

LAW MODERATIONS – HILARY TERM 2012

MODERATORS' REPORT

PART I

(A) STATISTICS

1. Numbers and percentages of those passing and failing

Numbers

	2012	2011	2010	2009
Total	218	219	212	216
Pass (without Distinction)	184	191	176	190
Distinction	34	26	35	25
Pass in 1 or 2 subjects only	0	2	1	1
Fails	0	0	0	0

Percentages

	2012	2011	2010	2009
Pass (without Distinction)	84.4	87	83	87.9
Distinction	15.5	12	16.5	11.5
Pass in 1 or 2 subjects only	0	1	0.5	0.5
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

winner 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 such cases affecting Course 2 candidates, and no scripts attracted a failing grade.

As last year (when this requirement was introduced), 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).

4. Number of candidates who completed each paper

218 candidates sat the three papers. None sat less than three. One person was registered for this examination by mistake and hence sat no 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. Two papers lacked a fourth answer; and, as always, 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.

The problem in 2011 with late delivery of scripts was effectively cleared up this year. The tight timetable for Mods nonetheless continues to create some difficulties in the marking process, but in the event the timetable was maintained.

Medical certificates and special cases

Two candidates had special arrangements for sitting their examinations. There were six medical certificates in total with two certificates 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

In a small number of cases erroneous information was sent to OSS due to a glitch in the Faculty's marks database. The errors did not delay release of results and were rapidly corrected. One candidate was unable to attend for typing of an illegible script until 20 April, with the result that a supplementary meeting of the Moderators was held on 30 April and the candidate's results released on 3 May.

(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	20
	M	14
Pass	F	113
	M	71

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:

The overall standard of scripts was good, with most candidates achieving 2.1 level marks and a substantial number reaching first class standard. Relative to 2011 there was some decline in candidates' focus on the questions set, with a good many reproducing tutorial essays rather than focussing precisely on the exact terms of the question.

Clustering of attempts was somewhat reduced in relation to recent years, but still noticeable. Between questions 1 and 2 (extracts) there was a heavy skew in favour of question 1 (presumably simply because it came first) and 1 (c) (contracts by consent) and 1 (d) (*iniuria*) were much more popular than 1 (a) (general classification) and 1 (b) (*avulsio*). Among the essay questions, questions 5 (ownership), 7 (stipulation) and 8 (theft) were most popular, but only question 4 (subsequent influence of Roman law) was really acutely unpopular. A bit less than a quarter of candidates attempted each of the problem questions.

The tendency remarked on in the past for candidates to explain legal developments by spurious versions of Roman history (in particular 'growth of the empire' between the times of Gaius and Justinian, in reality a period in which the Roman empire got smaller), which seemed to be abating in 2011, reasserted itself this year.

Individual questions:

Question 1:

(a) [general classification into 'persons, things and actions'] A minority attempted this; it was on the whole competently handled, though a few weaker candidates had no idea what might be contained in the law of persons and of actions (even in the very minimal terms in which this might be called for in an answer) and attempted unsuccessfully to bluff, rather than focussing on 'things' to illustrate the points made.

(b) [*avulsio*] On the whole well answered; the text could be successfully taken in more than one direction, e.g. either by deeper discussion of the relation between *avulsio* and *alluvio*, and other rules about islands etc., or by going in a more theoretical direction towards *accessio* as a general principle. Both options were rewarded if clearly done.

(c) [contracts *consensu*] Popular; generally well handled with some exceptionally strong answers which picked up well on the issue of 'agreement' flagged by the text.

(d) [*iniuria*] The most popular single text question. The examiners expected that this text would lead candidates to discuss the *conception* of *iniuria*, but we received instead large numbers of essays on its historical development. We marked on the basis that this was an acceptable way of addressing the text; on this basis candidates were rewarded for displaying detailed understanding of the development; weaker candidates tended to give sketchy accounts.

Question 2:

(a) [juristic opinion]. Generally competently handled by those who attempted it. The best answers were able both to address in outline the *ius respondendi* issue and the evolution of the role of juristic opinion, and to give some examples of the influence of the jurists on the substantive law.

(b) [incorporeal things in general]. The strongest answers addressed the question of the place of this text in Gaius' classification of things and the conceptual difficulties involved. Weaker answers provided merely a descriptive expansion of the incorporeals listed in the text.

(c) [Justinian's contract *litteris*]. Well handled by those who attempted it, with some exceptionally strong answers.

(d) [theft *ope consilio*]. This was the least popular text. There were some strong answers well focussed on this issue, but also some which talked merely about 'anything the candidate knew about theft'.

Question 3 [Edicts]

More popular than recent questions about Justinian's codification, and on the whole competently handled. The best answers were able to combine discussion of the basis of the authority of Edicts and temporal variations in the significance of this form of norm-production, with examples of Edictal interventions in the law drawn from the substantive part of the course. Weaker candidates tended to do only one or the other. A particular problem was a few candidates who used only the *Actio Publiciana* as an example of Praetorian intervention, and then went on to discuss the same material in answers to question 5. This inevitably affected the amount of credit that could be given.

Question 4 [subsequent influence of Roman law]

The examiners thought that candidates could legitimately spin this quotation either towards 'Roman Law and Common Law,' or towards the general European influence of Roman Law. In the event, too few candidates attempted the question, and their answers were too varied, for any comment on what they wrote to be possible.

Question 5 [divisibility of ownership/ 'bonitary ownership']

This was one of the most popular questions, but not one of the best answered. There were some very strong answers, but the majority of candidates tended to deliver only slightly variant forms of a tutorial essay, either on 'the absoluteness of the Roman concept of ownership', or on 'Ulpian says that ownership and possession have nothing in common'. Discussions of the *Actio Publiciana* and *exceptio rei venditae et traditae* tended to be in outline. A significant minority of candidates thought that 'another could hold it as part of his goods' was a way of saying 'another could be in possession of it'.

Question 6 [classes of contracts and the distinctions between them]

This was substantially more popular than last year's question on informal contracts, though still only attempted by a minority. Those who did attempt it mostly did well, producing some

very strong and creative answers which explored seriously and in diverse ways the possible benefits of a system of multiple different contracts, making effective use of examples from the sources.

Question 7 [evolution of the formalities of stipulation]

Very popular and well handled. The majority of candidates displayed a solid knowledge of the evolution of the formalities and were able to address their material effectively to the question of principle posed. Weaker candidates tended to answer in outline, and, in particular, to place all the evolution before the time of Gaius, conflating Gaius's treatment with Justinian's.

Question 8 [Sabinus' general definition of theft]

The most popular question on the paper, but rather variably answered. Though there were some strong answers which located this quotation in the evolution of definitions of theft, a great many candidates answered simply with tutorial essays on the Roman definition of theft, on the basis of assuming without close reading that Sabinus' definition was substantially identical to that in Justinian. A smaller group were able to spot the objectivist character of Sabinus's definition, but not able to relate it to Gaius's and Justinian's versions, instead merely contrasting it with the English Theft Act definition. A third group wrote 'anything I know about Roman theft' with substantial amounts of material on manifest/ non manifest, *conceptum* and *oblatum* not made relevant by relating these issues to the conduct element and/or mental element of the delict (as might have been done).

Question 9 [problem on servitudes, usufruct, and (mainly) Aquilian and contractual liability]

This problem was broadly competently analysed and handled by the minority who attempted it. There was some tendency for candidates either to handle the issues of causation and fault effectively, but miss, or jump to conclusions on, the issues about who could claim and for what, and whether the claims would be by the direct statutory action or by *actio utilis*; or, in the alternative, to address these issues at more length than they deserved, and treat the issues of causation and fault in a very summary way. The strongest candidates, as well as handling both aspects effectively, also noted A's contract claim against E, and the problem whether B's possibly excessive use of the right of way (depending on which sort of right of way it was) affected the possibility of an Aquilian claim against C.

Question 10 [problem on possession, *usucapio*, *accessio*, *specificatio* and related issues]

Again attempted by a minority, but more variably handled; there was some tendency for this to be the last question attempted and to attract scrappy answers as a result. The commonest weakness was inadequate depth in analysing the *usucapio* issue. Quite a lot of candidates either thought that land could be stolen (and that G could sue his own slaves, who are said in the facts to have disappeared, for stealing it) or, seeing the point that land cannot be stolen, did not see that the movables *had* been stolen and so could not be usucaped. Most, however, went on to discuss the *accessio* and *specificatio* issues anyhow. A minority thought that H or I could add the slaves' 'possession' to their own for *usucapio*. Only the strongest candidates noticed the problem posed by G's retention of possession *animo solo* and when it ceased or, conversely, when H or I began to possess.

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. The average standard for the scripts was high, including some very high calibre scripts in the First bracket, which demonstrated not only an excellent understanding of constitutional law, but also demonstrated pleasing signs of originality.

Question 1 (conventions and separation of powers)

Question 1 required candidates to assess whether a constitutional convention existed in the UK constitution requiring the separation of powers between the legislature and the judiciary. The weaker candidates focusing on giving a general account of the principle of the separation of powers, or merely analysing the extent to which the judiciary and the legislature are separate from one another in the UK constitution. The better candidates focused on analysing the meaning of a constitutional convention, in order to determine the criteria to be used to establish the existence of a constitutional convention. They were then able to determine the extent to which a constitutional convention existed to preserve the separation of the legislature and the judiciary, as well as determining the extent to which the separation between the judiciary and the legislature stemmed from common law principles or from legislation.

Question 2 ('constitutional statutes')

This was not a popular question. Weaker candidates were able to explain the judgment of Laws LJ in *Thoburn* and merely equated 'constitutional statutes' with 'statutes that cannot be impliedly repealed'. Stronger candidates were able to draw on other examples from case law, evaluate what it may mean for a statute to be 'constitutional' and were aware of debates surrounding whether 'constitutional statutes' are interpreted differently from other statutes. In addition, stronger candidates focused much more clearly on evaluating the utility of 'constitutional statutes' to the UK constitution.

Question 3 (functions of parliament)

This question was not as popular as other questions. Weaker candidates appeared to have little knowledge of the political means through which the executive could be held to account for its actions. Stronger candidates not only provide a detailed account of the potentially contradictory roles of Parliament, but in addition provided a detailed account and evaluation of the extent to which Parliament does hold the executive to account for its actions. They were also able to draw consequences of this assessment with regard to the UK constitution, evaluating how far this accountability may be performed by other institutions.

Question 4 (constitutional 'codification')

This was a popular question. Stronger candidates were able to distinguish between different forms of 'codification' and provided a detailed evaluation of the advantages and

disadvantages of codification. Weaker candidates focused more on the practical difficulties of codifying the UK constitution, as opposed to evaluating its utility or purpose.

Question 5 (prerogative powers)

This was a very unpopular question, suggesting that candidates have a weaker knowledge of the legal controls over prerogative powers than in previous years where similar questions evaluating legal controls over prerogative powers were very popular. Weaker candidates appeared to know very little of the detailed case law on the control of prerogative powers post *CCSU* and were unwilling to evaluate the extent to which courts should control prerogative powers. Stronger candidates had a detailed knowledge of more recent case law and demonstrated a good understanding of the comparative merits of models of deference and justiciability.

Question 6 (House of Lords reform)

This was a popular question, with candidates demonstrating a good knowledge of the arguments surrounding reform of the House of Lords. Stronger candidates were more able to distinguish between the different means through which the second chamber could be elected, evaluating the strengths and weaknesses of different compositions of the House of Lords in the context of its function and powers.

Question 7(a) and 7(b) (parliamentary sovereignty, judicial review, rule of law)

(a) This was not a popular question. *AXA General Insurance* was decided towards the end of Michaelmas Term and tutors were alerted to the decision and the need to add the case to the list, but its lack of popularity suggests either that it is hard to keep up to date in this area, or that students are very unwilling to answer questions on new cases. The few brave souls that did tackle the question demonstrated a sound understanding of the case and thoughtful insights upon the differences between courts evaluating Scottish legislation in terms of its compatibility with the Scotland Act and evaluating its validity in terms of common law principles.

(b) This was a popular question. However, many candidates did not seem to recognise the specific context of the quotation. Stronger candidates recognised the need to evaluate whether the rule of law, or parliamentary sovereignty, were best described as the ultimate controlling factor of the constitution. Weaker candidates saw the question as an invitation to present their knowledge on the rule of law and the extent to which this is recognised in English law.

Question 8 (devolution)

Question 8 was very popular this year. Weaker candidates focused mostly on determining whether democracy had been enhanced through devolution, focusing on the problems posed by the lack of devolution to England. Stronger candidates provided a more detailed analysis of the West Lothian question, evaluated democracy from the perspective of different members of the United Kingdom and demonstrated a sound understanding of different conceptions of democracy.

Question 9 (freedom of expression and parliamentary privilege)

This was not a popular question. Stronger candidates were able to evaluate both how parliamentary privilege can protect the speech of MPs and potentially restrict the speech of those criticising MPs, as well as demonstrating a sound understanding of the impact of *Reynolds v Times* on the defence of qualified privilege. Weaker candidates merely focused on the extent to which article 9 of the Bill of Rights 1689 protected the speech of MPs.

Question 10 (bill of rights)

This was a popular question. The strong candidates demonstrated a sound knowledge of the advantages and disadvantages of expanding protection of human rights to socio-economic and environmental rights. In addition, they provided an excellent evaluation of different means of protecting human rights.

CRIMINAL LAW

There was a pleasing performance in criminal law in Mods this year. Nearly all candidates had a good understanding of the definitions of the key offences and were able to analyse these and apply them in problem questions. Most candidates demonstrated a sound knowledge of the case law and were able to use it to answer problem questions. It was pleasing to see the best candidates using a knowledge of some of the theoretical writings on criminal law in answering essay questions and a keenness to engage with some of the complex academic literature.

This year, like last year, candidates were provided with a list of cases in the exam room. We were unable to detect any significant impact on the performance of candidates. As it appears to provide candidates with reassurance and ensure they focus their revision appropriately we would support the continued provision of these lists.

Here are some comments on some of the particular questions.

Q1 (loss of control).

This was interpreted too broadly by many candidates and used as an excuse to deal with all aspects of loss of control. Those who were more tightly focussed on the requirement of loss of self-control did better.

Q2 (joint enterprise).

This was not a popular question. The few answers were reasonable; the better ones showed good understanding of complicated joint enterprise cases and of the academic debates.

Q3 (recklessness).

This was a popular question. The best answers showed a good understanding of the cases and also a good understanding of the academic literature, and dealt clearly with both the descriptive and normative aspects. Few answers distinguished between criminalising

inadvertence and labelling inadvertence recklessness. The best answers included a discussion of the way the law on intoxication can be used to label an inadvertent person reckless.

Q4 (rape).

This was also a popular question, but not one that was always well answered. The best answers did not treat the question as an excuse just to write about rape generally, but were focussed on the issue of balancing sexual autonomy under the Act. There were some excellent answers that sought to compare the autonomy claims of defendants and complainants.

Q5 (self-defence and duress).

This was not a popular question, but was reasonably well handled. The best answers were able to explore whether it was helpful to consider whether the victim posed a threat to the defendant in distinguishing the two defences.

Q6 (assaults).

This was a popular question. There was some confusion from some answers about the mental state requirements for basic assault and battery. The best answers were well structured and were able to deal with the multiple issues at appropriate length.

Q7 (manslaughter).

This was a popular question. Some answers struggled with the causation issues and the applicability of *Evans* and *Kennedy* to murder. The best answers were clear about dealing with the ramifications both of instructing Edwina and of running off. Perhaps because of timing, Frankie's liability was less comprehensively discussed.

Q8 (property offences).

This was not a very popular question, but was reasonably handled. There was some confusion about whether it is fraud to type an essay for someone else. Weaker answers did not deal well with the core issues of both the Fraud Act and theft. Covering all of the issues took some time and required good technique. There was some variety in the quality of dealing with the *Oxford v Moss* issue of theft of the essay by email; there were some interesting answers discussing *MPC v Charles* and representations made to Goldie's computer about authority to send such an email.

Q9 (consent).

This was a popular question, though not always well done. There was again some confusion about the mental state requirements for s47 OAPA 1861 and the relevance of Keith believing that Lucy consented. There was some confusion about entry to the flat and whether that was necessarily a criminal offence. Weaker answers did not distinguish sex with Lucy while she was awake from when she was asleep, and there was much confusion about whether or not this was attempted rape. There were surprisingly many answers that found M raped L but that did not discuss that issue in deciding whether or not L had to inform M of herpes. Only a few

answers considered the implications of an STD being only ABH, and hence the s47 and *Slingsby* issues.

Q10 (defences, complicity).

This question was not popular, and was very complicated, and perhaps answered towards the end of the exam, and hence was rushed. Most answers discussed insanity, but few even mentioned diminished responsibility. There was some misdirected discussion of duress perhaps prompted by Q5, and some reasonable enough discussion of self-defence. The issues relating to Q were dealt with poorly but those who could demonstrate an understanding of *Lipman* were rewarded for it.