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Examiners' Report

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General

The most pressing general comments consist largely of repetition of the messages of previous years, particularly of the need to advise candidates to focus on and direct their answers to the precise questions set- whether it be the meaning of “legal positivism”, or predictability in connection with statutory interpretation or the operation of precedent. Such a focused enterprise is the only way to achieve the higher achievement bands, since otherwise, especially in what is essentially a stock or prepared answer, the examiner is unlikely to be convinced that the candidate is aiming undoubted knowledge at the actual question. A striking instance of this is the characteristic response to Q3, on the nature and antecedents of the 19th century reforms to equity and the common law. Most candidates cited the account of the Chancery Court in Bleak House, but because of the unfortunate chronology in the stock answer, Dickens appeared to be writing in the 17th century in advance of the Earl of Oxford’s case ! A related difficulty stemming from stock answers is that they tend to be bland and unremittingly descriptive, leaving as in answers to Q6 no room for critical analysis.

Part 1

Q 1 In a question aimed specifically at elucidation of legal positivism, and its nemesis, natural law, far too many candidates opted for

generalised accounts of law and morality, or detailed investigation of issues in the legal enforcement of morality, inevitably to the detriment of the ultimate mark. Typically answers contained only a brief paragraph on legal positivism, which was not much more than a caricature, such as “law and morals never coincide”, when the proper account is that the two do not necessarily coincide, and that law does not derive its validity from moral worth. The better candidates could develop a historical perspective on the growth of natural law thinking and of different theorists within the positivist tradition, such as Austin, Hart and Kelsen.

Q2 attracted very few responses, and appeared to be a last resort, as candidates gave very brief and superficial accounts of some connections between law and change, or tried to recycle material from Q1 or elsewhere.

Q3 has already been mentioned in the introduction, and despite relative narrowness of intended historical and analytical focus, it persuaded the vast majority of candidates to offer a potted history of the whole life cycle of equity, including different types of remedy, leaving the essential parts of the question almost untouched. The consequence was that very few candidates could rise beyond the satisfactory level and a mark of 12 out of 25.

Q4 was answered by the weaker candidates as an equivalent to a discussion of the severity of punishments in different contexts. The stronger responses focused on the nature and justification of strict liability with appropriate legal authority from statute and case law.

Q5 required demonstration of the ways in which the operation of the Human Rights Act has affected the relationship between judiciary and executive. The vast majority of answers tended to bypass this challenge in favour of catalogues of the various Articles in the Convention, and a recitation of sections of the 1998 Act without sufficient accompanying focused analysis. The stock answer tended towards a catalogue of Articles or sections with possibly one brief case reference attached, without any further elucidation. Where some analytical input was within the stock answer it was usually very cryptic, as when "Ghaidan was criticised for judicial activism" was the only contribution. Sadly what also often went awry was a proper description of the meaning of s3 of the Act, which tended to be expressed in bowdlerised terms

Q6 as mentioned above required some analysis of predictability in statutory interpretation, along with consideration whether the "rules" were really rules properly so called. The general tendency highlighted in the introductory remarks was particularly apparent here, and candidates would characteristically describe the various rules, in varying degrees of detail, sometimes without legal substance via case law. The analytical issues were usually covered briefly, if at all, although there were answers in the higher achievement bands through awareness of the need to tackle the question more critically.

Q7 to a large extent shared the fate of Q6, in that the majority of candidates could provide exposition of the operation of precedent at different levels in the hierarchy, but equally seldom went beyond description. The stronger answers were more explicit about the leeways inherent in the doctrine and the various strategies open to the judges to achieve flexibility, such as distinguishing on the facts.

Sadly a significant number of candidates did not state that the Supreme Court has replaced the House of Lords.

Q8 No responses to this question have come to the notice of the Principal Examiner.

Q9 This question on the jury was characteristically more successfully handled, probably because a catalogue of pros and cons of the institution would inherently be more relevant than say, the merits and demerits of the “literal rule” in Q6. Many candidates could describe in some depth not just the items just mentioned but also the fate of various proposals for reform such as Roskill.

Q10 involved both the Diceyan concepts of sovereignty and illustrative principles of EU law, backed by case illustration. Generally candidates were well versed in both elements, although there was a minority tendency to concentrate on the institutions of the EU rather than on the question posed.

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