

# LAW MODERATIONS – HILARY TERM 2013

## MODERATORS' REPORT

### PART I

#### (A) STATISTICS

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

###### *Numbers*

	2013	2012	2011	2010
<b>Total</b>	204	218	219	212
<b>Pass (without Distinction)</b>	166	184	191	176
<b>Distinction</b>	38	34	26	35
<b>Pass in 1 or 2 subjects only</b>	0	0	2	1
<b>Fails</b>	0	0	0	0

###### *Percentages*

	2013	2012	2011	2010
<b>Pass (without Distinction)</b>	84.4	84.4	87	83
<b>Distinction</b>	18.6	15.5	12	16.5
<b>Pass in 1 or 2 subjects only</b>	0	0	1	0.5
<b>Fails</b>	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.
- (iii) where a candidate had one mark at or above 60 or two marks at or above 58; and where their overall average mark was below 60.

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

Second marking scripts of a II.ii standard which were 4 or more marks below the candidate's average did not impose a significant additional burden on the examiners (and, conversely, it also did not significantly modify decisions on assessment standards). The second marking of papers where the overall average mark was below 60 was also thought to be a useful addition to the second marking criteria, and it did not impose a significant additional burden on examiners. The Moderators accordingly supported the continued use of this second marking category.

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

204 candidates sat the three papers. None sat less than three.

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

As last year, 'short weight' and associated phenomena were dealt with by the award of the mark merited by the work the candidate had actually presented. The Moderators were pleased to note that there were no rubric breaches this year.

Steps were taken to review the consistency of markers' profiles after 25 scripts, and also at the end of the first marking stage. The Moderators agreed that investigation and explanation should follow if either an individual marker or a team of markers awarded 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 tight timetable for Mods continues to create some difficulties in the marking process, but in the event the timetable was maintained.

#### Medical certificates and special cases

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

#### Release of Grades

The grades were released promptly and efficiently, and without error, on Wednesday 3<sup>rd</sup> April 2013 directly following the final Moderators' meeting.

### (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	19
	M	19
Pass	F	83
	M	83

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

The examiners were impressed by both average quality and the displays of prowess at the top end, and were happy to award a good number of Distinctions. The very best ten or so papers were especially good this year, suggesting a high level of enthusiasm on the part of both students and tutors. Even the workmanlike papers clustered in the mid 2.1 range showed keen engagement with the subject, curiosity, and writing flair. That said, certain weaknesses did recur; in particular the examiners noted a lack of attention to the set question and an overall lack of precision about periodization of the law in question, especially the distinction between law in the times of Gaius and of Justinian. Only a handful of papers revealed poor understanding of the material, and thankfully very few lower grades had to be given.

### Question 1

Of the four topics, sources of law and outrage proved most popular, though some candidates gave imaginative discussions of divine objects and price in sale. Students must be careful to address the actual quotation, and not just spill out everything they know about the topic – so outrage concerned proper parties, not mind states of perpetrator and victim; divine things are not *res publicae* or *res communes*; and so on.

### Question 2

The second group of four topics, covering praetorian law, alienation, unjust enrichment and fault in deposit, may have seemed more esoteric to the students, with many fewer answers offered than Q 1. There was generally more competence than brilliance on offer, with many answers not quite understanding the controversies aroused by each quotation, but instead offering generic discussions of wider topics. Some good answers on praetorian law mentioned juristic input, but few mentioned the work of Julian on the perpetual edict, or the nature of formulaic law

### Question 3

This question on the purposes and results of the Justinianic codification attracted few answers, and on the whole the discussions offered were a little thin or even bland. There are many fine secondary discussions of the process of law making in late antiquity and its impact on later European legal history, and the examiners expected some evidence of readings beyond the core textbook chapters, as well as resort to the primary materials where Justinian and his overtly reflect on their own work. Most answers concentrated on the making of the Digest rather than the impact of the Institutes; only very few looked at both strands and integrated reflections on the uses of the *Corpus Iuris* in later law.

### Question 4

Overall the question on the place of unilateral verbal contracts within the nominate contracts attracted good answers, covering the material competently. However, only a few strong students grasped the wider issues of how contracts with default terms can be an effective method to structure transactions, and how good faith and bilateralism in eg sale contracts contrast with unilateral and strict liabilities in stipulations. Many students merged nominate contracts with consensual contracts without discrimination, and very few talked about the special qualities of the real and literal contracts. Discussion of developments of stipulation could lack precision. Opinions differed on how to assess the decline of formality; for many it had no practical relevance whilst others spoke of *stipulatio* being the ‘healer’ of contract law!

### **Question 5**

The question on ownership rightly attracted answers from almost every candidate – not surprising since this is indeed a key issue within the syllabus. Answers were generally competent, but even the first class answers tended to lucid exegesis rather than deeper critical reflection on the nature of ‘absolute’ dominium and the relativist challenge of possessory and prescriptive claims to the core classical theory of ownership. Kaser’s radical relativist theory seemed almost unknown, and the legislative extensions of usucaption were not always clearly understood. But on the whole the distinctions of dominium, good faith possession and bonitary ownership and their contrasting remedies were well described. noticed inaccuracies in distinguishing *res mancipi* from *res nec mancipi* and little knowledge on how the former had to be transferred.

### **Question 6**

The area of servitudes was intensively taught and has attracted excellent secondary literatures, yet the answers offered tended to basic exegesis of the core texts, and often failed to extract deeper ideas about the nature of in rem claims involving incorporeal property and their distinction from obligations. Many answers revealed that students had a relatively poor understanding of actions *in rem* and *in personam*; many thought that personal servitudes were rights *in rem* or – even worse – rights *in personam*, and did not consider that classical law spoke rather of a thing or *res* which could be characterized as property or obligation, with actions appearing in a separate category being the means to assert or defend the *res*. If “all our law relates either to persons, things, or actions”, then rights make no appearance. These are difficult points, and overall the students had clearly read and thought hard about this complex area of law and developed good insights in their answers.

### **Question 7**

The theft question was popular and attracted many competent answers. Most students resisted the ever-present temptation to recycle their common law learning on asportation into the Roman answer (though some veered dangerously in this direction). Only a very few of the best answers reflected on how juristic extension brought much fraud regulation into the delict, going beyond the core territory of defense of possession. More could have been offered on *interesse* and proper parties, and perhaps the relation to interdicts.

### **Question 8**

The question on property damage was also popular and on the whole answered with competence rather than rigour or brilliance. In this complex part of the law the many intricate developments have to be presented within a convincing structure, looking at the key concepts of damage, intent, fault, cause and their interconnections; many answers tended to a scattergun approach, listing facets of the law with neither conceptual not historical orderliness. Only a very few candidates seemed aware of the debates on how damages were calculated or able to outline them convincingly. Several students focused on the juristic developments of *iniuria* and *furtum*, but had too little to say about the *lex Aquilia*. Others confused classical juristic interpretation with the exegetical interpretations offered by modern scholars such as Daube, Lawson, and Jolowicz.

### **Question 9**

The first problem question on various facets of ownership, sale and stipulation attracted a moderate level of interest, but answers were a little too brief, tending to list possible actions without plunging deeper into controversies over the boundaries of original and derivative

acquisition or the vagaries of contract formation. Only few candidates went into sufficient detail on fact and law to win high marks.

### **Question 10**

The final problem question on various aspects of delict, property, hire and sale attracted relatively few answers. The best candidates could see how many of the parties actions straddled the boundaries of adjacent actions. Less able answers dogmatically listed some plausible actions and ignored the complexities aroused by the various scenarios. Many students dealt with the question of ownership but left out the question of compensation. Surprisingly few candidates found the time to engage with the difficult problem of ownership of slave offspring.

## **CONSTITUTIONAL LAW**

In general the quality of the candidates was very good. Candidates answered a wide spread of questions and the best answers were varied and wide ranging in their references. There were very few papers of 2.2 quality overall and no thirds or fails. Among the firsts were some very good papers although perhaps too few in the outstanding category. Many of the answers were grouped in the high 2.1 category.

### **Question 1**

This was a fairly popular question and it was generally well answered. However, most of the answers were relatively cautious in nature, tending the favour the arguments for an uncodified constitution. Many of the answers could have made use of a wider range of references.

### **Question 2**

This was generally competently answered. Most answers were able to give a clear account of Dicey's notion of the rule of law and relate it to contemporary circumstances. Some answers made too little use of caselaw and many answers failed to consider whether alternative notions of the rule of law would be of greater relevance to the contemporary constitution.

### **Question 3**

This was not a popular question and very few candidates answered it. Those that did revealed a solid grasp of the nature of ministerial accountability but failed to give sufficient detail on the subject matter.

### **Question 4**

(a) This question was fairly popular and answers were reasonably well argued and workmanlike. However, in general most failed to give sufficient attention to the actual nature of the quotation and tended to provide a more general exegesis of the theory of separation of powers.

(b) Very few candidates answered this question.

### **Question 5**

(a) This was a popular question. The question was sufficiently general to lend itself to a widish variety of answers. In general, candidates demonstrated a competent level of knowledge of parliamentary sovereignty. The better answers drew on this knowledge to engage in different interpretations of the case law, as well as on academic debate, and

explored the consequences of these interpretations for the doctrine of parliamentary sovereignty. Weaker answers tended to list and describe the relevant case law, without a sufficient level of analysis.

(b) This was a difficult question and very few students attempted it, which is a pity because it gave the stronger candidates the chance to shine. The one or two who did answer it, tended to answer it very well.

#### **Question 6**

This was another popular question, and generally well answered. The very best answers were well informed about recent initiatives on Lords reform and could argue knowledgeably the benefits of the various reforms proposed.

#### **Question 7**

Also popular and usually competently answered. The best answers were able to probe intelligently the reasons for asymmetrical devolution and incorporate case law, and differing approaches to human rights, into their answers.

#### **Question 8**

(a) Again popular. However many candidates restricted themselves to analysing the obvious caselaw in a rather plodding fashion, without sufficient attention to both the details and consequences of judicial opinions.

(b) Equally popular. Regrettably some candidates seemed unaware of the more recent caselaw such as *Rabone*, so their answers were not as fully informed as they might have been.

#### **Question 9**

Reasonably popular. This was a fairly straightforward question. Weaker candidates tended to list the caselaw without sufficiently analyzing it, and also failed to give sufficient thought as to why freedom of expression should be given protection in the first place.

#### **Question 10**

Not very popular but sufficiently well answered by those who chose to tackle it. Most candidates were able to discuss the perceived deficiencies of the Human Rights Act and to discuss possible alternatives, along with reasons why a UK Bill of Rights should not be adopted. Few candidates considered the relevance of the question to the devolved legislatures

## **CRIMINAL LAW**

Overall this was a pleasing performance by the cohort, with very few scripts of poor quality and many scripts displaying an adept and deep understanding of relevant principles and offences. A number of general points could be made about problem question technique. Candidates would do well to remember that an offence has been committed only where *all* of the relevant offence elements are satisfied. It is likewise important to relate offence and defence elements to the relevant specific facts in the problem question. Candidates should also avoid an excessive reliance on analogy (the facts are very similar to *R v Smith and Hogan*; therefore it follows that the problem scenario will be disposed in the same way).

Candidates should explore the relevant rules and principles, their rationales and their limits, applying those insights to the facts in the problem scenario.

Q 1: The examiners were surprised at how many candidates could not summarise the *Woollin* model direction correctly. The best candidates engaged with both oblique and direct intent, relating these to different conceptions of the Rule of Law.

Q 2: This question was not especially popular. Better candidates explored problems of fair labelling, especially in the context of the offence of theft and the *Gomez* decision. Those candidates also explored problems with identifying harm in this context, comparing the different approaches of theft and fraud where appropriate.

Q 3: Overall this question attracted many good answers, appropriately distinguishing between voluntary and involuntary intoxication and the differences between ‘defences’ and denial of mens rea. They also explored the idea that the ‘defence’ of intoxication was in fact an *inculpatory* doctrine. Analysis of the distinction between basic and specific intent was sometimes lacking. Even those students who recognised the lack of clarity and accounted for the various ways in which these terms were defined did not always follow up on this to explain the implications that the various definitions may have to the legal recognition of claims of voluntary intoxication.

Q4: This question was relatively popular and generally well-answered.

Q5: This question was extremely popular and generally well-answered, with the best candidates exploring the difficulties and contradictions in the case law while relating this discussion to the rich theoretical literature on the limits of consent in the criminal law.

Q6: This was a popular question. *Bree* was not generally well-handled, with the mantra ‘a drunken consent is still a consent’ being taken as sufficient to discharge the burden of analysis. While that might suffice for the Court of Appeal, it won’t do for an Oxford Mods paper! There were some difficulties in understanding the relationship between s 74 and s 75, particularly on the intoxication issue. Better candidates explored the issue of deception as to ‘purpose’ in respect of the possible sexual assault in the latter part of the problem question.

Q7: A number of students spent a good deal of time on oblique intent, when this seemed to be a highly plausible instance of plain vanilla direct intent to cause gbh (at the very least). Also, too many candidates very quickly discounted ‘loss of control’ by simply asserting that it could not be the response of a normal person. This then led such candidates to bypassing an exploration of a host of interesting and difficult issues in respect of ‘loss of control’.

Q8: Candidates often elided the elements of different offences, especially s 47 and s 20 OAPA 1861. Sometimes the discussion of *Blaue* was superficial, driven by the assumption that ‘religious belief’ and ‘dislike of Scots’ should be treated in an identical manner as far as causation went. While this might be a plausible conclusion of an argument, it does need a supporting argument. The criteria in *Kennedy* were, however, explored in a more nuanced way by better candidates who identified the difficulties with ‘free’ and ‘informed’ choices in the context of the problem facts.

Q9: This was a challenging question and it attracted some brave and impressive answers. A surprisingly large number of candidates did not explore the possible relevance of offences under the Serious Crime Act 2007. *Gnango* was generally well-handled, as were the attempts liability points.

Q 10: This was a popular question, and it was generally well-answered. Sometimes there was a tendency to draw rather crude comparisons between fact scenarios and leading cases, especially *R v Parker*, as a way of yielding legal conclusions. Better candidates explored whether, in the light of *R v G*, there may be appropriate differences between 'closing one's mind' due to grief and 'closing one's mind' due to anger. Insanity and duress were generally well-handled.