent that any sensible candidate should stand up in shock and say "that can't be right". Furthermore, candidates should be familiar with the whole of the Basic Law. Article 41 of the Basic Law puts the matter beyond doubt, stating that any person in the HKSAR enjoys the protected rights. The "immigration reservation" (s 11 of the HK Bill of Rights Ordinance), if candidates took the time to read it, by its own terms applies only to the entry, stay and departure from Hong Kong of persons not having the right to enter and remain.

The other recurrent error, this year and last, relates to judicial review. Many candidates do not seem to be aware that judicial review is a specific procedure whereby (as you know) the Court of First Instance exercises supervisory jurisdiction over inferior courts, tribunals, the executive branch of government and other decision makers. These candidates seem to think that when any court considers a constitutional point it is conducting "judicial review". Some even suggested applying to the Court of Appeal or Court of Final Appeal for judicial review. They appear to be using "judicial review" in a very loose sense such as review by a judge of a constitutional point. However a lenient view was taken of this error as Head VI is not a procedure paper.

Better candidates did demonstrate an understanding that constitutional points may be raised in any court proceedings in Hong Kong without the need for a separate application for judicial review.

Question 4

This question was the least popular, being attempted by only 72 out of the 154 candidates. It also had the second lowest pass rate, at 72%.

The question was divided into three parts and invited candidates to consider the extent to which the Basic Law protects 'minorities' and/or 'vulnerable' groups. This question gave a great deal of license to candidates to define these terms and develop their answer from the body of available constitutional jurisprudence.

Part 1 (which carried 10 marks) required candidates to consider the range of constitutional rights in the Basic Law and BORO, and specifically whether they are 'adequate' in protecting the interests of minorities/the vulnerable. Candidates generally fared well on this part, both in drawing from provisions and explaining their relevance.

By contrast, candidates generally did not perform as well on Part 2 (also carrying 10 marks), which required candidates to consider the courts' record (giving at least two examples) in protecting minorities/vulnerable candidates, taking into account the margin of appreciation doctrine. Many candidates only described elements of the margin of appreciation doctrine without much thought as to the requirements of the question.

Part 3 (which also carried 5 marks) then required candidates to outline available constitutional remedies and to evaluate their effectiveness. Again, many of the candidates simply described the available remedies without offering any evaluation as per the question.

Question 5

This question was the second most popular, being attempted by 143 out of the 154 candidates. However, it had the lowest pass rate, at 69%.

The question was divided into two parts. Part (1), which carried 10 marks, required the candidates to consider whether the matter in question, concerning an amendment to the Fugitive Offenders Ordinance, ought to be referred to the National People's Congress Standing Committee for an interpretation. Candidates were required to draw from the usual jurisprudence, including the two-part test for making a reference in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [89].

Most candidates successfully identified the appropriate principles, but the standard of their answers varied quite considerably when it came to the application of these principles to the factual scenario in the question. This lack of detailed application meant that many of the candidates scored only borderline passes, and a considerable number failed.

Part 2 (which carried 15 marks) required candidates to consider the Court of Final Appeal's power to review the validity of an Interpretation of the Basic Law by the National People's Congress Standing Committee. Candidates had to engage with the jurisprudence and discuss relevant case law, in particular: *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, [57]–[58] (Li CJ); *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, [107]; *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 26; *Ng Ka Ling v Director of Immigration* (No 2) (1999) 2 HKCFAR 141; *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460, 478.

Again, the answers to part (2) varied greatly in quality. However very few engaged with the nuances of this question and all the applicable jurisprudence.

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