

**PCLL Conversion Examination**  
**June 2016**  
**Examiner's Comments**  
**Hong Kong Legal System**

The Examination Paper had 3 questions. Students were required to answer 2 out of the 3 questions.

**Question 1:** This question seeks to test the students' understanding of the essential elements and risks in respect of the establishment and maintenance of the high reputation of judicial independence in the Hong Kong SAR and what lawyers can do to help in this respect. In respect of (a), many students were able to refer to the 3 factors discussed in the Canadian case of *Valente* and apply them to the situation in the Hong Kong SAR. The separation of Hong Kong SAR's judiciary from that of Mainland China is also noted by many students. A good answer of (a) must include discussion on both the former and latter perspectives. In respect of (b), students who have answered (a) with reference to the *Valente* factors were usually able to further their discussion by reference to the extent these factors had been honoured in the Hong Kong SAR or the possibilities of these safeguards being undermined. A good answer of (b), however, must also understand that judicial independence is also "a state of mind or attitude in the actual exercise of judicial functions" by judges and discuss matters that may affect the confidence of the public on the independence and impartiality of the Judiciary of the Hong Kong SAR. In respect of (c), most students failed to point out the convention that the Judiciary of the Hong Kong SAR would not speak out and defend its judgments. Hence the role of lawyers in the Department of Justice and in private practice to explain and defend the Judiciary when the authority of the courts is being challenged. Some students managed to answer that lawyers should speak out on public issues but such an answer failed to make the connection with the context underlined above.

**Question 2:** The views expressed by students who attempted this question are varied, ranging from those who wholly accepted Professor Mo's statements, those who partially accepted the statements, and those who wholly rejected the statements. The good answer to answering the two parts of this question is to articulate the reasons, by reference to the student's understanding of the features of the Hong Kong SAR's legal system, for his or her view. In respect of (a), many students did not grasp the possibility that Professor Mo was speaking in cross-purposes with the Hong Kong legal community, with the consequence that both sides made true statements in the relevant contexts. Hong Kong's legal system can be described as part of China's legal system because Hong Kong is a Special Administrative Region of China whose systems are prescribed under a national law of China, the Basic Law of the HKSAR. Beyond that, can one proceed to identify the legal system of the HKSAR with the legal system of the rest of China? In respect of (b), a similarly nuanced answer is sought. The PRC Constitution has through Article 31 provided for the establishment of special administrative regions and the prescribing of the systems therein by law. In this sense, the PRC Constitution is the source and basis of the Basic Law. Yet, since (b) is primarily concerned with the interpretation and definition of legal rules in Hong Kong, the discussion should consider the extent to which the PRC Constitution is recognized as a principle or relevant material for interpreting the Basic Law and other laws in Hong Kong, and whether the present extent of recognition is correct. All students failed to refer to section 2A(1) of the Interpretation and General

Clauses Ordinance (Cap 1) which provides for the interpretation of previous laws in force in conformity with the Basic Law of the HKSAR and the Hong Kong SAR's status as a special administrative region of China.

**Question 3:** This question was intended to be a straightforward question for students to show their understanding of how the doctrine of stare decisis operates in respect of the Court of Final Appeal being invited to depart from a previous Privy Council decision on appeal from Hong Kong and to adopt a subsequent Privy Council not on appeal from Hong Kong or the UK Supreme Court decision which says that the previous Privy Council decision was wrong. While many students did refer in their answers to *A Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, CFA, a sizeable portion of them erroneously sought to apply the 'plainly wrong test' which the Court of Final Appeal prescribed in that case for *the Court of Appeal*. Some students answered the questions by way of a general discussion instead of tailoring their answers in the form of submissions from the appellant and the respondent respectively. A few students committed the more significant error of focusing on the substantive merits in criminal law secondary liability for murder between the *Chan Wing Siu* case and the *Jogee* case.