Examiners’ report 2012

LA1020 Public law – Zone B

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.

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 (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 probably 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.

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
The 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

‘In order to carry out these public duties without fear or favour, Parliament and its members and officers need certain privileges and immunities.’

Explain and evaluate this statement.

General remarks
This question is about the privileges that the two houses and their members have to control their own affairs and be protected against interference from outsiders.

Law cases, reports and other references the Examiners would expect you to use
Stockdale v Hansard; Pepper v Hart; Stourton v Stourton; A v UK; Chaytor; Bill of Rights 1689 (BoR); Human Rights Act 1998 (HRA); Freedom of Information Act 2000; the expenses scandal; and the Independent Parliamentary Standards Authority (IPSA).

Common errors
Thinking that this question is about Parliamentary sovereignty and illustrating the answer using privileges that are mainly of historical or symbolic interest.

A good answer to this question would...
Discuss ‘contempt of Parliament’ with good illustrations, discuss the immunity of Parliament from interference by the judges (see now HRA), but note that courts determine the limits of that privilege. A good answer will discuss the meaning of ‘exclusive cognisance’ as well as freedom of speech under art.9 BoR. A very good answer will refer to the Parliamentary Commissioner for Standards, the IPSA and briefly discuss standards in the House of Lords (HL).

Poor answers to this question...
Did not set out the need for privileges and did not discuss the relationship between Parliament and the courts. Poor answers also failed to discuss the independent mechanisms to enforce standards.

Question 4

Critically assess the constitutional implications of a fully-elected House of Lords.

General remarks
The purpose of the 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 composition and the functions of the HL, which is not sufficient for an answer. Another common error was writing 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.

Question 5
‘The courts should make greater use of section 4 of the Human Rights Act 1998, rather than section 3, as the declaration of incompatibility encourages a dialogue between the courts, the executive and the legislature that preserves the doctrine of Parliamentary sovereignty.’

Critically assess this statement.

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 European Convention of Human Rights (ECHR). It is about the internal logic of the HRA (s.3) and its relationship with other organs of government (s.4).

Law cases, reports and other references the Examiners would expect you to use
R v A; Ghaidan v Mendoza; Anderson; Belling v Bellinger, 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 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?

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.

Question 6
Discuss whether it is possible or desirable to codify the Royal Prerogative.

General remarks
The question addresses the evolution of the constitution from a position where the monarch personally headed the government to one where the monarch exercises power only through others.
Law cases, reports and other references the Examiners would expect you to use
Case of Proclamations; De Keyser's Royal Hotel; BBC v Johns; Laker Airways; GCHQ; Fire Brigades Union; Northumbria Police Authority; Bancoult; Ministry of Justice Report (2009); and the Constitutional Reform and Governance Act 2010 (CRGA).

Common errors
Focusing mainly (or only) on the personal powers of the monarch and/or Crown immunities, discussing prerogative powers mainly from a historical perspective, as well as discussing the contemporary controversies in insufficient terms.

A good answer to this question would…
Discuss the sources of the Crown’s executive powers, explain the role and justification of the royal prerogative and discuss the scope of prerogative powers (in relation to domestic and foreign affairs). Good answers would also examine the political and legal controls over the prerogative (are they subject to Parliamentary scrutiny; can they be reviewed by the courts?) and set out its relationship with statute (De Keyser’s; Northumbria Police Authority) as well as with human rights (Bancoult).
What attempts have been made to reform the royal prerogative (e.g. the CRGA)?

Poor answers to this question…
Focused mainly on the appointment of a Prime Minister, the dissolution of Parliament and the appointment of peers, and did not use cases to illustrate the argument.

Question 7
‘The doctrine of parliamentary sovereignty and membership of the European Union are fundamentally incompatible.’

Discuss.

General remarks
This 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; and 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 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 of 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 only on Parliamentary sovereignty or discussed the internal workings of the EU.

Question 8
Discuss whether the doctrine of the rule of law has a sufficiently certain meaning to be a useful guiding principle of United Kingdom constitutional law.

General remarks
The rule of law (ROL) is a broad principle that requires the government to be subject to clear and stable statements of the law that are generally applicable, but also accepts moral and political values that underpin the law (e.g. access to independent courts).

Law cases, reports and other references the Examiners would expect you to use
Entick v Carrington; Burmah Oil; Malone; M v Home Office; ex p. Fewings; Corner House Research; Belmarsh; Bancoult; Pinochet; and the Constitutional Reform Act 2005.

Common errors
Insufficient understanding of the scope and contested interpretations of the rule of law. Discussion was usually limited to the ‘formal’ (and not also the ‘substantive’) conception.

A good answer to this question would...
Set out the historical emergence of ROL (Aristotle, Magna Carta) and analyse its different versions (ROL relates to the substance of the relationship between citizens and government, and deals with the processes through which that relationship is conducted). A good answer would recognise that ROL is an ideal for law (which must be prospective, stable and general: Burmah Oil, Belmarsh) as well as government (Entick v Carrington; Malone; Bancoult). A very good answer would discuss the substantive/liberal concept as well: society must possess certain individual rights if it wishes to conform to the rule of law. Discussion must be critical: if considered in formal or procedural terms, does ROL enable the wealthy and powerful to manipulate its forms to their own advantage? If conceived in substantive terms, does ROL not amount to a complete social and political philosophy?

ROL is difficult conceptually. Take ‘equality’ for example: is it a formal concept (like treatment of like cases)? Is it a substantive concept (a right to fairness or rationality in the exercise of discretion)? Does it apply to the Crown (M v Home Office)? At what point does ROL become equated with the autocratic rule of judges?

Poor answers to this question...
Discussed primarily Dicey’s version of ROL, were unable to support the conceptual argument with cases and showed no awareness of the complexity of the issue.