

LAW MODERATIONS – HILARY TERM 2014

MODERATORS' REPORT

PART I

(A) STATISTICS

1. Numbers and percentages of those passing and failing

Numbers

	2014	2013	2012	2011	2010
Total	204	204	218	219	212
Pass (without Distinction)	166	166	184	191	176
Distinction	38	38	34	26	35
Pass in 1 or 2 subjects only	0	0	0	2	1
Fails	0	0	0	0	0

Percentages

	2014	2013	2012	2011	2010
Pass (without Distinction)	81.4	81.4	84.4	87	83
Distinction	18.6	18.6	15.5	12	16.5
Pass in 1 or 2 subjects only	0	0	0	1	0.5
Fails	0	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.

Some of the markers this year gave no 69 grades and very few 68 grades. This only resulted in a good deal of 67 grades being revisited as the effective marginal grade for a Distinction, and indeed a number of these 67s were seen to yield a result of 70 or higher on remarking, securing a Distinction for those particular candidates. The Examiners would re-emphasize the general instruction that the whole of the marking scale be used and grades at the higher end of the 60s and also above 70 be used liberally.

4. Number of candidates who completed each paper

204 candidates sat the three papers. None sat fewer 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 fewer than 15% or more than 20% first class marks, or fewer 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 was maintained. Markers who showed exceptional zeal and promptness early in the marking period helped make this a smooth process.

Medical certificates and special cases

Eleven candidates had special arrangements for sitting their examinations. There were four medical certificates in total and two college letters 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 for Course 1 students were released promptly and efficiently, and without error, on Wednesday 3 April 2014 directly following the final Moderators' meeting. However, an oversight in the central UAS Academic Records Office meant that Course 2 grades were not accessible online to students (or college tutors) until 7 April 2013.

(B) GENDER etc. (equal opportunities issues and breakdown of the results by gender; Course 1 and 2 performances; ethnicity analysis)

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

Result	Gender	Number
Distinction	F	17
	M	21
Pass	F	98
	M	68

These statistics yield a percentage comparison of Distinction performances as follows – F: 17.3%; M: 30.8%. This significant disparity is some departure from 2013, when male and female overall numbers, and Distinctions achieved, were more or less equal. The position in future years should be monitored, to test whether this was an anomalous result in one particular year, or whether there is a persistent gender element in formal examination performance.

It was also possible to disaggregate the comparative performance of Course 1 and Course 2 candidates – 17.8% (31/174 candidates) and 23.3% (7/30 candidates) achieved Distinctions in each group respectively, and 18.6% in the combined cohort. This does not seem remarkable given the small statistical samples in play; if one or two of the Distinctions in Course 2 had gone the other way, or if two or three Course 1 Passes had gone up, then the cohorts would have more or less equalized or even reversed position. Similar volatility has been seen in prior years. At the same time it may be recognized that the Course 2 cohort did perform very well this year.

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

(C) SUBJECT REPORTS

A ROMAN INTRODUCTION TO PRIVATE LAW

The examiners were pleased by the learning and enthusiasm of the examinees for the subject, and were happy to award a good number of Distinctions. The five best papers showed sustained engagement with the subject and an impressive maturity of juristic thought for students young in the law. Papers in the upper second range also showed a proper grasp of the main ideas of Roman law, which will provide a good basis for future studies. The main weakness perceived was a tendency to write a set piece essay only approximately responding to the question being asked by the examiner.

Question 1

In (a) the main deficiency was a failure to explicate each of the named contracts, perhaps concentrating too determinedly on sale. Reflections on the Roman technique of enumerating special contracts were not always offered, and some students barely mentioned contract at all but dwelled vaguely on natural law. The best students integrated natural law with the various civil contracts of the Romans. In (b), disappointingly few answers adequately address the central *explanandum* of the circumstances in which an *actio iniuriarum* arose out of mistreatment of a slave, notwithstanding the treatment of the point in lectures. A standard *inuria* mini-essay might be offered instead. Better answers to (c) considered what might count as ‘Roman’ after the *constitutio Antoniniana*, beyond the basic explanation of the jurisprudential classification of sources for which the gobbet called. In (d), an appreciable number of candidates appeared to conflate the limitations on *usucapio* relating to things stolen or taken by force with the clause denying the possessory interdict to a dispossessed claimant who had himself obtained possession from the defendant *vi, clam* or *precario*. Very few candidates saw the analogy to collection of fruits. Some candidates attempted to write about bonitary ownership, only to repeat themselves in Q.5.

Question 2

Some candidates attempted (a) with scant information concerning how Roman executive law-making worked, and did not distinguish the various categories very successfully. The best candidates saw the irony in the quote concerning the imperial power as itself a grant from a higher source. In (b), some students managed to write about sale without mentioning the role of price, or mentioned the money price versus barter debate without explaining why this might

be important. The best answers saw how the contract of sale could only operate if vendor and purchaser were identified. In (c), better students used historical analysis to show how some *res Mancipi* were yet incorporeal. The best students saw the ambivalence in Gaius when speaking of things and legal claims to things, sometimes blurring the two together. Excerpt (d) was generally well-answered, though in expatiating on fraud and theft some students ended up repeating themselves in Q.8.

Question 3

There were few takers for this question, and few of those provided well-informed answers. The point of the quotation was to open up the inquiry into the nature of codification and its impact on juristic science. Too many students wrote vaguely about the high classical and Justinianic periods without mentioning the achievements of any particular jurists or the types of legal inquiry they engaged in, and very few had detailed knowledge of Tribonian and his colleagues' work in producing the *Corpus Iuris*.

Question 4

Some interesting answers were elicited by this question on different types of contract. A surprising number of students trotted out their standard *stipulatio* answer and did not engage with the task of contrasting bilateral and unilateral contracts in order to show why good faith only pertained to the former. The best candidates did rise to the demands of the question and thought through how formation can dictate the content of obligations and how the *ex fide bona* clause in the formula has implications for substance as well as procedure.

Question 5

This was a popular and relatively straightforward question. Higher grades were awarded to those who could explain the basic dichotomy of possession and ownership, and then show how historically the system produced a type of relative title. The best candidates offered thoughts on how the procedure of property claims operated and how the Praetors used legislative remedies to protect some property transfers without rewarding dishonest acquirers. Some candidates went on to reflect on the meaning of absolute ownership and assessed the contributions of modern jurists such as Kaser and Birks.

Question 6

The material on servitudes was carefully explained in lectures but many candidates had a quite unfocussed appreciation of the terrain. A number of candidates characterised servitudes as obligations or as rights *in personam*, the latter being inaccurate in more than one respect. Indeed, candidates also appeared to associate rights in a thing with the un-Roman notion of a right *in rem* (cf. the Roman classification of certain actions as *actiones in rem*). Only a few candidates could clearly explain the property-like operation of usufructs and praedial servitudes, and show how these evolved with fresh remedies to assert or deny these. Some gifted candidates used the topic to offer reflections on the nature of ownership. Some less able candidates offered jejune theories of property as a "bundle of rights" as if this were a classical notion.

Question 7

The question on property damage was popular, but too many students offered a standard essay that failed to explain how the jurists defined and expanded the key concepts of damage, intention, fault, and causation. Few seemed to grasp any details of the lengthy debates on how damages were calculated and how this might affect the characterization of Chapter 1 and

Chapter 3 claims. The best answers showed a good historical sense of the casuistic nature of the jurists' work here.

Question 8

A large number of candidates focused on the penal character of the *actio furti* as showing its extension beyond the protection of possession. Of those, a very few acknowledged that penal deterrence was, indirectly, a mode of protection. For the rest, the point itself is sound but it was frequently developed beyond all proportion to its relevance, to the exclusion of more focused analysis on the scope and evolution of the elements of theft itself. Too few examples were given so that much discussion was at large and unsupported. An appreciable number of candidates claimed that Justinian introduced a fourfold action for *furtum prohibitum*. This ignores Gaius's telling us that it was a praetorian creation (G.3.192) and Justinian's telling us that it was no longer in use in his era (J.4.1.4).

Question 9

Students revelled in the legal intricacies of the storyline and found plentiful legal issues to write about. Weaker students were not content with the plotline and began embroidering it with speculations, rather than trying to legally analyse the various harms and losses narrated. A good level of competence was shown in isolating the various delicts. Property issues were more dimly perceived, and issues of causation and damages, e.g. who should pay for the slave's death, were not confronted sufficiently. Still, this question proved a good vehicle for candidates to show their zeal as problem-solvers.

Question 10

This problem asked candidates to subtly apply contract and property doctrine to a rather difficult set of problems. Only a few managed to apply the right law to the right facts. A number of candidates applied a test of *accessio* according to which the less valuable item accedes to the more valuable. Had the discussion been framed in terms of the apparent exception to the standard rules in the case of the accession of the tablet to the painting, it would have been rewarded. However, it was frequently presented as the standard rule, in defiance of statements to the contrary in the textbooks, to say nothing of the Institutional example of gold characters' accession to parchment (J.2.1.33). A number of candidates discerned a contract of mandate, despite the attempt to agree a price – only a very few very good answers afforded this possibility with the hypothesis that the maker's weight in gold was a kind of *honorarium*. An appreciable number of candidates focused on resolving the problems associated with the statue but wholly ignored the simpler scenarios relating to the gates and the fountain.

CONSTITUTIONAL LAW

In general the answers were good, with many papers clustered in the high 2.1 category and very few 2.2s. The best papers were able to see beyond obvious points and use their knowledge productively and imaginatively. One defect of the less proficient papers was the absence of discussion of relevant case law (other than the most obvious) in questions that specifically asked the students to discuss the issue with reference to case law. The best answers (as always) were those who did not just regurgitate pre-prepared essays, but could engage critically with the

issues addressed by the question, form their own view and defend an argument, as well as display knowledge about the key issues.

Question 1

This question was reasonably popular. There were some original answers on what the term ‘unconstitutional’ might mean in the context of the UK constitution. Most answers discussed constitutional conventions and the question of codification. Better answers also discussed other issues: what might be considered to be ‘constitutional principles’ of UK constitutional law and the issue of ‘constitutional statutes,’ as well as incorporating a discussion of relevant case law, including the recent *HS2* case.

Question 2

This question was not very popular but reasonably well answered by those who attempted it. Most answers were able to discuss legal accountability and case law, although not all answers got beyond the *GCHQ* case. Better answers were able to discuss what form political accountability of the prerogative might take, as well as current defects in its realization, and some also discussed the 2009 Government review of prerogative powers.

Question 3

This question was very popular, and most students answered it adequately, discussing challenges to the classical doctrine of parliamentary sovereignty from EU law, the Human Rights Act and devolution. More sophisticated answers also discussed nuanced approaches to classical sovereignty, and incorporated discussion of academic commentary. Most answers were able to discuss case law, although many were restricted to *Factortame*, *Thoburn* and *Jackson*.

Question 4

This question was reasonably popular. Most answers discussed it as a separation of powers question and limited themselves to a discussion of pure and partial theories of separation of powers, with a short discussion of checks and balances thrown in. The best answers also looked at contemporary issues that form checks and balances within our current constitutional arrangements – such as human rights, EU law, devolution, and judicial pronouncements on the rule of law – and were also able to use case law to illustrate their points.

Question 5

Not a very popular question. Some answers simply discussed the current devolution settlement but the better answers did what the question required and discussed relevant case law such as *Robinson*, *AXA* and *Welsh Byelaws* in sufficient detail.

Question 6

Nor was this question very popular. Most answers focused on freedom of expression aspects of parliamentary privilege, although the better ones also investigated other aspects of parliamentary privilege, including case law such as *Chaytor*, and made a serious effort to answer the question by considering the role of parliamentary privilege within the functioning of the UK Constitution.

Question 7

Reasonably popular. Most answers made an adequate attempt at the question, although the best answers went beyond abstract issues for reform to consider actual proposals (such as the Wakeham Commission or House of Lords Bill).

Question 8(a)

This question was very popular. Although some answers were unsatisfactory in so far as they failed to go much beyond a discussion of ss 3 and 4 of the Human Rights Act, most answers made a more serious attempt to engage with the concept of ‘constitutional dialogue’ and to examine the role of ss 2, 3, and 4 in this dialogue. Better answers also considered not just the relationship of the UK courts to Parliament but also the relationship between the UK courts, the European Court of Human Rights and Parliament.

Question 8(b)

Less popular than question 8(a) but a reasonable number of takers. Some chose to answer this by focussing on provisions of the Human Rights Act itself, particularly on perceived defects of s 3 and its role in judicial empowerment, or perceived weakness of declarations of incompatibility, as reasons for repeal. Other answers also took a broader view of the Human Rights Act, looking to the lack of popular support, and its disparagement by successive government ministers. Some also discussed the recent report of the UK Commission for a British Bill of Rights. Answers generally tended to be weaker on the second part of the question: namely what, if anything should fill its place.

Question 9

Reasonably popular and reasonably well answered. Generally students were well able to discuss the main justifications for freedom of expression, and a pleasing number of answers also made good reference to relevant case law to determine whether these justifications had been endorsed by English courts.

Question 10

Reasonably well answered, with a variety of ways in answering it. While some answers focused on case law and role of courts in developing important constitutional principles, the better answers were also able to discuss in sufficient detail key legislative initiatives, such as the House of Lords Act, the Human Rights Act, devolution statutes, the Constitutional Reform Act, and the role these have had in transforming the UK constitution.

CRIMINAL LAW

Question 1

Very few candidates attempted this question. Some candidates who answered it focused on the purpose of requiring *mens rea* rather than on whether (as per the question) the distinction between *actus reus* and *mens rea* is a useful organising device.

Question 2

This question, which concerned the connection between moral assumptions about the criminal law and causation, proved to be very popular. Weaker answers tended merely to describe the law of causation without engaging with the question. While it is certainly necessary for candidates to demonstrate in a question such as this that they know the relevant legal principles, it is necessary to do more than just recount those principles to score highly. A minor point is that some candidates who discussed the important case of *Airedale NHS Trust v Bland* [1993] AC 789 (HL) wrongly said that the patient in that matter was on a 'life-support machine' (in fact, he was able to breathe without assistance).

Question 3

Many candidates answered this question, which was about the distinction between acts and omissions. Some of the observations made in relation to question 2 are also applicable here, *mutatis mutandis*. It was not enough to do well in this question merely to outline the key principles concerning the treatment of omissions. Candidates needed to discuss whether the differential treatment of acts and omissions is justified. Some candidates who ventured such a discussion often did not organise their reasons in favour of their preferred position into separate points, and sometimes forgot to identify their position. Candidates are reminded that if a court finds that the act of a medical professional is a *novus actus interveniens* the court is not logically committed to the conclusion that the professional is guilty of a homicide offence.

Question 4

This question proved to be challenging for most of the small number of candidates who attempted it. Strong answers demonstrated a good grasp of the distinction between recklessness and negligence. Weaker answers generally betrayed confusion regarding the concept of recklessness and assumed that negligence is a state of mind as opposed to a type of conduct.

Question 5

This was an unpopular question and, on the whole, was not particularly well handled. Good answers tended to be able to describe the difficulties in the pre-existing law that the Serious Crime Act 2007 was intended to address, to discuss the provenance of that Act, and to engage with critical analysis of the Act in the literature.

Question 6

This question was principally concerned with the law of self-defence. Most of the facts given were squarely relevant to that doctrine. Disappointingly, some candidates thought that the question was about other issues, and sometimes failed entirely even to mention self-defence. Those candidates who did address the law of self-defence often did so superficially and without reference to the relevant legislation. The examiners would like to remind candidates that, while the material legislation might not alter the common law very substantially, a full understanding of this area of the law cannot be obtained without giving the legislation close scrutiny.

Candidates are also reminded that the defence of loss of control is only relevant where someone has been killed.

Question 7

This question, which was mainly about theft, was popular and generally handled well. Most candidates were able to discuss competently the salient offences and made good use of the relevant legislation and case law.

Question 8

This question principally concerned inchoate liability and complicity. Most answers were of quite high quality. Strong candidates noticed and were able to deal convincingly with the issues of withdrawal and impossibility.

Question 9

This question, which was about offences to the person, was popular. The answers were very variable in quality. Some candidates failed to discuss the fact that Michael asked Oliver to whip Patricia. Poorer answers tended to overlook the fact that it is necessary to consider in a sexual offences case section 74 of the Sexual Offences Act 2003 if it is concluded that one of the evidential presumptions in section 75 is inapplicable.

Question 10

This was another popular question. Some candidates focused disproportionately on minor issues or issues in relation to which few facts were given, such as whether Roger committed murder, whether Roger might enjoy the defence of insanity, and whether Ulrich might enjoy the defence of loss of control. The significance of Victor's vulnerability was generally well handled, as was the question of whether Xavier was liable for murder. Few candidates managed to discuss competently (or even notice) the potential significance of Roger's memory deficits in relation to the offence of manslaughter by gross negligence.