

PCLL Conversion Examination
June 2010
Examiner's Comments
Hong Kong Legal System

The Hong Kong Legal System examination consisted of three questions, of which candidates had to answer two. This closed-book examination 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 structured and coherent manner.

The overall standard achieved was irregular. While there were some very good papers, a majority of candidates only managed to submit mediocre answers. Many candidates seem to have failed to read the questions properly and subsequently failed to address the questions in a systematic, methodical and logical manner. The three questions were carefully designed to elicit specific answers but in many cases, it seemed as if candidates chose to write everything they knew on the general topic at issue, rather than addressing the specific points raised in the respective questions. Inadequate command of written English was also a problem for many candidates. Further, time-management seems to have posed some difficulties for a significant number of candidates as their respective first answers were long-winded which led to much shorter and insufficient second answers. Some candidates seemed not to have prepared at all and did very poorly.

The three exam questions addressed different issues and topics. Although the three questions differed in focus, ranging from descriptive to analytical, all questions contained both analytical and descriptive aspects. It was also noticeable that candidates seemed to have had no preference for a particular question, suggesting that candidates deemed the three questions to be of similar difficulty.

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

1. A spokesman for the Hong Kong Judiciary recently stated that “[t]here are many litigants in person who cannot afford legal representation but are not eligible for legal aid.” Explain the rules pertaining to legal aid and, in light of the above statement, the shortcomings of the legal aid system. How would you reform the current system to provide greater access to justice for parties to both civil and criminal proceedings in Hong Kong?

This was a three-part question about the provision of legal aid in Hong Kong. The first part, which was mainly descriptive, required candidates to describe the system of legal aid

available in Hong Kong and to list the criteria of eligibility for legal aid. Many candidates failed to address this part of the question methodically and often reverted to simply write down everything they knew about legal aid. Instead, they should have clearly delineated the various forms of legal aid, the means and merit tests, as well as criminal and civil cases. Overall, there were some serious shortcomings in many candidates' knowledge of the legal aid system, or, where they had the knowledge, there was a failure to present it in a structured fashion. Secondly, candidates were expected to reflect on the system's inadequacies. This question combined descriptive and analytical aspects. Many candidates were able to list relevant points, such as low threshold levels and high costs of legal services in Hong Kong. Third, candidates were asked to think of reform proposals. This part was meant to be mainly analytical but most candidates completely overlooked the fact that the question asked "[h]ow would you (...)?" and rather gave renditions of what the Law Society and others have proposed in terms of reforms. The failure to develop and articulate own ideas was a major shortcoming for most candidates.

2. Describe how precedents are employed within the court hierarchy of the post-1997 legal system in Hong Kong. Consider both binding and non-binding decisions. What are the relative advantages and disadvantages of the way in which the current system works? Answer with reference to relevant examples from the body of case law.

This was a two-part question with a balanced emphasis on descriptive and analytical aspects. First, candidates were expected to describe the system of precedent as it operates within the Hong Kong court system. Many candidates failed to address this part of the question in a methodical manner, choosing a 'this is everything I know' approach instead. The word hierarchy should have alerted candidates to the fact that they were expected to list the courts within the court system and then systematically explain which rules of precedent apply to each court. Many candidates did not do this. Most candidates also neglected to talk about non-binding decisions and the role they play. Very few candidates mentioned the distinction between courts of limited and unlimited jurisdiction or the distinction between *ratio* and *obiter*. However, most candidates did mention the concept of *stare decisis* and important aspects of it, such as the distinction between vertical and horizontal bindingness, as well as relevant cases, such as *A Solicitor v Law Society of HK*. In this regard, one noticeable shortcoming was that many candidates were able to list relevant cases but then failed to explain them. Candidates should then have moved on to the second part of the question by identifying advantages and disadvantages of this system. This part of the question was mainly analytical and many candidates failed to address it comprehensively. Some did not address it at all. Similar to what was evidenced in the first exam question, candidates seemed to have difficulties developing and articulating their own thoughts on how the system works and commenting on which aspects are positive and which ones are not. Even those who mentioned positive and negative aspects mostly failed to provide relevant reasons. Thus, most marks were lost on the second part to this question.

3. To what extent have the sources of law and the relative importance of the judiciary in relation to other branches of government changed since 1997 due to the courts' power to declare laws unconstitutional?

The third question was perhaps the least descriptive, most philosophical and allowed candidates the most room to develop their own thoughts. However, before doing so, candidates first had to describe the sources of law in Hong Kong before and after 1997. This aspect of the question was widely overlooked. Candidates also, for the most part, failed to explain the concept of constitutional judicial review and how, as a result of the adoption of the Basic Law in 1997, laws passed by the Legislative Council must be in conformity with the Basic Law. Having said that, given that most candidates did mention and explain relevant cases, it is evident that candidates were aware of both the sources of law and of the courts' judicial review function. Again, as was the case with the other two questions in this exam, many candidates failed to present relevant facts in a methodical and systematic fashion. Instead of explaining the system step by step and then using cases to illustrate the workings of the system, many candidates delved straight into specific cases and other very detailed aspects and observations. Most candidates also failed to identify and explain the role of the three branches of government but did, by and large, correctly state that the role of the judiciary seems to have been elevated since 1997. This question allowed for a degree of flexibility in answering and some candidates used this flexibility in further developing their conclusions on the relative importance of the judiciary, for instance, by explaining the importance of an independent judiciary. One aspect which many candidates chose to reflect upon was the role of the National People's Congress Standing Committee as the final interpreter of the Basic Law and what this means for the relative importance of the judiciary within the Hong Kong legal system. On the whole, this point was answered competently, not only because relevant cases and articles were mentioned, but also because the related analysis tended to be more cogent when compared to the first two questions.