LAW MODERATIONS – HILARY TERM 2008

MODERATORS' REPORT

PART 1

(A) STATISTICS

1. Numbers and percentages of those passing and failing

	Numbers				Percentages		
	2008	**2007**	**2006**		**2008**	**2007**	**2006**
Candidates entered for 3 papers							
Total	223	232	233				
Pass (without Distinction)	195	203	203		86.9	87.5	88.6
Distinction	28	29	26		12.6	12.5	11.4
Pass in 1 or 2 Subjects only	1	4	3		0.4	1.7	1.7
Fails	0	0	1		0	0	0.4

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. Scripts were double marked to decide prize winners; or where first marking 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 the first marker had given a failing grade; or where 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

223 candidates sat the three papers.

(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

The process continues to benefit from the exemplary support and expertise of Julie Bass, the Law Faculty Examinations Officer, with the able assistance of Ann Kennedy. Their professionalism ensured the smooth running of the entire process. Moreover, it is pleasing to record that the invigilators and support staff at Examinations Schools continued to perform an integral role in supporting the work of the Faculty. The Moderators considered that candidates needed to be reminded of their own responsibilities in the public examination process. In particular, *it is the candidate's responsibility* to be appraised of the rubric for the relevant examination paper, and to comply with the rules and protocols governing conduct in Examination Schools during the examination period.

The proportion of Distinctions was slightly higher than last year. The general view among the Moderators was that the scripts at the very top end were of exceptional quality. The Moderators were also struck by the relatively small proportion of scripts achieving marks below 60 in comparison with previous years. Overall, the Moderators considered that this year's results were indicative of a well taught and well prepared cohort.

Medical certificates and special cases

Six candidates had special arrangements for the sitting of their examinations. Fourteen medical certificates 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* 2007, page 34). In only one of these cases was the candidate's final result materially affected.

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

The computer programme now permits the automatic generation of a gender breakdown. The gender breakdown for Course 1 and Course 2 combined was (the figures are rounded):

	2008				2007				2006			
	MALES		FEMALES		MALES		FEMALES		MALES		FEMALES	
	No	%	No	%	No	%	No	%	No	%	No	%
Distinction	19	19	9	7	16	16	13	10	10	11	16	12
Pass	79	79	116	93	83	84	120	90	81	86	118	87
Partial Pass	1	1	0	0	0	0	0	0	3	3	1	1
Fail	0	0	0	0	0	0	0	0	0		0	
Total	99		125		94		135		94		135	

The Moderators were not asked to produce an ethnicity analysis of the results and do not have the data to do so.

Roman Introduction to Private Law

Candidates performed well in the examination. Only a very small number of candidates (including one who answered two of the gobbet questions, instead of the one required) failed to follow the rubric, and they were penalised in accordance with the clearly set out rules.

Very few candidates performed at less than 2.1. level; most recognised the central issues in the questions and dealt with them to a greater or lesser level of competence. A good number of candidates obtained marks of 70 or over, and amongst those were a small number of candidates whose intellectual sophistication and detailed knowledge and understanding of the material was extremely impressive, especially given that they have only studied law for two terms.

This is the second year in which the revised syllabus has been examined. The syllabus places greater emphasis on the influence of Roman Law after the time of Justinian; and the faculty reading list directs students to a catholic range of sources on the subject. Very few candidates, however, chose to answer the question on the influence of the Institutes (though those that did the question answered it well); moreover, some candidates referred to the modern civil law in some of their other answers.

There were two problem questions this year; both were popular, and candidates did not appear to be afraid to tackle the ranges of issues that the problems raised.

On the gobbet questions (QQ 1 and 2), however, too many candidates tended to write all they knew about the general issue, without sufficiently attempting to explain the particular significance of the passage set. This was particularly noticeable in QQ 1(b) and 1(d).

Detailed comments on the individual questions are as follows:

Q 1 (a) [Specificatio]. Popular and well done; the best candidates placed the text in context. Some queried whether the rule was necessary (given the existence of confusion) and made comparisons with more modern civil law.

1(b) [Civil law distinguished from the law of nations]. Not that popular; most candidates were able to state (with examples) the distinction(s) between the two ideas; some referred to Justinian's reference to natural law. There was, however a tendency to generality [see above].

1(c) [Mandate] Not often answered; but those who did understood how the contract worked.

1(d) [injuria through children and married women]. Very popular, and virtually every candidate was able to write about injuria in general, and apply the rules to injuria through married women and children. Some good candidates wrote also about what this indicated about the view of Roman society towards married women and children; and/or wrote about (by way of comparison injuria to slaves.

Q 2 (a) [Obligation] Reasonably popular; and reasonably well done.

2(b) [Partnership] Not often answered, but those who did answer understood not only how partnership operated, but explained the text itself.

2(c) [Rapina] Quite popular; and mostly done well, with candidates understanding the origin and development of the delict.

2(d) [Pictura/scriptura]. Popular, and well done; the best candidates offered a range of suggestions as to how the two categories could be reconciled.

Q 3 [Institutional structure]. As commented above, very few takers, but those who did attempt the question generally provided good or very good answers

Q 4 [Ownership and formalities]. A popular question, usually well done. There were, however, two weaknesses: first, candidates did not always explain what a formality was, and why formalities might be good or bad things; second, there was more to the importance of formalities in practice that the Actio Publiciana, and that the role of writing and the limited scope of res mancipi deserved some consideration. However, the general standard of the answers was good, with the best answers being impressive.

Q 5 [Contracts and stipulatio]. Although some candidates used the opportunity either to write about contracts generally, or all they knew about stipulation, the majority tried to answer the question set, and, in so doing, made comments both on the development of contracts, and how stipulatio fitted into that.

Q5 [Theft] This wide-ranging (and popular) question attracted some excellent answers, showing wide-ranging knowledge of the problems of the Roman law of theft and (in some cases) with detailed reference to examples from the Digest and showing knowledge of the academic controversies. Useful comparisons with English law were often made.

Q 7 [Praetor] Again, this was popular. Candidates answered the question set (although not always defining with sufficient clarity what was meant by the terms "judicial" and "legislative") and (almost invariably with examples) explained how the various aspects of the praetors' role related to the issue. Candidates also seemed well aware of the relevant historical developments.

Q 8 [Servitudes]. This was not very popular, and some answers contained little more than an account (competent though this almost invariably was) of personal and praedial servitudes. However, a goodly proportion of those who answered the question did realise that personal servitudes might not fit into property law as easily as did praedial servitudes. A surprising number of scripts contained the view that personal servitudes could not be over land.

Q 9 [Contracts problems]. Candidates usually spotted the main points, although the more sophisticated issues were not always considered. In (a) had the jars been segregated? Did it matter? In (b) did it matter that the money payment was very small, perhaps only a makeweight? In (c) some candidates seemed unaware that Gaius had actually dealt with this particular example.

Q 10 [Lex Aquilia problem]. This contained a range of issues, and most were well analysed, often by reference to examples from the Institutes and (sometimes) the Digest. The issues of causation were, perhaps unsurprisingly, not always well handled, but even the weaker answers showed that candidates had a serious understanding of the issues involved.

Criminal Law

This year candidates generally performed well in criminal law. In particular, it was encouraging that the proportion of candidates achieving marks below 60 on this paper was significantly lower than last year. As such, most candidates displayed, at the very least, a sound understanding of the relevant legal principles and applied them appropriately in the context of specific questions. In addition, a good proportion of the cohort (14 percent) achieved marks of 70 or above. The very best of these scripts displayed a sophisticated and subtle understanding of legal authorities, locating this within a perceptive analysis of relevant secondary literature. Problem questions were particularly popular this year, with a significant number of candidates attempting no essay questions whatsoever.

While the diminishing proportion of 2.2 scripts is an encouraging sign, the 2.1 category encapsulates a wide range in terms of quality. A significant proportion of this latter grouping was clustered in the 60-65 range. These scripts, while very competent, were lacking in serious penetrating analysis. Having demonstrably mastered the fundamentals of the subject, candidates are encouraged to explore more precisely the subtleties of legal doctrine, rather than 'playing safe' and engaging in bland and categorical description of relevant legal rules. Criminal law, like the lives it regulates, is rarely so straightforward.

Q.1 This question was generally well-answered, although some candidates mistakenly focused on automatism rather than principles of causal responsibility. The best candidates explored the difficulties and tensions between causation and the doctrine of complicity, and issues surrounding the doctrine of concurrent causation.

Q.2 This was a relatively popular essay question. Some candidates were less than clear about the inter-relationship between direct and indirect intention; better candidates engaged with the debates surrounding the 'moral elbow room' dimension of *Woollin*. In respect of recklessness, better candidates were prepared to engage with relevant issues such as the notion of 'practical indifference' as a moralized alternative to the advertence/inadvertence dichotomy.

Q.3 This was a challenging question, and many of those who answered it treated it as an invitation to describe the law on omissions liability and the merits and demerits of Ashworth's 'social responsibility' position. Better candidates attempted to defend a conception of the rule of law, making imaginative use of their learning in constitutional law, to analyse the legal framework.

Q.4 Although some candidates confused correspondence with contemporaneity, this question was generally well answered by candidates who attempted it.

Q. 5 (a) This was not a popular choice for candidates, but those who attempted the question tended towards offering a superficial description of the law without really exploring what 'justice for defendants' might mean in doctrinal terms. The second part of the question, focusing on reforms, tended to be eclipsed by a keenness to provide an exhaustive description of the law concerning intoxication

Q 5 (b) This was less popular still, but it attracted some answers of excellent quality. The very best answers engaged precisely with the quotation, exploring the nature of necessity in comparison with other cognate defences.

Q.6 This was a popular question and it was generally well-answered. A surprising number of candidates equated the infliction of gbh with an intention to inflict it. However, many candidates did a fine job of exploring the multiple ambiguities in the doctrine of joint unlawful enterprise, and the intersection between this doctrine and the defences of withdrawal/duress.

Q.7 This was an extremely popular question. Candidates generally navigated their way around the SOA 2003 provisions well enough. However, some candidates *still* apply *Morgan* to the issue of *mens rea* for rape, which discloses unforgivably sloppy preparation. Also, while most candidates were prepared to discuss the relevance of *Bree,* this often went no further than a bland invocation of the mantra, 'a drunken consent is still a consent'. This is not sufficient to dispose of the many difficulties inherent in the relationship between voluntary intoxication and capacity (not freedom!) to consent.

Q.8 Very few takers for this problem question, and it was generally not well-answered.

Q.9 This was a popular question, and it was generally well-answered.

Q.10 Once again, this was a popular question. Rather surprisingly, very few candidates understood the significance of a *complete* loss of self-control where automatism is concerned. Generally, though, most candidates knew their way around *Holley* and *James* in respect of the provocation issues. Better candidates engaged with the issue of voluntary intoxication, mistake, and their interaction with provocation and diminished responsibility pleas.

Constitutional Law

General Remarks
On the whole, the standard of answers received was high. This is reflected, in particular, in the small number of marks awarded of a 2(ii) standard or below. It was very clear that candidates had a very good level of knowledge and understanding of Constitutional law. It was also pleasing to see more candidates focusing specifically on the more challenging aspects of questions and developing their own perspectives on the law.

Two specific issues are worthy of further comment. First, the number of candidates answering questions on the scope of police powers of arrest and detention and stop and search continues to fall. It is perhaps worthy of further investigation as to why this topic is so unpopular with undergraduates. Second, candidates continue to approach the concepts of direct and indirect effect in a superficial manner, regarding any question asked on this topic as requiring an essay that advocates the adoption of the horizontal direct effect of directives as opposed to engaging more critically with the literature on this topic.

Comments on Specific Questions

Question 1:
Candidates demonstrated a good ability to evaluate the fusion of the legislature and the executive, using this as evidence of the adoption of a checks and balances as opposed to a pure model of the separation of powers. Less able candidates were able to relate different theories of the separation of powers, but failed to recognise that the separation of powers also required an analysis of the relative powers of the executive and the legislature in the UK constitution, restricting their analysis to the position of the judiciary. The better answers related the theory of the separation of powers and the fusion of the legislature and the executive to the historical evolution of the United Kingdom constitution, reflecting on the relative importance of the principle of the separation of powers to the constitution and the consequences of a fusion of some powers.

Question 2:
This question was not as popular as other questions. Weaker candidates were able to give a good account of the various devolution arrangements, but were not able to give good arguments either explaining whether the purpose of devolution as to recognise national differences, or by assessing how far, if at all, devolution should be extended to England. Better answers critically reflected upon the purpose of devolution, assessing the extent to which its worth stemmed from the recognition of national differences. In addition, stronger candidates were able to provide clear reasons for and against extending devolution to England, or to different regions within England.

Question 3:
As discussed above, many candidates saw the problem of the lack of horizontal direct effect of directives as stemming from the inability of individuals to adequately protect their rights, calling for the ECJ to develop the horizontal direct effect of directives. Weaker candidates were able to give an accurate account of the current law, without explaining the problems created by the lack of horizontal direct effect of directives. Stronger candidates were able to analyse potential problems from a range of perspectives, focusing on the impact for the European Union and the Member States as well as for individuals wishing to protect rights deriving from Directives, as well as recommending more specific reforms.

Question 4:
Most candidates were well-informed about the provisions of the Human Rights Act, regarding declarations of incompatibility not as a tacit admission of a failure of the Human Rights Act, given that the Government had responded to most declarations of incompatibility. Better answers provided a more in depth analysis, focusing on the different situations in which a declaration of incompatibility may arise and assessing when it was better for the judiciary or the executive or legislature to resolve tensions between Convention rights and legislative provisions. There is still an alarming ignorance about the relationship between the European Convention of Human Rights and European Community law and confusion between the European Court of Human Rights and the European Court of Justice.

Question 5:
This was not a popular question. Most candidates were aware of the relevant case law protecting political speech, although there as less awareness of the cases and statutes regulating religious expression. Again, better answers showed an ability to evaluate information, showing a good ability to based arguments upon the justifications for protecting the right to freedom of expression.

Question 6:
Weaker candidates focused on explaining the differences between conventions and legal provisions, as opposed to explaining whether conventions could or should crystallise into law. Candidates also assumed that conventions were more flexible, without recognising that many specific conventions may be less open to change than legislative provisions. Stronger candidates distinguished between crystallisation and codification, utilising arguments based upon the separation of powers and the evolutionary nature of the United Kingdom constitution to determine which conventions would be suitable for and benefit from crystallisation into law.

Question 7:
Although candidates were able to give an account of different theories of the rule law and of how far the rule of law was maintained in the UK constitution, few candidates were able to evaluate whether the rule of law was a defining feature of the UK constitution. Better answers discussed the importance of the rule of law, evaluating whether the rule of law was as much a defining feature of the UK constitution as other constitutional principles – e.g. parliamentary supremacy. Very few answers determined whether upholding the rule of law was a defining feature of constitutions, but did not define the UK constitution in particular.

Question 8:
Many candidates saw this question as an opportunity to give an account of the relevant law. Better candidates were able to compare and contrast the relevant legal protections before and after the enactment of the Human Rights Act, reflecting upon whether it was fair to regard the Act as a ‘sea change’ given its focus on positive rights. There were very few answers to 8(b).

Question 9:
Students had a good knowledge of the relevant law, but many tended to focus merely on giving a historical account of the development of the law in this area, without assessing the extent to which the court should control prerogative powers. Better answers were able to give

a more specific account of current prerogative powers that were not subject to judicial control and evaluate whether courts should also control these powers.

Question 10:
The question invited discussion on a broad range of topics. Many candidates used this as an opportunity to give accounts of recent case law, without evaluating the extent to which this case law illustrated that the UK had a controlled or uncontrolled constitution. Better answers discussed the meaning of an uncontrolled constitution, using the case law to evaluate how far the UK was moving towards a controlled constitution and discussing the relative merits of legal and political controls.