

LAW MODERATIONS – HILARY TERM 2010

MODERATORS' REPORT

PART I

(A) STATISTICS

1. Numbers and percentages of those passing and failing

Numbers

	2010	2009	2008
Total	212	216	224
Pass (without Distinction)	176	190	195
Distinction	35	25	28
Pass in 1 or 2 subjects only	1	1	1
Fails	0	0	0

Percentages

	2010	2009	2008
Pass (without Distinction)	83	87.9	87
Distinction	16.5	11.5	12.5
Pass in 1 or 2 subjects only	0.5	0.5	0.4
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. Following the agreed procedures, scripts were double marked during the first marking process to decide prize

winners; and also in one paper, where a check for consistency between the three markers had required it, in order to verify whether the markers were applying different standards (they were not). Scripts were double marked during the second marking process where first marking had left the candidate just below a Distinction.

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. But in the event, there were no such cases.

4. Number of candidates who completed each paper

212 candidates sat the three papers, while one sat the first two, being prevented by supervening illness from attempting the third. The latter case was handled in the manner described under “Medical certificates and special cases” below.

(B) NEW EXAMINATION METHODS AND PROCEDURES USED OR CONTEMPLATED

Three new procedures were adopted this year.

First, “short weight” and associated phenomena were dealt with by, simply, the award of the mark merited by the work the candidate had actually presented. The faculty board’s Examinations Committee had authorized this approach not merely for Law Moderations, but as a pilot for possible extension to the FHS and BCL, if the experience in Moderations threw up no unforeseen concerns. The Moderators are happy to report that, in their view, it did not. In contrast to the experience with previous rule (which, along with other deficiencies, required both markers and Moderators to apply artificial constructs, causing considerable problems at times), the markers found no difficulty in awarding the marks they felt appropriate to the work in fact presented by the candidate, and the Moderators had only to accept these marks. In the event, no script exhibited what would previously have been labelled full-scale short weight (though some deteriorated as they neared their end, perhaps through shortage of time). It is impossible to say whether the publicity given to the new policy played any part in producing this state of affairs, but the Moderators certainly regarded it with satisfaction.

(One script did, however, involve a breach of rubric. The candidate had attempted both “gobbet” questions in A Roman Introduction to Private Law, when instructed to attempt only one. The Moderators considered whether to award the mark of zero to the offending answer, but decided eventually to make only a deduction in respect of it.)

Second, a marker’s overall mark for a script had to be the average of the individual question marks. This adjustment too was ordered by the Examinations Committee as a pilot for possible wider application. It was unclear how much difference it would make; it was thought that many markers took this approach already; but markers were reminded especially of the possibility of using the entire first class range, lest the use only of low first class marks for individual questions should make it inappropriately hard to secure a first class mark overall. The Moderators are again happy to report that they noticed no ill-effects. In particular, the

proportion of first class marks given on first marking was 16.7% this year, compared with 17.7% for 2009, and 15% for 2008.

Third, steps were taken to review the consistency of markers' profiles not merely after 25 scripts, but also at the end of the first marking stage – "full-time". At the same point, too, the overall profiles for the three papers were compared with one another. This innovation was introduced by way of compensation for the fact that, in contrast to the FHS examiners, the Moderators have only one marks meeting, so no good opportunity to address possible concerns in these areas before the final awarding exercise. To inform this exercise, the Moderators agreed that investigation and explanation should follow if either an individual marker or a team of markers awarded less than 15% or more than 20% first class marks, or less than 5% or more than 10% lower second (or worse) marks. In the event, the marks for all three papers emerged within these "snakes". Two individual markers fell outside them, but the ensuing investigations strongly suggested that this had occurred purely through sampling effects.

(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 once again extremely grateful to Julie Bass, the Law Faculty Examinations Officer. Thanks are due also to the faculty board's Director of Examinations, Edwin Simpson, for his advice, and to the staff at the Examination Schools for their role in the running of the process.

The process was compressed into a period shorter by one day than is normally the case, owing to the timing of Easter. Everything was nonetheless accomplished according to the ordained timetable. However, it was felt that the additional day would have been useful, as allowing more comfortably for the additional work potentially – and in the event, actually – generated by the new "full-time" consistency check.

The number of Distinctions this year, at 35 or 16.5%, was up on that for the previous two or three years, ~12%. The number of Passes was correspondingly down. No candidate who sat all three papers failed to pass in all three.

Medical certificates and special cases

Four candidates had special arrangements for sitting their examinations. The Proctors sent the Moderators (under sections 11.8-11.9 of the EPSC's General Regulations for the Conduct of University Examinations: see *Examination Regulations 2009*, p 34) medical certificates, and

college letters about personal circumstances, in respect of six of the candidates who completed the examination. The candidate’s final result was affected in only one case, where, on learning of the candidate’s circumstances at the time of the examinations, the Moderators decided to look again at marks which, after first marking, fell just below a possibly significant figure but which would not otherwise have attracted such further attention.

One candidate was prevented by illness from sitting the third paper. The Proctors were consulted. They authorized the Moderators to proceed under Reg. 11(5), allowing the Moderators to decide whether to pass the candidate on the basis of the evidence otherwise available, or to require further evidence via arrangements of their own devising. The Moderators adopted the latter course, requiring the candidate to sit the outstanding paper in week 9 of Trinity Term. They were aware that this represented a departure from the policy, recently adopted by the faculty board’s Examinations Committee, of offering the candidate in such cases the choice of being viva’d at an earlier date; but they felt that this policy was better suited to the FHS and BCL, where the first opportunity to take a further paper might be a year away, than to Law Moderations, where it would follow after only one term.

(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:

	2010				2009				2008			
	FEMALES		MALES		FEMALES		MALES		FEMALES		MALES	
	No	%	No	%	No	%	No	%	No	%	No	%
Distinction	15	12.6	20	21.5	12	9.6	13	14.3	9	7	19	19
Pass	103	86.5	73	78.4	112	89.6	78	85.7	116	93	79	79
Partial	1	0.8	0	0	1	0.8	0	0	0	0	1	1
Fail	0	0	0	0	0	0	0	0	0	0	0	0
Total	119		93		125		91		125		99	

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

A ROMAN INTRODUCTION TO PRIVATE LAW

General:

As in recent years, the overall standard of scripts was high, with most candidates achieving marks of at least 60 and a substantial number reaching distinction standard. Most candidates displayed an ability to identify the central issues posed by the questions, though there was

something of a tendency in answers to the most popular questions to reproduce tutorial essays on the topic rather than focussing *precisely* on what the question set was asking.

There was very heavy clustering of attempts on questions 5, 6 and 8; in the text questions (1 and 2), though there was less extreme unevenness, there was marked clustering of attempts on 1 (b), 1 (d) and 2 (b). Questions on the sources of law and on the later influence of Roman law (1 (a), 2 (a), 3, 4) remain unpopular. Of the problem questions the (wide-ranging) question 10 was more than twice as popular than the simpler question 9, presumably because the division into sub-heads made it *appear* simpler; in fact, however, candidates who attempted question 9 on average achieved somewhat higher marks than those who attempted question 10.

It is again necessary, as last year, to comment on a minor point, the frequency with which candidates explained developments in the law between the classical period and Justinian by reference to the “expansion of the empire” and “growth of trade”; such arguments are legitimate (if debatable) for the later Republic and early Empire/classical period but seriously problematic if applied to the later development of the law.

Individual questions:

Question 1:

(a) [senatusconsulta] This question was relatively unpopular. Candidates were rewarded for showing awareness of the historical development of the role of senatusconsulta as a form of legislation. Only a few of the strongest were willing to ask *why* Gaius said that their force had been doubted.

(b) [traditio] Popular. Weaker candidates showed some tendency to discuss only the *traditio* of *res mancipi* and the *Actio Publiciana*; it was difficult to give much credit where the candidate also covered the same ground in relation to question 5. The strongest candidates discussed the nature and forms of *traditio* and related these to the second part of the quotation (“natural equity” and “wishes of the owner”).

(c) [mistaken payment and the classification of obligations] Not particularly popular but on the whole well answered by those who attempted it. The strongest candidates were able to discuss seriously whether Justinian’s four-fold classification of obligations really represented an improvement.

(d) [measure of damages in ch. 3 of the Lex Aquilia] This was the most popular of the texts attempted and was overall well handled. The strongest candidates were able to discuss the academic debate in some depth, identifying the arguments used. There was some credit for discussion of the assessment of damages and consequential losses in the classical law. Weaker candidates tended to wander into description of fault and causation issues without linking this material to the question as asked.

Question 2:

(a) [Justinian’s version of *ius naturale*]. The least popular of the texts attempted, this also provided the weakest group of answers. Strong candidates were able to address the fact that the compilers make a distinction here absent in Gaius, and that in later parts of the *Institutes*

they fall back on the Gaian division between natural reason – *ius gentium* on the one hand and *ius civile* on the other.

(b) [*res Mancipi/ nec Mancipi*]. Very popular and competently treated. The strongest candidates were able to state the list of *res Mancipi* accurately, give an outline description of *Mancipatio* and *in iure cessio*, and discuss the reasons for the rules effectively (for example, making use of the exclusion of camels and elephants, and the school dispute about beasts of burden, as evidence). *Traditio* of *res Mancipi* and the *Actio Publiciana* were more relevant to this text than to 1(b). Some candidates claimed, against the evidence, that *Mancipatio* was already out of use in the time of Gaius.

(c) [hire and sale]. Again an unpopular question, this attracted some very strong answers which focussed on the problems of overlaps, doubts and gaps in the lists of specific contracts, using some of the specific problems discussed in Gaius and Justinian as evidence. However, it also attracted some rather weak answers, which merely described hire and sale in outline.

(d) [*iniuria* in the Twelve Tables]. This was relatively popular. Candidates were rewarded for effective discussion of the difficulties of the Twelve Tables rules, and the evolution towards the classical law was also relevant. Weaker candidates tended to discuss simply the classical law, often in a somewhat confused way, and dwelt too much or even exclusively on dignitary affronts.

Question 3 [juristic opinions and Justinian's codification]

This question was very unpopular, and the standard of answers varied from the very strong to the very weak. Candidates were rewarded for identifying the fact that the quotation pointed to disputes among jurists as a problem for judges, for ability to use examples from the school disputes reported by Gaius in support, and for discussing attempts to solve the problem both before, and in, Justinian's codification. All too often candidates' sense of the chronology of the jurists and of the role of juristic interpretation as a source of law was weak.

Question 4 [the institutional taxonomy and the subsequent influence of Roman law]

The least popular question on the paper, but on the whole well handled by those who attempted it. Good answers could take a wide range of forms, but did need to address *both* the institutional structure *and* its modern influence. Only one or two candidates were willing to consider the possibility, suggested by the question, that alphabetical ordering might be a preferable solution for some purposes and the modern use of the institutional division merely an effect of the historical influence of Roman law.

Question 5 [ownership and possession]

This was one of the most popular questions, and attracted a large number of competent answers. A great many of them, however, began by identifying Grotius' (odd-ball) definition of ownership as *simply* the right to recover possession through litigation, with Ulpian's statement that "ownership and possession have nothing in common," and proceeded to discuss that statement. As it chanced, the resulting essay was relevant enough to produce an answer at 2.1 standard. Stronger candidates tailored their use of their material more effectively to criticising the limits of the definition. Some candidates introduced material on original and derivative acquisitions and their relationship to occupation and possession, and

sometimes did this well. Weaker candidates tended to discuss *only* the *Actio Publiciana* and not the recovery of possession through the interdicts and the nature of interdictal possession; they might also introduce irrelevant material on the “absolute” character of *dominium* and its delictual and public law limits as a substitute for detailed attention to the issues posed by the quotation.

Question 6 [purposes of contractual formalities and the evolution of *stipulatio*]

This was again a very popular question and competently handled. The strongest candidates were able to integrate the two aspects of the question effectively. A common weakness of middle-ranking candidates was to see *simply* a narrative of the “degeneration” of *stipulatio*, not identifying the advantages of writing as a formality. Weaker candidates tended to confuse requirements of formality in contracts with the existence of multiple specific contracts (“forms of contract”), producing, as a result, at best underdeveloped accounts of the evolution of *stipulatio* after two or three pages on delivery in the contracts *re* and consent in the contracts *consensu* as “formalities”.

Question 7 [implied terms as a reason for having multiple contracts]

This was not a popular question. Strong candidates were able to see that the quoted claim was most relevant to the contracts whose actions were *bonae fidei* rather than to those whose actions were *stricti iuris*. Beyond this point, the potential range of the question meant that strong candidates were bound to select examples for detailed discussion, so that answers necessarily became very diverse. Weaker candidates tended simply to write descriptively about the classification of contracts.

Question 8 [definitions of theft]

The most popular question on the paper, attempted by three quarters of candidates. It was commonly taken as an invitation to compare and contrast Roman and English theft law, rather than to compare the *definition* of theft in the quoted section with the *several definitions* offered by (in particular) Sabinus, Gaius, Paul and the compilers. Candidates were rewarded for a tight focus on the physical and mental components of the delict and the offence, and an ability to discuss the *evolution* of the Roman rules as to these elements; those who were able to identify differences between Roman definitions attracted the highest marks. Little credit could be given for extended discussions of the distinction between manifest and non-manifest theft or of *furtum conceptum* and *oblatum*, though some strong candidates were able to make some brief discussion of this material relevant by discussing the school dispute on the classification of theft reported by Gaius.

Question 9 [problem on the acquisition of ownership]

As indicated above, many candidates seem to have been put off by the need to perform fact analysis of the narrative in order to get to the (fairly simple) legal issues in this problem. Most of those who attempted it did so successfully. Weaker candidates ignored the instruction to advise the parties on their *property rights* and devoted half or more of the answer to advising them on *contractual and delictual claims and liabilities*.

Question 10 [problem on usufruct, servitudes, *iniuria* and Aquilian liability]

As indicated above, this was much more popular than question 9 but handled on average less successfully. The opening paragraph and (a) posed issues in the law of usufruct and servitudes. The fructuary's potential liability was on the whole competently treated. The strongest candidates noticed that in spite of this potential liability, the fructuary's activities were, in fact, for the benefit of the owner; and that the person making the complaint did not have any property right to the land. Sometimes fanciful answers were offered on the issue of the servitude of way. Stronger candidates identified the fact that the *type* of way affected the potential liability; the strongest, that the operations posed issues about the use of the servitude for the benefit of the dominant estate, not that of other land, and that the servitude must be used *civiliter*.

(b) Was on *iniuria* in the *adtemptata pudicitia* subvariant. The overwhelming majority of candidates did not ask whether the building workers had the mental state necessary to incur liability or, indeed, enquire into liability at all, simply proceeding to discuss remedies, whether the (assumed) *iniuria* was *atrox*, and the possibility of noxal surrender.

(c) Required discussion of (i) *culpa* and contributory negligence, which was well handled by most candidates; and (ii) the *actiones utiles/in factum* on the analogy of the *Lex Aquilia* in relation to injury to a son in power, injury to a free man, and the loss of slaves without their being killed or injured. Strong candidates were able to distinguish the three issues. Weaker candidates had a tendency to assume that the Twelve Tables *iniuria* provisions for personal injury were applicable - or, simply, that there was *iniuria* liability.

CONSTITUTIONAL LAW

The examiners were generally impressed by the quality of candidates taking the paper. There were few candidates who performed very poorly, and almost all demonstrated a decent grasp of the law and an ability to write a sensibly constructed essay. On the other hand, though, there were very few outstanding candidates, and little evidence of independent thought about the questions raised in the course. Most candidates continued to rely too heavily on the lectures and on the guidance provided in the tutorials, a reliance which tended to create a rather uniform performance across the school.

Question 1

Few people answered this question, but when it was answered it was generally answered well.

Question 2

Each part of question 2 raised, in different ways, the topic of parliamentary sovereignty. Candidates tended not to focus tightly on the question set, but to provide the answer that they had prepared earlier. Candidates who did pick up on the question – who addressed, for example, what it might mean to say that sovereignty had “evolved” – were rewarded. Generally, a good grasp of the outline of the issues raised was demonstrated, but a number of candidates seemed confused by the plethora of terms that have flourished in the literature. Some uncertainty was shown about the content of “self-embracing” sovereignty, its relationship to “continuing” sovereignty, and the place of “manner and form” sovereignty in the mix. Many candidates wrote about the “rule of recognition”, but few convinced the examiners that they understood the connection – if there is one – between this difficult

jurisprudential concept and the more mundane question of the legal rules that define and constitute the legal effect of statutes.

Question 3

Candidates tended either to provide strong or weak answers to this question. The stronger candidates reflected on the differences between laws and conventions, and then considered the advantages and disadvantages of turning some or all conventions into laws. The weaker candidates focused on the role of the courts in upholding conventions, an answer that addressed only one aspect of the issues raised by the question.

Question 4

The examiners expected that this question would be more popular than it proved to be. Many candidates provided sensible and workmanlike discussions of *Purdy* and *Cornerhouse*, though few made the connection between these cases and the question explicit. The best candidates considered, contrary to Dicey, whether executive discretion can ever be said to advance the rule of law.

Question 5

Many candidates were banking on a question that raised, yet again, the broad issue of the legal effect of directives. The decision of the examiners to ask about *Francovich* was plainly regarded as unsporting, and many answered the question that they thought ought to have been set. Those who did focus on *Francovich* were well rewarded.

Question 6

This question provoked a flurry of quite general, if reasonable, answers about the separation of powers. Once again – and it is a recurring theme of this report – relatively few focused tightly on the precise question set. The very best answers to this question distinguished between the separation of powers as a constitutional, or political, principle and its possible manifestation as a legal principle. Practically no-one considered whether it would be constitutionally, or institutionally, appropriate for the court to appropriate a principle which seeks to confine the power of the courts, as much as the power of the other branches of the constitution.

Question 7

A decent number of candidates answered one or other of these questions. Almost all of the answers were of high quality; with candidates showing a good grasp of the problems left by the devolution settlement. Under the surface of some apparently arid constitutional issues matters of real political moment were identified, revealing both the importance and interest of the topic.

Question 8

This question was well-done, though the answers given were quite homogeneous. Few candidates were prepared to adopt a position on the topic, and instead surveyed the advantages and disadvantages of the mechanisms provided by the Human Rights Act.

Question 9

Few answered this question, and fewer still had any proposals for enhancing the convention.

Question 10

Practically no-one answered either part of this question – suggesting, perhaps, that the older topics around civil liberties have been pushed aside by the broader issues raised by the Human Rights Act.

CRIMINAL LAW

The standard in this paper was generally quite good, with very little sustained incompetence (though some blind spots, as explained below) and some display of marked ability. The great majority of candidates, and their successors, might however be encouraged to develop in one respect. They currently tend to think in terms of “what they are supposed to say” in answer to a question, and, having said it, to stop. Quite often, however, they will have said something which surely merits, or even demands, further interrogation. This might for example be an inconsistency between two apparently germane rules; or a questionable policy position. Indeed, the questions are generally set with a view to exposing exactly such issues. Candidates should be more confident in venturing upon this kind of interrogation for themselves, even if (as is quite likely) they have never previously thought or written about the exact matter in question.

The paper was probably quite a challenging one. All questions attracted some answers, but Questions 4 (automatism, insanity and diminished responsibility), 5 (theft and fraud), and 10 (various inchoate offences, and complicity) were much less popular than the remainder. The unpopularity of Question 10 was however offset by the readiness of candidates to write about inchoate offences and complicity as and when necessary in responding to other questions.

Answers to the individual questions, obviously, were some better than others. The following remarks address only matters of general interest.

Question 1. This essay question asked candidates to reflect on the element of discretion in the concept of intention. Candidates tended to focus predominantly on oblique intention, discussing direct intent only briefly and uncritically, tending to assert, improbably, that the ‘golden rule’ involved no discretion.

Question 2. This essay question inquired after liability for omissions. A number of candidates assumed that the “duty” giving rise to such liability is identical with the “duty of care” that is an ingredient of gross negligence manslaughter.

Question 3. This essay question asked how the criminal law should treat one who performs a criminal act while in a rage. While some candidates wrote what looked like a prefabricated essay on the reform of provocation, many did better, addressing the slant of the question itself. Most, however, focused nonetheless on provocation/loss of control, overlooking the question’s greater width – making no reference, for example, to *Parker* and the notion that “rage” might be an inculpatory factor.

Question 6. This problem question asked about rape. Three comments. (i) Once again (a similar point was made last year), there was some tendency to think that if the facts came close to giving rise to a presumption under ss 76 or 75 of the Sexual Offences Act 2003, but in the end did not (or “an issue was raised” in rebuttal under s 75), *consent was necessarily present*. Candidates should realize that in such cases, just as in cases where there is no similarity with one of the presumptions at all, it is necessary to consider whether consent is or is not present under s 74. (ii) A number of candidates assumed that certain pre-2003 decisions (especially *Williams*, *Flattery*, *Linekar*, *Elbakkay* and *Olugboja* – and even, occasionally, *Morgan*) were of current authority, without justifying or even recognising and testing this assumption against, in particular, the terms of the Act. (iii) Candidates commonly wrote about the possibility of “raising an issue” to displace a s 75 presumption, without considering what this meant – in particular, what the presumption took as its idea of “consent”, which any rebuttal would need to confront. Thus, where V is unconscious at the time of the intercourse, *is it relevant* that she may have previously desired it, or was retrospectively content to have had it on previous similar occasions?

Question 7. This problem question asked after various offences against the person. A number of candidates made curiously heavy weather over the harm, and the mental state, inherent in the question’s announcement “Finn deliberately stabs Gabby”. Further, a surprising number seemed unaware that an intention to do serious bodily harm is sufficient mens rea for murder.

Question 8. This problem question addressed the rules about intoxication. Candidates’ understanding of these was often less good than might have been expected. In particular, the notion of “accident” in situations of intoxication was often overlooked. So too was the basic/specific intent distinction; and where this was not overlooked, it was often applied rather woodenly. In particular, where candidates noticed the possibility of a charge under s 1 (2) of the Criminal Damage 1971 – which not all did – they frequently neglected to consider the impact of *Heard* on its characterization.

Question 9. This problem question potentially raised the defences of duress by threats, duress of circumstances, and necessity; but many candidates overlooked the latter two. Many, too, seemed entirely accepting of the rule that duress cannot lie to murder (while necessity can) – an example of a situation where they could have done better, in the manner suggested in the first paragraph of this report.