

OLQE Examiners' Comments 2020

Head VI: Hong Kong Constitutional Law

Question 1:

This question was the most popular, being attempted by all 110 candidates who sat the exam. It had the highest pass rate of any question, at 94%.

The question asked candidates to prepare a briefing note explaining what is meant by "one country, two systems" and how it is implemented under the Basic Law, and what powers the National People's Congress Standing Committee (NPCSC) has under the Basic Law in relation to Hong Kong affairs.

Part 1 (carrying 10 marks) was generally well answered by most candidates. A number of Basic Law articles could be cited in support of the answer, such as Articles 1, 10, 12, 13 and 14 in relation to the "one country" aspect, and Articles 2, 5, 8, 18 and 19 in relation to the "two systems" aspect. Citation of other articles of the Basic Law was also accepted where relevant and appropriate. Candidates were also expected to demonstrate understanding of the meaning of one country, two systems, rather than a mere listing of relevant Basic Law articles, noting that the question asked candidates to "explain" the issue. Strong answers therefore tended to describe what is meant by one country, two systems, explain its meaning and significance, and cite relevant articles of the Basic Law such as those stated above.

Part 2 (carrying 15 marks) was also generally well answered. The main powers of the NPCSC which were expected to be cited included those in Articles 17, 18 (and Annex III), 20 and 158 of the Basic Law. Answers which did not include discussion of Article 158 of the Basic Law had marks deducted, as this has been one of the main and arguably most important mechanisms by which the NPCSC has exercised its powers in relation to Hong Kong affairs. Some additional marks were awarded where candidates included examples of NPCSC interpretations, rather than an unelaborated referral to Article 158 of the Basic Law, as part of a fuller answer to the question. A recurring mistake was to claim that the NPCSC has the power to amend the Basic Law under Article 159, whereas that power is possessed by the National People's Congress (NPC). The NPCSC instead has the power to propose bills for amendment to the Basic Law. Several candidates failed to understand the distinction between the NPC and the NPCSC, and others incorrectly regarded the NPCSC and the Central People's Government as the same thing.

Some strong answers also discussed the role of NPCSC decisions in relation to Hong Kong affairs, which attracted bonus marks where properly discussed.

Question 2:

This question was relatively less popular, being attempted by 64 out of the 110 candidates who sat the exam. It had a pass rate of 77%.

This is a case study question divided into two parts and required candidates to understand the law, theory and application in order to get a high mark.

Part 1 (carrying 10 marks) required candidates to consider whether challenges can be mounted against the constitutionality of the statutory provisions given in the question and, if so, to identify the correct respondents. Candidates were generally able to answer correctly in relation to the issue of whether challenges can be mounted to the constitutionality of these statutory provisions, with good candidates referring to relevant provisions in the Basic law, case law and legal theory. However candidates were often confused about the correct respondents and in a significant number of cases omitted one of the respondents.

Part 2 (carrying 15 marks) required candidates to consider whether or not the courts of the Special Administrative Region have the jurisdiction to hear such constitutional challenges and, if so, what would be the most effective grounds for mounting such challenges. Most candidates correctly identified the courts' jurisdiction to hear such challenges, and many referred to relevant authority such as *Ng Ka Ling*. However the issue of the most effective grounds for such challenges was less well answered with many inadequate answers. Only a relatively small number were able to correctly cite and refer to relevant issues such as delegation of power, proportionality and the "prescribed by law" requirement, while even fewer were able to discuss permissible restrictions on human rights.

Question 3

This question was the least popular, being attempted by 63 out of the 110 candidates who sat the exam. However it had the second highest pass rate, at 83%.

The question concerned human rights and asked candidates to discuss the question of whether persons in Hong Kong without the right of permanent residence, or even illegally, are entitled to the benefit of the rights set out in Chapter III of the Basic Law. Chapter III includes Article 39, by which the International Covenant on Civil and Political Rights is entrenched in Hong Kong's constitutional system.

This question was set because there had been indications in previous years that some candidates had the impression that Chapter III rights were only for the benefit of permanent residents, or lawful residents. That is a dangerous concept and could mean that a non-permanent resident would not be entitled to the usual rights in a criminal trial, such as the right to counsel, the presumption of innocence and so on.

It was pleasing to note that the great majority of candidates were able to answer correctly that the fundamental rights in Chapter III, for the most part, endure to the benefit of everyone in Hong Kong. Most candidates were aware of BL 41, which expressly stipulates that persons in the HKSAR "other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed by this chapter".

Most candidates were able to confine the "immigration reservation" (in the HK Bill of Rights Ordinance, whereby the government reserved the right not to apply the normal guaranteed rights in certain immigration situations) to cases concerning the exercise of delegated power in matters concerning entry into and stay in the HKSAR. They were also able to distinguish the CFA's decision in *Vallejos* (foreign domestic helpers not entitled to right of abode) as one concerning the factual question of whether foreign domestic helpers are ordinarily resident, not with legal rights.

Overall the performance of candidates on this question was more than satisfactory.

Question 4

This question was the second most popular, being attempted by 102 out of the 110 candidates. It had the second lowest pass rate, at 73%. However, many of the candidates who failed did so only marginally (e.g. with several marks of 13 out of 25).

The question was divided into two parts and invited candidates to consider, based upon judicial statements of the former Chief Justice Andrew Li in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, whether (1) the HKSAR courts are entitled to declare an NPC/NPCSC legislative act to be invalid where it is adjudged to contravene the Basic Law; and (2) whether, and to what extent, the HKSAR courts are able to adopt a ‘remedial interpretation’ (to either sever, read in, read down, or strike out language of a statutory provision) as a means to resolve an interpretive conflict between NPC/NPCSC promulgated legislation and fundamental rights under the Basic Law.

Part 1 (carrying 15 marks) required candidates to evaluate the scope of judicial power under the Basic Law (including Articles 11, 158, 159) and the framework of Chinese law in which the Basic Law was promulgated. Important authority that the candidate needed to contextualise their answer included *Ng Ka Ling v Director of Immigration* (No 2)(1999) 2 HKCFAR 141 and *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460. Generally speaking, the vast majority of the candidates were able to engage with this question and draw from appropriate authority in constructing their analysis.

Part 2 (carrying 10 marks) required candidates to engage with relevant authority recognising the power of the courts to apply a remedial interpretation and the form that this can take. From this authority, candidates were then required to consider the extent to which the HKSAR courts are able to interpret conflicts where the source of conflict is NPC/NPCSC legislation and the role of rights in this interpretive exercise. The general response to this sub-question was disappointing, with many candidates only describing the concept of remedial interpretation without going that step further to engage with the question asked.

Question 5

This question was quite popular, having been attempted by 99 of the 110 candidates. Its pass rate was 71%. However, many of the candidates who failed did so only marginally (e.g. with several marks of 13 out of 25).

The question was divided into two parts and invited candidates to consider: (1) the conditions under which a judicial reference to the Standing Committee of the National People's Congress is required; and (2) the constitutional basis for the Chief Executive to make a referral to the Standing Committee of the National People's Congress, and whether the lack of any such basis would have any effect on the validity of an Interpretation rendered by the Standing Committee of the National People's Congress.

Part 1 (carrying 15 marks), required candidates to support their answer with a critical analysis of the application of these conditions by reference to *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95. Candidates were required to identify the principle that the Court has a duty to make a reference to the NPCSC for Interpretation of a provision of the Basic Law if two conditions are satisfied: the 'classification' condition and the 'necessity' condition: *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [89]. Candidates were required to explain these conditions and the relationship between them, including additional qualifications placed upon these conditions (particularly the 'predominant provision' test), drawing upon relevant judicial authority including *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. Given that *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95 is the only such occasion in which a judicial referral has been made, candidates were asked to critique this judgment. This involved an analysis of the Court's central claim that Articles 13 and 19 were excluded provisions, of which the case could not be resolved without a determination of the questions of interpretation affecting the meaning of these provisions. Candidates generally fared well in identifying the two referral conditions although many papers were lacking the critical analysis required on *FG Hemisphere*.

Part 2 (carrying 10 marks) required candidates to acknowledge that a referral by the Chief Executive is not a power directly stated in the Basic Law. In particular, it is not mentioned in Article 158 and can be seen as giving the Government a quasi-right of appeal. However, the Chief Executive had done so following *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 in 1999, and again in 2005. In both cases this was done by making a report to the State Council under Article 48(2) of the Basic Law, which in both cases resulted in the State Council then submitting the request for interpretation to the Standing Committee. Candidates should have noted the plenary authority of the NPCSC to make an Interpretation on any part of the Basic Law, which is stated in Article 67(4) of the Constitution and was acknowledged by the Court of Final Appeal in *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141, [6]; *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, [56]–[57]. As a result, candidates would likely have noted the unlikelihood that procedural irregularity under Article 158 would invalidate an Interpretation rendered by the NPCSC. However, candidates who put forward convincing arguments to the contrary still achieved a good mark. In contrast to Part 1, the answers to Part 2 were comparatively weaker. Most answers were rather basic and lacked analysis of the case law and other constitutional authority.

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