Examiners’ report 2014

LA1020 Public law – Zone A

Introduction

As in previous years, the examination answers ranged from the truly outstanding to rather less impressive 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 was to discuss the respective questions critically and to draw on a wide range of (sometimes conflicting) primary and secondary legal materials. By contrast, the best scripts were able to show a clear and succinct grasp of the key issues and were well read in terms 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 role that constitutional conventions play in the functioning of the modern British constitution.

General remarks
The question requires you to think about sources of the UK constitution that fall into two categories: legal rules (primary and secondary legislation, case law) and non-legal rules (e.g. conventions and prerogative powers). This needs to be done in conceptual terms (by distinguishing sources of the constitution) and in empirical terms (by illustrating constitutional practice and cases). In that context conventions need to be distinguished from mere practices, traditions and custom.

Law cases, reports and other references the Examiners would expect you to use
Dicey, Jennings, *AG v Jonathan Cape Ltd*; *Madzimbamuto v Lardner-Burke*.

Common errors
This was a popular question that probably gave you the most latitude (to shine as well as to fail). Weak answers did not explain the nature of conventions; did not evidence good understanding by discussing examples of areas regulated by convention (e.g. ministerial accountability); did not explain how a convention comes into existence, how it is enforced, and how it can change; did not examine cases for codification of conventions. 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 flexible 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?

As always, a good answer will not be only descriptive, but also critical (by analysing the purposes of conventions, why they are obeyed, whether they should be codified). 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.

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

Focus on conventions *in abstracto*; compare the UK constitution to states with written documents (USA); display insufficient historical and legal knowledge about the UK; fail to produce a coherent argument.

**Question 2**

**How important is the doctrine of “the rule of law” to English public 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 Dicey’s ‘formal’ understanding (and not also the ‘substantive’ conception), and memorising Tom Bingham’s eight points without explaining them. Drawing up lists is never a good way to approach an examination question!

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

Set out the historical emergence of rule of law (Aristotle, Magna Carta); 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). 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 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 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 (like 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; simply recite Bingham’s eight points without analysis; show no awareness of the complexity of the issue.

**Question 3**

Discuss the extent to which sections 3 and 4 of the Human Rights Act 1998 encourage a dialogue between the courts, the executive, and the legislature.

**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 ECHR. It is about the internal logic of the HRA (s.3) and its relationship with other organs of government (s.4). Final thoughts could address reform of the HRA.

**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 ECHR context; to discuss mainly or only rights cases that took place before the HRA; not 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 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…**
An all too common approach is for weak answers to list the main provisions (ss.2, 3, 4, 6, 8 and 19) in the HRA and discuss 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).
Question 4
Discuss the advantages and disadvantages of proportionality as compared with Wednesbury unreasonableness.

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 larger 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 it 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.

Question 5
Explain and evaluate the evolution of the Royal Prerogative and consider the likely future of prerogative powers.

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.


Common errors
To focus mainly or only on the personal powers of the monarch and/or Crown immunities; to discuss prerogative powers mainly from a historical perspective and discuss 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. CRGA 2010)?

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

Question 6
Discuss the extent to which parliamentary sovereignty has been affected by membership of 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; Macarths v Smith; Garland v British Rail; Litster v Forth Dry Dock; Factortame; Thoburn.
Van Gend En Loos; Costa v ENEL; Internationale Handelsgesellschaft; Simmenthal.
European Communities Act 1972; European Union Act 2011.

Common errors
Some candidates write 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 limit 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 European Union.
Student extract 1

The supremacy of EU means that national law in conflict with EU law is considered inapplicable. Domestic court has an obligation to set aside national law which conflict with EU law.

The doctrine of parliamentary sovereignty has historically been accepted as one of fundamental principle. Dicey describes parliament supremacy as cornerstone of constitution. According to Dicey, parliament is supreme law-making body, can enact law on any matter [candidate writes more on parliamentary sovereignty].

It has been argued that membership of EU has diluted the concept of parliamentary sovereignty. After becoming member of EU the whole theory became changed. S.2(1) of European Communities Act 1972 ensures direct applicability of EU law over UK domestic law. S. 2(4) of this Act requires that subsequent statute is to be interpreted in accordance with EU law.

Student extract 2

There are 28 member states of the European Union and it was establishes through a number of treaties. None of the treaties mentioned, in the case of conflict, whether member state law or EU law will prevail. ECJ filled the vacuum through judgements in five cases.

1. Van Gend en Loos: EU law has created a new legal order which gives rights to a state and citizen.

2. Costa v ENEL: if a member state law in conflict with the EU law, then the EU law will prevail. Member State surrender all supremacy to EU.

3. Simmenthal: [candidate discusses case briefly and poorly]

4. Internationale Handelsgesellschaft [candidate discusses case briefly and poorly]

5. Factortame: a judge can void a conflicting law, and if a citizen suffers loss then the member state is liable for giving damages to the citizen.

Comment on extracts

Although the first extract contains some grammatical errors, and does not contain any references to cases (e.g. Factortame), the candidate here displays a solid understanding of the foundations of parliamentary sovereignty and EU law, and a nuanced understanding of the inter-relationship. The candidate has good knowledge of the European Communities Act 1972 as well as of the subsequent cases in UK courts that tried to interpret the Act. A high 2.1.

The second extract focuses entirely on the EU, and shows no understanding at all that this question is about the impact of EU law on UK public law. Listing cases in this way is a bad idea, especially if they are not relevant to the question. Only Factortame is relevant, but the candidate misunderstands the case (a judge cannot 'void' a conflicting law). This answer gets a fail mark.

Question 7

Discuss the role Parliament has in the process of making primary and secondary law.

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 would 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 role of the House of Commons and not the House of Lords.

**Question 8**

Discuss the extent to which the rules of natural justice have now developed into much broader concept of procedural fairness.

**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. 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 (e.g. 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.

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


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

Natural justice is clearly importance in any court or judicial hearing. But are the rules appropriate in other decision-making contexts (e.g. by a local authority or by a minister applying policy)? Since *Ridge v Baldwin*, the ‘duty to act fairly’ has developed as a more flexible, situation-related concept to protect rights and interests. 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.

The question overlaps with 'legitimate expectations', where claimants argue that public bodies have said or done things that have created an expectation that they will act in accordance with past practice, a policy or a promise. The leading cases are Coughlan, Bancoult and Niazi.

Poor answers to this question...
Do not sufficiently distinguish between ‘natural justice’ and ‘procedural fairness’; are unable to illustrate these principles with reference to case law; do not discuss the concept of legitimate expectation.

Student extract
Natural justice can be seen as the law being taken and being enacted upon in relation to an individual’s rendition, whereas procedural fairness insures that under the judiciary individuals are taken through the necessary procedure in equality and the right to a fair trial, e.g. Laws LJ stated that ‘access to the Courts is a constitutional right’.

Natural justice has developed to a much broader concept of procedural fairness by creating and establishing the Equality Act 2006 which is an act which addresses the Commission for Equal and Human Rights, racial equality, disability rights, discrimination against the grounds of religious belief, sexual orientation etc, to ensure the fundamental equal proceeding against an individual regardless of their identity or beliefs that they may practice or hold.

Comment on extract
The student does not correctly explain the concepts of natural justice and procedural fairness. The focus shifts too quickly to the Equality Act which forms the focus for the remainder of the answer. The relevance of the Equality Act to the question is not explained. The answer does not begin to understand the breadth of the issues at hand, and results in a fail mark.