Examiners’ report 2014

LA1031 Common law reasoning and institutions – Zone A

Introduction

Most candidates were able to give very convincing answers for this examination and marks were much improved compared to last year. This suggests that most candidates made use of the mock examination and the materials on the VLE, in particular the videos and other learning materials. The general improvement in essay writing – also evidenced by the improvement in marks – also suggests that the skills element of the course was well received and well used. Fewer candidates appeared to be resorting to model answers, and were instead actually thinking about the questions in an intelligent manner. There was good engagement with the textbooks and a real sense that candidates had used their time well in reading the case and the statute. Indeed, parts A and C of the examination were generally very well answered and suggest that blending essay questions with problem questions and comprehension questions allows most candidates to show their abilities and receive good marks.

Specific comments on questions

PART A

Question 1

Candidates must answer this COMPULSORY question.

1. (a) What are the key facts and legal issues of Rottman?  
   (5 marks)
(b) According to Lord Hope (dissenting) why was there a breach of Article 8 in this case?  
   (5 marks)
(c) Summarise Lord Hutton’s discussion of the nature and extent of the common law powers to search Rottman’s premises and why they continued in force after the 1984 PACE.  
   (10 marks)
(d) ‘Under the common law the police had power, after arresting a person in his house or in the grounds of his house, to search the house and seize articles which they reasonably believed to
be material evidence in relation to the crime for which they had arrested that person. Notwithstanding the incremental development of this power over the years, the principle is not wide enough to cover the search of the flat where Hewitson was some two hours prior to his arrest in a nearby road. The objective of the common law is not only the obtaining and preservation of evidence but also the protection of a person’s private property from arbitrary invasion or intrusion, an objective reinforced by Art.8 of the European Convention on Human Rights. It would therefore be a substantial leap, rather than an incremental development of the common law, to allow the police such wide powers of search following arrest.’


What is Jackson J’s understanding of the scope and limits of common law powers to search and seize evidence in the paragraph above?

(5 marks)

General remarks

(a) Rottman was arrested on a provisional warrant issued pursuant to the Extradition Act 1989. He had been accused of fraud and a warrant for his arrest had been issued in Germany. Rottman was arrested by British Police in the driveway outside his house. The police had then searched his property, seized and retained evidence that they believed related to the offence for which Rottman was arrested. The question raised by the case was whether or not the police had the power to search Rottman’s premises under PACE or the common law.

(b) Lord Hope considered that there had been a breach of Article 8. His argument has a number of strands. Referring to the terms of the Article, Lord Hope states that there was no settled basis for the alleged search powers in domestic law and that the alleged common law powers were imprecise, unregulated and lacked safeguards. Moreover, while there might have been a pressing social need in policing crime, the principle of proportionality requires that any interference with an Article 8 right be ‘rational, fair and not arbitrary’ (708). On the facts of the case, Lord Hope found that the interference with Rottman’s Article 8 right was not proportionate – and there was thus a breach of Article 8.

(c) There are two important points that Lord Hutton had to deal with in relation to the extent of the common law power to search and seize after arrest on a warrant. Firstly, did the power exist prior to PACE, and secondly, did the common law power cover both domestic crimes and those committed abroad. These two points can be dealt with separately. Lord Hutton asserts that a common law power had existed prior to PACE. The problem that Lord Hutton had to confront was an argument made by Rottman’s counsel that Lord Denning had mis-stated the law in the key case of Ghani v Jones. Lord Hutton refers to Lord Diplock’s ruling in Chic Fashions v Jones and ‘the robust common sense’ of Palles CB in Dillon v O’Brien and Davis – a case from 1887. These cases show that such a power existed, and that Lord Denning had been correct in his understanding of the law. As far as the relevance of the search and seizure power for arrests committed outside the UK, Lord Hutton makes a broad argument of principle that the ‘combating of international crime’ (714) means that the common law power
should be broad and cover both domestic offences and those committed abroad.

Lord Hutton rejected the argument that these common law powers existed alongside powers given to the police by PACE. While the police had a power of arrest under s.17 of PACE, and could enter his premises to make the arrest, they could not rely on ss.18 and 19 because these sections were limited to domestic offences by the Act itself, and thus did not apply for an arrest on a provisional warrant for an offence committed abroad. Section 32, which would also allow search and seizure of a property where an arrested person was immediately prior to arrest, was also limited to domestic offences. Lord Hutton also had to deal with the question of whether or not PACE had extinguished the common law powers of search and seizure. Rottman’s counsel argued that Osman was authority for the fact that s.18 of PACE limited common law powers of search and seizure. Moreover, the Extradition Green Paper did not make recommendations for the seizure of property. Furthermore, the Criminal Justice (International Cooperation) Act 1990 was consistent with PACE. Rottman’s counsel had argued that it was unlikely that the common law power had ‘survived’ (719). Lord Hutton disagreed. He asserted that the Brooke LJ had fallen into error in thinking that the issue was whether PACE had ‘saved’ the power. The point was whether or not the Act had ‘extinguished’ it (720). Lord Hutton referred to the fundamental principle that a common law power could only be extinguished by either ‘express provision or clear implication’ (ibid). Lord Hutton backs up his argument with an interpretation of the Extradition Green Paper, the 1990 Act and s.18 of PACE.

(d) Jackson J argues that the common law gave the police the power after arrest to search the immediate area in which a person was (his house or grounds of his house) and seize articles. This article could be searched for and seized on the basis that the police has a reasonable belief that they were evidence for the crime for which they had made the arrest. However, the common law also attempts to preserve private property and privacy of the arrested person. Jackson J sees Article 8 as supporting the common law on this point.

Law cases, reports and other references the Examiners would expect you to use


Student extract

Jackson J’s understanding reflects the fact that although he recognises that the common law gave the police powers after arrest to search a person’s premises and seize items that they reasonably believed to be material evidence of a crime. However, the scope of this principle should not be stretched to allow the police to search – on the facts of this case – the premises where the arrested person was two hours before his arrest. Expanding the principle in such a way would not be a legitimate use of the common law. This is because the common law attempts to balance two principles: to allow the police to obtain evidence – but also – to protect a person’s private property from arbitrary invasion. Indeed, it is this protection of the rights of the arrested person that makes the common law consistent with Article 8 of the European Convention. Allowing the police to search the arrested person’s premises would be an unjustifiable development of the common law.
Comment on extract
This is a good answer. The candidate has covered the main points made by Jackson J and has used the interesting idea that Jackson J is essentially referring to the balancing of two competing principles: power to search for evidence, and the rights of the person who has been arrested. The one thing that the candidate has not touched upon is the nature of the common law’s ‘incremental’ development. This is clearly an interesting point, and relates also to Jackson J’s argument that allowing the search of the premises where Hewiston was before his arrest would be too dramatic a development; both with reference to the common law’s incremental pace of development, and the coherence of the common law with the Convention.

PART B
Candidates must answer TWO questions in this section.

Question 2
‘Due process can be understood as requiring “equal protection of law” to all men and women.’
Discuss.

General remarks
Question 2 requires an engagement with this particular interpretation of due process: is it accurate to state that due process can be understood as the equal protection of law to all men and women? It would be reasonable to agree with this statement. Although due process has a long history, the idea of equal protection of the law is a fairly recent idea. Thus, if one chooses to refer to Magna Carta, it would be wrong to suggest that this document reflected notions of equality in contemporary law and political thinking. Likewise, it would be hard to show that equal protection of the law to all men and women applied at the time when Dred Scott was decided. In other words, one has to appreciate that this is a particularly contemporary interpretation of due process, and one linked to the broader conception of human rights. A good answer would engage with these points, and show how the human right to due process in the UDHR and the ECHR is linked to ideas about quality. It would be necessary to connect these themes with ones of dignity and moral personhood, as explained in the essay writing recording on the VLE.

Law cases, reports and other references the Examiners would expect you to use
This question relates to information contained in Sections 2.8–2.10 of the subject guide and Chapter 2 pp.10–22 of The politics of the common law (PCL). It also relates to further readings by Baroness Hale. One could also bring in Lord Bingham on the rule of law.

Poor answers to this question…
failed to engage with the question and remained somewhat superficial.

Question 3
‘Judges are law makers, but their powers are limited: this fundamental idea underlies the doctrine of precedent.’
Discuss.

General remarks
There are two parts to the statement that forms this question. One needs to engage with the claim that judges are law makers with limited powers, and then link this claim to that about the nature of precedent. It would probably be best to agree with both these statements. A good answer would then go on to show how the law
making powers of a judge are limited. One could engage with this first concern by discussing a representative statement or two from senior Law Lords or judges where they outline their own understanding of their law making powers. In order to elaborate this discussion, one could examine Owen Fiss’ ideas about judicial deference, or the analysis in *PCL* about the nature of judicial argument and public reason. One might also look at the duty to give reasons. One might want to touch upon the hierarchy of courts, but, it is unlikely that a detailed and mechanical analysis of the key cases is that relevant; one must merely engage with the major themes: for example, how does the hierarchy of courts limit the law making powers of judges? In order to understand contemporary judicial practice, one might refer to the 1966 Practice Statement; one might also show that judges are limited by the mirror principle in human rights cases.

**Law cases, reports and other references the Examiners would expect you to use**

This question relates to material in Chapter 6 of the subject guide and Chapters 7 and 8 of *PCL*. Public reason is discussed on pp.6–7 and 119–21. You could also bring in Etherton’s ‘Liberty, the archetype and diversity: a philosophy of judging’ which is the further reading to Chapter 6. It is important to realise that to write a good answer to this question you need to connect the themes in Chapter 6 with other themes in both *PCL* and the subject guide.

**Poor answers to this question…**
tended to show little or no familiarity with the arguments made in the course books and subject guide.

**Student extract**

This question requires a discussion of judicial law making in the context of the conventional doctrine of precedent. We will consider the general principles of judicial law making and then discuss the institutional limits of the court in respect to the doctrine of precedent. There will also be a discussion of judicial law making after the enactment of the HRA and the perturbations in judicial practice after this point.

**Comment on extract**

This introduction is moving in the right direction, but requires much more focus on the actual question. The candidate avoids stating what they actually think about the question asked: are judges law makers with limited powers? Do the limited powers of judges as law makers underlie the doctrine of precedent? The reader would like to know immediately what the writer will argue. For instance, a good beginning could be: ‘This is an accurate statement. Judges are indeed law makers with limited powers, and this idea is fundamental to the doctrine of precedent. The essay would then go on to argue this point. The extract above is useful as it outlines how the argument will develop, but the main thesis is not stated clearly enough.

**Question 4**

‘Given the impact of so many recent legal developments in statutory interpretation, it would not be surprising to find some degree of dispute over the precise constitution of legitimate techniques. However, this can exist alongside a more or less settled understanding of the fundamental orientation of the practice.’ (Gearey et al.)

**Discuss.**

**General remarks**

Note, from the beginning, that we need to engage with a number of related claims. The question refers to some understanding of how the Human Rights Act (HRA)
and European methods of interpretation require judges to interpret legislation. However, the precise point relates to whether or not there is a ‘more or less’ settled understanding of how statutes are to be interpreted, despite the ‘disputes’ or controversies that might arise in individual cases. So, in analysing the key cases (see below), one has to link one’s analysis back to the key issues raised by the question. It would probably be reasonable to agree that there is a broad understanding of how European methods of interpretation are to be applied, and how legislation is to be interpreted under the HRA. Arguing the opposite may amount to stating that judges do not know what they are doing. This seems hard to prove. There are of course controversies, but these exist alongside a broad consensus.

Law cases, reports and other references the Examiners would expect you to use
To be able to engage with these themes, one has to have read Chapter 7 of the subject guide, and Chapter 9 of PCL. One needs to examine the key cases: R v A, Re S, Anderson, Ghaidan; Duke v GLC Reliance; Pickstone v Freemans; Litster v Forth Dry Dock Engineering; Garland v British Rail Engineering; Webb v EMO Cargo; Grant v Southwestern Trains.

Common errors
General answers characterised by waffle and out of date case law; insufficient focus on the question asked. Reliance on model answers.

Question 5
‘My thesis is that judges in the UK [are] necessarily conservative and illiberal.’ (J.A.G. Griffith.)

Discuss.

General remarks
Note, first of all, that this question is based on a statement from Griffith’s The politics of the judiciary. One is being asked to assess whether this statement is still accurate. In order to do this, one has to remember that Griffith’s book was based on an analysis of cases from the 1970s and early 1980s and so, if nothing else, one should question whether a thesis developed over 30 years ago is still relevant. Some elements of the thesis may still be accurate, and one could perhaps reflect on judicial appointments briefly. However, there is no necessary link between the class/gender background of judges and their politics (it is worth also thinking in detail about precisely what Griffith meant when he made this claim, and the sense of the word ‘necessarily’). The major point that one has to discuss is whether cases like Jackson, Pro Life Alliance, Limbuela and the Belmarsh case show that judges are ‘conservative and illiberal’. It may be that they show the opposite, at least to the extent that judges since the HRA are less likely to show unquestioning deference to the executive. In other words, it might be that ‘the establishment’ has changed since Griffith wrote his book, and a sensible engagement with his thesis needs to take this into account.

Law cases, reports and other references the Examiners would expect you to use
Relevant material for this question is contained in Chapter 8 of the subject guide and Chapter 9 of PCL. It might also be worth looking at Chapter 6 on public reason, in particular pp.118–25. One could also bring in additional readings by Baroness Hale and Lord Bingham.
Common errors
Reliance on model answers. Not only is the use of model answers unacceptable, but, whoever provides them clearly has not read the course material, and still believes we are examining the old course material.

Question 6
‘Civil justice must balance the demands of justice, and the requirement that the civil justice system is efficient. With the increasing emphasis on ADR we are in danger of losing the very real benefits to the parties and public alike that court determination of disputes brings.’
Discuss.

General remarks
In order to answer this question a candidate must engage with the key issue that the statement is raising: does the post-Woolf focus on ADR in civil justice mean that the kinds of disputes that are best suited to resolutions formally in court are dealt with informally through mediation/arbitration? Inappropriate use of ADR, in the interests of cost control or time saving, may lead to unfair or unjust settlements. To discuss this question, you need to begin by agreeing or disagreeing with this statement and then showing why you either agree or disagree. Whatever position you take, there needs to be some discussion of the values of civil procedure and a consideration of the appropriateness of courts and ADR for different kinds of dispute. If Article 6 is seen as a statement of fair trial rights, then some discussion of the impact of Article 6 in ADR may also be appropriate. One needs to get down to the detail, and a good answer will engage with the theory as well as the practice of ADR.

Law cases, reports and other references the Examiners would expect you to use
This question focuses on material in Sections 9.1, 9.1.1 and 9.6 and 9.6.1 of the subject guide. There is also relevant discussion in PCL, pp.281–86. The discussion of Genn’s work in the Recent developments also feeds directly into this question.

Common errors
Reliance on model answers; insufficient focus on the question asked.

Question 7
‘A legitimate criminal justice system requires the public perception that policing is carried out fairly. This is more important than whether policing is effective.’
Discuss.

General remarks
In order to answer this question, one has to consider whether or not it is based on an accurate statement about policing. It would probably be best to agree to some extent: the public perception of the legitimacy of policing may depend on whether or not it is considered fair. The problem has to be thought through by reference to the material in the subject guide and Chapter 16 of PCL. The major point of reference is the Stephen Lawrence case, and the issue of institutional racism within the police force. One could also look at issues around stop and search and the way in which it disproportionally bears on BME people. The line of argument is that unless policing is seen to be in the interests of all members of the community, the police will not have public confidence, and that this will profoundly limit their capacity to prevent crime. One might also look at kettling and the policing of terrorism. Both areas raise critical concerns about police tactics. These issues are not
straightforward. In relation to kettling some might argue that these tactics are legitimate, as the right to protest is limited; others might argue that the shooting of Jean Charles de Menezes was a tragic accident in a time of public emergency and acute concerns over terrorism. The discussion of the shooting of Mark Duggan in the Recent developments is also relevant to this subject. A good answer might also reflect on the human rights cases on policing: what is the relationship between perceptions of fairness and the values of human rights?

Law cases, reports and other references the Examiners would expect you to use
The question draws on Sections 10.4–10.7 of Chapter 10 of the subject guide and PCL Chapter 16, pp.300–18.

Question 8

EITHER

(a) ‘Whilst all might agree that the integrity of the court requires that a judge is not biased, problems arise with the actual definition of bias.’

   Discuss.

OR

(b) ‘Dispensing with trial by jury would severely compromise the principles of the criminal trial.’

   Discuss with reference to the Criminal Justice Act 2003.

General remarks

(a) Note carefully the precise issue(s) that this question concerns. One needs to deal with effectively two parts of the statement: do most agree that the integrity of the court requires that a judge is not biased and is it true/accurate or untrue/inaccurate to argue that ‘problems’ are associated with the definition of bias? It would be hard to disagree with the first part of the statement; and a good essay would clearly link the discussion of bias to the notion of the integrity of the court. Be more careful with the second part of the question. There are issues in the case law about the precise constitution of bias - but would it be fair to describe them as ‘problems’? One could argue that any problems have been resolved by the qualification of the test for bias, or, one could argue that problems remain precisely because the test changed, the law is still not workable or clear. A good answer will engage with the relevant cases in detail. As the latter position is more difficult to sustain than the former, a good answer would perhaps assert that any problems have been resolved, and that the definition of bias is reasonably clear.

(b) A reasonably straightforward question. Note that the focus is on the Criminal Justice Act 2003 (CJA). A good answer will deal with the precise terms of the question. Does the CJA dispense with jury trial? Is it fair to say that the Act ‘severely compromise[s] a key principle of the criminal trial’? If you want to argue that the Act ‘severely compromise[s]’ the jury trial, then you need some good evidence to support your argument. Given the discussion of this material in Section 10.13 of the subject guide, this must be an argument based on principle. A good answer will engage in detail with ss.43 and 44 of the Act. Rather than simply summarising the law, the Act will show how the sections either support or contradict the statement that the CJA ‘severely compromises’ the trial. A good answer will also make
Examiners' report 2014

reference to the case law and will approach it in the light of the argument being made. The relevant cases are KS v R [2010] and J, S, M v R [2010].

Law cases, reports and other references the Examiners would expect you to use
(a) This is a fairly straight forward question that focuses on Section 9.2 of the subject guide and pp.221–30 of PCL.
(b) Section 10.13 of the subject guide is the major source of references.

Common errors
Reliance on model answers, superficial analysis and failure to focus on the actual question.

PART C
Candidates must answer this COMPULSORY question.

Question 9
(a) In November 2006, Alan was issued with an identity card which he still has.
   Explain to Alan how sections 1 to 3 of the Identity Documents Act 2010 have changed the law and whether his card is still valid. Would it matter that Alan no longer lives at his registered address in the UK?
   (5 marks)

(b) Chris asks Dave to obtain a library card in his (Chris’s) name and Dave agrees. Chris gives Dave his passport, as proof of ID is required to open an account with the library. When Dave takes the passport to the library, the librarian refuses to open an account and explains to the chief librarian that she feels that something suspicious is going on. The chief librarian alerts the police who arrest Dave and Chris. The passport turns out to be a forgery.
   Explain to Dave, with reference to the extracts from the statute reproduced below what possible charges he might face under the Act, and, if he is found guilty, what kind of sentence he might expect.
   (10 marks)

(c) Ethan has just failed his driving test and has been refused a driving licence. He goes online and downloads a picture of a UK driving licence which he then digitally alters using computer software so that his name appears on the licence. He then uses the driving licence to try to get served alcohol in a bar. The bar manager alerts the police.
   With reference to the extracts from the statute reproduced below, advise Ethan of possible charges under the Identity Documents Act 2010 Act and any sentence he might receive if found guilty.
   (10 marks)

General remarks
(a) Section 1(1) repeals the Identity Cards Act 2006. According to s.2(2), his card will become invalid one month after the 2010 Act is passed. Following s.2(3), he should expect to receive a letter explaining that his card has been cancelled. As far as the cancellation of his card is concerned, it does not matter that Alan is no longer at his registered UK address, though the letter will be sent to this address. Alan should also be informed that under s.3,
any information on him in the National Identity Register will be destroyed
two months after the Act is passed.

(b) It is unlikely that Dave would be charged under s.4. Although he has in his
possession an identity document relating to someone else (s.4(1)(c)), it is
unlikely that he has improper intention under s.4(2)(a) or (b). Note also
s.4(3). However, it might be the case that Dave faces prosecution under s.6
for the offence of possession of false identity documents without
reasonable excuse. It appears the case that under s.6(1)(a) Dave is in
possession of a false identity document. Section 6(1)(c) may also be
relevant. But might Dave have a reasonable excuse? It is also the case that
a passport is defined as an identity document under s.7(1)(b). Under s.6(2)
it may be that Dave could face a jail sentence of up to 12 months or a fine.
Section 6(3)(a) and (b) should also be noted.

(c) Ethan would face prosecution under s.5(1)(a) as he appears to have an
apparatus designed for making false identity documents. It is also probably
the case that he has intention under s.5(2)(a) and (b). Under this section,
he may face a prison sentence of up to 10 years or a fine, or both. A driving
license is an identity document under s.7(1)(e). Ethan may also be charged
under s.6(1)(a) or (b). Section 6(2)(a) and (b) should also be noted.

Law cases, reports and other references the Examiners would expect you to
use
The Identity Documents Act 2010.

Common errors
Speculative discussion of criminal law doctrine, rather than focusing on the Act
itself.