Examiners’ reports 2015

LA1020 Public law – Zone B

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.

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 the extent to which Parliament can control the exercise 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**
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.

**Student extract**
The essay will discuss about the prerogative power exercise by the executive and the crown. It will also look at whether or not the parliamentary control is sufficient in controlling the use of prerogative power.

As Blackstone stated, prerogative power is the power that every king has above and other and cannot be question by others. There are many prerogative powers which were exercised by the King. For example, power of proclamations which allowed the King to make any law based on his personal interest. However, this definition is no longer accurate for the modern context.

After the civil war, right of the monarch was passed to the parliament, this may include those prerogative right that was previously exercised by the King. Those rights are given legal effect by the Bill of Right 1688. As Dicey stated, these powers are those powers which was residual and left legally in
the hand of the crown. I personally feel that this definition is more accurate as the monarch no longer have the power to control the UK’s politics.

Comment on extract
This was a competent attempt at answering the question. The candidate is aware of the historical origins of prerogative powers, and goes on to do a decent job at discussing parliamentary scrutiny. Unfortunately, the candidate completely ignores the judicial dimension. Are prerogative powers judicially reviewable? What is their relationship with statute (De Keyser’s; Northumbria Police Authority) as well as with human rights (Bancoult)? Finally, the candidate did not discuss recent and future reforms to prerogative powers. Mid 2.2.

Question 4

Explain the concepts of ‘procedural fairness’ and ‘natural justice’ and discuss the need for flexibility in applying these concepts.

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. You 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.

Law cases, reports and other references the examiners would expect you to use
Dr Bonham’s case (1610); LBG v Aridge (1915); Ridge v Baldwin (1964); Leech (1988); Re HK (1967); Pinochet No 2 (1999); Locabail (2000); Doody (1994); Gough (1993); Porter v Magill (2002); Coughlan (2001); Bancoult (2008); Niaz (2008).

A good answer to this question would...
Natural justice is clearly importance in any court or judicial hearing. But are procedural fairness and natural justice appropriate in other decision-making contexts, for example, 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...
did not sufficiently distinguish between ‘natural justice’ and ‘procedural fairness’; were unable to illustrate the principles of natural justice and fairness with reference to case law; did not discuss the concept of legitimate expectation.
**Question 5**
Discuss how the processes of European integration are affecting the UK constitution.

**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 a federal system would be much better than the current devolution arrangements for the United Kingdom.

**General remarks**
Good answers would explain the overall scheme for devolution and give an account of the powers of the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly as well as the odd position of England. Among the issues that can be explored are: the impact of devolution on parliamentary sovereignty; whether further devolution might be a stepping stone towards the break-up of the UK; is federalism an option? What else could happen to the UK?

**Law cases, reports and other references the examiners would expect you to use**
- Scotland Act 1998
Common errors
Insufficient understanding of the current devolution arrangements; ignoring the benefits of a tailored system of devolution over a one-size-fits-all system of federalism. Ignoring the English Question under the current arrangement, and not addressing English dominance under federalism.

A good answer to this question would…
provide nuanced alternatives to federalism. Could the English Question be answered by, for example, an English Parliament, a Grand Committee for England within the UK Parliament and regional assemblies in England? What are the constitutional implications of ‘Britishness’? You should mention academic literature (Brazier, Hadfield) to make the normative case for/against further devolution.

Poor answers to this question…
tried to shoehorn the UK into a federalist model and did not rise to the challenge of defending devolution by understanding its component parts.

Student extract
The question is with regards as to whether a federalized UK would be of greater benefit compared to the current devolved state of the UK. In order for this question to be answered, the terms federalism and devolution have to be understood clearly. Both terms are relatively close in terms of their definition, but distinct differences between them still exist. Andrew Scott defined federalism as the authority to govern is divided between the central government and its constituent states. On the other hand, devolution is the delegation of authority without relinquishing sovereignty. Thus parliamentary supremacy is still prioritized in devolution!

The UK consists of England, Wales, Scotland, and Northern Ireland. Devolution arrangements have been carried in each of the respective states, except for England. The devolution arrangements in Scotland will be discussed first. Scotland has been united with England since the Act of Union 1706 [candidate discusses devolution in Scotland, Wales, and Northern Ireland]

The situation would not be the same if the UK adopted a federal system. The power which the central government holds at Westminster parliament would have to be divided equally with the constituent states. There is no doubt that this would affect the doctrine of parliamentary sovereignty in the UK in an adverse manner. This would also be detrimental because the uncodified constitution of the UK heavily relies on the doctrine of parliamentary supremacy. If the UK is to adopt a federal system, it would lose the flexibility to amend the constitution. [candidate also analyses need for a written constitution under the federal model, before concluding].

Comment on extract
This is a good attempt at the question. The candidate starts strongly by rightly insisting on a comparison of devolution and federalism. The discussion of devolution in Scotland, Wales and Northern Ireland was fine, although the candidate could have explored the different arrangements in more detail. That would also have opened up scope to discuss the benefits of a system of devolution that is tailored to different needs and circumstances. More problematically, the candidate does not discuss the role of England, especially what would happen to England under a federal system. The constitutional analysis at the end, and the discussions of the impact on sovereignty and unwritten constitution, was very strong. Mid 2.1.
Question 7
Evaluate the effectiveness of the parliamentary procedures by which government ministers are held accountable for decisions, actions and policies of their department.

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 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).