Introduction

As in previous years, the exam answers ranged from the truly outstanding to the 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.

Comments on specific questions

Question 1

Consider whether the role played by conventions is the most compelling argument in favour of a codified constitution for the UK.

General remarks

The question requires the student to think about sources of the UK constitution that fall into two categories: legal rules (primary and secondary legislation, case law) and non-legal rules (e.g. conventions and prerogative powers). This needs to be done in conceptual terms (by distinguishing sources of the constitution) and in empirical terms (by illustrating constitutional practice and cases). In that context, conventions need to be distinguished from mere practices, traditions, and custom.

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

Dicey, Jennings, A.G. v Jonathan Cape Ltd; Madzimbamuto v Lardner-Burke.

Common errors

This was a popular question that probably gives the student the most latitude (to shine as well as to fail). Weak answers did not explain the nature of conventions; did not evidence good understanding by discussing examples of areas regulated by convention (e.g. ministerial accountability); did not explain how a convention comes into existence, how it is enforced, and how it can change; did not examine the case for codification of conventions. 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, e.g. 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 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?

As always, a good answer will 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…**

focus on conventions in abstracto; compare the UK constitution to states with written documents (USA); display insufficient historical and legal knowledge about the UK; fail to produce a coherent argument.

**Student extract**

Without a major revolution in the UK it is often said that UK doesn't have a codified constitution to declare the principle of the constitution. Instead there are diverse source of the constitution such as an Act of Parliament, common law, constitutional convention and so on. It has been arguable whether UK should develop a codified constitution for simplicity. In this essay, I would focus on the role of convention would be the most compelling reason for not having one.

According to Dicey, convention is a set of practice tradition and habit of how the major player of the constitution operate the major function of the organ of the country, but they are not legally enforceable in the judiciary system. Meanwhile, Marshall & Moodie describe it as the rule that are binding upon the members of the major constitutions. Within the state Jennings set up the three part test on the constitutions to define what it exactly is. Firstly, what are the precedent of the practice and whether it is an Act of Parliament. Secondly, if they are not an Act of Parliament does the play self-consider it as a binding part when he performs the convention? Lastly, if he doesn't act in the way of the convention, there would be any scrutiny or sanction on him. Constitutional convention can be said as the rule of the game that the player in the UK should follow. Although it is not enforceable in the court, there would still be a political rather than legal solution on the breach of that convention.

**Comments on extract**

Typos and language errors aside, the student demonstrates the right approach to the question. She discusses sources of law, but focuses on conventions. The use of scholars is very helpful in stressing the role of conventions in the UK constitution. This answer received a mid-2:1.
Question 2
Discuss the claim that the rule of law is a complex and in some respects uncertain concept.

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 exam question!

A good answer to this question would…
set out the historical emergence of the rule of law (ROL) (Aristotle, Magna Carta); analyse its different versions (the ROL relates to the substance of the relationship between citizens and government, and deals with the processes through which that relationship is conducted). It recognises that the ROL 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 discusses the substantive/liberal concept as well: society must possess certain individual rights if it wishes to conform to the ROL. Discussion must be critical: if conceived in formal or procedural terms, does the ROL enable the wealthy and powerful to manipulate its forms to their own advantage? If conceived in substantive terms, does the ROL not amount to a complete social and political philosophy?

The ROL 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 the ROL 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
Assess whether the classic account of the doctrine of the supremacy of Parliament has any place in the modern United Kingdom.

General remarks
Parliamentary supremacy is a legal principle whose scope is uncertain. It is sometimes taken to mean that Parliament has the legal power to enact to enact any law whatsoever without external restraint. More prosaically, it just means that courts recognise an Act of Parliament as the highest form of law. In either case, there is a question mark over the extent to which late 19th century theory matches contemporary political practice.
Law cases, reports and other references the examiners would expect you to use
Factorotame; Thoburn; Jackson; Axa.

Common errors
The most common error was to turn this question into one solely about the relationship between EU law and parliamentary sovereignty. While that relationship is clearly a component, the question offers the candidates a much wider range to explore.

A good answer to this question would...
illustrate the scope of Parliament’s power. One school of thought claims that the political sovereignty of the electorate produces a ‘self-correcting’ constitution. Another line of reasoning places the rule of law above parliamentary supremacy: Parliament operates under the constraints of a common law constitution, a network of moral principles, policed by judges. This, however, does not answer the question about ultimate authority. Are the courts the guardian of the ultimate constitutional rule (or rule of recognition)? The main contemporary challenges to parliamentary supremacy come from the new constitutional settlement (devolution, EU, HRA, international law) and recent dicta from judges (Jackson; Axa).

Poor answers to this question...
focused exclusively on the relationship between Parliament and the EU; displayed an insufficient understanding of the rule of law; demonstrated a lack of knowledge of contemporary power-sharing practices (international law, human rights, devolution).

Question 4
Explain and evaluate the need for the reform 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; Bancoul.


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 (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 (Bancoul). What attempts have been made to reform the royal prerogative (e.g. CRGA 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.
Question 5

Discuss whether federalism in the UK would be so unbalanced as to be unworkable.

General remarks
Good answers will 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 in an effective answer are: the impact of devolution on parliamentary sovereignty; whether further devolution might be a stepping stone towards the break-up of the United Kingdom. Is federalism an option? What else could happen to the UK?

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

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 e.g. an English Parliament, a Grand Committee for England within the UK Parliament, and regional assemblies in England? What are the constitutional implications of ‘Britishness’? Students should mention academic literature (Brazier, Hadfield) to make the normative case for/against further devolution.

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

Question 6

Discuss the claim that the central concern of the European Union is ‘institutional balance’ between the different organs, rather than separation of powers.

General remarks
In their answer, candidates 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 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 EP 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
Although there were some very satisfactory and thoughtful attempts at this question, most students treated this question as a traditional question on separation of powers in the UK context. This, inevitably, resulted in the award of very low marks.

A good answer to this question would...
have contrasted the balance of powers at the EU with the traditional concept of separation of powers (SOP). SOP 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 SOP 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...
of which there far too many (!), discussed SOP in the UK context and failed to discuss the EU institutions altogether.

Student extract
The doctrine of separation of power is defined by Montesquieu in his book 'De L'Esprit de Lois' as one person should not exercise more than one power and that one organ of government should not confront or interfere the work of another.

Hilaire Barnett took the modern view that the three organs which are the legislature (making of bind rules), executives (developing national policy, administration, foreign affairs, and conduct of wars) and judiciary (applying the law and resolving civil disputes) should not exercise the function of another. There is a check and balance mechanism and there is a scope to scrutinize their functions.

[...]
Prior to the Constitutional Reform Act 2005, the judicial appointment was selected by Lord Chancellor. After the CRA 2005, Lord Chancellor was no longer the head of judiciary and does not in charged of judicial appointments.

Minister are required to be members of Parliament to be accountable to Parliament [...].

Comments on extract
If the question had been about separation of powers, this script would have crept into the 2:1 bracket overall. However, the question is about the way the EU institutions relate to each other, which the student did not discuss at all. This answer has to fail.

Question 7
Discuss the advantages of the standard of proportionality over 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; and others.
Common errors
A larger number of students limit 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, students 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, students 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 8

Explain and evaluate how the domestic courts have given effect to sections 3 and 4 of the Human Rights Act 1998.

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
To write about rights in the ECHR context; to discuss mainly or only rights cases before the HRA; not to analyse 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 DOI 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...
list the main provisions (ss.2, 3, 4, 6, 8, and 19) in the HRA without any discussion. 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 discussed counter-terrorism (which was the focus in last year’s exam).