

OLQE Examiners' Comments 2021

Head VI: Hong Kong Constitutional Law

Question 1:

This question was relatively less popular, being attempted by 62 candidates who sat the exam. It had a pass rate of 76%.

The question asked candidates to advise Raymond on two issues. First, whether the PRC Constitution and the Basic Law are incompatible, and how any inconsistencies and contradictions between the PRC Constitution and the Basic Law are resolved. Second, whether the Sino-British Joint Declaration can be used in litigation to challenge the legality of government action.

Part 1 (carrying 10 marks) was well answered by most candidates. However, on several occasions candidates lost marks because they failed to identify how inconsistencies and contradictions between the PRC Constitution and the Basic Law are resolved. In some cases, this aspect of the question was simply not addressed, or not addressed directly enough, by the candidate. In other cases, the attempted answer failed to identify and/or discuss the mechanisms by which such inconsistencies and contradictions are resolved. Marks were sometimes lost where some such mechanisms were identified but not others. Some candidates denied that there are any inconsistencies and contradictions between the PRC Constitution and the Basic Law, or that they are incompatible, without elaborating on why that is the case or offering supporting evidence. A common omission from answers was reference to the National People's Congress Decision of 4 April 1990 which is directly relevant to the issue raised by the question. Nonetheless, as stated, most candidates gave good answers to this part of the question.

Part 2 (carrying 15 marks) was also generally well answered. Most candidates demonstrated an understanding that the Sino-British Joint Declaration is an international treaty and is not directly actionable in the HKSAR courts, though sometimes this was implied rather than expressly stated in answers. Clarity is always desirable in answers. An encouraging number of candidates correctly identified that the Sino-British Joint Declaration can be used as a pre-enactment extrinsic aid to interpretation of the Basic Law. More surprising was that a greater number of candidates did not identify the relevance of Article 159 of the Basic Law to the potential role of the Sino-British Joint Declaration in litigation in the HKSAR courts. However, strong answers not only identified the relevance of Article 159 of the Basic Law, but also explained the practical obstacles to HKSAR courts enforcing this provision against the NPC. It was not necessary for candidates to speculate on what "recent constitutional law developments in the HKSAR" Raymond may have had in mind when seeking advice.

Additional marks were awarded under both parts of the question where relevant sources and authorities were appropriately cited in support of the answer. Overall, Question 1 was well answered.

Question 2:

This question was one of the most popular, being attempted by 74 of the 78 candidates who sat the exam. It had a pass rate of 76%.

The first part of the question (carrying 10 marks) asked examinees to explain the overall governmental structure of the HKSAR with particular reference to how far it constitutes a system of separation of powers and/or a system of executive-led government. The second part of the question (carrying 15 marks) asked examinees to explain the relationship between the legislative, executive and judicial branches of the HKSAR Government, with reference to actual examples from recent events.

Generally speaking, most of the examinees were able to understand the question and answered correctly with reasoned justifications. However, those who failed or got marginal marks showed one or more of the following shortcomings: Partial or incorrect understanding of the cases, no reference to any authorities such as case law, little understanding of separation of powers as well as a failure to apply the doctrine correctly in the Hong Kong context, and/or a misunderstanding of the meaning of “executive-led government”. Some poorly performing candidates also seemed unfamiliar with the subject of Hong Kong constitutional law altogether.

A specific fault in relation to the first part of the question was an inability to explain why Hong Kong practices a system of separation of powers system by reference to relevant provisions in the Basic Law, and judicial decisions. A specific fault in relation to the second part of the question was a failure to deal with the relationship between the legislative, executive and judicial branches of the HKSAR Government either appropriately or comprehensively.

Question 3

This question was the least popular, being attempted by only 37 candidates. It also had the lowest pass rate at 54%.

This question concerned discrimination on the basis of race. This is the first time that a discrimination question has been asked in a Head VI paper, though the Race Discrimination Ordinance (RDO) and the other discrimination statutes have been on the reading list for some time. Given that this is the first time, a lenient approach to marking was called for.

The question set out a client's story of having been appointed to a teaching position at a tutorial college, only to be effectively terminated before starting on the ground that she didn't look like a native English speaker. A similarly qualified white person was appointed in client's place.

Almost all candidates spotted the obvious racial discrimination and knew that a remedy was available to client. This was considered essential for a pass.

The main comment on the papers of candidates who did poorly (low pass or failure) would be that they did not appear to be aware of the RDO and the Equal Opportunities Commission (EOC). These are the avenues to redress discrimination in the private sector. Such candidates looked mostly to the Basic Law and the Hong Kong Bill of Rights for a remedy. While those constitutional instruments are clearly relevant and do indeed prohibit discrimination on the basis of race, they do not provide an enforceable remedy for private sector discrimination. This omission led some such candidates to suggest judicial review which is only appropriate against government and bodies exercising statutory power. These candidates were given credit for their knowledge of the Basic Law and Bill of Rights as well as judicial review, but it was difficult to give them anything much more than a bare pass if they had not mentioned anything which could actually be useful to the client to seek redress.

The better candidates were aware of the RDO and the EOC as the proper avenues for redress in private sector cases and were generally awarded marks considerably above a bare pass. Some very good candidates explained both the public sector and the private sector avenues to redress in cases of discrimination.

Question 4

This question was one of the most popular, being attempted by 74 of the 78 candidates who sat the exam. It also had the highest pass rate, at 84%, and many of the candidates who failed did so only narrowly.

The question was divided into two parts. In the first part (worth 15 marks), candidates were expected to define 'judicial review' drawing on authority from the Basic Law and case law, including Article 35 and seminal cases on judicial review. At a minimum, candidates were expected to note the power of the courts to review legislative and executive acts according to legal standards and methods of review, including rights under the Basic Law, common law principles, and the proportionality test. Most candidates were able to identify the key features of judicial review, with a smaller percentage offering more critical analysis of the applicable legal standards and methods of review.

The second part (worth 10 marks) required candidates to consider the scope of constitutional remedies: Declarations of invalidity, remedial interpretation, suspensions of declaration and damages. An analysis of the limits to these remedies (an issue which was specifically highlighted in the question) could have focused on the limited scope of damages, although there was some room for argument on this aspect of the question. In contrast to the first part, the answer to this part was generally less satisfactory. Most candidates only partially answered the question, in noting some of the available remedies but not considering any limitations on their use.

Question 5

This question was quite popular, having been attempted by 66 candidates. It also had a relatively high pass rate at 82%.

This question comprised two parts, asking the candidates to prepare a research brief on Article 158 of the Basic Law.

In Part 1 (worth 10 marks) candidates were required to explain the rationale underpinning the allocation of interpretative powers to both the National People's Congress Standing Committee and the Hong Kong courts under Article 158 of the Basic Law. This required close attention to the text of Article 158 and corresponding judicial commentary, such as *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, Ma CJ at [100]. Other cases which were also relevant to the analysis included *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

In Part 2 (worth 15 marks) candidates were required to engage closely with the five instances in which the NPCSC have rendered an interpretation of the Basic Law, namely in 1999, 2004, 2005, 2011 and 2016 respectively. Candidates had to explain the background leading to these interpretations, the differences between them, and how such interpretations implement the relevant provisions of the Basic Law. There was some room, within the context of discussing how these interpretations implement the relevant provisions of the Basic Law, for argumentation on the nature of these interpretations and whether they ensure fidelity to various constitutional principles in the Basic Law, including 'one country, two systems' and 'judicial independence'.

As evidenced by the high pass rate, candidates generally performed well on both parts of this question with very few bad answers.