
Examiner's report 2009

267 0005 Jurisprudence and legal theory Zone B

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.

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.

Specific comments on questions

SECTION A (The Set Book)

Question 1

'On this simple account of the matter, which we shall later have to examine critically, there must, wherever there is a legal system, be some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience. This person or body must be internally supreme and externally independent. If, following Austin, we call such a supreme and independent person or body of persons the sovereign, the laws of any country will be the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign.' (Hart, *The Concept of Law*)

Discuss.

This question draws on section 5.4 of the subject guide, and the activity in this section of the chapter. It invites candidates to consider Hart's summary of his explication of Austin's theory of law. Many candidates answered this question quite well. Good answers should first consider whether Hart has fairly set out Austin's theory, before going on to show how Hart's criticisms of the narrowness of this account form the beginnings of his own account of law. A good answer should contain some consideration of Hart's understanding of the variety of laws, and the material in the chapter Sovereign and Subject. Discussion of the nature of Hart's idea of political community may also be relevant, extending to the discussion of Rex I and II and the idea of the legitimacy of law. It would thus have helped if candidates had undertaken the discussion topic at the end of section 5.4.

Question 2

'Plainly, there will be a very close connection between the rules of change and the rules of recognition: for where the former exist the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation... [A] system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are.'

(Hart, *The Concept of Law*)

Explain the connections between the secondary rules Hart describes in this passage, and discuss how significant they are, if at all.

This question is a variation on a question asked last year (Question 2, Zone A paper), and discussed in detail in last year's Examiner's report. The question invites candidates to consider how the functions of the secondary rules depend upon each other. It is no use for an authority to create new rules if these are not recognised, so the rule of change and the rule of recognition are intimately linked. Raz, for one, has argued that the essential function of the rule of recognition is to identify law-creating acts – that is, acts of legislation. Similarly, there is no point laying down or recognising rules if they are never going to be applied, so rules of adjudication that empower authorities to apply the rules are generally required as well. As Hart points out in this passage, it is difficult to see how adjudication on the basis of rules can be accomplished in the absence of a rule of recognition, however rudimentary, that identifies the applicable rules. Furthermore, in most systems, those who have the power and the duty to recognise the rules are also the ones with the power and duty to apply them (i.e. judges). A very good answer would not only see the connections between the rules, but the way in which the rules together can be seen as an account of authority which contrasts with Austin's notion of sovereignty.

Question 3

'...though every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points.'

(Hart, *The Concept of Law*)

Discuss.

This question was only rarely answered well since most candidates failed to realise that this quote framed Hart's argument against the rule sceptics. A starting point would be to explain that the statement above forms the core of Hart's position. Agreeing with the rule sceptics, he notes the open texture of rules, but argues that the rule sceptics fall into error. They create a false dichotomy between the idea that rules are absolutely clear and binding and the claim that there are no such thing as rules – merely predictable decisions or patterns of behaviour. Hart also refutes the argument that 'the law or the constitution is what the court says it is'.

A good answer would go on to discuss the analogy of the 'game without an official scorer' and Hart's idea that the courts have a discretion to clarify ambiguities in a rule. A very good answer might go on to engage with the Hart/Dworkin debate over the nature of rules, principles and the determinacy of legal interpretation. This answer draws principally on section 7.1 of the subject guide, but see also 6.3.1 and 6.3.2.

SECTION B

Question 4

'For Weber, the study of modernity suggests that legitimate modern law is fundamentally rational.'

Discuss.

Section 12.4 of the subject guide provides the focus for this discussion of Weber. This is not a particularly difficult question, provided that the candidate has read the relevant parts of the subject guide. Well-prepared candidates were aware that the question takes us to one of the central concerns of Weber's sociology, the connection between legitimacy and rationality. A good answer would discuss the fundamental point that the broad and general processes that lead to modernity can also be linked with forms of thought and organisation that take rational forms. If one recalls Weber's typology of forms of authority, then law can be located in this general account of social development. Better answers would also focus on Weber's discussion of the irrational elements that he claimed characterised the common law. This raises the question whether modern law is indeed fundamentally rational.

Question 5

'Marx was not writing jurisprudence. If his work tells us anything about law, it does so in the context of a radical philosophy of political economy.'

Discuss.

Many candidates answered this question well, understanding the essential point that Marx was not concerned to produce a philosophy of law. Rather, to the extent he was concerned with the law at all, he wanted to show the role the law plays in securing the economic relations which characterise different stages of social and economic development. The question could be answered in a number of ways, but the fundamental material on which it draws is contained in sections 13.1, 2 and 3 of the subject guide. Moreover, the self-assessment exercise within these sections would have allowed candidates to familiarise themselves with the central terms of Marx's thinking. Probably the best approach to the question is to agree with both parts of the statement. Marx did not set out to write jurisprudence – he was engaged with a critique of particular mode of production: capitalism. To the extent that understanding capitalism means understanding the role that law plays in social and economic (and indeed political) relations, then his work touched upon law. However, as the question suggests, this has to be seen in the context of his own

understanding of his work which was as a radical critique of political economy. Marx's radicalism is an attempt to understand the class relations that lie behind legal, economic and social phenomena. An example of Marx's radicalism could be given by reference to his idea of the state (see section 13.2 of the subject guide). Contrary to Hegel, who saw the state as essentially rational, Marx was concerned with the state as an expression of class interest. Those who controlled the economy also controlled the state. This would suggest that law could not be neutral, but always operated in the interests of the class that held power. We can see from Marx's writing on law in *Das Kapital* that Marx was also concerned with the part that law played in economy. The analysis of the Factory Acts (section 13.3 of the subject guide) provides relevant material for an answer.

Question 6

'Feminist theory of law is so compelling because it has developed the ability to criticise and update itself.'

Discuss.

Many candidates provided good answers to this question, although too many took it as simply an opportunity to give an overview of the different strands of feminist thought. An answer to this question could draw plentifully on the material in sections 15.2, 3 and 4 of the subject guide. Whether or not a candidate agreed with the statement – no candidate needs to find feminist theory of law compelling – it is undoubtedly true that the development of feminist thought, in particular the development of different strands, has often been precipitated by criticism of prior feminist analyses. For this reason, some good answers reviewed the conventional story of the development of feminist thought (from liberal to radical and black/ethnic minority feminisms) to show how radical and black/minority feminisms were critical of the assumptions made by the earlier liberal feminists. Does this make feminism compelling? The quote suggests that it has become a tradition, with the resilience to question itself and adapt its insights to new realities.

Question 7

'American Critical Legal Studies was primarily concerned with the way in which legal reasoning distorted the social world, and how legal reasoning itself could be manipulated.'

Discuss.

Very few candidates answered this question so it is impossible to discern any patterns in the answers. This fairly straight forward question draws directly on activities 16.4, 5 and 6 and the discussion in 16.5.2 of the subject guide. It is primarily concerned with how scholars like Gabel and Kennedy understood the nature of legal reasoning. An answer should not simply provide a 'history' of CLS, summarising its 'successes and failures'. A good answer could agree with the statement in the question, and go on to discuss Kennedy's discussion of the 'activist judge' and Gabel's studies of legal reification. A very good answer would try to show how these

approaches to legal reasoning could be contrasted with those 'liberal' theories that stress the neutrality of law and the clarity of legal principles.

Question 8

'Critical race theory has a largely pessimistic view about the potential of law to bring to an end modernity's endemic racism.'

Discuss.

The material relevant to this question is drawn from 17.1, 17.2 and the relevant activities in these sections of the subject guide. If a candidate had read these sections in detail, this would have been a reasonably straightforward question requiring an engagement with the arguments made by critical race scholars about the failures of law effectively to end discrimination. As the statement is broadly accurate, it would be sensible to broadly agree with it. Critical race theory is, on the whole, pessimistic about the law's potential to bring about social change. A very good answer would raise the question of whether the law's deficiency in this regard (if it is true) is a failing of the law, and consider whether the limitations of the law provide room for broader political possibilities of social change.

Question 9

'If Raz's service conception of authority is correct, then the theories of both soft positivists and Dworkin cannot be right.'

Discuss.

This question is closely related to sections 8.4 and 8.5 of the subject guide, reproduces one of the learning outcomes, and is, in part, the subject matter of activity 8.3. Many candidates tackling this question did well. A good answer would normally begin by explaining what the 'service' conception of authority is, and in particular not confuse it with the normal justification thesis or the idea that authorities can issue exclusionary reasons. The service conception of authority is the idea that authorities mediate between the reasons that apply to their subjects and the subjects themselves. For example, a doctor mediates between medical knowledge and procedures and his patient, so serving the interests of the patient. Raz concludes that, where an authority does not provide determinate guidance to his subject – say by giving injunctions, the requirements of which are controversial, such as a directive to comply with the moral requirement of equality – this cannot amount to authoritative guidance. This is because rather than telling the subject what to do, it instead sends him off on a research project. It follows from this, for Raz and other hard positivists, that the law cannot incorporate controversial moral criteria in its requirements for legal validity. Very good candidates would consider the soundness of Raz's reasoning, in particular in light of Dworkin's criticism that Raz's notion of authority is peculiar and that, even when controversial in its content, an obligation to act in some way morally (e.g. fairly) makes a difference in the conduct of the subject. (An idea also associated with others, such as Coleman, who calls it the 'practical difference' thesis, i.e. that an authority's directives must make (or be able to make) a practical difference in the conduct of its subjects.)

Question 10

What is Dworkin's concept of law? What is Dworkin's conception of law, and how would Dworkin say it differs from the conceptions of law held by Hart and Kelsen?

This question is modelled on activity 11.3 of the subject guide. It is a very straightforward question, not in terms of requiring a candidate to undertake any particular critical stand, but in that it should allow the candidate to indicate that they have really got hold of Dworkin's theory. Most did poorly because they failed to identify that Dworkin draws a difference between the concept of law and the conceptions of the concept. The concept of law describes those essential features of law upon which all theorists agree (a very good answer would set out what Dworkin's elaboration of the concept actually is), while conceptions of the concept encompass those different theoretical takes on the law which reveal theorists' different understandings of it. As the positivist most often considered by Dworkin, Dworkin would distinguish his own 'law as integrity' conception from Hart's 'fair warning' conventionalism. Since Dworkin rarely dwells on Kelsen, a candidate was required to 'think like Dworkin' to describe Kelsen's theory in the terms of a Dworkinian conception of law.

Question 11

What is Raz's distinction between 'social normativity' and 'justified normativity' and how, if at all, does it illuminate Kelsen's theory of law?

This question is modelled on activity 10.7 of the subject guide. It raises one of the most difficult issues concerning Kelsen's theory, the way in which it is supposed to be normative. Kelsen was adamant that legal validity was not equivalent to moral validity. On the other hand, he insisted that the legal order was a genuinely normative order in that he denied that the norms were valid as norms simply because of the fact that a legal order was by and large complied with. He stated the same thing in denying that a new legal order following a revolution came into being simply because, as a matter of fact, a new regime was able to establish its rule. This is therefore one Kelsen question where an intelligent discussion of the revolution cases would be in order. The problem with Kelsen's theory is that he never provides any definitive substance to the idea of **legally** binding which is neither equivalent to 'morally justified' nor to 'followed in actual practice'. (In some of his writings, Kelsen seems to solve this problem by resorting to a thorough-going normative relativism, in which he simply denies that any normative order is more basic than any other, such that it makes no sense to treat moral criticism of legal rules as anything more than one normative order pointing out its differences with another. From this perspective, the legal order is no less a 'moral' order than any other self-styled 'morality'.) In drawing the lines as he does, Raz denies that there is a middle ground (if middle ground is the right way to conceive of it) for Kelsen to occupy. Candidates who had done the activity and had grasped the distinction Raz makes between 'justified' and 'social' normativity did well.

Question 12

How would Aquinas make sense of the criminal law of rape, the law of wills, and the law imposing value added tax (VAT)? Would Finnis makes sense of them in a different way?

The first half of the question roughly reproduces activity 4.2 of the subject guide. A good answer would consider how each of these laws fits within the 'orders of law' (eternal, natural, human and divine law) which Aquinas sets out. The substantive law of rape, for example, would seem to fall into both natural and divine law (though various elements of the law in respect of doctrines such as *mens rea*, the rules of evidence, and the rules of sentencing, are more likely to be, one might argue, human law determinations which might rightly vary from society to society). The second part of the question requires an application of Finnis's claim that law is a social institution necessary for the regulation of communal matters so that all people can flourish (i.e. so all can realise the seven basic values). So, for example, the laws imposing taxes might be justified as required by practical reasonableness for the support of institutions, such as education, which admit people into the pursuit of knowledge, aesthetic experience and play, or for the support of institutions like the National Health Service, which serve the value of life, and so on. Nevertheless, for Finnis as well as Aquinas, the particular tax laws, such as value added tax, are presumably very much human law determinations from more general principles, which are not unique results and may vary from society to society.