

**MARK SCHEME for the October/November 2009 question paper
for the guidance of teachers**

9084 LAW

9084/12

Paper 12, maximum raw mark 75

This mark scheme is published as an aid to teachers and candidates, to indicate the requirements of the examination. It shows the basis on which Examiners were instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began, which would have considered the acceptability of alternative answers.

Mark schemes must be read in conjunction with the question papers and the report on the examination.

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- 1 Lord Denning invites the candidates to discuss the difficulties of statutory interpretation and they should therefore consider how and when the need arises, as well as how the judge will go about dealing with it. Analysis of the literal, mischief and golden rules is expected, supported by examples, as appropriate, from decided cases. Better candidates should also include material on the ancillary aids and presumptions etc. the best will include some material of a critical nature on the actual role of the judiciary within the constitution and arrive at a measured conclusion. Answers dealing only with the 'three rules' should not progress beyond half-marks, unless dazzlingly acute and well-illustrated. Max.13 for answers which concentrate solely on 'three rules'. Max. 18 for no useful discussion of the problems associated with statutory interpretation.

- 2 2008 statistics on judicial appointments reveal a startling lack of movement away from the 'status quo', with women, members of ethnic groups other than white English, and solicitors achieving elevation to the bench in very small numbers. The way a solicitor can become a judge will be relevant. One would hope to avoid the usual rather shallow, mechanistic answer that commonly appears and that the abler students would think at least a little about the diversity and sophistication of society in the UK in the 21st century. Racial integration is hardly an issue in the modern world and equality legislation, after nearly forty years, is hardly hot news. It is sixty years since the first woman barrister appeared in a murder trial. So one might wonder why the law treads so cautiously.

Candidates should look at the ways in which judges are appointed, and perhaps at the system of taking silk, in considering whether the system has become more egalitarian – and if indeed it ought to be? The problems that may arise with the appointment system should also be discussed.

Better candidates might also consider whether there should be a policy of positive discrimination and whether this is, anyway, desirable, and whether the high-cost and social assumptions about a career at the Bar merely lead to self-perpetuation. Good answers might also consider whether it is a case of broader changes in society percolating through slowly, or whether resistance lurks beneath some elite and clubbable surface. A considered conclusion should be reached.

- 3 The reference is to the photographing of J.K.Rowling's son by some 'celebrity' magazine, whilst the child was on a shopping trip in Edinburgh. It was held not to be an invasion of his right to privacy.

Candidates can be given fairly free rein in considering a reasonable range (at least two or three) of the rights protected under the HRA 1998 and rewarded proportionately. Relevant decided cases should be analysed and there are plenty to discuss, as publicity has been extensive.

A list of rights only should reach no more than a half-way mark. Max. 13 for list of rights however comprehensive.

The sharpest answers will spot the point that the protection of human rights has clearly not been straightforward, if cases are regularly being fought with such vitriol and such large amounts of money in the courts, and that the law is still developing in stages.

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- 4 Candidates should consider critically the method of appointment of magistrates and what they actually do in court. Focus should be mainly on their criminal jurisdiction but any discussion of their civil or appellate powers is worthy of reward. Max. 13 if discussion of appointment or function only.

Mrs Careless, of course, is likely to be dismissed from office by the Lord Chancellor, which brings the answer full circle. Max. 13 for jurisdiction only.

The best candidates will point out that this is only proper, given her duty to represent and judge the community impartially and to listen to both sides without prejudice before arriving at any decision. If this is done well, the writer should reach the top band. Max. 18 for gd answer but no discussion of Mrs Careless. Advantages/disadvantages should not be credited.

- 5 The question asks candidates to look at precedent and its adaptability or otherwise. There should be an analysis of the hierarchy of the courts and the degree to which they are lumbered with old injustices. The candidates should consider the extent to which harsh or outmoded decisions can be departed from and in particular the greater flexibility of the House of Lords since 1966 and the more limited means available to the courts below it. Max. 13 no case law. Max. 18 no critical analysis.

Illustration is vital.

- 6 A straightforward question, requiring a definition of delegated legislation; its principal forms; and, given its constitutional context, its merits or otherwise. Better candidates will consider how any excess can be curbed and the doctrine of 'ultra vires', as well as the adequacy or otherwise of parliamentary controls. Answers should be illustrated from decided case law – and a clear conclusion be reached.