**SAMPLE No:-1**

**Essay Title:**

‘**The HRA 1998 has had little impact upon protecting the basic liberties of British subjects and could be repealed without any consequence’. Discuss.**

The Human Rights Act 1998 (HRA) incorporates the majority of rights protected under the European Convention on Human Rights into domestic law. In his foreword to the Blackstone Guide to the Act, the then Home Secretary Jack Straw wrote[[1]](#footnote-2); ‘The Human Rights Act 1998 is the most significant statement of human rights in domestic law since the 1689 Bill of Rights. …The Act will guarantee to everyone the means to enforce a set of basic civil and political rights, establishing a floor below which standards will not be allowed to fall.’ Thus the enactment of the Human Rights Act 1998 (HRA) and the incorporation of European Convention on Human Rights (ECHR) in United Kingdom law marked a turning point in United Kingdom's legal and constitutional history. This new epoch has brought about greater domestic respect for human rights under the rule of law, resulting in significant changes in public law, both in substance and in the conduct of judicial review proceedings.

The Human Rights Act 1998 (HRA 1998) attempts to provide some fundamental guarantee of individual rights and freedoms but this does not come close to a constitutional Bill of Rights due to the inherent characteristics of parliamentary sovereignty and the fact the European Convention of Human Rights (ECHR) which is incorporated by the HRA 1998 may be out of date. The European Convention on Human Rights (ECHR) was adopted under the auspices of the Council of Europe in 1950 to protect human rights and fundamental freedoms.

Not all articles of the ECHR have been incorporated. Of notable exclusion are Articles 1 and 13. The significant exclusions are Articles 1 which imposes a duty on signatory states to ensure that those within their jurisdiction can enjoy the rights and freedoms guaranteed by the Convention. Its exclusion would effectively remove the protective blanket covering all the rights afforded by the ECHR. Another significant exclusion is Article 13 which guarantees citizens whose fundamental rights are violated an effective remedy before a national authority. Thus the UK Parliament is excluded - effectively protecting parliamentary sovereignty but not citizen sovereignty.

While Articles 2,3,4,7 and 14 provide absolute rights the rest are subject to legal restrictions such as are necessary in the interest of national security or public safety. Article 15 of the ECHR allows domestic legislation to derogate from Articles 5,8,9,10,11 and 14 of the ECHR in time of war or other public emergency threatening the life and security of the nation. This power to derogate can be abused at the expense of the citizen.   
  
The UK entered into such a derogation in relation to the Terrorism Act 2000 which enhanced police powers and allowed wider stop and search powers and the power to detail suspects after arrest for up to 28 days without trial as well as the Anti-terrorism, Crime and Security Act 2001 which allows for the detention without trial of foreign citizens suspected of being involved in terrorist activity and grants the Home Secretary the power to deport or detain indefinitely any non-citizen reasonably believed to be a terrorist.   
  
Case law however has limited these powers of derogation. In the case of A and others v Secretary of State for the Home Department and X and another v Secretary of State for the Home Department it was decided by the House of Lords that section 23 of ACTSA 2001 was incompatible with Articles 5 which is the right to liberty and Article 14 which is freedom from discrimination because the section permitted the detention of suspected international terrorists that discriminated against them on grounds of nationality. The courts viewed that there was **no sense of proportion** attached to the rights of the individual as opposed to the level of threat to national security for there to be derogation. However Derdre M. Dwyer in her article "Rights Brought Home" argues that the effect was only political and not legal. The Act remained and could not be declared invalid. The most that could be done was to enact further legislation as happened in the case of Bellinger v Bellinger[[2]](#footnote-3) where the Gender Recognition Act 2004 and the Civil Partnership Act 2004 was legislated to cater to the declaration of incompatibility of section 11(c) of the Matrimonial Causes Act 1973 which went against the right to a family for single sex couples.   
  
An example of a fundamental guarantee is Article 6 of the ECHR, which is the right to be heard by an unbiased tribunal, the right to have notice of charges of misconduct and the right to be heard in answer to these charges. However in Fiscal v Brown it was decided that the right to a fair trial under Article 6 would not overwhelm the requirement of local traffic legislation on the basis that the rights of individuals had to give way to the wider interests of the community. In the case of Venables v Thompson v Newsgroup Newspapers it was held that the courts would only apply the Convention in exceptional cases where it was strictly necessary. In the case of Campbell (Naomi) v Mirror Group Newspapers[[3]](#footnote-4), the courts would look into the balancing of competing interests whether the right to privacy under Article 8 outweighed the freedom of expression under Article 10.   
  
The dualist approach to incorporating the ECHR into UK domestic law through the HRA1998 has whittled down the effects of the ECHR. Because the ECHR is not entrenched into domestic law a provision of the Convention can be breached with impunity. The HRA 1998 is still an Act of Parliament and not an entrenched Bill of Rights and can be repealed by a future Act of Parliament on the basis of supremacy of Parliament.   
  
Section 2 of the Act requires future courts to take into account any previous decision of the ECtHR. The operative phrase here is ‘take into account’ which does not mean that they are bound by it. Judicial decisions will continue to be made in light of judicial decisions made by UK courts regardless of decisions outside the UK. The decision in the case of Harrow LBC v Qazi was incompatible with the decision of the ECtHR case of Connors v UK*[[4]](#footnote-5)*. In the case of Price v Leeds City Council[[5]](#footnote-6), the Court of Appeal held that where there were contradictory rulings from the House of Lords and the ECtHR, UK courts were required to follow the ruling of the House of Lords.   
  
Section 3 of the Act requires all legislation to be read, so far as possible, to give effect to the rights provided under the ECHR and Section. According to Section 4 courts may make a declaration of incompatibility if it finds that a provision in a UK statute is incompatible with a Convention right. Taken together the impact of Section 3 and 4 would mean that the courts were able to protect individuals sufficiently. However this has been curtailed by parliamentary sovereignty and the courts are loath to go against Parliament.   
  
The courts have interpreted the phrase ‘so far as possible’ narrowly and will only go so far in giving effect to rights. In deciding on the legality of any derogation, courts are required not just to be convinced that there is a need for the derogation but they must also be sure that the State’s action has been proportionate to the need.   
  
Section 6 requires that public authorities act lawfully in a way that is compatible with the ECHR. Although some bodies are clearly public authorities such as government departments, local authorities, the police and the Inland Revenue the Act does not define public authority and quasi public authorities can fall outside this ambit, such as in Donoghue v Poplar Housing and Regeneration Community Association Ltd which limited the action one could take against a body that was clearly not a public authority.   
  
It is not mandatory that an Act of Parliament needs to be compatible with ECHR rights. Section 19 of the HRA 1998 allows for a minister responsible for the passage of a Bill through Parliament to make a statement that the bill does not comply with ECHR rights. Alternatively by virtue of Section 10 a Minister could subsequently amend an offending legislation by a fast-track procedure which avoids the full parliamentary process.

Consistent with the concept of Parliamentary sovereignty, the Human Right Act has no higher status in law than any other statute. It can accordingly be amended or repealed, although the non-legal, moral and political constraints would make this difficult. Parliamentary supremacy is also protected in that judges may not declare Acts of Parliament invalid, but may grant ‘declaration of incompatibility’. This device also protects the separation of powers between the judiciary and Parliament. However the importance of the Act and the need to protect it from amendment by implied repeal, it has been declared that the Human Right Act is a ‘Constitutional statute’ which may not be impliedly repealed, as seen in the case of *R v Secretary of state for the Home Department ex parte Simms*[[6]](#footnote-7)*.*

The incorporation of Convention rights into domestic law under the Human Right Act 1998 was a logical step forward for a government seriously committed to individual rights and freedoms and represents a significant extension of the rule of law. Incorporation may also have change the traditional public conception of individual freedoms in favor of rights, and thus brought a greater clarity to the law relating to both civil liberties and human rights. The Act preserves the traditional principles in the constitution, ensuring that Parliament alone can reform the law but enabling Judges of the higher courts to grant a Declaration of Incompatibility where a violation of a right which cannot be remedied by interpretation of the relevant domestic law is found. The Declaration does not invalidate the offending law but puts government and Parliament on notice that a reform is called for. Nevertheless, at the same time, the HRA 1998 attempts to reconcile UK law with the ECHR which has been recognized as a de facto Bill of Rights among members of the EU. However the ECHR has limited effect in the UK and the HRA 1998 falls short of an entrenched constitutional Bill of Rights.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(Words: 1,702)

**Bibliography**

* Hilaire Barnett & Marinos Diamantides, Public Law Subject Guide (2007),University London Press.
* Hilari Barnett, Constitution &Administrarion Law 8th Edition.
* Dworkin, Ronald; A Bill of Rights for Britain, London (1990) Chatto & Windus
* Adam Gearey, Wayne Morrison & Robert Jago, The Politics of Common Law (2010), Routledge-Cavendish.
* Blackstone’s Guide to the Human Rights Act, Blackstone Press, London, October 1998
* Helen Fenwick, Civil Liberties and Human Rights, Cavendish 2002

**References**

* Amos,M.(2007),‘ The Impact of the Human Rights Act on the UK’s Performance Before the European Court of Human Rights’, Public Law 655
* Irvine of Lairg, Lord (2003),’The Impact of the Human Rights Act: Parliament, the Courts and the Exacutive’,Public Law.
* Nicol,D.(2006),‘Law and Politics after the Human Rights Act’,Public Law,722.
* Steyn, Lord (2005) ,’Deference: A Tangled Story’, Public Law, 346
* Young, A. (2005),’ A peculiarly British Protection of Human Rights’, Modern Law Review, 68:858.

SAMPLE No:-2

**Essay Title:**

**‘Judicial Precedent is best understood as a Practice of the courts and not as a set of binding rules. As a practice it could be refined or changed by the courts as they wish.’ Discuss?**

Judicial Precedentrefers to the way in which the law is made and amended through the decisions of judges. The doctrine of judicial precedent is based on the principle of stare decisis, this means that like cases should be treated alike.  The general rule is that all courts are bound to follow decisions made by courts higher than themselves in the hierarchy and appellate courts are usually bound by their own previous decisions. Where there is no previous judicial decision on a point of law before the court then the decision made in that case on that point of law will be original precedent.  The way in which a judge will come to his/her decision in this situation is to look at cases which are similar to the one in question.  These cases are not binding on the court but they are persuasive. To some extent it can be said that the Judicial Precedent is a practice of the courts and not a set of binding rules. By over viewing the hierarchy of the courts in light of the doctrine of Judicial Precedents it will become obvious that it is a practice that could be changed or refined by the courts as they wish.

 In order for the doctrine of judicial precedent to work, it is necessary to be able to determine what a point of law is. In the course of delivering a judgment, the judge will set out their reasons for reaching a decision. The reasons which are necessary for them to reach their decision amount to the *ratio decidendi* of the case. The *ratio decidendi* forms the legal principle, which is a [binding precedent](http://www.e-lawresources.co.uk/forum/viewtopic.php?f=86&t=6736), meaning it must be followed in future cases containing the same material facts. It is important to separate the *ratio decidendi* from the *obiter dicta*. The *obiter dicta* concerns matters stated in the course of a judgment which are not necessary for the decision.

Different courts practice precedents differently:

In regards to the European Court of Justice, under s3 (1) of the European Communities Act 1972, decisions of the ECJ are binding, in matters of Community law, on all English courts. It is not bound by its own previous decisions.

The House of Lords was not bound by its own previous decisions until the case of *London Street Tramways v London County County Council* (1898) when it bound itself in the interests of certainty. Then the Practice Statement (1966), issued by the LC, stated that although the House of Lords would treat its decisions as normally binding it would depart from these when it appeared right to do so.

The Court of Appeal is bound by decisions of the House of Lords even if it considers them to be wrong. In *Young v Bristol Aeroplane Co Ltd* [1944], the Court of Appeal (civil division) held that it was bound by its own previous decisions subject to the following three exceptions:  Where there are two conflicting decisions, the CA must decide which to follow and which to reject. Where, a decision of its own has been impliedly overruled by the House of Lords. The previous decision was given *per incuriam* (by carelessness or mistake). In the criminal division, in addition to the *Young* exceptions, precedent is not followed as rigidly because a person's liberty may be at stake. In *R v Taylor* [1950] the Court of Appeal held that if ‘the law has either been misapplied or misunderstood’ then it must reconsider the earlier decision.

A Divisional Court is bound by the House of Lords and the Court of Appeal and normally follows a previous decision of another Divisional Court but has similar exceptions to the CA.

The High Court is bound by the Court of Appeal and the House of Lords but is not bound by other High Court decisions. However, they are of strong persuasive authority in the High Court and are usually followed. Decisions of individual High Court judges are binding on the county courts. However, under the Human Rights Act 1998, English courts must now have regard to decisions of the European Court of Human Rights. In *Re Medicaments* (2001) the Court of Appeal refused to follow a decision of the House of Lords in *R v Gough* (1996) because it was different to decisions of the ECHR.

Decisions made on points of law by judges sitting at the Crown Court are not binding, though they are of persuasive authority. Whereas, in the COUNTY COURTS AND MAGISTRATES' COURTS, the decisions of these courts are not binding.

On the other hand there are also persuasive precedents, which are not absolutely binding on a court but which may be applied. The following are some examples: Decisions of English courts lower in the hierarchy. For example, the House of Lords may follow a Court of Appeal decision, and the Court of Appeal may follow a High Court decision, although not strictly bound to do so. For example, *R v R* (1991) the marital rape case where the HL followed the decision of the CA and held the husband to be liable. Decisions of the Judicial Committee of the Privy Council,, for example, *The Wagon* *Mound* (1961) which is the leading authority on remoteness of damage in the tort of negligence. Decisions of the courts in Scotland, Ireland, the Commonwealth (especially Australia, Canada and New Zealand), and the USA, are usually cited where there is a shortage or total lack of English authority on a point. For example, *Re S (adult:* *refusal of medical treatment)* (1992).

There are also methods of avoiding precedents which make it seem that it is a practice which can be refined or changed by the courts as they wish. Firstly the Practice Statement (1966); in *R v Howe* (1987) the HL declined to follow the decision in *Lynch v DPP for N. Ireland* (1975) where they had held that duress was available as a defense to accomplices to murder. The practice statement was accompanied by a press release, which emphasised the importance of and the reasons for the change in practice: It would enable the House of Lords to adapt English law to meet changing social conditions.  It would enable the House to pay more attention to decisions of superior courts in the Commonwealth. The change would bring the House into line with the practice of superior courts in many other countries. In the USA, for example, the US Supreme Court and state supreme courts are not bound by their own previous decisions. However, the practice statement has been rarely used by the HL.

The case of ***Young v Bristol*** *Aeroplane* (1944)allowed the CA to correctits mistakes, which is especially important as it hears the most appeal cases. The extra flexibility in the criminal division is important as such cases involve the liberty of a person. DistinguishingA previous case is only binding in alater case if the legal principleinvolved is the same and the factsare similar. Distinguishing a caseon its facts, or on the point of lawinvolved, is a device used byjudges to avoidthe consequences of an earlierinconvenient binding decision.The cases where the defendants hadstabbed the victim who receivednegligent medical treatment: *R v Smith* in which *R v Jordan,* where the victim died ofpneumonia and the chain ofcausation broken, was distinguished. *Balfour v Balfour* (1919) which was distinguished in *Merritt v Merritt* (1971). Any judge can distinguish a precedent on minute details and the differences can sometimes seem illogical but it allows judges to develop the law and create exceptions to a general rule from a previous case.

By over-ruling, a higher court can overrule a decision made in an earlier case by a lower court. The ECJ and House of Lords can also overrule their own previous decisions. Overruling can occur if the previous court did not correctly apply the law, for example, the overruling of *Anderton v Ryan* [1985] by the House of Lords in *R v* *Shivpuri* [1986] concerning the Criminal Attempts Act 1981; or because the later court considers that the rule of law contained in the previous case is no longer desirable. For example, the House of Lords' decision in *Miliangos v George Frank Ltd* [1975] which overruled a previous authority that judgment could not be given in foreign currency. Over-ruling means proving the previous case was wrong and therefore changing the “leading case” in that aspect of law. However, the decision in the previous case is not actually changed itself. Over-ruling can only be done by a court with authority to over-rule, example, the HC cannot over-rule the CA but the CA can over-rule the HC. Over-ruling can also be criticized on the ground that law making should be left to Parliament and not to judges.

Reversingis the overturning onappeal by a higher court, of thedecision of the court below thathearing the appeal. The appealcourt will then substitute its owndecision.*R v Kingston* (1994) where the House of Lordsreversed the decision of the Court of Appeal andheld that involuntary intoxicationwill not be a defense unless itprevents the defendant formingmens rea for the crime chargedeven though the defendant was notat fault for becoming intoxicated.This can only be carried out by acourt with enough authority, suchas a Divisional Court, the CA orHL.Most cases stop at the CA and donot go to the HL

Disapproving Precedent Judges may disapprove of a precedent, which they are nevertheless bound to apply, in the hope that it will be reconsidered. A superior court may also disapprove of a precedent created by a lower court without actually over-ruling it. An example of the former is *Elliott* *v C* (1983) where Lord Justice Goff disapproved of the House of Lord’s decision in *R v Caldwell* (1981) which established objective recklessness. An example of the latter is *B v DPP* (2001) where the House of Lordsdisapproved of the strict liability case, *R v Prince* (1875). Criticism may persuade a court to overrule a heavily criticized precedent.

Many areas of law have been developed by the decisions of judges, for example, the tort of negligence.  The speed at which the law develops can depend on whether the judge is an active or passive law maker. Active law making can be seen in the case of *R v R* (1991) where the House of Lords ruled that rape within marriage was a criminal offence.  An example of passive law making is seen in the case of *C v DPP* (1995) where the House of Lords refused to change the presumption about criminal responsibility of children under the age of 14, feeling that it was the job of Parliament to make such major changes to our law.

There are a number of advantages and disadvantages of precedents. The advantages are that it creates certainty in the law and means lawyers can advise their clients on the probable outcome of their case. Similar cases are treated in a similar way, this is in the interests of justice and fairness. It saves court time as for most situations there is already an existing solution and most importantly it allows the law to develop alongside society. *R v R (*1991) overturned a centuries old legal principle that a man could not rape his wife.

However, there are also many disadvantages as the system is too rigid and does not allow the law to develop enough. The strict rules of judicial precedent can create injustice in individual cases. The law is slow to develop under the system of judicial precedent.  The law cannot be changed until a case on a particular point of law comes before one of the higher appellate courts. Hundreds of cases are reported each year, making it hard to find the relevant precedent which should be followed. The law is too complex with thousands of fine distinctions.

(Words: 1,997)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Bibliography**

* Hillarie Barnett 8th edition. [2011], Constitutional and Administration Law, Routledge.
* Adam Gearey, Wayen Morrison and Robert Jago, [2009], The Politics of common Law,Routledge-Cavendish.
* Hillarie Barnett and Morrison Diamantides [2007], Public Law Subject Guide,university of London Press.
* Wayne Morrison and Adam Gearet [2007] Common Law Reasoning and Institutions subject guide, University of London Press.
* Gary Slapper and David Kelly, 11th Edition [2010], The English Legal System, Routledge.

**References**

* Buxton, R. (2009) How the Common Law gets made. Hedley Byrne and other Cautionary Tales, 125 law Quarterly Review.
* Harris. B, V (2002) Final Appellate Courts Overruling their Own, Wrong Precedents :the Ongoing search for Principle,118 Law Quarterly Review,408.
* Harris, J.W.(1990),Toward principles of Overruling-When should court of Appeal Second guess?, Oxford Journal of Legal Studies,135.
* Roger, A. (Lord)(2005),A Time for Everything under Law, some Reflections on Restropectivity, Law Quarterly Review,(121),57.

**SAMPLE No:-3**

There is no hope of doing perfect research (Griffiths, 1998, p97). Do you agree?

Research: is defined as any gathering of information, data or facts for further knowledge or advancement. Basically research is performing a methodical study in order to prove a hypothesis or answer a specific question. The central goal is finding a definitive answer. In order to attain that goal one must strive towards perfection, yet it is a known fact that it is impossible to conduct an accurate research without any flaws, faults or errors. The reason being as research is done by human beings and it is a universal truth that man is not born all knowing, he gradually attains knowledge through trail and error. Thus agreeing with the statement that ‘There is no hope of doing perfect research’, constitutes to the fact that the genuine process of research involves mistakes, errors and inaccuracies and so in order to achieve the desired result one is bound to encounter a great deal of failure.

Although there are several different types of researches, but generally speaking research can either be qualitative or quantitative. “ In the qualitative research approach the researcher is placed as a key point of research. In consequence, the researcher's personal knowledge and research experience fully influence the research,” (Maanen, ed. 1979). Where as the results of “quantitative research are derived by discovering exact facts and, therefore, the same research methods and the results are generalized. In other words, it can be applied to a large number of other situations because it is objective and value free,” (Soltis, 1990).

Moreover, among these types of research the is no definitive assurance of perfection. There are in fact two forms of error that are commonly associated with research, which are: random and systematic errors. Random errors, also known as statistical errors, are  random in nature and very difficult to predict. They are caused by sources that are not immediately obvious and it may take a long time trying to figure out the source. There can be a number of possible sources of random errors for example, a biologist studying the reproduction of a particular strain of bacterium might encounter random errors due to slight variation of temperature or light in the room. However, when the readings are spread over a period of time, possible to minimize these random variations by averaging out the results. Hence random errors occur in all quantitative studies and can be minimized but cannot be avoided. On the other hand Systematic errors are produced by faulty human observations or changes in environment during a particular research, which are difficult to get rid of. Furthermore, apart from error there are other factors which create problems in the process of research such as; time, money, sources, energy and manpower are the names of few among many.

History itself provides proof that work done by researchers is far from perfect. Take the example of the field of medicine, progress is made everyday, new medicines are discovered and some old drugs are banned due to their side effects concluded by newer studies. The other example is that of Newton’s Laws which were found to be not as perfect as they were originally thought for nearly two centuries, as a result of Einstein's publication on the General Theory of Relativity that explained all of the equations of motion that are taking place in the universe, Newton’s Laws were declared to be imperfect. Even though, Newton's laws are still used today to predict motion at low speeds, they are still substituted by using the full Einstein equations of the General Theory of Relativity for more precise results. Thus, this comes to prove that often what has been regarded as perfect research may not be as perfect as originally thought to be and in some cases, this might even become more evident after centuries of acceptance.

It is a well recognized fact that old research forms the basis for newer discoveries. As explained by the given example: on [December 17, 1903](http://inventors.about.com/od/weirdmuseums/ig/Wright-Brothers/1903-Wright-Flyer.htm) the Wright Brothers invented and flew the first powered and piloted  airplane. This was the birth of the first real airplane. Over the years Inventors continued to improve airplanes after the Wright Brothers, and this led to the invention of modern jets, which are used by both the military and commercial airlines. Eventually by the end of the 19th century, inventors began to consider the possibility of space travel, ultimately resulting in the evolution of rockets to be used for space travel. Even today it cannot be denied that the work of Wright brothers formed the basis of the research that led to the invention of the modern jet. It is only through research and abundant failure that the ultimate goal is accomplished. Thus it is evident that research is a continuous process of trial and error which keeps improving or changing previously proven theory.

In my conclusion, I agree with Griffiths there is absolutely no hope of doing a perfect research as research is an ongoing process that can never be complete nor absolute. At the same time one must also consider the fact that the accuracy of research will never be without doubt or debate as research is done by human being and human error is only natural. No one is perfect and consequently no research can ever be perfect.

1. See Blackstone’s Guide to the Human Rights Act, Blackstone Press, London, October 1998.

   [↑](#footnote-ref-2)
2. [2003] [↑](#footnote-ref-3)
3. [2006] [↑](#footnote-ref-4)
4. [2004] [↑](#footnote-ref-5)
5. [2005] [↑](#footnote-ref-6)
6. [2000] 2 AC 115 [↑](#footnote-ref-7)