

EXAMINATION FOR THE DEGREES OF B.C.L. AND M. JURIS

REPORT OF THE BOARD OF EXAMINERS FOR 2004

1 General Remarks

The latter stages of the examination were overshadowed by the death of Peter Birks, the first Chairman for the 2004 Examination. His many and matchless virtues have been described elsewhere, but for ourselves we add this: that there is none who took the examination – administration of procedures, classification of candidates – with greater seriousness of purpose, nor any who was more anxious to get everything absolutely right, than him. In an examination system of increasing complexity he seemed, right to the very end, to have every last detail at the forefront of his mind. The substitution of the first Chairman by the second, and addition of one Examiner, did not obviously dislocate the process of the examination. In part, this demonstrated the robustness of the procedures which we now have in place, and which Peter had worked so hard to improve. But it was also a result of his quiet professionalism in making provision for an orderly transmission of responsibilities if the worst came to the worst, as it so sadly did.

The smooth running of the operation is also precariously dependent upon the goodwill of those who have no contractual or moral obligation to give it. The Faculty's Examinations Officer (Julie Bass) and the Director of Examinations (Ann Kennedy) went far beyond the limits of what the Examiners/Faculty/Division/University could fairly expect of them, working long hours and undertaking a wide range of diverse duties. In particular, we did not have a computer programme, whether fully functioning or at all, which could produce the marks, profiles, mark-sheets, and so forth. The impact of this on the work of these willing individuals, is addressed below, but if ever any of these key personnel were to work to rule, the entire procedure would be stopped in its tracks. Maybe all universities stand on such exploitative foundations, but being an examiner really brings it home to you.

As last year, the observations below are a collection of points which were worthy of happy note, points which were worthy of mere note, and points which were worthy of disgraceful note; and other facts and matters which may be borne in mind by those who have oversight of the examination of candidates on the BCL and MJur.

2 Minutes of Marks Meetings

Attached as Appendix 1 are the minutes of the meeting of the Board of Examiners held on July 19th and July 23rd.

3 Statistics

Attached as Appendix 2 are the numbers of entrants, distinctions, passes, and fails. We were aware that the percentage of distinctions was not low (one in three for the BCL, one in five for the MJur), but it emerged almost effortlessly from the accurate application of the classification rules to the marks produced by the first and second markers. We did not consider it a matter of negative remark, but preferred the view that such a split was about right. Most of the Prizes were

won by female candidates. At the bottom end, there were very slightly more bad papers than some of us remember, but the numbers are still very small indeed.

4 The Computer

Last year's examination process was almost ruined by nameless and numberless deficiencies in the computer program. Lest anyone have mislaid his or her copy, we take the opportunity of reprinting the observations of last year's Board, rendered in the urgent prose of last year's Chairman:

15 Reliability

At several points in the final stages of the process the program proved itself unreliable, not in the sense that it confused marks or got its arithmetic wrong but rather in refusing to do exercises expected of it. At the very end, for instance, the Examinations Officer had to type up the results to be taken to Schools because the program would not disgorge them. The Examiners, having finished their work, could not therefore sign the list. This was the third such incident in the period after the deadline for submission of marks, in which time is at a premium and delay therefore intolerable. **As examiners we have no expertise in this sphere, but, inexpert as we are, we take the risk of saying that there is no excuse on the part of the computer officers for allowing the program to remain unreliable in this way.**

16 Flexibility

It appears that the program is at the moment insufficiently flexible in the sense that it cannot respond to all the orders we would wish to give it. In addition to what it is presently supposed to be able to do, it should henceforth have the capacity to **(a) show that a script has been marked more than twice; (b) produce at the end of the examiners' final meeting a complete list in which the candidates' numbers are replaced with names and all decisions as to prizes are included ; (c) to list by name the results of those 25 or so candidates who have conditional offers to do the M Phil; (d) to list the results not only by college for college tutors but also by subject for subject teachers in accordance with the recommendation in para 12 above.**

17 Stability

At the first marks meeting the examiners learn to read the complex printout quickly and reliably. It is then extremely disorienting to find that the printout for the final meeting presents the picture in a different pattern. There appears to be no reason for this. **If possible, the printouts for the first and second meetings should conform to the same pattern.**

Television quizzes sometimes ask contestants, who have just been shown a film clip cut and frozen at a critical moment: what happened next? Ask it in this context, and the answer is: Nothing. We had not expected to find ourselves having to report that useful progress towards achieving these goals over the period which elapsed from the end of the 2003 examination to a meeting in May 2004, was as close to nil as made no practical difference. Now it may be that some, maybe many, improvements had been made, but we did not see their fruit; and even if they had been made, timely and sufficient they were not. Above all, it had not been possible to obtain the programme to allow it to be test driven and certified, before June when the Examinations Office finds itself swamped by the tasks of the Final Honour School examinations. Any and all work which had been done was, one bitterly regrets to say, as useless to the examiners as it would have been if the project had lain utterly neglected for every one of the 300 days following last year's shambles. An eleventh-hour decision was therefore made by the second Chairman and the Director of Examinations that the program could not and would not be used in 2004, whether later completed or not, and that the dust would be blown off an older and more stable technology instead. So the marks were entered manually; pre-classification lists were produced by human endeavour; averages and other necessary statistics were calculated

on the second Chairman's pocket calculator; college mark sheets and candidate transcripts were generated by manual extraction from the mark sheets. This made much more work for the office, though doing it this way offered a pretty clear guarantee that we had the information which we needed, accurately, and usefully. The computer program as we understood it to exist in June 2004 was in no position to offer an equivalent guarantee.

Those with experience from last year's and this year's Boards will be able to compare and contrast 2003 (with a capricious or malevolent computer which would do everything it felt like at the touch of a button but which manifested no consistent intention to do, or do only, what it had been told) and 2004 (which involved a candidate-by-candidate evaluation of marks, with examiners taking the decision on re-reading and on classification in the meeting and for themselves). We have the clear sense that we were more in control of the procedure this year than last. That is an unexpected, but very real, benefit. We lack no confidence in the results which we recorded. But what can one say about the fact that we found ourselves cast in this position? Last year's Board, even by speaking through its Chairman and making liberal use of the **bold** key, failed to provoke the necessary activity. There is no reason to suppose that we can do any better, so we have been persuaded to keep our thoughts to ourselves and let the facts, whatever they are, tell their own story.

5 The setting of papers

It seemed that almost everyone delivered the papers in draft form and electronic format in sufficient time for the meeting: though the first Chairman will have needed to cajole a few recalcitrants, he was too much the gentleman to make the justifiable fuss in full view of public. The Examiners were taken through the papers, line by line, and no issue of principle arose. We did sometimes wonder whether questions overlapped, but all one could do was ask the setter to reassure us that there was no problem.

6 Information given to candidates

The Edicts are attached as Appendix 3. They speak for themselves; and there was no need to issue supplementary instructions. There may be a belt-and-braces need to make a clearer and more precise reference to the rules on plagiarism, as to which see further below.

7 The written examinations in 11th week

Though Jurisprudence and Political Theory is examined by three Easter vacation essays, and some MJur candidates took a paper from the FHS list in May-June, the great majority of written examinations take place in 11th week. By striking contrast to the practice only a few years ago, the Examination Schools now runs a much more efficient operation than before. Their employment of professional invigilators is a great step forward, as is the fact that the material provided in the Examination is collated and put on desks by the staff of Schools. Though the second Chairman had to attend at the start and finish of each paper, in full fig, there was generally little else for him to do.

All those who set papers were asked to attend for the first half hour of the examination, to field unexpected problems on the paper. It was no surprise to find that the one occasion on which, by

oversight, the relevant person did not appear or otherwise get in touch was when a paper had an incomplete rubric. This drawn to his attention, the Chairman hurtled around in an attempt to get a quick and reliable answer to the question which this presented, and in the end it is improbable that candidates even noticed it. But it brought home the point that this is not an empty or decorative formality; and it must be impressed on those who set papers that this is a chore, not a choice.

The timing of the examination is, for an appreciable number of people (examiners and probably candidates) very far from optimal. To require half or more of the academic staff of the Faculty to be present and available until the last week in July is to extend their Trinity term by about a month. There is no need to rehearse all the arguments for and against this timing here, but is everyone really at his or her happy best in Oxford in weeks 11 to 13 of Trinity Term? Would a gradual move towards a slightly earlier date really harm anyone? It would make a lot of difference to those who have other duties to discharge in the long vacation; and there are those who can still remember when all the writing was over by the end of seventh week, and the examining not much later than that..

8 Materials provided in the examination room

Last year's Board, following its predecessors, also observed that the cost of the madness which required tonnages of statutory material to be delivered to the Schools in a skip and piled up on desks was getting out of hand. It suggested that candidates be permitted to carry their own designated texts into the room, and that a check by the invigilator would suffice to ensure that candidates had not encrypted their revision notes in the margins. No doubt some copies would still need to be procured for those whose means had not spread to such purchases, but the principle seemed a sound one, adopted and applied in law schools from China to Peru. This suggestion seems to have fallen on deaf ears. So we shall try again. It is madness to squander what little spare money we have on these hideous volumes. Nor should any be distracted by some spurious argument that it is not the Faculty's money but comes out of some other account. We are adult enough to disregard such silliness: it is the University's money. In grotesque particular, the Yellow Tax Handbooks (now numbering four volumes) which whomp down onto each candidate's desk, now make a tottering pile almost a foot high: does anyone know how many of these horrid pages are of any use to anyone? If this fell on someone's foot, he or she would be *hors de combat* for weeks: perhaps health and safety could come along and save us from ourselves (or have they forbidden us to require candidates to haul these malevolent tomes from home to Schools and back again?). The rapacity of publishers who produce these shamelessly overpriced annuals leads to a wholly avoidable transfer of funds from the universities to the shareholders of these piratical (or is it parasitical?) organisations. Can no-one do anything about this? Can we not even try?

9 Plagiarism

Since the paper in Jurisprudence and Political Theory was first examined by essay written over the Easter vacation, a small number of candidates will have been selected for informal viva by two non-examining assessors, who interview them to ascertain that the work was the candidate's own: this to serve as a guard against plagiarism. This year, for the first time, the assessors felt unable to certify their opinion that the work submitted was in every case the candidate's own; the reference to the Proctors for directions led in turn to proceedings before the Court of Summary

Jurisdiction. The details and outcome of that procedure are not a matter for this Report. But the need to give clear and precise and multiple instructions about plagiarism to essay writers (and the same must be true for dissertation writers), reiterated at the point when this is most likely to be heeded, is apparent. No doubt steps will be taken to ascertain that all candidates have actual, rather than constructive, knowledge of where lies the line which separates what can be said without attribution from what must have its source identified.

10 The credits system

In a small but noticeable number of cases, a candidate did not obtain a distinction because he or she had distinction marks on only six-thirteenths of his or her credit points; in a further small number, re-marking was not undertaken of a paper close below a borderline because this rule would still have operated to confine the candidate to the pass category. It was observed last year that this was the rule; it remains the rule; and it continues to bite on those who take papers with credit ratings of 4-3-3-3. As specific notice of it is given at the start of the course, no-one can truly say that he or she was taken by surprise, but the Examiners cannot report that they are completely untroubled by the results which the rule can produce. Maybe the truth is that all rules will show a rough edge to a few blameless candidates. But this one seems oddly to make life harder for those who elect to take 13 credits than those who take 12: the rational case for the discrimination to lie in this direction rather than the other is not obvious. An alternative would have been to have a rule that drew the satisfaction line at six thirteenths: it has to be six or seven, and if these people are taking on more of a challenge than those who take twelve credits, should they not have the benefit of the doubt? It was certainly not for us, mere examiners, to rewrite rules made and promulgated by Higher Authority. But we are of opinion that this one needs to be looked at again.

A more radical view would be that the credits system should be recognised as having reached its use-by date. Though it would have been inconceivable only a few years ago, there is now greater acceptance that broad uniformity of size of course is neither an impossible dream nor the stuff of nightmares. Many subjects may now accept, if grudgingly, that those which are just too big may be required to lose weight; and some which are lightweight could be asked to beef up their syllabuses. Indeed, there is some evidence on the street that the candidates simply do not believe that the workloads correspond, even approximately, to the current credit ratings. Accepting this would allow the credits to slip into history. Progress along these lines would simplify and clarify matters greatly.

11 Ranges of marks

The marks given on first reading were calculated into percentages and put into a table appended as item 6. We noticed that some papers seemed to have high average marks, but considered that only by looking back over the years would it be possible (and maybe not even then) to come to the conclusion that some subjects marked higher or lower than others. Even so, we were struck in particular by the relative meanness of dissertation marks, especially on the BCL. We believe that this is not a novelty, but it is striking. Some candidates mess up the timing, and probably complete the dissertation in a hurry; some others will have been unsuccessful in getting a supervisor to allocate time to a final reading when he or she is presented with a first draft only moments before the date for submission. We see nothing to be done about it, but it is still a

surprise that what may well be the most polished piece of work a candidate does will be the least likely to receive a distinction mark.

A small number of candidates had opted to take five papers (or four and a dissertation). Freedom of choice is all very well, but can it ever be wise to take the credits system as being quite as reliable as this strategy would suggest?

12 Marking and remarking

The routine marking of scripts prior to the first meeting of examiners will have included the second marking (blind) of borderline scripts, and of a sample of others. The examiners were therefore given two marks on a significant number of papers. In all but a handful of cases these marks were agreed between the markers. When the examiners in their first meeting came to consider whether to call for a further marking of borderline cases, they largely confined these requests to borderline papers which had not been twice marked to begin with. This reduced the number of scripts which had to be marked between the two meetings; and it was in some respects a change from the previous year. We consider it to be a change for the better.

It was justified on the footing that the examiners were satisfied that if a paper had been read, twice blind, and marked at (say) 68, it was a 68. It was not a 69 or a 70 but whose merits had not been fully appreciated the first two times around. It was also justified on the basis that to give some candidates a third bite at the cherry would be to treat them unequally. We knew we had a discretion, and were certainly willing to exercise it in an appropriate (which meant unusual) case. But we were satisfied that this was the correct general approach, and we commend it to the Examinations Committee and to next year's Board.

It follows that there is sense in asking first markers to send (silently, blindly) to second markers all papers marked by them with a score ending in 8 or 9. If these are twice marked before the first meeting, it will much reduce the need for markers to be around in the third week of July.

13 Documentation for the markers and examiners

The increasing bureaucratisation of life is probably something we must live with. But the encyclopaedic book of instructions to markers is fiendishly complex. Not least because the marking and remarking rules for BCL and FHS are still divergent (just read the second marking and reporting rules, for example), it is just difficult to work out exactly what is and what is not permitted by this formidable document. It will not be everyone's view, but it would have been possible to reduce the BCL/MJur elements of this to a couple of pages, so that one could see at a glance what and when was required: the current composite document is comprehensive but not user friendly.

Nor were all its instructions obviously right. It seemed to suggest that after the first marks meeting there needed to be only one marker available in Oxford for further marking. Some had evidently taken this literally, as well they might, with the result that a paper in need of another marking might have to be looked at again by the person who had marked it the first time. Blind second marking is fair enough, but amnesiac second marking is asking a bit much. If the second marker is not going to be in Oxford or otherwise available for second marking, the first and second markers really do have to mark all broadly borderline cases before one of them leaves.

Nor did we understand, and neither did all the markers completely observe, half of the rule that above 70 there are only even numbers, stopping at 80. We are entirely happy with the view that 80 is the top mark; no paper reached this point on the scale. But it was impossible to see why a paper coming out at 71 or 73 could not be returned as such. We were told that the supposed problem lay with the calculation of the Weighted Average: quite possibly a distant cousin of the General Average, if rather more obscure. But this is implausible. The Chairman and his trusty pocket calculator managed to derive the Weighted Average even when the raw data included odd numbers above 70, and one of these days someone will design a computer program which can reach this level of numerical sophistication. Trying to fit scripts to this unnatural mark range is rather like trying to pull up trousers cut too high in the rise: it never feels comfortable, it never looks quite right. This rule should be abrogated.

14 **Illness**

In the case of a candidate who does not complete the full complement of papers by reason of illness, the examiners may be directed to page 1024 of the 2003 Examination Regulations. These appear to be written for examinations in which Honours are awarded, and do not seem to work easily for this examination. But the examiners had real difficulty with the proposition that, if a candidate had been prevented from doing enough to allow the examiners to declare themselves to be satisfied, they were to fail the candidate. Of course, in a technical sense, the candidate has failed to persuade the examiners that he or she should be awarded the degree. But it seems that salt is rubbed in the wound if a candidate, whose illness has been accepted by the Proctors as justifying these special provisions, then has to be told that he or she has failed. Is it not possible to find a less insulting (or transcript-damaging) way to express the unhappy outcome?

15 **Final remarks**

The Examiners do not wish to give the impression that they spent their time carping. Almost all the time spent on the task reminds one that the standard of candidate is very high, examining on these degrees is not so bad, really, and the two degrees really are jewels in our crown. The continual effort to improve the assessment process is, as Peter Birks always reminded us by word and deed, a duty which one is privileged to discharge.

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October 2004

Appendices to this Report: (1) Minutes of Examiners' meetings; (2) Statistics; (3) Notices to Candidates; (4) Awards and Prizes; (5) Degree classification; (6) Mark distribution on first reading; (7) Reports on individual papers; (8) Report of Professor Christine Chinkin, External Examiner.

REPORTS ON INDIVIDUAL PAPERS

CORPORATE AND BUSINESS TAXATION

There were 26 candidates: 15 BCL and 11 MJur. 7 candidates achieved a distinction: 4 BCL and 3 MJur. The majority of marks were over 60 and there were no fails but a higher proportion of papers than in the previous two years were awarded marks under 60 (3 BCL and 4 MJur). These varied marks reflect the increased size of the class and the range of students taking the course this year but do not seem to be significantly connected to the MJur/BCL split. At the top end of the range the papers were as impressive as ever with some very well argued answers showing an admirable ability to integrate technical knowledge with an understanding of the policy issues. At the lower end there was a tendency to answer questions too generally without tailoring the answer specifically to the question asked and the approach was less sophisticated than at the higher end but, although a few of the papers at the lower end of the range showed a lack of detailed knowledge and analysis, only a very small number of answers contained errors or misunderstandings.

All questions were attempted. The question on recent ECJ case law on taxation was popular, which reflected an increased emphasis in the seminars on this key area. The questions on the impact of accounting standards on taxable profits and on the rationale for corporation tax also had good take up. The problem on corporate losses attracted some good answers and the essay on UK taxation of companies incorporated outside the UK was well done by most of those who attempted it. The least popular question focused on the capital/income distinction: some students may have felt the distinction was just too intractable to tackle but the two candidates who did this question made a good attempt. The planning problem on small businesses was not widely attempted, perhaps due to the fact that the Chancellor once again changed the rules in the 2004 Budget, which, although predicted in the seminar, may well have confused students (as well as small businesses).

CONFLICT OF LAWS

A high standard of competence was shown. All questions attracted a decent number of takers, and none was done badly. However, it was a slight surprise that in the problem question on service out and stays when the alternative forum was in a non-member state, the large point about whether the Jurisdiction Regulation permitted a stay of proceedings (*re Harrods, Owusu v Jackson*) went unnoticed. And it remains a mystery why candidates prefer to answer questions involving jurisdiction over multiple defendants without taking advantage of Art 6.1 of the Regulation or CPR r6.20(3): this appears to represent a big blind spot which no amount of creative teaching can eradicate. The candidates who attempted the question about Contracts (Applicable Law) Act 1990 s 2(2) were pleasingly many, though the discussion of Art 7.1 needed to look at more than the question of illegality under the law of the place of performance: the mandatory rules provision of Art 7.1 is surely wider in scope than that. What one can do for those candidates who believe that Nefaria has become a member state of the European Union is hard to say. Maybe popular enthusiasm for enlargement of the EU is stronger than the opinion polls would have us believe.

EVIDENCE

Twelve candidates sat the Evidence paper. Four were awarded distinction marks. The paper followed the usual format of three essay titles and five problem questions, with each candidate being required to answer three questions including at least two problems. Most candidates elected to answer three problems although each of the essay questions was addressed. Given the persistently poor rate of takeup there may be a case for scrapping the essay section of the paper, although it helps secure coverage of some elements of the syllabus. Most of the problem answers were very well structured, perhaps a legacy of the seminars held in Trinity term. The most popular problem questions were Qs.5 and 6. The statutory and common law hearsay issues in Q.6 were confidently handled although some people did not mention the new Criminal Justice Act. The least popular were Q. 7, in which relatively little was said about the interviewing of children, and Q. 4, perhaps because it involved both criminal and civil proceedings. The similar fact evidence point in Q.4 was largely overlooked, perhaps because it was more central to Q.8. The overall quality of the answers was very sound, if not absolutely outstanding at the top end.

RESTITUTION

On the whole, this paper was extremely well done. The comments below try to draw attention to common errors and omissions.

Question 1

The vast majority of candidates saw this as a question about quadrature, ie, whether unjust enrichment and restitution form two sides of the same square. And though this has some relevance to the line between unjust enrichment and wrongs, what was really being asked was whether that boundary was being blurred by decisions such as *Barclays Bank v O'Brien* and *Roxburgh v Rothmans*, cases which attempt to push clear cases of unjust enrichment into wrongs.

Question 2

Although many talked about the relationship between duress and actual undue influence, few included in their discussion any mention of presumed undue influence and its relationship with actual undue influence.

Question 3

The main problem here was that many candidates spent the greater part of their answers discussing whether Birks was right as a matter of authority to the detriment of any discussion of the question whether his new approach was a preferable one.

Question 4

This question was generally well done.

Question 5

A number of candidates failed to realize that a third party who receives a thing over which the claimant has a persisting property right is not an indirect but a direct recipient.

Question 6

On the whole, this question was competently done, though few answers raised the issue of the computational difficulties raised by partly-performed contracts.

Question 7

No candidate did this question.

Question 9

Answers tended to simply turn into a list of authorities rather than a discussion of the various theories of those, such as Jackman and Edelman, who have tried to rationalize the law of restitution for wrongs.

Question 10

Like question 9, this at times degenerated into a list, with no attempt to come up with any overarching principles.

Question 11

While many candidates saw that the exclusion of the person whose change of position was made in good faith could be justified by reference to ideas of induced reliance, none then asked whether those whose position was changed by non-reliance events, such as theft, would then have to be denied the defence.

CONSTITUTIONAL THEORY

The standard of answers to the Constitutional Theory paper was good, if a little unadventurous. The exam questions offered candidates the opportunity to think creatively about the issues addressed in the seminars, and it is because of the slight lack of ambition that really high marks were few. Those who showed independent reflection as well as a good grasp of the key writers were rewarded, as were those who used the law of a particular constitution effectively in dealing with theoretical issues.

PROBLEMS IN CONTRACT AND TORT

There were 14 scripts, 3 of them MJur. Eight questions were offered. Most answers were given on privacy (12), pure economic loss (10), illegality/immorality (10), and formation of contract (9). The questions on causation (5), sources of law (4) and the problem question on third party rights (3) were less popular. No candidate answered the question on remedies in sales law. In most cases the candidates had heeded the warning not to rehash pre-rehearsed essays and paid attention to the questions. All of them showed effective time-management and answered the number of questions required. There was no fail. The overall standard of the answers was fairly high and candidates showed that they had come to grips with complex issues in another legal system, proving the ability to reflect the solutions in both their own and the other system, so the majority of marks was in the range between 60 and 65. However, most candidates did not venture far beyond the descriptive stage and only one distinction could be awarded. At the other end of the scale there were two MJur papers which somewhat confirmed the concerns on the standard in the MJur highlighted in previous reports.

CRIME, JUSTICE AND THE PENAL SYSTEM

Eight candidates sat for the examination. Four candidates achieved a distinction and the other four good to very good passes. Candidates focused on three questions in particular – regarding the Crown Prosecution Service, victim impact statements and restorative justice – and three other questions were ignored entirely. In future it would be desirable to structure the examination to attract answers across a broader range of subjects and components of the course. The best answers included efforts to use the theoretical, empirical and normative literature to advance original arguments. In future members of the course should be encouraged from the outset to use the literature in this way rather than to simply review what they have read. Overall, however, the performance of the candidates was strong and the questions were handled thoughtfully.

INTERNATIONAL LAW OF THE SEA

The very small number of candidates makes it difficult to present general remarks about the performance in this year's examination. The scripts evidenced a commendable range of reading, and a good grasp of the principles of the subject.

There is, however, one salient defect that deserves mention. That is the perennial problem of the failure to provide an answer to the question set, as opposed to the question that the candidate had expected to be set. Too many of the answers tended to recite the principles of entire areas of the law without actually applying those principles to the question on the paper. Though the catalogues of principles were often accurate and concise, this approach inevitably fails to attract high marks. This is particularly true in the case of questions such as question 8 where it is the relationship between principles, rather than the principles themselves, that is the subject of the question.

PRINCIPLES OF CIVIL PROCEDURE

The number of candidates taking the paper was smaller than in past years: 8. The standard achieved was very high, with some 70% obtaining a Distinction mark. All but two of the 10 questions received serious treatment. A fair proportion of the candidates demonstrated not only good analytical skills, but also considerable independent initiative in identifying relevant recent unreported court decisions and drawing on comparative material, which was outside the syllabus.

COMPETITION LAW

The examination was taken by 15 BCL candidates and 19 MJUR candidates. On the whole, the scripts showed a good command of the subject and good analytical skills. The examiners awarded 9 marks above 70, 23 marks between 60 and 69, and 2 marks below 60.

All questions were attempted by students, the most popular being the essay question on the modernisation of EU competition law and the problem question on Article 82.

BCL and MJUR students performed equally well, yet the examiners noted that 3 of the MJUR students submitted short work on the final answer.

THE LAW OF PERSONAL TAXATION

There were 6 candidates with a good overall standard. One candidate obtained a distinction and only one a mark under 60. There were no fails. Of the 10 questions set 7 were attempted by at least one candidate: this seems reasonable given the small number of students. It was mandatory to attempt a problem question and all but one chose the employment tax problem. This will not be possible next year when employment tax will be removed to the new undergraduate tax course and Personal Taxation becomes a three credit course. The overall number of questions on the paper will be reduced to 8 to reflect this.

There was no evidence from the scripts that the rewriting of the employment tax legislation under the Tax Law Rewrite programme had made the legislation any easier to access than before for the weaker students but at the upper end of the marks there were some very good and even excellent answers to the employment tax problem question. The tax avoidance question was also popular, as ever, and mostly well done but the importance of really addressing the specific question asked was not appreciated by every student.

COMPARATIVE HUMAN RIGHTS

The standard of responses in this year's examination was very high. Twenty six candidates sat the paper; six achieved 70% or over, and no-one scored less than 60%. Many candidates achieved 70% or more on one or two individual questions. Candidates were assessed according to five criteria: use of legal materials; addressing the question; structure of answers; comparative methodology and critical analysis. Most candidates scored well on all these criteria, achieving a good synthesis between descriptive and critical analysis, as well as making good use of comparative law methodology. A wide range of questions was dealt with, and candidates showed an impressive knowledge of the detail of the law, as well as a good understanding of the strengths and weaknesses of comparative law. Some candidates, however, paid insufficient attention to the question set, using prepared essays (often based on previous exam papers).

CORPORATE INSOLVENCY LAW

19 candidates took this paper and the performance was very good. 6 candidates obtained a mark of distinction. All the questions had takers, with the most popular questions being question 1 (set-off), question 2 (*pari passu*) and question 6 (the extent of which insolvency law is redistributive). The essay topics were more popular than the problems. The problems, however, were very well attempted with the candidates managing to address most of the issues. However, a number of the candidates who did question 9, did not fully argue the implications of *Money Markets* with respect to question 9(b). Also, in question 10, the candidates should have argued more fully the implications of s.245 of the Insolvency Act with respect to the increase in the loan facility. The answers were extremely strong in discussing policy issues but sometimes the candidates failed to clearly set out the particular legal doctrine that was being addressed. For example, the answer to question 1, would have been

greatly enhanced if there had been a clear but brief statement of what insolvency set-off entails.

There were no serious gaps in the candidates' knowledge. Some of the answers to question 4 (s.238) should have more clearly identified the difficulties of valuation which *Re Thors* brings to light. This would have led them to an assessment of whether idiosyncratic value in applying s.238 should be taken into consideration. The question on preferences would have been greatly improved if the candidates had concentrated on the detail of the question, particularly the last sentence. Question 7 required the candidates to attempt to formulate principles that would guide directors in deciding whether or not they should continue to trade where the company is in financial distress and also examine the position of Professor Goode that premature termination of a company's trading activities in itself constitute wrongful trading. These issues were not always sufficiently addressed. As stated above, the answers to the problems were very competent. Question 9(b) has already been dealt with, and in question 9(a) candidates should have analysed *Denny v Hudson* in greater detail than some did. The difficulties of creditors dealing with a company in distress is an important issue and not coherently addressed by insolvency law – it is important that the candidates should have thought about this issue.

TRANSNATIONAL COMMERCIAL LAW

Most candidates this year produced very competent scripts and there are no significant problems to report. Candidates had clearly worked hard and demonstrated a good grasp of the subject. There were some very good answers indeed, where candidates had clearly read beyond the set reading lists. There were some weaker scripts but these were in the minority and were fewer in number than in recent years. There were two principal weaknesses. The first was that there was a tendency on the part of some candidates to use the question as an excuse to rehearse an essay previously written for the tutorials. This was particularly noticeable on the arbitration question which a number of candidates answered as if it were a question solely about delocalisation (which it was not). Candidates must answer the question set, otherwise they will lose marks. The second weakness relates to the quality of the candidates' written English. In general this was not a problem but it was a factor in the case of the one candidate who failed the examination.

INTELLECTUAL PROPERTY RIGHTS

Thirty candidates wrote this paper. The overall standard overall was pleasing. 6 papers obtained Firsts, and 5 papers were marked below 60, none of which was egregiously bad. I did not draw any specific comparisons between the BCL and MJur cohort, but my overall impression was that there were no noteworthy differences. The paper involved the candidate's answering 3 questions out of 10 (some containing a further choice within them) ranging across the field of patents, designs, trade marks, copyright, database rights, moral rights, passing off, and misappropriation of personality. The questions were all essay-type and generally were well done. The usual tendency to avoid questions involving patents - thought to be the most technical of the categories - was noted. Nevertheless the design of the paper and the responses sufficiently tested the students' overall knowledge of the legal and theoretical field, including a high level of technical detail. No particular problems need to be drawn to the Faculty's attention.

COMPARATIVE PUBLIC LAW

The Comparative Public law paper produced good scripts this year, a number of which were awarded distinctions. It was especially encouraging that the balance of quality as between BCL and MJur papers was more even this year than it has been on some past occasions. There was a reasonable spread of answers judged in terms of the questions set, and there were some attempts at all the questions. The most popular questions were however those concerned with proportionality, legitimate expectations and fundamental rights. Candidates demonstrated good awareness and understanding of the primary and secondary literature in these areas, and were able to get this across while still leaving time for their own thoughts and analysis. There were also thoughtful answers on topics such as propriety of purpose and damages.

EUROPEAN BUSINESS REGULATION

This paper offered considerable choice for the 28 candidates (11 questions). The general level of attainment was high. The first question, on subsidiarity, was popular, and generally well answered. The second question, which asked whether a measure which was not caught by Article 28 EC could be harmonised under Article 95, was also popular. The best answers dealt with the possibility of such a measure also being caught by Articles 43 or 49, and with consumer confidence as a basis for harmonisation. The third question, which asked whether the effect, rather than the form of a challenged measure dictates its subjection to the rules of the Treaty, attracted few candidates. Rather more candidates answered the fourth question, on mutual recognition, and the instruments available to assess its application in practice. There was a good overall level of knowledge and understanding. The fourth question, on the harmonisation of company law, and the impact of *Centros* and *Überseering* on the scope of the harmonisation programme, was attempted by few candidates. Question 6, on golden shares, was popular, and showed good knowledge of the case law and understanding of its implications. A few candidates attempted question 7, on the main features of the EC's legislative record in the field of environmental law. Question 8 on consumer protection was popular and provided an opportunity to discuss various pieces of EC secondary legislation in this field. Question 9 on state aids was popular. Some candidates spent more time than strictly necessary on the examining what constituted a state aid, at the expense of the real substance of the question, which concerned the consequences for beneficiaries of non notification. Question 10 was on public procurement was a popular question, and answers demonstrated overall a good level of knowledge of the relevant legislation and case law. The final question, which asked whether the claim that Europe is "united in its diversity" could be said to describe the pattern of business regulation in the EU, attracted no takers.

EUROPEAN EMPLOYMENT AND EQUALITY LAW

The standard of achievement in this paper was particularly good, with candidates showing both a detailed knowledge of the subject and a good critical approach.

Thirteen candidates took the paper, of whom as many as eight scored 70% or over. The rest were above 65% except for a single candidate, who scored below 50%. Answers were assessed according to five criteria: knowledge of the law, ability to set the law in context, answering the question, structure and critique.

A wide range of questions were attempted, and candidates displayed an impressive knowledge both of policy documents and of legislation and case-law. Candidates were able to answer the questions both comprehensively and critically, and this is demonstrated in the generally high level of their results. This was equally true of M Jur candidates, most of whom were functioning in their second language, as of BCL students.

INTERNATIONAL ECONOMIC LAW

The examination performance by students was excellent. There were eight distinction class marks and ten marks between 60-70%.

The general standard of exposition in the answers was excellent with good substantive content. The performance of a number of some students would have been even more enhanced if they had not simply recounted their knowledge in a particular area but paid more attention to answering the questions asked.

INTERNATIONAL ENVIRONMENTAL LAW

The examination performance by students was rather disappointing this year. There was only one distinction class mark, five marks between 60-69%, and five students with marks between 51-59%. Most popular were the questions integrating human rights and trade law issues with environmental concerns (Q 1, 2 and 8 in particular). No student attempted questions 4, 5 and 10. The performance of students could have been greatly enhanced if they had drawn more on general international law principles. As in previous years, more attention to the questions asked would have benefited the answers.

PHILOSOPHICAL FOUNDATIONS OF PROPERTY RIGHTS

This was a strong year of nine candidates, comprising one woman and eight men, all in the BCL programme. Six were awarded distinction grades, and two of these distinctions were marked by exceptional creativity and lucid command of the materials. Other papers lacked the highest degree of flair but nonetheless gave trenchant analyses of property arguments and showed close engagement with the subject. A few papers stuck relentlessly to orthodox descriptions of classical theories ranging from Locke through to Hohfeld, Honore, Nozick and Epstein. But most candidates followed Harris in judging property theories sceptically, with an eye to practical and legalistic examples.

INTERNATIONAL DISPUTE SETTLEMENT

The examination performance by students was excellent. There were thirteen distinction class marks and seventeen marks between 60-70%.

The general standard of exposition in the answers was excellent with good substantive content. The performance of a number of some students would have been even more

enhanced if they had not simply recounted their knowledge in a particular area but paid more attention to answering the questions asked.

ROMAN LAW (DELICT)

There was only one candidate.

PHILOSOPHICAL FOUNDATIONS OF THE COMMON LAW

This year's paper adopted the familiar format of allowing students an opportunity to write on each of the three major areas of study and also to write on themes common to pairs of areas. The overall standard was very high. A range of questions were answered, with questions 4 (contracts as voluntary) and 3 (negligence in tort) the most popular. The answers displayed a good grasp of the relevant theoretical literature. Some candidates stayed at a high level of abstraction, while others made more detailed use of their legal knowledge. Each approach was rewarding when carried out successfully. Common weaknesses were an attempt to cover too many theories in a question at the expense of depth and, at the other extreme, presenting a single approach with little attention to its possible flaws. The popularity of questions 3 and 4 on contract and tort left criminal law as the poor relation this year, though it fared better in question 8, with many answer on the relevance of moral luck and intention to the common law.

In light of the increasingly abstract nature of much of the literature, it would seem appropriate for the teaching group to consider whether PFCL should remain generally restricted to BCL students.

GLOBAL COMPARATIVE FINANCIAL LAW

This course is in its second year and 46 students sat the examination in the approximate proportions of 60% MJur and 40% BCL. The students wrote an open book mock exam at the end of Hilary Term as a dress rehearsal.

The ten questions were essay style and demanded the ability to argue a position, to cite supporting data and to distil large quantities of information in persuasive support. The questions required a range of knowledge of policies, doctrine and transactions. The most answered question involved securitisations with 70% of the candidates exploring the intricacies of these transactions, but most of the questions attracted many takers, with the least popular drawing 15% of the students. Apart from securitisations, the questions which had a transactional slant were displaced by a greater proportion of answers on policy-orientated questions, eg a new code of security interests for the Republic of Legalia. Not many attempted the general question inviting a taxonomy of the world's jurisdictions according to their financial law.

The answers contained some splendidly enthusiastic and strongly argued positions showing a sound grasp of the principles and of the various pressures on financial law round the world. About 28% of the candidates were in the distinction bracket and only a few dropped below 60%. There were excellent papers in the top slice and fine individual answers throughout. Altogether this was an impressive class.

GLOBALISATION AND LABOUR RIGHTS

As was the case last year, the examination was divided into Part A (which included questions on the ILO, etc) and Part B (which included questions on international economic organizations). Candidates were required to take at least one question from each part. This ensured that candidates answered questions on a variety of topics. Each question on the paper was tackled by at least one candidate. The overall standard of the answers was extremely high. Most candidates had a pleasingly detailed knowledge of the material and were able to present this material in a way that directly addressed the question asked. Some candidates, however, in answering questions from Part B failed to link specifically enough the relationship between the international economic law issue raised with its actual or potential effects on labour rights issues. Those who did were suitably rewarded.

JURISPRUDENCE AND POLITICAL THEORY

Scripts showed an adequate level of competence, with 6 first class marks, though few of outstanding quality. Only a few explored additional literature, or ideas of their own, and those who did not always produce the strongest essays. There were 2 essay topics in political philosophy and 4 in legal philosophy, reflecting the balance of teaching in seminars, though the political philosophy papers attracted a somewhat greater than average number of replies. Yet the overall distribution of replies was reasonable, with no question being universally favoured nor generally shunned.