

# LAW MODERATIONS – HILARY TERM 2015

## MODERATORS' REPORT

### PART I

#### (A) STATISTICS

##### 1. Numbers and percentages of those passing and failing

###### *Numbers*

	2015	2014	2013	2012	2011
<b>Total</b>	211	204	204	218	219
<b>Pass (without Distinction)</b>	177	168	166	184	191
<b>Distinction</b>	34	36	38	34	26
<b>Pass in 1 or 2 subjects only</b>	0	0	0	0	2
<b>Fails</b>	0	0	0	0	0

###### *Percentages*

	2015	2014	2013	2012	2011
<b>Pass (without Distinction)</b>	83.9	82.4	81.4	84.4	87
<b>Distinction</b>	16.1	17.6	18.6	15.5	12
<b>Pass in 1 or 2 subjects only</b>	0	0	0	0	1
<b>Fails</b>	0	0	0	0	0

##### 2. Number of vivas

Vivas are not held in this examination.

##### 3. Number of scripts double or treble marked

Scripts in this examination are not automatically double marked. 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 remarking could alter the candidate's overall classification.
- (ii) Papers of a II.ii 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.

The Moderators expected also to double mark where the marks on first marking had left a Course 2 candidate with an average mark marginally below the 60 required for automatic continuation on that course, and where the first marker had given a failing grade. In the event, there were no such cases affecting Course 2 candidates, and no scripts attracted a failing grade.

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 (and, conversely, it also did not significantly modify decisions on assessment standards). The second marking of papers where the overall average mark was below 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 this second marking category.

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. The borderline grades of 58, 59, 68, and 69 were also used liberally, and each subject group vigorously engaged in double marking in order to test the lines between II.2, II.1 and I class grades.

#### **4. Number of candidates who completed each paper**

211 candidates sat the three papers.

### **(B) EXAMINATION METHODS AND PROCEDURES**

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 Moderators found one rubric breach this year, which seemed to be a simple misreading of possibly vague instructions and which involved no advantage taking by the candidate. This concerned the instruction in one paper to "answer **four** questions including **one, and only one**, of those marked with an asterisk." It was possible to read this as an instruction to answer asterisked *parts* drawn from any of the first two questions, rather than two parts of either Question 1 or Question 2. The rubric could be redrafted to make it clear that the candidate is to "comment on *either* two parts of Question 1, *or* two parts of Question 2". The Faculty Examination Committee may wish to review this wording.

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% first class marks, or fewer than 5% or more than 10% lower second (or worse) marks.

### **(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, where an early Easter break imposed an early cut-off date.

#### **Medical certificates and special cases**

17 candidates had special arrangements for sitting their examinations. There were 4 medical certificates in total and 5 college letters forwarded to the Moderators (under sections 11.8-11.10 of the Education Committee's General Regulations for the Conduct of University Examinations). No candidate's final result was affected.

#### **Release of grades**

The grades for all students were released without error, on Wednesday 8 April 2014, one day after the planned release; this delay was caused by software issues at Schools. The final Moderators' meeting had occurred just before the Easter break, which necessarily delayed the publication of the results by a few days.

### **(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:

	<b>2015</b>		<b>2014</b>		<b>2013</b>	
Result	Gender	No.	Gender	No.	Gender	No.
Distinction	F	18	F	17	F	19
	M	16	M	21	M	19
Pass	F	109	F	98	F	83
	M	68	M	68	M	83

These statistics yield a percentage comparison of Distinction performances as follows – F: 8.53%; M: 7.58%. This is a more or less equal result, slightly favoring female candidates, but not to a significant degree. This year's result removes some concerns about gender disparity following the 2014 examination. Future Moderators will continue to keep an eye on this distribution to guard against gender bias in the formal examination process.

It was also possible to disaggregate the comparative performance of Course 1 and Course 2 candidates – 15% (27/180 candidates) and 22.5% (7/31 candidates) achieved Distinctions in each group respectively, and 16.1% in the combined cohort. This is in line with past years' results, where the Course 2 cohort has tended to show special strength. The surprising results of 2014, where the Course 1 cohort out-performed Course 2, now looks like an anomalous year.

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**

This year's class showed pleasing levels of engagement with the subject, and the great majority of candidates amply reached a good standard of learning and analytical understanding. Compared to last year there were perhaps more papers in the low II.2 range indicating students who had done the bare minimum of preparation; and there were perhaps fewer really outstanding Distinctions at the top of the range. The four best papers suggested strong talent in both learning the source materials and expressing subtle jurisprudential ideas. Many papers in the upper second range also demonstrated a strong grasp of principle and an ability to write about the law with lucidity and originality. However many candidates succumbed to the temptation to give pre-prepared and flat-footed answers that failed to engage directly with the questions being asked. Candidates should grasp by end of Moderations that studying law does not involve merely memorising a simplified set of rules and facts, but is rather an exercise in critical thinking that demands an adroit approach to interpretation enlivened by a spark of fresh thought.

#### **Question 1**

In (a) some candidates gave fanciful explanations of how the emperor was (or was not) a totalitarian dictator, suggesting a poor grasp of the relevant constitutional history. The better students discussed changes in sources of legislation from Augustus to Justinian and saw that this extract concerned sources of law-making authority, and the best discussion played with the conundrum that the emperor's power was said to come from himself as legislator and yet also from the people who had conferred their own natural authority. The scope of *iniuria* in (b) was well explored and proved a popular question, though some candidates took this as an opportunity for a general account of the delict, without any focus as to how slights to a woman or minor could involve contempt towards many individuals by the same conduct. The gobbet on incorporeal and corporeal property attracted some partial answers that got stuck on usufruct and cession in court; only a few gave rounded answers looking at servitudes and other categories of incorporeal right more broadly; the best answers investigated problems of derivative acquisition where physical possession is impossible, and even the Gaian paradox as to whether all legal claim-rights whether obligational or proprietary are properly incorporeal. The question on informal consensual contracts was difficult, requiring a good overview of the essentials of sale, the contract *litteris* and the other nominate contracts; some excellent answers

were registered. Few candidates discussed the requirement for writing in sale and other contracts introduced by a constitution of Justinian.

### **Question 2**

There were some very weak discussions of (a) that failed to see that Gaius was using natural reason as a metric or indicium of the law of nations; better candidates could see how later natural law theory was in tension with *ius gentium*. Very few candidates seemed to know that Ulpian had condemned slave institutions in the *ius gentium* as against natural law, yet valid. In (b) the problem of language of stipulation – and the wider issue of how a Roman institution could be exported to non-Roman peoples – was generally submerged in a general discussion of how stipulation worked. Too few candidates seemed aware of the debate over the reforms of Leo, and others did not link this debate to the quotation. In (c), students generally showed a good appreciation of cession of usufruct; but only a handful could go on to discuss what this technique revealed about the nature of incorporeal rights and the origins and evolution of usufruct as personal servitudes lacking full corporeality or assignability. Discussion of other methods of creation of personal servitudes was largely absent. Excerpt (d) was generally poorly answered, with candidates lacking any information about the historical debate over the emergence of this aggravated delict; the better answers noted the relation to *iniuria* and to manifest theft, and correctly identified an imbalance in the severity of sanctions.

### **Question 3**

This question aimed to elicit reflections on juristic method in different eras of Roman law. Few candidates tackled this question (despite extensive lecturing on the topic in Michaelmas term); and even fewer were able to give a convincing historical analysis of either codification or different aspects of juristic science. As in past years, students seemed unwilling to learn any detail about the outstanding jurists and schools of different historical periods, running together Gaian institutionalism, Praetorian intervention, juristic interpretation, and later codifications. More historical curiosity is called for in order to answer this type of question convincingly.

### **Question 4**

Most candidates saw that bilateralism of contractual obligation and good faith standards were linked, as reciprocity in formation and performance inevitably imports mutual regard and interdependence. Better answers looked at whether good faith was to be seen as emanating from the agreement itself or else was imposed as a requirement of law, and provided illustrations as to the development of the law (e.g. in the case of protection against eviction). The best answers added in the plane of formal and informal *causa* and saw that unilateralism and formality of stipulation and its strict liability elements were linked.

### **Question 5**

This was one of the most popular questions, addressing a central issue of the law of property. A good number of candidates saw that a straight essay on bonitary ownership and good faith possession would not capture all that should be said about the dichotomy of possession and ownership, and were prepared to look at the role of possessory interdicts in disputes about title to property, original modes of acquiring property, and the shape of derivative acquisition, as well as the *actio Publiciana*. The best candidates gave an excellent explanation of how protected physical control and usucaption combined to introduce relativistic elements into a self-consciously absolutist system of property.

### **Question 6**

Servitudes were tested here by asking candidates to prepare an advice concerning the creation of rustic and praedial servitudes and the distinction of real rights from obligations. This was competently answered by most, but few were able to give a fully convincing explanation of the nature of servitudes and their evolution, with many using the model of *iure in re aliena* rather naively as if this was a classical concept. Only the best candidates broached the problem of counter-servitudes and other curbs of land use akin to servitudes but based on natural rights rather than consent or historical user.

### **Question 7**

The theft question was immensely popular, and attracted some very good answers, as well as many misfires. Weaker students fell prey to the temptation to write out a disconnected list of rules concerning theft, including marginally relevant reflections on sanctions. Better students refracted their knowledge through the lens of the question, using the key idea of handling to explore how theft was stretched to encompass many types of dishonest appropriation or fraud, while linking this to discussion of other, material elements of the delict. Some first class answers added an historical dimension, showing awareness of juristic contributions in different time periods, and noting thorny problems such as the law of attempts and inchoate offences, and accessory liability.

### **Question 8**

The Birksian quote and attached question were designed to elicit analysis of the development of the Aquilian action. Better candidates saw that the expansion of the action for wrongful damage came in historical phases of Praetorian and juristic extension, and explored expertly the move from fixed penalties for direct and forceful interferences towards a more fluent set of remedies encompassing indirect losses and other cases falling outside the scope of the statute. Only a few candidates showed a strong awareness of the casuistic debates among jurists over causation and fault, and surprisingly many of the greatest classical discussions were omitted; only a few students seemed to know about the Slave and Barber case, for example, though everyone know about the Slave and the Javelin Thrower.

### **Question 9**

It is fair to say that no student found and analysed much more than a half of the possible issues in this question; but this was the point of the problem – to show how a relatively contained set of facts could arouse a host of issues across the law of property and contract. The rules of original acquisition such as *nova species*, the real contracts, and usufructary rights to slaves, were the most insecurely grasped, but overall those who attempted the question did well at identifying the issues aroused by a hapless colonial adventure rupturing local property claims, notably involving types of property outside patrimony. Many students fell into error by detailed examination of the classical rules on usucapion despite the absence of any *iusta causa* leading to possession of property.

### **Question 10**

This problem was only moderately popular. The exuberant exhibitions of bad behaviour by miscreant aristocrats in the narrative stimulated some good answers exploring *iniuria* and property damage. Only a few candidates were willing to go deeply into issues of dissimulation, causation, and measures of liability; and it was worrying that the major modern academic debates over the proximate periods for measuring loss were often skirted or omitted. Many candidates ducked any detailed discussion of the contractual issues involving sale and stipulation, and perhaps none saw in full the issues of property transfer involving *traditio* and

*derelicto*. Only a very few candidates spotted all of the major issues in play, including the possible application of other contractual or delictual remedies, such as the action for corrupting a slave; these were rewarded appropriately.

## CONSTITUTIONAL LAW

In general the papers were of a high standard this year, with a lot of essays clustered around the high 2.1 level and very few 2.2s. There were also a few truly outstanding scripts. The very best answers were able to use knowledge imaginatively and to make connections between the different topics studied. In particular, these answers were able not only to describe and explain aspects of constitutional law and doctrine, but also to apply and critically evaluate these concepts. A common defect in the weaker papers was to focus on describing aspects of constitutional law without using a detailed knowledge of the case law, and without going beyond this description. There also seemed to be a heavy reliance on quotations from lectures. The best answers were those which demonstrated clear critical engagement with the issues addressed by the question and which illustrated that the candidates were able to form their own perspective on constitutional law, providing a clear description and defence of that perspective.

### Question 1

This question was not very popular. The strong answers to the question were able to evaluate the complexities arising from the potential hierarchy amongst constitutional statutes or constitutional principles, in addition to the way in which the approach of the Supreme Court in *HS2* may have modified the nature of the relationship between UK and EU law. Weaker answers focused on the using the quotation either as a general indication to discuss the challenge to parliamentary sovereignty posed by EU law or to evaluate the existence of constitutional statutes.

### Question 2

This was popular, with candidates demonstrating a good knowledge and understanding of constitutional statutes. Better answers were able to focus equally on assessing whether constitutional statutes should exist in the UK, as well as whether they did exist. These answers also assessed what it might mean for a statute to be 'constitutional', explaining clearly how their answer to the question might change depending on the definition they adopted and providing a detailed evaluation of the case law and a critical engagement with the relevant secondary literature. Weaker answers focused predominantly on describing *Thoburn* and giving a general account of the impact of this case on parliamentary sovereignty.

### Question 3

This question was fairly popular. The best candidates provided a good evaluation as to the way in which the existence of prerogative powers may undermine the ideals of the rule of law, as well as discussing how the rule of law may require prerogative powers to be exercised in a particular manner. These candidates demonstrated a detailed knowledge of the relevant case law. Weaker answers focused on giving an account of the rule of law, frequently focusing on the division between formal and substantive conceptions of the rule of law, before providing a general account of prerogative powers, often referring only to the *CCSU* case. There was often little or no engaged evaluation of the relationship between the two. Some candidates also seemed to confuse judicial review of statutory powers with judicial review of prerogative powers.

#### **Question 4**

This question was very popular. The best answers were able to not only provide an account of a range of potential challenges to parliamentary sovereignty, but to evaluate the extent to which each potential challenge could be assessed as the greatest challenge. Outstanding answers focused on evaluating what was meant by ‘greatest’, recognising that different challenges occur when faced with a potential way in which Parliament may bind itself as to the manner and form of future legislation than that faced by the courts asserting that parliamentary sovereignty is a principle of the common law and, thus, may be modified by the common law. Weaker answers saw this question either as an opportunity to list potential challenges to parliamentary sovereignty, without evaluating which may pose the greatest challenge, or to select one particular challenge as ‘the greatest’ without providing a full explanation for this selection. In addition, better candidates were able to explain how cases demonstrated a challenge to parliamentary sovereignty as opposed to merely setting out the facts of the case.

#### **Question 5**

This was not a very popular question. Better answers were aware of the recent case law on the extent to which courts can use parliamentary debates and weaker answers merely restricted their analysis to *Pepper v Hart*, or also included reference to *Wilson v First County Trust* without distinguishing between the different ways in which courts refer to and use parliamentary debates. The better candidates were able to evaluate the extent to which scrutiny in this manner may enhance checks and balances, as well as how this may damage the separation of powers by, for example, elevating the will of the executive to that of the legislature.

#### **Question 6**

This was a fairly popular question. Weaker answers focused predominantly on the ‘West Lothian’ question, often concluding that no modification of the current devolution settlement should be made given that it was not wise to pose the question. Better candidates were aware of further issues – e.g. whether there was a need for greater devolution to regions of England – as well as being able to provide a more detailed evaluation of possible solutions to the ‘West Lothian’ question.

#### **Question 7**

This question was extremely popular. Most answers were able to give a good overall account of the possible ramifications of a repeal of the Human Rights Act. Better candidates were able to provide a detailed evaluation of the possible impact of the Act’s repeal, assessing the possible scenarios of such a repeal – e.g. whether this would be replaced by a different Act. Weaker answers tended to focus on giving an account of general arguments concerning the advantages and disadvantages of a legal protection of human rights, or focused predominantly on giving an account of the recent proposals of the Conservative Party to replace the Human Rights Act with a British Bill of Rights and Responsibilities, often taking a vehement stand in favour or against these proposals as opposed to evaluating the impact of the repeal of the Act.

#### **Question 8**

This question was fairly popular. Candidates demonstrated a good knowledge of the distinction between legal and political constitutionalism. The better candidates were able to evaluate the utility of this divide, assessing whether it provides a useful tool with which to evaluate the relative strengths and weaknesses of the UK constitution, drawing on case law as well as the secondary literature to illustrate their argument. Weaker candidates gave an account of the divide, criticising it for its lack of clarity, without further evaluating its utility.

### **Question 9**

This question was not popular. Weak answers tended to provide a list of constitutional conventions, declaring their role to be that of adding flesh to the bones of the constitution. Stronger essays were able to recognise that there is a range of different constitutional conventions which perform different roles, as well as evaluating these different roles.

### **Question 10**

This question was not popular. Good answers drew on a range of issues, recognising that Article 9 of the Bill of Rights would also grant immunity to MPs who made racist or blasphemous remarks in Parliament in addition to a consideration of the blanket immunity in defamation law for proceedings in Parliament. These candidates also provided a detailed evaluation of each of these differences, recognising that some may cause greater problems than others. Weaker answers were less able to explain these differences, or failed to evaluate the problems caused by this distinction.

## **CRIMINAL LAW**

Candidates generally responded very well to this paper. We were pleased that nearly all candidates were able to show a good understanding of the key legal principles and of the leading cases. Very few papers revealed any serious misunderstandings. As is common in mods there were many papers in the mid 60s which showed a solid understanding of the law and were able to explain legal concepts in a clear way. The best candidates were able to use the law more imaginatively to explore less straight forward ways or applying the case law or explore complexities in the law.

Comments on particular questions were as follows.

### **Question 1**

(Intention) This was generally well answered with nearly all answers being able to summarise the current law well. The best answers were able to explore the difficulties with the concept of the “normal” meaning of intention and consider alternatives that the law might use.

### **Question 2**

(Consent) This was a popular question which produced some outstanding answers. The best answers were able to explore the advantages and also the problems with using a stricter concept of consent in this context. It was pleasing to see some candidates who had clearly read widely and thought deeply about the issue.

### **Question 3**

(Theft and fraud) This was not a popular question. A few candidates answered it and generally the answers struggled to identify examples of where there was dishonesty but no criminal offence. Surprisingly there was little discussion of the “temporary appropriation” issue.

### **Question 4**

(Defences) This was also not a particularly popular question. The best answers were able to use some of the theoretical material on “choice theory” and “character theory” to explore the issues raised. Weaker answer tended to simply summarise the requirements of some defences.

**Question 5**

(Attempts) Surprisingly, given there was major new case on attempts, this question received very few takers. There were a few strong answers that drew well on the theoretical material to explore the issues.

**Question 6**

(Problem question on offences against the person). This was a very popular question, even though it raised some tricky issues. Most candidates were able to explore the issues around the kiss reasonably well and whether or not there could be implied intent to that. The resulting harms to Cara and Daisy proved more challenging and only the strongest candidates were able to make much headway. Candidates struggled to identify or even consider what harms could be said to be caused by Alfred or Branson. This left many candidates floundering in the latter parts of their answers.

**Question 7**

(Property offences). This was a fairly popular question and was generally well done. Most candidates were able to identify the relevant fraud or theft offences and apply the law. We were particularly pleased at how many candidates spotted the issues surrounding abandonment with the umbrella.

**Question 8**

(Joint enterprise/accessories). This was a really tricky question and was not particularly popular. Given its difficulty we were generous when marking it. The best answers sought to identify the principal offender(s) before going on to consider whether others could be seen as accomplices.

**Question 9**

(Defences) This was a popular question with a particular focus on the defences of duress and possibly necessity. Most candidates were able to outline in broad terms the requirements of the defences, but some struggled to apply them to the facts of the question.

**Question 10**

(Homicide) This was a popular question and was generally well done. Good answers realised that the primary focus was on the loss of control defence, although only the strongest candidates discussed whether a fear of a psychological disorder could be seen as a fear of violence. There were some weak answers which failed to discuss the loss of control defence at all. The omissions issues were generally well discussed.