

PCLL Conversion Examination
4th January 2010
Examiner's Comments
Hong Kong Legal System

The Hong Kong Legal System examination consisted of three questions, two of which were compulsory. This was a closed-book examination which was held over one-and-a-half-hours. The examiner had prepared the exam paper itself, along with an answer guide, listing relevant factors and issues which candidates were expected to address. To complete the exam successfully, candidates were required to address a majority of the points mentioned. Candidates were expected to illustrate their answers with relevant examples and to reinforce their answers with relevant cases or other legal authorities and sources. Additionally, candidates were expected to write their answers in a clear, structured and coherent manner.

The overall standard achieved was irregular. While there were some very good papers, a majority of candidates were average and/or below average. As in previous years, it seems as if a majority of candidates had not adequately familiarised themselves with the relevant systems, laws and sources. There was also a wide-spread failure to properly read the questions and address them in a structured and analytical fashion when answering. In many cases, it seemed as if candidates chose to write everything they knew on a certain topic rather than addressing the specific points raised by the respective questions. Inadequate command of written English was also a problem for a number of candidates. Further, time-management seems to have posed some difficulties for a significant number of candidates as their respective first answers were long-winded with their respective second answers being too short and poorer overall. Some candidates seemed not to have prepared at all and did very poorly, some scoring in the single digit range.

The three exam questions addressed different issues and topics. Although the three questions differed in focus, ranging from mainly descriptive to mainly analytical, it seems as if the questions chosen by candidates are distributed equally, with no particular preference having emerged.

More specifically, these are some of the observations on how candidates performed with respect to the individual questions.

1. Identify the purposes of the doctrine of stare decisis. To what extent are those purposes fulfilled by the way the doctrine is applied in the Hong Kong court system?

The first question was the most descriptive with candidates expected to describe a fundamental doctrine of the common law and examine its application to Hong Kong. Many candidates seemed to have overlooked that this was a two-part question, requiring not only a description of the purposes of the doctrine of *stare decisis*, but also an examination of the doctrine's application to Hong Kong. While most candidates described what *stare decisis*

means, many forgot to examine the doctrine's purpose, as demanded by the question. There was also much confusion about the meaning of *stare decisis* (binding precedents) as opposed to persuasive precedents. Similarly, many candidates failed to address the distinction between vertical and horizontal *stare decisis* adequately. However, the far greater problem in answering this question which seems to have been encountered by candidates was the second part. Far too few candidates addressed such fundamental issues such as the court system and structure in Hong Kong, an issue which must be raised when answering how the doctrine is applied in Hong Kong. Further, there was much confusion about the status of binding decisions and capacity to create binding precedent within certain courts, especially the lower courts. Many candidates did, however, show some familiarity with the recent case of *A Solicitor v Law Society of Hong Kong* which changed some important aspects of how *stare decisis* is applied in Hong Kong.

2. In what ways have the nature and philosophy of the Hong Kong legal system changed as a result of the introduction of the Basic Law in 1997?

The second question was more philosophical and candidates were expected to reflect on certain changes the legal system had undergone since 1997. Many candidates seem to have understood this as an exercise in comparing the situation in Hong Kong before and after the handover in 1997. However, the question was designed to focus candidates' attention on a narrower issue, namely the way in which the Basic Law specifically might have altered the nature and philosophy of the legal system. Also, although relevant points such as the replacement of the Privy Council with the Court of Final Appeal were mentioned by many, candidates often failed to follow up by explaining what a certain, specific change has meant for the nature and philosophy of the system. Many candidates also focused on the fact that the National People's Congress had assumed the right to render final interpretations of the Basic Law. While it was correct to do so, such information needs to be backed up with an examination of how the National People's Congress interpretive powers have changed the nature and philosophy of the legal system, if at all. Most candidates also failed to address the topic of constitutional judicial review, something which has only become possible by introduction of the Basic Law and which represents a big shift in the nature and philosophy of the system as compared to the situation before. Overall, many candidates performed reasonably well on the descriptive part of this question but failed to address the more important aspect of analysing how specific facts have impacted on the nature the legal system as a whole.

3. How does the method of appointment and tenure of justices in the Hong Kong judiciary enhance or weaken the independence of the judiciary?

The third question was designed to require candidates not only to describe facts and aspects relating to the legal system but also to employ originality in analysing the effects on the independence of the judiciary. This was also a two-part question. First, candidates needed to

describe the method in which appointments are made and then analyse how this method impacts on the independence of the judiciary. Similar to the previous questions, candidates tended to do better in the descriptive part as compared to the analytical part. However, in this question, candidates also had serious knowledge gaps in terms of the descriptive part, with many evidently not aware of the specific methods by which justices are appointed in Hong Kong. One specific shortcoming was the wide-spread failure to mention the problematic area of Deputy Judges and Registrars, as well as the method of their appointment and impact on the independence of the judiciary. Another area which was mentioned by only a few candidates was the length of service and forced retirement and the effects this issue has on judicial independence. A more analytical rather than descriptive approach would have helped candidates improve their scoring for this question.