

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

REPORT OF THE BOARD OF EXAMINERS FOR 2006

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) and the Examinations Officer (Julie Bass).

As last year, the observations below are a collection of points 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 examinations went very much more smoothly than last year. By starting a little early and using two Saturdays, the incidence of candidates having two papers on the same day was minimised, almost to vanishing point.

This year's examiners, though not entirely of one mind on whether the examinations might start earlier, do wish to add their voice to that of those who are currently contemplating such a move, perhaps to the Monday of tenth week.

3 Statistics

Attached as Appendix 2 are the numbers of entrants, distinctions, passes, and fails. The percentage of distinctions was very high in the BCL (approaching 40%), but only about half of that in the MJur.

In terms of the gender of those achieving distinctions, there was a very marked difference between the BCL and the MJur. While males were more than twice as likely as females to achieve a distinction in the BCL, females were a little more likely than males to achieve one in the MJur.

4 The Computer

The computer software worked satisfactorily with only a few minor hiccups. It did not prove possible to commission and produce a new database during the summer 2005, so the existing software was used with manual adaptations to accommodate our present procedures.

5 The setting of papers

Although one or two setters had to be given a little extra encouragement, everyone delivered the papers in draft form and electronic format in sufficient time for the meeting to consider them. It may have been a function of hurry at the last minute that the Examiners needed to pay more attention than they might have hoped to the

grammar and syntax of a few of the papers. They wish to emphasize the role of checkers, in this respect. The Examiners were taken through the papers, line by line, and only one issue of principle arose.

There was a particular difficulty with the Principles of Civil Procedure paper. Because of the very large number of questions that had either/or elements, the effective choice for the candidate was somewhat greater than the rubric would have led the Examiners to believe. The Examiners were satisfied by the setter that it would have been unfair, given the way the course had been taught, to reduce that choice, but think that the reason given may properly raise issues for the Graduate Studies Committee. That reason is that different students had taken different routes with their work, such that some might be able satisfactorily to answer one of the either/or parts but not the other, yet, for other students, the reverse would be the case. Our concern is that this raises issue of comparability within what we would understand to be the same essential syllabus.

When considering this year's papers, the Examiners were again 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 candidates must answer three. This may deserve reconsideration.

6 Information given to candidates

The Edicts are attached as Appendix 3. As will be noted, the documents continue to increase in complexity.

7 The written examinations

The Chairman of Examiners, or one of the other Examiners, attended for the first half hour of every examination, as did the setter or an alternate. The Examiners wish to emphasise the importance of the conventions that demand that these persons be present. Though the invigilators are invariably competent or better, the authority of an Examiner may be required, and was, in one case, this year, to help sort out difficulties being experienced by particular candidates. As far as the setter is concerned, it may seem that time is wasted since, in the vast majority of cases, there are neither queries nor issues about the paper. However, on a couple of occasions, there were, and the expert was needed to sort them out.

Because there were examinations on two Saturdays, colleges with candidates taking papers on these days were asked to provide contacts available to deal with any problems, in particular emergencies. This was clearly a wise precaution, which the Examiners firmly believe, could continue to be taken.

Overall, the examinations went very smoothly. It may be recalled that the temperature was exceptionally high during the examination period, and the Examination Schools became very hot at times. It is right to pay tribute to the stoical way that the candidates dealt with this. They were a very impressive group of young people.

8 Materials provided in the examination room

For the third year in a row, the Examiners wish to lament the enormous expense involved in the provision of statutory materials by the University. We too 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 The credits system

Because of a faculty decision that any candidate with marks of 70 or above in papers with a combined credit value of at least 6 would achieve a distinction, the credit system caused less of a problem than last year. Nevertheless, the Examiners are pleased that, as they understand, the credit system is intended to be replaced.

10 Ranges of marks

The Examiners are pleased to report that, as the table appended as Appendix 6 shows, the variation between the ranges of marks and the average mark for the papers offered in the examinations was not as great as last year. Apart from the European Union as an Actor in International Law paper, which was artificially reduced because one candidate achieved an extraordinarily low mark, the average mark was between 63.7 and 68.4. The Examiners consider this a perfectly reasonable divergence. They do note, in particular, that the dissertation average, at 66.1, fell roughly in the middle. (In some years, the average mark for the dissertation has been, noticeably, on the low side.)

11 Marking and remarking

The routine marking of scripts prior to the first meeting of Examiners 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 had been 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 confined these requests to borderline scripts which had not been twice marked to begin with, except in one case, where a script was third marked.

As 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 (if not already in the sample batch), the amount of double-marking between the two marks meetings was significantly reduced, even after the decision had been taken, as it was last year, also to have papers with marks ending in 7 re-marked if an improvement of three marks would make a difference to the final classification

The Examiners wish to stress the importance of availability of both the first and second markers, at least for consultation (if necessary, by email) throughout the marking period, and no less so between the Examiners' first and second meetings. In

one or two cases, borderline scripts had not been marked by both markers before the Examiners' first meeting, so availability to mark was necessary after that meeting.

The Examiners also wish it to be recalled that the published conventions that they apply entitle the candidate to the relevant classification, but do not rule out their exercise of discretion in favour of a candidate, even where there is no medical evidence to justify such a course. They record that they awarded a distinction to a candidate who had marks of 70 or better in subjects totalling only 5 credits out of 13, yet who had a (weighted) average mark of 70.

12 Medical Certificates, dyslexia/dyspraxia and special cases

12 medical certificates were forwarded to the examiners. In addition, 2 candidates were certified as dyslexic or dyspraxic (1 also had a medical certificate which is included in the 12 such certificates).

3 candidates wrote some or all of their papers in college. A further 5 candidates wrote some or all of their papers in a special room in the Examination Schools. 2 candidates had special arrangements in the examination room (eg water) because of medical conditions.

The following additional specific details have been requested by the Proctors. In the BCL and MJur, 6 medical certificates and similar documents (from 3.90% of candidates) were forwarded to the examiners under sections 11.8 – 11.9 of the EPSC's General Regulations for the Conduct of University Examinations (see *Examination Regulations* 2005, page 34), and in 2 cases the final result was materially affected.

13 Concluding Remark

We would like to conclude by expressing our warm thanks to our External Examiner, Richard Fentiman, whose spell has now concluded.

P. N. Mirfield (Chairman)
P. P. Craig
D. Vaver
D. Wyatt

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.

Raw Marks Statistics, BCL/MJur 2006

Marks distribution on first reading, as percentages

---->	<----- Mark ranges (%) ----->							
	Av. Mark	Number sitting	49/less	50/54	55/59	60/64	65/69	70 / over
BCL Dissertation	66.1	16		6	6	25	25	38
Comparative Human Rights	66.4	25				24	52	24
Comparative Public Law	68.3	11				9	45	45
Competition Law	65.1	32		3		50	22	25
Conflict of Laws	64.5	38		5	11	32	26	26
Constitutional Theory	64.5	18		6	6	44	17	28
Corporate Finance Law	66.1	25			4	24	40	32
Crime, Justice and the Penal System	67.1	10				30	40	30
European Business Regulations	65.7	16		6	6	19	38	31
European Employment & Equality Law	68.1	11					73	27
European Private Law: Contract	66.9	9		11		11	33	44
European Union as an Actor in International Law	58.3	8	13		13	13	38	25
Evidence	66.9	25		4		16	44	36
Global Comparative Financial Law	63.9	63		6	6	37	30	21
Globalisation and Labour Rights	66.9	9				11	56	22
Intellectual Property Rights	64.5	18			6	44	44	6
International Dispute Settlement	66.3	41			5	27	41	27
International Economic Law	67.6	19			5	16	42	37
International Law and Armed Conflict	68.4	14				7	57	36
International Law of the Sea	66.5	11				18	55	18
Jurisprudence and Political Theory Essays	68	22				23	27	50
Legal History	69	1					100	
MJur Dissertation	65.1	11			9	9	73	9
Phil. Found. Common Law	67.5	13				8	62	31
Principles of Civil Procedure	67.3	23				9	61	30
Regulation	63.1	10			30	30	30	10
Restitution	66.1	38	3		11	11	39	37
Roman Law (Delict)	68	1					100	
The Law of Personal Taxation	66.8	6				33	17	50
Transnational Commercial Law	63.7	23	4	4	17	22	30	22

REPORTS ON INDIVIDUAL PAPERS

CONFLICT OF LAWS

At the top end, the quality of papers was higher than in recent years; but there was a slightly larger number of weak papers than might have been expected. The weaker candidates often took too long to get to the point of a question; and doctrinal errors abounded. But the better candidates were able to see most of what was called for, and to prioritise their time so as to make room for the challenging issues raised by the questions. Art. 6(1) of the Judgments Regulation is still misunderstood and misapplied far more than any other; and there was not always a clear separation between the standard of certainty required to establish jurisdiction (say on the basis of a choice of court agreement), and that needed to justify final relief (such as an anti-suit injunction).

EVIDENCE

This paper was taken by exactly the same number of candidates as last year (25). Once again, as last year, some 40% (i.e.10) of those candidates gained marks of 70 or above. Only one candidate obtained a mark below 60. The markers impression of the papers fits in well with that profile, all but one candidate showing at least a high level of competence, but a number showed skills in the use of evidential concepts of a most commendable quality.

As in previous years, the problem questions were much more popular than the essay ones, there being 67 answers on the former, but only 8 on the latter. Question 3 produced one or two very good answers.

As regards the problem questions, question 4 was the most popular with only one candidate not attempting it. There were no noticeable differences in the quality of answers to particular problem questions. It does seem that the problem-solving format of the Evidence seminars in Trinity Term may be helpful to candidates.

RESTITUTION

The format of the exam was slightly different this year. Instead of the usual ten essay questions, the exam included two problem questions. To ensure a smooth changeover to this regime, students were given a choice from 11 questions (some of which had internal choice) instead of ten. Despite the fact that there were only two problem questions, half the students attempted at least one of the problem questions and some students attempted both. The attempts (particularly to the first question) were generally excellent. In the first problem question (question 5) almost all students identified the three major issues: was there a mistake or merely a misprediction? Did the defences of change of position and estoppel apply in the various circumstances? And what is the relationship between the two defences in each circumstance? The discussion of the relationship between mistake and misprediction (and the *Dextra*, *Kerrison* and *KB v Lincoln* cases) was very well done and some of the points raised in relation to defences (particularly change of position, and whether the purchase of a chattel with secondhand value will be a change of position) were novel and ingenious. The second problem (question 6) was less popular and the answers not quite as good. The good answers

identified that there could be two different parties exerting the pressure/undue influence/exploitation of weakness. No answer noticed that both scenarios were three party cases because the contract for the purchase of the shares was with the company. Only one answer dealt with the defence of counter-restitution in detail. In the essay questions, by far the most popular were questions 2 (enrichment when title is retained), 3(a) (at the expense of: is equivalence required?), 4 (absence of basis) and 8(b) (proprietary rights after unjust enrichment). Many of the answers surveyed the cases and academic positions comprehensively and a significant number showed that they had also engaged with the debate at a very high level and had understood and raised issues beyond those discussed in the standard texts.

CONSTITUTIONAL THEORY

The paper was sat by 18 candidates. The scripts were mostly of a good to excellent standard, with the better students able to use the material covered in the course to good effect to develop their own perspectives on the subject as a whole and on the specific issues raised by the question set. Weaker candidates demonstrated a very good understanding of the materials and a good ability to present the arguments of others, but were less able to weigh up the relative merits of the arguments presented and were not as willing to develop their own critical analysis of constitutional theory.

Question 1: This was a fairly popular question, where candidates showed an excellent knowledge of the advantages and disadvantages of using nationalistic criteria. Better candidates were able to provide a more specific analysis of different theoretical accounts and develop their own critique.

Question 2: This was a very popular question that attracted answers of a very high standard, demonstrating a good ability to explain the general and specific incompatibilities between the rule of law and constitutional conventions. The question also attracted some exceptional answers explaining how conventions could also be used to promote the values of the rule of law.

Question 3: A very popular question. The better candidates were able to critically engage with different theoretical accounts of the separation of powers, as well as closely scrutinising the assumptions inherent to the quotation.

Question 4: A popular question that generated a variety of responses. Many of the essays made good use of arguments made in the seminars and the better answers demonstrated a very good ability to critically reflect upon different theoretical accounts of the rule of law.

Question 5: This question was not popular. The better candidates were able to explore the differences between a pluralist interpretation of the legal system and a pluralist interpretation of the constitutional order as well as critically assessing the advantages and disadvantages of this description of the European Union.

Question 6: A very popular question. Better candidates did not merely critically reflect upon the nature of sovereignty and Wade's account of a constitutional revolution, but also upon the nature of constitutional revolutions, applying their analysis to the Parliament Acts as well as the European Communities Act.

Question 7: This was not a popular question and most answers, although able to describe different theories, were not as adept at critically reflecting upon the relative merit of these theoretical accounts.

Question 8: An unpopular question that, on the whole, generated an interesting discussion about the nature of democratic representation.

Question 9: An unpopular question that generated answers that produced a list of characteristics of the state. The better answers provided more critical analysis and illustrated this analysis with practical examples.

Question 10: An unpopular question. The better answers provided a detailed analysis of the wide range of constitutional implications of the Bill.

CRIME, JUSTICE AND THE PENAL SYSTEM

There were 10 candidates for this examination. There were 3 distinctions and the remainder passed with marks falling in the relatively narrow range between 64 and 68. Questions 4, 6, 8, 10 and 12 were the most popular; questions 1, 2, 5, and 7 were not answered at all. The other questions were answered by a few students each.

In general the scripts demonstrated a good command of the subject and a willingness to engage with academic debates. The best scripts were clearly structured, tightly argued, made very good use of available research evidence, and, where appropriate, engaged effectively with the theoretical literature.

Although nearly all answers were well substantiated some were let down by a tendency to disgorge ‘all I know’ and a concomitant failure to engage directly with the question set.

INTERNATIONAL LAW OF THE SEA

The examination was sat by 10 candidates. There were two distinctions, 8 candidates scored between 60 and 69. With the exception of question 2 (a) on the US Freedom of Navigation Programme, all questions were answered by some candidates. There was a slight preference for questions 3 (maritime delimitation), 4 (Proliferation Security Initiative) and 5 (ship-source pollution).

The general standard of exposition was excellent with only two candidates scoring less than 65% (both scoring 63%). The performance of a number of students would have been even more enhanced if they had framed the issues and organized the material in a way not slavishly following the zonal approach to law of the sea questions.

LEGAL HISTORY: LEGISLATIVE REFORM OF THE EARLY COMMON LAW

There was one candidate – please see Appendix 6.

PRINCIPLES OF CIVIL PROCEDURE

The number of candidates taking the paper was 23 (12 BCL and 11 MJur). The standard achieved was very high. This is reflected both in the number of Distinctions achieved and in the average marks. A distinction was awarded to 7 scripts. Only 2 scripts fell below 65 (the

lowest being 62). The course provides students with opportunities to conduct independent research in their areas of special interest. The examination paper reflected this policy and provided candidates with a fairly extensive choice. All the questions were therefore attempted, with relatively little “bunching” around particular questions. With very few exceptions indeed, answers to questions displayed knowledge of the subject that went well beyond the standard course materials and reading lists. Some scripts that earned distinctions drew attention to writings or arguments that were unfamiliar to the examiners but which turned out to be illuminating. The candidate that was recommended for the prize showed an outstanding scholarly approach and an original of theoretical analysis. There were numerous other really good answers that shed light on fundamental questions of English civil form from the viewpoint of different procedural systems.

COMPETITION LAW

The examination was taken by 32 candidates. The examiners awarded 9 marks of 70 or above, 23 marks between 60 and 69, and one mark below 60.

Candidates were required to answer three questions, including at least one problem question. The majority of the candidates chose to answer two essay questions, the most popular being on private enforcement and on the economic approach to Article 82 EC. The other two essay questions were also attempted by candidates and focused on conglomerate mergers and on competition law and the state.

Out of the four problem questions, most popular was the problem question on Article 82 and the abuse of market power. The question addressed a range of issues including market definition and market structure, dominance and different forms of abuse. Other problem questions focused on horizontal agreements, vertical agreements, takeovers and mergers,

BCL and MJUR students performed equally well.

THE LAW OF PERSONAL TAXATION

The paper was taken this year by 6 candidates, 3 of whom secured marks above 69, and the other 3 marks higher than 59. Each of the candidates displayed an impressive knowledge of the material within the syllabus, and was able to discuss the often complex material intelligently. Within the best papers there was an encouraging preparedness seriously to engage with the questions asked, resulting in answers of a high quality which were a pleasure to read.

Of the eight questions set, two were not attempted by any candidate (questions 1 and 3), but the answers written were well spread across income tax, capital gains tax and inheritance tax. The problem questions were particularly popular this year, with more than one candidate choosing to answer both of them. For once, the question concerning judicial responses to tax avoidance was not the single most popular question.

COMPARATIVE HUMAN RIGHTS

The general standard of the answers was good, with a high proportion of marks above 65, and about 20% above 70. There were none below 60. The paper was quite specific in terms of what was asked for in each question, and those who responded appropriately to the specifics were rewarded; those who did not were penalised. There was a pleasing spread of questions

answered, both across those taking the examination as a whole and also individually, although the most popular questions were questions 4, 8, 9, and 10. The least popular question was question 5, which no one attempted, perhaps wisely, on interrogation methods. Otherwise, the least popular questions were 1 and 2 (on human dignity and proportionality respectively), perhaps showing a slightly worrying tendency to ignore issues that cut across specific topics (because of the relatively few candidates taking these questions, specific notes on these are omitted). The ability to attempt such questions that require a knowledge across the course as a whole appears to be limited to those who did not confine their revision to only certain subject areas. Question 3 (use of comparative material) was quite well done, showing close attention to debates in the US Supreme Court. The second part of the question, was, however, not particularly well answered, in part because several of those attempting the question did not appear to have the range of knowledge across the course to enable a full answer to be given. Question 4 (constitutional morality) was generally well answered, being well illustrated with discussion drawn from both obscenity and sexual orientation; the ability to draw on several relevant areas of the course was rewarded. Question 6 (right to marry) was quite specific in asking for discussion about reasons that had been used why homosexual couples should not be accorded the right to marry. Several answers ignoring this and were penalised accordingly. Question 7 (freedom of religion) was competently answered, although only one answer was excellent. Question 8 (holocaust denial) asked for discussion of a quotation from Dworkin. Few candidates fully explored the significance of the argument put, particularly in calling into question the legitimacy of anti-discrimination law in jurisdictions that adopt laws against holocaust denial and incitement to racial hatred. Question 9 (abortion) gave the text of a recent piece of US (state) legislation restricting abortion and asked whether it would be constitutional in other jurisdictions. Few candidates even considered the specifics of the legislation, concentrating instead on general approaches; those who did were rewarded. Question 10 (diversity) was well answered, on the whole.

CORPORATE FINANCE LAW

25 candidates sat this course. There were 7 Firsts (28%). The remainder of the marks were strong and the majority were in the upper 60s. There were no failures. All questions had takers but there was only one who answered question 7, which is somewhat surprising as the seminar on it was very enjoyable. The other questions with few takers were questions 3, 4, 8 and 10. The most popular questions were 1, 5, 6 and 9 (the most popular of the questions being 9). As can be seen from the distribution of the answers, the candidates tended to favour equity over debt. It has been a number of years since this course was offered and since then there have been considerable EU developments. These developments were clearly reflected in the candidate answers. The answers were extremely strong on policy and overarching principle. However, on occasions there could have been greater analytical detail. This is particularly true of question 6 (role of target board in takeovers). The case law on this is somewhat messy and the answers could have been analytically more precise in bringing this out. Also, on question 3 (market abuse) the statutory provisions in FSMA could have been addressed in greater analytical detail. Part of the difficulty is that there is no satisfactory text that deals with FSMA and the legislation is extremely complex. However, there was no indication that there is any design fault in the course as it was clear that the candidates had ample opportunity to put forward very competent answers on the various matters that were examined.

TRANSNATIONAL COMMERCIAL LAW

Most questions were answered competently by candidates. Students had clearly done the work set for them in the lectures and seminars. The most popular questions were questions 3(b), 4, 7 and 9. Neither question 2 nor question 3(a) was answered by any candidate.

Candidates displayed good knowledge of the legal issues and the literature. Some candidates had read very widely. The principal weakness in the answers was that a few candidates did not answer the question which was asked, instead writing rather generally about the issue raised by the question. An example is provided by question 3(b). It asked students (i) to comment on the identity of the new law merchant, (ii) the role of good faith within the law merchant and (iii) whether or not the law merchant can be considered to be autonomous. Some candidates wrote extensively on (i) but either ignored or said very little on (ii) and (iii). At graduate level students should be able to focus to a greater degree on the question which has been asked and not use the question as an excuse to serve up a tutorial essay on *lex mercatoria*.

INTELLECTUAL PROPERTY RIGHTS

18 candidates sat this paper and overall the results were pleasing. There was no disastrous paper, the top end quality was high, and most papers demonstrated a comfortable familiarity with the intricacies of the various aspects of the subject and a variety of views on whether or how the field should be reformed. Pleasing too was the erosion of a noticeable prior tendency for candidates to avoid answering questions on patent law because of a mistaken perception of its over-technicality. On some topics, some papers did read somewhat the same, suggesting a tendency to take the safe path of following the lecturer's line rather than presenting an original view. But this tendency was not pervasive. Another pleasing feature was the lack of any marked disparity of quality between BCL and MJur scripts.

COMPARATIVE PUBLIC LAW

The paper in Comparative Public Law was done well this year. There were a significant number of distinction marks and there were no weak scripts. It was encouraging that the spread of marks was not significantly different as between BCL and MJur and that held also for the spread of distinctions.

The most popular questions were those on proportionality, misuse of power, legitimate expectations and damages liability for fault.

It was also encouraging to see that candidates generally wrote well on the case law analysis, while leaving themselves time to engage in the normative analysis required by the questions set. This is always difficult when writing a paper on comparative law, given that candidates were commonly required to deal with material from two or three legal systems in each of the questions on the paper.

EUROPEAN BUSINESS REGULATION

The scripts revealed a generally secure grasp of the key issues that had been examined during the course, and the stronger scripts, of which there was a slightly above-average number (judged in terms of percentage), displayed a gratifying level of analytical depth and evidence of wide reading. The most popular question (by far) was Q 1 which most candidates used as a platform to discuss themes that had been visible in many places throughout the teaching of the

course. No question was answered in a way that suggested the topic had been generally poorly understood.

EUROPEAN EMPLOYMENT AND EQUALITY LAW

This was a very good set of scripts. There were 11 candidates, 3 of whom achieved a distinction and there were no marks below 60. The standard was generally high, with a good proportion of very good scripts and no really weak ones.

The course was taken by BCL and MJur students and all performed well.

Not all questions were attempted and there was considerable variation in popularity, not all of it predictable or similar to the pattern in previous years.

Comments on particular questions:-

Question 1 – New EU Social Agenda

No student attempted this general question.

Question 2 – Two models of equality – individual, complaints-led and proactive

The question allowed candidates to discuss the topic in relation to any one ground of discrimination. All but one chose to discuss the gender ground, and the better answers comparing the traditional model, with positive action, positive duties and mainstreaming, highlighting the shortcomings and strengths of each. One student dealt with the race ground, and examined the institutional enforcement provisions of the Race Directive in some detail, in light of the range of techniques. Weaker answers simply synthesised the caselaw and legislation, without attention to the question. No student disagreed with the quote, questioning whether the various techniques really do amount to ‘two models.’

Question 3 – positive action in the ECJ

Good synthesis of the caselaw in general, and better answers suggested that AG Maduro’s suggestion would lead to different approaches to positive action on different grounds. Disappointingly, there were few sustained attempts to work out what difference the approach endorsed in the quote would make.

Question 4 – future of the EU Charter of Fundamental Rights

Only one student attempted this question. It required a consideration of the role of the Charter in the judicial and non-judicial context going forward.

Question 5 – Working Time Directive and Flexibility

A very popular question this year, in contrast to last, when the examiners commented that the question was ‘[n]ot...popular...despite the importance of the issue.’ Stronger answers considered different meanings of ‘flexibility’ and the scholarly material on the opt-outs under the Directive and current reform proposals.

Question 6 – Acquired Rights Directive and job security

A very popular question this year. Stronger answers considered different meanings of ‘job security’ and assessed the Directive in light of these, noting the changing judicial notion of ‘transfer’ under the Directive and the limited scope of protection provided.

Question 7 – regulatory strategies

A popular question, with all those who attempted it focusing on the European Employment Strategy. Stronger answers put the regulatory strategies into historical context, exhibiting an awareness of how the regulatory agenda has developed over time.

Question 8 – industrial democracy

Quite popular - five students answered this question this year. In answer to the second part of the question, stronger answers offered some ideas on precisely which ‘alternative strategies’ might explain the law better than ‘industrial democracy’.

INTERNATIONAL ECONOMIC LAW

There were 19 candidates. The level of performance was, in overall terms, very good. More specifically, 5 candidates (26%) achieved a distinction mark; 13 candidates (68%) achieved a mark in the 60’s range; and 1 candidate (5%) obtained a mark of 57.

Among those who obtained marks in the 60’s, there were 7 candidates (37%) who obtained a mark of 68. These candidates might have achieved a higher, possibly distinction, mark if they had integrated a greater degree of analysis of the material being considered into their answers instead of employing a more descriptive approach.

INTERNATIONAL DISPUTE SETTLEMENT

The standard of answers were very high. Of the 41 candidates, 11 scored distinction marks. With two exceptions, the rest scored marks between 60 and 69% with most of those marks towards the top end of that range. Candidates displayed very good knowledge of the relevant debates and provided good analysis of the issues raised by the questions. As is often the case, the poorer answers were those that failed to identify and explore the particular issues raised by the question but chose instead to rehash their knowledge of the topics from which the question was drawn.

The most popular questions were numbers 2 (ICJ), 6 (ICSID arbitration vs. national courts and ad hoc arbitration), 11 (insulation of mixed contracts from changes in host state law) and 13 (enforcement of annulled arbitral awards). All of these (and other questions) produced some excellent answers which displayed a good command of relevant cases, debates and theories, considered different approaches to the issues identified, and provided evidence of personal reflection on those issues by setting out an argument which indicated the candidate’s views.

ROMAN LAW (DELICT)

There was one candidate – please see Appendix 6.

PHILOSOPHICAL FOUNDATIONS OF THE COMMON LAW

This year’s paper adopted the standard format, with questions on individual areas of study as well as questions comparing areas studied. The standard of the answers was very high. There were 4 Firsts and 9 (mainly higher) 2:1s. A wide range of questions were answered, with questions 2 (negligence and distributive justice), 3 (specific performance in contract) and 6

(the relative coherence of tort and contract) being popular. The best answers displayed a strong grasp of the theoretical approaches to the Common Law and a willingness to argue over them. Most papers avoided the mistake of merely summarising a range of approaches, or assuming the correctness of one particular theory.

GLOBAL COMPARATIVE FINANCIAL LAW

63 candidates sat the examination, 21 BCL and 42 MJur in the ratio of 33% to 66%. There were 13 distinctions (21%) and no failures. Only 11% fell below the 60% mark.

Overall the students showed impressive grasp of the principles and the practice with many excellent papers and throughout an understanding of the important concepts in this wide-ranging subject. Five of the questions were more transactionally orientated and five were more theoretical – a mixture of deals, data, dogmatics and, because many of the questions were broad, a need for distillation. The accent was on applied law on a comparative basis.

37 candidates (59%) answered question 1, designed to bring out the comparison between highly prescriptive corporate bankruptcy regimes and completely free state insolvency regimes, and answered it with perspicacity. 17 candidates (27%) attempted the problem question on loan transfers and handled it competently with a convincing grasp of the underlying nuances. 18 candidates (29%) wrote on project finance with sound commercial understanding. 26 candidates (41%) dealt with key differences between bonds and syndicated credits with an eye to the impact of the contract veto variations in these two major methods of financing if the debtor experienced financial difficulties, putting commercial banks in competition with bondholders. 25 candidates (40%) each reviewed the two questions on set-off and netting and security interests on a comparative basis and demonstrated a fine ability to see through the technicalities and the ideologies to the grand patterns. Conflicts of interests in conglomerate financial institutions attracted 18 answers (26%), exhibiting a knowledge of the case law and the pros and cons of the various techniques of managing conflicts. The intricacies of securitisations drew 26 candidates (41%) and some splendid overviews of the structure and the issues. 9 candidates (14%) considered whether trusts are essential to financial law and practice and there were some vigorous responses. Finally 10 candidates (16%) took on the “big” question – this time on the issue of complexity versus simplicity and how the collision should be resolved internationally. This produced lively debate and a handful of truly brilliant essays – amongst the best and most original in the whole examination.

Altogether this was a fine class and one felt in the papers a refreshing curiosity and enthusiasm and intellectual engagement of high quality.

GLOBALISATION AND LABOUR RIGHTS

8 candidates sat the exam this year. All the candidates had an excellent detailed knowledge of the material, but there was a disappointing lack of analysis and argument in many of the answers.

Question 1 (ILO)

All the candidates attempted this question. Most answers displayed a good knowledge of the Alston/Langille debate. The very best answers assessed the effectiveness of the ILO prior to the Declaration and compared this with the effectiveness of the Declaration itself.

Question 2 (labour rights as human rights)
Not attempted.

Question 3 (economic analysis)

This attracted a couple of takers who did a good job of explaining the economic analysis of the effect of globalisation on labour rights. However, the impact of this on legal analysis could have been explored in greater detail.

Question 4 (public procurement)

This attracted one very good answer.

Question 5 (mainstreaming)

Not attempted.

Question 6 (codes)

This attracted three answers. On the whole, they were well-informed but did not focus sufficiently clearly on the question, which asked candidates to address the potential conflict between the voluntariness of codes and their legal enforcement.

Question 7 (WTO)

This attracted four answers. Most candidates knew the case-law and literature very well and produced clear and detailed answers.

Question 8 (NAFTA)

This attracted four answers. The answers showed a detailed knowledge of the NAFTA regime and its associated problems but did not focus very clearly on the exact terms of the question.

EUROPEAN PRIVATE LAW: CONTRACT

This year's class was an outstanding one, and it shows in the results. The depth of argument and the level of knowledge shown by the better candidates were impressive. Sources from three or more jurisdictions were skilfully used, and the various solutions in different legal systems were well reflected upon and assessed. Acute attention was given to the questions asked. There were 9 scripts altogether, 5 of them MJur. The examiners were able to award distinction marks to 3 of the BCL scripts and 1 of the MJur scripts. The standard of most of the other papers was also high, and 3 candidates achieved marks in the high 60s. Ten questions were set. With the exception of the question on contractual interpretation, all of them were attempted. The most popular questions were on *force majeure*/hardship and on formation of contract.

EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL LAW

The course ran for the second time this year. The examination was taken by 8 candidates. The examination performance by candidates was generally very good. There were 2 distinction class marks; 4 marks between 60-69% and 1 mark of 59%. With the exception of questions 2a, 8 and 9 every question was answered by some candidates. A clear preference was given to the analysis of the Opinion of Advocate General Poiares Maduro in Case C-459/03 (question 5) and the legal limits to sanctions imposed and implemented by the European Union (question 9).

The general standard of exposition in the answers was very good with in-depth treatment of the substantive issues. The performance of a number of candidates could have been enhanced if they had made more reference to the case law of the ECJ. Several candidates also spent too much time on their introduction before dealing with the issues at hand.

INTERNATIONAL LAW AND ARMED CONFLICT

Overall, the standard of the answers in this exam were very good indeed. Of the 14 candidates, 4 scored distinction marks and all the rest scored high or mid-to-upper marks in the 60's. Candidates' answers were usually directed at the specific question asked, well structured and demonstrated a good knowledge of relevant legal authority and the literature. The answers that scored lower than average marks were those that did not possess the characteristics just mentioned.

Q.1: Good answers considered how the statements of law in Nicaragua case applied to the US attack and considered to what extent the position has changed since Nicaragua.

Q. 2: Only one answer to this question.

Q.3: This question was popular and in the main was answered well. Most candidates appreciated the distinction between immunity *ratione materiae* and *ratione personae*. The better candidates considered the range of arguments as to why immunity *ratione materiae* may not apply in the case of international crimes and distinguished the position before national courts from international tribunals.

Q. 4: A popular question. Good answers distinguished between anticipatory and preemptive self defence, provided analyses of the relevant provisions of the UN Charter and of state practice and considered policy arguments for accepting or rejecting preemptive self defence.

Q 5: Another popular question which was answered well. Most candidates provided good analysis of the extent to which universal jurisdiction is established in international law and of the recent challenges to this form of jurisdiction. Some failed to note that the question required a discussion of other forms of extraterritorial jurisdiction.

Q6: All the answers to this question were very good. Candidates provided excellent discussions of all three aspects of the question.

Q: 7: Surprisingly few candidates attempted either sub part but all the answers were very good. The answers provided excellent analysis of the relevant provisions of the Geneva Conventions and Additional Protocol I and demonstrated very good knowledge of the relevant debates.

Q: 8. Very few takers. No answer was excellent. Candidates failed to realise that the question required some comparison of the ICC with other mechanisms for international criminal justice.

JURISPRUDENCE AND POLITICAL THEORY

22 candidates took this paper. Half of the candidates achieved a mark of 70 or higher. The rest clustered at or below 65. The lowest mark was 61. The distribution of the answers was as follows. Two questions (1 and 2) concerned, respectively, the role of history and of morality in law, and the way in which law is meant to figure in subjects' reason. One question (3) asked candidates to write on the relation, if any, between the character of political association and the nature of law. The final three questions (3-6) were on classic topics in political theory.

Question 2 (on whether the law is the government's or someone else's view on how we should behave) was the most popular. A few essays on this question were outstanding but

several took one or more parts of the question as granted, and many simply summarized Joseph Raz's key articles on the topic. Question 1 (a quote by Ronald Dworkin on whether history is a constraint on or an ingredient of the political judgment of judges regarding litigants' entitlements) was the second most popular. Most essays were reasonable or better. However, several candidates ignored Dworkin's proposed distinction between constraint and ingredient, and simply summarized Dworkin's theory of interpretation and the standard objections to the theory. Question 3 was the least popular. Those who attempted it wrote very good or outstanding essays. Essays on questions 4-6 were varied, many restricted to the material discussed in seminars. Many candidates writing on question 4 (on whether national identity is desirable and what could form it) treated it as an invitation for a free-ranging reflection on individual and social psychology. Most essays on question 5 (on whether distribution must be sensitive to choice but insensitive to endowment) summarized Dworkin's defence of an affirmative answer and the standard objections against it—primarily that it is harsh on the imprudent and that it degrades the weak. Question 6 (on public and non-public reasons) mostly elicited summaries of John Finnis's criticism of Rawls's distinction, which was taught in seminar. A handful of essays on questions 3-6 were high quality original discussions of the philosophical problem set.

**B.C.L. AND M.JURIS EXAMINATIONS 2006
EXTERNAL EXAMINER'S REPORT**

I write to report as External Examiner in the 2006 Examinations for the B.C.L. and M.Juris degrees.

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 in July.

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 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. The high number of Distinctions awarded properly and explicably reflects this. That the proportion of B.C.L. candidates obtaining a Distinction exceeds the proportion on M.Jur. candidates, is to be expected, and is comparable to the relative performance of common law and civil law candidates for the Cambridge LL.M degree.

4 No difficulties, other than routine matters, arose in the examining process, and it is unnecessary to comment on any in particular.

Richard Fentiman

1 October 2006