Examiners’ reports 2015

LA1020 Public law – Zone A

Introduction

The best examination answers are able to show a clear and succinct grasp of the key issues and demonstrate that the candidate is well-read in terms of the further reading recommended in the subject guide and available on the VLE.

However, reiterating what was in the subject guide or textbook, or merely giving a descriptive account of a particular area of public law is insufficient, given that the objective is to discuss the respective questions critically and to draw on a wide range of (sometimes conflicting) primary and secondary legal materials.

Please note that in the extracts below, spelling errors and other linguistic problems have been left as they were on the examination scripts.

Comments on specific questions

Question 1

Discuss the strength of the arguments for the UK keeping its uncodified constitution.

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, but also one of the harder ones to answer.

This question can be approached historically (by tracing the historic aspects of the constitution), doctrinally (legal versus non-legal sources) or theoretically (codified versus uncodified constitution). It also has a comparative element which should only be illustrative and not dominant – avoid writing more about your 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?
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.

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...
focused on constitutions in abstracto; were mainly about the candidate’s home state; displayed insufficient historical and legal knowledge about the UK; failed to produce a coherent argument.

Student extract
The question is regarding the strength of parts which support the UK in keeping its uncodified constitution. The UK is among the few countries in the world, aside from countries such as Israel and New Zealand to possess a constitution of such form. The author, Colin Munro, has stated that the term ‘uncodified document’ best describes the UK’s constitution. Despite the fact that the constitution is deemed to be uncodified, a part of it is indeed written especially in the form of statutes. There, if the term ‘unwritten’ is to be used instead, it would be a misnomer.

If we take into consideration the scenario where a codified constitution was created, there would be detrimental effects. The constitution which would have been codified might have little or no relevance to the governance of the country whether or not the provisions in that constitution would protect the rights of today’s people would also be highly questionable. As a result, it seems that the failure of establishing such a constitution in the past is of benefit to the country currently.

Comment on extract
A fairly standard answer that takes the historical approach and then gets stuck in it. Although the candidate goes on to discuss the role of conventions and the Jonathan Cape case, there is too little discussion of the contemporary condition and how the constitution would benefit from codification. A low to mid 2.2.

Question 2
Discuss the extent to which the major offices and institutions of the European Union resemble a ‘balance of powers’ more than a formal ‘separation of powers’.

General remarks
Here, you should attempt to discuss the functions and the legitimacy of the EU’s principal institutions – the Council, the European Parliament and the Commission – and contrast them with the separation of powers in the traditional nation state.
Unlike the clear institutional demarcation under the separation of powers doctrine, the concept of ‘institutional balance’ is less clear and less clearly a doctrine. It is a dynamic idea that tries to capture the shifts in relative power of the EU institutions over the course of the integration process. It is not obvious, for instance, where ‘executive’ power lies in the EU: the technocratic Commission has the legislative initiative but needs to work through the Council of Ministers. The Council of Ministers acts in both an executive/supranational and legislative/intergovernmental capacity. Moreover, the elected European Parliament has evolved from a consultative body to a co-legislator. The functions of each institution are fluid rather than rigid, and institutional balance is more of an ideal than a description. (The same could be said of separation of powers.) A very good answer would include the European Council, which often acts as the de facto executive.

**Common errors**
Treating the question as a traditional question on separation of powers in the UK context.

**A good answer to this question would**
contrast the balance of powers at the EU with the traditional concept of separation of powers. Separation of powers was about rational constitutional design that prevented arbitrary power and protected liberty. But the English constitutional structure and fusion of power was already in place when Montesquieu wrote. At the very least, the historic incongruity of separation of powers in the UK constitution needs to be brought out. It is an alien doctrine, and a problematic lens through which to analyse, explain or understand the UK organs of government.

**Poor answers to this question**
discussed separation of powers in the UK context and failed to discuss the EU institutions altogether.

**Question 3**
Discuss whether the concept of prerogative powers is out of date and ought to be abolished.

**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**
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. 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.

Question 4
Discuss whether the doctrine of collective ministerial responsibility enhances or undermines government accountability to Parliament.

General remarks
Parliament performs a number of roles, and one of them is supervising the executive. Its effectiveness depends upon the doctrine of ministerial responsibility. In the final analysis, the House of Commons can require the government to resign. These powers are governed by conventions.

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

Common errors
Lack of awareness of the function of Parliament; too many or too few examples; lack of constitutional analysis.

A good answer to this question would...
Understanding conventions can be demonstrated in theoretical terms (by distinguishing sources of the constitution) or in empirical terms (by illustrating constitutional practice and cases). In that context, conventions need to be distinguished from mere practices, traditions and legal principles. As always, a good answer would 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...
discussed examples without relating them to the governing conventions.

Question 5
Assess the impact of the UK’s membership of the European Union on the doctrine of Parliamentary sovereignty.

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; Coasta v ENEL; Internationale Handelsgesellschaft; Simmenthal.

European Communities Act 1972; European Union Act 2011.
Common errors
Writing mainly about Parliamentary sovereignty or setting out (for this question irrelevant) EU law cases (van Duyn, von Colson, Marshall, Francovich etc.) in great detail. Limiting discussion to Factortame, without putting the decision in its proper context. Writing about the Council of Europe and the European Convention of Human Rights.

A good answer to this question would…
either start by explaining the evolution and the sources of EU law and discussing the manner in which they take effect within the UK, or 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…
were one-sided and either focused only on Parliamentary sovereignty or discussed the internal workings of the European Union.

Question 6
Discuss whether the adoption of the proportionality principle simply vests enormous discretionary power in the hands of the judiciary.

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
Limiting the discussion to Wednesbury and ultra vires and failing 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'. You 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 socioeconomic or political factors that are removed from ordinary judicial competence. You 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, and without awareness that the grounds of review function as an external judicial control on the operation of a statute.
Question 7

Evaluate the roles of Parliament in the process of making primary and secondary legislation. Does it have too little power?

General remarks
Parliament (i.e. the elected House of Commons, the appointed House of Lords and the Monarch) is the supreme law-maker. Since Parliament has (in theory) unlimited law-making power and 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
Thinking that the question was about parliamentary sovereignty.

A good answer to this question would...
focus 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, but the focus should be on legislative procedure (three readings) and executive supervision (questions, debates; select committees). A very good answer would 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 discussed the stages of a public bill in Parliament (first reading, second reading etc); failed to discuss the different ways in which Parliament does scrutinise laws (public bill committees, etc); focused only on the role of the House of Commons and not the House of Lords.

Question 8

Discuss the purpose and core provisions of the Human Rights Act 1998, and the respects, if any, in which its provisions might be reformed in order to better promote the protection of civil liberties in the UK.

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 and others.

Common errors
Writing about rights in the ECHR context; discussing mainly or only rights cases before the HRA; not analysing 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…**
listed the main provisions (ss.2, 3, 4, 6, 8 and 19) in the HRA without any discussion. Did not discuss cases sufficiently, or only focused on human rights protection **without** considering judicial empowerment. Erroneously discussed counter-terrorism (which was the focus in last year’s examination).

**Student extract**
The nature of the United Kingdom constitutional arrangement it is necessary for every treaties outside from UK need a incorporation Act to effect in domestic legal system. This is called ‘dualist’ state. The dualism nature of the UK proposed them to pass Human Rights Act 1998 for the effect of the ECHR before the national courts. The former labour government was entitled to pass this Act as their election manifesto. Before HRA 1998 incorporated in United Kingdom legal system, people didn’t enjoy the ECHR article into domestic court. In the case of Malone v Metropolitan Police Commission, Arts 8 and 14 of ECHR rights were violated by policy of an antique dealer by tapping his telephone call. His argument was rejected by the national court because of no national legislation to incorporate these rights.

[...]
In the question of reform the HRA I think there was nothing necessary but the present conservative government proposed in their election manifesto 2015 to remove themselves from ECHR, or ECtHR to remain only an advisory body for national courts, not imposes decisions on them.

**Comment on extract**
In spite of grammatical errors and spelling mistakes, the candidate gives a comprehensive and well-thought out answer to the question. The answer pre-dates the HRA 1998 (see extract), discusses the relevant provisions of and cases under the HRA and discusses reform proposals at the end. A high 2.1.