Examiners’ report 2014

LA1031 Common law reasoning and institutions – Zone B

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


Common errors

Spending too much time on this question and failing to answer all the relevant questions on the paper. The other main common error was not going into enough detail on (c).

A good answer to this question would...

cover the main points raised in each part of the question. Most candidates were able to do this; this perhaps shows that they had spent the year reading and thinking about the case.

Poor answers to this question...

Most answers were good. Some candidates failed to submit the case note and were thus awarded zero for this part of the examination. This question did not appear to produce problems for most candidates, and marks overall were good.

Student extract

Jackson J’s understanding can be summarised as follows: Under the common law the police have the power to search and seize evidence which
they reasonably believe to be relevant. However, there are limits to this principle such as when there is a gap of time between the search and the arrest. On the facts of this case, Jackson J argued that the police should not have searched the arrested person's property where he had been some time before his arrest. At the level of principle, the common law is not just about the search and seizure of evidence. The common law protects the rights of the arrested person. This makes the common law coherent with Article 8 of the European Convention. Jackson J is concerned with an illegitimate extension of common law principles that would go beyond both the Convention and the common law's historical balancing of due process and police powers.

Comment on extract
The candidate has provided a good discussion of Jackson J’s argument. The key point – that of the common law’s balancing of the power to search and seize evidence with the rights of the arrested person – is dealt with in the first sentence, and then related to the facts of the case. The candidate then develops this point, with an explicit discussion of the principles of the common law, and the coherence of the common law with the Convention. The candidate also uses the distinction between crime control and due process values to show that they have understood Jackson J’s argument and can relate these themes to one of the key concerns of the course. The candidate has not touched upon the incremental nature of the common law’s development. This is a major point, and one that also relates to the themes of the course, and was thus worth mentioning.

PART B
Candidates must answer TWO questions in this section.

Question 2
‘Although there are different ways of thinking about due process, the fundamental idea is that all people are equal before the law.’
Discuss.

General remarks
To produce a good answer to this question, you need to engage directly with this assessment of due process. Is it accurate to state that, although there are different ways of thinking about due process, there is a fundamental idea of equality that underlies it? It would probably be wise to agree with the first part of the statement and link one’s analysis of this theme to the second part. There are indeed different ways of thinking about due process, as any brief review of the history of this area of law reveals. However, the ‘fundamental idea’ that due process is about the equality of all people before the law is a recent invention. Consider Magna Carta. It would be wrong to suggest that this document reflected notions of equality in contemporary law and political thinking. It would also be hard to show that equal protection of the law to all men and women applied at the time when Dred Scott was decided. 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 equality. One could 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.
Common errors
If there was a common concern, it was perhaps not going into enough detail.

Question 3
Judges are law makers, but their law making is guided by 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.

Common errors
One of the main common problems was a rather ignorant argument that judges don’t make law.

Question 4
Discuss.

General remarks
Note the precise terms of this question. You are being asked to consider whether or not European methods of statutory interpretation (SI) have completely redefined how judges interpret statutes. It might be wise to suggest that while European methods of interpretation have defined the way in which judges interpret domestic law in the light of European law, and have influenced interpretation outside of a European context, it might be putting it too strongly to suggest that this has ‘completely redefined’ the way judges interpret statute. Besides, there have always been purposive methods of interpretation in common law.
Law cases, reports and other references the Examiners would expect you to use
This question draws on material in Chapter 7 of the subject guide, in particular Sections 7.5–7.8. Relevant information is also contained in Chapter 9 of PCL, particularly pp.168–78.

Common errors
It was clear that some candidates had not read relevant contemporary cases.

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
‘The adoption of ADR is a disaster for the civil justice system. All disputes need to be resolved by courts- despite the implications of cost.’

Discuss.

General remarks
Note the precise terms of the statement: do you agree that ADR has been a disaster for civil justice because all disputes need to be resolved by courts? In order to write a good essay, you need to clarify your response. It would be fair to say that this statement perhaps over-states the case for formal resolution of disputes by courts. In order to build a convincing argument, a good essay will consider the
appropriateness of courts and ADR for different kinds of dispute. One needs to get
down to the detail and engage with the theory and 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. This is entirely obvious to the Examiners.

**Student extract**

On 26 April 1999, the new Civil Procedure Rules came into force,
constituting the most fundamental reform in the civil justice system. One of
Lord Woolf’s recommendations was to encourage the use of ADR. Whilst
Lord Woolf described his proposal provides a “new landscape for the civil
justice system of the 21st century” it has been criticized on the basis that the
adoption of ADR is a “disaster for the civil justice system.”

**Comment on extract**

This is not a bad beginning but it is insufficiently focused on the actual question.
The question is asking about ADR, and specifically about the problem of costly
resolution of disputes by courts. The candidate should not have begun with a
general point about the CPR. This – although not irrelevant – is off point. The
candidate gets closer to the point in the final sentence, but, this is still not a useful
statement that responds to the question. The essay must begin by responding
directly to the question asked: is ADR a disaster for civil justice, or is it not? Thus it
would have been much better to begin: ‘the adoption of ADR was not a disaster for
the civil justice system. ADR introduces a just and efficient method of resolving
disputes that takes the pressure of the courts.’ Of course, one could argue the
opposite. The point, however, is that it should be clear to the reader from the first
sentence of the essay what the writer’s thesis is. The essay should then develop
that thesis. This introduction does not do this and is weaker for this absence.

**Question 7**

**There is a crisis in British policing. The police have lost the trust of the
communities they are meant to serve.**

**Discuss.**

**General remarks**

Is this an accurate statement about policing? The statement 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 disproportionately 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 the subject guide and PCL Chapter 16, pp.300–18.

Question 8

EITHER

(a) ‘Reforms have gone too far. The jury is now no longer relevant to the criminal trial.’

Discuss with reference to the Criminal Justice Act 2003.

OR

(b) ‘The doctrine of Open Justice has been profoundly compromised by recent reform.’

Discuss with reference to closed material proceedings.

General remarks

(a) A good answer will deal with the precise terms of the question. Does the CJA go too far? Is the jury no longer relevant? 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 forms the question. A good answer will also make reference to the case law and will approach it in the light of the argument being made.

(b) In this question one has to weigh up the doctrine of open justice in the light of the Justice and Security Act 2013. One would need to engage with the arguments for and against CMP, and assess whether or not the Act does profoundly compromise the doctrine. If one argues that the Act has not compromised open justice, one would have to show how CMP are acceptable limits. To argue convincingly that the Act has compromised open justice, one would have to show how CMP dangerously limit the way in which evidence can be tested in court. A good answer would engage with the key cases (*Al Rawi*, *Tariq* and *Mohammed*).

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

(a) The relevant cases are *KS v R* [2010] and *J, S, M v R* [2010]. The question is based on material in Section 10.13 of the subject guide.

(b) The civil procedure question draws on Sections 9.4–9.5.2 of the subject guide. See also PCL, Chapter 14, pp.260–70.

Common errors

With (a) reliance on model answers (and out of date ones at that!); with (b) failure to go into detail.
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.