

CONSTITUTIONAL LAW

MODEL EXAM



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IRAC method of completing exams

- Issues** - Outline the issues that you are going to discuss.
- Rules** - Define the legal rules that are relevant to the question.
- Application** - Apply the legal rules to the facts of the question (this is the hard part!).
- Conclusion** - Tie things up, usually in the form of an advice to your hypothetical client.

Always use your reading time wisely to **PLAN YOUR ANSWER** before writing. This is of utmost importance as it will help you clarify your thoughts and ensure that you avoid following desperate exam strategies that unprepared students commonly resort to, such as:

- i) 'the kitchen sink' i.e. spilling all of your knowledge that is vaguely related to the topic onto the exam paper and hoping for the best.
- ii) 'the garden path' i.e. going off on an irrelevant tangent

Remember that the **APPLICATION IS THE MOST IMPORTANT SECTION** of your answer and should take up the bulk of your time. The actual conclusions you reach are often superfluous. Rather, your marker will be most interested in *how you arrived* at your conclusion.

Question One

The UK Government, recently elected by a majority of the public, wish to pass an Act of Parliament with the effect of:

- a). abolishing the House of Lords altogether;
- b). extending the life of a Parliament to 30 years; and
- c). requiring a two-thirds majority of the House of Commons in order to amend the Act in future.

The House of Lords opposes this measure, but the Government placed the terms of the Bill in their manifesto.

With reference to cases and statute and international law, could the Government pass these measures, and if so, would they be valid? What constitutional issues are raised by the provisions?

Answer

a). The Parliament Act was passed in 1911 in order to restrict the powers of the House of House of Lords. This gave the House of Commons, to some extent, the power to restrict, where necessary, the powers of the House of Lords in relation to the passage of some types of measure. If the Government wishes to pass the Act, they must usually obtain the assent of Parliament in the Diceyan sense: A majority of the House of Commons, a majority of the House of Lords and the Royal Assent. In theory without these no Bill can become law no matter how much a Government may desire it. Sections 1 and 2 of the 1911 Act, as amended in 1949, changed this, allowing a Bill to become law without the approval of the Lords.

Evidently it would be constitutionally unsafe for the House of Commons to be able to remove its brother House. It would be undemocratic. There is evidence that the Commons could abolish the Lords by using the procedure laid down by the Parliament Acts. According to this theory, the Commons would be required to pass the measure and the Queen to Assent to it. Once the Lords have rejected it the Bill would become law. The Commons has used this privilege seven times since 1911, four of which (including the Parliament Act (1949)) were Bills of a constitutional nature, involving: the disestablishment of the Anglican

Church in Wales, the independence of Ireland, the powers of the House of Lords and elections to the European Parliament. On this basis, it is likely that a Government with a clear majority in the Commons will succeed with its wishes. In *Jackson and others v. Her Majesty's Attorney General* (2005) the House of Lords held that the Act itself could be amended without the approval of the Lords. The law would be legally valid and primary, so neither the law nor the procedure of its enactment could be questioned in a court. Lord Bingham even went so far as to say that the Commons could amend words in the Act and delete them without Lords approval. Following this logic, it is clear that it is within the power of the Commons to outright abolish the Lords. In effect, this would not make much difference to the way things are now. In addition to the situations where the Act was used, both the Commons and the Government have threatened its use on a number of occasions in order to ensure the Lords comply. This happened successfully during the passage of the Terrorism Bill in 2005. The Government also has the power to "swamp" the Lords with peers that will agree with the Commons. Thus the Lords has been gradually emasculated over the years and abolition, it may be argued, would not effect an important constitutional change given the fact that the Lords is powerless enough.

There is an argument that the law would not be valid. Although there is no statutory provision which forbids the abolition of the House of Lords, in theory the Diceyan definition of Parliament requires the consent of the Lords as well as the Commons for a parliamentary law to be passed. Necessarily any amendment to the Parliament Act (1911) without Lords approval would not be valid as a statute because the Lords do not approve. The important principle is the Diceyan idea that no Parliament can bind its successors. The Lords, as it was in 1911, assented to the 1911 Act; but the Lords *today* do not and the previous Act carries no force in the future as each House is assumed to be coequal by this theory. Thus the Lords could ignore the Parliament Acts. The problem with this idea, however, is that it would inevitably lead to the Commons asserting its sovereignty

whilst the Lords assert coequality. Thus nothing would be achieved without complete agreement.

Question Two

Everpool Local Council has recently been elected and has a general policy of anti-racism. They actively attempt to tackle racism in Everpool and direct a large amount of resources and community attention to this end.

Fred, a rising professional tennis player, lives in Everpool and trains at the local training ground which is owned by the council. He has been invited by the Government of Shooland to play a charity tennis match against their number one player. Shooland has a reputation for institutionalised racism and their Government supports it.

Everpool do not wish for Fred to go to Shooland because the policies of the Shooland Government conflict with their policy in Everpool. In a press conference, Fred signified that he might go to Shooland. Subsequently, Everpool decide to ban Fred from using the training ground.

Everpool Local Council, in furtherance of their anti-racism policy, decided later to ban James, the leader of a local political party, the Anti-Free Speech Action League, from giving their monthly address at the local Town Hall. Some members of the party advocate racist discrimination, but James chooses not to, and has never publicly advocated it in his fifteen years of leadership.....

Answer

Rule 54.1 of the Civil Procedure Rules states that a person can apply for a judicial review of an enactment or a decision in relation to the exercise of a public function. The applicant must have a sufficient interest in the issue and, where human rights are at issue, he must be a victim of the decision (section 7 of the Human Rights Act (1998)). These requirements are likely to be satisfied by both Fred and James because it is their personal rights that are affected by the banning orders. The three grounds for judicial review, as clarified by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* (1984), are illegality, procedural impropriety and irrationality.

Fred:

Fred may choose to apply on the ground of illegality. The reason would be that the Council have taken irrelevant considerations into account in deciding to ban Fred from the training ground. For example, Fred's decision that he "might" go to Shooland and their policy of anti-racism, have been taken into account. In *Bromley London Borough Council v. Greater London Council* (1983) a council was held to have erred in making a decision based on party politics. In *Roberts v. Hopwood* (1925) a council had taken account of an irrelevant consideration when it fixed equal wages for all employees on socialist grounds without any consideration for the type of work that was carried out. In *R. v. Somerset County Council ex parte Fewings* (1995) moral grounds were held to be irrational in deciding to ban stag hunting. Everpool Local Council have based their decision on equally political motivations: the policy of fighting racism. This is irrelevant to the purpose Fred had of playing tennis in Shooland. The question is whether they have acted in excess of the statutory provision. If the court is satisfied that the decision was unfair, liberal judges will be more likely to find that the decision was not "fair" within the meaning of the Act. In *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) ("*Wednesbury*") a power to grant

licences “subject to such conditions as the authority think fit to impose” was exceeded when a council granted cinema licences to the exclusion of children on Sundays. On this basis, a court is well within its power to find that Everpool exceeded their very wide power. Illegality could also be argued on the basis that the council misused its powers. Fred could argue that the purpose of the ban (to stop Fred from going to a racist country) was inconsistent with the purpose of the Local Council Powers Act. In *Attorney-General v. Fulham Corporation* (1921) a council was held to have missed its powers when it opened a launderette on a commercial basis (the power was to establish wash houses for the local community to use). The question for the court would be whether one of the purposes of the Act was to punish people who may fail to agree with the council’s views.

On the other hand, the Council has been elected and the statutory provision does give them a wide discretion. Judges are extremely cautious of intervening in decisions that rightfully belong to elected decision-makers. It is not the court’s role to decide on the facts. Courts are concerned with whether they have exceeded their powers. It is very difficult to exceed a power to make an order “in any circumstances that appear fair.” If the council considered the order to ban Fred from the training ground to be fair, then technically no consideration can be irrelevant. This is, however unlikely given the decision of the House of Lords decision in *Wheeler v. Leicester City Council* (1985) (“*Wheeler*”).

Question Three

To what extent can it be argued that the Judiciary is a useful restraint on the executive and legislature in the UK?

Answer

The principle of the separation of powers requires that each branch of the State is kept apart from the other to a certain degree in order that no single group of people is able to have total control of the main functions: judicial, legislative and executive. Judicial independence from the legislature and executive is seen as one of the most crucial characteristics of a modern democracy because it is the judiciary which has control of fundamental rights and freedoms, and it is they who are entrusted with the power to constrain the executive branch from encroaching on civil liberties.

The UK does, however, hold one principle as superior even to the independence of the judiciary: parliamentary sovereignty. This principle asserts that while the judiciary must have the means to interpret legislation and decisions fairly and impartially, in the event of any conflict between statute (Parliament-made) law and common (judge-made) law, the former will always win out. The courts have, for centuries, been subordinated to the whim of Parliament. In essence, therefore, one side of the argument is that it is not possible for the courts to be truly independent of Parliament if it is forced to uphold Parliamentary law. When interpreting statutes, the courts attempt to give effect to the intention of Parliament. Thus in the UK system, the courts are restrained and cannot exercise any free will beyond the wishes of Parliament. In this sense, therefore, the courts are unable to perform an effective check on the UK legislature, and the purpose of the doctrine of the separation of powers is for the courts to restrain the legislature when it acts beyond its powers. The courts are forbidden from doing this, although Parliament is free to restrain the courts. Judicial review, the mechanism by which the courts are able to hold public bodies to account for their decisions, does not apply to Parliamentary (primary) legislation, and the courts are not at liberty even to question the circumstances in which it was made. This was confirmed in *Pickin v. British Railways Board* (1974). Thus, it is theoretically impossible for the UK Parliament to act *ultra vires*, or beyond its powers, since

the doctrine of parliamentary sovereignty sees no limit. Also, section 6 of the Human Rights Act (1998) excludes Parliament from the provision that it is unlawful for any public body not to act in a way that is compliant with the European Convention on Human Rights (ECHR).



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