<p style="text-align:center">**LAW MODERATIONS – HILARY TERM 2017**
MODERATORS' REPORT</p>

PART I

(A) STATISTICS

Numbers and percentages of those passing and failing

Numbers

	2017	2016	2015	2014	2013
Distinction	37	26	34	36	38
Pass	176	180	177	168	166
Pass in 1 or 2 subjects only	-	3	-	-	-
Fails	-	-	-	-	-
Total	213	209	211	204	204

Percentages

	2017	2016	2015	2014	2013
Distinction	17.37	12.44	16.11	17.65	18.63
Pass (without Distinction)	82.63	86.12	83.89	82.35	81.37
Pass in 1 or 2 subjects only	-	1.44	-	-	-
Fails	-	-	-	-	-

Number of vivas

Vivas are not held in this examination.

Number of scripts double or treble marked

Scripts in this examination are not automatically double marked. Following the agreed procedures, scripts were double marked during the first marking process to decide prize winners and when a fail mark had been awarded. Some further double marking was done in the first marking process to police borderlines and check awards of very high and very low grades. Once the marks were returned, the following classes of script were second marked:

(i)   Papers awarded 68 or 69 were double-marked when the candidate had achieved 68 or above in another paper, and there was a reasonable prospect of altering the candidate's overall classification.

(ii)   Papers of a II.I standard which were 4 or more marks below the candidate's average.

(iii) Where a candidate had one mark at or above 60 or two marks at or above 58; and where their overall average mark was below 60.

(iv)   Where a candidate had one mark above 60 and two marks of a II.II standard and the average mark across all three papers was above 59.

(v)   Where a Course 2 candidate had an average, over the three papers, of less than 60.

Second marking scripts of a II.II standard which were 4 or more marks below the candidate's average did not impose a significant additional burden on the examiners. The second marking of papers where the overall average mark was below 60, but above 59 with one paper marked at above 60, was also thought to be a useful addition to the second marking criteria, and it did not impose a significant additional burden on examiners. The Moderators accordingly supported the continued use of these second marking categories.

Markers this year loyally followed the general instruction that the whole of the marking scale be used and grades at the higher end of the 60s and also above 70 be used liberally. This was particularly true of marks above 70. This resulted in a small group of candidates obtaining outstanding marks across all three subjects. The borderline grades of 58, 59, 68, and 69 were also used at the first marking stage, and each subject group engaged in double marking in order to test the lines between II.II, II.I and I class grades. We adopted the policy of ensuring that, when checking scripts across the marks for calibration purposes, these borderline scripts were chosen for double marking at the first marking stage.

Number of candidates who completed each paper

213 candidates sat each of the three papers.

(B) EXAMINATION METHODS AND PROCEDURES

Incomplete answers and breaches of rubric

As last year, 'short weight' and associated phenomena were dealt with by the award of the mark merited by the work the candidate had actually presented. The only rubric breaches this year occurred in criminal law, where candidates had failed to complete four questions, thereby failing to answer two problem questions or one essay question. No further action was taken other than awarding a mark of zero for the answers which were not completed.

Consistency of marking

Steps were taken to review the consistency of markers' profiles after 25 scripts, and also at the end of the first marking stage. The Moderators agreed that investigation and explanation should follow if either an individual marker or a team of markers awarded fewer than 15% or more than 20% I class marks, or fewer than 5% or more than 10% II.II (or worse) marks. This was the case in the Roman law paper (A Roman Introduction to Private Law) and was brought to the attention of the Moderator for that paper in the Moderators' meeting. It was clear that the group marking that paper had followed the procedures, meeting to agree marks after the profile of 25 scripts and the final profiles and had a satisfactory explanation for this divergence.

(C) PRACTICE WITH REGARD TO SETTING PAPERS

Each paper was set by the relevant Moderator, acting in conjunction with the paper's other markers.

Past papers were available via OXAMS.

PART II

(A) GENERAL OBSERVATIONS

The Moderators are extremely grateful to Julie Bass, the Law Faculty Examinations Officer.

The tight timetable for Mods was maintained. All the markers showed exceptional zeal and promptness early in the marking period making this a smooth process, particularly given an early Easter break which occurred over the weekend before the first marking deadline. All markers also cooperated effectively to ensure that second marking took place efficiently, accommodating conferences and childcare over the school holidays.

Medical certificates and special cases
18 candidates had special arrangements for sitting their examinations. There were 15 'Factors Affecting Performance' applications in total. No candidate's final result was affected.

Release of grades
The grades for all students were released without error, on Monday 3 April 2017.

(B) GENDER etc. (equal opportunities issues and breakdown of the results by gender; Course 1 and 2 performances; ethnicity analysis)

The gender breakdown for Course 1 and Course 2 combined was:

	2017		2016		2015		2014	
Result	Gender	No	Gender	No	Gender	No	Gender	No
Distinction	F	16	F	7	F	18	F	17
	M	21	M	19	M	16	M	21
Pass	F	106	F	102	F	109	F	98
	M	70	M	78	M	68	M	68
Two Paper Pass			F	3				
			M	0				
Withdrawn			F	1				
			M	1				

These statistics indicate that the rate at which women obtained a Distinction is appreciably lower than the rate at which men obtained a Distinction, although the disparity is much smaller than it was in 2016.

It was also possible to disaggregate the comparative performance of Course 1 and Course 2 candidates – 16% (31/188 candidates) and 24% (6/25 candidates) achieved Distinctions in each group respectively, and 17% in the combined cohort.

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

(C) SUBJECT REPORTS

A Roman Introduction to Private Law

General comments

A new rubric was introduced in this subject in 2017, requiring candidates to answer a compulsory gobbet question (choosing to comment on 2 texts out of 6 offered) and at least one of three problem questions. This change was accompanied by an adjustment in the syllabus in the area of contractual obligations, expanding the number of substantive topics covered by focussing more closely on two of the specific contracts, sale and purchase (*emptio venditio*) and the verbal contract of *stipulatio*.

Overall, these changes appeared to have bedded in well. There were no breaches of rubric and the overall standard of scripts was more consistent across the cohort than in previous years. There were some exceptionally strong scripts, and a greater number of scripts were deserving of Distinction marks. Even so, the candidates appeared on the whole more comfortable with the gobbet and essay questions than with problem questions and a few were let down by poor technique in answering problem questions, and in particular in not identifying the issue or the rule(s) to be applied to the issue with sufficient precision. It is to be hoped that this slight imbalance will be erased as the new rubric and syllabus become second nature.

Questions

Q1: Texts (c) and (d) were the most popular by far, although there were strong responses to all texts. The best responses used the text to maximum advantage – as a provocation for the following comment, defining the area of enquiry and highlighting key issues. For example, candidates who focussed in text (d) on the effects of discordance between question and answer in stipulation, whether formal or substantive, were rewarded more highly than those who gave a general account of verbal contracts. Attention to detail, based on the primary texts, was also commended. For example, in text (c), candidates were expected to be able to identify with precision the (short) list of things requiring transfer by a formal conveyance.

Q2: Questions concerning formation of the contract of sale and purchase were, in general, better handled than questions concerning its performance (including liability for statements, impossibility and risk/care). Stronger candidates identified a proprietary question as to ownership of the eggs and carried this forward into a detailed analysis of the legal consequences of the fire, and in particular the possibility of claims for *damnum iniuria datum* and related issues of noxal liability. A number of candidates suggested, incorrectly, that Balbus had delictual actions against his own slave for the damage caused to his property.

Q3: This problem question, focussing on the law governing delictual obligations, was on the whole well answered. Most candidates recognised the possible application to the events in the forum of the delicts of *iniuria* and *damnum iniuria datum* and the possible theft (*furtum*) of the plate, but detailed analysis of the remedial protection was often curtailed or omitted. Stronger candidates paid close attention to the facts and used primary sources to analyse more difficult aspects such as the measure of compensation in *damnum* and *contrectatio* in *furtum*.

Q4: This problem question, combining elements of property, contract and delict, was generally less well handled. The strongest answers paid close attention to the facts and to the position in which the advisee (Javolenus) found himself, focussing on the means by which he could assert entitlement to the land, servitudes and bricks *vis-à-vis* Otho, and then considering the impact of that analysis upon

the contractual relationship between Javolenus and Marcus. The importance of clear and concise analysis of the *usucapio* rules cannot be underestimated – too many fell into the trap of asserting that the usurper, Nerva, had usucapted the land before his death. Very few candidates identified the potential significance of the possessory interdicts in determining who would be the claimant in a *vindicatio*, and the significance of that mechanism. On the contractual side, a few fell into the error of suggesting that if the seller, Marcus, did not own the land, the contract to sell it was invalid.

Q5: Relatively few candidates answered this question. The best answers used detailed knowledge of all areas of Roman private law to highlight the relative importance of the urban praetor's role as a law maker. Weaker candidates treated the question as a prompt to deliver a general essay on sources, without giving specific examples and without putting the urban praetor's role in context.

Q6: Relatively few candidates answered this question. The strongest candidates used the whole of the given text to structure and provoke analysis of the law concerning praedial and personal servitudes, looking at their purposes and relationship to other concepts within the law of property, as well as their relationship to one another. Others drifted quickly (and dangerously) into a general account of the law of property.

Q7: This was a popular question, and was well answered by most candidates. The most impressive responses analysed in detail, with reference to supporting materials, the character and relationship of the nominate contracts and the gap-filling role of *stipulatio* and the innominate contracts. As many candidates disagreed with Birks' assessment as agreed with him, leading to some lively discussion of the Roman approach to contractual obligations.

Q8: This was also a popular question. The stronger answers used the texts to identify and analyse specific examples of *accessio* and *specificatio*, and to analyse critically the rules governing both ownership and remedial protection, as well as the linked contractual and delictual framework.

Q9: This was the most popular question on the paper, and produced answers at both ends of the marking scale. Those who engaged with the quotation, using their knowledge derived from primary texts and secondary literature to test (and, in many cases, refute) Nicholas' specific claims, were rewarded. Those who delivered a general account of the law of theft were likely disappointed.

Q10: Only two candidates answered this question.

Constitutional Law

General Comments

Overall the standard was high and there were some outstanding scripts. Questions concerning human rights and parliamentary sovereignty were again very popular, and it may be that candidates should be preparing themselves to address a wider range of examinable material. The strongest answers addressed the precise question posed, were grounded in the detail of constitutional law and practice, balanced description and evaluation as the question warranted, and made such use of general constitutional theory and/or academic literature as appropriate. Weaker answers tended to recite well-worn observations about the topic in general, and either made errors in discussing particulars or simply never descended into the relevant detail at all. Limited engagement with relevant cases, notwithstanding their provision in a case list, was also a feature of some scripts.

Q1: Is the duty of national courts to keep pace with the jurisprudence of the European Court of Human Rights best captured by the phrases "no more, but certainly no less" or "no less, but certainly no more"?

This was a very popular question, with most candidates focusing on how to understand the cases introducing, applying and then perhaps abandoning the 'mirror principle'. Some candidates either overlooked section 2 of the Human Rights Act 1998 altogether or, more often, assumed that its meaning and significance was obvious. The best candidates worked through the detail of the relevant cases, explaining clearly how the law had developed and evaluating this development by reference to the structure of the 1998 Act and/or constitutional principle more widely. Some candidates went astray in considering instead the power or duties of the courts under other sections

Q2: What sense is there in saying that the constitution is summed up in the phrase: "what the Queen-in-Parliament enacts is law"?

This question was reasonably popular but was often misunderstood. Many candidates aimed to explain the extent to which the doctrine of parliamentary sovereignty could be summed up in the phrase in question, rather than asking what sense there was in taking the phrase to sum up the constitution. However, there were some very strong answers, intelligently analysing parliamentary sovereignty and the extent to which the constitution centred on it, elucidating the connections to the differences between legal and political constitutionalism.

Q3: Does Parliament have the authority to impose manner and form limitations on its successors?

This question was also reasonably popular. Most candidates discussed at least the European Communities Act 1972, although only some made clear how that Act could be understood to impose manner and form limitations on successive Parliaments. Likewise, many candidates asserted that the Parliament Acts 1911 and 1949 imposed such limits, but only some took care to explain how exactly this was so or to address alternative understandings. The better answers understood and considered the theoretical foundations of parliamentary sovereignty and closely addressed the question of *authority* in particular.

Q4: How and when do statutes limit the Crown's prerogative powers?

This was a fairly popular question, but perhaps less so than might have been expected in view of the salience of the *Miller* litigation. Most candidates reviewed the leading cases on point. The range and depth of case analysis varied widely across the scripts. There were some very weak answers, which missed the cases altogether, misunderstood the prerogative, and instead discussed the constitutional position of the monarch in general. The strongest answers analysed the leading cases incisively, connected them to fundamental constitutional principle and drew sharp conclusions about the interplay between statute and prerogative.

Q5: "The description of the Government of Wales Act 2006 as an Act of great constitutional significance cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted in the same way as any other statute" (*Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* (2014) (Lord Reed and Lord Thomas)). Discuss.

This was not a popular question but it was mostly well-answered. Most candidates reflected on the idea of constitutional statutes in general and the devolution legislation in particular. The better answers perceived the difference between how the court understood the legal meaning of the statute in question (such as the Government of Wales Act 2006) and how the statute informed the interpretation of *other* statutes. The best answers were able to evaluate the quoted proposition and to relate it critically to the case law at large.

Q6: Does the Human Rights Act 1998 unjustifiably qualify the separation of powers?

This was a very popular question and was reasonably well answered in the main. Some candidates addressed the literature on the theory of the separation of powers at length, which was not always an effective strategy. The best answers outlined an understanding of the constitutional principle and then considered how the main features of the Human Rights Act might qualify it. Many scripts only addressed sections 3 and 4 of the Act, but better answers ranged more widely (although sometimes too far, introducing irrelevant material). The best answers considered carefully how, if at all, qualification of the separation of powers might be justified, whether by the nature of human rights or the peculiar context of the Human Rights Act or otherwise.

Q7: How does the rule of law bear on judicial control of executive power?

This was a reasonably popular question. The calibre of answers ranged widely. Some candidates made good use of the theoretical literature on the rule of law, integrating perspectives from that literature with examples of judicial control of executive power. For others, the discussion of the literature became an end in itself and did not inform a more general argument about the grounds – and limits – of judicial oversight. There was some excellent case analysis, but also some surprising omissions and errors about important cases, which often had been discussed at length in lectures.

Q8: What relationship should hold between Government and Parliament?

This was a popular question and was mostly well-answered. Better answers understood the complexity and grounds of the relationship between the two institutions; weaker answers were simplistic in their analysis and could not adequately explain how one institution stands to the other. Some scripts simply recited a critique of executive domination of the Commons, for example, and never addressed the question of what relationship *should* hold. Relevant constitutional conventions were discussed by some essays, usually to good effect, but a number of answers overlooked these conventions almost entirely.

Q9: Should the Parliament Acts 1911 and 1949 be amended?

This was not a popular question. Some answers took the question, wrongly, as an opportunity to discuss parliamentary sovereignty in general. Others reflected on the Acts as a way to think about the case for House of Lords reform. The better answers were able to address the detail of the Acts, and hence to make the case for or against possible amendment with authority and precision, and to relate that detail to constitutional principle.

Q10: "There is no constitutional reason why an MP representing a constituency in one of the devolved nations could not be appointed to a ministerial post whose remit pertains largely to England (or England and Wales)" (HOUSE OF LORDS CONSTITUTION COMMITTEE, November 2016). Is this true?

Again, this was not at all a popular question. Some scripts took it to be a general invitation to discuss the West Lothian question and the asymmetries of the devolution settlements. Better answers reflected on how the formation and maintenance of responsible cabinet government intersected with parliamentary accountability, and the West Lothian question and recent developments concerning English Votes for English Laws.

Criminal Law

Q1 comprised two alternatives. Alternative (a) concerned the difference between offences and defences. Alternative (b) related to the distinction between justification and excuse. Neither alternative was popular. However, the candidates that attempted question 1 generally wrote impressive answers to it, often drawing on important pieces of theoretical literature.

Q2 asked candidates to address whether the criminal law should be concerned with outcomes. The best answers to this question were able to engage convincingly with the concept of moral luck. Weaker answers missed the fact that this is what the question was ultimately about.

Q3 asked candidates to discuss how legislative intervention in relation to the criminal law has proceeded generally. The question could have been usefully developed in a number of interesting directions. It would have been possible to discuss, for example, the absence of codification efforts and the ad hoc way in which Parliament has generally intervened. The question was unpopular, which is a fact that perhaps reflects candidates' general focus on doctrine rather than on deeper questions about the criminal law as a system.

Q4 asked whether there is any principle underpinning the circumstances in which a duty to act arises. The question was very popular, but most of the answers were unimaginative and dull. By and large, nearly all candidates to this question simply outlined the principal situations in which a duty to act is recognised and did not consider the deeper point with which the question was concerned, which was whether these situations are animated a core organising idea. Those answers tended to do poorly.

Q5 asked whether strict liability in the criminal law objectionable. Very few candidates attempted this question. Those that did produced answers of varying quality, with some candidates apparently being uncertain as to what strict liability entails and others not discussing what is potentially problematic about strict liability. Some of the better answers tied the discussion to key contributions in the (vast) theoretical literature that exists on the topic.

Q6 queried whether the criminal law's approach to recklessness is satisfactory. The question was very popular. However, many answers to this question simply trotted out a basic description of the law governing recklessness and did not engage with the normative issue that it had been raised. These answers received low marks.

Q7 concerned the recent decision in *Jogee*. Many candidates attempted this question. Weak answers simply described the decision (sometimes badly). Better answers quickly moved on to consider possible objections to the reasons given in it.

Q8 addressed the structure of the Offences against the Person Act 1861. Many good answers to this question were written. The very best answers generally engaged convincingly with John Gardner's article on the subject, to which the question steered candidates.

Q9 raises issues in the law regarding sexual offences, theft and attempts. The question was very popular. Many candidates were tripped up by a point at the end of the question regarding impossible attempts. A significant number of students wrongly thought that the criminal law does not attach liability to impossible attempts. The best answers to this question were able to deal comprehensively with the Sexual Offences Act 2003, particularly sections 75 and 76. Weaker answers omitted to mention key passages in, in particular, section 75.

Q10 concerned issues in the law of homicide, causation and intoxication. The answers were generally of high quality. Some candidates became pre-occupied with what were plainly non-issues, such as whether the (unidentified) owner of the swimming pool might be liable for murder. The best answers were those that engaged well with the complex points that arose on account of the fact that both George and Fred were intoxicated.

Q11 principally concerned issues regarding loss of control and self-defence. Surprisingly, a large number of candidates mentioned only one of these defences, and many candidates overlooked the fact that both defences have been heavily impacted by legislative intervention (the former being a creature of statute) and failed to make appropriate reference to the legislation.

Q12 presented points in the law of fraud and theft. The question was popular and the answers written to a high standard, overall. The better answers demonstrated lateral thinking, such as by considering

whether there might be property in the cinema pass both in terms of the contractual rights that it conferred vis-à-vis the cinema and qua chattel.

Q13 called for consideration of the law concerning attempts, accessorial liability, encouraging and assisting crime and conspiracy, among other areas. Many students attempted this question and, overall, did so successfully. The question raised a large number of points and the best candidates were able to move straight to the principal issues. Weaker scripts omitted to mention central issues, such as the provisions of the Serious Crime Act 2007.