
Examiner's report 2009

2650031 Common law reasoning and institutions Zone B (new syllabus)

Introduction

Learning outcomes and format of the examination

The learning outcomes specified in each chapter of the subject guide form the basis of this unit, and the examination questions map on to the subject guide and supplied materials. It is important to focus on the supplied learning materials and the guidance therein on study and examination preparation. You are expected to read widely and to cover – in addition to the subject guide and study pack – the two supplied texts: Gearey et al. *The Politics of the Common Law* (London; New York: Routledge-Cavendish, 2009) [ISBN 9780415481533] and Holland and Webb *Learning Legal Rules* (London: Blackstone, 2006) [ISBN 9780199282500].

The examination is three hours long, with an additional 15 minutes for reading time. Candidates who first registered on 1 September 2007 answered a new examination paper designed to reflect the new *Regulations*. **All** candidates in 2010 will sit the same paper. The format of the paper and examples of the new questions were fully presented in the 2007 *Recent developments*. The new paper contains a compulsory question based on pre-set research essays, while the assessment question closely fits the tasks given to the candidates. An example of a full set of questions and answers, with a model answer for the question on the research essay, were presented in the 2009 *Recent developments*: candidates should refer to this again.

The assessment question (Part A) is in two parts, with the first part (a) comprising five short questions worth one mark each. In order to answer these questions successfully, candidates were required to undertake specified online research tasks, such as using the Cardiff online index to search for the meaning of 12 legal abbreviations, using the various search engines, etc. If a candidate did all the legal research exercises, they should be able to score full marks here. If they did not do them, they would only have been able to guess at the answers and might not have scored any marks.

The second part (b) consists of a set of reflective questions based on the research essay that candidates wrote. This was a new requirement for the 2009 examinations. Candidates were required to submit their essay of 1,500–2,000 words via the VLE by 1 May 2009. The essay was then downloaded by administrators at the University of London, the name and candidate number was checked against the examination entry candidate lists and, once confirmed, the candidate's name was

crossed out before the essay was joined to the relevant examination script.

If no essay was submitted then the candidate received zero for the second section of the compulsory question.

The Examiners then checked the essays against the scripts to ensure that what the candidates state was true, e.g. that they had written an essay on the topic they claimed, that the sources were what they had cited, etc.

Note: the essay itself does not form part of the assessment in that it carries no marks, but it is a prerequisite for the reflective questions.

General remarks

The new syllabus paper (Zones A and B) had 2,916 entrants, of whom 2,451 actually sat the paper. Nearly 3,000 essays were submitted on the VLE. Of these candidates, 757 (31 per cent) failed; 524 (21 per cent) received a bare pass mark (i.e. 40–44); 465 (19 per cent) received a third class mark (45–49); 568 (23 per cent) received a 2.2 (50–59); 124 (5 per cent) received a 2.1 (60–69), and 13 (1 per cent) received a first (70+).

There is no quota in awarding marks, and we would like to be in a position to award many more high marks. However, there are a number of common problems that affect candidates' performances – some of which recur year after year and have been commented on in previous *Examiner's reports*.

One is a lack of argumentative focus. You are expected to cover the supplied materials and to be able to use your reading to present, develop and sustain an argument in the context of the specific question asked. Many questions present a quote and ask you to 'discuss'. The quote will often reflect an opinion on a subject such as the policy underlying legal aid, or on the outcomes of the Woolf reforms in civil justice. You may agree or disagree with the underlying opinion of the quote; either stance would be valid as we require you to critically dissect the actual words of the quote. Of course, to do this demands that you have read widely and reached an understanding of the issues in the area and can appreciate the complexity of the issues the quotation brings up.

Conversely, a common error, which resulted in low marks, was the production of answers that drew on very limited material – with repetitions that may have come from lecture material (perhaps wrongly written down by the candidate). In many cases it appeared that candidates had not made sufficient use of the materials supplied by the University of London. These are an essential element of the unit and should form a central part of candidates' learning materials.

How do you use these materials? In order to achieve a good grade on this unit, you need to begin by identifying the material to be learnt by reading the syllabus carefully, taking into account any changes mentioned in the *Recent developments*.

Candidates should then familiarise themselves with the **learning outcomes** as set out in the subject guide. You will find these at the

beginning of each chapter of the subject guide – you should check carefully that you can meet these for each chapter.

We advise candidates to read widely, but you must assimilate what you have read. A good performance involves convincing the Examiner that you are in control of your answer. This is a function of ownership – in other words, the answer's structure should reflect the candidate's ability to organise and use their material. How is this achieved? Again, it is so straightforward to expect candidates to undertake some preparatory work that it seems redundant to mention it, but we suspect from often seeing answers using the same material that bad practices occur. Write **your own set of notes** for each area – writing notes in your own words is proven to significantly aid your recall of material at a later date (e.g. in the exam). If you like particular quotes or ways in which authors have expressed something, then be prepared to learn them so that you can use them in the examination, citing them properly by using quote marks and a reference, e.g. 'as Hazel Genn puts it ...' or 'Holland and Webb explain that ...'.

Use **your** material – or your organisation of material – in the examinations: it is important to show that **you** are in command of your answer. Simply reading the subject guides, textbooks and other people's notes or any institutional lecture material/revision material will not be as effective. Note particularly that material you are supplied with in an institution, of necessity, will be supplied to all the other candidates in your class: if you all – or even a few of you – use this when you sit the examinations, your scripts are likely to be similar and the Examiners will note this.

The following two failings were common. First, many answers tended to be very general and often did not address the particular question asked. It was as if the candidate recognised the question as 'this is the precedent question, here is my precedent answer' rather than focusing on the actual words of the question. Secondly, many candidates wrote significantly longer answers to the first two questions, which left them with insufficient time for the third and fourth questions, thereby losing marks. It is important to remember that all questions are worth equal marks and to ensure that you spend equal time on each.

Fuller guidance on these issues is set out for candidates in Chapter 1 of the CLRI subject guide. The *Welcome and introduction* covers topics such as 'How to be successful with the London package' (1.3), 'Styles of learning and preparation for assessment' (1.4) and 'The examination' (1.5).

Specific comments on questions

PART A

Candidates must answer all parts of this question.

1.a.

- i. Which online index would you search to find what a journal or case report abbreviation stands for?
- ii. On which freely available website will you find British and Irish case law and legislation, European Union case law, Law Commission reports, and other law-related British and Irish material?
- iii. What do the abbreviations W.L.R. and All E.R. stand for?
- iv. When searching for a Criminal case with a common surname (such as Smith) what is often added to the party name to help identify the case?
- v. Why are the "official" Law Reports series (A.C., Q.B. or K.B., Ch. and Fam.) the most authoritative reports?

(Total: five marks)

1.a.

- i. The Cardiff Index to Legal Abbreviations.
- ii. www.bailli.org
- iii. Weekly Law Reports, All England Law Reports (½ mark for each).
- iv. The forename(s) of the party, e.g. *Regina v Smith* (Morgan James).
- v. Because their reports go to the judges and counsel concerned for approval prior to publication (mentioned in case law document).

The answers to these questions were to be found in the online research. It was clear that large numbers of candidates had not undertaken the online legal research exercises: it was also clear that others had. Several obtained full marks. However, many candidates only got one or even just a ½ mark. It was amazing to read that W.L.R. stood for World Law Reform; White Law Reform; Whole Law Reports; Western Law Reports; Wikapleadia law Reports [sic] and that All E.R. stood for All Examiners Reports; All European Reports and even All Extension Reports.

- b. State which one of the six essay topics specified for 2008–9 you chose to write your essay on and submitted on the VLE, and complete all the following tasks:
 - i. set out your conclusions (in about half a page);
 - ii. list the sources that were of most value in writing the essay; rank them in terms of their relevancy and authority and how they led you to your conclusions;
 - iii. explain the research process that gave you the sources above and explain any difficulties you experienced in obtaining material and how you overcame these;

- iv. if you were to undertake the same research exercise again explain what would you do differently.

(Answer all sections – total 20 marks)

The research essay questions for 2008–09 were:

1. How does a long-term historical perspective improve our understanding of the rationales of the different approaches to statutory interpretation?
2. Has the Human Rights Act (1998) led to a more pronounced judicial intervention into politics?
3. 'The legal systems of most of the world are the products of colonialism.' Discuss.
4. Assess the arguments for and against Alternative Dispute Resolution in Civil Justice.
5. Are the rights of the defendants sufficiently protected in Criminal Justice in England and Wales?
6. 'The key to understanding common law systems is their adversarial nature.' Discuss.

The key to a successful answer is candidates' ability to demonstrate authenticity. The Examiner will ask: is the account presented a reasonable and believable account of the process that resulted in the essay submitted?

We did receive some material that directly criticised the University for its requirement that candidates engage in online research as they claimed that it was too difficult to access the Online Library, etc. In one batch of scripts there was a run of low marks and the candidates' accounts of the essay writing process was almost (depressingly) convincing of their structural inability to access the London online environment. However, there were then two scripts next to each other (as it later turned out, from the same place as the earlier scripts) that scored 4 ½ and 5 for part (a) of question 1 and solid marks for part (b). One stated that they already had a first degree and at first took the exercise lightly, but when they started they soon realised that working the online laws environment 'was not like searching on Google and wow! I woke up! It needed effort, but after the effort I found it was a whole new world...'. The other stated they were 'fitting working on the research while at work and couldn't (sic) get the right attention to it and was getting frustrated ...' so they took a day off and used a friend's computer and found that 'after really working on it it became straight forward'.

It seems that some candidates did not take this exercise seriously enough, while those that did, benefited and achieved high marks. You **will** achieve good results if you take this seriously.

PART B

Question 2

'There is an acceptable and an unacceptable "politics of the judiciary". Reforming the selection process of the judiciary is an essential part of enhancing the acceptable and avoiding the unacceptable.' Discuss.

This is a question in two parts. Begin by looking at the 'key words': the first part includes the key words 'acceptable' and 'unacceptable' and

'politics of the judiciary'. So take a stance: what do you think 'acceptable' and 'unacceptable' 'politics' are? The question then moves to a second part that states that reforming the selection process 'is an essential part of enhancing the acceptable and avoiding the unacceptable'.

Note that this question makes **no reference to the UK**. It is a question with global relevance and candidates were able to refer to their own countries. In major areas of London External Law candidate concentration, for example Malaysia and Bangladesh, there have been Royal Commissions of inquiry into the selection process for the judiciary – candidates could discuss these! Show the Examiners you are alive and active, that you want to know something about your legal system!

This question closely mapped Chapter 5 'The politics of the judiciary revisited: rights, democracy, law' in Gearey et al. (2009) and section 9.5 'The judicial appointments process' in the subject guide. The study pack contains the chapter 'The judiciary' from Slapper and Kelly *The English Legal System* (London: Routledge-Cavendish, 2006) [ISBN 9781845680343] as well as 'Judicial appointments' from Malleeson's *The Legal System* (Oxford: Oxford University Press, 2007) [ISBN 9780199212699]. The role and functions of the judiciary, judicial independence and impartiality in decision-making were constant themes in the literature supplied.

Our expectations of candidates who just stuck with the London materials and did not engage with the situation in their own country were that they would identify the key words of the question, which would lead to a discussion of Griffith's text, using material from the chapter and tying it in with the reforms to the selection process. We supplied a large amount of material to allow candidates to really get to grips with this question and we expected a lot of high scores.

However, it appeared that many candidates could not recall or had not read the provided text. A number of answers made no reference to J.A.G. Griffith's seminal text *The Politics of the Judiciary* (London: Fontana, 1997) [ISBN 0006863817]. How is this possible if candidates used the London materials? A number of answers simply treated the question as if it was: 'Tell us all about the new selection process for England and Wales.'

Question 3

Complaints that coastal fish stocks were being exhausted by large vessels using sophisticated equipment led to the (fictitious) Inshore Fishing Act 2008. The long title of the Act describing it as 'An Act to preserve fish stocks, to establish a licensing system, and for related matters'. The Act requires those fishing 'in the course of a business' within three miles of the coast (the 'controlled area') to obtain a Ministry licence and restricts the issue of licences to those operating vessels under 100 tons. Section 3 makes fishing in the controlled area without a licence an offence and the Act also provides:

Section 4 Any licensee who within the controlled area uses in fishing for sea fish any ring net or similar net commits an offence.

Section 5 Any person who for consideration supplies fish caught within the controlled area to any other person, being a person carrying on a business of fishing for sea fish but who is not a licensee under this Act, commits an offence.

- a. William, who operates a 1,000 ton ocean-going trawler and is therefore ineligible to hold a licence, paid Allen, a licensee, £10,000 on the informal understanding that Allen would give him first refusal on all his catches. Allen has returned from a fishing trip with a full catch and was looking for William when he was arrested and charged under s.5.
- b. Blake takes parties of holiday-makers for trips close to the shore in his motor boat. Part of the attraction is that the trippers receive fish caught by Blake during the trips, using a small net which he operates in much the same way as a ring net but is much smaller and which Blake made for himself, since no nets of that size are available for purchase. Upon returning from a trip with 10 passengers and some 19 fish he has been arrested for fishing without a licence and for the use of this net.
- c. Charles, who holds no licence, was found pumping fish from a ring net into his 90-ton trawler within the controlled area. He has been charged under s.3, but says that the catch was made outside the controlled area and that his trawler must have been pushed into that area by the weather conditions during the pumping operation. Sea conditions had been unusually stormy for the previous two days with a strong gale blowing towards the land.

Advise Allen, Blake and Charles. (You may assume that nothing in the Act conflicts with the United Kingdom's Treaty obligations.)

This is a problem question. Yet we got answers that gave us up to three pages of essay answers about the 'general' theme of statutory interpretation. Why? The result was that these candidates usually ran out of time so they could not address the actual question. It is vital that candidates pace their answers so as to give equal time to each question.

In order to answer these questions, candidates are not required to have knowledge of criminal law. There was no requirement for any discussion of the fact that there appear to be strict liability offences being created here (i.e. the mental state or 'intention' of the person being irrelevant). The question required an analysis of the facts, then for the candidate to apply the statute using one or other of the accepted approaches to interpreting statutes.

Learning outcomes in Chapter 7 of the subject guide states at point four:

'Apply the techniques of interpretation to imaginary cases and draw upon decided cases to illustrate your arguments as to what is the appropriate approach.'

Far too many answers treated this as an essay question. For example, part (a) of the question involving William concerned the interpretation and application to the facts of Section 5: 'Any person who for consideration supplies fish caught within the controlled area to any other person, being a person carrying on a business of fishing for sea fish but who is not a licensee under this Act, commits an offence.'

A number of candidates saw reference to the word 'supply' and took this as a prompt to discuss *R v Maginnis*. While this case may have been relevant, as relevant as, say, *Fisher v Bell* (1959) or *Adler v George* (1964), candidates who mentioned it did not apply it effectively. The key word in our question is the word 'supplies' – in *R v Maginnis* the words considered were 'intent to supply'.

R v Maginnis [1987] 1 All ER 907 was concerned with the interpretation of the Misuse of Drugs Act 1971, by s.5(3) of which: ‘... it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply to another...’. The police had found a package of cannabis resin in the defendant’s car. He said that the package was not his but had been left in his car by a friend for collection later. The defendant was convicted and appealed. Their Lordships held by a majority that the defendant was guilty of the offence because a person in unlawful possession of a controlled drug left with him for safekeeping by another person had the necessary ‘intent to supply it to another’ (even though the supply was not being made from the provider’s own resources) if his intention was to return it to the other person and for that other person’s purposes. The majority of their Lordships purported to apply the ordinary, natural meaning of the word ‘supply’. Lord Goff, however, dissented on that very point and referred to definitions of the word given in *The Shorter Oxford English Dictionary*. In his view the word ‘supply’ was not apt to describe a transaction in which A handed back to B goods which B had previously left with A. Thus the cloakroom attendant, left luggage officer, warehouseman and shoe repairer do not, in ordinary parlance, ‘supply’ their customers. Lord Goff was further of the opinion that the particular offence in question was aimed at drug ‘pushers’; the defendant was not a ‘pusher’ and should have been charged with the lesser offence of ‘unlawful possession’. If, he said, persons in the position of the defendant were to be convicted of ‘possession with intent to supply’, it was up to Parliament and not the courts to enlarge the definition of ‘supply’.

In our case, Allen has the fish, and is looking for William, undoubtedly in order to tell him he has returned with a full catch and quite arguably would have an ‘intent’ to supply – but does he actually supply? On a literal interpretation surely he has yet to supply, so would be not guilty. However, you can argue that such a finding would frustrate the intention of the Act, which was to create a transparent licencing system, and if Allen is not found guilty this would make an absurdity of the Act in this respect. Against this, one might argue that any reading in of another word (such as the court did in *Adler v George*, where it interpreted ‘in the vicinity of’ to mean ‘in, or in the vicinity of’) is a question about whether you want to argue that the court should extend the meaning of ‘supplies’.

Such precise attention to the question and the argumentative nature of the law was extremely rare. Many candidates seemed to show little awareness of how to argue for and against alternative interpretations. Only a minority of candidates stuck to answering the actual question rather than writing an essay.

Again, the important message to candidates is that they must complete some practice exercises. Holland and Webb (2006) has several. The University of London materials provide others.

Question 4

‘Our image of civil justice is distorted if we concentrate upon trials. The main action takes place elsewhere and all attempts at reform must take into account the whole landscape.’

Discuss.

The aim of the question is to allow candidates to use the materials provided to focus on the key words: 'image of civil justice', 'distorted if we concentrate upon trials', the 'action takes place elsewhere' and 'reform must take this into account'.

Chapter 12 of Gearey et al. (2009) is entitled 'Imagining civil justice'; the first quote of that chapter is from Albert Einstein and reads: 'Imagination is more important than knowledge. For while knowledge defines all we currently know, imagination points to all that we might yet consider.'

The chapter begins with an image: the original cover page of Charles Dickens' *Bleak House* (c. 1853). It goes on to discuss the messages of *Bleak House* and how these continue to be relevant today.

The study pack contains three chapters on civil justice and all make considerable reference to Alternative Dispute Resolution (ADR) and mediation, etc. Hazel Genn's paper 'Solving civil justice problems: what might be best?' (2005) sets the discussion in the context of the differing objectives of the parties in litigation, the need for processes that are responsive and affordable, and considers the role of the legal profession in shifting attitudes towards litigation and changing the focus away from preparing for a usually non-existent trial.

Clearly, the vast majority of the candidates had done some work on the civil justice reforms, but their ability to apply that to the question, as asked, was limited.

Question 5

'A rule as to precedent (which any court lays down for itself) is not a rule of law at all. It is simply a practice or usage laid down by the court itself for its own guidance and, as such, the successors of that court can alter that practice or amend it or set up other guidelines, just as the House of Lords did in 1966.' (Lord Denning in *Davis v. Johnson*)

Discuss.

Precedent is central to the operation and development of the common law, but how is it to be understood? The distinction between seeing the doctrine of *stare decisis* and precedent as a rule and a practice was the central theme of Chapter 3 'Institutionalising judicial decision making: the judicial practice of precedent' in Gearey et al. (2009). A significant amount of space in Holland and Webb (2006) is devoted to this area, which is also given in-depth treatment in Chapter 6 of the subject guide. This was a popular, and predictable, question and many answers covered the same material. Most candidates passed, but there were some very poor answers.

Question 6

What would an ideal criminal justice system look like? How does the current system in England and Wales compare with that ideal?

This structure of this question, which attracted a substantial number of good answers, is relatively simple. It asks the candidate to put forward an opinion as to what an 'ideal' criminal justice system would look like and how the system in England and Wales might compare to that ideal. Relatively common, and acceptable, answers began by putting forward an 'image' that would be free from miscarriages of justice, highlighting the importance of an understandable ethos. Many candidates mentioned the models developed by Michael King and presented in the

subject guide as well as the historical contrast between 'crime control' and due process'. A number of answers stressed that the criminal justice system in England and Wales appears to be moving more towards crime control than due process, and several also noted the rise of the victim's movement and the politicisation of criminal justice.

We are not looking for perfection: answers that show evidence of reading and the candidate organising the materials so that their voice comes across clearly will be rewarded. Candidates should not be afraid of expressing themselves by letting their own voice through.

Question 7

'The changes made to the Legal Aid system as a result of the Access to Justice Act 1999 and the Carter Reforms will ensure that legal aid providers offer efficient and high quality services to clients. These are the principal objectives of the legal aid system.'

Discuss.

This was not as popular as the legal aid question in the Zone A paper. This is a loaded question in that it puts forward a positive interpretation of the changes to the legal aid system. It also claims that offering 'efficient and high quality services' to 'clients' are the 'principal objectives of the legal aid system' and will be achieved by the changes. It cries out for candidates to take a stance. There is a wealth of criticism of the changes.

Question 8

What do we mean when we speak of 'the common law tradition'?

Discuss.

This question offers candidates the opportunity to write wide-ranging essays. The key words are 'common law tradition', and candidates need to ask themselves what does 'tradition' mean? It should allow candidates to reflect upon the idea of the receipt of the common law into other countries. Answers could cover legal history, the building of the common law through decided cases, the role of the judiciary, or whether rights are easily accommodated in the 'tradition'. This is meta question in that all the material on the unit is relevant and the whole of the text by Gearey et al. (2009) can be read as addressing this question, as indeed does the text by Slapper and Kelly (2006).