

LAW MODERATIONS – HILARY TERM 2011

MODERATORS' REPORT

PART I

(A) STATISTICS

1. Numbers and percentages of those passing and failing

Numbers

	2011	2010	2009	2008
Total	219	212	216	224
Pass (without Distinction)	191	176	190	195
Distinction	26	35	25	28
Pass in 1 or 2 subjects only	2	1	1	1
Fails	0	0	0	0

Percentages

	2011	2010	2009	2008
Pass (without Distinction)	87	83	87.9	87
Distinction	12	16.5	11.5	12.5
Pass in 1 or 2 subjects only	1	0.5	0.5	0.4
Fails	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. 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.

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 cases affecting Course 2 candidates, and only two scripts attracted a failing grade on first marking and were remarked.

The second of these policies, relating to II.ii grades, was a new innovation this year. A relatively small number of papers were caught by the rule. The policy did not reveal any systematic problems with the marking, but was helpful in a few cases.

4. Number of candidates who completed each paper

218 candidates sat the three papers, whilst one sat only the first two. One candidate withdrew before the start of the exams.

(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. There were no papers that lacked a fourth answer, but, as ever, a few candidates ran short of time, and rushed the final question.

Steps were taken to review the consistency of markers' profiles after 25 scripts, and also at the end of the first marking stage. As last year, 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.

(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.

There seems to have been some difficulty in getting the scripts to markers after the exams. One marker had to wait four days to receive her papers. Given the tight timetable for Mods, this created some difficulties in the marking process, but in the event the timetable was maintained.

Medical certificates and special cases

Six candidates had special arrangements for sitting their examinations. Five medical certificates were forwarded to the Moderators (under sections 11.8-11.10 of the Education Committee's General Regulations for the Conduct of University Examinations), and two college letters. In four cases the candidate's final result was affected.

Release of Grades

A technical problem with OSS delayed the release of the results. There was little the Moderators or, indeed, the Faculty, could do about this. The Moderators shared the candidates' frustration at this glitch.

(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:

Result	Sex	Number
Distinction	F	12
	M	14
Pass	F	103
	M	88
Two Paper Pass	F	1
	M	1

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 2.1 level marks and a substantial number reaching first class standard. There was some improvement by comparison with 2010 in candidates' focus on the questions set (as opposed to reproducing tutorial essays).

There was very heavy clustering of attempts on questions 2, 5, 6 and 8, with almost no candidates attempting question 1; within question 2, 2 (a) (custom) was also severely unpopular, and there was significant clustering on (b) and (d). Questions on the sources of law and on the later influence of Roman law (1 (a), 2 (a), 3, 4) remain unpopular.

The tendency remarked on in the past for candidates to explain legal developments by spurious versions of Roman economic history was also reduced, though a few weaker candidates came up with one or another historical fantasy. One general point, though it arose from a specific question, needs to be remarked: the use of "principle" where "principal" is required. This has not been penalised in marking this year, but since this error can under certain circumstances have operative effects in legal instruments and hence produce liability for professional negligence, perhaps it should be.

Individual questions:

Question 1:

- (a) [edicts, starting from that of the Aediles] Only one candidate attempted this.
- (b) [sacred, religious and sacrosanct things] Few candidates attempted this, but there were some very good answers addressing the differences between Gaius's and Justinian's classifications at this point.
- (c) [Gaius's contract *litteris* and *ius civile/ius gentium*] Again unpopular but mostly well handled by those who attempted it.
- (d) [classification of obligations] Again unpopular, but competently answered, the best answers focussing on the differences between Gaius's and Justinian's classifications.

Question 2:

- (a) [custom]. A few candidates could see what this was about and scored well, but the majority provided merely descriptions of the sources of *written* law.
- (b) [*accessio* to land]. Very popular and competently treated. The strongest answers addressed the conceptual difficulties of the 'dormant ownership' where the owner builds with another's materials. Weaker answers tended to evade the problem posed by difference between the builder in and out of possession, saying merely that the *bona fide* builder had an *action* for compensation.

(c) [standard of care in deposit]. While not among the most popular of the extracts, this was attempted by a substantial number and produced some pleasing answers well focussed on the text.

(d) [classification of thefts]. This was very popular and on the whole competently handled; weaker answers tended *only* to discuss manifest and non-manifest theft (though this was, obviously, *part* of the question). The strongest answers identified and addressed the juristic debate and Gaius's opinion before going on to discuss the changes in Justinian's account.

Question 3 [Justinian's codification]

Very unpopular; answers were polarised between highly competent and well-prepared ones, and ones which were obviously desperate attempts to write something.

Question 4 [subsequent influence of Roman law, and criticisms of it]

Slightly more popular than question 3, but again polarised between strong competently prepared answers at the top end and general waffle at the lower end; a few candidates, oddly, sought to defend the Roman law of classical antiquity against Hotman's criticisms by reference to the difference between *ius civile* and *ius gentium*, as if doing so were a *sufficient* explanation of the subsequent influence of Roman Law.

Question 5 [ownership and servitudes]

This was one of the most popular questions, and attracted a large number of highly competent answers. The strongest candidates deployed aspects of the legal doctrines relating to servitudes and usufruct and related rights, and the fact that these rights were created by a *dominus*, to qualify the claim with which everyone started, that the existence of these institutions showed limits on the 'absolute' quality of *dominium*. It was relevant in a sense to make passing reference to issues of ownership and possession as also qualifying 'absolute' ownership, but weaker candidates tended to write only briefly on servitudes and usufruct before spending half or more of the essay on *usucapio*, interdicts and the *Actio Publiciana*. Significant minorities thought either (a) that the usufructuary had possession, or (going to the opposite extreme) (b) that the usufructuary had only remedies *in personam* against the *dominus*.

Question 6 [evolution of *stipulatio*]

This was again a very popular question and well treated. Strong candidates, having treated the evolution of the forms of *stipulatio* effectively, could take their answers in a variety of directions; some, for example, usefully brought up the argument that the contract *litteris* was a better candidate for elimination; others argued carefully about the possible meanings of the Constitution of Leo; yet others emphasised the continued existence of gaps in the Justinianic law of informal contracts as a reason to retain *stipulatio*. Weaker candidates generally showed only an outline grasp of the evolution of the formalities of *stipulatio*; those who were aware of this (as opposed to simply producing very brief outline answers) used the proposition that *stipulatio* functioned as a gap-filler as a bridge to talking at length about gaps and overlaps among the informal contracts.

Question 7 [praetors' and jurists' influence on the informal contracts]

This was the least popular essay question, attempted only by five candidates. Other than remarking on the fact (true also last year with a different question on similar issues) there are no particular comments to be made, since the attempts were completely diverse.

Question 8 [development of Aquilian liability]

The most popular question on the paper, and on the whole very well handled, with some really excellent answers and most candidates who attempted it able to reach a mid-high 2.1 standard. The best scripts as well as being able to discuss the debates on the original meaning of the *Lex* and the impact of juristic interpretation and the provision by the praetors of the decretal actions, were also able to address how far “a simple liability to compensate ...” was an accurate description of the classical and Justinianic law. Weaker candidates generally gave thinner and less accurate accounts of the development; some seemed to think that the debate about the original meaning of the statute concerned its meaning in classical law. A common minor error was to identify *pecudes* in Ch 1 with beasts of burden, or directly as *res mancipi*. One remarkable suggestion was “beasts of burden, such as cows, sheep and pigs”.

Question 9 [problem on ownership, possession, *usucapio* and the *Actio Publiciana*]

Attempted by a minority, who had variable success with it. Though the outcome of the problem is necessarily indeterminate (for want of information about time periods) candidates who ‘got’ the issues could run through the steps and arrive at potential outcomes without too much difficulty. The commonest error was a serious one: this was either to fail to notice that some of the goods transferred at the beginning of the problem were *res mancipi*; or, having noticed it, to rewrite the problem by ‘presuming’ that - contrary to its express words - A had mancipated the farm to B, rather than delivering it. Since this made nonsense of much of what followed, it was usually disastrous. An appreciable number of candidates also asserted that the orchard had been stolen; while a few did so in the context of observing the early juristic debate on the point and its ultimate conclusion – that land cannot be stolen – most just baldly asserted that it could. The examiners thought it was reasonable to expect candidates to know that all the places mentioned are in Italy, though we didn’t penalise candidates who had doubts about the issue. A small number came up with the old myth that a year in ancient Rome had ten months.

Question 10 [problem on theft and *iniuria*]

This was also attempted by a minority, though a significantly larger number than attempted Q 9. It was on the whole competently handled. It posed a large number of relatively small issues, and candidates were rewarded for identifying them and providing brief discussion of each. The commonest errors were the belief that since *furtum manifestum* can in a sense be characterised as attempted theft, there must be a *general* remedy for attempted theft, and not addressing whether the facts with which the problem opened could in any sense of the word amount to *contrectatio*; the belief that retaliation was an appropriate response in classical law to *iniuria* in the form of shouted insults; failure to identify the *doli incapax* issue in relation to K; and failure to discriminate between early and classical, or between classical and Justinianic, law in the affair of the vase. A minority of candidates did not understand the English word “absconded” and thought that it meant the owner L had abandoned the slave K.

CONSTITUTIONAL LAW

The papers submitted for Constitutional Law were generally of a good quality, with a great many awarded solid upper second grades. As ever, the best papers were characterised by a close attention to the question set. A number of candidates produced papers of a very high quality, showing strong analytical ability and an independence of thought.

Question 1

This produced a large number of sensible answers, and a couple of very good answers. Most candidates grasped the distinction between the legal and political constitution, and rightly noted that the divide was a soft, not a sharp, one. Only a few candidates considered whether a shift from a political to a legal constitution was desirable.

Question 2

Again, lots of sensible answers: the candidates had a good grasp of the literature and issues involved. A large number, having learned the cases on the subject, put them in, despite their only tangential connection to the question set.

Question 3(a)

This question was less well-done. A number of candidates seemed unsure of the role of the whips and appeared not to have considered the advantages and dangers of parties in the political process.

Question 3(b)

Some candidates seized the opportunity to provide the examiners with a general survey of the role of the House of Lords, and the possible reforms of that chamber. The best candidates answered the question set, and considered the potential risks and potential benefits of conferring special representation for a religious group in the legislature.

Question 4

Generally well done, once again, some candidates provided very general essays on the prerogative, only parts of which directly addressed the question set. The best answers focused on whether codification would lead to complicated political difficulties without adding to the specificity of the powers, or their amenability to judicial control. Few if any answers considered the potential for further developing or narrowing the prerogative powers through the codification exercise.

Question 5

A number of candidates seemed not to know what parliamentary privilege was, a deficiency that proved quite a disadvantage when answering a question set on that topic. However, the majority did, and provided sophisticated answers which showed an awareness of the institutional implications of privilege.

Question 6(a)

A lot of sensible, if rather homogenous, answers to this question; candidates had plainly come prepared for a question on this broad topic. As with the other questions on this paper, the best candidates focused on the question set, addressing the issue of the nature of a 'constitutional revolution' and its potential timing.

Question 6(b)

Generally well answered; many candidates showed an awareness of the risks of the courts stepping in to Parliament's shoes.

Question 7

The examiners thought that this would prove a tricky question, but in the event a large number of good answers were produced – though, once more, a large number of standard essays on the broad topic were also handed in. Answers that focused on either the caselaw or the jurisprudential analyses of the idea could achieve a good upper second, but first class answers addressed both (though not necessarily in even measure).

Question 8

This was a popular question, and often produced thoughtful answers. The best answers critically examined the options of federalism, an English parliament, 'English votes for English laws', and continuation of the status quo, and gave sound arguments for the best option – in most cases the last of these.

Question 9

Candidates showed a solid grasp of the literature and case law when answering the question. Most, though, appeared not to have considered the issues raised by the question for themselves, and were content to reproduce the views of academic commentators.

Question 10

This was not a popular question, but did produce some sensible answers. Some discussion of *Reynolds*, *Derbyshire*, and parliamentary privilege was expected, and the very best answers gave attention to the question of what might constitute a 'public figure.'

CRIMINAL LAW

Candidates generally performed well this year in criminal law. There were fewer distinction level marks than last year, but a similar number to earlier years. Nearly all candidates were able to demonstrate a good understanding of the basic principles of criminal law. The best papers were of a very high quality indeed, showing a detailed understanding of the case law and an awareness of the broader theoretical debates over the underpinnings of criminal law. Candidates this year were given a list of cases for use in the exam. We did not identify any impact on the performance of candidates as compared with previous years. Weak candidates still made little use of case law, while strong candidates were able to show a good

understanding of what the cases decided. We did not come across to any notable extent candidates simply writing out the names listed on the list in a hope they might be relevant. Comments on particular questions are as follows:

1 (Recklessness). Nearly all candidates who answered this question were able to state the current law. The stronger candidates went on to examine the significance of the decision in *R v Parker* and also how the law on intoxication fitted into the general approach to recklessness. The best candidates were able to draw on the academic literature to consider whether recklessness should be restricted to advertant risk taking.

2 (Consent in Rape). This was a fairly popular question. Weaker candidates used it to simply set out the approach of the current law to the definition of consent in rape. Stronger candidates focussed on the issue raised by the question: whether the current law was hopelessly vague and whether the term consent could be dropped from the law.

3 (Attempts and Serious Crime Act). This was not a popular question. The best answers considered carefully what harm might mean in this context and the extent to which an inchoate crime might, or might not involve harm, and whether that mattered.

4 (Causation). This question was misunderstood by quite a number of candidates. The question clearly focuses on causation, but several candidates spent much of the essay discussing issues surrounding mens rea, and the 'correspondence principle'. Weaker candidates demonstrated considerable confusion over the difference between *actus reus* and *mens rea*.

5 (Property offences). This question was not popular, but in general the answers were of a high quality. Inevitably the answers focussed on the interpretation by the court of the meaning of appropriation and in particular the decision in *R v Hinks*. Strong candidates also considered the use of civil law concepts in defining 'property' and 'belonging to another'.

6 (problem on assaults). This was a very popular question. Many candidates thought that walking a dog should not be an assault, but struggled to explain why. More use could have been made use of *Collins v Wilcock*. Only stronger candidates discussed the possible sexual assault with the pulling of the hair offence.

7 (Problem on defences). This was an extremely difficult question. It was not surprising that candidates really had problems with it. On the drinking of the poison one important question was whether the agreement to drink could be seen as a novus actus interveniens, following *R v Kennedy*. Very few candidates discussed whether Harriet could rely on self-defence in response to the charge of murder of Guiseppe (probably not due to the *Dadson* principle). While most candidates showed an awareness of the defence of necessity they struggled to use it in answer to the problem.

8(Problem on Accessories). This was a relatively straight-forward problem question on accessories. Many candidates struggled with the difference between being an accessory and a party to a joint enterprise. In particular it was not appreciated that if the doctrine of joint enterprise applies there is no need to show the accomplice did an act of aiding, abetting, counselling or procuring. Similarly that if it was not possible to prove joint enterprise due to a lack of *mens rea* then inevitably it would not be possible to prove aiding and abetting for the same offence.

9 (Problem on property offences). This was a reasonably popular question and most candidates demonstrated a good knowledge of the Fraud Act 2006. Stronger candidates discussed whether Nina intended to gain *by the deception*. Although most candidates picked up that Prafel's taking of the umbrella raised issues about an intention to permanently deprive, only the stronger ones were able to rely on the relevant statute and case law.

10 (Loss of control). This was a fairly popular question, but caused some difficulties. Although nearly all candidates discussed whether Su could use the loss of control defence, weaker candidates were able to do little more than quote the relevant provisions. Stronger candidates explored how arguments could be made based on the statutory language over whether the defence was available. In relation to Una many candidates seemed to assume she lacked the *mens rea* for murder, although that was far from clear from the facts. Few candidates explored whether Una could rely on the defence of loss of control.