# LAW MODERATIONS – HILARY TERM 2009

## MODERATORS' REPORT

## PART 1

### (A) STATISTICS

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

*Numbers*

|  | 2009 | 2008 | 2007 |
|---|---|---|---|
| **Total** | 216 | 224 | 236 |
| **Pass (without Distinction)** | 190 | 195 | 203 |
| **Distinction** | 25 | 28 | 29 |
| **Pass in 1 or 2 subjects only** | 1 | 1 | 4 |
| **Fails** | 0 | 0 | 0 |

*Percentages*

|  | 2009 | 2008 | 2007 |
|---|---|---|---|
| **Pass (without Distinction)** | 87.9 | 87 | 86 |
| **Distinction** | 11.5 | 12.5 | 12.2 |
| **Pass in 1 or 2 subjects only** | 0.5 | 0.4 | 1.6 |
| **Fails** | 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. Scripts were routinely double marked during the first marking process to decide prize winners; or where the first marker had been given a failing grade, or the script deemed to be short weight. Scripts were routinely double marked during the second marking process where first marking had left the candidate just below a Distinction (one mark of 70 or above and one or more marks of 68 or 69, or two or more marks of 68 or 69); or where the marks on first marking had left any Course 2 candidate with an average mark marginally below the 60 required for automatic continuation on that course.

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

216 candidates sat the three papers.

## (B) NEW EXAMINATION METHODS AND PROCEDURES USED OR CONTEMPLATED

No new methods or procedures were employed this year, and none were contemplated.

## (C) PRACTICE WITH REGARD TO SETTING PAPERS

In each paper, the final paper was set by the relevant Moderator acting in conjunction with the other markers.

Past papers were available via OXAMS.

# PART II

## (A)  GENERAL OBSERVATIONS

The Moderators are once again extremely grateful to Julie Bass, the Law Faculty Examinations Officer.  Without her support and expertise the examination process would not have run nearly as smoothly as it did this year (if at all).  Thanks are due also to Mark Freedland and Ann Kennedy for their expert advice, and to the staff at the Examinations Schools for their role in the running of the process.

The number of Distinctions this year was similar to that achieved in previous years, as was the number of Passes.  In the view of the Moderators the general standard of papers was high, with some truly exceptional scripts at the top end of the range and few papers below 2.1 standard.

### Medical certificates and special cases

Two candidates had special arrangements for sitting their examinations.  Six medical certificates were forwarded to the Moderators under sections 11.8-11.9 of the EPSC's General Regulations for the Conduct of University Examinations (see *Examination Regulations* 2008, p 34)  The moderators also received one letter from a college regarding a candidate's difficult personal circumstances.  In none of these cases was the candidate's final result affected.

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

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

|  | 2009 | | | | 2008 | | | | 2007 | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
|  | FEMALES | | MALES | | FEMALES | | MALES | | FEMALES | | MALES | |
|  | No | % | No | % | No | % | No | % | No | % | No | % |
| Distinction | 12 | 9.6 | 13 | 14.3 | 9 | 7 | 19 | 19 | 13 | 10 | 16 | 16 |
| Pass | 112 | 89.6 | 78 | 85.7 | 116 | 93 | 79 | 79 | 120 | 90 | 83 | 84 |
| Partial | 1 | 0.8 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 |
| Fail | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total | 125 | | 91 | | 125 | | 99 | | 133 | | 99 | |

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

# ROMAN INTRODUCTION TO PRIVATE LAW

**General remarks:**

The overall standard this year was high, with very few candidates performing below 2.1 level and an impressive number achieving first-class marks. Most candidates displayed a solid knowledge of the material studied, and were able to recognise central issues raised by the questions and deal with them competently. Candidates at the top end of the range displayed sophisticated awareness of doctrinal and/or historical issues. The diversity in approaches among candidates reflects a pleasing diversity in teaching styles and points of emphasis across the teaching group.

The examiners noted a strong preference for certain questions, such as questions 5 and 6, and a corresponding reluctance to attempt others, such as question 4. The overwhelming popularity of question 5 in particular meant that it was difficult for candidates to distinguish themselves from the rest of the cohort. On the other hand, it is a pity that more students did not attempt questions on the influence of Roman law after the time of Justinian, given the importance of this topic. A pleasing number of candidates attempted questions 9 and 10 (the problem questions), although question 10 proved more popular.

One minor historical point: candidates should note that the Roman Empire did not expand throughout its history. In fact, territorial expansion is generally regarded as having come to an end by the early decades of the second century AD. Admittedly the effects on the law of this expansion continued to be felt over the course of the following centuries, and it is true that Justinian retook a substantial portion of the Western Empire in the 6$^{th}$ century. Nevertheless, a statement to the effect that e.g. the degeneration of the stipulatory form in the late classical and post-classical period was due to the 'the needs of the ever-growing commercial Empire' is simply wrong. Glib and inaccurate statements of this sort should be discouraged by tutors.

**Detailed comments on individual questions are as follows:**

**Question 1**

(a) [division of private law] This question was surprisingly unpopular. Candidates were rewarded for showing awareness of the three-fold division of the Institutes reflected in this text, and for commenting critically on the utility of this division. Equally, candidates were given credit for showing awareness of the reception of this division in the Civilian tradition. Answers consisting solely of unprocessed data regarding the classification of things (e.g. res religiosae/sacrae/sanctae etc) received lower marks.

(b) [praedial servitudes] Candidates were rewarded for discussion of the nature of servitudes qua real rights; for awareness of the need for conveyance to create praedial servitudes; for awareness of the practical operation of praedial servitudes; for discussion of the differences between praedial and personal servitudes etc.

(c) [mutuum] This was a popular question which was generally well answered. Candidates were rewarded for contrasting mutuum with the other real contracts, and for speculating as to Gaius's reasons for discussing only mutuum in this context. Meditations on the nature of real debt were also rewarded. Candidates able to discuss this text in context, relative to G.III.91, the condictio indebiti text, were rewarded with first-class marks.

(d) [delicts] Also popular. Candidates were rewarded for discussing the existence (or not) of a single criterion uniting the delicts (comparison with contract was appropriate here); for commenting on the omission of the Praetorian delicts of dolus and metus from this list, and on the (arguably irrational) inclusion of rapina; and for discussing the penal vs compensatory functions of the delicts. However, a summary of each of the four delicts without context attracted at best a low-2.1 mark.

## Question 2

(a) [in/corporeal things] This was a very unpopular question. Critical analysis of Gaius's corporeal/incorporeal distinction – e.g. the exclusion of ownership itself from the incorporeal category, or (alternatively) the conception of usufruct, servitude etc as themselves the objects of the right of ownership – was rewarded with a first-class mark.

(b) [bona fide possessor] This was not a popular question. Good candidates were able to contrast the entitlement of the bona fide possessor to fruits with that of the usufructuary, tenant, colonus etc. Excellent (i.e. first-class) candidates were able to discuss the adjustments to the classical rules made by Justinian's Compilers, and the contradictions inherent in this text as a result of their partial revision of the classical rules.

(c) [sale] This was a popular question which was generally well answered. Strong (i.e. first-class) answers included detailed discussion of the institution of arra, including the different conceptions of arra present in classical (as here) and Justinianic law. However, candidates were also rewarded for discussing other features of the contract of sale raised by the text, e.g. the risk rules, the exclusion of barter, the nature of sale as a purely consensual contract etc.

(d) [culpable negligence (culpa)] A general essay on culpa received no more than a high-2.1, while a note on the lex Aquilia scored only a borderline 2.2/2.1 mark. However, candidates who were prepared to analyse the text – in particular, those who were able to contrast the roles of culpa and iniuria in the context of the case discussed – were rewarded with a first-class mark.

## Question 3

This was a relatively unpopular question. Candidates were required to distinguish clearly between legislative and interpretative law-making. Candidates who did not discuss the ius respondendi/responsa prudentium problem only rarely achieved a first-class mark.

## Question 4

Almost no-one answered this question.

**Question 5**

This was an overwhelmingly popular question, attempted by the great majority of candidates and generally well handled. However, there was a tendency to treat this question as the opportunity for an uncontextualised discussion of the absolute concept of ownership, and of the impact of actio Publiciana and the institutions it created on ownership. While much of this detail was relevant to the question posed, a candidate who failed to direct their remarks specifically to Ulpian's proposition could not achieve a first-class mark for this question: in order to do really well, candidates were expected to show some awareness of the institution of possession per se, and of the nature of interdictal protection in particular. Candidates were also rewarded for discussing the acquisition of ownership through usucapio, as well as the institutions of traditio and occupatio.

**Question 6**

This was also a popular question, and was generally very well handled. Candidates took a wide range of inventive approaches, although most centred their answers around the degeneration of the verbal form in stipulatio. Candidates were rewarded for discussing the rise of writing in classical and post-classical law and its ultimate displacement of other forms and methods of contracting, such as the verbal form at issue here; some strong candidates discussed the implications of this development for the classical system of nominate contracts. Another excellent approach was to discuss why the 'contract' in the question was not a sale, lease, commodatum etc – in other words, to use the question as the basis for a discussion of the classical system of nominate contracts per se. One truly outstanding candidate even considered whether donation could constitute a causa for stipulation.

**Question 7**

This was an unpopular question. Candidates were rewarded for evaluating the strengths and weaknesses of the bona fide contracts, and for contrasting them with the contracts stricti iuris. The best candidates were able to illustrate the operation of the bona fide clause in practice, e.g. with reference to implied terms.

**Question 8**

This was another very popular question which attracted some excellent answers. However, candidates who focused exclusively on the historical development of the delict rarely achieved first-class marks: in order to excel, candidates were generally required to discuss the proposition advanced in the passage quoted. An 'everything I know about iniuria' answer achieved at best a low 2.1. One point of substance: candidates (and tutors) should be aware that it is extremely doubtful whether truth was an absolute defence to a defamation claim in Roman law.

**Question 9**

A competent account of the requirements of usucapio, showing awareness of the differences between Gaius and Justinian, lies at the heart of this question. A candidate who was unable to give an adequate account of these requirements achieved no higher than a high 2.2. On the other hand, candidates were rewarded for showing awareness of problems of proof in this context and in the context of derivative acquisition. Comment on the rules regarding the cumulation of time-periods was considered excellent, especially if the candidate was aware of the changes to these rules towards the end of the classical period. Finally, candidates were rewarded for discussion of the warranty against eviction inherent in the contract of sale.

**Question 10**

(a) Key issues here were culpa, indirect causation (actio utilis/in factum) and the quantification of damages (Jolowicz/Daube etc). Answers were generally strong.

(b) Candidates were required to give an accurate account of the rules on furtum conceptum and oblatum, as well as those on furtum manifestum and nec manifestum (P might still be a manifest thief according to Justinian's definition) Discussion of furtum prohibitum and search lance licio was also relevant. Candidates were rewarded for noticing that conceptum is strict while oblatum requires knowledge that the property in question is stolen. Excellent candidates mentioned that during the classical period furtum conceptum and oblatum – essentially crude indicia of guilt – were superseded by furtum nec manifestum.

(c) Candidates were rewarded for discussing both the issue of contrectatio in theft and the question of extended liability under the lex Aquilia (contrast e.g. the case of the ring thrown into a river, or coins knocked from the victim's hand, which attracted liability under the actio utilis) Candidates who were able to discuss the emergence and refinement of the contrectatio and lucri faciendi gratia concepts received high marks. The issue of complicity in theft was also relevant.

## CRIMINAL LAW

The new requirement that candidates should answer at least one essay question (as well as at least two problem questions) appeared to cause no difficulty. Nor did it occasion any hardship: on the whole, candidates' essay answers seemed just as good as their problem answers.

Obviously, candidates' responses to individual questions varied in quality. The following general comments may be made:

Q 2. The question asked whether the law's rules about intoxication are best understood in terms of its treatment of prior fault. Those who answered it quite often neglected to say how they saw the latter. This was unfortunate, as it seems fair to say that prior fault is not a firmly delineated idea, and the question was therefore as much about it as about intoxication.

Q 3. The question asked candidates to consider whether duress and self-defence should be merged. Less good answers detailed the two defences, concluded that they were different, and

merely assumed that this meant they could not be merged. Better answers considered their underlying bases, to judge whether the differences in detail were essential.

Q 5. The question asked candidates to think about provocation through the lens of a Government Minister's statement that 'I am determined that women should understand that we won't brook any excuses for domestic violence.' Candidates quite often proceeded via (rather conventional) assumptions as to what the Minister meant rather than via analysis of what she actually said—thereby missing an opportunity to shine.

Q 6. This problem question involved the occurrence of (broadly speaking) bodily harm in a number of ways, some of which were some distance from the standard paradigms of the leading cases. (For example, a woman dumped her boyfriend, knowing that he might as a result become depressed; which he did, and indeed attempted suicide.) Many candidates found it hard to map the rules onto such facts, and/or to segregate the issues which, given these rules, they needed to consider separately.

Q 7. This problem question featured unprotected sexual intercourse between a man suffering from a sexually transmissible disease and a woman who did not, however, become infected. Many candidates devoted much space to considering whether the man was guilty of an offence under the OAPA 1861 s 20 … before deciding not, as GBH had not in fact occurred. Unfortunately too, this effort was in many cases combined with a failure to consider the greater and more interesting possibility, namely that rape had taken place.

Of those who did consider the possibility of rape, a number were not completely on top of the relationship between ss 75 and 76 of the Sexual Offences Act 2003, and s 74. In particular, cases deciding that some set of facts does not fall within s 76 were often cited as deciding that consent was, therefore, definitely present. The arguable inconsistency of the caselaw on s 76 was often overlooked, too.

Q 8. A character in this problem question shoots down a helicopter, killing its pilot. He hopes that the pilot will escape, but has little doubt that she will die. Appropriately, candidates considered whether the character was guilty of murder, on the basis of 'oblique intention'. Most identified the possible 'moral elbow room' in that concept, but many did not go on to consider whether it might avail the defendant here … even though his object in destroying the helicopter was to avert a terrorist atrocity.

On another aspect of the question, discussions of gross negligence manslaughter often confused the 'duty of care' relevant there with the duty which can found liability for omission.

Q 9. This problem question asked after fraud, but also (given *Gomez* etc) after theft. Coverage of the latter aspect was surprising patchy. As regards fraud, there was little discussion of the question whether the character intended to make her gain 'by' her deception, as required by the legislation.

Q 10. The new offences of assisting and encouraging a crime might have been relevant to this problem question, but were referred to only sporadically. Candidates may be finding it (understandably) hard to internalise them. 'Joint enterprise' liability was more generally considered, but often without great assurance.

# CONSTITUTIONAL LAW

The scripts in Constitutional law were of a good standard and most candidates were able to demonstrate a very good level of knowledge, and a sound understanding, of constitutional law. Although the average standard of scripts was lower than that found in previous years, the scripts of the top candidates were of an extremely high calibre, demonstrating not only an excellent understanding of constitutional law, but also an ability to produce original perspectives. The lower average may be explained by the greater award of marks of a 2(ii) or below. This is explained by the tendency of candidates to use questions merely as an opportunity to recite their notes, or to provide an essay that was an answer to a question different from the one asked by the paper.

*Question 1*
Question 1 required candidates to determine the extent to which courts should be able to strike down actions of the executive that breached the rule of law. Good answers recognised that the question did not just concern the rule of law, but also issues from the separation of powers determining the relative ability of the courts and the executive. They also applied different understandings of the rule of law to assess the powers of the court, as well as referring to the recent *Corner House* decision in the House of Lords. Weaker answers merely gave an account of different theories of the rule of law, without explaining how these theories were relevant to an assessment of whether courts should have the power to strike down actions of the executive that breached the rule of law.

*Question 2(a)*
This was an unpopular question that was, for the most part, tackled well. Candidates demonstrated a good knowledge of political mechanisms of accountability and evaluated the extent to which these mechanisms held MPs and Ministers to account for their actions.

*Question 2(b)*
The question required candidates not only to give an account of the extent to which courts can review prerogative powers, but also whether there should be prerogative powers whose nature and subject matter made them immune from judicial review. Better answers provided a detailed evaluation of whether some prerogative powers ought to be immune from judicial review, focusing on different justifications for the non-justiciability of these prerogative powers. Weaker answers merely gave a chronological account of the case law without explaining why the nature and subject matter of these prerogative powers should be immune from judicial review.

*Question 3*
This was an extremely popular question that produced a range of very good answers. Most candidates were not only aware of the alternative means through which individuals can enforce Community law in national courts, but were also able to provide good explanations of these alternatives, showing that they had a good understanding of the complexities in this area of the law. Better answers also assessed how far these alternatives did provide a sound protection of individual rights and whether this alone could provide a reason to not grant horizontal direct effect to Directives. Weaker answers merely listed alternatives, without fully explaining how they protected individual rights and without determining whether this protection was sufficiently effective.

*Question 4*
This was an extremely popular question, with candidates able to demonstrate a very good level of knowledge of parliamentary sovereignty, focusing on *Factortame* and *Thoburn.* Better candidates used this knowledge effectively to answer the question, explaining different interpretations of the case law and the consequences of these interpretations as to whether it was legally possible for Parliament to legislate contrary to directly effective EC law, explaining the precise mechanisms through which this may be possible. They also evaluated the consequences of their conclusions for the principle of parliamentary sovereignty. Weaker answers merely described the relevant case law, without applying this to the specific issue raised by the question.

*Question 5*
Although this was not a popular question, it was answered extremely well. Candidates demonstrated an excellent ability not only to explain why the UK constitution was often described as political as opposed to legal, but also to assess whether such a classification was a strength or a weakness, drawing on arguments from parliamentary sovereignty and the importance of constitutional conventions.

*Question 6*
This was a popular question, with candidates demonstrating a good knowledge of constitutional conventions. However, the majority of candidates found it hard to know how to use this information to answer the question. A lot of candidates merely provided lots of information about constitutional conventions. Also, many candidates wrote an essay on whether constitutional conventions can or should crystalise into law. Although this was an issue that could be relevant to evaluating the role of conventions in the UK constitution, it was not the main issue discussed in the question. Better answers focused on explaining the role of conventions in the UK constitution, using their knowledge of the features of conventions to explain how well conventions performed this role, as well as assessing whether conventions were a positive or a negative feature of the UK constitution. Also, better answers were able to evaluate the role of different types of conventions and did not merely discuss individual and collective ministerial responsibility.

*Question 7*
This was a popular question. Candidates, on the whole, showed an excellent understanding of the law and were able to discuss both the definition of political speech and apply justifications for freedom of expression to determine the extent to which political speech should be afforded greater protection. Candidates were also very adept at discussing the recent *Animal Defenders International* decision. Weaker answers merely listed case law explaining the extent to which political speech was protected in English law without assessing whether political speech should receive a greater protection than other forms of speech or determining the extent to which English law met this objective.

*Question 8(a) and 8(b)*
Both questions were popular and required candidates to assess the Human Rights Act 1998. Whilst 8(a) was broader, giving candidates the opportunity to discuss whether the Act as a whole provided an effective protection of rights, 8(b) was narrower in focus, requiring a more detailed argument as to whether it was possible to provide an effective protection of rights and protect parliamentary sovereignty. Better answers to 8(a) recognised the need to explain

other ways in which the Act failed to provide an effective protection of rights and either provided specific reforms in response to these weaknesses, or provided a sound argument to explain how weaknesses were only perceived and that no reforms were required. Better answers to 8(b) were able to evaluate political and legal means of protecting rights. Weaker answers tended to explain how the Act protected rights without determining whether this protection was effective or not.

*Question 9*
Better answers were able to distinguish between a federal and a unitary state and to assess the extent to which devolution as a whole as well as the distinct devolution settlements moved the UK towards a federal structure. They also provided good evaluations of whether the UK should become a federal state. Weaker answers showed less detailed knowledge of the different devolution settlements.

*Questions 10(a) and 10(b)*
These questions were extremely unpopular. Candidates who did answer the question had a good knowledge of recent case law on detention and the regulation of protests.