Examiners’ report 2012

LA1020 Public law – Zone A

Introduction

As in previous years, examination answers ranged from the truly outstanding to rather less impressive responses to the questions set. Some candidates took the approach of repeating what was in the subject guide or textbook, or merely giving a descriptive account of a particular area of public law. This is insufficient and the aim when answering the questions is to discuss the questions critically and draw on a wide range of (sometimes conflicting) primary and secondary legal materials. The best answers were able to show a clear and succinct grasp of the key issues and they showed that the candidates had read the further reading recommended in the subject guide and available on the VLE.

Please note that spelling errors and other linguistic problems have been left as they were on the examination scripts.

Specific comments on questions

Question 1

‘Although the case for reforming particular aspects of the United Kingdom constitution is strong, the radical reform that would be signalled by the adoption of a codified constitution is both unnecessary and unjustifiable.’

Discuss.

General remarks
The question requires candidates to think about both the nature of a constitution (e.g. written versus unwritten; political versus legal; flexible versus rigid) and its purpose (from the efficient organisation of the state to the protection of individual rights).

Common errors
This was a popular question that gave candidates the most scope to do very well, as well as to fail. The question can be approached historically (by tracing the historic aspects of the UK constitution), doctrinally (legal versus non-legal sources), or theoretically (codified versus uncodified constitution). The question also has a comparative element in which the UK constitution can be compared to the constitution of another state but this should not form the majority of the answer – some candidates wrote more about their home state or the USA than about the UK! The key to this question is sound general knowledge of the UK constitution which is presented clearly, coherently and critically. The discussion of legal codification should include an assessment of the constitutional implications, especially in relation to the courts in enforcement.
A good answer to this question would...
Set out the types, concerns and foundations of a constitution, and assess the importance of the fact that the UK constitution is 'uncodified'. Are there merits to the flexibility and opaque constitution over the relative transparency and certainty of a document? Do written constitutions in other countries include all the rules needed for governing? A good answer would discuss the advantages (e.g. for the rule of law) and disadvantages (e.g. is there general agreement on what would count as 'constitutional?') of codification in the UK context. Such an answer should also discuss the impact on the institutional balance, especially on the courts. A very good answer would either draw on history (the continuity of common law), theory (as per Paine and Locke), or a rich knowledge of UK constitutional law to illustrate the more conceptual answer that this question invites.

Poor answers to this question...
Candidates who received poor marks wrote mainly about their home state and displayed insufficient historical and legal knowledge about the UK. Poor answers failed to produce a coherent argument relating to the question asked.

Student extracts
‘The UK constitution has been described as unwritten, flexible, monarchical and unitary in nature. It is made up of a number of principles such as the rule of law, separation of powers, parliamentary sovereignty, conventions and customs. Whilst some of these principles have been written down or codified, others have developed over time – for example the royal prerogative is a residual power, which can be exercised by the Crown. Therefore, I would suggest it is a misnomer to say that the UK does not have a codified constitution already, albeit with some elements written down or enforceable by a court, such as ministerial responsibility.’

‘To say that a constitution is largely uncodified in nature means that the rules and regulations are not adapted from a single source, such as is the case with the constitution of the USA. The UK constitution comprises various elements which include legal sources (legislation and case law) and non-legal sources (conventions and the royal prerogative). It must be noted that in states like the USA, where there is a written constitution, this document holds supremacy. However, in the UK, the constitution is underpinned by the rule of law, the doctrine of separation of powers, and most importantly Parliamentary sovereignty. A written constitution would mean that the judiciary is of utmost importance, while according to the rule of law doctrine no man is above the law’.

There follow discussions of the various legal and non-legal sources of the constitution, and assessments of the case for particular reforms. The flexibility/rigidity argument is also discussed before offering a balanced conclusion. Both answers are sensitive to the traits of the UK constitution and do not try to fit it into a box (the model of a codified, supreme, hierarchical constitution).

Comments on extracts
Interpretation of the question Very good
Relevance of the answer to the question Very good
Substantive knowledge Very good
Use of authorities Good
Articulation of argument Very good
Accuracy of information Good
Clarity of expression Very good
Legibility Very good
Question 2

‘I think that the day will come when it will be more widely recognised that [Wednesbury] was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation’ (per Lord Cooke in R v Secretary of State for the Home Department, ex parte Daly (2001)).

Discuss.

General remarks
This question focuses on grounds of review that are less directly linked to the notion of ultra vires and which, therefore, raise issues regarding the proper limits of the courts’ role.

Law cases, reports and other references the Examiners would expect you to use
Wednesbury; ex p. Smith; GCHQ; ex p. Fire Brigades Union; ex p. Daly, and others.

Common errors
Not many candidates understood that the question was about judicial review, and they focused their (pre-prepared?) answers on procedural impropriety. A larger number of candidates limited their responses to Wednesbury and ultra vires and failed to discuss the evolution of that ground of review (which now tailors the level of interference to the subject matter) or the emergence of additional grounds (e.g. proportionality).

A good answer to this question would...
Use Wednesbury and GCHQ as the starting point of the ultra vires doctrine and illustrate why the decision is ‘unfortunately retrogressive’. In order to get a competent mark, candidates need to demonstrate the judicial flexibility in this area. The courts’ approach changes depending on whether individual rights are at stake (anxious scrutiny) or whether the case raises broad socioeconomic or political factors that are removed from ordinary judicial competence. In order to get a good mark, candidates need to be able to conceptualise ‘proportionality’. Does it overlap with unreasonableness? What are its requirements? A very good answer would discuss the criticism that proportionality allows judges to interfere with decisions by the executive by imposing their own opinion on the merits in place of that of the decision maker.

Poor answers to this question...
Gave a summary of the cases without connecting them to the issue that what is unreasonable must always be decided in the context of the particular statutory power. Poor answers showed a lack of awareness that the grounds of review operate as an external judicial control on the operation of a statute.

Question 3

How are constitutional conventions recognised and enforced in the United Kingdom system of government?

General remarks
This was a popular question. The first task is to show that you understand precisely what conventions are and how they operate in the UK constitution. How come they have constitutional status but do not have legal force? How is the breach of a constitutional convention different from a breach of a legal rule?
Law cases, reports and other references the Examiners would expect you to use
Ministerial Code (2010); Cabinet Manual (2011); Madzimbamuto v Lardner-Burke; Southall; Attorney General v Jonathan Cape; Patriation of the Canadian Constitution.

Common errors
Misunderstanding the particular meaning of the word ‘convention’ in the UK constitutional context and failing to distinguish conventions from other practices or usages.

A good answer to this question would…
Understanding conventions can be demonstrated in theoretical terms (by distinguishing sources of the constitution) or in practical terms (by illustrating constitutional practice and cases). Conventions need to be distinguished from mere practices, traditions and legal principles. As always, a good answer will not be only descriptive, but also critical (for example by analysing the purposes of conventions, why they are obeyed and whether they should be codified). This analysis needs to be supported by primary material (cases, codes, concordats) and secondary materials, drawing on the rich scholarly literature.

The discussion should focus on collective responsibility (the need to present the appearance of strong government; the rules relating to confidentiality; the binding nature of Cabinet decisions on all ministers) and individual responsibility (the twin rules of responsibility for personal conduct and responsibility/accountability for government departments). A very good answer would distinguish the two concepts of responsibility and accountability.

A poor answer to this question…
Candidates who scored poorly failed to understand and illustrate conventions as non-legal but binding rules of constitutional behaviour, and failed to demonstrate the close connection between law and convention in practice.

Student extract
‘The scope and speed of changes and challenges to the practice of constitutional conventions in the UK must seem – to legal scholars and laypersons alike – as something of an assault. The notion of constitutional actors – from the monarch to the executive and parliament to those with delegated authority – having to abide by rules that are binding though not necessarily recognised by courts of law has been challenged by statutory changes…

These conventions have formed over any years when traditional practices have hardened into non-legal rules which bind those who operate the constitution. Marshall and Moodie (1971) state that “constitutional conventions are those rules of behaviour that are binding […].” Ivor Jennings has stated that for a convention to exist or be recognised there are three requirements […].’

There follows a discussion of specific conventions, how they operate, and whether they have been or should be reformed.
Critically assess the constitutional implications of a fully-elected House of Lords.

General remarks
The purpose of the House of Lords (HL) is to act as a check on the House of Commons (HC), and to provide a second chamber for considering important decisions. However, politicians are calling for a reform of the HL.

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

Common errors
Memorising the structure and the functions of the HL and considering a discussion of it to be sufficient for answering this question. Another error would be to write about the HL only in the law-making process.

A good answer to this question would...
Discuss not only the functions, but also the purpose of a second chamber. What is its constitutional role? Is a second chamber necessary? If so, should the HL be reformed to be more representative? The numerous consultations, government papers and reports can be discussed. Why is reform of the HL proving so difficult? A very good answer would ask whether a reformed HL should have enhanced powers and whether that would disturb the current balance between the two Houses.

Poor answers to this question...
Were limited in a descriptive sense and did not discuss HL reform critically.

Explain the constitutional significance of R v Secretary of State for Transport, ex p Factortame (1991) to the legal relationship between the United Kingdom and the European Union.

General remarks
The question addresses the main legal principles relating to the EU as they affect the UK constitution. The internal workings of the EU are irrelevant to this question.

Law cases, reports and other references the Examiners would expect you to use
Pickin v British Railways Board; Madzimbamuto v Lardner-Burke; Vauxhall Estates; Ellen St Estates; Macarthys v Smith; Garland v British Rail; Litster v Forth Dry Dock; Factortame; Thoburn and others; Van Gend En Loos; Coasta v ENEL; Internationale Handelsgesellschaft; Simmenthal.
Common errors
Some candidates wrote mainly about Parliamentary sovereignty or set out EU law cases which were irrelevant for this question (such as van Duyn, von Colson, Marshall, Francovich etc.) in great detail. Other candidates limited their discussion to Factortame, without putting the decision in its proper context. Another fairly common error was to write about the Council of Europe and the European Convention of Human Rights (ECHR). In the worst cases, this would have resulted in the candidate failing this question.

A good answer to this question would…
This question can be approached from a number of perspectives. Candidates may start by explaining the evolution and the sources of EU law and discuss the manner in which they take effect within the UK, or they could start by analysing the UK constitutional premise and then discuss the impact of EU membership. Key to this question is the ‘legal relationship’ between the two systems. A good answer would discuss the main facets of Parliamentary sovereignty (e.g. by Dicey and Wade), and a very good answer would include objections to that interpretation (Jennings, Heuston, Craig and Allan). These objections are relevant to the question whether Parliament successfully limited its sovereignty in 1972 in the context of EU law. What are the arguments that deal with the case of a UK statute that is inconsistent with EU law? How have UK courts resolved the issue?

Poor answers to this question…
Were usually one-sided and either focused solely on Parliamentary sovereignty or discussed the internal workings of the EU.

Student extract
‘The Factortame case points out that there exists two legal systems operating within the UK. There is the British legal system, and there is the European Union legal system. The decision to join the then EEC, and the passing of the European Community Act 1972, effectively mean that Parliament is no longer sovereign in matters of EU law, and judges are now faced with the task of interpreting and applying two different legal rules. In matters of domestic law, the UK Parliament is supreme and the courts will not question the validity of Acts of Parliament. In matters of the EU, EU law is supreme and judges are bound to apply its law within the jurisdiction of the UK.’

…
‘As Lord Denning pointed out in Macarthys v Smith, albeit obiter, if Parliament chooses one day to pass a law in direct defiance of EU law and expressly does so, then the UK courts will give effect to Parliament’s intention. Until that time, it remains to be seen how far the EU will exert its supremacy over domestic law and finally create one legal system in the UK.’

The discussion is preceded by a critical analysis of sovereignty in the UK context (is Dicey’s understanding still valid today?), as well as by a brief synopsis of the EU's evolution. The answer contains a discussion of key cases by the European Court of Justice (ECJ) as well as UK cases that precede and post-date Factortame.
Comments on extract
Interpretation of the question Very good
Relevance of the answer to the question Very good
Substantive knowledge Very good
Use of authorities Very good
Articulation of argument Good
Accuracy of information Very good
Clarity of expression Good
Legibility Good

Question 6

Discuss whether the existing method of electing members of the House of Commons should be replaced by a system of proportional representation.

General remarks
A difficult (and unpopular) question for public lawyers, this question consists of a number of elements: How does the present electoral system operate? What are the merits of the alternative voting systems? What would be the purpose of electoral reform for Westminster?

Common errors
Candidates often memorise information and try to impress the Examiners with lots of numerical data. However, a public lawyer should examine the electoral system as part of, and not in isolation from, the overall constitutional framework.

A good answer to this question would...
Set out the object of the current first past the post (FPTP) system as well as its advantages and disadvantages. On the plus side, it generally produces a stable, single-party government. On the down side, it does not result in a proportionate distribution of seats in the HC. Nor does it accurately reflect the different parties or viewpoints in society. Is it problematic for democracy if minority parties are disproportionately penalised by the voting system? Alternative voting systems (proportional representation (PR)) and their variants (single transferable vote (STV)) need to be discussed (especially since they are already used within the UK). A very good answer would ask whether reforming the voting system of the HC (without also reforming the other institutions or reforming the way in which people participate in politics, e.g. through referendums between elections) makes any sense.

Poor answers to this question...
Were only aware of FPTP in the Westminster context and did not discuss alternative voting systems in the devolved regions, for European Parliament elections and for London mayoral elections.

Question 7

Explain the doctrine of the separation of powers. To what extent does the United Kingdom system of government reflect the doctrine in practice?

General remarks
This was the most popular question. The difficulty of separation of powers (SOP) is usually underrated or not appreciated by candidates. A strange doctrine, it is a problematic lens through which to analyse, explain or understand the UK organs of government that has traditionally been based on the mixed/balanced constitution which joins monarchical, aristocratic and democratic elements, but controls them through checks and balances.
Common errors
Candidates typically introduced the three major institutions of state and discussed their role, functions and personnel systematically. So, the (relatively uncontroversial) Parliament/executive relationship was given as much time as the (more controversial) judiciary/executive relationship. The role of the Lord Chancellor needs to be downplayed, and the role of the judiciary in relation to law-making and judicial review highlighted. The respective relationships need to be discussed critically, and not just described. Is separation of powers (after the Constitutional Reform Act 2005 (CRA), UK Supreme Court (UKSC) etc.) still as irrelevant to understanding the UK constitution as it historically was?

A good answer to this question would...
Discuss the emergence of the doctrine of SOP in historical terms, but stress that Montesquieu’s conception is based on an idealised English constitution. At the very least, the historic incongruity of the doctrine in the UK constitution needs to be brought out. A very good answer would show that SOP is enjoying a renaissance in the UK and point to recent constitutional developments to underscore the point (CRA; reformed Lord Chancellor; UKSC). Although clearly of historical and theoretical interest, there are cases that need to be discussed if only as illustrations (Anderson; Matthews; Duport Steels; Fire Brigades Union), as well as contemporary literature to be considered.

Poor answers to this question...
Treated the SOP as a template to analyse the UK constitution and discussed the relationships systematically when the reality is much less clean cut. Poor answers focused on historical and comparative elements (e.g. the USA and France), rather than the contemporary legal and political realities in the UK.

Student extract
‘When looking at the UK constitution or system of government, it quickly becomes clear why these academic observers [Montesquieu, Dicey, Bradley and Ewing] have sought to question its validity and practical relevance. Even a cursory glance at the three arms of government will show that, as Bradley and Ewing remark, the system is one of ‘mutual dependence’ rather than independence. Even in the USA, where separation of powers is more central to the constitutional make-up, the reality is far from Montesquieu’s ideal.’

‘The role of the Lord Chancellor has been reformed by the Constitutional Reform Act 2005 whereby he no longer has a judicial role (head of judiciary and senior judge) and a legislative role (speaker of the House of Lords), but has kept only his executive role (government and cabinet minister and head of the Ministry of Justice). This has strengthened the separation of powers in the UK as has the moving of the new Supreme Court to a separate location from the rest of Parliament under the Constitutional Reform Act 2005. This also further strengthens the independence of the judiciary.’

‘Judges assert their independence daily by applying the law objectively in courts across the UK and they have a role to check arbitrary government of executive power through judicial review. However, it would be wrong to suggest they do not have a lawmaking role. Both by developing the common law and through statutory interpretation they change and build the law. The advent of the HRA 1998 has also increased their authority into
areas which might be seen to usurp the role of Parliament. Deciding on matters of human rights has brought them into conflict with the government and it is testament particularly during the post-2001 9/11 era that they have stuck firm and on a number of cases rules against the arbitrary use of power despite it being used with the full backing of Parliament, such as in the Belmarsh case before the advent of control orders’.

The extracts above are preceded by a historical overview of separation of powers, references to France and the USA. More importantly, the answer includes a solid analysis of the organs of government in the UK and displays good knowledge of recent developments: the reforms of the CRA, and the ever-changing role of the judiciary.

**Comments on extract**

| Interpretation of the question | Very good |
| Relevance of the answer to the question | Very good |
| Substantive knowledge | Very good |
| Use of authorities | Good |
| Articulation of argument | Very good |
| Accuracy of information | Good |
| Clarity of expression | Very good |
| Legibility | Very good |

**Question 8**

Discuss whether the Human Rights Act succeeded in doing what it was designed to do.

**General remarks**

This question is not about the nature of human rights, their historical recognition by the common law, or the substantive rights protected by the ECHR. It is about the internal logic of the Human Rights Act (HRA) (s.3) and its relationship with other organs of government (s.4). The conclusion to an answer to this question could consider reform of the HRA.

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

*R v A; Ghaidan v Mendoza; Anderson; Bellingham v Bellingham*, and others.

**Common errors**

Writing about rights in the ECHR context and discussing mainly or only rights cases before the HRA. Errors also included a failure to analyse the impact of the HRA on the constitution and the institutional balance between the courts and Parliament/government.

**A good answer to this question would...**

Set out the position before the HRA was enacted; set out and illustrate (using case law) the interpretative obligation in s.3: What are the limits to statutory interpretation? Section 4 also needs to be discussed: Does the power to make a declaration of incompatibility (DOI) change the constitutional role of the courts? A very good answer would also consider the impact of the HRA on institutional balance. Is Parliament still sovereign? Has the relationship between Parliament, government, and courts been reordered? Is the gap between legal theory and political reality getting wider and harder to justify? Would a British bill of rights remedy the perceived ‘defects’ of the HRA?

**Poor answers to this question...**

Discussed the impact of the HRA only in the context of administrative law, and did not discuss its (lack of?) impact in the context of constitutional law.