LAW MODERATIONS – TRINITY TERM 2020
MODERATORS' REPORT

PART I

(A) STATISTICS

Numbers and percentages of those passing and failing

	2020	2019	2018	2017	2016
Distinction	42	30	34	37	26
Pass	162	189	166	176	180
Pass in 1 or 2 subjects only	1	2	2	-	3
Fails	-	-	-	-	-
Total	205	221	202	213	209

Percentages

	2020	2019	2018	2017	2016
Distinction	20.49	13.57	16.83	17.37	12.44
Pass (without Distinction)	79.02	85.52	82.18	82.63	86.12
Pass in 1 or 2 subjects only	0.49	0.90	0.99	-	1.44
Fails	-	-	-	-	-

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

	2020		2019		2018		2017		2016	
Result	Gender	No	Gender	No	Gender	No	Gender	No	Gender	No
Distinction	F	21	F	18	F	17	F	16	F	7
	M	21	M	12	M	17	M	21	M	19
Pass	F	96	F	118	F	104	F	106	F	102
	M	66	M	71	M	62	M	70	M	78
Two Paper Pass	F	-	F	1	F	2	F		F	3
	M	-	M	1	M	0	M		M	0
One Paper Pass	F	1	-		-		-		-	
	M	-								

Number of vivas

Vivas were not held in this examination.

Number of candidates who completed each paper

204 candidates sat each of the three papers.

(B) EXAMINATION METHODS AND PROCEDURES

Online examinations

Law Moderations were originally scheduled for the Monday, Wednesday and Friday of 9th week in Hilary Term. I was informed by the University on Thursday of 8th week that the examinations could not take place on the scheduled days. Both students and markers had to change plans at very short notice. The Law Faculty was asked to consider cancelling Law Moderations and deeming students to have passed. Given the need for students to pass an examination in Constitutional Law and Criminal Law for the purposes of a Qualifying Law Degree, it was felt that the exams had to take place at a later date. While not required for professional purposes, the Faculty decided to include Roman Law, so that the exams were as close to the usual Law Moderations as possible.

Over the Easter vacation, considerable deliberations were conducted in the Faculty about the format of the exams. The University and Faculty agreed that Law Moderations would be examined through an open book online paper, to be completed in 4 hours. Most students were scheduled to begin the exam at 9.30am on the relevant day, with some variation for candidates in different time zones. The Moderators received no reports of late submissions.

Moderators were asked to consider the suitability of the existing exam papers for the open book format, taking into account the risk of answers being cut and paste. Where appropriate, questions were revised.

Law Moderations took place in 2nd and 3rd week of Trinity Term. The rescheduling of the exams caused consideration disruption to the teaching of 1st year subjects in that term, as the bulk of tutorial teaching had to be delayed into the second half of term. The timetable also meant that Law Moderations were one of the first sets of exams in the University to be conducted online. Detailed guidelines from the University on the conduct of exams were provided not long before the exams commenced. As a result, it proved difficult to give students clear guidance much in advance.

Word limits and the rubrics

A word limit of 2000 words was applied for each question. While exceeding the limit did not lead to any penalty, markers were entitled to disregard any content that went beyond 2000 words. Given that most answer papers were submitted in a PDF document, checking the word count for any answer was not so straight forward. After the exams were completed, one candidate reported that the rules were ambiguous as to whether the word limit applied to each part of a multi-part question or to the question overall. While most candidates understood the rule as applying to the question overall, the concern was conveyed to the relevant Moderator, who reported that it had not been a significant issue.

At the moderators meeting only one breach of the rubric was considered, where a candidate did not answer a question from all the required parts of the Criminal Law paper. As a result, the candidate's mark was reduced by 5%. That did not take the candidate into the equivalent of a lower class.

No incidents of plagiarism were detected.

Mitigating circumstances

43 mitigating circumstances applications were considered. In three cases, the mark for a script was adjusted taking into account the material available.

Processing marks

The processing of marks was a little more complicated than usual this year. First, the new system of mark reconciliation means that more data is recorded – the initial marks of the first and second marker for the paper overall, the first marker's initial marks for each question, the agreed marks for each question and the agreed mark for the paper overall. The way the information is arranged on the spreadsheet makes it harder to detect an error. Secondly, there is no custom database for Law Moderations at present, so we relied on an Excel spreadsheet to process the data. That increased a risk of error in data entry. As a result, the data was checked several times to address that risk. That made the process more labour intensive, particularly as we were all working remotely.

Double marking and consistency checks

Steps were taken to review the consistency of markers' profiles after 25 scripts, and also at the end of the first marking stage. 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. Some further double marking was done in the first marking process to check borderline scripts and check awards of very high and very low marks.

Once the first marks were returned, the following classes of script were second marked:

- Where a candidate had an average below 60.
- Where a candidate had 2 marks at or above 68 but not 2 marks at or above 70, the scripts with marks at 68 and 69 were remarked.
- Where a script was 4 or more marks below the candidate's average.

The 4 below average rule meant that some scripts were second marked even where it would make little difference to the equivalent overall 'class'. However, the change in rule had been introduced as it was felt important to check for consistency, given that some employers will place some weight on individual marks and averages.

Safety net

Given the disruption to the examining process, the following 'safety net' commitment was given by the Faculty prior to Law Moderations:

> 1. The proportion of Distinctions overall (i.e. not individual papers, but overall Distinctions) awarded will be no less than the proportion of Distinctions overall awarded, on average, over the last three years;
> 2. Save in exceptional circumstances (such as for incomplete scripts), the proportion of Fails overall (ie. not individual papers, but overall fails) awarded will be no more than the proportion of fails overall awarded, on average, over the last three years;
> 3. For the award of a Distinction overall, a candidate must secure two marks of 70 or above and a third mark of either 60 or above for Criminal Law or Constitutional Law or 55 or above for Roman Law; and
> 4. If a candidate seeks progression to the FHS in Law with Law Studies in Europe, they must obtain either an average of 60 overall across all three papers or 60 across Criminal Law and Constitutional Law, whichever is higher.

As the statistics above show, the undertakings in relation to the number of Distinctions and Fails were met.

Release of grades

The grades for all students were released without error on 9 June 2020.

(C) SUBJECT REPORTS

A Roman Introduction to Private Law

Generally speaking candidates performed well in this paper. Answers tended to be more detailed than in other years, but the selection of material was not always judicious, and there was a tendency towards offering safe answers that didn't fully engage with the question posed. This resulted in a clustering of marks in the high 2:1 range. Candidates were required to answer one of three problem questions, but many candidates attempted to tackle two or even all three.

Question 1
When answering gobbet questions, candidates are expected to keep their focus tightly on the text. Lengthy but generic accounts of the broader area of law to which the text relates are a common weakness, as they often do little to cast light on the particular issue or point of interest raised by the given text. This was a particular issue this year.

The significance of text (a) could be approached from a range of perspectives relating to taxonomy and legal pedagogy. Weaker candidates were unaware of the scope of the three braches employed by Gaius, and in particular thought "things" related to the law of property alone.

Text (b) raised a scenario within the law of property that could (and was) cogently analysed through both *occupatio* and *traditio*. Stronger candidates showed an awareness of the classical dispute surrounding this scenario, and/or emphasised Justinian's focus on intention in the text, and related that to the broader conceptualisation of *traditio* in Justinian's *Institutes*.

Text (c) raised a doctrinal point (the extinction of usufructs) and a theoretical point (the division of *dominium*, and the meaning of "bare ownership"). Candidates could excel through focusing on either of these points, though many of the stronger answers took into account both dimensions. The text produced several excellent answers on the divisibility (or otherwise) of *dominium*.

Text (d) raised a doctrinal question and required candidates to explain the difference between the two scenarios ("promising that T will do" versus "promising that I will bring it about that T will do"). This was not straightforward, and candidates who engaged with the scenarios in the text were duly rewarded.

Text (e) produced many safe accounts of the nature of *contumelia* in classical Roman law, with surprisingly few candidates narrowing their analysis to how *iniuria* could be committed through an insult to a slave. Particularly strong answers showed sensitivity to the language of the text, e.g. the implications of "one would not easily be obtained by a claimant" in the final clause.

Text (f) required an account of the assessment of damages under chapter one of the *lex Aquilia*. Candidates developed their analysis in a number of directions (comparisons with chapter three, the timing of the one-year rule, the potential for over-compensation, whether damages were penal or compensatory) with similar degrees of success.

Question 2
The issues raised by this problem were 1) error in *commodatum* (and the implications of a finding of an error for liability both under the *commodatum* and in *furtum*); 2) *furtum* of the box versus the document, of information, and the nature of *lucrum*; 3) the exchange of the news story for publicity (if this could be a contract it would likely be innominate, though candidates were rewarded for thinking through the possibilities. The likely immoral purpose of the contract also required discussion); and 4) the publication of a potentially injurious story (*atrox iniuria*? Is it contrary to good morals to expose corruption by a public servant? Can it be *contumelia* if it is already widely rumoured?).

Each aspect of the problem has points of varying difficulties, and candidates were rewarded for engaging with some of these well. Particularly impressive answers saw the interplay between different heads of liability (e.g. the implications of there being an error in *commodatum* for *furtum* liability).

Question 3
The issues raised by this problem were: 1) the hire of the fighters, whether *locatio conductio* or *emptio venditio*; the conditional price, and the fact that the condition never materialised; whether it mattered that it was L who called off the competition and so ensured the condition could never materialise; 2) the provision of weapons, likely an *emptio venditio* but again inviting discussion as to the proper identification of the contract; whether the price was certain; 3) the three dead slaves, raising issues under both the contract (if one was identified and found to have perfected) and under chapter one of the *lex Aquilia*; the chain of causation (the chariot accident, the decision to send them into the arena, etc); the issue of *culpa* (e.g. whether death in the arena meant there could be no *culpa*); damages, e.g. the effect on the value of the team as consequential loss; 4) the three injured slaves, both under the contract (as above) or under chapter three of the *lex Aquilia*; directness (i.e. whether a direct or decretal action); fault (as above); identifying the appropriate claimant; and 5) the booing, which was unlikely to be an *iniuria*.

As above, stronger candidates saw that one fact might raise issues of law under multiple headings, e.g. the parallel delictual and contractual liabilities that might arise. The *lex Aquilia* analyses tended to be collapsed into a single account with little exploration of the differences between the dead and the injured fighters.

Question 4
The issues raised by this problem were: 1) the effect of the necklace being dropped (abandonment?); 2) the ownership of the necklace upon discovery (*occupatio*, treasure trove or continuing ownership by L); 3) the effects of the two deliveries pursuant to sales, and whether there was any difference between the two sales; 4) the use of force in recovering the necklace; 5) the digging of the pits (whether a servitude has been acquired by J's acquiescence, and whether the act of digging constitutes a delict); 6) the ownership of the deer when it falls into the pit; 7) if owned, whether the death of the deer constitutes a delict; and 8) whether Tina's injury is actionable.

While no individual point was as difficult as the hardest points in the previous two problems, students found it challenging to keep track of their reasoning and offer an analysis that was free from contradictions, especially in relation to ownership of the necklace. Candidates who had a firm grasp of the rules governing treasure and ownership of wild animals tended to do well. Given the range of issues raised by this question, some candidates spent too long exploring relatively straightforward points (e.g. whether the sales were valid), cutting short the available time for unpacking the more complex issues which could have provided a better opportunity for displaying analytical skills.

Question 5
This essay provoked many safe accounts of the sources of law, and the place of the jurists within Roman law. Candidates were rewarded for thinking about what it might mean to refer to Roman law as "jurists' law", both in terms of the authority of juristic writing within different periods of Roman legal history, and the way in which the Digest has dominated later accounts of Roman law. Weaker candidates offered generic accounts of the sources of law without any particular focus on the jurists.

Question 6
This question was a fairly typical essay on the effect of praetorian innovations (such as the possessory interdicts and the *actio Publiciana*) within the law of property, and most candidates approached it in this way. Those who engaged with its particular focus on the dynamic between the *ius civile* and the *ius honorarium* (characterised by the question as one of "subversion") were duly rewarded.

Question 7
This essay was extremely popular. The first prompt ("contract or contracts?") was dealt with extremely ably by most candidates. Common issues that were raised included changes in the classification of contracts over time, the role of capacity, error et al as unifying concepts, and the importance of contract-specific doctrines to commercial reality. The second prompt ("does it matter?") was sometimes overlooked. Candidates who were willing to take a position on its importance did well.

Question 8
This essay in disguise required a firm grasp of the rules on error and defects in sale. The issues could be divided into precontractual (fraud/error/misrepresentation) and then under the contract itself (the relevance of any statements made by the seller, and liability for defects). This question was ably handled by most candidates.

Question 9
This essay on the nature of *furtum* could only really be answered with a clear picture of what differences might be thought to exist between "theft" and "fraud". Many candidates realised this and began by defining their terms, whether through English law, textbooks of Roman law or even their own definitions. Stronger candidates focused on the handful of lynchpin texts (false weights, chasing peacocks, impregnating the mare) that are dealt with in the textbooks to make their argument, which inevitability needed to focus on both the physical and mental elements of *furtum*.

Question 10
This question has almost no takers. It required an understanding of the place of the *Corpus Iuris Civilis* in European legal history, with most of the familiar "stages" of that history (glossators, commentators, humanists, pandectists, etc) being differentiated by their school's methods in approaching the Roman texts.

Constitutional Law

For the first time, the exam was conducted online. This meant that candidates faced considerable disruption and had to adjust to the new method, but had more time than usual to revise for the paper. The scripts were generally of a high standard. Given the online format, there was a risk of prepared tutorial style essays being cut and paste. However, the better scripts avoided such an approach and engaged directly with the question. 47 candidates had marks above 70, 144 had marks between 60-69, 11 had marks between 50-59 and 2 scripts had marks below 49.

Comments on each question:

1. A question on direct democracy, reflecting a change in the core reading list. To do well on this question, candidates were expected to consider the constitutional status of direct democracy (for example whether outcomes should be binding or advisory) and the relationship with representative democracy. Candidates also considered the types of issue or question for which direct democracy is appropriate.

2. A broad question on devolution, requiring candidates to consider the different rationales for devolved government. The better answers were also able to draw on the detail of the arrangements to support the arguments (rather than writing about some of the general political developments).

3. On this question on conventions, candidates showed a good knowledge of the high-profile examples, such as the Sewell Convention and the Ministerial Code, and the leading cases (*Cape*, *Evans*, *Miller*). Better scripts tended to distinguish different types of convention when considering suitability for codification.

4. The question asked candidates to consider the impact of *Miller* on the separation of powers, and other constitutional principles. Most candidates had a sound grasp of the decision and its reasoning. As well as discussing the separation of powers, a number of candidates also considered the treatment of parliamentary sovereignty in *Miller*.

5. A familiar question on House of Lords reform, with candidates considering the alternatives to the current arrangements (such as an appointed or elected chamber).

6. This question on legal constitutionalism invited candidates to consider a wide range of developments. Many candidates discussed the role of constitutional statutes, common law rights and constitutional principles.

7a. The question invited candidates to consider contemporary debates about the impact of the Human Rights Act on political decisions. Weaker scripts tended to give rehearsed answers on s.3 and s.4, while better scripts went beyond such issues and considered the proportionality test, using examples such as *Nicklinson* and the prisoner voting rights cases.

7b. A familiar question relating to the mirror principle. Good answers were familiar with the limits of the mirror principle and the cases where the domestic courts have been willing to depart from the Strasbourg jurisprudence.

8a. A broad question on the rule of law, in which candidates could discuss a range of issues. Most scripts showed familiarity with the various theoretical foundations for the rule of law.

8b. Most candidates discussed judicial control of the prerogative and the extent to which the prerogative powers are consistent with the rule of law. Candidates were familiar with the leading cases such as *De Keyser*, *CCSU* and *Miller*. Candidates also considered the extent to which prerogative powers are clearly defined.

9. The question invited candidates to consider whether Parliament can bind itself. Candidates considered the different accounts of sovereignty (political fact, manner and form, etc) and considered the leading cases such as *Factortame* and *Jackson*. Stronger scripts also differentiated limits imposed by Parliament from those imposed by the courts.

10. A question on executive influence on Parliament. To answer this well, candidates considered the fusion between the executive and legislature, party control, control of legislative agenda, as well the scope for parliamentary assertiveness (for example through Select Committees and the Backbench Business Committee).

Criminal Law

It goes without saying that this was an exceptional year. Given the challenges candidates faced, we were pleased to find that many produced excellent scripts. The paper again contained eight essay questions and five problems questions. As in previous years, candidates tended to struggle more with the former than with the latter. It is not clear why this is the case, but some basic points may bear repeating. First, candidates must answer the question they were asked, not the question they wish they had been asked. Second, an essay question is not an invitation to engage in general discussion of a topic (say, omissions or intention), but to engage with specific aspects of a topic raised by a specific question. Third, it is no less important when writing essays than when tackling problems to be precise in one's legal analysis and to give authority for one's legal claims. Fourth, candidates are expected to engage critically with relevant academic literature. This is not achieved merely by mentioning names or restating conclusions. It is achieved by setting out arguments made by academics for their conclusions, and by identifying missteps in those arguments.

Part A

Q 1 – A question on *mens rea*, which invited candidates to consider both whether criminal offences should always include *mens rea* requirements, and whether those requirements should always incorporate a subjective test. Some of the best answers explored a range of examples from the syllabus (including *Ivey* on dishonesty, *G* on recklessness, and the SoA 2003 on beliefs in consent); drew on basic principles of criminal law to defend their favoured position; and recognised that the answer to the question might not be uniform—that the appropriate *mens rea* requirement might depend on the wrong under consideration.

Q 2 – A question on consent to sexual offences, focusing specifically on failure to disclose information. Candidates who ignored this focus did not score highly. Nor did those who suggested that failure to disclose information can only vitiate consent under s 76 of the SoA 2003. The best candidates were aware of recent case law under s 74, and of academic debate on the merits of that case law. Such candidates also squarely addressed the normative question asked by defending an answer to the question of what the law ought to be.

Q 3 – A question on complicity, focusing on the decision to abolish parasitic accessorial liability in *Jogee*. The question was not popular but produced some very good answers. The best broke the quotation down into its constituent parts and subjected them to scrutiny. They showed detailed knowledge of the law prior to *Jogee*; of arguments for parasitic accessorial liability made by Simester and the Law Commission; and of reasons for abolition given in *Jogee* as well as by Ormerod, Laird and others.

Q 4 - A question on duress and necessity, focusing specifically on murder. Candidates were expected to be clear about what they took necessity to be, given the confusion exhibited in much of the case law. Better answers considered the relevance of the distinction between justifications and excuses; explored arguments in favour of making duress a full or partial defence (including those made by the Law Commission); and considered the difficult question of how to frame a defence of lesser evils necessity, given the moral and legal problems presented by any general defence of this kind.

Q 5 – A question on omissions, which proved very popular indeed. Most candidates distinguished satisfactorily between existing categories of liability and showed an awareness of academic debate over whether further categories should be recognised. The best subjected the terms of that debate to scrutiny (questioning whether it is true, for example, that wider omissions liability is disfavoured by autonomy) and considered whether English law might not only be too narrow, but might in some respects also be too wide (challenging, for example, the decisions in *Stone* and *Evans*).

Q 6 – A question on consequences, which predictably had few takers. The question might have been attacked in various ways, and the markers rewarded creativity where they found it. One approach would have been to consider whether there are good reasons for some offences (e.g. murder, criminal damage) and not others (e.g. fraud, burglary) to require causation of consequences. Another would have been to consider whether there are good reasons for the rules of causation themselves to differ across offences. Whether there are such reasons depends, among other things, on the different wrongs being addressed by different crimes, and on the relevance (if any) of moral luck to the proper definition of offences.

Q 7 – A question on manslaughter, which attracted a fair bit of interest. Candidates were entitled to, and did, choose to limit their focus to particular categories. There was some good discussion of the reforms already made to the partial defences, as well as of reforms that ought to be made to both constructive and gross negligence manslaughter. There were also candidates who appeared to draw heavily on tutorial essays written earlier in the course. As always, those who answer a question they were not asked will be penalised.

Q 8 – A question on theft, which invited candidates to distinguish between the provisions of the Theft Act and their interpretation by the courts. The best answers combined careful discussion of the leading cases (including Gomez, Hinks, Ghosh and Ivey) with critical analysis grounded in basic principles (such as the principles of fair warning and fair labelling).

Part B

Q 9 – This problem centred on inchoate offences, while also raising questions of complicity. The best candidates carefully applied the provisions of the Serious Crime Act 2007; addressed the tension between *Pace* and *Khan* on the MR of attempts; and considered the implications of *Anderson* for a possible conspiracy.

Q 10 – This problem focused on complicity in both non-fatal and fatal offences. Trickier issues were often overlooked, including: (i) whether failing to exercise a power of control over property can constitute abetment; (ii) whether a duty to return property to its owner precludes liability for assistance.

Q 11 – The bulk of this problem concerned involuntary manslaughter and causation. The initial events also invited discussion of non-fatal offences, and of possible defences to those offences. The best answers distinguished carefully between different possible offenders, and between different possible breaks in the chain of causation. Weaker answers confused two very different questions: (i) whether D2's acts break the chain of causation between D1's acts and V's death; (ii) whether D2's acts are themselves a legal cause of V's death.

Q 12 – This problem involved a number of property offences. It also raised the defence of duress and questions of complicity. The best answers considered possible liability for fraud, theft and burglary. They discussed the House of Lords decision in *Hasan* in relation to a possible defence of duress, and the relevance of that defence to any secondary liability. Disappointingly, many candidates thought that touching a laptop, with intent to permanently deprive the owner of it, could only amount to attempted theft.

Q 13 – This problem focused on the relevance of intoxication to liability for offences against property and against the person. Though there were some excellent answers, the issues were often handled less well than we would have liked. Too few candidates seemed aware that the intoxication rules are inculpatory: they make defendants criminally liable who would otherwise be entitled to an acquittal. Too few candidates distinguished between (i) the rules that apply in cases where D lacks MR, and (ii) the rules that apply in cases where D has MR but relies on a defence. And too many candidates were unclear about the conditions under which the rules are applicable—about the distinctions between basic and specific intent, and between voluntary and involuntary intoxication.

Thanks

The Moderators are extremely grateful to Heather Schofield, the Law Faculty Examinations Officer, especially given the challenges in working from home and the overlap with FHS examining in Trinity Term. Thanks are also due to the markers, especially in accommodating the new timetable.

Board of Examiners

Prof J Rowbottom (Chair)
Prof J Edwards
Prof J Sampson