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# Examiner's report 2009

## 267 0005 Jurisprudence and legal theory Zone A

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### Introduction

As in years past, the quality of the answers varied greatly, but generally students showed a commendable degree of knowledge of the different parts of the syllabus. While, once again, too many candidates provided memorised essays on the general topics addressed by the questions, it was noticeable that this year a larger proportion of students did engage directly with the actual questions. As will be seen from the comments in respect of particular questions below, many of the questions related directly to the subject guide sections and activities, so students must remember that their first task in preparing for the examination is to make sure they follow the subject guide. The most basic instruction that can be given is this: take jurisprudence seriously and you will pass; don't and you won't.

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### General remarks

The quality of the papers and the consequent range of marks showed the typical division between those candidates who took time to think about the question before writing, and those who plunged into setting down a memorised, prepared essay which only touched on the topic of the question. The Examiners cannot stress too strongly that pages of irrelevant information which cannot be framed as a response to the question count for nothing. Candidates whose answers showed that they were summoning their knowledge so as actually to address the question **always** received higher marks than candidates who merely wrote down as quickly as possible everything they knew about the general area of jurisprudence raised by the question. Many candidates who ended up getting pass and third class marks showed, by their answers, that they would have been capable of getting 2:1 marks if only they had made a genuine attempt to answer the question set. Students in jurisprudence should consider juris questions to demand the same sort of pre-answer thinking as that demanded by a problem question in a subject like contract or criminal law. No student answering such a problem question would think it appropriate simply to set out a prepared essay, and the same should be the case in jurisprudence. As we stated last year, the Examiners hope that there does not exist an unspoken compact of false hope between students and teachers at some institutions, in which juris teachers give good grades to students on mock exams for simply showing that they've assimilated (i.e.

memorised) lecture notes on a topic, rather than engaging with the actual questions. As a rule, any answer which does not forthrightly address the question set cannot get more than a pass, and will often fail. An answer of this kind passes only on the basis of the Examiner extracting from the answer whatever passages can be seen to contribute to what might have been an answer to the question. Examiners are **not** obliged to construct an answer that the candidate might have given from the set of sentences the candidate actually wrote with no thought of the question in mind. The Examiners strongly encourage juris teachers to return to be re-done any mock examination paper which avoids, rather than addresses, the questions set. As a general rule in jurisprudence, the more you rely upon memorised passages, the lower the mark you will get. To refer again to the advice given in previous years' reports: as a general rule in juris exams, more is less and less is more. If you are writing a booklet per question then you clearly haven't spent enough time thinking before writing.

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## Specific comments on questions

### SECTION A (The Set Book)

#### Question 1

'But the dichotomy of "law based merely on power" and "law which is accepted as morally binding" is not exhaustive. Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive themselves as morally bound to do so, though the system will be most stable when they do so. In fact, their allegiance to the system may be based on many different considerations: calculation of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.'

(Hart, *The Concept of Law*)

Discuss.

This oft-quoted passage from *The Concept of Law* is probably Hart's clearest expression of his view that taking the 'internal attitude' to the law is not equivalent to being morally committed to the law, in the sense of taking the laws of the system to be morally valid norms. As the passage clearly indicates from the outset, he argues that there is conceptual space between the command theorists, who regard law as nothing more than organised coercion, and the natural lawyers, who regard the law to be only valid as law if it is morally valid. A good answer to this question needed first simply to explain the point that Hart was trying to make in this passage. An answer might go on to consider in turn the various alternative bases upon which Hart says a person might commit themselves to complying with a legal system without at the same time believing that (or even genuinely considering whether) its laws are morally valid, for example, long-term interest, inherited attitudes and so on. A good answer would also consider

whether Raz's notion of the 'detached legal statement' bolsters Hart's view and the different positions of officials and ordinary subjects of the legal system that Hart discerns; while officials must commit themselves to the system in the sense of taking the internal attitude and acting accordingly, does this entail that they, any more than an ordinary subject, need accept the system as morally binding? The commonest error made by candidates was fixing on the word 'coerced' in the second sentence and on the basis of that, providing a review of Hart's critique of Austin's command theory. The lesson here is to read the entire quote and think about that before answering.

#### Question 2

Give some examples from the *The Concept of Law* where Hart picks out distinctions in the meaning of words to advance his claims about the nature of law, and critically assess how successful he was in using this technique in these examples, and how much such examples contributed to the overall project of the book.

This is a very straightforward question, closely modelled on activity 5.1 of the subject guide, and the candidates who answered it generally addressed the question. The most famous linguistic distinction that Hart relies upon is, of course, the one between being obliged (by a gunman) and being under an obligation (to a tax inspector). However there are others, such as:

- the distinction between someone ordering X to do Y and someone giving an order to X to do Y
- saying that the words obey and disobey do not properly apply to compliance with power-conferring rules
- following a rule as opposed to doing something 'as a rule'.

Good answers would not require more than two or three examples, though more would indicate that the candidate had done the activity with some diligence. For a good mark it would be more important to explain how these examples were supposed to support Hart's claims – that is, candidates should give a reasonable explanation of how attention to words is supposed to 'sharpen our awareness of the phenomena', to use Austin's phrase. Good answers would show some consideration of how much such cases establish whether and how, for example, a command theorist might get round the obliged/obligation distinction.

Finally, the question asks whether such techniques of linguistic philosophy are as central to *The Concept of Law* as one might suppose from the preface. After all, much of chapters 2 to 4 is more or less just 'regular' philosophical criticism of Austin and the command theory, pointing out various unpalatable philosophical consequences of it, such as the problem of the succession of the sovereign, criticisms which do not turn on any linguistic distinctions.

### Question 3

**What is the rule of recognition, and what are Finnis's and Dworkin's criticisms of Hart's theory of the rule of recognition? Are these criticisms sound?**

This question draws very clearly on sections 6.1 and 6.2 of the subject guide, which summarise Hart's theory of the rule of recognition, and set out in some detail Finnis's and Dworkin's challenge to it. The most typical problem in candidates' answers to this question was misunderstanding or not knowing Finnis's main criticism. This is his argument that the acceptance of the rule of recognition by officials gives evidence of a moral commitment of those officials to the legal system, a claim Hart denies (see Question 1, above). Good answers must first, of course, explain what the rule of recognition is meant to address (i.e. the problem of the uncertainty of the regime of primary rules) and consider how it is supposed to address it. Too many answers wasted time providing an unnecessary recitation of all three of the defects in the pre-legal society Hart imagines and a rundown of all three secondary rules. A good answer would also explain why, according to Hart, the rule of recognition is the lynchpin rule of the legal system, and how, although a norm, it is also a matter of fact. Very good answers might draw on later writers such as Raz or Simpson to flesh out this picture, for example discussing to what extent the rule of recognition is more of a judicial practice than a rule, is a customary rule, and so on. Answers would then need to turn to the criticisms of Finnis and Dworkin. As a minimum an answer should be able to reproduce the summary of Finnis's and Dworkin's criticisms in 6.2 of the subject guide. A very good answer might consider whether/how Dworkin's first 'model of rules' criticism (that is, that the rule of recognition fails to identify all the legal material (in particular principles) upon which judges rely to resolve disputes in hard cases such as *Riggs v Palmer*) was modified or enhanced by Dworkin's criticisms of positivism in *Law's Empire*.

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## SECTION B

### Question 4

**'Durkheim believed that the key to understanding law in modernity was to see it as an index of underlying social forms. These forms themselves relate to structures which hold society together.'**

**Discuss.**

This question is based on 12.3 of the subject guide – in particular, the discussion of Durkheim's view of morality and the terms of the summary and conclusion to the discussion of Durkheim's work. Very few candidates answered this question, so it is difficult to discern any pattern in the ways it was tackled badly or well. The correct approach to the question would probably be to agree with both parts of the statement in the question. Durkheim was indeed concerned with the way in which law has to be studied in a social context. Furthermore, law is related to the structures that hold society together. In complex, modern societies, Durkheim refers to 'organic solidarity' and any sufficient answer would explain this key

concept and how it relates to forms of both criminal and civil law. The question concerns law in **modernity**. In other words, while it would be perfectly sensible to discuss pre-modern societies and 'mechanical solidarity' by way of contrast to modernity, the law in modernity should be the focus. Since Chapter 12 of the subject guide focuses on the idea of sociology as a response to modernity, candidates' answers should show a reasonable facility with the concept.

#### Question 5

'Marx's work has been constantly re-interpreted. A Marxist theory of law needs to be understood in light of this fact.'

Discuss.

Answers to this question fell into two categories: those that answered the question and those by candidates who chose simply to write down everything they knew about Marx. Many of the answers in the first group were very good indeed. This question draws most directly on material in sections 13.4 and 13.5 of the subject guide, although more generally on the whole of chapter 13.

The question sets two main tasks. Firstly, to consider how Marx's theory has been re-interpreted since Marx wrote, in particular to deal with social conditions and events such as the founding of the Soviet state which arose after Marx's death. Secondly, to assess whether these re-interpretations enhance, undermine, or otherwise affect the way in which the Marxist theory of law should be understood and judged. Although some good answers discussed both Soviet and western Marxism in answering this question, some good answers focused on one or the other in greater detail.

In general, those who addressed the question sensibly agreed in broad terms with the quotation. After all, Marx's work is rooted in its nineteenth-century context, and his ideas need to be updated and applied to new social realities. If one chooses to write about Soviet Marxism, then the basic idea that Marx's work on law needed to be updated is accurate. Marx wrote very little about what social, political and economic structures would come after the revolution, and it was thus necessary for the Soviet Marxists to innovate. Lenin's writing on the state (13.4.1) might be considered here, and a good answer might then shape the discussion around the work of Pashukanis, which clearly builds on ideas from *Das Kapital*. However, the answer could also suggest how Pashukanis's work failed to engage with the problems inherent in the revolutionary state. Answering this question from the perspective of western Marxism could begin by suggesting that writers like Louis Althusser were concerned with what sense Marx's work made in post-war, western capitalist democracies. Again, it is a question of re-interpreting Marx's fundamental insights. Althusser's theory of law and ideology would provide a useful focus for this answer. Indeed, it covers much of the same material covered by activity 13.6.

#### Question 6

**'Feminism reminds legal theory that there is no neutral standpoint, and no objective knowledge. Claims to truth or authority always are underpinned by power; and power is inevitably that of men over women.'**

**Discuss.**

As with answers to the last question, answers divided into those which made a serious attempt to address the question, and those which were simple regurgitations of prepared essays on feminism. An answer to this question would draw on material covered in activity 15.1 and there is simply no scope in the question for submitting a rote essay rehearsing the development of different forms of feminist thinking. The question can be broken down into the claims that there is no objective knowledge, and that this is so because knowledge reflects power relations. It would be wise to agree generally with the statement. Feminists do argue that claims to objective knowledge obscure the realities of gendered power. The discussion of the five tactics in section 15.1 of the subject guide provides good material to build the answer, as would a close examination of MacKinnon's work, which makes the claim that objectivity is gendered (and male) and reflects inequalities in power central to her theory.

#### Question 7

**'To the extent that Critical Legal Studies engages with legal reasoning, it shares an essential concern with postmodern accounts of rhetoric.'**

**Discuss.**

Few candidates answered this question so it is impossible to discern any pattern in the merits or failings of the answers. The question builds directly on activities 16.4, 5 and 6 and the discussion in 16.5.2 of the subject guide. The fundamental point that the question raises is that there is a continuity between the concerns of writers like Peter Gabel and Duncan Kennedy (as representatives of CLS) and Peter Goodrich (as a representative of a postmodern legal thinker). A good answer would consider the links between postmodern concerns with rhetoric and the CLS concern with the politically malleable quality of judicial thought and reification in legal reasoning. Both are techniques for discovering the ways in which law makes claims to authority and objectivity which in fact conceal political positions. A strong answer would go on to consider the suggestion that legal postmodernism has less to do with the idea that 'there is no truth' and more to do with an ongoing critique of the power relations which underpin modern legal institutions and legal discourse.

#### Question 8

**'For those who are not writing about race in America, critical race theory is primarily concerned with the problem of the postcolonial.'**

**Discuss.**

Very few candidates answered this question so it is impossible to discern any pattern in the merits or failings of the answers. This question covers material in section 17.1 of the subject guide, the activity at the end of this section, and the latter part of the chapter, section 17.6. A good answer

might also bring in the material covered in 17.5 by considering a link between postcolonialism and racism in post-war British society. Probably the best approach to the question is to agree with the statement. Critical race theory certainly has its origins in America, but has been extended to engage with other experiences of racism. In other words, a solid answer should deal first with the American context, but move beyond this to present critical race theory as a much broader form of thinking. An answer to this question would also require some understanding of the postcolonial. Chapter 17 treats the postcolonial as, in part, a critique of some assumptions made by Hart in *The Concept of Law*. Clearly this suggests a significant difference from the American concerns with slavery, reconstruction and racism in American society – and extends the range of critical race theory.

#### Question 9

In view of Raz's normal justification thesis, on what basis might the law have authority to make laws (i) empowering officials to punish murderers, (ii) requiring the wearing of seat belts, (iii) imposing taxes and (iv) regulating traffic?

Candidates who answered this question generally did well. This question is closely modelled on activity 8.1 of the subject guide. This requires candidates to consider whether the law, in regulating the activity of its subjects may legitimately do so (i.e. meets the normal justification thesis) because it has theoretical knowledge its subjects do not, or rather because it solves coordination problems, broadly conceived. So, for example, in the case of punishment for murder, a Razian would probably say that primarily this solves a coordination problem, as a state apparatus of dealing with murderers is likely to be more just and efficient in achieving the goals of punishment than leaving the response to crime to individuals (revenge, feud, vendetta, etc.). On the other hand, seatbelts may be required because the state simply knows more about the best safety procedures to adopt to reduce injury and death from road accidents. There may be a bit of both in taxes (coordinating the obligation to contribute to public goods in the least economically distorting way) and traffic regulation (picking the side of the road to drive on but also setting out rules which reduce accidents, enhance traffic flow, etc.). Any candidate who seriously considered the feedback to this activity had ample resources to provide a good answer.

#### Question 10

What is Dworkin's 'rights' thesis? What is his 'right answer' thesis? In what ways, if any, are the two connected?

While this is a very straightforward question requiring candidates to explore two of Dworkin's most famous claims about the law, it was also one of the most poorly answered, because many candidates simply failed to set these theses out correctly. In regard to the 'rights thesis', an answer must express Dworkin's worry about judges 'creating rights', and so applying law retroactively to the parties. A good answer might consider whether Dworkin should be so worried about this, given the way that judges, in England at least, explicitly accept their law-making role (see, for

example, the recent 'mistake of law' cases such as *Kleinwort Benson v Lincoln CC*).

Turning to the 'right answer' thesis, answers would need not only to say that Dworkin believes there is one right answer to any legal dispute, but explain how one is to go about finding it. That does not require a complete reprise of Dworkin's theory of law, but it must as a minimum mention Hercules and the way in which he would be able to determine such a right answer. A good answer would consider whether, given that actual judges do not have the capacities of Hercules, the theoretical possibility of obtaining one right answer does any real work when there is no practical means for judges to determine that they have found it. Is an unknowable answer as to whether the plaintiff has a right of any use to the plaintiff? This raises the connection between the two theses. If there is no right answer to the question of whether the plaintiff has the right he claims in the litigation, then there is no right that he has which genuinely pre-exists the litigation and the rights thesis collapses. On the other hand, if there is a right legal answer to any dispute, then it can be plausibly claimed that a plaintiff's claim is a claim that he has a pre-existing legal right which resolves the dispute in his favour.

#### Question 11

For most of his life, Kelsen described the grundnorm or basic norm as a 'pre-supposition' which made the understanding of law possible, but in his later years referred to it instead as a 'fiction'. What is the grundnorm, and which of these terms better describes it and its place in Kelsen's theory of law?

This question was generally answered poorly, with many candidates just parroting notes about the grundnorm, many entirely avoiding the question as to how the grundnorm is best described. Reasonable answers needed to explain the central place of the grundnorm in Kelsen's theory, in particular the way in which it underpins the legal system as a system of norms, in which any valid norm is the result of an act authorised by a superior norm. Qua pre-supposition, the grundnorm is the only unauthorised norm. Rather than deriving from a norm-creating act, it counts as a transcendental postulate, a quasi-Kantian conceptual orientation outside of which law cannot be recognised or understood. Kelsen's claim in this regard is quite obscure, and candidates received credit for attempting to make sense of it.

Kelsen's later claim that the basic norm was fictional seemed to turn on his coming to think that a norm is necessarily the product of an act of will, and since no act of will (by any supernatural or other actor) creates the grundnorm, it must count as a non-existent or fictional entity. The obvious problem with this account of the basic norm is that it seems to suggest that, although we can treat the norms of a legal system as though they were binding (that is, take the 'point of view of the legal man' as Raz has put it) it does not require, and perhaps denies, that the norms of a legal system are actually binding in any way, since they depend for their normativity on something necessarily fictional. Furthermore, the fictional account of the basic norm seems to invite, rather than solve, the 'infinite

regress' problem. The essence of Kelsen's theory is that the power to create a norm is authorised by another norm. So the creation (fictional or not) of the basic norm by an act of will, if valid, would seem to depend upon a more basic norm in turn authorising it.

#### Question 12

'Fuller's "principles of legality" perpetrate a confusion between two notions it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit", or "Avoid poisons however lethal if their shape, colour or size is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.'

Discuss.

This question is closely modelled on activity 4.5 of the subject guide, as well as sections 7.3 and 7.3.1, so any student who undertook the subject guide activities should have done well. However, a large number of candidates wrote very poor answers because, apparently, upon seeing the name Fuller they immediately wrote all they could about the grudge informer case. Good answers of course set out Fuller's eight principles of the morality of law, but then went on to explain in what way Fuller understood them to be moral, before turning to the criticism made by Hart in the quoted passage. Good answers considered whether such principles, which are normally connected with the idea of the rule of law, are rightly considered to be moral principles. From the feedback given to the activity, candidates will be familiar with a Razian perspective on this (though the feedback does not cite Raz). That is that, while Fuller's principles, and other sorts of principles of this kind, are moral principles because they identify particular ways in which the law can serve as an instrument of evil, this does not mean that meeting these principles makes a positive moral contribution to laws which do not violate them.