Parliamentary law making

Question 01

Question 01 required a brief explanation of what is meant by the doctrine of Parliamentary supremacy, or sovereignty, and the purpose and use of Green and White papers. The explanation of Parliamentary supremacy or sovereignty required an explanation of both legal sovereignty – the highest form of law which must be applied by judges, and political sovereignty - that any law passed by Parliament is not binding on its successors. Many good answers were seen to this question by well-prepared students who were able to achieve high marks on this question by accurately explaining political and legal sovereignty and by clearly identifying the distinctions between Green and White Papers and including accurate examples of each. On the other hand weaker answers tended to ignore legal sovereignty and the different forms of papers could be explained in a very superficial way with few examples included.

Question 02

Question 02 required an explanation of the parliamentary process in both the House of Commons and the House of Lords in the making of an Act of Parliament. The process could have explained the legislative process in both Houses covering the order of readings and any differences in the process between the two Houses such as there being no Report stage in the Lords. In addition, a sound answer required an explanation of any two other points such as the introduction of Bills by a Minister or promoter, the different forms of bills (Private, Public and Private Members), the role of the House of Lords as a revising chamber, the ‘ping pong’ procedure and the effect of the Parliament Acts. To achieve maximum marks an answer needed to make distinctions in the processes between the two Houses. Most answers explained the process in the House of Commons reasonably accurately. However, fewer covered the process in the House of Lords and fewer still made any distinction between the two Houses. Many answers covered the ‘ping pong’ procedure and the effect of the Parliament Acts in addition to the process and most answers included reference to the royal assent which was unnecessary.

Question 03

For Question 03 a brief discussion of advantages and disadvantages of the parliamentary law-making procedure was required. For advantages points that could be discussed included:

- the democratic nature of the process,
- that there is open discussion, scrutiny, and possible amendment of proposals at several stages,
- there may be a law introduced after a detailed inquiry or Law Commission report,
- the government is giving effect to election manifesto commitments,
- that Parliamentary law is supreme over all other forms of law, and
- there is flexibility and speed if required.

For disadvantages points that could be discussed included:

- either delay or rushed ‘knee jerk’ legislation,
that debates, especially in the House of Commons, can take a political approach rather than a genuine consideration of an issue, or there may be a compromise,
that neither House is fully democratic,
the complexity of legislation and the need for statutory interpretation.

Most students were able to identify some relevant advantages and disadvantages and there were many who were able to discuss them thoroughly and achieve high marks.

**Delegated Legislation**

**Question 04**

In question 04 students were required to describe how statutory instruments are made and used. This description could have covered points such as:

- they are laws made by government ministers with delegated powers under the authority of a piece of primary legislation
- ministers will often consult experts before making it
- they are drafted by a government department and laid before Parliament before coming into force
- it completes the detail in the framework of a parent Act
- they can be used for updating, for example the annual changes to the minimum wage
- or used as commencement orders or for implementing EU directives.

Examples of the use of statutory instruments were credited.

There were some good answers but equally there were many weaker responses with many students unable to identify the range of uses of statutory instruments. Answers frequently outlined a number of examples of the same kind rather than considering the different uses. Many responses were simply too narrow in focus, perhaps suggesting that students were not fully prepared for a whole question on just one form of delegated legislation.

A few students were confused about the distinction between statutory instruments and other forms of delegated legislation.

**Question 05**

Question 05 required an explanation of judicial controls on delegated legislation. This could have covered an explanation of the meaning of judicial review including who can take action and where, of judicial review on grounds of procedural ultra vires, such as in *Agricultural Training Board v Aylesbury Mushrooms Ltd* (1972), judicial review on the grounds of substantive ultra vires such as in *Commissioners of Customs & Excise v Cure & Deely Ltd* 1962 on the grounds of unreasonableness such as in the case of *R (on the application of Rogers) v Swindon NHS Primary Care Trust* 2006 or on the grounds of a conflict with EU law or decisions of the European Court of Human Rights such as in *Vinter and others v UK* 2012. Answers to this question were generally detailed explaining a range of judicial controls with appropriate case examples. However, a good proportion of answers covered Parliamentary controls.
Question 06

Question 06 required a discussion of advantages of delegated legislation. The discussion could have included points such as

- that it saves parliamentary time allowing parliament to focus on major issues;
- that delegated legislation can be made quickly because it does not have to be discussed in either House and can be used in the case of emergency;
- that often it is made for technical reasons, to fill in the gaps in primary legislation and experts can be consulted for specific detail;
- it is flexible as different rules can be introduced in different areas (by-laws) as required by local need, or to deal with specific issues;
- that statutory instruments can complete the detail of a framework Act, or deal with regular amendments, such as making changes in the annual amounts of the minimum wage;
- there is some form of control by either Parliament or the judiciary;
- that some form of democracy is involved, as by-laws are made by local politicians and statutory instruments are made by, or in the name of, elected ministers.

Most students were able to discuss relevant advantages, but many did so without referring to examples which prevented them from achieving the highest marks.

Statutory Interpretation

Question 07

Question 07 required a brief explanation of the purposive approach to statutory interpretation and one rule of language including how both are used by judge. An explanation of the purposive approach could have included that it is a broad approach as judges are finding the intention of parliament, it is the EU approach to statutory interpretation and/or applying the Human Rights Act to legislation. Its use could have been illustrated in cases such as Jones v Tower Boot Co. or RCN v DHSS.

Any one of the rules of language could have been briefly explained. These are:

- the *ejusdem generis* rule where general words follow specific words and there must be at least two specific words to create a genus. The common case example is Powell v Kempton Park Racecourse 1897;
- the *noscitur* rule where the meaning of a word is to be found from its context. A case example is Inland Revenue v Frere (1964); or
- the *expressio* rule where the expression of one thing implies the exclusion of another. A case example is Inhabitants of Sedgely (1831).

Well prepared students were able to explain the purposive rule with at least one appropriate case example and there were many thorough and detailed responses. Explaining a rule of language, for some, proved more of a challenge because, to achieve the highest marks, students had to be able to show how their chosen rule worked and then illustrate it through an example. Many responses either lacked precision or were confused or did not relate the facts of a case to the approach or rule.
Question 08

Question 08 required an explanation of the literal rule and its use by judges. This could have covered an explanation of the rule when a judge will give a word or words their ordinary, natural, dictionary meaning, even if it results in an absurdity. This meaning will be given from the time the Act was passed and once the meaning is found, that word is then given the same meaning throughout the Act. This explanation would have been supported by the facts from at least one case example to show how the literal rule was used by the judge. Case examples commonly seen were Fisher v Bell (1961), Whiteley v Chappel (1868), LNER v Berriman (1946) and DPP v Cheeseman (1990) or any other relevant case.

There were many good responses to this question and many students managed to explain the literal rule and illustrate its use through at least one relevant case example. Some answers were briefer and case illustrations were not linked to the use of the rule.

Question 09

Question 09 required a brief discussion of advantages and disadvantages of the literal rule. For advantages points that could have been discussed were:

- that judges are applying the will of Parliament and it is democratic as unelected judges are not making law, merely applying law passed by Parliament;
- it is predictable as the same meaning is given every time a word is used in an Act; and
- the result is certain and lawyers can advise their clients on the likely outcome of a case.

For disadvantages points that could have been discussed were:

- rigidity – that judges have no discretion, so if a bad precedent or absurd result is made, then judges cannot provide justice in individual cases. This could have been illustrated by the outcomes of Berriman or Cheeseman;
- the rule cannot be used if words to be interpreted are not in an Act or if the words can have more than one meaning
- the rule assumes that the Act is perfectly written in the first place as with Fisher v Bell
- there is a possible need for Parliament to rectify an error following the result of the case as seen in Fisher v Bell
- there is an assumption that Parliament meant the result which the rule achieves.

Those students who dealt well with the previous question were also able discuss relevant advantages and disadvantages of the rule and to illustrate their point with a case example. Some students misunderstand certainty of the rule becoming confused with precedent and 'like cases decided alike'. There was also confusion about words with more than one meaning often referring to golden rule cases.
Judicial Precedent

Question 10

Question 10 required an outline of obiter dicta and the hierarchy of civil courts in the context of judicial precedent.

An outline of obiter required an outline of the meaning of obiter – other things said ‘by the way’, which is the non-binding part of the judge’s decision and which does not have to be followed by other judges, but that it may be persuasive. The support of a case example would have enhanced the outline.

An outline of the hierarchy of courts could have included coverage of the civil court structure showing which courts bind others and which courts are bound by others and the need for the hierarchy.

Stronger answers explained obiter well, though the basic explanation could be a little brief. However it was often linked to Brown and the obiter in that decision becoming the ratio in Wilson. Weaker answers showed some idea of the meaning of obiter, but there could be confusion when it was illustrated through a case example.

The court hierarchy part of answers was often incorrect with many answers confusing civil and criminal courts. Many students failed to recognise that the question required an outline of the hierarchy of civil courts and instead referred to magistrates and crown courts and the criminal division of the Court of Appeal. Where it was correct it wasn’t always discussed in the context of judicial precedent.

Question 11

Question 11 required an explanation of the powers of the Court of Appeal when considering an earlier precedent of the Supreme Court and an earlier precedent of the Court of Appeal itself. This could have included:

- an explanation of the powers of Court of Appeal when considering a Supreme Court precedent which has the Supreme Court at the top of the hierarchy and, because of the principle of stare decisis, all courts below Supreme Court have to follow their decisions. In addition, the general rule is that the Court of Appeal should follow its own previous decisions.
- The Court of Appeal can depart from a previous decision of itself if the exceptions in Young v Bristol Aeroplane 1944 apply. These are when an earlier decision conflicts with a later Supreme Court decision, when previous decision was made per incuriam, or when there are two conflicting previous Court of Appeal decisions – for example Parmenter and Spratt and Savage. The court can, in this case, choose which decision to follow.
- If the Court of Appeal can find a distinguishing feature they do not have to follow the Supreme Court precedent. A case example is Brown and Wilson.
- The Court of Appeal can disapprove of one of its previous decisions. The Criminal Division can depart from one of its previous decisions if the interests of justice of the defendant require it.
Some students seemed confused by this question. Those who read it carefully were usually able to work out what was required, but a number of students appeared to read the first bullet point as requiring a discussion of the powers of the Supreme Court including the Practice Statement and their power of overruling. This did not receive credit.

However many students accurately explained how the Court of Appeal has to deal with a decision of the Supreme Court and with one of its own earlier decisions and how it may be able to avoid following those decisions through the rule in *Young* or through distinguishing. However many students incorrectly used *Balfour* and *Merritt* as examples of distinguishing the Supreme Court’s decisions when they could have referred to *Brown* and *Wilson*. Many students incorrectly thought that the Court of Appeal can use the Practice Statement quoting cases such as *Anderton* and *Shivpuri*. Some students were able to accurately explain the concept of disapproving a previous decision.

**Question 12**

Question 12 required a discussion of disadvantages of judicial precedent. Points that could have been made were that:

- it is undemocratic as the role of a judge is said to be to apply the law passed by Parliament rather than create law
- a case has to come to court to allow judges to create precedent; case has to reach higher courts in order to create valid precedent; this may be a lottery depending on funding issues and lawyer’s advice
- there can be more than one opinion in the appeal courts; it is possible that multiple reasons for decision can lead to confusion for future judges and lawyers;
- there may be difficulty in identifying the ratio of a decision;
- the large number of past precedents and the difficulty in finding authoritative law reports;
- precedent creates retrospective decisions such as in *R v R*
- there is uncertainty of a result until a final decision has been made
- that precedent of a higher court is rigid – it may be incorrect but it needs a new precedent to be made or legislation before it can be corrected.

This question presented little difficulty for well-prepared students and it was often well answered with points supported by relevant case illustration. Weaker answers could become confused with statutory interpretation issues.

**Civil courts and ADR**

**Question 13**

Question 13 required an outline of Conciliation and Negotiation in the context of Alternative Dispute Resolution.

For Conciliation the outline could have covered who conducts the process and its form, the type of cases dealt with (it is likely to be employment or commercial), and a successful outcome is an agreement which is enforceable if the parties formally agree; however there is no obligation on parties to reach an agreement.
For negotiation the outline could have covered who carries out the negotiation – the parties, their lawyers, insurance companies or unqualified representatives; the possible forms of negotiation – face to face, using telephone, email or conference calls; the types of dispute dealt with using this method; the process and, if a successful outcome is reached, that there is an agreement which is enforceable if the parties formally agree; however, there is no obligation on the parties to reach an agreement.

This question was generally well answered with many students able to accurately outline both forms of dispute resolution. The only area of difficulty or confusion appeared to be in the resolution of disputes.

**Question 14**

Question 14 required a description of how tribunals are used to resolve civil disputes. This could have covered points such as:

- the composition of the panel – usually a legally qualified chair or judge and panel of lay persons (with some background in area of dispute)
- how tribunals can come about – statutory, administrative or disciplinary, with possible examples of cases heard by each form
- the tier structure – First and Upper Tiers with possible reference to further appeals through the civil justice system
- the nature of hearings – formal hearing, evidence may be given on oath, possible use of lawyers/representatives, reasons given for decision
- the potential outcome - a legally enforceable award
- the possibility of an appeal to an appeal tribunal and then to the courts, based on legal reasons.

Most students were able to describe some aspects of tribunals, though some responses were relatively narrow in range, concentrating on one aspect such as types of tribunals or the structure of the system, often in considerable detail, but saying relatively little about other points.

**Question 15**

Question 15 required a brief discussion of advantages and disadvantages of dispute resolution by tribunals. Points that could have been made for advantages were:

- their speed in comparison with court based resolution
- their informality in comparison with court based resolution
- the likely expertise of the panel – a qualified lawyer or judge will be in charge of the proceedings and other members of the panel are likely to have specialist knowledge of the area of the dispute
- legal reasons for decisions have to be given and recorded
- proceedings are at a lower cost compared with civil courts, perhaps because of greater informality of proceedings and lesser need for legal representation
- they provide a public forum for airing a dispute, as compared with negotiation, mediation or conciliation.

Points that could have been made for disadvantages were:

- possible influence of chair/judge over the other panel members;
• the cost of tribunal hearing due to initial fee (especially in employment tribunals); the need to pay for lawyers, if used; the lack of public/state funding; this may lead to an imbalance between parties where one party can afford a lawyer and the other cannot;
• oral hearings are formal compared with other methods of ADR;
• appeals are only available against legal reasons for decisions; there are high costs of taking an appeal as lawyers likely to be required;
• oral hearings and appeals may be reported, which may lead to adverse publicity.

Those that answered the previous question well were generally able to discuss relevant advantages and disadvantages of tribunals.

Criminal courts and lay people

Question 16

Question 16 required a description of the work of lay magistrates.

This could have included matters such as:

• deciding initial bail and custody issues
• running the trial of summary or either way cases which would include hearing evidence, deciding guilt or innocence, deciding a sentence for those found guilty and using advice of legal adviser
• sending cases to Crown Court for trial for indictable and either way offences, or committing for sentence in either way guilty pleas
• sitting on appeals at Crown Court, or on a specialist panel in the Youth Court, or sitting in Family Court cases, or sitting in Licensing appeal cases
• issuing search and/or arrest warrants or extensions of custody.

Generally this answer was well done. However, many students introduced irrelevant material on the selection, appointment or training of lay magistrates or discussed at inordinate length the role of the Justices Clerk. In addition there was reluctance for a significant number of students to describe what actually goes on in the court room and to state the most basic of facts including that the magistrates have to find defendant guilty or not guilty.

Question 17

Question 17 required a description of the work of a jury in a Crown Court trial. This could have included matter such as:

• their general role as the decider of facts and the verdict,
• that in court they listen to the evidence, cross examination and summing up by prosecution and defence,
• they listen to the judge’s summing up of the evidence and any legal directions,
• they have a secret discussion in the jury room, where they have to reach initially a unanimous verdict, but after a certain time the judge can direct them to reach a majority verdict,
• and finally there is the announcement of the verdict in open court but there is no role in sentencing.
Again there were many good answers to this question but as with the previous question there was often irrelevant material included on the selection of jurors. In addition some answers discussed at excessive length the problems that might occur in the jury room or what would happen if the judge tried to influence them. What was actually required was a straightforward description of what jurors actually do during the trial itself, in the jury room and when they return to court with their verdict.

**Question 18**

Question 18 required a brief discussion of advantages and disadvantages of lay persons deciding criminal cases.

For advantages points that could have been made included:

- there is public confidence in trial by peers as it is a long established tradition, it eliminates bias and there is a reduction of professional involvement,
- it is a fair system of open justice,
- there are a limited number of appeals from jury trials,
- it is relatively cheap compared to having to appoint a considerable number of judges, and
- it is generally representative of the community in terms of gender and ethnicity.

For disadvantages points that could have been made included:

- that sometimes perverse verdicts can be made by juries such as in *Ponting* or *Kronlid* or there may be inconsistent sentencing by lay magistrates;
- there may be feelings of possible bias towards police or prosecution such as in *R v Bingham Justices, ex parte Jowitt*;
- the make-up of the panel of magistrates or selection issues for a jury may mean they are not truly representative;
- there may be suggestions of influence by the legal adviser to lay magistrates or, in the case of a jury by the judge or by other members of the jury;
- there may be media pressure on the jury, and
- in certain cases the jury may find issues to be too complex for them to fully understand.

Generally this answer was well done and students usually supported points with case and other evidence.

There was some evidence of more students answering questions on the topics of the legal profession and the judiciary and some brief comments follow the requirements of the questions.
The legal profession and funding

Question 19

Question 19 required an explanation of how barristers are trained and qualify in order to practice. This could have covered an explanation of academic training including degree level entry, and the CPE or GDL for non-law degree graduates. For the vocational stages there is enrolling with the Bar Council and Inns of Court, completion of the BVC/BPTC, residential training weekends as an alternative to dining, pupillage, a call to the Bar and finding a place in chambers. This question appeared to pose few problems for well-prepared students.

Question 20

Question 20 required an outline of where Helen could obtain legal advice for a claim in negligence and how such a claim could be paid for.

Advice on such a claim could be obtained from sources such as solicitors or barristers, a Community Legal Service or law centre, the CAB or other charity, a claims company, through the internet or because of membership of a trade union, insurance company or motoring organisation. A claim could be paid for by private funding, through a no win no fee conditional fees arrangement, by an insurance policy or through union membership or pro bono. Credit was given for any other credible source of funding and also for recognition that Legal Help is not available for negligence claims. Most students who attempted this question had some understanding both of where Helen could obtain legal advice and how it could be paid for. Weaker responses however, tended to be generalised and lacking in precision.

Question 21

Question 21 required a comparison and contrast between the roles of defence solicitors and defence barristers in a Crown Court criminal case.

In pre-trial matters this could have covered the initial instruction of a barrister by a solicitor, the researching and obtaining evidence by a solicitor rather than by a barrister. There might be contact with the CPS over possible charges, finding witnesses and any evidence to be used at the trial; and preliminary hearings. These preliminary hearings could cover matters such as consideration of bail or custody, legal representation and referral to Crown Court and may be covered by a solicitor though they could be covered by a barrister.

During the trial itself the advocacy and examination and cross examination of witnesses will usually be performed by a barrister though this could also be covered by solicitors with extended rights of audience; any advice and conduct of a possible appeal could be carried out by either or both a solicitor or barrister. For the answer to be awarded sound there had to be explicit comparisons and contrasts between the roles.

Even though the style of this question should have been familiar to those who had looked at past questions from previous exam series, it seemed to present a challenge even to well-prepared students. Most answers were lacking in development and although they identified some of the roles of barristers and solicitors, they dealt less confidently with comparative aspects.
The judiciary

Question 22

Question 22 required a description of the work of a judge in a criminal case in the Crown Court. This could have included dealing with pre-trial matters such as plea, directions, venue, questions of bail or custody. At trial there are matters such as overseeing the swearing in of the jury and keeping order during the hearing, ruling on questions of law and keeping notes of evidence; various matters relating to the jury such as directing the jury on the relevant law and evidence as well as the burden and standard of proof, answering questions from the jury during their deliberations and deciding whether to accept a unanimous or majority verdict. Finally a judge has to pass a sentence following a guilty verdict or plea and possibly grant leave to appeal.

There were some good answers to this question, and where students had clearly been taught this topic they answered this question well. However the main issue seemed to be some confusion over the role of a judge in civil and criminal matters.

Question 23

Question 23 required an explanation of how judges are selected and appointed for office. For the selection of judges this could have covered matters such as the initial eligibility of students, advertisements for available posts, applications and testing of students, that the procedure is overseen by the Judicial Appointments Commission and in the case of higher courts the possible promotion of students to fill vacancies. Even well prepared students struggled a little with this question. Selection was generally answered reasonably well, though with varying amounts of precision, but appointment was dealt with rather poorly.

For appointment this could have covered the procedures for both inferior and superior level judges. For inferior judges, appointment is by the Minister of Justice and Lord Chancellor after recommendation by the Judicial Appointments Commission. For superior judges appointment is by Queen, after recommendation by the Judicial Appointments Commission.

Question 24

Question 24 required a brief discussion of advantages and disadvantages of the selection and appointment procedure for judges.

For advantages points that could have been made were:

- knowledge of law and court rules and procedure
- the ‘new’ selection methods now provide a choice of best applicants
- the Judicial Appointments Commission is independent of government, Parliament and lawyer’s organisations.

For disadvantages points that could have been made were:

- the best lawyers may not apply
- there is a predominance of barristers applying, especially for higher level posts
- the judiciary is not representative of gender, racial, educational mix of the country, especially at the higher levels
judges may not be experienced or knowledgeable in areas of law they are required to deal with in court and there is limited training given to appointees.

Answers to this question tended to be rather generalised, particularly by those who lacked precision in their answer to the previous question.
Mark Ranges and Award of Grades

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