Examiners’ report 2013

LA1020 Public law – Zone B

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

To what extent does the UK system of government reflect the doctrine of the separation of powers?

General remarks

The most popular question by far, the difficulty of separation of powers is frequently underrated or not appreciated by candidates. An alien 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 monarchic, aristocratic, and democratic elements, but controls them through checks and balances.

Common errors

Candidates typically introduce the three major institutions of state and discuss their role, functions and personnel systematically. So, the (relatively uncontroversial) Parliament/executive relationship is 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, UK Supreme Court, 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 separation of powers 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 separation of powers is enjoying a renaissance in the UK and point to recent constitutional developments (Constitutional Reform Act 2005; reformed Lord Chancellor; UK Supreme Court) to underscore the point. 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...**
treat the separation of powers as a template to analyse the UK constitution; discuss the relationships systematically when the reality is much more complicated; focus on historical and comparative elements (USA; France) rather than the contemporary legal and political realities in the UK.

**Question 2**

**Does the Human Rights Act 1998 illustrate that it is possible to achieve effective protection of human rights without excessively empowering judges?**

**General remarks**
This question is not about the nature of human rights, or their historical recognition by the common law, or the substantive rights protected by the European Convention on Human Rights. It is about the internal logic of the Human Rights Act (s.3) and its relationship with other organs of government (s.4). Final thoughts could address reform of the Human Rights Act.

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

**Common errors**
To write about rights in the European Convention on Human Rights context; to discuss mainly or only rights cases before the Human Rights Act; not to analyse the impact of the Human Rights Act 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 Human Rights Act 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 change the constitutional role of the courts? A very good answer would also consider the impact of the Human Rights Act 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 Human Rights Act?

**Poor answers to this question...**
An all too common approach is for poorer answers to list the main provisions (ss.2, 3, 4, 6, 8, and 19) in the Human Rights Act without any discussion. Some better attempts lost points because they did not discuss cases sufficiently, or because they only focused on human rights protection without considering judicial empowerment. Finally, some answers erroneously discussed counter-terrorism (which was the focus in last year’s examination).
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Student extract
Considering the concept of parliamentary sovereignty, the HRA has no higher status than any other statute. It can be amended or repealed anytime but the moral and political constraints would make this difficult. S.2 of HRA requires all domestic courts to ‘take into account’ any judgements, decisions or opinions of the ECHR. In R v Horncastle; R v Marquis (2009) the Supreme Court made a statement to follow the case law of the ECtHR. However, Lord Phillips stated that on rare occasions the domestic courts may decline to follow the case law of the ECtHR, provided the ECtHR had not accommodated a particular aspect of the domestic process.

[The answer then discusses ss.3; 4; 6 of the Human Rights Act]

Initially, it was thought that HRA would only act vertically against government bodies. However, by including courts and tribunals within the definition of public bodies, the HRA seems to allow for horizontal effect which extends the scope of the Act to include non-state bodies. An example of this can be seen in Douglas v Hello (2001), where the Court of Appeal found that the individuals had a right of personal privacy, which was grounded on the equitable doctrine of breach of confidence. Sedley LJ state that the law recognises and will appropriately protect a right of personal privacy. […]

To conclude, the genuine effect of HRA is to strengthen the protection of individual rights and freedoms. The HRA clearly illustrates that it is possible to achieve protection of human rights without excessively empowering judges.

Comment on extract
Good use of cases throughout; well written and nicely balanced answer. But the candidate does not discuss the role of the judges in the case law and adds the bit about ‘empowering judges’ in the conclusion as an afterthought. It needed to be integrated in the answer from the start. Mid 2.1.

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

Question 3
Consider whether proportionality is superseding irrationality as a ground of judicial review.

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.
Common errors
A large number of candidates limited their response 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) to whether the case raises broad socio-economic 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...
Give 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, and without awareness that the grounds of review operate as an external judicial control on the operation of a statute.

Student extract
[After a discussion of *Wednesbury*, *GCHQ*, and proportionality in the ECtHR context, the candidate continues:]

Does this mean that proportionality is separate from irrationality? Given the fluidity of the concepts of judicial review it might be wrong to suggest that at the end there is a hard and fast difference between proportionality and unreasonableness. One can easily argue that an administrative decision can be reviewed because it placed unreasonable restriction on a human right or it placed restriction that is out of proportion to the end it intended to achieve. Thus a distinction can be made between the two grounds of judicial review if a human right was not at stake, but it does mean that these two grounds are conceptually so distinct as to be open to contrast.

[The candidate discusses *Alconbury* and *Daly*]

So, even though the doctrine of proportionality and irrationality have different origins there is insufficient conceptual difference between them. However, Richard Gordon QC in his article ‘Two Dogmas of Proportionality’ stated proportionality like *Wednesbury* is not a monolithic legal doctrine, it is not a new dish rather merely a bit of extra icing on the intensity of the review cake.

Comment on extract
The candidate writes with great confidence throughout and displays exemplary knowledge of the case law. The answer is broad in scope, with a lot of relevant background information, but good on the detail as well. A first class mark.

Interpretation of the question:   excellent
Relevance of the answer to the question:  excellent
Substantive knowledge:    excellent
Use of authorities:     very good
Articulation of argument:    excellent
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; Macarthys v Smith; Garland v British Rail; Litster v Forth Dry Dock; Factortame; Thoburn.
Van Gend En Loos; Coasta v ENEL; Internationale Handelsgesellschaft; 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 5
Critically assess the role of Parliament in the law-making process.

General remarks
Parliament (i.e. the elected House of Commons, the appointed House of Lords, and the Monarch) is the supreme law maker. Since i) Parliament has (in theory) unlimited law making power and ii) the executive and the legislature are not
separated, the resulting ‘elective dictatorship’ questions both the notion that ‘Parliament makes law’ and also Parliament’s role regarding the scrutiny of laws.

**Common errors**
Some candidates erroneously thought this question was about parliamentary sovereignty.

**A good answer to this question would...**
The main focus should be on legislating and holding the executive to account. The executive dominance in Parliament may be touched upon, especially since it controls the timetable for debating legislation. The adversarial nature of parliamentary procedure (government versus opposition) and party discipline (whips) may be discussed as well, but the focus should be on legislative procedure (three readings) and executive supervision (questions, debates; select committees). A very good answer will find time to say something about delegated legislation which is subject to a limited degree of parliamentary scrutiny. The purpose of the House of Lords (which is subordinate to the House of Commons) should not be forgotten: it is to act as a check on the lower house. The Salisbury Convention, the composition of the House, and its status (unelected but a useful counterweight in the mixed constitution) may be discussed.

**Poor answers to this question...**
Only discuss the stages of a public bill in Parliament (first reading, second reading, etc.); fail to discuss the different ways in which Parliament does scrutinise laws (public bill committees, etc.); focus only on the role of the House of Commons and not the House of Lords.

**Question 6**
Consider whether parliamentary privilege is an essential part of parliamentary democracy.

**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.


**Common errors**
To understand this question as being about Parliamentary sovereignty; to illustrate 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 the Human Rights Act), 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 Article 9 of the Bill of Rights. A very good answer will refer to the Parliamentary Commissioner for Standards, the IPSA, and briefly discuss standards in the House of Lords.

**Poor answers to this question...**
Do not set out the need for privileges; do not discuss the relationship between Parliament and the courts; do not discuss the independent mechanisms to enforce standards.
Question 7

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 8

‘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.