This irony can, however, be overstated. There were several more positive contributions made by equity to the legal system. Its discretionary remedies of the injunction and specific performance, the law of trusts and the equity of redemption should all be cited in this regard.

QUESTION 4

What is legislation? Where does it come from, how is it produced and what does it do?

Answer Plan

This is a wide-ranging question that requires a fairly close knowledge of the workings of Parliament. A suggested structure is as follows:

- distinguish statute law from judge-made common law;
- consider where the actual proposals for legislation come from – for example, government policy, Green Papers, White Papers;
- mention the limited scope for individual MPs to generate legislation;
- set out the actual process that legislation has to pass through to be enacted;
- make reference to the various types of legislation, emphasising the role of delegated legislation; mention should also be made of the potential impact of the **Human Rights Act (HRA) 1998**.

ANSWER

Although the courts retain an essential function in the interpretation of statutes, it has to be recognised that legislation is the predominant form of law-making in contemporary times. The process through which an Act is passed by Parliament is itself a long one, but before concentrating on that process, some attention should be focused on the pre-Parliamentary process through which the substantive content of the Act is generated.

SOURCES OF LEGISLATION

There are various sources of legislative proposals.

The majority arise from government departments, in pursuit of their policies in relation to their allocated area of responsibility. Actual policy will, of course, be a consequence of the political persuasion and imperatives of the government of the day and as, by convention, the Government is drawn from the majority party, it can effectively decide what legislation is to be enacted through its control over the day to day procedure of the House of Commons, backed by its majority voting power. The

decision as to which Bills are to be placed before Parliament in any session is under the effective control of a cabinet committee known as the Legislation Committee, which draws up the legislative programme announced in the Queen's Speech, delivered at the opening of the Parliamentary session.

In some cases, the Government will set out its tentative plans for legislation in the form of a Green Paper and will invite interested parties to comment on the proposals. After considering any response, the Government may publish a second document, in the form of a White Paper, in which it sets out its firm proposals for legislation.

If the Government is the source of most legislation, the role of the individual MP, acting through the process for the enactment of Private Member's Bills, should not be forgotten. There are, in fact, three ways in which an individual MP can propose legislation. These are through the ballot procedure, by means of which backbench MPs get the right to propose legislation on the 10 or so Fridays specifically set aside to consider such proposals, under Standing Order 39 and under the 10-minute rule procedure. Of these procedures, however, only the first has any great chance of success and, even then, success will depend on securing a high place in the ballot and, in practice, must not incur government disapproval. If such a proposal is looked upon with favour by the Government, it has an especially good chance of being enacted, since the Government may provide additional time to allow it to complete its passage. Perhaps the most famous Private Member's Bills have related to the provision of abortion. The original **Abortion Act 1967** was introduced by the Liberal MP David Steel, and has been subject to numerous attempts to amend it by further Private Member's Bills.

Alternative sources for proposed legislation are the recommendations of independent commissions and committees, such as the Law Commission, or the Law Reform Committee, which considers alterations in the civil law, and the Criminal Law Reform Committee, which performs similar functions in relation to the criminal law.

It is always open to pressure groups to lobby political parties and individual MPs in an attempt to have their particular interests made concrete in legislation. However, some concern has been expressed at the growing number of professional lobbyists who are paid to make sure that their clients' cases are prominently placed before the appropriate people within the legislature.

THE LEGISLATIVE PROCESS

Before any legislative proposal (known at that stage as a Bill) can become an Act of Parliament, it must proceed through, and be approved by, both Houses of Parliament and must receive the Royal Assent. A Bill must be given three readings in both the House of Commons and the House of Lords before it can be presented for the Royal Assent. It is

possible to commence the procedure in either House, although 'money Bills' (containing only financial provisions) must be placed before the Commons in the first instance.

When a Bill is introduced in the Commons, it undergoes five distinct procedures:

(a) it receives its first reading. This is purely a formal procedure in which its title is read and a date set for its second reading;
(b) after this comes the second reading; this is the time when its general principles are subject to extensive debate. The second reading is the critical point in the process of a Bill. At the end, a vote may be taken on its merits and if it is approved, it is likely that it will eventually find a place in the statute book;
(c) if the Bill passes its second reading, it is sent for consideration by a standing committee which will consider its provisions in detail. The function of the standing committee, which, if it is successfully proposed, may be replaced by a Select Committee or committee of the whole House, is to go through the Bill clause by clause and to amend it to bring it into line with the general approval given by the House at its second reading;
(d) the next stage is the report stage, at which the standing committee reports the Bill back to the House for the consideration of any amendments made by it;
(e) the final stage in the process is the third reading, during which further debate may take place, although on this occasion, it is restricted strictly to matters relating to the content; matters relating to general principles cannot be raised.

When a Bill has passed all these stages, it is passed to the House of Lords for its consideration, which is essentially similar, if less constrained by the pressures of time. After consideration by the Lords, the Bill is passed back, with any amendments, to the Commons, which must then consider such amendments. Where one House refuses to agree to the amendments made by the other, Bills can be repeatedly passed between them, but it should be remembered that Bills must complete their passage within the life of a particular parliamentary session and that a failure to reach agreement within that period might lead to the total loss of the Bill. In September 2010 the new coalition government controversially announced its intention to extend its first parliamentary session by some 7 months, thus effectively giving it longer to pass any contentious legislation. Given the fact that the House of Lords is a non-elected institution and that the Members of the House of Commons are the democratically elected representatives of the voters, it has been apparent since 1911 that the House of Lords should not be in a position to block the clearly expressed wishes of the Commons. The **Parliament Act** of that year and of **1949** restricted the blocking power of the Lords. The situation now is that a money Bill can be enacted without the approval of the House of Lords after only one month's delay and any other Bill can only be delayed by one year by the House of Lords' recalcitrance.

The most recent use of the **Parliament Acts** occurred in relation to the **Hunting Act 2004**, which in turn led to the Court of Appeal's determination of the legality of the later **Parliament Act**, which itself was introduced through the earlier **Act of 1911**. In *R (on the application of Jackson) v Attorney-General* (2005) the Court of Appeal concluded that the **1949 Act** was properly introduced and consequently the **Hunting Act** could not be challenged. However, the Court of Appeal also suggested that the **1949 Act** might not be capable of being used to introduce major constitutional reforms, such as completely doing away with the House of Lords, for example.

Subsequently an augmented nine-member panel of the House of Lords unanimously held that the reasoning of the Court of Appeal could not be sustained. In reaching that conclusion the House of Lords rejected the argument that the **Parliament Act of 1911** was an exercise in the *delegation* of powers from Parliament to the House of Commons, which could not later be used to extend those powers. Rather as Lord Bingham stated:

> The overall object of the **1911 Act** was not to delegate power: it was to restrict, subject to compliance with the specified statutory conditions, the power of the Lords to defeat measures supported by a majority of the Commons . . .

The House of Lords, however, did differ in their assessment of the extent of the power extended to the House of Commons under the **Parliament Acts**. It is clear that a majority of the House of Lords were of the view that the House of Commons could use the powers given to it under the **Parliament Acts** to force through such legislation as it wished, but a number of the judges were of the view that the Commons could not extend its own lifetime through such a procedure, as that would be in direct contradiction to the provisions of the **Parliament Act 1911**.

No statute becomes law unless it has received the Royal Assent and although in the unwritten constitution of the UK, no specific rule expressly states that the monarch has to assent to any Act passed by Parliament, there is, by now, a convention to that effect and any monarch would place their constitutional status in extreme jeopardy by a refusal to grant the Royal Assent to legislation passed by Parliament. The procedural nature of the Royal Assent was highlighted by the **Royal Assent Act 1967**, which reduced the process of acquiring Royal Assent to a formal reading out of the short titles of any Act in both Houses of Parliament.

An Act of Parliament comes into effect on the date of the Royal Assent, unless there is any provision to the contrary in the Act itself. It is quite common for newly enacted statutes to contain commencement clauses which provide for the Act to become operational at some date in the future. Difficulty and an inevitable lack of

certainty is produced, however, by the now common occurrence of passing general enabling Acts which delegate powers to a government minister to introduce specific parts of the Acts in question at some later date, through the means of statutory instruments.

TYPES OF LEGISLATION

There are two distinct types of legislation: the public Act and the private Act. The former relates to questions which affect the general public, whereas the latter relates to the powers and interests of particular individuals or institutions. Public Bills can be further categorised into government Bills and Private Member's Bills, to which reference has already been made.

Acts of Parliament can also be distinguished on the basis of their function. Some are designed to initiate new legislation to cover new areas of activity, previously not governed by legal rules, but other Acts are aimed at rationalising or amending existing legislative provisions. Examples of the latter type of legislation are the consolidating Act and the codifying Act. The purpose of any consolidating Act is to bring together the various statutory provisions contained in a number of discrete pieces of legislation, without altering them, for the main part. Company law is a classic example of this procedure, in that it has evolved through the enactment of numerous Acts of Parliament which have, every so often, been brought together under one large consolidating Act. The **Companies Act 1985** is just such an Act, although it is arguable that a new consolidation Act is due in the light of the subsequent changes that the **1985 Act** has undergone since it was passed.

Codifying Acts seek not just to bring existing statutory provisions under one Act, but also look to give statutory expression to common law rules. The classic examples of such legislation are to be found in the commercial sector; amongst them are the **Partnership Act 1890** and the **Sale of Goods Act 1893**.

THE HRA 1998

Traditionally, by virtue of the operation of the doctrine of Parliamentary sovereignty, Parliament could pass whatever laws it thought proper, without the courts being able to challenge the legality of such legislation. Although the **HRA 1998** has not directly challenged this relationship, it has nonetheless altered it significantly. Even where a court holds that a piece of primary legislation does not comply with the provisions of the **ECHR**, that court cannot declare the legislation invalid: the court has no such power to strike down primary legislation. However, the court can issue a declaration of incompatibility stating that the Act breaches the provisions of the Convention (see, for example, *Bellinger v Bellinger* (2003)). Although changing the incompatible Act

remains solely the power of Parliament, it is highly likely that a judicial declaration of incompatibility would lead to an alteration of the Act in question. The **HRA 1998** provides for a fast-track procedure for changing any Act subsequently found to be in breach of the Convention.

QUESTION 5

What do you understand by 'delegated legislation'? Consider its advantages and disadvantages and explain how it is controlled by Parliament and the courts.

Answer Plan

This question focuses more closely than the previous one on delegated legislation. It is suggested that the increased importance of delegated legislation makes it a likely question topic. A good answer plan will do the following:

- give an explanation of what is meant by delegated legislation;
- emphasise the large amount of delegated legislation that is produced annually;
- provide examples of the various types of delegated legislation;
- list and consider in some detail the various advantages and disadvantages;
- mention Parliamentary scrutiny of delegated legislation;
- consider the powers of the courts to control delegated legislation, through judicial review and under the **Human Rights Act (HRA) 1998**;
- weigh the advantages and disadvantages and offer a conclusion in favour or against its use.

ANSWER

Modern legislation tends to be of the enabling type, which simply states the general purpose and aims of the Act and lays down a broad framework, whilst delegating to ministers of the state the power to produce detailed provisions in pursuit of those general aims.

Generally speaking, delegated legislation is law made by some person or body to whom Parliament has delegated its general law-making power. In statistical terms, it is arguable that at present, delegated legislation is actually more significant than primary Acts of Parliament. The output of delegated legislation in any year greatly exceeds the output of Acts of Parliament and each year there are over 3,000 sets of rules and regulations made in the form of delegated legislation, compared to fewer than 100 public Acts of Parliament.

Any piece of delegated legislation has the same legal force and effect as the Act of Parliament under which it is enacted, but equally only has effect to the extent that it is authorised by its enabling Act.

Delegated legislation can take the form of Orders in Council which permit the Government, through the Privy Council, to make law. The Privy Council is nominally a non-party political body of eminent Parliamentarians, but in effect, it is simply a means through which the Government, in the form of a committee of ministers, can introduce legislation without the need to go through the full Parliamentary process. Although legal textbooks tend to use situations of state emergency as exemplifying occasions when the Government will resort to the use of Orders in Council, in actual fact, a great number of Acts are brought into operation through these provisions. Perhaps the widest scope for Orders in Council is to be found in relation to EU law, for under **s 2(2)** of the **European Communities Act 1972**, ministers can give effect to provisions of the Community which do not have direct effect.

Statutory instruments are the means through which government ministers introduce particular regulations under powers delegated to them by Parliament by enabling legislation. As with Orders in Council, such provisions do not have to undergo the full rigour of Parliamentary procedure involved in the passing of Acts of Parliament. The relative and, indeed, the absolute importance of statutory instruments can be seen by the fact that in 2004, Parliament enacted 3,459 statutory instruments, as compared to only 38 general public Acts. There is such a range of powers delegated to ministers and such a range of Acts of Parliament which are given practical effect by statutory instruments, that it is almost pointless to give examples, but it is certainly worth pointing out that such regulations tend to be of a highly specific and technical nature. One example of the way in which statutory instruments were used, if not abused, may be found in the **Limited Liability Partnership Act 2000**. Although the Act established this new form of legal entity, it stated very little about how it was to operate and be regulated. **Sections 14** and **15** of the Act simply stated that appropriate regulations would be made in the future and introduced through statutory instruments (the **Limited Liability Partnership Regulations 2001**).

Bylaws are the third type of delegated legislation, by means of which local authorities and public bodies are empowered by Parliament to make legally binding rules within their area of authority. Bylaws may be made by local authorities under such enabling legislation as the **Local Government Act 1972**.

In addition to the foregoing, the various Court Rule Committees are empowered to make the rules which govern procedure in the particular courts over which they have

delegated authority, under such Acts as the **Supreme Court Act 1981**, the **County Courts Act 1984** and the **Magistrates' Courts Act 1980**.

The final source of delegated legislation is to be found in the power given to certain professional bodies to regulate the conduct of their members. An example of this type of delegated legislation is the power that the Law Society has been granted under the **Solicitors Act 1974** to control the conduct of practising solicitors.

Parliament delegates its law-making powers for a number of reasons. Amongst these is the fact that it simply does not have the time to consider every detail that might be required to fill out the framework of enabling legislation. A related point is the fact that given the highly specialised and extremely technical nature of many of the regulations that are introduced through delegated legislation, the majority of MPs simply do not have sufficient expertise or the technical knowledge to consider such provisions effectively.

These reasons why there has been an increased reliance on delegated legislation also suggest its potential advantages over the more traditional set-piece public Acts. For example, the fact that Parliament does not have to spend its time considering the minutiae of specific regulations permits it to focus its attention more closely, and at greater length, on the broader but no less important matters of principle in relation to the enactment of general enabling legislation. The use of delegated legislation also permits far greater flexibility in regulation, permitting rules to be changed quickly in response to changes in the situations they are aimed at regulating. It can also be appreciated that the use of delegated legislation not only permits an *ad hoc* response, but also a quicker response to emergencies or unforeseen problems. With regard to bylaws, it practically goes without saying that local and specialist knowledge should give rise to more appropriate rules than reliance on the general enactments of Parliament.

There are, however, distinct disadvantages in the prevalence of delegated legislation as a means of making legal rules. The most important of these relates to a perceived erosion in the constitutional role of Parliament, to the extent that it does not actually consider provisions made in this way. To the extent that Parliament, as a body, is disempowered, other people, notably government ministers and the civil servants who work under them in order to produce the detailed provisions of delegated legislation, are given more power than might be thought constitutionally correct. The foregoing, which inevitably involves the question of general accountability and the need for effective scrutiny, is compounded by the difficulty which ordinary MPs face in keeping abreast of the sheer mass of technically detailed legislation that is enacted in this form. Also, the point must be raised that if Parliamentarians cannot keep up with the flow of delegated legislation, how can the general public be expected to do so?

These difficulties and potential shortcomings in the use of delegated legislation are, at least to a degree, mitigated by the fact that specific controls exist in relation to it. These controls are twofold: Parliamentary and judicial. Parliament exercises general control, to the extent that ministers are always responsible to Parliament for the regulations they actually make within the powers delegated to them by Parliament. Additionally, it is a usual requirement that such regulations be laid before Parliament. This laying before Parliament can take two forms, depending on the provision of the enabling legislation. The majority of Acts simply require that regulations made under their auspices be placed before Parliament and automatically become law after a period of 40 days, *unless a resolution to annul them is passed*. Other regulations, on the other hand, require a positive resolution of one or both of the Houses of Parliament before they become law. Also, since 1973, there has been a Joint Select Committee on Statutory Instruments, whose function is to consider statutory instruments. It has to be remembered, however, that this committee merely scrutinises statutory instruments from a technical point of view as regards drafting, and therefore has no power as regards any question of policy in the regulation.

Previously, judicial control of delegated legislation was limited, but not unimportant. It was always possible for delegated legislation to be challenged, through the procedure of judicial review, on the basis that the person or body to whom Parliament has delegated its authority has acted in a way that exceeds the limited powers delegated to them. Any provision found to be outside this authority was *ultra vires* and consequently void. Additionally, there is a presumption that any power delegated by Parliament is to be used in a reasonable manner and the courts may, on occasion, hold particular delegated legislation to be void on the basis that it is unreasonable. The **HRA 1998** fundamentally alters the courts' power over delegated legislation. As secondary legislation, rather than primary legislation such as Acts of Parliament, delegated legislation may be declared ineffective by the courts where it is found not to comply with the provisions of the **HRA 1998**, so ministers must be extremely careful to ensure that any delegated legislation is in fact compatible with the **ECHR**. An example of the courts quashing secondary legislation can be seen in *A v Secretary of State for the Home Department* (2005), in which the House of Lords quashed a derogation order wrongly made in relation to the **Anti-terrorism Crime and Security Act 2001**. For a later example, see *HM Treasury v Mohammed Jaber Ahmed* (2010) (UKSC 2), the first substantive case heard by the Supreme Court. The court quashed fully the Terrorism (United Nations Measures) Order 2006 and quashed parts of the Al-Qaida and Taliban (UN Measures) Order 2006 as being ultra vires the powers of the Treasury extended to them under the United Nations Act 1946.

QUESTION 6

The English legal system can no longer be considered on its own, but has to be understood within the context of the European Union and its institutions.

What are the institutions referred to and what is their impact on the English legal system?

Answer Plan

Again, it has to be emphasised that the English legal system can only be understood in the context of the EU. This straightforward question ensures that a candidate is at least aware of that context. Such an awareness can be shown by covering the following points:

- a short history of the EU – consideration of its present status after the Lisbon Treaty, perhaps, its future;
- a detailed account of the various types of EU legislation, that is, treaties, regulations and directives, and how they are each brought into effect;
- a description of the essential institutions of the EU and their relationships and particular roles and functions;
- a focus on the relationship between the ECJ and the domestic courts of the UK, with examples where possible.

ANSWER

The European Community was set up by the **EEC Treaty** (known as the Treaty of Rome and later re-named the **EC Treaty**) in 1957, and the UK joined the Community in 1973.

On joining the Community, now called the European Union, the UK and its citizens became subject to EU law. This subjection to European law remains the case, even where the parties to any transaction are themselves both UK subjects. In other words, in areas where it is applicable, European law supersedes any existing UK law to the contrary.

Community law consists primarily of the **EC Treaty** and any amending legislation such as the **Single European Act (SEA)** to which the UK acceded in 1986, the **Maastricht Treaty 1992** and the **Treaty of Nice 2001**. However the most recent reform was introduced by the Lisbon Treaty, signed by all the members in 2007 and subsequently ratified by them individually by the autumn of 2009. The necessary alterations to the fundamental

treaties governing the EU, brought about by the Lisbon Treaty, was published at the end of March 2010. As a result there are three newly consolidated treaties:

- *The* **Treaty on European Union (TEU)**
  Article 1 of this treaty makes it clear that 'The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. *The Union shall replace and succeed the European Community.'*
- *The* **Treaty on the Functioning of the European Union (TFEU)**
  Article 2 of this treaty provides that:

  'When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.'

  Article 3 specifies that the Union shall have exclusive competence in the following areas:

  (a) customs union;
  (b) the establishing of the competition rules necessary for the functioning of the internal market;
  (c) monetary policy for the Member States whose currency is the euro;
  (d) the conservation of marine biological resources under the common fisheries policy;
  (e) common commercial policy.

Additionally **Article 3** provides that the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

- *The* **Charter of Fundamental Rights of the European Union (CFREU)**
  Many member states, including the UK, have negotiated opt outs of some of the provisions of the charter.

The **EC Treaty**, as subsequently amended by the **Treaty on the Functioning of the European Union**, provides for two types of legislation: regulations and directives:

(a) Regulations under **TFEU Art 288** (formerly **Art 249** of the **EC Treaty**) apply to, and within, member states generally without the need for those states to pass their own legislation. They are binding and enforceable, therefore, from the time of their creation within the European context and need no further validation by national Parliaments.
(b) Directives, on the other hand, are in theory supposed to state general goals and leave the precise implementation to individual member states in the form that they consider appropriate. In practice, however, directives tend to state the means, as well as the ends, to which they are aimed and the ECJ will give direct effect to directives which are sufficiently clear and complete.

The major institutions of the EU are: the Council; the European Parliament; the Economic and Social Committee; the Commission; and the ECJ.

THE COUNCIL

The Lisbon Treaty established two new offices:

- President of the European Union, a position currently held by Herman Van Rompuy of Belgium; and
- High Representative for Foreign Affairs, effectively that of EU foreign minister, a position held by Baroness Ashton from the UK.

However, it should be recognised that, although significant, neither of these new posts carries any real executive power as against that of the Union's main sources of political power, pre-eminently the Council of Ministers.

The Council is made up of ministerial representatives of each of the 27 member states of the Union. Thus, when considering economic matters, the various states will be represented by their finance ministers or, if the matter relates to agriculture, the various agricultural ministers will attend. The Council of Ministers is, in essence, the supreme organ of the EU and, as such, it has the final say in deciding upon Community matters, although the Treaty of Lisbon has given the parliament powers of co-determination in some areas. Although it acts on recommendations and proposals made to it by the Commission, it does have the power to instruct the Commission to undertake particular investigations and to submit detailed proposals for its consideration.

THE EUROPEAN PARLIAMENT

The European Parliament is the directly elected European institution and, to that extent, it can be seen as the body which exercises democratic control over the operation of the EU. As in national Parliaments, Members are elected to represent constituencies, the elections being held every five years. Membership is divided amongst the 27 member states in proportion to the size of their various populations. The Parliament's general secretariat is based in Luxembourg and although the

Parliament sits in plenary session in Strasbourg for one week in each month, its detailed and preparatory work is carried out through 18 permanent committees which usually meet in Brussels.

The powers of the European Parliament, however, should not be confused with those of national Parliaments, for the European Parliament is not a legislative institution and, in that respect, it plays a subsidiary role to the Council of Ministers. Originally, its powers were merely advisory and supervisory.

In pursuance of its advisory function, the Parliament always had the right to comment on the proposals of the Commission and, since 1980, the Council has been required to wait for the Parliament's opinion before adopting any law. In its supervisory role, the Parliament scrutinises the activities of the Commission and has the power to remove the Commission by passing a motion of censure against it by a two-thirds majority.

The legislative powers of the Parliament were substantially enhanced by the **SEA 1986**. Since that enactment, it has had a more influential role to play, particularly in relation to the completion of the internal market. For one thing, it can now negotiate directly with the Council as to any alterations or amendments it wishes to see in proposed legislation. It can also intervene to question and, indeed, to alter any 'joint position' adopted by the Council on proposals put to it by the Commission. If the Council then insists on pursuing its original 'joint position', it can only do so on the basis of unanimity.

The **SEA 1986** also required the European Parliament's assent to any international agreements to be entered into by the Community. As a consequence, it has ultimate control, not just in relation to trade treaties, but also as regards any future expansion of the Union's membership. The Lisbon Treaty has subsequently further increased the powers of the parliament, effectively giving it equal power of co-decision with the Council for most legislation, including the budget and agriculture.

THE COMMISSION

The Commission is the executive of the EU, but it also has a vital part to play in the legislative process. To the extent that the Council can only act on proposals put before it by the Commission, the latter institution has a duty to propose to the Council measures that will advance the achievement of the Union's general policies.

Another of the key functions of the Commission is the implementation of the policies of the Union and to that end, it controls the allocation of funds to the various common programmes within the Union. It also acts, under instructions from the Council, as negotiator between the Union and external countries.

A further executive role of the Commission is to be found in the manner in which it operates to ensure that Treaty obligations between states are met and that Community laws relating to individuals are enforced. In order to fulfil these functions, the Commission has been provided with extensive powers, both in relation to the investigation of potential breaches of Community law and the subsequent punishment of offenders. The classic area in which these powers can be seen in operation is competition law. Under **Arts 105** and **106** of the **TFEU** (formerly **Arts 85** and **86** of the **EC Treaty**), the Commission has substantial powers to investigate and control potential monopolies and anti-competitive behaviour and it has used these powers to levy what, in the case of private individuals, would amount to huge fines where breaches of Community competition law have been discovered. For example, in 2004 Microsoft were fined €497m and in 2009 Intel were fined €1.06bn. If the individual against whom a finding has been made objects to either the result of the investigation or the penalty imposed, the course of appeal is to the ECJ.

THE COURT OF JUSTICE

The ECJ is the judicial arm of the EU and, in the field of Community law, its judgments overrule those of national courts. It consists of 27 judges, assisted by eight advocates general, and the Court sits in Luxembourg. The role of the advocates general is to investigate the matter submitted to the Court and to produce a report, together with a recommendation for the consideration of the Court. The actual court is free to accept the report, or not, as it sees fit.

The jurisdiction of the ECJ involves it in two key areas in particular:

(a) determining whether any measures adopted, or rights denied, by the Commission, Council or any national government are compatible with Treaty obligations. Such actions may be raised by any Union institution, government or individual. A member state may fail to comply with its Treaty obligations in a number of ways. It might fail or indeed refuse to comply with a provision of the Treaty or a regulation; alternatively, it might refuse to implement a directive within the allotted time provided. Under such circumstances, the state in question will be brought before the ECJ, either by the Commission or another member state or, indeed, individuals within the state, as being in dereliction of its responsibility;

(b) determining, at the request of national courts, the interpretation of points of Community law. This procedure can take the form of a preliminary ruling where the request precedes the actual determination of a case by the national court. The point that has to be remembered, however, is that it is the ECJ's role to determine such issues and in relation to those issues, it is superior to any national court.

THE GENERAL COURT (FORMERLY THE COURT OF FIRST INSTANCE)

The Court of First Instance, separate from the existing Court of Justice was introduced **SEA 1986**. Under the Treaty of Lisbon it was renamed the General Court. It has jurisdiction in first instance cases, with appeals going to the ECJ on points of law.

CIVIL SERVICE TRIBUNAL

The former jurisdiction of the Court of First Instance, in relation to internal claims by EU employees was transferred to this distinct institution in 2004.

The above three distinct courts together constitute *the Court of Justice of the European Union*.

Common Pitfalls ✗

It is an almost unforgivable error to confuse the European Union and the European Council and their respective courts the European Court of Justice and the European Court of Human Rights. They are distinct and must always be dealt with as such.

Aim Higher ★

It is essential to be aware of the consequences of the Lisbon Treaty, but additional marks will be awarded for a thorough knowledge of those consequential changes and the ability to refer to the new Article number. Given the significance of the changes it is not impossible that full questions could be set on the consequences of the Lisbon treaty.

QUESTION 7

Explain the powers of the European Court of Justice (ECJ), paying particular regard to its relationship with UK courts.

Answer Plan

Particular attention should be paid to the relationship of that court to the domestic courts within the UK. In answering it, students could usefully apply the following structure:

- detail the role and powers of the ECJ;
- describe its structure and how it operates, making some mention of the General Court;
- explain the way in which references can be made to the ECJ from domestic courts under **Art 267** (formerly **Art 234**);
- provide some examples of cases decided by the ECJ that have had particular impact on the UK.

ANSWER

Prior to the Lisbon Treaty, it was accurate to refer to European Community law, but this reference has now been replaced by European Union law. The ECJ is the judicial arm of the EU and, in the field of European Union law, its judgments overrule those of national courts. It consists of 27 judges, assisted by eight advocates general, and sits in Luxembourg. The role of the advocates general is to investigate the matter submitted to the Court and to produce a report, together with a recommendation for the consideration of the Court. The actual Court is free to accept the report or not, as it sees fit.

A Court of First Instance, separate from the ECJ was introduced by the **Single European Act 1986**. Under the Treaty of Lisbon it was renamed the General Court. It has jurisdiction in first instance cases, with appeals going to the ECJ on points of law. The former jurisdiction of the Court of First Instance, in relation to internal claims by EU employees was transferred to a newly created European Union Civil Service Tribunal in 2004. Together the three distinct courts constitute *the Court of Justice of the European Union*. The aim of introducing the two latter courts was to reduce the burden of work on the ECJ, but there is a right of appeal, on points of law only, to the full ECJ.

The ECJ performs two key functions:

(a) It decides whether any measures adopted, or rights denied, by the Commission, Council or any national government are compatible with Treaty obligations. Such actions may be raised by any EU institution, government or individual. A member state may fail to comply with its Treaty obligations in a number of ways. It might fail or, indeed, refuse to comply with a provision of the Treaty or a regulation; alternatively, it might refuse to implement a directive within the allotted time provided for. Under such circumstances, the state in question will be brought before the ECJ, either by the Commission or another member state or, indeed, individuals within the state concerned.

(b) It provides authoritative rulings, at the request of national courts under **Art 267 TFEU** (formerly **Art 234** of the **EC Treaty**), on the interpretation of points of Union law. When an application is made under **Art 234,** the national proceedings are suspended until such time as the determination of the point in question is delivered by the ECJ. Whilst the case is being decided by the ECJ, the national court is expected to provide appropriate interim relief, even if this involves going against a domestic legal provision, as in *Factortame Ltd v Secretary of State for Transport (No 1)* (1989). The Common Fishing Policy established by the EEC had placed limits on the amount of fish that any member country's fishing fleet was permitted to catch. In order to gain access to British fish stocks and quotas, Spanish fishing boat owners formed British companies and reregistered their boats as British. In order to prevent what it saw as an abuse and an encroachment on the rights of indigenous fishermen, the British government introduced the **Merchant Shipping Act 1988**, which provided that any fishing company seeking to register as British would have to have its principal place of business in the UK and at least 75 per cent of its shareholders would have to be British nationals. This effectively debarred the Spanish boats from taking up any of the British fishing quota. Some 95 Spanish boat owners applied to the British courts for judicial review of the **Merchant Shipping Act 1988**, on the basis that it was contrary to Community law. The case went from the High Court, through the Court of Appeal, to the House of Lords which referred the case to the ECJ. There, it was decided that the **EC Treaty** required domestic courts to give effect to the directly enforceable provisions of Community law and, in doing so, such courts are required to ignore any national law that runs counter to Community law.

This procedure can take the form of a preliminary ruling where the request precedes the actual determination of a case by the national court. **Article 267** (formerly **Art 234**) provides that:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of treaties;
> (b) the validity and interpretation of acts of the institutions of the Union and of the European Central Bank;
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a member state against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

It is clear that it is for the national court, and not the individual parties concerned, to make the reference. Where the national court or tribunal is not the 'final' court or tribunal, the reference to the ECJ is discretionary. Where the national court or tribunal is the 'final' court, then reference is obligatory. However, there are circumstances under which a 'final' court need not make a reference under **Art 267** (formerly **Art 234**). These are:

(a) where the question of Community law is not truly relevant to the decision to be made by the national court;
(b) where there has been a previous interpretation of the provision in question by the ECJ, so that its meaning has been clearly determined;
(c) where the interpretation of the provision is so obvious as to leave no scope for any reasonable doubt as to its meaning. This latter instance has to be used with caution given the nature of Community law; for example, the fact that it is expressed in several languages using legal terms which might have different connotations within different jurisdictions. However, it is apparent that where the meaning is clear, no reference need be made. In undertaking such a task, a purposive and contextual approach is mainly adopted, as against the more restrictive methods of interpretation favoured in relation to UK domestic legislation. The clearest statement of this purposive contextualist approach adopted by the ECJ is contained in its judgment in the *CILFIT* case:

> Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.
>
> *CILFIT Srl v Minister of Health (No 283/81)* (1982)

Another major difference between the ECJ and courts within the English legal system is that the former is not bound by the doctrine of precedent in the same way as the latter are. It is always open to the ECJ to depart from its previous decisions where it considers it appropriate to do so. Although it will endeavour to maintain consistency, it has on occasion ignored its own previous decisions, as in *European Parliament v Council* (1990), where it recognised the right of the Parliament to institute an action against the Council.

The manner in which European law operates to control sex discrimination, through the Equal Treatment Directive, is of significant interest and in *Marshall v Southampton*

and West Hampshire AHA (1993), a number of the points that have been considered above were highlighted. Ms Marshall had originally been required to retire earlier than a man in her situation would have been required to do. She successfully argued before the ECJ that such a practice was discriminatory and contrary to **Council Directive 76/207/EEC** on the equal treatment of men and women.

The present action related to the level of compensation she was entitled to as a consequence of this breach. UK legislation, the **Sex Discrimination Act 1975**, had set limits on the level of compensation that could be recovered for acts of sex discrimination. Marshall argued that the imposition of such limits was contrary to the **Equal Treatment Directive** and that in establishing such limits, the UK had failed to comply with the Directive.

The House of Lords referred the case to the ECJ under **Art 264** (formerly **Art 234**) and the latter determined that the rights set out in relation to compensation under **Art 6** of the Directive were directly effective, and that as the purpose of the Directive was to give effect to the principle of equal treatment, that could only be achieved by either reinstatement or the awarding of adequate compensation. The decision of the ECJ, therefore, overruled the financial limitations placed on sex discrimination awards and effectively overruled the domestic legislation.

Common Pitfalls ✗

Do not confuse the ECJ with the ECtHR.

Aim Higher ★

Many textbooks will not have been updated in time to include the new Article numbers in the two new treaties. Clearly good marks are available for anyone who knows the changes. Also not new title of the General Court.

QUESTION 8

One of the hallmarks of an advanced society is that its laws should not only be just, but also that they be kept up to date and be readily accessible to all who are affected by them.

Law Commission, Proposals for English and Scottish Law Commissions, Cmnd 2573, 1965

Consider the mechanisms and procedures for law reform in Britain in the light of the above quotation with particular regard to the role of the Law Commission.

Answer Plan

The quotation above refers to the Law Commission and although the question does, indeed, require an examination of the operation of the Law Commission, the temptation must be resisted to launch straight into such a consideration and other means of law reform must also be considered. The following structure avoids this possible error:

- Parliament enacts reforming legislation and this may be in pursuit of party political agendas, or may be the outcome of Private Member's Bills;
- judges may also alter law, especially the common law;
- both of these mechanisms are not unproblematic and the potential problems should be considered;
- reference should be made to Royal Commissions of inquiry, but the major focus of attention should be on the Law Commission;
- the creation, structure and procedure of the Law Commission should be considered in some detail.

ANSWER

At one level, law reform is either a product of Parliamentary or judicial activity. However, the enactment of new legislation or the statement of a novel *ratio* in a particular case are the end products of a complex process, and to focus on them, and to ignore the various procedures that led up to them, would be to diminish our understanding of the process of law reform.

Legislation is, by definition, the product of Parliament, but perhaps of more interest is the actual source or inspiration for any particular piece of reforming legislation. Any consideration of the legislative process must be placed in the context of the political nature of Parliament. Thus, a great deal of law reform can be seen as the implementation of party political policies. Examples of this type of legal reform include the changes in trade union law, education law and the financing of local services introduced by past Conservative administrations, as well as the previous government's introduction of the **Human Rights Act (HRA) 1998** and its constitutional reforms in the areas of devolution and the House of Lords. The current coalition government has already indicated its desire to introduce legislation to deal with what it sees as essential reform. It is perhaps of interest in dealing with a question on legal

change/reform to refer to the number of inquires the coalition leadership has promised and indeed the decision to hold a national referendum on parliamentary and voting reform.

If Parliament tends to focus on narrow political issues, it nonetheless does have access to a wider consideration of law reform through various mechanisms. There is, first of all, the issuing of consultative Green Papers in which the government sets out its proposals for legislation and invites contributions from interested parties.

More formal advice may be provided through advisory standing committees such as the Law Reform Committee, established in 1952, which is charged with the task – in relation to the civil law – of considering what changes to such legal doctrines as may be referred to it by the Lord Chancellor are desirable. In relation to criminal law, the Criminal Law Revision Committee was established in 1959 to perform similar functions.

A further mechanism for considering the need for law reform in specific areas is the Royal Commission. Examples of such commissions include the Commission on Criminal Procedure (1980), which led to the enactment of the **Police and Criminal Evidence Act 1984**, and the Royal Commission on Criminal Justice (the Runciman Commission), which examined pre-trial procedure, the conduct of trials and the provision of redress in the case of alleged miscarriages of justice, reporting in 1993. Also, senior judges may be given the remit of investigating particular aspects of the legal system. The most important recent report of this nature was Lord Woolf's *Access to Justice*, which examined the operation of the procedures of the civil law system.

Lord Woolf's recommendations were subsequently given effect by the **Civil Procedure Act 1997** and the **Civil Procedure Rules 1998**. Lord Justice Sir Robin Auld undertook a corresponding examination of the criminal law system and Sir Andrew Leggatt reviewed the operation of the tribunal system.

The weakness in this panoply of committees and commissions is that they are all *ad hoc* bodies. Their remit is limited to the particular areas of concern that are put before them, and they do not have the power either to widen the ambit of their investigation or to initiate proposals for investigation and reform.

In relation to particular reforms, external pressure groups or interested parties may very often be the original driving force behind them; and, when individual MPs are fortunate enough to find themselves at the top of the ballot for Private Member's Bills, they may well also find themselves the focus of attention from such pressure groups proffering pre-packaged law reform proposals in their own particular areas of interest.

The weakness, again, lies in the single issue, *ad hoc* nature of such proposals, at the expense of a general consideration of related issues.

Turning attention to the role of the judiciary, it is a matter of little contemporary controversy to recognise that judges have a potential power to create law. Indeed, it is at least arguable that the whole of the common law is a product of judicial creativity.

Given this potential to create law, it would seem equally obvious and uncontroversial to recognise that the judiciary also has a role to play in law reform. An example of this reforming power was evident in the recognition of the possibility of the crime of rape within marriage (see *R* (1991)). Whereas the common law had previously denied the possibility of such a crime being committed when the parties were married, both the Court of Appeal and the House of Lords held that a husband is not immune from prosecution for rape in relation to his wife.

In the above case, the court restricted itself to reforming common law rules and it is in that limited area that some of those who would recognise the power of the judiciary to reform the law would limit its operation. The argument is that as the judges created the common law, they can be left to reform it. There is an important corollary to this, however, that judges have no place in reforming statutory provisions. They may signal the ineffectiveness of such provisions and call for their repeal or reform, but it would be a usurpation of the legislature's function and power for the courts to engage in such general reform. Of course the introduction of the **HRA 1998** has increased the scope of the courts' power to interpret legislation in such a way as to make it compatible with the provisions of the **European Convention on Human Rights**, but there are limits to such powers (see *Re S* (2002)) and the courts are specifically denied the power to declare primary legislation unlawful. The courts can, however, issue a declaration of incompatibility which may well lead to the revision of the law in question by Parliament (see *Bellinger v Bellinger* (2003) and the subsequent **Gender Recognition Act 2004**).

However, if Parliament is overly concerned with particularities of law reform, and the judiciary is constitutionally and practically disbarred from reforming the law in other than an opportunistic and piecemeal basis, there still remains the need for some institution to concern itself generally with the question of law reform. That need is, at present, met by the Law Commission.

The Law Commission was established under the **Law Commission Act 1965**. It was set up under the auspices of Lord Gardiner LC, with the specific aim of improving the previous *ad hoc* consideration of law reform by charging it with the duty of keeping the law *as a whole* under review and making recommendations for its *systematic*

reform. Under the **Act of 1965**, the Law Commission was constituted as an independent body with full-time members. It was given duties with regard to the revision and codification of the law, but its prime duty was, and remains, law reform.

The scope of the Commission is limited to those areas set out in its programme of law reform, but its ambit is not unduly restricted, as may be seen from the range of matters covered in its tenth programme, set out in June 2008. The seven new projects listed in the programme relate to the following issues:

1. *Adult social care*. The stated aim of reviewing the law under which residential care, community care and support for carers is provided, with the ultimate aim of providing a coherent legal structure, preferably in the form of a single statute, for those services.
2. **Intestate succession and the Inheritance (Provision for Family and Dependants) Act 1975**. This project will involve a general review of the law of intestacy, and the legislation under which family members and dependants may apply to court for reasonable financial provision from the estate of a person who has died.
3. *Level crossings legislation*. This project will undertake a general review of the law relating to level crossings with a view to providing a modern legal structure for their regulation.
4. *Marital property agreements (pre-nuptial contracts)*. Such agreements are not currently enforceable in the event of the spouses' divorce or the dissolution of the civil partnerships although courts may take them into consideration in deciding ancillary relief. This project will examine the status and enforceability of such agreements.
5. *Private rights of redress under Unfair Commercial Practices Directive*. Currently the regulations enacting the directive provide no private rights to consumers and breaches can only be enforced by administrative measures or through the criminal courts. This project will consider how far a private right of redress for unfair commercial practices would simplify and extend consumer law.
6. *Simplification of criminal law*. This project will look to identify offences which have ceased to perform any real function due to social changes, or which have been rendered redundant by the creation of new criminal offences, with a view to their abolition or repeal. It is recognised that such a simplification of the criminal law is a prerequisite for any attempt to codify the criminal law, which remains one of the essential goals of the Law Commission.
7. *Unfitness to plead and the insanity defence*. As the programme puts it:

> The current law is based on rules formulated in the first half of the nineteenth century when the science of psychiatry was in its infancy. Those rules are in need of reform. There are important unresolved issues which include the scope of a trial of the facts following a finding of unfitness to plead. In addition, there is a need to reconsider the relationship between automatism and insanity and that between diminished responsibility and insanity.

The Law Commission is currently consulting as to areas to cover in its forthcoming eleventh programme.

In addition to these programme projects, ministers may refer matters of particular importance to the Commission for its consideration. As was noted in Chapter 1, it was just such a referral by the Home Secretary, after the Macpherson Inquiry into the *Stephen Lawrence* case, that gave rise to the Law Commission's recommendation that the rule against double jeopardy be removed in particular circumstances. An extended version of that recommendation was included in the **Criminal Justice Act 2003**.

It is estimated that at any one time, there are some 25 law reform projects being actively considered by the Commission, and it only ever recommends reform after it has undertaken an extensive process of consultation with informed and/or interested parties. It is this process of general and disinterested consultation, as the basis for the formulation of a genuinely informed recommendation, which distinguishes the procedure of the Commission from the reforms of the judiciary and the partial reforms advocated by interested parties. Reference has already been made to the way in which the judges altered the common law rule relating to rape within marriage, but it is perhaps worthy of mention that the Law Commission had already issued a working paper, entitled *Rape Within Marriage* in 1990, and its report of the same name was issued in 1992 (Law Com No 205). The Commission continues to consider whether this particular matter, and other important related matters concerning the relationships of married couples, such as the question of compelling a wife to give evidence against her husband, should be subject to legislative reform. The point to be made is that judges can only change the common law with regard to the problem encapsulated in the case that comes before them: the Commission, on the other hand, is at liberty to consider all matters relating to a specific issue.

The Law Commission claims that, in the period since its establishment in 1965, over 100 of its law reports have been implemented. Examples of legislation following from Law Commission reports are: the **Contracts (Rights of Third Parties) Act 1999**, based on the recommendations of the Commission's Report No 180, *Privity of Contract*; and the **Trustee Act 2000**, based on the Commission's Report No 260. In February 2002 the **Land Registration Act** was passed, which has had a major impact on the land registration procedure. The Act implemented the draft Bill which was the outcome of the Commission's largest single project.

Current judicial review procedures are very much the consequence of a 1976 Law Commission report, and a review of their operation and proposals for reform was issued in October 1994.

In the area of criminal law, the preparatory work done by the Commission on several aspects of the criminal justice system (bail, double jeopardy and the revelation of an accused person's bad character) was incorporated into the **Criminal Justice Act 2003**.

It remains a fact, however, that a significant number of its reports recommending reform remain to be implemented, even though a number of them had been accepted by the Government. In response to this failure of implementation the former Law Lord, Lord Lloyd of Berwick, introduced a Law Commission Bill in the House of Lords. The resultant Act of 2009 contains provisions to amend the **Law Commission Act 1965** so as to:

- require the Lord Chancellor to prepare an annual report, to be laid before Parliament, on the implementation of Law Commission proposals;
- require the Lord Chancellor to set out plans for dealing with any Law Commission proposals which have not been implemented and provide the reasoning behind decisions not to implement proposals;
- allow the Lord Chancellor and Law Commission to agree a protocol about the Law Commission's work. The protocol would be designed to provide a framework for the relationship between the UK Government and the Law Commission, and the Lord Chancellor would have to lay the protocol before Parliament.

Common Pitfalls ✗

Avoid the temptation to rush straight in to a consideration of the Law Commission. Reference should be made to the other mechanisms for examining the need for reform.

Aim Higher ★

Reference to the **Law Commission Act 2009** and the reason for its introduction will gain credit, as will knowledge of the content of the Law Commission's programmes.

2 The Courts and the Appellate Process

THE COURTS

A sound knowledge of the civil and criminal court structure is essential for a proper understanding of many aspects of the English legal system. You should be aware of the jurisdiction of each court (that is, which types of cases each court is competent to deal with), how its workload compares with other courts, how it is organised and what criticisms have been made of these features. The courts in question are the county courts, magistrates' courts, the Crown Court, the High Court, the Court of Appeal, the Supreme Court and the Judicial Committee of the Privy Council.

The court system of 2011 is significantly different from that of 20 years earlier. It has undergone many changes to fit in more with the interests and conveniences of litigants and less with the interests of lawyers. A charter for the civil courts now states, for example, that anyone telephoning a court between 9 am and 5 pm on a weekday will get a prompt and helpful answer. It also says that within 10 working days of a court receiving a letter, the sender will get a reply by letter or telephone.

The Judicial and Court Statistics (published in December 2009) give the following profile of court activity for 2008:

KEY FINDINGS

APPEALS

A total of 33 appeals were entered, and 58 disposed of by the Judicial Committee of the Privy Council during the year, compared to 97 and 71 for 2007 respectively.

Seventy-one appeals were presented to the House of Lords. The House disposed of 96. Of the appeals heard by the Court of Appeal Criminal Division, 43% against conviction and 75% against sentence were allowed.