LAW MODERATIONS – HILARY TERM 2006

MODERATORS' REPORT

PART 1

(A) STATISTICS

1. Numbers and percentages of those passing and failing

	Numbers				Percentages		
	2006	**2005**	**2004**		**2006**	**2005**	**2004**
Candidates entered for 3 papers							
Total	233	240	255				
Pass (without Distinction)	203	197	220		88.6	82.1	86.3
Distinction	26	39	31		11.4	16.3	12.2
Pass in 2 Subjects only	4	3	2		1.7	1.3	0.8
Fails	0	1	2		0	0.4	0.8

2. Number of vivas

Vivas are not held in this examination.

3.   Number of scripts double or treble marked

Scripts in this examination are not automatically double marked, but around   80 scripts were second marked. Those scripts were those 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 67, 68 or 69, *or* two or more marks of 67, 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.

4.   Number of candidates who completed each paper

	2006	2005	2004	2003	2002	2001
Roman Law	143	139	142	176	153	152
Introduction to Law	90	100	113	91	108	106
Criminal Law	233	240	255	267	260	257
Constitutional Law	233	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 with previous years 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.

The support from the faculty office staff, and in particular of Julie Bass, was outstanding and did much to make the process run smoothly. The computer system worked at a basic level, although it could not be used for sophisticated analysis of any kind. For example, it could not provide an analysis of marks by gender.

There were difficulties with the late delivery of scripts from the Examinations Schools. For the Friday examination Julie Bass and Ann Kennedy distributed the scripts by hand and this prevented lengthy delays.

The proportion of Distinctions were lower than previous years. The general view among the markers was that the level of scripts at the very top end was unusually high. Several very strong scripts vying for the top prizes. However, generally there were fewer scripts of a distinction level scripts. As in previous years several of the prize winners did not obtain an overall distinction.

Notably the marks of those on course II were not as strong as might be expected given the competition for places on it. Three candidates on course II failed to get the 60 required to continue on the course.

Medical certificates, dyslexia/dyspraxia and special cases

10 medical certificates were forwarded to the Moderators. In addition, 9 candidates were certified as dyslexic or dyspraxic. 4 candidates wrote some or all of their papers in college and a further 11 candidates wrote some or all of their papers in a special room in the Examination Schools. 1 candidate had special arrangements in the examination room.

The following additional specific details have been requested by the Proctors. In Law Moderations 5 medical certificates and similar documents (from 2.15 % of candidates) were forwarded to the Moderators under sections 11.8 – 11.9 of the EPSC's General Regulations

for the Conduct of University Regulations (see *Examination Regulations* 2005, page 34), and in all 5 cases the candidate's final result was not materially affected.

(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):

	2006				2005				2004			
	MALES		FEMALES		MALES		FEMALES		MALES		FEMALES	
	No	%	No	%	No	%	No	%	No	%	No	%
Distinction	10	11	16	12	19	18	20	15	17	16	13	9
Pass	81	86	118	87	87	81	110	83	88	83	133	90
Partial Pass	3	3	1	1	1	1	2	2	-	-	-	-
Fail	0		0		0		1	1	1	1	1	1
Total	94		135		107		133		106		147	

For the first time since these figures have been taken female candidate were very slightly more successful than male candidate in achieving distinctions. The Moderators were not asked to produce an ethnicity analysis of the results and do not have the data to do so.

CRIMINAL LAW

229 candidates sat this paper, 43 marks of 70 or higher were awarded, and 3 papers failed.

There were several outstanding scripts this year, showing a most impressive knowledge of both the case law and theoretical issues. There were, however, fewer distinction level scripts than in previous years. Too many candidates stated the law reasonably well, but failed to consider the real complexities raised. In a problem question simply to say (as many candidates did) "D may be guilty of crime X. To establish the elements of crime X is it necessary to show [definition of offence]. D is therefore guilty/not guilty" is certainly not enough to reach a distinction level mark. It is necessary to look at the problems the prosecution might face and debate the legal issues raised. Similarly in an essay question is normally necessary to do more than simply recite the leading cases in order to get a good mark.

Question 1.

This was a popular question. The question on the Law Commission's proposals was generally well answered. The alternative question on the meaning of intention and the "gbh rule" in murder was slightly less well done, with few candidates demonstrating an awareness of the theoretical issues.

Question 2.

Very few candidates answered this question. On the attempts question many of those who did either focussed on problems surrounding the *mens rea* or the *actus reus*.

Question 3

This was not a particularly popular question, but those who did answer it produced some high quality answers.

Question 4

This was not a popular problem, although where it was attempted students were generally better at stating what the law was than discussing the theoretical issues.

Question 5

This was a fairly popular question. Weaker candidates just summarised what had been decided in *Hinks* and *Gomez*. Only the best candidates considered what the "harm" in theft really was.

Question 6

This was a very popular question. Most candidates were able to deal with the current state of law. The intoxication issue troubled many candidates. As the question asked only about provocation that may have been unnecessary. The distinction drawn in *Camplin* between factors affecting the gravity of the provocation and factors affecting the level of self-control was not understood by quite a number of candidates.

Question 7

This was a popular question. Candidates were generally able to cover some of the issues, raised but few dealt with them all. Some failed to properly discuss the necessity/duress issues in part (i), while others did discuss the defences issues but omitted to consider which offences may have been committed. In part (ii) many candidates discussed whether or not the case could be said to be a sport or dangerous exhibition (thereby enabling consent to be a defence), but few considered these possibilities in depth.

Question 8

This was a fairly popular question, but was not done particularly well. Few candidates used the relevant case law well and there was a great deal of confusion.

Question 9

Many candidates answered this question. It was generally answered satisfactorily, but not done particularly well. Few candidates analysed the relevant statutory materials in detail. Indeed quite a number seemed to think it unnecessary to refer specifically to the statute at all. Also a surprising number of candidates assumed that the law on intoxication and dependancy would apply to cases where the issue is the drunken consent of the victim.

Question 10

This was not a popular question. The deception issues were generally not well dealt with, while most candidates had a good knowledge of the law on dishonesty and appropriation.

CONSTITUTIONAL LAW

Overall, the standard of papers was reasonable, with some impressive papers in the first class range, which demonstrated critical reflection upon the nature and purposes of constitutional law, as well as its application to specific issues. The majority of papers, however, indicated that candidates had a solid grasp of the material but often failed to apply that material directly and concisely to the question asked. The most popular questions concerned parliamentary sovereignty, the separation of powers, the rule of law and the application of EC law.

Quesiton 1. **(ministerial responsibility as a masking device)** Not a very popular question. More interesting essays discussed the relationship between Parliament and the Executive and the problem of executive dominance, as well as comparing ministerial responsibility to other potential masking devices within the UK constitution and reflecting upon the desirability of such masking devices. Weaker answers focused almost solely on either collective or

individual ministerial responsibility, with little, if any, assessment of how they may operate as a masking device.

Question 2. (**British constitution: object of reference or rotting monstrosity?**) Very few candidates answered this question. Some candidates attempted to squeeze a general essay on 'what is the British constitution comprised of?' with more or less success, depending on the extent to which specific reform suggestions were discussed. Better answers provided critical reflection upon the nature and purposes of a constitution, explaining how the UK constitution measured up to these standards.

Question 3 (**Are Acts passed pursuant to the Parliament Acts delegated legislation?**) A handful of candidates answered this question, and to good effect. Many candidates offered a close and careful reference to the recent House of Lords case (*Jackson*) concerning the status of legislation passed pursuant to the Parliament Acts, offering a critical reflection upon the definition of delegated legislation. Weaker answers merely discussed the facts and conclusions of the case.

Question 4 (**the rule of law enforcing minimum standards of fairness**). A very popular question with responses of highly varied quality. A number of more pedestrian answers simply outlined notions of a formal conception of the rule of law which was superficially contrasted with a more substantive conception. Better answers critically reflected upon how the rule of law could provide for minimal standards of fairness, illustrating their conclusion with reference to specific cases or features of the Constitution.

Question 5 **(Why disagreement about the separation of powers in Britain?)** Another very popular question with responses of varying quality. Poor answers provided an account of the principle of the separation of powers and whether this was achieved in the UK constitution. The better responses explored uncertainty in the doctrine itself, and in the contours and content of the British constitution.

Question 6 (**Parliamentary sovereignty and EC law and/or HRA and/or Scottish devolution)** An extremely popular question. Answers were generally solid, although there was a disappointing reluctance to engage with competing theories of parliamentary sovereignty at more than a superficial level. There were, however, a few outstanding answers to this question. Outstanding answers to question 6(a) assessed the relative merits of different theories of parliamentary sovereignty and their explanations of whether Parliament had surrendered its right to legislate contrary to the provisions of directly effective EC law. Outstanding answers to question 6(b) were able to provide an excellent analysis of not only how entry to the EU, but also how either the enactment of the Human Rights Act or devolution challenged the classical account of parliamentary legislative supremacy and reflect upon the consequences of this pressure for sovereignty and the UK constitution.

Question 7 **(Devolution settlements and constitutional principles)** Few candidates answered this questions. Although answers were generally solid, few candidates went beyond offering an account of the divergences between different devolution settlements as evidence for a lack of a clear constitutional model of devolution. Better candidates were able to provide a critical reflection upon whether constitutional principles could provide for a clearer model of devolution, or whether there were other explanations for the lack of a clear constitutional model of devolution.

Question 8 (**Has the Human Rights Act 1998 conferred excessive power on British judges?**) A popular question, generally well-answered. Most answers focused on sections 3 and 4 of the HRA, explaining, historically, whether these sections had conferred new and larger powers to the judiciairy. The better answers considered the HRA in light of principles of constitutionalism and the rule of law, reflecting upon the extent to which the judiciary should have the power to protect human rights within the setting of the UK constitution.

Question 9 (**Can legislation prohibiting racist hate speech be constitutionally justified?**) Relatively unpopular. A few weak answers with relatively thin content, but some impressive answers which explored justifications for freedom of expression and the challenges which racial hate speech presents for a democratic state.

Question 10 (**Police powers**). Only a handful of candidates answered this question. Some provided thoughtful discussion of detailed statutory provisions, others were unfocused and unstructured. Better answers were able to provide a clear critical assessment of the law, focusing on common themes as well as specific criticisms of particular statutory provisions.

Question 11 (**How satisfactory is the judiciary's power to review the exercise of prerogative powers?**). This question was less popular, with mixed responses. Weaker candidates offered a chronologically account of important judicial review cases. Stronger candidates considered the need for executive discretion and the need to ensure that executive powers were not abused, and how this tension was approached in case law.

Question 12 **(capacity of EC directives to generate legal rights and obligations).** A very popular question which was generally well-answered. A number of candidates argued that the distinction between horizontal and vertical effect was rapidly becoming redundant. The better answers were also able to recognise the inherent tension in this area between the interests of the Community, individuals and the Member States, theorising about how these tensions should be resolved.

INTRODUCTION TO LAW

The quality of the scripts overall was very sound, and the great majority of candidates demonstrated a good deal of knowledge, coupled with the ability (to be expected at this stage) to strike the right balance between exposition and analysis in their essays. Notwithstanding the wide variety of combinations of questions chosen by candidates, almost all scripts attested to the success of the course to live up to its name, Introduction to Law: depending on the particular combination chosen, candidates were able to show a good grasp of the fundamental principles of legal reasoning, familiarity with the structure and the debate over the aims of the criminal process, knowledge of some essential concepts of evidence and procedure and their relationship to areas of substantive law, the ability to compare and contrast the Common Law and the Civil Law traditions, a critical grasp of the merits and demerits of alternative methods of dispute resolution, and an understanding of the normative tensions encapsulated within the concept of 'lawyers' ethics'. Especially when it came to candidates' treatment of issues relating to legal reasoning (the structuring logic of the doctrine of precedent, the nature and scope of judicial discretion) and to principles of evidence and procedures, the Moderators were satisfied that the knowledge displayed by the great majority of candidates will serve them well in the remainder of their legal education: the former by way of informing and nuancing their grasp of case law and judicial reasoning,

the latter by heightening their awareness of the interplay between substance and procedure, truth and evidence in the working of the legal system.

ROMAN LAW

There were 140 candidates; 27 (approx 19%) achieved a mark of   70.

The examiners were impressed by the quality of the candidates in this cohort. First-class candidates not only demonstrated detailed knowledge of the historical complexities of the subject but also engaged in sophisticated analysis of the fundamental concepts of Roman private law. There were several scripts of exceptional quality, such that the examiners had real difficulty in choosing the prize-winner.

Comments on individual questions are set out below.

Question 1

1(a) Marks awarded for this question were oddly polarised. On the one hand, a relatively large proportion of candidates wrote first-class answers: these candidates were able to contrast the classical and post-classical rules regarding the *bona fide* possessor's entitlement to fruits and discuss possible justifications for these rules. On the other hand, a number of candidates treated this text as the pretext for a discussion of the *actio Publiciana*, which was irrelevant.

1(b) This was not a popular question. Those who did attempt it generally gave excellent answers, showing good historical sense and awareness of the parallel text in Gaius's Institutes.

1(c) Again, a relatively unpopular question, well answered by those who did attempt it. First-class answers reflected detailed knowledge of the different standards of care in the four real contracts; some also compared Justinian's taxonomy of the real contracts with that of Gaius, or criticised Justinian's reasoning in this passage.

1(d) First-class answers concentrated on the points made in the text itself, i.e. the restriction of the scope of this chapter to the killing (as opposed to wounding) of slaves and certain animals, as well as the issues surrounding the assessment of damages under this chapter. Weaker candidates treated this question as an opportunity to comment generally on any of the issues surround Aquilian liability.

Question 2

2(a) Candidates generally showed good understanding of the various meanings of the terms *ius civile* and *ius gentium* and in many cases were able to illustrate with examples the distinctions between the concepts denoted by these terms. Weaker candidates tended to confuse the different meanings of the terms.

2(b) This was a very popular question. Strong answers focused on the subject-matter and significance of this particular text, while the best answers explicitly contrasted the Gaius text with the parallel text in Justinian's Institutes. On the other hand, many candidates treated the question as an opportunity to write rather general essays on the degeneration of the formal *stipulatio*. Some candidates discussed the *stricti iuris* character of *stipulatio,* its role as a gap-filling mechanism etc, issues not raised by this text.

2(c) This question required specific knowledge of the doctrine of *atrox iniuria*, yet many candidates treated it as the occasion for a general essay on the delict of *iniuria*. Only a minority were able to discuss the real significance of *atrox iniuria*, i.e. the procedural rules set out in G.3.224. Some candidates drew from this doctrine wider conclusions about the hierarchical nature of Roman society, demonstrating impressive insight into the social context of private law.

2(d) Most candidates were able to give a good account of the nature and significance of juristic *interpretatio* in general terms. However, only a few attempted to grapple with the difficulties involved in treating juristic writing as a source of law, or to explain what the text means by 'persons permitted by the emperor to give answers to questions of law'.

Question 3

Relatively few candidates attempted this question. A substantial proportion were able to give a good account of the Institutional structure, making the point that the taxonomy of private law adopted by Justinian in his Institutes differs in only a few respects from that of Gaius. However, only a worryingly small number of candidates understood that the Digest itself does not follow the Institutional structure.

Question 4

This question was one of the most popular of questions 3–10. Overall it was reasonably well answered, with many scripts including detailed accounts of the praedial and personal servitudes and some demonstrating also good understanding of the wider theoretical issues. That said, there was a tendency to answer the question in two unrelated halves, i.e. candidates began with an account of the servitudes and then moved on abruptly to discuss the

absolute and indivisible nature of ownership without attempting to integrate the two points. A significant proportion of candidates seemed to have confused personal servitudes with rights *in personam*. A few weaker candidates discussed in detail the *actio Publiciana,* which was irrelevant.

Question 5

This was the most popular question. Generally it was well answered: most candidates were able to give accurate accounts of the *actio Publiciana*, although candidates did not achieve the highest marks unless they discussed also the protection of possession by means of interdicts and the question of which holders were accorded interdictal possession in classical law. Some candidates drew illuminating comparisons between possession and ownership; less satisfactory answers contained detailed discussion of the absolute nature of ownership without any such comparison to justify it. Some otherwise strong candidates thought that the acquisition of possession 'by force, secretly or by grant of will' always **absolutely** precluded the acquirer from relying on the possessory interdicts.

Question 6

This question attracted one of the highest proportions of first-class answers. Most candidates were able to give an accurate account of the system of nominate contracts and the gaps in that system, while many discussed also the role of *stipulatio* and the *actio praescriptis verbis* as gap-filling mechanisms. A few wrote intelligent defences of the system of nominate contract. Some weaker candidates discussed only the degeneration of the verbal *stipulatio,* which led to overlap with Question 2(b).

Question 7

This question attracted only a very few answers, but several of those were first class.

Question 8

Another popular question. Many candidates found original ways to tackle the question posed, but there was a marked tendency to write purely descriptive essays. Moreover, many candidates discussed either only *contrectatio* or the *furtum manifestum/nec manifestum* distinction and search. Those who elected to discuss *contrectatio* tended to treat this issue rather superficially: their accounts generally lacked both relevant detail and analysis. Accounts of the search remedies tended to be inaccurate.

Question 9

Also a relatively popular question. Most candidates were able to identify and discuss all the main issues raised, and discussion of that portion of the problem dealing with natural modes was generally of a high standard. However, the examiners identified the following principal weaknesses. First, many candidates seemed fundamentally ignorant of the requirements of *usucapio*. Secondly, there was a significant tendency to waste time discussing theft, which was only peripherally relevant. Third, some candidates had difficulty applying their knowledge of the possessory interdicts to the facts of the problem. Finally, almost no-one discussed *traditio longa manu* (raised by the attempted conveyance of the wagon by B to C).

Question 10

Although there were some strong answers here, overall there was a tendency towards superficiality: candidates did not appear to know enough about delict to analyse the problem in sufficient detail. In particular, answers appeared to be rather unbalanced as between the

lex Aquilia and *iniuria*. Regarding the *lex Aquilia*, although the issue of the calculation of damages was generally well handled, candidates tended to avoid discussion of the indirect causation of damage. On the other hand, a number of candidates appeared to be ignorant of the requirement of intention in *iniuria*, and many touched only rather briefly on the issues raised in the final paragraph. Some candidates applied methods of analysis and concepts culled from English criminal law, with unhappy results.