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# Examiner's report 2009

## 2650020 Public law Zone A

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### General remarks

As in previous years, the standard of examination scripts varied from first class to poor fails, although it is pleasing to note that the quality of the scripts improves year by year, both in terms of knowledge and in the construction of coherent answers.

There are a number of features which are peculiar to Public law examinations, and these require a rather different approach from those subjects which are examined primarily through problem questions rather than essay questions.

The first of these relates to the analysis of the question. Public law examination questions, unlike many other legal subjects, are mostly (but not exclusively) essay questions which are usually quite broad in scope. The most important task to be undertaken is correctly to interpret the question and understand exactly what is being asked for. Far too many candidates see a question on, say, the House of Lords and proceed to tell the examiner 'all they know' about the House of Lords without any reference to the actual question on the paper. Such an approach usually leads to failure.

The second feature is that of style. An essay question requires an answer which (generally) involves an introduction, analysis and conclusion. This requires careful planning in terms of the use of theory and authorities and the construction of a logical argument.

The third issue is that of the citation of authorities, in particular case law. Relative to subjects such as the Law of contract, Public law has few cases. However, those cases are important and candidates must be able to cite them accurately and to demonstrate that they understand their significance. If there is a line of cases for discussion, these should be discussed in a logical order (usually by date), and candidates should be able to cite the name of the case and if not the full citation, at least the date on which it was decided. It is not acceptable to keep referring to 'a decided case', without name or date.

More generally, and as a practical matter, it is important that candidate can offer a coherent answer of sufficient length. Tutors are often asked 'how much should I write', and the answer to this, of course, varies. The key issue is whether you have given a sufficiently detailed analysis of the question to gain a good mark. This is rarely (even with fairly small handwriting) possible in less than three sides of the examination booklet. In most cases, the best candidates will write significantly more than this.

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## Specific comments on questions

### Question 1

**'Under the United Kingdom's constitution, constitutional conventions play a key role in maintaining flexibility. Their lack of clear definition and uncertain application, however, make reform essential.'**

**Discuss. What, if anything, is your preferred option for reform?**

This question on the role of constitutional conventions under the United Kingdom's unwritten constitution generated some very good and some very bad answers. The strongest candidates were able to explain the uncodified constitution and its gradual evolution. They then defined constitutional conventions, with examples, with a view to illustrating the manner in which conventions provide for constitutional flexibility. Some of the best answers analysed the working of collective and individual ministerial responsibility as examples of conventions lacking 'clear definition' and 'uncertain application', and explaining how they change over time.

As to reform, few candidates took the view that they should be placed under a statutory code, mainly on the grounds that this would introduce rigidity. The strongest candidates also explained how this development would potentially alter the balance between the executive, parliament and judiciary.

The most common error was a failure to read the question with care. This led a number of candidates to ignore conventions and to focus on the constitution as a whole.

See the subject guide, 3.41–3.4.3., pp.36–37. See also R. Brazier 'How near is a written constitution?' (study pack p.13) and G. Marshall 'The theory of convention since Dicey' (study pack, p.79).

### Question 2

**'Parliamentary privilege protects Parliament from outside interference. Abuse of privilege in recent years suggests that Parliament should now be regulated by an independent outside body.'**

**Do you agree? What potential problems would arise from such a reform?**

This question on parliamentary privilege was generally well done, although again there were too many candidates who misinterpreted the question.

The most successful approach was firstly to define parliamentary privilege and explain its constitutional significance, giving examples of both collective and individual privileges. That set the scene for a discussion of alleged 'abuse in recent years' and whether or not Parliament should be regulated by an 'independent outside body'.

Most candidates were able to discuss the problems arising in the 1990s and the resulting Nolan Report into Standards in Public Life and the reforms which were introduced as a result. A small proportion of candidates were aware of the current allegations about misuse of parliamentary expenses. The strongest candidates were against any form of outside regulation, explaining the implications for parliamentary sovereignty and the problem

of who would take on the role and how that body itself would be regulated.

Where some candidates went 'wrong' was failing to see that the question involved MPs' outside financial interests, and limiting their discussion to alleged abuses of freedom of speech in Parliament.

See the subject guide, Chapter 12.

### Question 3

**Discuss the nature and importance of the doctrine of separation of powers, making reference to the constitutional arrangements of the United Kingdom.**

This question on separation of powers was statistically popular and generally well done. Candidates rightly started by explaining that this is an ancient concept designed to avoid the concentration of power within one institution of state. There then followed an introduction to the role, personnel and functions of the executive, legislature and judiciary. That led on to an analysis of the relationships between the executive and legislature, legislature and judiciary, executive and judiciary.

Most attention should have been paid to the executive/legislative relationship, with an analysis of the 'checks and balances' which are aimed at avoiding executive dominance of the House of Commons. The House of Commons Disqualification Act 1975 required discussion, as did an outline of parliamentary procedures designed to scrutinise government policy and administration.

In relation to the legislature/judiciary relationship, many candidates explained the independence of the judiciary (Act of Settlement/Constitutional Reform Act) and pointed out that there are conventions in place to prevent parliamentary discussion of cases or criticism of judges. A discussion of the importance of the role of judges in developing the common law should have been offered, with examples from case law, together with an explanation of the judges' complementary but ultimately subordinate position in relation to Parliament.

In relation to the executive and judiciary, the reform of the system of appointments was relevant, as was a discussion (albeit fairly brief) of the reform of the office of Lord Chancellor, the establishment of the Supreme Court and the election of the office of Speaker of the House of Lords. The appointment of judges as chairmen of enquiries, and the dangers therein, was also relevant.

See the subject guide Chapter 4. See also D. Oliver, 'The project: modernising the UK constitution', (study pack, p.51).

### Question 4

**Assess the adequacy of procedures available to backbench Members of the House of Commons to scrutinise the actions of government.**

This question on procedures for scrutinising the actions of government was not statistically popular, but was generally well done. A useful starting point was an explanation of the presence of prime minister, cabinet and other ministers in (principally) the House of Commons. This then led on to a discussion of the importance of parliamentary scrutiny in underpinning the conventions of collective and individual responsibility.

The majority of candidates were able to discuss, questions time, debates, the role of public bill committees and select committees. What was required for good marks was a critical discussion of these procedures, rather than a mere description. Many candidates achieved this, but a significant proportion went no further than description.

See the subject guide, Chapter 9.

#### Question 5

'The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.'  
(*Costa v ENEL* (1964), European Court of Justice)

Discuss, with reference to the case law of the United Kingdom courts.

A quotation from *Costa v ENEL* with the requirement to discuss it with reference to the case law of the domestic courts which produced some very good answers. A good starting point was to discuss the origins of the Community and Union, with a brief introduction to the major institutions of the Union. A discussion of the role of the Court of Justice could then follow, with an explanation of the ECJ's stand on the necessity for the supremacy of Community law over the domestic law of the Member States. The evolution of the ECJ's approach – direct effect, vertical and horizontal, indirect effect, state liability – as illustrated by case law was required.

Attention should then have turned to the European Communities Act 1972 and its role in enabling the reception of Community law into domestic law. There should have been a discussion of several cases, ranging from *Macarthy v Smith* (1981) and *Garland v British Rail Engineering Ltd* (1983), *Duke v GEC Reliance* (1988), *Litster v Forth Dry Dock Ltd* (1990), *Pickstone v Freeman plc* (1989), *Webb v EMO Cargo* (1992) and *R v Secretary of State for Transport ex parte Factortame* (1991). The cases of *R v HM Treasury ex parte British Telecommunications plc* (1993) and *R v Secretary of State for Employment ex part Equal Opportunities Commission* (1995) were also relevant.

It was not sufficient to limit discussion to the *Factortame* cases.

See the subject guide, Chapters 13 and 14. See also A. Tomkins 'The impact of the European Community' (study pack p.181ff.) and extracts from case law (study pack pp.177, 201, 203 and 205).

#### Question 6

'Having such limited powers, the House of Lords is unable to make a significant contribution to the legislative process.'

Critically assess this statement.

Questions on the House of Lords are always statistically popular, and this one proved no exception. Candidates were asked for a 'critical assessment' of the statement relating to the limited powers of the House of Lords. A high proportion of candidates were able to explain the historical relationship between the Lords and Commons and the limitation of the Lords' powers under the Parliament Acts 1911 and 1949.

A brief discussion of the different stages of the legislative process was relevant, as was a discussion of the difficulties which the House of Commons faces in subjecting bills to adequate scrutiny. It should have been recognised that these difficulties make the role of the House of Lords in scrutinising and proposing amendments even more important than it would otherwise be. The relatively infrequent use of the Parliament Acts should have been noted, together with a recognition that governments generally want to get their proposals on to the statute book without waiting for a year before resorting to the Parliament Act procedure, a fact which underlies the willingness of government to accept amendments from the Lords.

Reform of the House of Lords was of course relevant, in so far as its undemocratic composition weakens its claim to equal powers with the Commons. It should not, however, as it did with far too many candidates, have accounted for most of the answer. The differing recent proposals should have been discussed. The strongest candidates were able to explain the constitutional difficulties in making the House of Lords fully elected.

One error which was far too frequent was a complete misunderstanding of the term House of Lords, leading many candidates to discuss the role of the Law Lords and the establishment of the Supreme Court. A few candidates even thought that all members of the House of Lords were judges and as a result offered a mostly irrelevant answer.

See the subject guide Chapter 10. See also *Jackson v Attorney General* (study pack p.165ff.).

#### Question 7

**With reference to case law, critically assess the view that, since the enactment of the Human Rights Act 1998, the judiciary has assumed more power than Parliament intended.**

This question on the Human Rights Act was undertaken by a high proportion of candidates, with varying success. Most candidates correctly started with a (brief) explanation of the origins of the European Convention on Human Rights and its status as international law. The influence of the Convention on domestic law before the Human Rights Act should have been noted.

Candidates were asked to 'assess the view that ... the judiciary has assumed more power than Parliament intended'. In order to do this, it was necessary to explain the interpretative duty (section 3), declarations of incompatibility and their legal effect (section 4), the inclusion of the courts in the definition of public bodies (section 6), remedial orders (section 10) and the duty imposed on Ministers to declare whether a Bill complies with Convention requirements (section 19). Examples from case law should have been offered to show how the Act has been working. Many candidates were able successfully to illustrate the scope of, and limits to, the interpretative duty. Many also pointed out that Parliament had given these powers to the judges and that, accordingly, the judges were doing no more than Parliament had intended them to do.

However, as the strongest candidates were able to demonstrate, the Act has been used by the judges in a robust manner. Examples of this include

the development of the law of breach of confidence to protect personal privacy – a development not intended by Parliament. Another example is the giving of horizontal effect to Convention rights, through the interpretation of section 6. Further difficulties have arisen in relation to national security, with judges ruling that indefinite detention of foreign terrorist subjects is unlawful, and that control orders may also be unlawful.

See the subject guide Chapter 15. See also F. Klug and K. Starmer 'Standing back from the Human Rights Act: how effective is it five years on?' (study pack p.209ff). See also the White Paper 'Rights Brought Home' (study pack p.223), Irvine, Lord 'Constitutional reform and a Bill of Rights' (study pack, p.227ff.) and the extract from *A v Secretary of State for the Home Department* and *Malone v United Kingdom* (study pack, pp.269 and 271ff.).

#### Question 8

Compare and contrast, with reference to case law, the concepts of 'reasonableness' and 'proportionality' in administrative law.

This question on judicial review was not statistically popular. Of those who answered the question there were a very few very good answers and all too many very poor answers.

A good starting point was to introduce judicial review and explain its constitutional role. A brief discussion of the requirements of and process of judicial review was relevant: the focus on process rather than merits, public bodies, public law, sufficient interest, timeliness etc., as were attempts to limit/exclude review and the concepts of justiciability and nonjusticiability.

However, the bulk of the answer should have been a discussion of 'reasonableness' and 'proportionality'. The strongest candidates were able to discuss the case law defining reasonableness and explain that it provided an objective standard, set at a high level. On proportionality, its European origins should have been noted, together with the domestic courts former reluctance to use proportionality as a basis for review. The more recent acceptance of the concept, prompted in particular by the Human Rights Act, and case law illustrating its use should have been discussed.

Where a high proportion of candidates failed this question, it was mostly due to the offering of a generalised discussion of judicial review, with a brief mention of reasonableness and virtually nothing on proportionality. This error does underline the fact that if candidates do not understand the scope of a question, they should not undertake it.

See the subject guide Chapter 18.