Examiners’ report 2013

LA1020 Public law – Zone A

Introduction

As in previous years, answers ranged from outstanding to poor responses to the questions set. Some candidates took the approach of reiterating what was in the subject guide or textbook, or merely giving a descriptive account of a particular area of public law. This is insufficient, given that the objective is to discuss the questions critically and to draw on a wide range of (sometimes conflicting) primary and secondary legal materials. By contrast, the best candidates showed a clear and succinct grasp of the key issues and had made use of 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

Discuss the different ways it might be possible to reconcile the sovereignty of Parliamentary with the supremacy of EU law.

General remarks

The question addresses the main legal principles relating to the European Union 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; Macarthy v Smith; Garland v British Rail; Litster v Forth Dry Dock; Factortame; Thoburn.*

*Van Gend En Loos; Coasta v ENEL; Internationale Handelsgeellschaft; Simmenthal.*

European Communities Act 1972; European Union Act 2011.

Common errors

Some candidates wrote mainly about Parliamentary sovereignty or set out (for this question irrelevant) EU law cases (*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 is to write about the Council of Europe and the European Convention of Human Rights. 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 either 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 may 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), a very good answer would include objections to that interpretation (Jennings; Heuston, Craig, 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...
Are usually one-sided and either focus only on Parliamentary sovereignty or discuss the internal workings of the EU.

Question 2
Consider whether the flexibility of the ‘unwritten’ constitution of the United Kingdom should be replaced by the openness and certainty of a written constitution.

General remarks
The question requires the candidate 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). The purpose ranges from the procedural (how to select and deselect rulers; how to hold government to account) to the substantive (individual rights against the government). The question is broad in scope (which might explain its popularity), but also one of the harder ones to answer.

Law cases, reports and other references the Examiners would expect you to use
The focus should be on the UK’s variety of constitutional sources, including conventions, prerogative powers, international treaties, etc. which must be contrasted with the concept of a documentary constitution that stems from the revolutionary period in 18th/19th century Europe and USA.

Common errors
This was a popular question that probably gives the candidate the most latitude (to shine as well as to fail). It can be approached historically (by tracing the historic aspects of the constitution), doctrinally (legal versus non-legal sources), or theoretically (codified versus uncodified constitution). The question also has a comparative element which, however, should only be illustrative and not dominant – some candidates write more about their home state or the USA than about the UK! The key to this question is, therefore, sound general and specific 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. Does the UK constitution encourage decision making that is ‘rational’ and a framework for government that is ‘logical’ and hierarchical (e.g. the distinction between constitutional and ordinary laws)? Or does it fail to do so because, for example, it developed pragmatically, flexibly, and peacefully (but without design) in response to short-term political factors?
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 (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 (continuity of common law), theory (Paine, Locke) or a rich knowledge of UK constitutional law to illustrate the more conceptual answer that this question invites.

Poor answers to this question...
Focus on constitutions in abstracto; write mainly about their home state; display insufficient historical and legal knowledge about the UK; fail to produce a coherent argument.

Question 3
Does the doctrine of the rule of law have a sufficiently certain meaning to be a useful guiding principle of UK constitutional law?

General remarks
The rule of law 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 embraces 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.

Constitutional Reform Act 2005.

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

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

Rule of law is difficult conceptually. Take 'equality': is it a formal concept (such as treatment of like cases)? 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 rule of law become equated with the autocratic rule of judges?
Poor answers to this question...
Discuss primarily Dicey's version of the rule of law; are unable to support the conceptual argument with cases; show no awareness of the complexity of the issue.

Student extract
A constitution is a set of rules which governs the relationship between the major institutions of the state and governs the relationship between the individual citizen and the government of the state. Primarily, constitution can be of two types, written or unwritten. In UK, there is an unwritten constitution. However, it is more accurate to speak of it as an uncodified constitution instead of 'unwritten'. The word unwritten carries with itself a meaning there are no rules or laws within written documents at all. There are many Acts of Parliament and statutes which can be regarded as 'written'. However, there is not a single unified code or book of rules called a constitution.

Along with being an uncodified scripture, the UK constitution is Monarchical in nature, with the Queen as the head of state and ministers exercise powers on her behalf. Nevertheless, it is a constitution in which the powers are concentrated at the centre rather than being diffused equally.

The very important aspect of this unwritten constitution is its flexibility. Under an uncodified text, it is easier to make new amendments. However, with a rigid constitution like the one in UK, constitutional amendments are a difficult process requiring certain procedures to be fulfilled beforehand.

Comment on extract
The answer went on to discuss the merits and demerits of written constitutions, especially in relation to fundamental rights. The answer as a whole was along the right lines, but it was written in too general terms, without evidence of any specific knowledge relating to the UK. The final mark was a high third.

Interpretation of the question: good
Relevance of the answer to the question: satisfactory
Substantive knowledge: poor
Use of authorities: very poor
Articulation of argument: very poor
Accuracy of information: satisfactory
Clarity of expression: poor
Legibility: good

Question 4
Are the prerogative executive powers wholly inconsistent with a mature constitutional democracy, and are the reforms of the last five years to be welcomed without hesitation?

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); Constitutional Reform and Governance Act

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 and discussing the contemporary controversies in insufficient terms.

A good answer to this question would...
Discuss the sources of the Crown's executive power; explain the role and justification of the royal prerogative; discuss the scope of prerogative powers (in relation to domestic and foreign affairs); examine the political and legal controls over the prerogative (are they subject to Parliamentary scrutiny; can they be reviewed by the courts?); 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 Constitutional Reform and Governance Act 2010)?

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

Student extract
Prerogative powers are the special powers conferred on the Crown which has no statutory basis but are inherently assumed to belong to Crown and for the executive to exercise in the name of the Crown. In UK this is called the Royal Prerogative. According to Blackstone this is the special pre-eminence that the King hath over others. Dicey however had a more extensive view and emphasized that they are conferred upon the Crown without any statutory authority and their exercise is arbitrary.

Examples of Prerogatives are: prerogative of war, dissolution of Parliament, right to treasure trove, national policy. The executive exercises these powers in the name of the Crown for administrative efficiency. On may argue that their existence is not undemocratic since democracy can only exist in a country which is strong enough, so perhaps some emergency powers ought to be given to the Crown so that the country can efficiently function albeit with controls. The UK does exactly this: the Royal Prerogatives are accepted but they are kept in check by the judges and Parliament so the democracy can flourish at the same time so that the executive doesn’t take away rights of people in the name of ‘administrative efficiency’.

Comment on extract
This thoughtful answer went on to discuss judicial and Parliamentary checks on prerogative power, including recent statutory reforms. It stands out for its ability to raise general questions (are prerogative powers democratic?), answer them (yes, provided there are checks), and give some relevant examples. The final mark was a mid 2.1.

Interpretation of the question: very good
Relevance of the answer to the question: very good
Substantive knowledge: good
Use of authorities: good
Articulation of argument: satisfactory
Accuracy of information: good
Clarity of expression: good
Legibility: very good

Question 5

‘The police's power to put restrictions on demonstrations has to be exercised in a way that pays proper regard to demonstrators' rights to free expression and free assembly.’

Discuss.

General remarks
Freedom of (political) assembly is of heightened importance as (unlike other civil liberties) it is open to and free for all. As a result, the police have wide powers to regulate public meetings and demonstrations.

Law cases, reports and other references the Examiners would expect you to use
The answer should discuss the advance notice requirement in the Public Order Act 1986 allowing the police to impose conditions upon demonstrations (such as on their route or numbers), and in exceptional circumstances to prohibit them altogether on grounds of serious public disorder. It should mention the common law doctrine of breach of the peace, giving rise to powers of arrest and orders for dispersal; and should mention the wide number of public order offences especially those in the Public Order Act 1986 (notably riot, violent disorder, affray, and threatening, abusive and insulting behaviour), as well as the statutory offence of obstruction of the highway giving rise to a power of arrest on the part of the police. Case-law decisions and judicial dicta should be used to illustrate the legal and human rights issues involved, such as those in Redmond-Bate v DPP (relevant considerations in exercising a power to order demonstrators to disperse) and DPP v Jones (obstruction/reasonable user of the highway).

Common errors

A good answer to this question would...
display an understanding of the theoretical tension between the individual rights and freedoms of public protest, freedom of expression, and political dissent on the one hand, and the collective national interest in maintaining public order and peace, as well as protecting private persons and property, on the other. A good answer would explain the constitutional position at common law – that persons are free to do as they wish within the confines of the law – and then discuss the statutory buttressing of the rights of public processions and demonstrations under the relevant articles of the European Convention on Human Rights as incorporated into domestic law by the Human Rights Act 1998. A sound answer would discuss the role of the police and range of powers available to them to respond to processions and demonstrations to maintain public order, and where necessary intervene.
Question 6
Discuss the view that the proliferation of agencies in UK government has made ministers less, rather than more, accountable.

General remarks
Since the 1980s, many governmental functions have been removed from the traditional civil service structure (where the minister heads the department). They are now performed by ‘arms-length’ private companies (on a contractual basis) or by executive (‘next steps’) agencies. Executive agencies are part of the civil service and, despite efforts to contract-out crucial public services (e.g. Jobcentre Plus, Border Agency, Prison Service), they remain subject to control by ministers.

A good answer to this question would...
point to the logic of ‘public choice’ theory, according to which accountability and efficiency are best served through competition in a free market for public services. Does the experience with new public management show that the theory is correct? Or does competition illustrate (and contribute to) the gap between the agency and the core policy making function? A very good answer would highlight the lack of clarity regarding the minister’s role in the process (and discuss the application of the Carltona principle).

Poor answers to this question...
Would focus on ministerial accountability in general without specific focus on the impact of new public management; would show insufficient knowledge of new public management; would not be able to illustrate the answer with relevant background stories (Child Support Agency; Prison Service and IRA prisoner escapes).

Question 7
Discuss, with reference to case examples, whether counter-terrorism legislation allows for substantial restrictions on the liberty of people who have not necessarily committed a crime.

General remarks
UK counter-terrorism laws have introduced increasingly wide executive powers. The width of these powers is especially problematic when used against non-violent people whose activities the government dislikes or whom the police find it convenient to target. Such laws also illustrate the importance of constitutional safeguards (access to independent courts, parliamentary mechanisms of scrutiny, etc.) which lend an air of legitimacy to measures that are nonetheless harsh.

Law cases, reports and other references the Examiners would expect you to use
R (Gillian) (2006); Brannigan and McBride v UK (1993); Belmarsh Detainees (2004); Chahal (1996); MB (2008); Liversidge v Anderson (1942).

A good answer to this question would...
Candidates need to find the right balance between discussing the requirements of the rule of law (government powers should be defined by clear laws: R (Gillian) (2006)) and human rights legislation (that safeguards individual freedom) on the one hand, and discussing the Hobbesian minimum duty of the state to protect human life (which may require immediate action in the face of unpredictable threats). The European Court of Human Rights gives a wide margin of discretion to states in this context: Brannigan and McBride v UK (1993), and states can derogate from Article 5 of the European Convention on Human Rights (liberty and security). A good answer would set out the various ways in which emergency legislation can violate the rule of law and human rights norms (e.g. detention without trial: Belmarsh; restricting judicial review by an independent court: Chahal; restrictions on
fair trials: *MB* (2008); secrecy in court proceedings: Special Immigration Appeals Commission; etc. A very good answer would discuss critically whether matters of national security should be non-justiciable (*GCHQ; Liversidge v Anderson*).

**Poor answers to this question**…
Pays insufficient attention to the development of the legislative framework and the case law. Fails to discuss, or discusses exclusively, the European Convention on Human Rights context.

**Question 8**
Discuss, with case examples, the range of procedural requirements imposed on decision-makers by the administrative law principles of natural justice.

**General remarks**
The old common law principle of ‘natural justice’ stems from 17th century decisions (*Dr Bonham’s case* (1610); *Bagg’s case* (1615)): anyone whose rights have been affected by an official decision is entitled to advance notice of a decision and a fair hearing before an unbiased judge.

**Law cases, reports and other references the Examiners would expect you to use**
*Dr Bonham’s case* (1610); *LBG v Arlidge* (1915); *Ridge v Baldwin* (1964); *Leech* (1988); *Re HK* (1967); *Pinochet (No 2)* (1999); *Locobail* (2000); *Gough* (1993); *Porter v Magill* (2002).

**A good answer to this question would**…
Candidates should introduce the role and purpose of judicial review, and briefly outline the principal grounds on which administrative action can be challenged in the courts. The requirements of natural justice should be outlined, and the discussion illustrated with case law. The courts have introduced limits, for example, to the right to be heard: what does ‘fairness’ require? When is a hearing required? When is legal representation required?. A decision maker must also be free from the appearance of bias (financial, ideological, personal) and the test (*Porter v Magill*) is whether a reasonable and fully informed observer would consider there to be real danger of bias. The ‘duty to act fairly’ as a more flexible, situation-related concept, and the need to retain flexibility, should be explained and contrasted with the government’s interest in efficiency. There should also be a discussion of proportionality and the increasing role it plays in evaluating procedural fairness.

**Poor answers to this question**…
Do not sufficiently distinguish between ‘natural justice’ and ‘procedural fairness’; are unable to illustrate the principles of natural justice and fairness with reference to case law.