

OLQE Examiners' Comments 2015

Head VI: Hong Kong Constitutional Law

General Comments (particularly in relation to Questions 1 & 4):

The standard of answers was reasonable on the whole. There were few failures, and at the same time, a significant number of candidates achieved high marks. The only negative comment (particularly in relation to Question 1) would be that some candidates appeared to do little more than copy pre-prepared answers without much attempt to adapt them to, or answer directly, the questions actually put. Although such candidates were most often given a passing mark, one would have preferred to see an ability to apply legal principles to the particular client matter.

Question 1:

This question was based on a fact pattern involving an international retail business intending to enter the Hong Kong market. Candidates were asked to assist in advising the business on two matters:

- (1) Are businesses in HK subject to different levels of regulatory regime as in the United States and European Union? (15 marks)
- (2) Are commercial disputes resolved solely in Hong Kong, or can they be appealed to a Mainland tribunal; and are they subject to outside influence? (10 marks)

Candidates were expected to answer 'no' to part (1) by demonstrating an understanding that China is a unitary state and that analogies to federations and supra-national bodies are not helpful in understanding the constitutional status of the HKSAR. Most were able to do so, primarily by discussion of the principles of 'one country two systems' and 'high degree of autonomy'.

Most candidates were aware that only those national laws listed in BL Annex III apply in the HKSAR, and that none has direct relevance to normal commercial transactions.

Part (2) of question 1 required an understanding of the power of final adjudication under the Basic Law and the independence of the judiciary. Good candidates were expected to explain the limits to these concepts, such as the interpretation power of the National People's Congress Standing Committee. To this extent, the question was generally well answered. A few were rewarded for excellence in explaining how a choice of forum or arbitration clause might affect the advice to be given to the client.

Question 2:

This question was about fundamental rights, in particular the right to legal representation. Candidates were asked to provide preliminary advice on the prohibition on legal representation in the Labour Tribunal (LT). They were referred to the right to choice of lawyers in BL 35 and asked to consider whether the prohibition (s 23 of Cap 25) might be unconstitutional.

In this open book examination candidates could easily refer to BL 35 and see that the right to choice of lawyers is expressed to apply to 'courts'. The main issue was thus whether the LT is a 'court'. Although the main authorities suggest the answer is 'no', meaning BL 35 should

not apply to the LT, candidates were not necessarily expected to come to that conclusion. A principled approach to the issue, whichever way resolved, was regarded as sufficient for a pass.

Extra marks were awarded to candidates who went on to consider the right to a fair hearing (ICCPR 14; BORO 10), which has been interpreted by the CFA as militating against blanket prohibition on legal representation in a domestic tribunal (*Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237).

Candidates were expected to be aware that not all rights are absolute, and that proportional restrictions with valid objectives may be constitutionally permissible. The issue was whether, if the right be *prima facie* applicable, the prohibition on legal representation in the LT might nevertheless be constitutionally valid. This aspect of the question was answered well by some good candidates who could see costs savings and employer-employee equality of arms as valid objectives in resolution of employment disputes.

Candidates were also referred to the power to transfer proceedings from the LT to the District Court or CFI, in the hope they might explore whether this could 'cure' any constitutional infringement. Few did. However, some excellent candidates offered solid practical advice to the client to apply for such a transfer in the hope of getting legal representation without costly and lengthy constitutional litigation.

Question 3

This question was split into three parts. The first part (worth 6 marks) explicitly asked candidates to advise on the jurisdiction of the courts of the HKSAR to consider a challenge to the constitutionality of provisions of an ordinance of the HKSAR by reason of inconsistency with a provision in the Basic Law. Despite this, a large number of candidates instead chose to answer by giving general advice on the procedures to be adopted in bringing an application for leave to seek judicial review. While these points might be relevant in advising a client considering such an application, this was not what the question asked. Good answers (of which there were also a large number) were those that cited relevant case authority that directly addressed the point asked in the question, such as *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.

The second part (worth 12 marks) asked for firstly an understanding of the approach adopted by the courts in interpreting the provisions of the Basic Law, and secondly an application of that approach to the facts in the question. Most candidates successfully addressed the first of these two issues. But many either failed to address, or only discussed very briefly, the second of these two issues. Very few cited the case of *Re: Cheng Kai Nam, Gary* [2002] 1 HKC 41, which was directly on point (and upon which this question was modelled). Nonetheless there were some good answers, with intelligent discussion of how the courts might interpret Article 9 of the Basic Law in this context and candidates were rewarded for such answers even where they were unaware of the relevant case authority.

The third part (worth 7 marks) tested candidates' knowledge of the case law on the use of extrinsic materials in interpreting provisions in the Basic Law and, especially, the different status of pre-enactment and post-enactment materials. Since the Basic Law was enacted in April 1990, it should have been immediately obvious that the August 1996 report mentioned in this question constituted a post-enactment material. Nonetheless an alarmingly large number of candidates made the basic mistake of confusing the date of enactment with the date of coming into force of the Basic Law (which took place on 1 July 1997) and so wrongly described the 1996 report as pre-enactment material.

Question 4

This question was split into two parts. The first part (worth 15 marks) required candidates to show an awareness of the different approaches towards the doctrine of separation of powers in Mainland China and Hong Kong by reference to both the writings of mainland scholars and Hong Kong court judgments such as *Lau Kong Yung and Others v. Director of Immigration* (1999) 2 HKCFAR 300; *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211; and *Leung Kwok Hung v. President of the Legislative Council of the Hong Kong Special Administrative Region* (2014) 17 HKCFAR 841. Candidates were expected to address the issue of why the courts have adopted such an approach, by reference to issues such as the principle of one country, two systems and the maintenance of the common law system.

The second part (worth 10 marks) tested the application of one particular aspect of the doctrine of separation of powers, i.e. whether the power under the s. 67C of Criminal Procedure Ordinance (as it was previously worded) is executive power or judicial power. This part of the question was modeled on the case of *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, and the hypothetical text of s. 67C used in the question was the text of s. 67C before it was amended as a result of this case. However candidates were not necessarily required to know the Yau Kwong Man case and marks were awarded for any intelligent discussion of the issues involved, such as reference to the provisions in Chapter IV of the Basic Law under which executive power and judicial power are clearly separated (see, in particular, Article 80).

Question 5

This question required candidates to explain, with reference to an excerpt from the Court of Final Appeal's judgment in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, 969, and other relevant legal authorities, (1) the legal basis of, and (2) approaches to constitutional judicial review of legislation and administrative action in the Hong Kong Special Administrative Region.

The general standard of answers to this question was reasonably satisfactory. Most candidates were able to address the above question's requirements. Many managed to accurately outline the doctrine of proportionality, with reference to relevant Hong Kong case law (e.g., *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229), as well as the doctrine of margin of appreciation, also with reference to appropriate case law, especially *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950.

Weaker candidates omitted any elaboration whatsoever of the legal basis of constitutional judicial review (e.g., *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4; Articles 8, 11, and 158 of the Hong Kong Basic Law; Section 6(1) of the Hong Kong Bill of Rights Ordinance (Cap. 383)), and/or the overall different judicial approaches of constitutional judicial review in relation to civil and political rights on the one hand (e.g., *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229), and social and economic rights on the other hand (e.g., *Fok Chun Wah v Hospital Authority* (2012) 15 HKCFAR 409).

A very small fraction of candidates misconstrued this question as mainly about the procedures under which people may apply for judicial review of administrative action.