

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 12 – PUBLIC LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Section A (essay questions)

The better candidates analysed many of the key issues well, analysing and evaluating the topics in a systematic manner rather than simply writing out what they knew. In this regard, it is important to read the command word carefully. If a question requires critical evaluation, candidates cannot expect to obtain a good mark if there is little in the way of critical evaluation.

Candidates with lower marks generally wrote descriptive essays with little analysis or evaluation. As emphasised in the previous paragraph, this is not sufficient to obtain a high mark.

Section B (problem questions)

The better candidates were able to identify the majority of issues raised by the question and applied the law to the facts systematically, reaching well-reasoned conclusions. The weaker candidates often found it difficult to identify the issues and, even when they did, found it difficult to apply the law to the facts consistently and accurately; their answers also tended to be disorganised. A systematic and structured approach to answering problem questions is essential.

A significant fault on the part of the weaker candidates was poor use of the statute book. Two of the problem questions were very much based on applying statutory provisions to the facts.

Although the statutes in question were in candidates' statute books, some candidates did not refer to specific provisions and provided very general answers.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was a question in two parts on the separation of powers. Part (a) required candidates to describe the principle, while part (b) required candidates to critically evaluate a prominent academic's views regarding the extent to which it is a feature of the UK constitution. It was a very popular question. The candidates were required to define the principle and to analyse it with reference to the statement by the academic. This question therefore provided a reliable test of the candidates' understanding of a fundamental constitutional principle.

Question 2

This question asked candidates to critically evaluate the concept of retained EU law. No candidates answered this question. This is not entirely surprising as retained EU law is a novel category of UK law arising out of the UK's exit from the EU and so has not been examined previously. It is likely, though, to feature in future exams due to its significance in the UK legal system and government plans to amend its operation.

Question 3

This was a question in three parts, each part requiring candidates to analyse a key judicial review concept – (a) irrationality, (b) the rule against bias, and (c) legitimate expectation. While judicial review usually features as a problem question, understanding and analysis of the main concepts can be validly and reliably tested by way of essay question, and this question provided an effective test of the candidates' understanding of these concepts.

Question 4

This question required candidates to critically evaluate the effectiveness of the Human Rights Act 1998 in safeguarding the rule of law in the UK. The question required candidates to define the rule of law and to set out the relevant provisions of the 1998 Act; it also required case analysis. The question gave the better candidates the opportunity to demonstrate their analytical and evaluative skills and knowledge of case law.

Section B

Question 1

This was a problem question concerning parliamentary supremacy and whether it would be possible to entrench legislation. This style of question has been used successfully in the past, but on this occasion no candidates answered it.

Question 2

This was a question in three parts covering fundamental constitutional principles such as devolution, defamation and parliamentary privilege, and ministerial responsibility. Only one candidate answered this question. It is possible candidates may tend to avoid problem questions divided into more than two parts. However, the question covered core constitutional issues so there is no reason to doubt its appropriateness.

Question 3

This was a very popular question. It required candidates to analyse police powers, including the powers to search and arrest individuals, prohibit a person being informed of an arrest, and search property. It provided a sound test of the candidates’ ability to identify issues, apply specific statutory provisions to the facts, analyse case law and solve problems.

Question 4

This was a question in two parts. Part (a) required candidates to analyse police powers to control marches and part (b) required candidates to analyse and apply the strict liability offence created by the Contempt of Court Act 1981. Both parts provided a reliable test of the candidates’ ability to identify issues, apply the law to the facts and solve problems.

SUGGESTED POINTS FOR RESPONSE
LEVEL 6 – UNIT 12 – PUBLIC LAW

Question Number	Suggested Points for Responses	Max Marks
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Reference to the three branches of government • Functions and personnel of the three branches should be kept separate • Check and balances - separation needed as safeguard against arbitrary government <p>Responses could include:</p> <ul style="list-style-type: none"> • Historical background - Montesquieu 	6
1(b)	<p>Responses should include:</p> <p>(a) Executive/legislature</p> <ul style="list-style-type: none"> • How Parliament can hold the government to account; e.g. votes of no confidence, parliamentary questions/debates, select committees. • Areas of overlap, in particular the executive’s dominance of Parliament <p>(ii) Executive and judiciary:</p> <ul style="list-style-type: none"> • Constitutional Reform Act 2005 (CRA): judicial appointments • Other safeguards; e.g. security of tenure/constitutional conventions <p>(iii) Judiciary and legislature:</p> <ul style="list-style-type: none"> • CRA: removed Law Lords from the House of Lords and created Supreme Court 	19



	<ul style="list-style-type: none"> • Judicial law-making through case law <p>Responses could include:</p> <ul style="list-style-type: none"> • Executive/legislature <ul style="list-style-type: none"> ○ Risk of politicisation of judiciary ○ Quasi-judicial functions of ministers • Judiciary/legislature: <ul style="list-style-type: none"> ○ Limited powers/self-restraint of judiciary; e.g. no power to strike down statutes 	
Question 1 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
2	<p>Responses should include:</p> <ul style="list-style-type: none"> • Need to ensure EU law applicable in the UK on IP completion day remained in force to avoid a legal vacuum • Retained EU law: ‘snapshot’ of EU law applying in UK on IP completion day • Categories of retained EU law <ul style="list-style-type: none"> ○ EU-derived domestic legislation ○ Direct EU legislation ○ Rights and powers available in UK law prior to IP completion day • Explanation of retained EU case law and extent to which it is binding on UK courts • Exclusion of directly effective rights arising under directives, <u>Francovich</u> damages and actions based on retained general principles • Power for ministers to adopt statutory instruments correcting ‘deficiencies’ in retained EU law, e.g. to correct inappropriate references to EU institutions <p>Responses could include:</p> <ul style="list-style-type: none"> • Some EU law, e.g. relating to free movement, repealed prior to IP completion day • Limited supremacy of retained EU law over pre-IP completion day UK legislation • Regulations governing departures from retained EU case law 	25
Question 2 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Irrationality as one of the three traditional grounds of judicial review (<u>CCSU</u>) • <u>Wednesbury</u> unreasonableness: decision so unreasonable that no reasonable authority could ever have come to it • <u>CCSU</u>: decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person could have arrived at it • Analysis of case law on irrationality <p>Responses could include:</p> <ul style="list-style-type: none"> • Comparison of irrationality with proportionality • Whether irrationality could result in ‘merits’ review 	7
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • the right to be heard by an unbiased tribunal as aspect of right to fair hearing/natural justice • Automatic disqualification: Actual bias/ direct interest, pecuniary (<u>Dimes v Grand Junction Canal</u> (1852)) and non-pecuniary (<u>ex parte Pinochet Ugarte</u> (1999)) • Non-automatic disqualification: appropriate test whether circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased (e.g. <u>Porter v Magill</u> (2002)) <p>Responses could include:</p> <ul style="list-style-type: none"> • Applicability of test for bias to administrative proceedings 	8
3(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Rationale for principle: If a public body has stated that it will act in a particular way, then in principle it should keep its implied promise (<u>R v North and East Devon Health Authority, ex p. Coughlan</u> (2001)) • Categories: <ul style="list-style-type: none"> ○ legitimate expectation - change of policy: the public authority need only have regard to its previous policy/ representation: court’s task is merely to review whether the decision is rational ○ procedural legitimate expectation: the promise or practice creates a legitimate expectation of, for example, being consulted before an adverse decision is made ○ Substantive legitimate expectation: as the promise or practice has created a legitimate expectation of a substantive benefit, the court will determine whether frustrating that expectation is an abuse of power. In deciding this, the court will balance the requirements of fairness against any overriding interest argued for the change of policy. • Category 3 only likely to arise where the public body concerned had made a specific undertaking, directed at a particular 	10

	<p>individual or defined group of people, that the relevant policy would be maintained (<u>R v Niazi (2008)</u>).</p> <p>Responses could include:</p> <ul style="list-style-type: none"> • Public bodies will be expected by the courts to follow policies unless they can demonstrate good reasons for departing from it, even where applicant unaware of policy (<u>Mandalia v Home Office (2015)</u>). 	
Question 3 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
4	<p>Responses should include:</p> <ul style="list-style-type: none"> • Need to incorporate European Convention on Human Rights into UK legal system • Key Convention rights • Definition of the rule of law (Dicey) <ul style="list-style-type: none"> ○ An absence of arbitrary power; ○ Equality before the law; and ○ Basic constitutional rights of individuals derived from judicial decisions • Modern definitions of the rule of law; e.g. Lord Bingham's version: emphasis on human rights • Section 2: decisions of ECtHR persuasive; e.g. <u>Ullah</u> principle • Section 3: interpretative obligation on courts; e.g. <u>Ghaidan v Godin-Mendoza (2004)</u> • Section 4: declarations of incompatibility; e.g. <u>Bellinger v Bellinger (2003)</u>, <u>A v Home Secretary (2005)</u>, but incompatible legislation remains in force • Section 6: unlawful for public authorities to act incompatibly with Convention rights <p>Responses could include:</p> <ul style="list-style-type: none"> • Section 7: Only victims may invoke Convention rights in legal proceedings • independent review of the HRA set up by government 	25
Question 4 Total:		25 marks

SECTION B

Question Number	Suggested Points for Responses	Max Marks
1	<p>Responses should include:</p> <ul style="list-style-type: none"> • Dicey’s definition of parliamentary sovereignty, including <ul style="list-style-type: none"> ○ Parliament’s unlimited legislative competence ○ No person/body can question an Act of Parliament • Enrolled Act rule: Courts will not normally scrutinise validity of Acts of Parliament (<u>Pickin v BRB (1974)</u>); cf <u>Jackson v Attorney-General (2005)</u>) • Express repeal - meaning • Definition of implied repeal: Where two statutes conflict, the latter will prevail (<u>Ellen Street Estates v Minister of Health (1934)</u>) <ul style="list-style-type: none"> ○ Qualification of doctrine in relation to ‘constitutional statutes’ (<u>Thoburn v Sunderland City Council (2002)</u>) ○ Analysis of constitutional statutes: statute that significantly affects fundamental rights and duties or the overarching relation between citizen and state • Conclusion: Whether Constitution Act 2021 repealed the inconsistent provisions of HLRA 2019 • Examples of requirements in Act making it more difficult to amend or repeal that Act; e.g. s 4 Statute of Westminster 1931 • Manner and form/contingent entrenchment arguments only upheld in relation to non-sovereign legislatures; e.g. <u>AG for NSW v Trethowan (1932)</u> • Whether Parliament can redefine itself/ alter Rules for defining Acts - see Parliament Acts • Constitutional revolution - acceptance by courts of political change; e.g. Bill of Rights 1689, European Communities Act 1972 • Conclusion: Whether courts would uphold requirement for 70% majority <p>Responses could include:</p> <ul style="list-style-type: none"> • Obiter in <u>Jackson v Attorney-General (2005)</u> • Potential political consequences 	25
Question 1 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
2a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • ‘Reserved powers’ model for Wales - all policy areas are assumed to be devolved unless specified as remaining with the UK Government • Senedd Cymru can legislate on tourism as not a reserved matter • UK Parliament remains sovereign – can legislate on devolved matter 	7

	<ul style="list-style-type: none"> • Sewel Convention – UK Parliament should not normally legislate on devolved issue without devolved legislature’s consent, but not legally binding (<u>Miller (No. 1) (2017)</u>) 	
2(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Zoe’s statement <ul style="list-style-type: none"> ○ Elements of defamation ○ Absolute privilege for proceedings in Parliament • Newspapers <ul style="list-style-type: none"> ○ Qualified privilege for fair and accurate reports of parliamentary proceedings unless malice 	6
2(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Zoe <ul style="list-style-type: none"> ○ Definition of individual ministerial responsibility as constitutional convention ○ Examples of personal conduct (e.g. Profumo scandal) and departmental accountability (e.g. <i>Crichel Down</i> affair) ○ Application to the facts: no legal sanction but resignation/dismissal probable • Rohit <ul style="list-style-type: none"> ○ Definition of collective Cabinet responsibility as constitutional convention ○ Examples/exceptions; e.g. EU referendums/Iain Duncan Smith’s-Robin Cook’s resignation ○ Application to the facts: no legal sanction but resignation/dismissal probable <p>Responses could include:</p> <ul style="list-style-type: none"> • Whether duty of confidentiality arises (<u>Attorney-General v Jonathan Cape Ltd (1976)</u>) 	12
Question 2 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
3	<p>Responses should include:</p> <ul style="list-style-type: none"> • Stop and Search <ul style="list-style-type: none"> ○ Power to stop and search for stolen articles in public place (s 1(2) PACE) ○ Reasonable grounds for suspicion (s 1(3)) ○ Conduct of search (s 2(2) and (3); e.g. officer’s name and station, the object of the proposed search and the grounds on which it is made ○ Reasonable grounds exist, but conduct of search unlawful • Arrest <ul style="list-style-type: none"> ○ Power of arrest – s 24(3) PACE: reasonable grounds for suspecting an offence has been committed ○ Arrest necessary – s 24(5) PACE - to allow prompt and effective investigation of the offence (s 24(5)(e)) 	25

	<ul style="list-style-type: none"> ○ Manner of arrest – fact of arrest and grounds, even if obvious (s 28) ○ PC Pearson does not state fact and grounds of arrest adequately ● Detention at police station <ul style="list-style-type: none"> ○ Arrest lawful once s 28(2) and (4) complied with ○ Reason given for Jack’s ongoing detention does not comply with s 37 – whether necessary to enable police to decide if there is sufficient evidence to charge him ○ Detention reviews not carried out every six hours (s 40) ● Refusal to inform employer <ul style="list-style-type: none"> ○ Section 56 – Jack entitled to have someone told that he has been arrested and detained at police station ○ Police may delay Jack’s right for up to 36 hours if certain conditions satisfied: <ul style="list-style-type: none"> - indictable offence? Yes - burglary - authorised by inspector or above? No - reasonable grounds for believing that telling named person of arrest will lead to alerting of other suspects who have not yet been arrested (s 56(5)). Not satisfied ● Search of flat <ul style="list-style-type: none"> ○ Power to enter premises occupied by person arrested for indictable offence subject to written authorisation by inspector or above (s 18) ○ Reasonable grounds for suspicion that there is evidence in premises relating to that offence or to connected/similar indictable offence ○ Search of flat unlawful: No written authorisation nor reasonable grounds for suspicion that evidence is the premises <p>Responses could include:</p> <ul style="list-style-type: none"> ● Section 117: Search of Jack unlawful, so police cannot use reasonable force. ● Police complied with s 30: Jack taken to police station promptly after arrest 	
Question 3 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
4(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> ● The March <ul style="list-style-type: none"> ○ Section 12 POA 1986 – Senior police officer may give directions imposing conditions if he reasonably believes that public procession will cause serious public disorder/damage/disruption or has intimidatory purpose. ○ Grounds for reasonable belief – Clash between demonstrators and President’s supporters ○ Use of reasonable force permissible 	13

	<ul style="list-style-type: none"> • The Meeting <ul style="list-style-type: none"> ○ Section 14 POA – powers arise if meeting a ‘public assembly’ (s 16) ○ Senior police officer may give directions imposing conditions as to maximum duration if he reasonably believes that assembly will cause serious public disorder/damage/disruption or has intimidatory purpose ○ Grounds for reasonable belief – threats from embassy staff ○ PC Bradley – not the most senior officer present <p>Responses could include:</p> <ul style="list-style-type: none"> • Breach of the peace – whether police have power to disperse meeting due to possible breach of the peace (<u>Bibby v Chief Constable of Essex Police (2001)</u>) 	
4(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Section 1 Contempt of Court Act 1981 – ‘strict liability rule’: Elements of the rule <ul style="list-style-type: none"> ○ Publication: s.2(1) – clearly satisfied ○ Substantial risk’ that the course of justice will be ‘seriously impeded or prejudiced’: s.2(2) – probably satisfied ○ Proceedings must be active: s.2(3) and (4), Schedule 1 - clearly satisfied • Defences: <ul style="list-style-type: none"> ○ Innocent publication: s.3 – not applicable on the facts ○ Contemporary report of legal proceedings: s.4 – not applicable on the facts • Discussion of public affairs: Publication made as part of a discussion in good faith of public affairs does not infringe the strict liability rule if risk of prejudice is merely incidental: s.5 (<u>A-G v English (1983)</u>) – not applicable on the facts <p>Responses could include:</p> <ul style="list-style-type: none"> • Comparison with common law contempt of court 	12
Question 4 Total:		25 marks