

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

REPORT OF THE BOARD OF EXAMINERS FOR 2005

1 General Remarks

This report begins by paying tribute to the dedication, good-humour and sheer hard graft of those who ensure that the examinations process is conducted quite as successfully as it is; in particular the Director of Examinations (Ann Kennedy), the Examinations Officer (Julie Bass) and the Assistant Examinations Officer (Felicity Butcher).

As last year, the observations below are a collection of points thought worthy of note and which may need to be borne in mind by those who have oversight of the examination of candidates on the BCL and MJur.

2 Timetable

The setting of the timetable for this year's examination proved to be a very unhappy saga. The unhappiness came in two stages.

First, it proved not to be possible to set a timetable which avoided some candidates having two papers in one day. The number of such candidates was only reduced from around 100 to 13 by bringing forward the start of the exam period to Thursday of 10th week, from its traditional start-date of Monday of 11th week. The two intervening Saturdays were said not to be available due to the demands this would place on the Examinations Schools. The Examiners regard this as a matter of the most serious concern and urge those responsible for the allocation of the necessary resources to look closely into this matter well in advance of next year's examinations.

Second, those candidates who were left with two papers in one day applied for "incarceration" so as to allow them to delay the taking of one of the papers concerned. In the end, all those who applied were granted permission. It is understood that this aspect of the timetable is to be the subject of further inquiry.

3 Statistics

Attached as Appendix 2 are the numbers of entrants, distinctions, passes, and fails. The percentage of distinctions was not low (one in three for the BCL, one in five for the MJur), and it was remarkably similar to last year.

The gender breakdown for the BCL was also remarkably similar to last year, but it may be noted that what was already a large gap in the percentage of Distinctions awarded to men over women extended, marginally, yet further still.

For the MJur, there was a marked reverse in the awards to men and women. Whereas, in 2004, Distinctions had been awarded at the rate of just over 2:1 in favour of women, in 2005 it was over 3:1 in favour of men.

It was a made a point of special note in 2004 that most of the Prizes were awarded to female candidates. The reverse was true in 2005.

4 The Computer

Since last year's report relayed the very unhappy experience of the Examiners so far as the absence of a reliable, flexible and stable computer program was concerned (indeed, so far as the absence of any program was concerned), it is only right to report that this year's experience was a happier one. The Examiners are not entirely certain that the effort of putting in the data required was worth the outcome (when compared to older and traditional methods) and there were still one or two "gremlins" in the works: several candidates whose profiles disappeared after the insertion of second marking and a rather over-zealous instruction to second-mark for candidates with profiles well short of any borderline. All such gremlins were detected and corrective action taken. Since it is understood that a different system again is to be used next year, to bring the BCL/MJur in line with the FHS, it may be that such problems will take care of themselves, though it seems to be in the nature of such programs that one would not be surprised to read next year of still one or two more teething problems.

5 The setting of papers

Although one or two recalcitrants had to be cajoled (a comment made last year and no doubt every year in the history of the BCL and MJur) everyone delivered the papers in draft form and electronic format in sufficient time for the meeting to consider them. The Examiners were taken through the papers, line by line, and no issue of principle arose.

When considering this year's papers, the Examiners were struck by the very inconsistent approach in the rubric of each of the papers so far as the difference between BCL and MJur candidates is concerned. In some, all candidates are required to answer three questions; in others, BCL candidates must answer four, while MJur may candidates must require three. If there is a case for a different assessment of the two cohorts, it must surely apply across the board and not in some papers, but not others?

6 Information given to candidates

The Edicts are attached as Appendix 3. The need to issue supplementary Edicts was due to delays in the final setting of the timetable (see para 3 above) and a late change of subject by some candidates.

7 The written examinations

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 (and this year at the end of tenth week). With one small exception, when the scripts for a paper were left undelivered for 24 hours at the crucially tight end of the exam period (these things are bound to happen), the conduct of the examinations themselves by the Examination Schools was exemplary. The Chair would like to express his personal thanks to the invigilators who ensured that he was required to do no

more than attend at the very start and end of the paper. Setters all duly attended as instructed and no problems were encountered with the papers.

It is perhaps worth reminding the reader of what was said last year about the timing of the examinations: “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..”

Given the difficulties encountered this year in the setting of a timetable, it may be that the solution is to bring forward the examinations themselves as a means of elongating the exam period. To that end, it is proposed that the earlier starting date of Thursday of 10th week is retained.

8 Materials provided in the examination room

Last year’s report lamented the enormous expense involved in the provision of statutory materials by the University. The present examiners share that lament and urge reconsideration of the proposal to allow students to provide their own materials (most of which they will have acquired for the purpose of the course in any event).

9 Plagiarism

Unlike last year, this Report is happy to state that there was no evidence detected of any plagiarism (since the controls against plagiarism are entirely random, this is not the same as stating that there was no plagiarism). While this cannot necessarily be attributed to the inclusion in the Edict (Schedule VI) of the guidance issued by the EPSC, this is a welcome development which should be adhered to in future years.

10 The credits system

Following on from last year’s report, the Examiners urge the Law Board to consider, as a matter of some urgency, whether the time has come to abandon the credits system. The worst of the anomalies it had led to in the examination were avoided this year by a change to the Marking Conventions which allowed for the award of a Distinction to a candidate who secured marks of 70+ on 6 out of 13 credits (as opposed to 50% of credits). This left the further anomaly that a candidate with 70+ on 6 out of 14 credits would be denied a Distinction having demonstrated the same level of quality while supposedly under a heavier burden during the course as a whole. The Examiners had a clear view that if a candidate had presented such a profile they would have exercised the discretion given to them to award a Distinction. It is understood that the Convention will be further altered to reflect this approach next year. That is the least that should be done.

It may be recalled that the credits system was introduced, at least in part, to ensure that a certain level of teaching provision was adhered to; the credits originally reflected the level of provision, as well as a perception of the scope of the subject and the workload involved. There seems to be no basis to suggest that any of the subjects now offered are not accompanied by adequate provision of teaching (even if this is ensured in some cases by the introduction of “capping”). Perceptions about workload are just that and cannot really be so finely calibrated as to suggest differences in credit-rating of 25, 33 or even 50%. If one adds that candidates may offer between 12 and 14 credits on the basis of these perceptions, one reaches the current position where some candidates are offering 3 papers, most are offering 4, and a few offer 5 (with essays and dissertations in lieu in some cases). A three hour exam is a three hour exam whichever way you look at it and whatever the underlying credit rating, and the Examiners were struck by the feeling that candidates were not necessarily being subjected to the same tests of their ability, or stamina. Would it be a regressive move to revert to four papers for all candidates (with essays/dissertations in lieu) and leave it to the students to assess the wisdom of the combinations they have in mind? By talking to their college advisors and contemporaries, their perceptions are likely to be just as reliable as anybody else’s.

11 omenclature

Until about ten years ago, about one third of candidates for the BCL were awarded a First and the rest a Second, and about one fifth (and sometimes less) of candidates for the MJur were awarded a First and the rest a Second. Now, they are awarded a Distinction and a Pass respectively. One can see the case for the abolition of broad classifications altogether and the substitution of a more finely calibrated ranking to provide an indication of relative merit, but what has been gained by the move to Distinction/Pass?

12 Ranges of marks

The marks given on first reading were calculated into percentages and put into a table appended as item 6. As last year, it was noted that some papers seemed to have high average marks, and the spread from highest average to lowest was a very appreciable 5 points, even allowing for the statistical anomalies thrown up by small samples. It was agreed that the time has come to look a little more closely at this. The Chair will conduct some research into the results over several years to see if there is a consistent pattern and will report his findings to the Examinations Committee. A relative meanness in the award of marks for dissertations is also noted.

13 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 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, with one exception they confined these requests to borderline papers which had not been twice marked to begin with.

As was reported last year, this approach 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. Since first markers were asked in advance to send all papers on 8 or 9 to second markers as part of their sample batch, the amount of double-marking between the two marks meetings was significantly reduced, even after the decision was taken to also have papers with marks ending in 7 re-marked if an improvement of three marks would make a difference to the final classification

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Appendices to this Report: (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 Mr. Richard Fentiman, External Examiner.

REPORTS ON INDIVIDUAL PAPERS

CORPORATE AND BUSINESS TAXATION

This was a very good set of scripts. There were 21 students, 7 of whom achieved a distinction and there were no marks below 60. The course was taken by BCL and MJur students and all performed well. The papers with the highest marks showed excellent mastery of the technical aspects of the topics combined with carefully considered and critical analysis. Proposals for reform and comment on policy was combined well with analysis of existing systems, case law and legislation.

All questions were attempted but there was considerable variation in popularity, not all of it predictable or similar to the pattern in previous years. Question 1 focused on the key question of integration between shareholder and corporate level taxes and was not attempted by as many as might have been expected nor done particularly well by those who did write it, suggesting too narrow a focus by students on either corporate or shareholder level without looking at the overall picture. The question on capital allowances was also not widely attempted but the question on the utilisation of trading losses was both popular and well answered. Question 4 on the remaining role of the courts in defining taxable profits was the most widely done, probably because there was recent literature on the topic. Some of the best answers were well argued and took issue with that literature. The question about group taxation in Europe attracted some very well informed and well reasoned answers which engaged well with recent case law and some students also showed an impressive understanding of the complexities of transfer pricing. The problem questions were not widely taken up but most of those who did answer problems did so effectively and obtained high marks for these answers.

CONFLICT OF LAWS

This paper was taken by 51 candidates, a significantly higher number than in previous years. The overall quality was a little lower than normal and than expected, based on seminar and tutorial participation; the markers wondered if this indicates that candidates are increasingly less familiar with the demands of the three-hour, hand-written, unseen examination. Only 18% of candidates (9 in number) were awarded a mark of 70+, though 65% secured a mark of 65 or better.

There were four essay questions and four problems. The essays proved a little more popular than in previous years, but answers to problems were still more common. Although enforcement issues were raised by what was part (a) in question 5, the real meat of the question lay in part (b). Many candidates spent too long on enforcement, including the discussion of entirely hypothetical issues not raised by the facts, at the expense of (in some cases) any discussion at all of the choice of law issues in part (b). This was part of a general trend to concentrate on jurisdiction to the detriment of any discussion of choice of law. Problem 7 (on property and restitution) was not popular, but those who attempted it did so rather well. Problems 6 (choice of law in contract, illegality) and 8 (enforcement of judgments) were handled well on the whole.

Essays 1 (characterization) and 4 (public policy) required the candidates to provide a structure and focus which was all too evidently missing from the weaker of the answers submitted. Essays 2

(Part III of the 1995 Act) and 3 (enforcement of choice of court agreements) were popular and generally handled well.

EVIDENCE

Many more candidates (25) took this paper than in recent years. The overall impression was one of high competence, with some very good scripts. Some 40% of the candidates were awarded first class marks. No candidate gained a mark at lower second level or below.

As in previous years, the three essay questions in Section 1 were not popular, despite the fact that there had been lectures on the topics dealt with by two of the questions. Indeed, the most popular such question was the third one, though there had been a seminar on the issues raised by it.

Candidates will not have been surprised that at least three of the problem questions raised issues under the Criminal Justice Act 2003, whether as to character of the accused and of others, or as to hearsay. The relevant sections of that Act had, in general, been carefully read and well understood. The least popular question was the only one on civil matters, Question 8, but there were some good answers to it and no bad ones.

Though, of course, there were particular weaknesses and errors in specific scripts, nothing emerged as a more general problem of knowledge or understanding.

RESTITUTION

The questions asked this year were slightly more focused on specific issues than in recent years, although still more general than is found in some other papers. Unfortunately, several candidates seemed to be thrown by this, very slight, shift in emphasis and chose to answer the questions they hoped they had been set rather than the ones actually asked. This was to be regretted as many knowledgeable and extremely able candidates failed to do themselves justice. Perhaps in future years exam papers should be headed with the words "Answer the Question Set" in bold italics. There was also a tendency towards overly abstract answers unrelated to any primary material and without concrete examples to illustrate the arguments made. All questions obtained some answers, questions 2, 5 and 11 being the most popular.

Question 1 (Terminability) drew several excellent answers, answering both the descriptive and normative aspects of the question. One or two weaker candidates did not seem to understand the difference between a contract being terminable, voidable, unenforceable and void.

Question 2 (At the expense of) attracted a large number of good answers, focusing both upon whether an enrichment must correspond with a loss before a claim can be brought and when an enrichment can be 'from' the claimant even when received from an intermediary.

Question 3 (Restitution for breach of contract) although relatively straightforward attracted few answers, perhaps reflecting the fact that this topic is no longer dealt with in seminars.

Question 4 (Undue Influence) was unpopular but those answers it did attract were strong.

Question 5 (Mistake/Absence of Basis) was, inevitably, the most popular question on the paper. Few candidates emphasised how the historical limits placed upon recovery in restitution (eg that a mistake must be one of fact, that a failure of consideration must be total) once made it impossible to argue that English law adopted the same approach as Civilian jurisdictions, which is no longer true today.

Question 6 (Defences) attracted some strong answers but many focused exclusively on change of position.

Question 7 (Bank accounts) proved predictably unpopular but did attract one or two answers from the more technically minded.

Question 8 (negotiorum gestio) was ably done by some, but few attempted to establish whether there was a correlation in English law between the instances of a duty to assist others and a claim for recompense from the person assisted.

Question 9 (Children) was deliberately opaque/open textured. One of several possible approaches, would have been to focus on incapacity as a ground of recovery and as a defence. Another would have been to see it as a springboard for a discussion of the fact that the defendant's enrichment at the claimant's expense is insufficient to ground restitution. The weaker answers used this as a dustbin fourth answer into which they poured anything they liked without making any attempt to relate their answer to the question.

Question 10 (separation of benefits/at the expense of) was unpopular.

Question 11 (Claims to substitute assets) was popular, most answers being well versed in the relevant academic debate, the best trying to push the debate a small amount further.

CONSTITUTIONAL THEORY

The scripts showed a general improvement on last year's batch, but many candidates still refused to answer the questions set. The best answers showed an awareness of relevant materials, both the work of constitutional theorists, and the constitutional law of one or more jurisdictions and a willingness to engage with them critically, whilst the weaker candidates, once again, recycled their lecture notes.

CRIME, JUSTICE AND THE PENAL SYSTEM

This year 10 candidates sat the BCL/MJur Crime, Justice and the Penal System paper, all of them producing a creditable, if not outstanding, performance. Although all of the candidates revealed themselves to be suitably familiar with the literature and key debates in the course, it was perhaps disappointing that there were fewer truly outstanding papers than in previous years. In part, this may have been a result of students trying to do "too much" – that is, attempting to reference more literature that was perhaps necessary, at the expense of detailed and critical analysis of the question. In future, candidates might be well advised to concentrate their efforts on dealing with certain

aspects of a given question in depth, rather than attempting to provide a broad overview of a particular area.

INTERNATIONAL LAW OF THE SEA

The examination was sat by 13 candidates. There were three distinctions; 8 candidates scored between 60 and 69 and two scored less than 60. There was a strong preference for questions 10 (dispute settlement), 9 (Commission on the Limits of Continental Shelf), and 2a (baselines).

On the whole, the scripts showed a good command 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.

LEGAL HISTORY: LEGISLATIVE REFORM OF THE EARLY COMMON LAW

There were three candidates. The scripts were broadly competent, but displayed two common weaknesses: there was a tendency for argument clearly focused on the questions set to be submerged by the amount of data used; and candidates showed some tendency to imprecision in stating the legal doctrines deployed in cases and contemporary literature.

PRINCIPLES OF CIVIL PROCEDURE

The number of candidates taking the paper was 18. The standard achieved was high, with only 2 candidates achieving marks under 65. A Distinction was awarded to 5 scripts. The remaining 11 scripts obtained marks between 65 and 69. All the questions received serious treatment. The most popular questions were: question 9 (on the intersection between conditional fee agreements and the right to free expression), question 3A (on the concept of irreparable harm), question 3B (on the intersection between interim injunctive relief and the right to free expression), and question 4A (on legal advice privilege). Most candidates showed advanced knowledge and understanding of the materials and the problems. Yet, a few candidates did not take as much trouble to develop their answers as they might have done. For example, few addressing question 3A paid attention to the fact that it required a consideration of the abuse of the concept of irreparable harm, and not just its use. Some of the minority questions received quite outstanding answers. For example, question 5 (on the extra territorial potential of freezing injunctions) and question 6 on appeal, received a treatment that demonstrated not only good analytical skills, but also considerable independent initiative in researching these areas.

COMPETITION LAW

The examination was taken by 42 candidates. On the whole, the scripts showed a good command of the subject and good analytical skills by both BCL and MJUR students.

The examiners awarded 8 marks of 70 or above, 25 marks between 60 and 69, and 9 marks below 60.

Candidates were required to answer three questions, including at least one problem question. The examiners noted that many of the candidates chose to answer two problem questions, the most popular being the problem question on vertical agreements and state-owned undertakings. The other problem questions, dealing with cartels, dominance and mergers were equally attempted by candidates.

The essay questions dealt with four distinct subjects; market power, judicial review, US antitrust laws and private enforcement. The most popular essay questions were the ones dealing with market power and private enforcement. None of the candidates attempted the essay question on judicial review.

PERSONAL TAXATION

The candidates displayed an impressive level of knowledge of the material within the syllabus and were able to discuss it intelligently. There was also a pleasing willingness to address the questions asked. The result was answers of high quality which were a pleasure to read.

Although the paper contained fewer questions as a result of changes to the syllabus, there was no evidence that this caused problems in choosing questions to answer. Rather, the removal of employment income meant that the other areas were handled significantly better than in some recent years.

The answers were quite evenly spread across income tax, capital gains tax and inheritance tax. However, easily the most popular question was that on judicial responses to tax avoidance.

COMPARATIVE HUMAN RIGHTS

The answers to this paper were generally of a high quality, with a large number of candidates gaining marks at or close to distinction level. The best answers were well-informed, well-written, and tried to say something original and interesting about their subject-matter. Generally, candidates engaged in comparative observations in a perceptive and thoughtful fashion. Only a tiny number of answers merited marks of less than 60.

Questions 5, 7 and 8 were the most popular in terms of responses; questions 2, 6 and 10 the least popular.

Comments concerning individual questions are as follows:

1. There were some good general answers to this question, focusing on the constitutional positions of different courts and the implications of these positions for human rights jurisprudence. Some of the answers might have been improved by the use of a larger number of specific case studies or examples.

2. Of the few candidates who answered this question, most displayed a good knowledge of the South African case law and thought seriously about the problems of jurisprudential 'export'. Some of the answers might have been further strengthened by tying the discussion more closely to an

evaluation of the theoretical and practical difficulties associated with judicial decision-making about socio-economic rights.

3. This question was broadly drafted, and some candidates chose to focus disproportionately on jurisdictions or rights that interested them, rather than thinking about the question in its broadest possible focus. The best answers integrated ideas of legal and political theory with specific comparative examples.

4. The best answers to this question were very good indeed, with candidates comparing in both conceptual and practical terms the review standards used by a series of courts in human rights cases to test how far those standards could be reduced to an approach based on proportionality. Weaker answers, by contrast, focused on the word ‘proportionality’ and talked at excessive length about Strasbourg jurisprudence.

5. There were lots of comprehensive and well-argued responses to this question. Many took the question as an opportunity to discuss the nature of community and political engagement alongside the place of religion, and some of the best answers reflected on the role of speech as well as the extent to which minority religious practices should be protected. A few candidates took the question as a chance to criticise Justice Scalia’s interventions in non-discrimination cases more generally; although this strategy ran the risk of interpreting the question too broadly, the candidates who followed it tended to do so skilfully and well.

6. Not a popular question, but one which produced some thoughtful comparative answers concerning the coherence of affirmative action strategies. Most candidates displayed a good knowledge of the Indian case law, which was then used to advantage when drawing comparisons with the US jurisprudence. The best responses sought to grapple with more theoretical points concerning the purposes and policy goals of the law.

7. This was the most popular question on the paper, and produced many very strong answers. Most candidates displayed excellent knowledge of the strengths and weaknesses of the different constitutional arguments which are used in lesbian and gay rights cases. Weaker answers drifted into a ‘write all you know about the comparative case law’ mode, but in general candidates were thoughtful and reflective. Although the question was very narrowly drafted – focusing on the ‘criminalization of sodomy’ rather than partnership rights or non-discrimination claims (the staple of most lesbian and gay rights cases nowadays) - the strongest candidates took care to reflect on the implications of their arguments for the full range of claims.

8. The strongest answers to this question engaged with the values underpinning freedom of expression and their relevance (or otherwise) to hate speech, and the values underpinning freedom from discrimination and their relevance to the matter. Most candidates displayed a good knowledge of the comparative case law, as well as of *RAV v. City of St. Paul* itself.

9. Many candidates took this question as an invitation to talk specifically about *Refah Partisi v. Turkey*, or (perhaps paralleling question 8) how to resolve conflicts between disturbing or violent expression (in this case religious expression) and competing social values. Stronger answers, by contrast, took care to follow the wording of the question by looking – on a comparative basis – at the full range of ‘subversive’ activities that might be conducted by political parties of different persuasions.

10. Not a popular question. The strongest answers considered why freedom from torture is generally felt to be an absolute right, and related this discussion to the case law of those jurisdictions (e.g. Israel) where some qualifications to this position are permitted. Candidates generally managed to avoid rhetorical discussions of ticking bombs inside airports.

CORPORATE INSOLVENCY LAW

27 candidates took this examination. The performance of the candidates was very strong indeed with 33% obtaining a First class mark. The problem questions proved relatively unpopular with very few of the candidates attempting to answer any of the questions. Most of the essay questions had takers but somewhat surprisingly question 1 which involved an analysis of section 127 of the Insolvency Act 1986, proved relatively unpopular. There were some particularly strong answers to question 2, which wrestles with the concept of values in sections 238 and 423 of the Insolvency Act 1986. As in previous years, the candidates' discussion of policy was very strong indeed. This reflects the nature of the course and also the type of questions that were set. The questions very much reflected the types of questions that were dealt with in the seminars but this gave the candidates an opportunity to display their knowledge which they did to very good effect. However, when addressing the policy issues some answers would have been greatly improved if the candidates had laid the foundation for their discussion by setting out what the current law is. There were no noticeable gaps in the candidates' knowledge and the papers indicated that the candidates had come to grips with the course.

COMPARATIVE PUBLIC LAW

Only one candidate sat this paper, held over from last year. The course was not offered in 2004-2005 and no report is therefore appropriate.

EUROPEAN BUSINESS REGULATION

This was an above-average year, with an unusually high number of scripts scoring marks comfortably exceeding the Distinction threshold. Overall the scripts revealed a gratifyingly high level of understanding of not only the constitutional and institutional context in which the pattern of European Business Regulation has developed but also the relevant substantive law. Politically charged matters such as competence and subsidiarity were handled as convincingly as more economically driven concepts such as the meaning of a trade barrier for the purposes of free movement law and the role of the consumer in the process of market integration. Moreover the scripts often revealed a good understanding of the complex and dynamic relationship between the Court and the legislature in the shaping of the EU's internal market. All questions attracted at least some takers, but Questions 1, 2, 10 and 11 were markedly more popular than the remainder. Questions 10 and 11, the two problem questions on the paper, were handled by most candidates with skill and perception. A failing seen in previous years, rooted in unwillingness to use rich factual material to demonstrate an ability to apply the law to the given context, was almost wholly absent. Candidates seemed very comfortable with the expectations of the examiners in relation to problem questions as much as to essays.

EUROPEAN EMPLOYMENT AND EQUALITY LAW

General:-

The standard was generally very high, with a good proportion of very good or excellent scripts and no really weak ones.

Particular questions:-

Social issues in the development of EU social policy and employment law.

Generally well answered, though few candidates were aware of the details of the new EU Social Agenda.

Grounds of prohibition of discrimination – hierarchy? – satisfactory?

The issue of hierarchy was often not well handled – few candidates attempted a real analysis of what that might mean.

Control of Working Time – achievement of EU employment law

Not a popular question, despite the importance of the issue.

Positive action under Race Directive, Framework Directive and EC Gender Equality Law

Very popular, and generally well handled.

EU employment law – commitment to security of employment?

Even otherwise excellent answers sometimes failed to refer to the Acquired Rights Directive or the Collective Dismissals Directive.

EU employment law – representation and consultation of workers

Some good answers.

European Employment Strategy and Open Method of Co-ordination

A surprisingly widespread misapprehension that this could be strongly linked to EMU.

Impact of Charter of Fundamental Rights

A popular question which produced good answers, even in the face of the current faltering of EU constitutional development.

INTERNATIONAL ECONOMIC LAW

The examination performance by students was excellent. There were eleven distinctions class marks; twenty-six marks between 60-70%; and one mark of 58%.

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 DISPUTE SETTLEMENT

Every question and part-question was answered by some candidates. The overall level of familiarity with the subject-matter of the course was exceptionally high, and the differences in grades were largely the product of differences in examination technique. The poorest answers identified one central issue in a question and answered it badly. The best answers identified all of the issues signalled in the question and then explored both different approaches to those questions and different issues in which similar principles arose which could cast light on the central issues in the question. The best answers also pursued an argument, setting out the reasoned opinion of the candidate rather than merely rehearsing the views of others.

The answers also suggested that the candidates who did best tended to be those who had read, and given thought to, some of the periodical literature and had not relied solely on a textbook and lecture handouts. There was no evidence of widespread failure to understand any part of the syllabus. Overall, the standard was usually, and gratifyingly, high.

ROMAN LAW: DELICT

There were only three takers. It would be impossible to comment in detail on the answers without identifying the candidates. The quality of the answers was mostly in the high 2:1 range. Standards appeared to vary rather erratically in the answers to the one compulsory question asking for commentary, without translation, on either two or three set Latin texts within each question. Approaches to these questions included merely paraphrasing the text, coming at times very close to a translation, and transcribing pre-prepared essays on the general topic underlying the question, without necessarily paying sufficient attention to the set text.

PHILOSOPHICAL FOUNDATIONS OF THE COMMON LAW

There were 17 candidates. The general quality of work was higher than in some recent years, and more than half of the candidates showed some sign of distinction-quality work in their answers. In the final analysis, overall marks of 70 or above were awarded to five candidates. No candidate scored lower than 62.

Interest was quite evenly spread across the paper, although relatively few candidates chose to reflect on methodological matters (question 8). There was a slight leaning towards issues in contract law (questions 3 and 7), and away from issues in criminal law (question 6). No question was particularly badly handled. Question 7 (on the measure of damages for breach of contract) attracted some of the best answers, as did question 5 (on torts as breaches of obligations).

As usual, the best scripts were marked by originality in the way they framed the issues and organised the material. Happily, the old tendency to divide the writers on any given topic into two opposing camps seems to have died out. Candidates are more aware than ever before of the diversity of possible positions.

GLOBAL COMPARATIVE FINANCIAL LAW

The exam paper for 2005 had ten questions spread over the course and requiring analysis, argument and powers of concentration synthesis. The answers demonstrated thoughtfulness, conviction and an enthusiastic engagement with the subject. There were many splendid essays, and some which showed outstanding prowess.

The achievement bands were 27% distinction, about 66% in the 60-69% range and 7% in the 50-59% range. There were no failures. A commendable result, with very high level of overall understanding from this extremely able and internationally varied class of 2005. The total sitting the exam was 59 candidates.

The spread of answers was more balanced than in previous years, with only derivatives attracting few takers, probably because of the angularity of the question. Otherwise the five most popular questions drew 41% to 59% of students and the four less popular from 20% to 30%. Securitisations continued to exert the greatest appeal, but with syndications, security interests and international solvency rescue policies not far behind. The role and content of bank regulation elicited spirited essays.

GLOBALISATION AND LABOUR RIGHTS

General:-

The level of performance was generally high and often very high. There was a marked focus on questions 1 and 2, perhaps indicating that the work of the candidates had been concentrated on the elements of the course relating to the ILO and to Codes of Practice, rather than upon other mechanisms for the articulation or enforcement of labour rights at an international level.

Particular questions:-

Part I

Codes of Practice

All but the strongest candidates tended to focus exclusively upon corporate codes of practice, to the exclusion of governmental or NGO codes of practice.

ILO Declaration of Fundamental Labour Rights

A very popular question, generally well handled, but only a few answers looked beyond the declaration to wider aspects of the Decent Work Initiative.

US Alien Tort Claims Act as a model

Generally, a well answered question dealing with the United States, but few demonstrated significant knowledge of the extent to which other legal systems had adopted something similar.

UN Norms on human rights responsibilities of businesses

More discussion of the precise content of the draft Norms would have been useful.

Part II

Bi-lateral trade agreements after NAALC

More discussion needed of the extent to which bi-lateral agreements differed from each other, as well as from NAALC.

Public Interest Clauses in WTO Law

Generally well answered with good discussions of the contrasting theoretical approaches, as well as recent critiques of the Petersmann approach.

Non-interference of World Bank in politics under Article IV (10)

Relatively well answered on the issue of the limits of the Article of Agreement, but relatively poorly answered in the context of the approach that the World Bank to labour rights issues.

Labour standards as conditions for tariff preferences under WTO.

Surprisingly little discussion of the implications of the recent WTO Appellate Body decision on the issue in some answers.

EUROPEAN PRIVATE LAW: CONTRACT

There were fourteen scripts altogether. Ten questions were offered, including one question with a choice between alternatives. All of them were attempted. The most popular questions were on *cause/consideration* (10 answers), pre-contractual liability (9) and 'change of circumstances' (6), with an almost equal distribution of the others. Most 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. The overall standard was pleasingly high with three distinctions and ten further papers above 60. In one paper the examiners were regrettably unable to discern the level of attainment required for a pass mark. The best papers showed a remarkable ability to reflect and critically assess solutions in more than two legal systems, to look for the underlying reasons of differences or similarities and to make skilful use of original sources from different jurisdictions.

EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL LAW

The course ran for the first time this year. The examination was taken by 11 candidates. The examination performance by students was very good. There were three distinction class marks; seven marks between 60-69%; and one mark of 58%. There was a strong preference for questions 6 (membership of the EC in international organizations), 3 (treaty-making under the Treaty Establishing a Constitution for Europe), and 2a (the relationship between international, European and national law of the member states).

The general standard of exposition in the answers was excellent with good substantive content. The performance of a number of students could have been enhanced if they had not simply recounted their extensive knowledge but had applied it to the questions asked.

REGULATION

The exam was well handled, with no weak papers, and two particularly strong papers. All questions but question 5 were answered. A good general spread of answers obtained overall, although question 6 was especially popular, and questions 1 and 10 had only one taker each. An interesting division of focus occurred in Part A, with the BCL candidates concentrating on questions about markets and regulatory techniques, while MJur candidates explored questions of democracy and legitimacy. One of the particularly creditable aspects of this year's answers was the degree to which Part B answers integrated extensive illustrative detail from the case studies. The best of these answers gave a theoretical relevance to this detail in addition. This year was also notable for very long, and often correlatively very difficult to read, answers. In general, the length of answers neither added nor subtracted to their quality, except where candidates obviously ran out of time: more compact answers would do just as well and would spare both reader's eye and writer's hands!

JURISPRUDENCE AND POLITICAL THEORY

There were more candidates for this subject than usual, and the vast majority of essays were very competent, with many just below first class though disappointingly few above that borderline and almost none really outstanding. All six topics were attempted by a fair number of candidates. Few of the relatively many who considered the question "Is vagueness in legal language the main obstacle (besides time and effort) to enumerating all the rules of law in a single legal system?" attended to the logic of the question, which requires a comparison ("the main") and therefore some consideration of other obstacles; and disappointingly few considered any of the classic late-twentieth century reflections on whether it is conceptually possible to specify and differentiate rules or propositions of law with the determinacy necessary for a count. The italics in the question whether there are any *human* rights failed to arouse those who attempted it to consider why animals of this sort have rights and (or which) those of other sorts don't. This was symptomatic of a more general reluctance to venture into deep waters.

31 August 2005

Appendix 8

The Vice-Chancellor,
University of Oxford,
University Offices,
Wellington Square,
OXFORD
OX1 2BR

Dear Vice-Chancellor,

B.C.L. AND M.JURIS EXAMINATIONS 2005
EXTERNAL EXAMINER'S REPORT

I write to report as External Examiner in the 2005 Examinations for the B.C.L. and M.Juris degrees.

General observations

1 I was kept fully informed at each stage of the examination process, and my views were sought freely by the Chairman of Examiners where appropriate. I had the opportunity to comment on the conduct of the examination and the draft papers, and participated in two final examiners' meetings on 18 and 22 July 2005. I also had the opportunity to read and comment on a number of scripts, at the higher and lower ends of the scale.

2 The conduct of the examination, the setting of the papers, and the performance of the candidates complied in every way with the high standards that one would expect, conforming (and in most respects surpassing) best national practice. In particular, I was impressed by the challenging but realistic nature of the examination papers; by the fairness and effectiveness of the procedures for double-marking scripts; and by the transparency, clarity and fairness of the classing conventions applied in the final meetings.

3 It is especially noteworthy that the current procedure for remarking borderline scripts minimises the extent of remarking necessary between the first and second examiners' meeting. This is very desirable, in so far as remarking at that stage, in the knowledge that the overall class may be affected, though to some degree inevitable, can distort the process, and lead to the application of different standards depending upon when a script is re-read.

4 More generally, I was impressed that the process, though rigorous, made realistic demands on the candidates, and was animated by an understanding of what can and cannot be expected of students.

5 The standard achieved by the candidates was consistent with what one would expect of an advanced, taught course in law, with a highly competitive entry. My own estimate of the scripts I read reflected that of the examiners. That one in three candidates secured distinctions in the B.C.L., and one in five in the M.Juris, is to be expected, and is comparable to the relative performance of common law and civil law candidates for the Cambridge LL.M degree.

Particular observations

6 I have a number of observations about some features of the B.C.L./M.Juris examination. These are not criticisms of the examination process, but simply the perceptions of an external observer.

7 First, I was struck that candidates for the M.Juris are required in some subjects to answer three questions, rather than the usual four. I can see why some papers might require *all* candidates to supply three answers not four, no doubt because of the nature of the questions. But I am unsure why M.Juris candidates should be treated more leniently than B.C.L. candidates. Presumably, the reason is that M.Juris candidates are from civil law backgrounds, and may not have English as a first language. But I am not aware that such a concession is offered to similar candidates in other UK universities, where the assumption is usually that all students must take the examination process as they find it. I was not aware that this caused any particular difficulty this year. But I wonder whether there is a risk that some M.Juris candidates - especially the ablest, and those with fluent English - might be perceived as having some advantage over B.C.L. candidates in certain papers.

8 Secondly, it is noteworthy that the average mark awarded this year for dissertations was lower than that for timed examinations (which I understand is usual). One might have expected the opposite, as is the case with comparable courses with which I am familiar. A capable candidate is often likely to do better in this format, given the opportunity to write at length on a subject of their choice. In a sense, it is no problem that marks awarded for dissertations are lower on average, provided that lower marks are consistently awarded by all examiners, and if candidates are aware of this when choosing their courses. But, if this is widely known, might it not discourage candidates from offering a dissertation? And if it is not widely known, is there not a risk that affected candidates will feel prejudiced by their decision to write a dissertation?

9 Thirdly, to an external observer, a singular aspect of the B.C.L./M.Juris examination process is the credit system. This year's examiners were careful to identify cases where this system might produce unfair anomalies, and to take avoiding action. There also may be reasons concerning the structure and subject matter of certain courses which justify the system - which are not matters for an external examiner. But I am unsure why a three hour paper in one subject counts for less than a three hour paper in another subject. In other universities with which I am familiar, any differences in the size of particular courses is recognized by designating 'lighter' subjects as 'half' courses, with a shorter final examination to match. (If the latter, a candidate might be able to offer two such courses in lieu of one whole course, and appropriate classing conventions might be devised to reflect this.)

10 Fourthly, to an observer, the timetabling of this year's examination ran the risk of disadvantaging those candidates required to sit two papers in one day. Such operational matters may be at the edges of an external examiner's jurisdiction - I am aware that timetabling is not a matter for the examiners or the Faculty of Law. There is also room for argument about whether students are in fact prejudiced by a tight timetable - at one time, nobody would have thought to mention it. But students are increasingly concerned about equal treatment in examinations, and many postgraduates come from universities where the authorities go to considerable (and, arguably, extravagant) lengths to avoid any perception of unfairness. Moreover, many candidates for both the B.C.L. and M.Juris are new to the Oxford (and, indeed, English) examination system, and find our traditional model intimidating at the best of times. I understand that the problem was avoided this year by the expedient of 'incarcerating' the students affected, allowing them to sit the affected papers on successive days. This perhaps avoided any actual unfairness that might otherwise have arisen. But to sit an examination under special conditions is surely a last resort, and introduces its own anomalies into the examination process. It is surely preferable, if possible, to avoid such 'doubling up' at the outset, in the preparation of the timetable.

Yours sincerely,

Richard Fentiman
Reader in Private International Law

