LAW MODERATIONS – HILARY TERM 2005

MODERATORS' REPORT

PART 1

(A) STATISTICS

1. Numbers and percentages of those passing and failing

	Numbers				Percentages		
	2005	**2004**	**2003**		**2005**	**2004**	**2003**
Candidates entered for 3 papers							
Total	240	255	267				
Pass (without Distinction)	197	220	226		82.1	86.3	84.6
Distinction	39	31	37		16.3	12.2	13.9
Pass in 2 Subjects only	3	2	4		1.3	0.8	1.5
Fails	1	2	0		0.4	0.8	0

The candidate entered for only one paper passed that paper.

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 70 scripts were second marked, principally where they were possible prize winners; where on first marking the marks left the candidate just below a Distinction (one mark of 70 or above and one or more marks of 68 or 69, *or* two or more marks of 68 or 69), or where on the first marking a failing mark was awarded. The vast majority of this Second marking took place in a two day window between the first marks having been entered into the computer and the final marks being generated for the Marks Meeting. Second marking would also have been carried out if the marks on first marking had left any Course 2 candidate with an average mark marginally below the 60 required for automatic continuation on that course – but this year all the Course 2 candidates had average marks above 60 at the end of the first marking process.

Unlike last year scripts first marked at 69 were not *automatically* second marked (ie regardless of whether the result of the re-marking might alter overall classification). Last year's Moderators suggested that such automatic remarking was a misuse of resources and the Examinations Committee agreed with this assessment. We agree that such automatic remarking would have been wasteful – had we remarked all scripts awarded 69 or 59 then a further 28 scripts would have been double-marked without the result of the re-marking altering overall classification.

4. Number of candidates who completed each paper

	2005	**2004**	**2003**	**2002**	**2001**
Roman Law	139	142	176	153	152
Introduction to Law	100	113	91	108	106
Criminal Law	240	255	267	260	257
Constitutional Law	240	255	267	261	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

In each subject, the final paper was set by the relevant Moderator acting in conjunction with other markers.

Past papers were available via Oxams.

PART II

(A) GENERAL OBSERVATIONS

As last year, 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, as last year's report noted, "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." We would add that it was programmed to identify as borderline scripts a different range of scripts from those that the Moderators had agreed were suitable for re-marking.

The work of the faculty office staff involved with the examination was efficient and reliable. On the whole we found the work of the Examination Schools staff to be excellent. However, last year's Moderators noted that there was some, not obviously necessary, delay in getting the scripts out to the markers, and this year there were some similar problems. For instance, one marker was told that there could be no guarantee that scripts from an examination sat on Friday morning would reach his College before Tuesday. A further unexpected feature was the extent to which the invigilators saw it as essential to police very minor deviations from the sub-fusc rules – in one case apparently going beyond the wording of the text.

The proportion of Distinctions was higher than in the three previous years, but not, we think, to an extent requiring investigation. As last year, 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, though a small number managed to cause a large amount of administrative bother by forgetting their candidate numbers.

(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 gender breakdown for Course 1 and Course 2 combined was (the figures are rounded – hence the peculiarity of the sum of percentages of female candidates in 2005 reaching 101):

	2005				**2004**			
	MALES		**FEMALES**		**MALES**		**FEMALES**	
	No	**%**	**No**	**%**	**No**	**%**	**No**	**%**
Distinction	19	18	20	15	17	16	13	9
Pass	87	81	110	83	88	83	133	90
Partial pass	1	1	2	2	-	-	-	-
Fail	0		1	1	1	1	1	1
Total	107		133		106		147	

As last year, these figures show that male candidates were proportionately more successful in achieving Distinctions than female candidates, though the gap is far less pronounced. (A gender analysis of results in years before 2004 is not available). We offer no explanation for this phenomenon.

Last year's Moderators provided separate figures for Course 2 (Law with Law Studies in Europe). Since only 31 of the candidates whom we examined are on course 2 (10 males and 21 females) we doubt whether such statistics as can be generated are worth attention. But, for the benefit of those who disagree, 5 of the 31 candidates on Course 2 obtained distinctions (1 male and 4 females).

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

(C) REPORTS ON INDIVIDUAL PAPERS

INTRODUCTION TO LAW

100 candidates sat this paper. 21 marks of 70 or higher were awarded, and 7 marks of 59 or lower. The examiners were impressed with the overall standard of the scripts and a pleasingly substantial majority of candidates demonstrated both a sound knowledge of the relevant material and a willingness to put forward some critical analysis. In particular, candidates made good use of material discussed in lectures. Whilst the somewhat more centralised nature of the teaching in the subject (co-ordinated lectures; reworked and more reading lists) did lead to many candidates putting forward very similar ideas, it may well also have had a role in ensuring there were very few poor scripts.

Six questions formed a very popular core: Q1 (on the rule of law); Q2 (statutory interpretation); Q3 (precedent); Q6 (theoretical models of the criminal process); Q8 (values of a system of civil procedure); and Q11 (alternative dispute resolution). Of these, Q1 was extremely popular (it featured 21 times in a random sample of 25 scripts). In contrast, answers to Q4(ii) (clashes of Convention rights); Q5 (common law and civil law traditions); Q10 (lawyer's duty to the court) and Q12 (nature of legal processes) appeared only very rarely, if at all.

Question 1: **(Why, if at all, should a society attempt to conform to the rule of law?)** Extremely popular and generally well done, with the best candidates combining discussion of theorists' views with practical examples. Despite the adverse comment in last year's report, some candidates felt the need to discuss natural law and positivism and, in almost all cases, this led to confusion: e.g. the idea that Finnis, as a natural lawyer, espouses a substantive version of the rule of law.

Question 2: **(The only goal of statutory interpretation is the discovery of Parliament's intention):** Very popular and generally well done. By and large, candidates went beyond the usual and unproductive trot through the literal, mischief and golden rules. There were some pleasing examinations of what, if anything, "Parliament's intention" can be taken to mean, with Steyn's observations often featuring in the best answers. Most candidates would have profited from a more thorough examination of specific cases. There was also a widespread

complacency, when discussing *Pepper v Hart*, to state that it allows judges to look at Hansard, without setting out the conditions permitting such references.

Question 3: **(The effectiveness of the doctrine of precedent is undermined by a judge's ability to distinguish a previous decision)** Probably the least popular of the core of 6 very popular questions. The effectiveness of many answers was undermined by candidates' inability to explain and give examples of distinguishing. Too many candidates instead focussed on overruling.

Question 4(i): **(The interpretative obligation under s.3 of the Human Rights Act 1998)** Popular and generally well done. The best answers contained a sensitive discussion of the leading cases, and the very best examined wider questions of the judicial role, such as the boundary between interpretation and law-making.

Question 4(ii): **(Clashes of convention rights)** Very few takers.

Question 5: **(What are the most important lessons the common law and civil law traditions can learn from each other?)** Very few takers.

Question 6: **(What use are theoretical models of the criminal process?)** Very popular and many thorough answers. Predictably enough, many candidates suffered from a tendency to discuss the use of *particular* models of the criminal process (e.g. Packer's) without drawing out lessons about the use of theoretical models *in general*. Some candidates also assumed that theoretical models could only be seen as useful if they accurately described the reality of a country's criminal process.

Question 7: (**Is the use by the police of stop-search powers created by the Police and Criminal Evidence Act 1984 consistent with rule of law values?**) Not very popular. The best answers made good use of empirical research.

Question 8: **(What values should a system of civil procedure aim to uphold?)** Very popular and generally well done. The best candidates were not only aware of the three values proposed by Zuckerman, but also of the tensions between them and their role in informing judicial decisions.

Question 9: **(Judicial case management and severe sanctions)** Not very popular. Some very good answers discussed both the impact of Article 6 of the ECHR and the need to consider the effect of individual breaches of procedural obligations on the system as a whole.

Question 10: **(The overriding duty of a lawyer is to the court, not the client)** Very few takers.

Question 11: **(Can an expansion in the use of alternative methods of resolving disputes be justified?)** Very popular and generally well done. The vast majority of candidates were familiar with a number of different methods of ADR; the best realised that particular types of dispute might be better suited to one of those methods, and that some types of dispute might be better left to the traditional court process. It was pleasing to see a good number of candidates drawing on empirical research to support their answers.

Question 12: **(The nature of legal processes)** Very few takers.

ROMAN LAW

25 candidates (18%) achieved a mark $\geq$ 70.

This year most candidates demonstrated a sound grasp of the basic concepts. The high mean and median standard was matched by a large number of first class scripts, though there were perhaps fewer absolutely top papers than might have been expected. The examiners hoped for more answers that delved into the conceptual and historical foundations of the subject, and this suggests that students are only rarely seeking to deepen their learning by going beyond the basic texts and materials. However, it should be emphasised that most candidates did display a reasonable knowledge of the set texts, rather then regurgitating what the textbooks said. The overall standard of competence in this subject is good news.

Some questions were more popular than others but overall spread was satisfactory.

Question 1: (a) The Gaian division of obligations into contract or delict was sometimes used as a pretext to celebrate all the Roman divisions of law; or to point out the omission of unjust enrichment. Only some answers explored the difficulties of the basic division itself, as where a breach of contract is a wrong.

(b) The Praetorian edict was only rarely described with accuracy and put into its historical context. In particular, the significance of Julian's codification was often ignored. Too many answers gave set-piece analyses of all the sources of law.

(c) Most students could write about usufructs and servitudes as incorporeities; the best answers also broached the issue of how all rights including ownership can be seen as incorporeal.

(d) Dependence of sale on price was described as a Schools conflict, but rarely analysed as an issue of how to identify the division of risks and rights and duties between the parties. A small number of candidate tried to write all they knew about sale, and were appropriately penalised.

Question 2: (a) Three types of answers were given – analysis of acquisition of unowned and abandoned things; analysis of occupation and modes of acquisition generally; and analysis of natural law reasoning. Only a few answers integrated all three.

(b) *Injuria* again was described rather than analysed, and many students lacked information about the nature of the action and its place in obligations.

(c) Few answered the question on custom as a source of law; some covered their lack of information by writing about all the sources of law.

(d) *Culpa* attracted many interesting answers, though only a few could convincingly discuss Roman thought on blame and causality.

Question 3: (i) Justinian's relationship to classical law was attempted by few, and on the whole candidates lacked information on the history if juristic science in the late republic and empire. This was puzzling as the material was lectured on and is covered well in the textbooks.

(ii) The Birksian claim for the primacy of taxonomy attracted many answers, generally agreeing that classification was fundamental to legal rationality. Reasons to support this claim were rarely given, however.

Question 4: This was one of the most popular questions. However not all students managed to give a clear analysis of the fictions informing *stipulatio*, and this made it hard for them to assess the conceptual and procedural qualities of the action.

Question 5: Diosdi's metaphor of *dominium* as the residue of ownership left over from the *res incorporales* was a difficult text to gloss. Those students who attempted the question generally rose to the challenge, writing learned and insightful essays. Only a very few could enter the intricacies of the procedural history as charted by Rodger.

Question 6: The contrast of ownership with possession was discussed by many candidates and overall was done well. Some chose to concentrate on *occupatio* rather than bonitary ownership, which made it difficult to award high grades in those cases. Some candidates were at sea and clearly had not spent the minimal time necessary to understand the relationship between the possessory interdicts, prescription as a cure for imperfect titles, and vindication.

Question 7: The nominate contracts question was popular. Many candidates failed to produce a clear and accurate schema of the law, and few actually answered the direct question, eg by looking at consent or voluntary deposit or receipt as bases of obligation. A depressing number set out the fourfold classification, without seeking to discern the common elements of the contracts.

Question 8: The question on theft was popular, and generally answered well with much detail.

Question 9: The problem question on acquisition summoned many excellent answers. Candidates were inventive at finding legal issues emerging from the story-line, and the only recurrent weakness was a poor grasp of the details of the prescription rules.

Question 10: Again many excellent, inventive answers to the question on property damage. The recurrent weakness was a shying away from engagement with fault and causation, a lack observed in last year's paper also.

CRIMINAL LAW

240 candidates sat this paper, 52 marks of 70 or higher were awarded, and 26 marks of 59 or lower, including one paper which failed. Generally the knowledge of the law was good. Most candidates knew the essential elements of the offences or defences. What was often lacking was an ability to use this knowledge to analyse the issues raised. In problem questions, in particular, candidates tended to define the relevant offence and point to difficulties which the prosecution might face, but then stopped. Few candidates went on to explore the real legal issues thrown up by the problem questions or to consider how a court might resolve them. Similarly in essay questions candidates were generally good at setting out the key cases, but less good at considering the wider theoretical issues and tensions which the law has to resolve.

Question 1: This was a fairly popular question. Most candidates focussed on *R v G*, although a few discussed issues surrounding negligence or strict liability. The best answers raised the law on intoxication and other forms of potentially blameworthy inadvertence.

Question 2: This question had some very good answers and some weaker one. The best answers discussed the recent caselaw on appropriation and the disputes surrounding those decisions. Weaker answer simply set out the basic law on the whole of theft.

Question 3: This was a popular answer. Understandably most answers focussed on the law on provocation. Good answers were able to discuss well the Law Commission's work in this area.

Question 4: This was not a popular question. Strong candidates used the question to discuss the law on attempt and/or causation. The best were able to discuss some of the theoretical writings on the issue of "moral luck". A surprising number of candidates treated the question as one about insanity and automatism.

Question 5: This also was not a particularly popular question. Strong answers were able to discuss some of the recent case law on the issue. Very few were able to discuss the issues surrounding criminalization in this area.

Question 6: This was a very popular question. Most candidates were able to refer to the Sexual Offences Act 2003, although there appeared to be some confusion over the status of earlier case law with some candidates citing it as if it were still binding. Although good candidates were able to point to ambiguities in the wording of the statute few were able to get very far in suggesting arguments that may influence the courts in its interpretation.

Question 7. This was a fairly popular question. Predictably candidates struggled with issues surrounding the *mens rea* of accessories. However, a few candidates showed a most impressive grasp of the case law.

Question 8. This was a difficult question which relatively few takers. Only the very best candidates were able to appreciate the impossibility issues raised.

Question 9. This was a very popular question. Unfortunately many candidates failed to spot the self-defence/prevention of crime issues raised. It was popular to write at length about duress or provocation.

Question 10. This was also a very popular question and was generally well answered. The mens rea for attempt was not known by a surprising number of candidates. The consent issues were generally dealt with well.

CONSTITUTIONAL LAW

240 candidates sat this paper; 34 (14%) marks of 70 or higher were awarded, and 22 (9%) marks of 59 or lower. Whilst the first class papers were very good, the majority of papers tended to present rather tired and predictable sequences of points, often only attempting in a rather superficial way to relate the material to the questions asked. The questions on general constitutional features such as Parliamentary Sovereignty, separation of powers and the Rule of Law were far more popular than those relating to police powers, free expression and public protest.

Question 1: **(Why is it interesting to ask if the UK has a Constitution?)** Quite a popular question, and one where good candidates tended to distinguish themselves. Weaker candidates recycled general essays on whether the UK has a Constitution.

Question 2: **(Sovereignty of Parliament – the dominant feature of our political institutions?):** A very popular question. Reflection on how to assess "dominance" might, or what "political institutions" are, was rare. General answers to some question like "how far is the Westminster Parliament able to pass whatever legislation it likes?" were common.

Question 3: **(Convention not to pass tyrannical legislation?)** One of the less popular questions, but many of those who attempted it made interesting points about the difficulties involved in identifying negative and vague conventions.

Question 4: **(Constitutional implications of the direct effect of EC Law)** Quite popular, but often stimulating answers which discussed the constitutional implications of EC membership generally or which presented the law relating to direct effect (not always accurately!) as a saga without paying much attention to the constitutional implications.

Question 5: **(HRA and separation of powers)** Quite popular. Many answers expressed the opinion that a judicial power to strike down legislation would augment a checks-and-balances version of separation of powers but that the interpretative obligation in s. 3 tends to undermine separation of powers. Only the very good candidates seemed to be aware of the relevance of Article 6.

Question 6: **(Parliament's contribution to holding the government to account)** Not a very popular question and one that yielded a mixed response. Weaker answers tended to confuse Select Committees and Standing Committees. A few answers treated the question as about legislative process.

Question 7: **(Departures from the Rule of Law)** A very popular question. The best answers were good. But many candidates decided to answer the question on last year's paper – "Does Dicey's concept of the rule of law have any relevance to contemporary United Kingdom constitutional law?" – instead. Many candidates were aware that T.R.S. Allan had expressed views relating to the Rule of Law, but few could explain what those views were.

Question 8: (**Prerogative**) Not a very popular question – and, with the benefit of hindsight, not a good question! Many of those who chose to answer it provided interesting assessments of the future of the prerogative, but some delivered very general essays on the topic.

Question 9(a): **(Police powers of stop and search)** Attempted by only a handful of candidates. Some answers were very weak. More than one seemed unaware of the importance of "reasonable suspicion" to the legality of a search under s. 1 of PACE and very few answers referred to powers to search without "reasonable suspicion".

Question 9(b): **(Police powers in anticipation of a breach of the peace)** Attempted by only a handful of candidates. Many answers were descriptive rather than evaluative.

Question 10: **(Institutional balance in the European Community)** Attempted by too few candidates for any comment to be made on regularities in their answers.

Question 11(a): **(Obscenity)** Not a popular question. Attempted by some candidates without a sufficient knowledge of the law. Many answers concentrated on problems with the relationship between statutory and common law offences. Some good answers chose to separate the claims being made in the quotation used by the question.

Question 11(b): **(Religious sensitivities)** Not a popular question. Weaker answers tended to contain nothing beyond a rant against blasphemy law for only protecting Christianity.

Question 12: **(Public protest and HRA 1998).** Not a popular question. Weaker answers seemed to have little sense of the range of legal issues a protestor might face (eg Where can I march? Where can I meet? What can I say and do?). Candidates also did not seem to have much knowledge of the different ways the HRA can help the protester. In particular, there was practically no discussion of the liability created by the HRA.