
Examiner's report 2009

2650020 Public law Zone B

Introduction

As in previous years, the standard of examination scripts varied from first class to fails. It is, however, 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 are usually (but not exclusively) essay questions which are 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 candidates 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.

Specific comments on questions

Question 1

Discuss the advantages and disadvantages of an unwritten constitution.

This question called for an assessment of the advantages and disadvantages of an unwritten constitution. It proved statistically popular and was generally well done. One starting point was to define the meaning of the word 'constitution'. It was then relevant to explain, albeit briefly, that unlike most other countries Britain has not had a historical break in its constitutional development sufficient to compel the introduction of a written constitution.

Candidates should then have discussed the various sources of the constitution, legal and non-legal. The flexibility of the constitution, relative to written constitutions, should have been discussed. The role of constitutional conventions in ensuring this flexibility, together with the ease of constitutional reform under the doctrine of parliamentary supremacy, was also relevant. However, the problem posed by parliamentary supremacy – and its capacity to undermine individual rights and freedoms – should also have been noted. As many candidates rightly pointed out, however, whether a constitution is written or not, its success in protecting individual rights and freedoms lies in the government's willingness to respect rights and the people's power to dismiss a government seen to abuse its powers.

The most glaring mistake in relation to this question was that too many candidates were very confused over the royal prerogative and its relation to constitutional conventions.

See the subject guide, Chapters 2 and 3. See also R. Brazier 'How near is a written constitution?' (study pack, p.13ff.) and V. Bogdanor 'Introduction' to *'Constitutions in democratic politics'* (study pack, p.35ff.).

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.'

Discuss.

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 that 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

To what extent do committees of the House of Commons ensure that government policy and administration are subject to detailed scrutiny?

This question on committees of the House of Commons was generally well done. One good starting point was to explain that the prime minister, by convention, must be a member of the House of Commons and that most cabinet and non-cabinet ministers are also members of the lower House. While this arrangement is a breach of the doctrine of separation of powers, it also offers the advantage that the government is present in Parliament and is answerable and accountable to Parliament.

This discussion sets the scene for a detailed discussion of committees – public bill committees and select committees – and an assessment of their value in subjecting policy and administration to 'detailed scrutiny'. The composition of the committees and the selection process should have been discussed, pointing out that membership reflects the overall party political strength in the House of Commons (and therefore gives an advantage to a government with a strong majority in the Commons).

In relation to public bill committees, the procedure used to scrutinise bills should have been discussed, together with the problem of time and the means used to curtail debate (while Allocation of Time motions have decreased, programming has increased). The usefulness of Explanatory Notes should have been discussed but the lack of power to call for persons and papers should also have been noted. The recent use of pre-legislative scrutiny, and the carry-over of bills from one session to another should also have been mentioned.

In relation to select committees, their more permanent membership and independence from government in terms of the subject of their enquiries should have been discussed. The less adversarial, less party political and more inquisitorial nature of select committees should have been noted. As many candidates rightly pointed out, select committees have the advantage of being able to summon witnesses, appoint specialist advisers and call for documentation. The inability of select committees to compel ministers to attend should have been noted but not exaggerated, since successive governments undertake to cooperate with committees. Too much should also not have been made of the relative infrequency with which the Commons as a whole debates committee reports: the government by convention responds to reports within about three months.

See the subject guide Chapter 9.

Question 4

'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 the case of *R v Secretary of State for Employment ex parte 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.). See also extracts from case law (study pack pp.177, 201, 203 and 205).

Question 5

Write a memorandum to the Secretary of State for Justice outlining the constitutional advantages and disadvantages of making the House of Lords:

- (a) fully elected;
- (b) partially elected.

Candidates were asked to advise the secretary of state on the advantages and disadvantages of a full elected and partially elected House of Lords. A good starting point was a discussion of the role of the House of Lords in relation to both legislation and scrutiny of administration. The powers of the House of Lords under the Parliament Acts 1911 and 1949 should also have been discussed. Discussion of the current composition of the House of Lords (after the House of Lords Act 1999) was also needed.

Attention could then turn to the various reform proposals which have been made since 1997. The Wakeham Report, given that it has been superseded by more recent proposals, should have been mentioned but not discussed

in detail. The government's proposals for a 100 per cent and 80 per cent elected House should have been focused on.

The central difficulty with reform of the composition of the House of Lords will always lie with the powers which the House will have. Many candidates rightly pointed out that the more 'democratic' the House becomes, the more legitimacy it will have and the more it may seek to exercise more power. On a partially-elected House the strongest candidates were able to discuss the problems which might arise with differing degrees of legitimacy of the elected peers and the appointed peers. However, many recognised that a mixed House would avoid the potential problems of a fully elected House either mirroring the House of Commons or acting as a House in political opposition to it.

The practical problems of elections – constituencies, tenure, salaries, the voting system – should also have been briefly mentioned.

See the subject guide Chapter 10.

Question 6

Explain the simple majority system of electing Members of the House of Commons, giving your views on the relative advantages and disadvantages of alternative voting systems for elections to a legislature.

This question on the simple majority voting system was generally well done. The aims of a 'good' electoral system – equality in voting power, legal controls over expenditure etc., and the return of a government with a sufficient majority to carry out its mandate – were used by many as a starting point. Attention could then turn to the simple majority system and the way in which it works. Central to the discussion were the issues relating to the simplicity of the system, the fact that it returns a Member of Parliament with strong links to the constituency, contrasted with the disadvantages of 'wasted' votes, the fact that a majority of MPs will be elected on a minority of the popular vote and the lack of proportionality between the votes cast and seats won.

Alternative voting systems could then be discussed, with a view to assessing whether the advantages and disadvantages outweighed those of the simple majority system. There was no need to discuss the various alternative systems in detail (nor was there time to do so). The key issue was proportionality, and the systems under which this could best be achieved. The constitutional implications of a change in the voting system for general elections also required discussion, and candidates correctly discussed the problem of potential governments without a clear majority; coalition governments or the disproportionate strength of small parties; the problem of the mandate and whether or not the doctrine of collective ministerial responsibility could survive a government comprised of members of different political parties.

See the subject guide Chapter 11.

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 far 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 extract from the White Paper (study pack p.223ff.) and S. Fredman 'From deference to democracy' (study pack, p.237ff.) and the extracts from *A v Secretary of State for the Home Department* and *Malone v United Kingdom* (study pack pp.269 and 271).

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.

A high proportion of candidates failed this question, which 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 attempt to answer it.

See the subject guide Chapter 18.