Examiners’ report 2014

LA1020 Public law – Zone B

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 advantages and disadvantages of an unwritten constitution with reference to the UK system of government.

General remarks
The question requires you 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
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 you 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 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?

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.

**Student extract**

A constitution is basically a set of rules which sums up how the country should run or how it should be run. UK along with Israel and New Zealand is said to have an unwritten constitution. This is mainly due to the fact that UK has not really gone through a major change in their country like most of the countries throughout history have.

To write off UK constitution as ‘unwritten’ would not be entirely correct. However, it is debatable whether it is unwritten or written but uncodified. In order to discuss that we need to look at the sources of the UK constitution.

Acts of Parliament: these are Acts that have been made by the Parliament that have constitutional significance. They would be: Magna Carta (1215); Bill of Rights (1688); Constitutional Reform Act (2005), Constitutional Reform and Governance Act (2010); Fixed-Term Parliament Act (2011) [list continues].

Common law: also known as judge made law is when judges make new law while interpreting statutes. These are an important form of law, less superior to the Acts of Parliament though, but is one of the key sources of UK constitution.

Conventions: are basically certain procedures, rules that have been followed over a certain period of time and so they eventually become...
binding. Conventions are not written down anywhere, this is one of the most influential sources of the constitution.

Comment on extract
Although this candidate uses lists (which are discouraged!), she puts them into context and displays some good knowledge about the different sources of the constitution. There are some inaccuracies: Magna Carta was not an Act of Parliament, and conventions may be ‘binding’, but not in a legal sense. The overall quality of this answer was sufficient for a mid-2.2.

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 legal nature of, and the limits to, the prerogative powers exercised by ministers of the Crown.

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 powers (are they subject to Parliamentary scrutiny; can they be reviewed by the courts?); set out the powers' 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. Constitutional Reform and Governance Act 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.

Student extract
The Royal Prerogative Powers is crown self-power which enjoy executive in the name of Crown. It takes power from Crown. Crown hold some power, which was use from century to century.

Blackstone: it is assent of Crown over and over all people, it any time remove from Crown. Legally, test of prerogative.

Dicey says: it is discretionary arbitrary power in hands, which any time left from Crown.

Royal Prerogative Power has some limits to exercise by Ministers of the Crown. It is true that Crown held some power in his hands by birth. Like legislation, assent, treaty-making power, law-making by bill, sign war and peace declaration, Prime Minister appointment, judge appointment.

But nowadays it use Minister in the name of Crown. Royal Prerogative power set up in own Constitution, for using it sometime has few limits.

Comment on extract
This is clearly a very poorly written essay, but it is not incomprehensible. The candidate displays some knowledge, and is aware at least that Blackstone and Dicey had different conceptions of the prerogative. Some of the examples are accurate, others are not. But the candidate manages to make the transition from powers traditionally vested in the Crown to their exercise today by Ministers. The
rest of the essay continued to evidence basic knowledge of prerogative power. Although borderline, this answer narrowly passed.

**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**

Discuss the role, powers and procedures of the House of Lords in the legislative process.

**General remarks**

The normal process is that a Bill is passed by both the House of Commons (HC) and the House of Lords (HL) before it may receive royal assent. The purpose of the HL is to act as a check on the HC, and to provide an opportunity for second thoughts. But it is an unusual second chamber and some politicians are calling for it to be reformed.

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

Parliament Acts 1911 and 1949; *Jackson v AG*. 
Common errors
Some candidates wrote about law-making in general terms, or focused on the composition of the HL and reform proposals, which are not central to the question.

A good answer to this question would...
A good answer 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. The issue of supremacy of the Commons and the Parliament Acts 1911 and 1949 should be discussed.

Poor answers to this question...
Only discuss the legislative stages. Do not discuss pre-legislative scrutiny, the roles of, for example, the HL Constitution Committee or the relationship between the HC and HL in case of disagreement (Jackson).

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; Macarthys v Smith; Garland v British Rail; Litster v Forth Dry Dock; Factortame; Thoburn.
Van Gend En Loos; Costa v ENEL; Internationale Handelsgeellschaft; 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.

Question 7
Discuss, with examples from case law, the scope of the requirement for procedural fairness in administrative law.

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.

Question 8
Discuss the legal status and effect of the European Convention on Human Rights in the domestic law of the United Kingdom.

General remarks
The European Convention on Human Rights is an international treaty of the Council of Europe in 1950. It entered into force in the United Kingdom in 1953. The articles contained in the Convention are mainly civil and political in nature rather than social and economic. It was not ‘incorporated’, but given further legal effect by the Human Rights Act 1998. The distinctive legal features of the Act include rules on standing,
liability of public authorities, statutory interpretation, declarations of incompatibility and ministerial statements.

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

*Golder v UK, Malone, Hirst v UK (No 2).*

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

Set out the position before the HRA was enacted; set out the disadvantages for claimants before the HRA; discuss the strained relationship between the UK and Council of Europe, as seen in cases like *Malone* and *Hirst*.

A very good answer would 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 poorer answers to list the main provisions of the ECHR and/or of the HRA (ss.2, 3, 4, 6, 8 and 19). 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 limited themselves to counter-terrorism.