

LAW MODERATIONS – HILARY TERM 2004

MODERATORS' REPORT

PART 1

(A) STATISTICS

1. Numbers and percentages of those passing and failing

	Numbers			Percentages		
	2004	2003	2002	2004	2003	2002
<u>3 subject candidates</u>						
Total	255	267	261			
Passes	220	226	222	86.3	84.6	85.4
Distinctions	31	37	36	12.2	13.9	13.8
Pass in 2 Subjects only	2	4	2	0.8	1.5	0.8
Fails	2	0	1	0.8	0.0	0.4

2. Number of vivas

Vivas are not held in this examination.

3. Number of scripts double or treble marked

Double marking is not a feature of this examination, but about 130 scripts were second marked, principally where they were possible prize winners; where on first marking they received 69; where they left the candidate just below a Distinction, or would cause the candidate to fail; and where they left a Course 2 candidate with an average mark below the 60 required for automatic continuation on that course.

4. Number of candidates who completed each paper

	2004	2003	2002	2001	2000
Roman Law	142	176	153	152	149
Introduction to Law	113	91	108	106	109
Criminal Law	255	267	260	257	259
Constitutional Law	255	267	261	259	259

(B) NEW EXAMINATION METHODS AND PROCEDURES USED OR CONTEMPLATED

No new methods or procedures were employed this year, and none were contemplated.

(C) PRACTICE WITH REGARD TO SETTING PAPERS

We understand that in the previous two years, consultation with teaching groups was regarded as mandatory. Following new advice from the faculty board's Examinations Committee, the setters of the papers were this year given latitude to consult with members of their group as they (or their group) thought appropriate – as we understand is the case in the FHS. In each subject, the final paper was set by the relevant Moderator: in principle acting in conjunction with other markers – though in fact, practical difficulties prevented this in the case of two papers, so in these cases an alternative (equally robust) checking procedure was adopted instead, the paper then being discussed with the other markers before marking began.

Past papers were available via Oxams.

PART II

(A) GENERAL OBSERVATIONS

Moderations papers need to be drafted over the Christmas/New Year period. Given this, it is essential – as last year's report noted – that the Moderators and assessors be identified by the end of Michaelmas Term. That occurred this year, except in the case of one assessor.

As explained above, the Moderator, in drafting the paper, consulted and acted in conjunction with assessors and perhaps others. This arrangement worked satisfactorily and indeed helpfully. The two cases of practical difficulty referred to above arose, in one case, when the appointed assessor was away from Oxford over the crucial period of Christmas and New Year, this being a time when secure postal communication was also not to be relied on; in the other case, when the assessor had exceptionally not yet been identified. In each case, after discussion, another tutor in the subject was enlisted as checker.

Each paper was marked by a team of two or three markers, co-ordinated by the relevant Moderator, and with cross-checks aimed at ensuring a fair consistency of standard. This arrangement worked unproblematically.

The computer programme used by the faculty office in respect of this examination is rather basic and inflexible; inter alia, it does not allow for analysis of patterns by subject, marker, or gender, and it cannot record medical certificates on the mark sheets sent out to colleges. When resources permit, an upgrading would be appropriate. The work of the faculty office staff involved with the examination was of high quality. The same goes for the Examination Schools staff, except that there was some, not obviously necessary, delay in getting the scripts out to the markers.

As (we believe) in past years, scripts first marked at 69 were automatically second marked, regardless of whether a Distinction was at stake – indeed, before it was known whether or not that was the case. We suggest this procedure to be a misuse of resources. We acknowledge the view that it matters to a candidate whether he or she has earned 70 as opposed to 69 in a paper whether or not it makes a difference to his or her overall classification. But in Moderations (very possibly unlike the FHS and BCL/MJur), we believe the work required to address this is disproportionate to the benefit it delivers.

The proportion of Distinctions was fractionally lower than in the two previous years, but not, we think, to an extent requiring investigation. In three of the four subjects, the prize-winning script was written by a candidate who did not achieve a Distinction overall.

Candidates seemed generally at home with the practical procedures applying to them.

(B) GENDER (equal opportunities issues and breakdown of the results by gender; ethnicity analysis)

The computer programme did not permit the automatic generation of a gender breakdown. The following figures have been extracted manually.

The gender breakdown for Course 1 and Course 2 combined was:

	2004			
	MALES		FEMALES	
	No	%	No	%
Distinction	17	16	13	9
Pass	88	83	133	90
Fail	1	1	1	1
Total	106		147	

The gender breakdown for Course 1 was:

	2004			
	MALES		FEMALES	
	No	%	No	%
Distinction	13	14	11	8
Pass	78	85	120	91
Fail	1	1	1	1
Total	92		132	

The gender breakdown for Course 2 was:

	2004			
	MALES		FEMALES	
	No	%	No	%
Distinction	4	29	2	13

Pass	10	71	13	87
Fail	0	0	0	0
Total	14		15	

Evidently, these figures show that male candidates were proportionately more successful in achieving Distinctions than female candidates. What is less clear is whether this phenomenon is recurrently associated with Moderations (a gender analysis of results in previous years is not available); whether it is endemic to the examination as a whole or has more specific roots within it (the current computer programme cannot assist here); and what the causes of it might be. We do not speculate on these questions.

The Moderators were not asked to produce an ethnicity analysis of the results.

(C) REPORTS ON INDIVIDUAL PAPERS

INTRODUCTION TO LAW

114 candidates, 16 (14%) achieved a mark ≥ 70

The quality of the great majority of scripts was sound, the candidates exhibiting a solid grasp of the material and general competence in dealing with the questions. Having said that, many of the candidates did not seem to fully grasp the required – or, at any rate, the *ideal* – balance between exposition and analysis in their essays, tending to place too great an emphasis on the former at the expense of the latter. To an extent, this is to be expected at this early stage of the candidates' legal education. However, a subject such as Introduction to Law, relatively light on legal technicality and doctrinal detail as it is, presents candidates with a particularly good opportunity to draw on their imagination as well as background knowledge, to bring original analysis to bear on the debates at issue, and sometimes to take a somewhat more daring approach to their engagement with the questions, particularly those of a theoretical nature. The relatively few who took that opportunity, in most cases reaped the rewards.

The comments below pertain to specific questions, with an emphasis on prevalent weaknesses in attempts to answer them. They serve as an illustration of the general comment above. They also provide illustrations for several more specific patterns that candidates in future should be encouraged to abandon or adopt, as the case may be.

Questions 1 ((a) and (b)) and 2: Some candidates built their answers to these questions around archaic, and not very insightful, concepts such as ‘the literary rule’, ‘the golden rule’, ‘the purposive approach’, etc. A detailed account of such concepts and distinctions, usually accompanied by various statistics pertaining to the age, gender, race and class of judges, sometimes came in place of genuine engagement with the questions.

Question 2: Whereas a good proportion of the candidates showed awareness of the fact that the scope for judicial discretion cannot be eliminated altogether, most treated it as some kind of unavoidable misfortune, and many chose to demonstrate its very existence by using rather exotic examples of judges departing from well-established interpretations of statutory material, or straightforwardly flouting legislative intent. Even those candidates who recognised the potential usefulness of judicial discretion, tended to illustrate it by reference to such examples, so as to show that discretion is sometimes necessary in order to avoid extreme injustice. Having studied criminal law and constitutional law, candidates must have encountered numerous instances where judges have to apply a standard of ‘reasonableness’, for instance, to the fact of a case; and it was disappointing to find that very few were able to draw on such cases in their analysis of the issue. Indeed, very few candidates offered any account of what ‘discretion’ means in the first place – quite a basic requirement in terms of engagement with the question.

Question 4: A surprising number of candidates built their essays on the rule of law around the entirely irrelevant distinction between ‘positivism’ and ‘natural law’, while revealing a complete lack of understanding of either term. The examiners found this pattern puzzling. Many exaggerated the implications of disagreements in the literature as to the precise meaning of ‘the rule of law’, in some cases concluding that in light of such disagreements it is doubtful that the concept has any meaning at all, and hence that the question can be answered.

Question 6: Precious few of those who attempted this question offered any thoughts about what ‘the truth’ stands for when its discovery is described as an aim of the criminal process. (The truth about what?) Many used limitations on the admissibility of illegally-obtained evidence as an example of the willingness to sacrifice ‘the truth’ on the altar of ‘procedural justice’ or ‘human rights’, failing to consider the possibility that such limitations, and indeed

legal rules pertaining to gathering evidence in the first place, may be informed by the desire to limit the scope for *perverting* the truth, rather than solely by a willingness to sacrifice it. Other features of the criminal process used by candidates as examples in this context were often considered in a similarly one-sided or superficial manner.

Question 7: Whereas most candidates who attempted this question gave an adequately bleak account of the problems associated with the stop-search powers of the police, and backed it up by drawing on pertinent statistics, almost all came to the cursory conclusion that these powers must not be withdrawn (but should be regulated better) – without offering any *argument* to that effect (e.g. explaining why stop-search powers are important or how they can be useful despite all the problems). In many cases candidates simply *stated* that, rampant racism and general inefficiency and impossibility of adequate regulation notwithstanding, stop-search powers are important and useful and hence must not be withdrawn!

ROMAN LAW

20 candidates (12%) achieved a mark ≥ 70 .

There were some very good papers this year, showing real creativity, learning and insight, as well as flair in expression. But this soaring quality was confined to the top 2%, and the examiners had the distinct impression that many candidates were content to produce workmanlike summaries of basic primary materials and paraphrases of one, sometimes two, well-known modern student texts. This was particularly evident in many answers requiring historical imagination, such as those regarding the nature of the jurists' achievement or the import of Justinian's codification. One unfortunate tendency should be avoided if possible by future examinees, which is to borrow phrases culled from lectures and textbooks and repeat them as mantras without full understanding. Thus the great bulk of candidates who wrote about *stipulatio* believed that the institution 'degenerated' over time and wrote essays about degeneration rather than the institution of stipulation and the nature of formality and artifice in law. Many who wrote about nominate contracts were content to repeat Professor Birks' metaphor of Roman contract as an 'archipelago', though only a few could explain the metaphor.

One good feature of this year's examination was the even spread of answers across the ten questions. It was also pleasing to see serious engagement with doctrinal problems in the two problem questions.

Question 1: (a) Gaius' taxonomy was often reported as a great achievement without being analysed or explained. The divisions of things was tracked over but little said about persons or actions and the relations between these categories.

(b) The nature of jurists' authority through state recognition was described, but the importance of the jurists and their identities and roles at various stages of Roman history were rarely touched upon.

(c) Only a fraction of candidates had anything learned or percipient to offer on the nature of *res communes* and their relationship to other property concepts. Many were content to speculate on the role of the law of nature in Roman thought, or missed the point entirely by concentrating on wild animals.

(d) Candidates showed good understanding of the extract on sale and price.

Question 2: (a) The authority of legislation is arguably impossible to analyse without adverting to the history. Many candidates did this well.

(b) *Injuria* was well described, with many candidates aware of rival historical interpretations of the origins and contours of the wider insult remedy.

(c) More candidates wanted to describe the category of the *res nec mancipi* than discuss the persistence of this division in the law of things and the nature of conveyance by delivery.

(d) Levels of fault in delict were rarely analysed, but some candidates were perceptive analysts of the variant policies of the Lex Aquilia.

Question 3: Too many candidates attempted this question without sufficient knowledge of the history of juristic thought and of the codification process. Shallow paraphrase of the student texts was obvious here.

Question 4: Good descriptions of the evolution of formality requirements were offered, but few could describe the point of formalities, or the point of fictionalizing formalities requirements rather than discarding them. Some candidates were very good at penetrating into the anthropology of early stipulation as a unilateral contract in upper class society.

Question 5: The servitude question attracted less than its due share of answers, perhaps as the result of the rather forbidding quotation from Buckland. There was a tendency to offer a lot of information about servitudes, e.g. distinction between rustic and urban rights, but little

evidence of how to link praedial and personal servitudes to theories of ownership. Many candidates thought that absolute ownership connoted the entire possible bundle of rights and were unaware of rival models of ownership.

Question 6: Some excellent answers were given which not only grasped the nature of classical *dominium* and the impact of praetorian reforms, but which analysed aspects of the problem drawing on the law of servitudes and theft as well. Many candidates manipulated the terminology of bonitary ownership without penetrating its meaning. The candidate who thought that *dominium* was 'fairly absolute' deserves mention.

Question 7: Interestingly only a handful of candidates actually described the various Roman contractual forms of sale, hire and so on. Few addressed the precise question concerning why nominate contracts developed as a series of useful default positions, rather than adapting a general contract law to different contexts.

Question 8: Some learned answers were produced, though many candidates wrote at too great a length without structuring their argument. Many candidates relished the opportunity to try out ideas from Criminal Law in a different context.

Question 9: The standard of analysis on acquisition of property was high, with good levels of information and grasp of doctrine. Uncertainties in the law were often identified and alternative solutions proposed. Perhaps deeper levels of understanding of Roman prescription law could be looked for.

Question 10: Some excellent analyses of *injuria* and property delict were offered. A good number of candidates appreciated the significance of the linguistic debate over the period of time for assessing loss. *Injuria* was well appreciated, though some candidates attempted baldly to recycle their gobbet answer here. The only real lack was sustained analysis of causation and fault.

CRIMINAL LAW

17% of candidates achieved a mark of 70 or more in this paper; 61%, 60-69; 18%, 50-59; 4%, 49 or below. Last year, 12% achieved 70 or more; 54%, 60-69; 36%, below 60. A number of hypotheses are possible as to the reason(s) for the apparent rise in standard as

between the two years, but the examiners feel no better qualified than others to select among them.

Although there was thus a good deal to feel pleased about in candidates' performances in this paper, some observations can be offered by way of guidance for the further development of this year's candidates, and for their successors.

The scripts contained evidence leading the examiners to feel a concern that candidates, while fully prepared to talk *about* the law, quite commonly regard it as a mystery not to be penetrated.

Answers to the essay questions were sometimes rather superficial or otherwise disengaged. Candidates sometimes neglected to answer the question (frustratingly, as a number of the essay questions were based on made-up quotations, calculated to be a little off-centre and so to give candidates a good opportunity for critical reaction: candidates who did engage with them often wrote quite excitingly). Candidates sometimes also referred to a collection of sources (primary and secondary), without going beyond dropping their names – not giving much account of what they might say, nor attempting to analyse and criticise it. As an example of both these shortcomings, candidates attempting question 4 might neglect to state the ratio of *Woollin*, to think carefully about the word 'invite', or to reflect on what (if anything) the 'true' meaning of 'intend' might be: preferring instead merely to report the fact that a selection of commentators have held different views as to the significance of 'intend'. This year's problem questions were drafted so as to be fairly tightly focused on not too many real points, in the hope of eliciting reasonably extended reflection on those points, so that skill in this vein should be required for these questions too. This hope was not altogether fulfilled. Candidates often passed by without a murmur difficulties in the law they were applying, such as the variety of different – conflicting? – causation tests apparently relevant in question 9, and the questionable outcomes apparently yielded by *G* and *Jaggard v Dickinson* in question 7. (Conversely, candidates quite commonly spent much time considering issues which, on the given facts, were beyond serious doubt: for example, whether murder was established when Anya 'deliberately shoots Ben dead' in question 6, and when Viktor pushes rocks down over Taj and Ulrike, intending to hurt but foreseeing no serious injury, in question 9.)

It would of course be quite inaccurate to suggest that the ‘typical’ candidate did all this, in a pure form. The examiners do feel it right to highlight the tendency, however, and to urge students to strive to avoid it.

The examiners would encourage undergraduates to regard law as a set of ideas which in principle they should reckon not merely to remark, passively, but to manipulate, actively; to see themselves as playing essentially the same game as the judges. If a tutor or examiner has done his or her work at all well, the questions which undergraduates are asked to address – and this goes for problems as well as essays – should be ones to which the only sensible short answer is ‘I don’t know’. The undergraduate should understand that saying ‘I don’t know’ in this way is entirely healthy. It represents the point of departure to a reflection about *why* he or she doesn’t know: an investigation into, and reflection upon, the considerations pulling in different directions.

The uncertainty might be over what the law does say, or over what it ought to say: in fact ultimately, and especially in the areas we focus on, maybe those questions cannot really be separated (that is another ‘I don’t know’ issue, for later in the course). The reasons for the uncertainty might be points explicit in the institutional sources (eg the authorities’ different causation tests in question 9); or they might be considerations which, while not explicitly reflected in the institutional sources, seem nonetheless to possess relevant ethical moment (eg the arguments for saying that Henri and Ivar should be guilty in question 7). Having identified these reasons for uncertainty, the student must explore them – assess their relationships, foundations, and cogency – before identifying the view which he or she favours, with reasons why. But all this investigating and reflecting needs to be done by the student personally. It is not enough just to record the fact that other people have also noticed the uncertainty, and have investigated and reflected upon it.

In contrast to these remarks about technique, there follow some notes about particular difficulties of knowledge or understanding revealed by answers to some of the individual questions.

Question 6: many candidates seemed unable to work at a detailed level with the defences of necessity and duress of circumstances. In particular, a number of candidates considered the possible relevance of such a defence only in some, not all, parts of the question; and *Re A*,

though quite commonly referred to, was less commonly searched for principles, many candidates merely announcing it (correctly or otherwise, but not something to be lightly assumed) to be a one-off decision with no ratio decidendi.

Question 7: *Jaggard v Dickinson* was not universally known.

Question 8: knowledge of the rules on joint enterprise and conspiracy was sometimes relatively shaky.

Question 9: 'but for' causation was sometimes thought to be *an alternative to* causation as per *Blaue, Cheshire*, etc. (That is, it was said that if D's act had not 'caused' under the latter, but was a 'but for' cause, D was guilty.) Though *Cheshire* was often cited, its message was not always clearly described. A number of candidates thought Viktor's incorrect assumption that Taj and Ulrike would be wearing helmets raised a defence of 'mistake' (entailing reference to *Morgan* etc). Of those who discussed the possibility of manslaughter by gross negligence, several thought the required duty of care arose only where the accused owed the victim the sort of duty that would found liability for omission.

Question 10: the possibility of dealing with these facts in theft (via *Hinks* etc) was sometimes overlooked. (This question and question 5, the two Theft Acts questions, were easily the least popular on the paper. A number of candidates did raise the possibility of theft in question 7(ii), however.)

CONSTITUTIONAL LAW

255 candidates sat this paper and 43 (16%) distinctions were awarded. Good responses were those that addressed the issues raised by the question and displayed a clear understanding of the complexity of the concepts involved. Weaker responses tended to fall into two categories. First, there were those candidates who gave very general answers in which there appeared to be no appreciation of detail, subtlety or nuance. Secondly there were those candidates who responded to questions by largely writing down random (and not always correct) information about a topic rather than addressing the question asked.

Question 1: (Human Rights Act) A popular question with some skilful answers that generally tried to answer the question asked. Good responses were those that unpicked what the quote was saying and explained the major features of the HRA.

Question 2: (Conventions): Some thoughtful answers to this question which contained a good discussion and evaluation of different commentator's views of the status of conventions.

Question 3: (Rule of Law) There were mixed responses to this question. Good answers were those which could explain the three aspects of Dicey's theory clearly and consider its relevance to contemporary constitutional law by citing examples. Generally speaking, however, candidates tended to have a poor understanding of what Dicey's rule of law actually means and leapt into an examination of the formal/substantive debate without explaining sufficiently why this had any relevance to the question.

Question 4: (Separation of Powers) Mixed responses that tended to be descriptive as opposed to evaluative. Weaker answers tended to ignore debates over what the separation of powers may mean and what is its purpose.

Question 5: (Direct Effect of Directives) A very popular question which yielded answers of mixed quality. Poor responses were those that discussed direct effect generally with no focus on directives and/or which displayed no understanding of what direct effect is. In some cases it also appeared that candidates could not distinguish between ECJ decisions and those of English courts. Good responses were those that explained why the ECJ had made the distinction between horizontal and vertical direct effect and could also explain clearly the various cases that blurred the distinction

Question 6: (EU Constitution) Not a popular question and one that yielded a mixed response. Good answers were those that could apply general principles about constitutions to a student's institutional knowledge of the EU.

Question 7: (Parliamentary Privilege) Some good answers in response to this question but a number of candidates discussed parliamentary privilege only in relation to freedom of speech and seemed to have no appreciation that it has other aspects.

Question 8: (Parliamentary Sovereignty and the EU) A very popular question which produced a wide range in the quality of answers. Good answers were those that displayed a solid knowledge of both the case law and the academic debate. A general weakness in responses were that students did not seem to understand or appreciate the weight that should be given to different cases and in some cases it appeared that students thought that *Thoburn* (a Divisional Court decision) was of higher authority than *Factortame* (a House of Lords decision).

Question 9(a): (Ministerial Responsibility) Mixed responses to this question. Weaker answers tended to be highly descriptive of political events and had no discussion of different views of the constitutional significance of the doctrines.

Question 9(b): (Devolution). Not a particularly popular question but one that had some good responses which revealed a solid understanding of the constitutional significance of devolution.

Question 10: (The Royal Prerogative) This question yielded some excellent responses with good candidates discussing the problems in defining the royal prerogative and in making it accountable. Poorer responses tended to only have a very vague understanding of such powers and described the case law without explaining the significance of the case law to the question.

Question 11: (Freedom of expression) This question was an example of where candidates tended to ignore what the question was actually asking. Questions tended to focus on what constraints there were without sufficient consideration to the first half of the quote (the multiplicity of ends which are served by free expression). This was a pity because there was much material for candidates to use and good answers were those that compared a number of areas.

Question 12(a): (Powers of Arrest): Mixed responses to this question with a number of answers failing to sufficiently to address what the question was asking about (general powers of arrest) but rather discussed police discretion more generally.

Question 12(b): (Freedom of Assembly). Competently done with some good answers that thoughtfully evaluated legislation and the common law. Poorer answers tended to simply recite different areas of the law of public order and made no attempt to explain why it was relevant to freedom of assembly.