

**PCLL Conversion Examination
June 2024 Examiner's Comments
Hong Kong Legal System**

This paper consisted of three questions of which candidates needed to answer two. This is the same format as last year's examinations.

Question One

This question had three parts. Each part tested candidates' knowledge about different aspects of judges in Hong Kong.

Part a)

The first part asked about a comparison about the appointment of judges before and after the Handover. What examiners were looking for was a clear argument to the question. Candidates can argue that there are more similarities than differences, with the differences being the additional wording of "make recommendations" after the Handover by the Judicial Officers Recommendation Commission (JORC) and the involvement of the Legislative Council in the appointments of certain judges.

Most answers did relatively well in answering the second part about post-Handover. In numerous cases, the pre-Handover section was either omitted or answered vaguely or even incorrectly. Candidates should discuss how from 1976 to 1997, the Judicial Service Commission (JSC), set up in 1976, gave advice to the Governor and judges of the Supreme Court were appointed by Letters Patent under the Public Seal by the Governor with the instructions given through a Secretary of State (Letters Patent, Supreme Court Ordinance, and Judicial Service Commission Ordinance (Cap. 92)). Candidates should cite how the main function of the JSC was to "advise the Governor regarding the filling of vacancies in judicial offices" (s.2 Judicial Service Commission Ordinance (Cap. 92)).

The name of the JSC was changed to Judicial Officers Recommendation Commission (JORC) on 1 July 1997. The function of the Commission was changed to "advise or make recommendations to the Chief Executive regarding the filling of vacancies for judicial officers" (s. 6 Judicial Officers Recommendation Commission Ordinance (Cap. 92)). The addition of the words "make recommendations" should be noted. The JORC advises or makes recommendations to the Chief Executive and the Chief Executive accepts the recommendations. Article 48(6) of the Basic Law provides the Chief Executive with the power to appoint/remove judges of the courts at all levels in accordance with legal procedures. Article 88 of the Basic Law states: "Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors."

Candidates should highlight that for the Chief Justice, other CFA judges (permanent and non-permanent judges), and Chief Judge of the High Court, endorsement of appointment is needed by LegCo, and the Chief Executive shall report such appointment to the Standing Committee of the National People's Congress for the record (Articles 73(7) and 90 of the Basic Law).

Part b)

Amongst all the answers, the second section of Question One was answered most thoroughly. This question asked about whether a civil action can be brought against a judge for what is said or done by the judge during legal proceedings. Examiners looked to see if candidates cited Article 85 of the Basic Law, which states: “The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.” This protection extends to judges and magistrates.

Candidates should distinguish between possible differences for District Court judges and magistrates and refer to the relevant sections in the District Court Ordinance (Cap. 336) and the Magistrates Ordinance (Cap. 227). Reference should also be made to *Sirros v Moore and Others* [1975] QB 118.

Part c)

The third sub-question asked about the nationality requirements of judges and other members of the judiciary in Hong Kong and whether candidates thought that this requirement should be extended. Not all answers provided the necessary background to the question. Candidates should discuss how there are only two judges where there is a nationality requirement. The Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court must be Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country (Article 90 of the Basic Law).

Candidates who did better generally discussed both sides of the issue. The key here is for candidates to critically discuss this issue. There is no right or wrong answer. But it is the analysis and depth of the answer that matters most. There was, however, too much attention given to the nationality of overseas non-permanent justices in the Court of Final Appeal.

Arguments for extension may include for the judiciary to be more in line with other branches of government (as shown above), to reflect the new constitutional framework under Chinese sovereignty post-Handover, and for judges to reflect the makeup of Hong Kong society.

Arguments against extension may include how it may contradict how HK can recruit judges from other common law jurisdiction, it is unnecessary as judges take the judicial oath anyways, and the diversity of background of judges make for better judgments.

Question Two

This was a longer and complex question that was not separated into parts. The question asked about the legal basis of Decisions by the Standing Committee of the National People’s Congress (NPCSC) in Hong Kong’s legal system. While there were some very good answers, many candidates’ answers were unfocused and veered into a variety of different topics including NPCSC’s interpretations of the Basic Law, the National Security Law, and the application of national laws in Hong Kong. This was somewhat surprising since it was expected that more recent and famous Decisions would be discussed such as the decision regarding the co-location arrangement at the West Kowloon Express Rail station and the postponement of the Legislative Council elections for one year because of COVID-19.

Candidates needed to give examples to support their answers. For example, in 2017, the decision was about the co-location arrangement at the West Kowloon Express Rail station. This decision did not grant any additional powers to HKSAR, rather it approved the co-location arrangement made between the Guangdong and HKSAR government, which included the established of the Mainland Port Area. The decision conformed that the arrangement was consistent with the PRC Constitution and the Basic Law and required HKSAR to legislate in the implementation of the co-location arrangement.

The legal status of the co-location arrangement decision was challenged in the case of *Leung Chung Hang v President of Legislative Council* [2018] HKCFI 2657, [2021] HKCA 871. In these cases, the courts upheld the constitutionality of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Colocation) Ordinance (Cap. 632), which in the judgments relied on the NPCSC's decision.

Question Three

This question was also divided into three parts. The sub-questions focused on fundamental aspects of the criminal justice system in Hong Kong.

Part a)

The first part asked about private prosecutions in Hong Kong. For the most part, candidates did relatively well for this sub-question. Candidates should answer that the answer is yes. However, this is a qualified right where the magistrate may refuse to issue the summons and where the Secretary for Justice may intervene. A person has the right to initiate private criminal prosecutions in the public interest. It is codified under section 14(1) of the Magistrates Ordinance (Cap. 227). There are two procedural steps. The first step is the laying of an information or making of a complaint by the individual concerned. The second step is the issue of a summons by the magistrate. It is important for candidates to answer that under section 14 of the Magistrates Ordinance (Cap. 227) the Secretary for Justice is entitled to intervene in a private prosecution and to assume its conduct, becoming a party to the proceedings at that time and displacing the original private prosecutor. Once the private prosecution has been taken over, it becomes a public prosecution.

There were some confusions by other candidates who misunderstood the question and answered about prosecutors on fiat or about the police.

Part b)

The second sub-question asked about what “control of criminal prosecutions” and “free from any interference” meant with respect to the Department of Justice.

Candidates should discuss that “free from any interference” is not only political interference but judicial encroachment as well. The courts will very rarely interfere with a decision not to prosecute. It would only be in extremely rare cases where the evidence points unquestionably to the desire of a prosecution.

Candidates should also note the criticism that is often raised where the Secretary for Justice is a political appointee, a member of the Executive Council, and the primary legal advisor to the Government. On the other hand, the Secretary for Justice has been referred to as the minister of justice. Moreover, the DPP, while under the administration hierarchy of the SJ (who is the

head of the DOJ), is in reality responsible for all criminal prosecutions as the head of the Prosecutions Division. The DPP is a law officer of the DOJ and a career prosecutor who discharges the prosecutorial functions of the DOJ independently of the SJ.

The following “controls” should be discussed: decision to prosecute/laying of charges; taking over private prosecutions, and the choice of venue.

The first one is the most straightforward. Section 14(1) of the Criminal Procedure Ordinance (Cap. 221) states: “The Secretary for Justice, if he sees fit to institute criminal proceedings, shall institute such proceedings in the court against the accused person as to him may seem legal and proper.” Candidates may also refer to the Prosecution Code, where in deciding whether to prosecute or not, prosecutors must consider the two-tiered test of sufficiency of evidence and the public interest.

For private prosecutions, candidates should discuss how the SJ can take over the prosecution.

Candidates should also discuss how the control of criminal prosecutions conferred on the Department of Justice includes the choice of the venue. It is the prosecution that decides whether to transfer a case to the District Court subject to the restrictions set out by law (s. 88 Magistrates Ordinance (Cap. 227); see also *Chiang Lily v Secretary for Justice* [2009] 6 HKC 234).

Candidates tended to focus their answers more on the decision to prosecute or not and did not discuss the other aspects in-depth.

Part c)

The third sub-question was about the jury and what happens if a juror fell asleep during trial. Answers for this part tended to be rather short. This could be perhaps candidates waited until the end to tackle this last question and ran short on time. Answers tended to describe the requirements of being eligible to serve as a juror. Candidates should discuss how the jury is required to pay attention during the course of the trial. Failure to pay attention may be treated as a juror being unable to understand the proceedings. Whether a sleeping juror disqualifies him/herself is a matter of fact and degree and it is a matter for the judge to rule upon. References should be made to the case of *De Bruin v HKSAR* [2011] 6 HKC 367.