

External laws programme law constitutional administrative essay

[Law](#)



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Essay Title: 'Although the Human Rights Act 1998 has impacted on the judicial understanding of precedent, the underlying features of the doctrine remain unchanged.' Candidate No: 53906 The doctrine of binding precedent is based on the principle of *Stare Decisis* i. e, to stand by decided cases. In practice this element of compulsion means that the Court of Appeal is generally bound to follow its own previous decisions, and that each court is bound to follow the decisions of a court above it in the hierarchy[1].

Precedent is a sophisticated mechanism, and one can under-estimate its complexities. At the same time, there is no point in simply saying that precedent is too complicated to understand. One of the key issues is the relationship of precedent to law as a broader area[2]. The main objective of precedent was to ensure consistency and certainty which are the major two tools of ensuring justice. However, with the passage of time this doctrine became an obstacle to ensure justice and also to the development of common law. This is owing to the fact that the doctrine of precedent was too rigid. So after a long time they decided to establish new rule. As a result practice statement 1966 was introduced. Until 1966 the House of Lords was bound by its own decisions unless they were decided in ignorance of an earlier binding case or a statutory provision. However in that year the Lord chancellor set out a practice direction which stated that while the House of lords would normally regard itself as bound, it might depart from a previous decision where the earlier decision was influenced by a condition which no longer existed[3]. However two years after Practice statement 1966 . the Hose of Lords in " Conway v Rimmer[4] departed from their previous decision of " Duncan v Cammell Laird & Co. 5 and affirmed that an affidavit from

Government was not enough to claim public interest immunity for nondisclosure of documents. It was further held that Duncan was probably a right decision at that time but it is not applicable in the present case. After practice statement 1966 the courts showed bold and sometimes restrictive attitude in departing from their previous decision. Such cases are discussed below: Ex p Khawaja[6]overruled Ex p Zamir[7]. In Ex p Khawaja the House of Lords ruled that the decision of the Home office to detain him was unjustified. In other words, one could not read the act in a way that allowed some one to be deprived of their liberty unless and until they proved that such imprisonment was unjustified[8]. It is to be remembered that House of Lords did not depart from their previous decision always and such a glorious example is Paal Wilson & Co . where the House of Lords denied deviate from its own previous decision of Bremer Vulkan. In Arthur J. S Hall & Co. v Simon[9]House of Lords gave its famous judgment overruling Rondel v Worsely[10]that lawyers should have negligent liability for doing their jobs. Another famous case which removed a lot of confusion in Criminal justice process is the R v G[11]which overruled the decision of R v Caldwell[12]and affirmed the decision of R v Cunningham i. e established the " subjective nature of recklessness." After 1966 House of Lords also made huge developments in making law. In Donoghue v Stevenson[13]: " The appellant and a friend visited a café where the friend ordered for her a bottle of ginger-beer. The proprietor of the café opened the ginger-beer bottle, which was of opaque glass so that it was impossible to see the contents, and poured some of the ginger-beer into a tumbler. The appellant drank some of the ginger-beer. Then her friend poured the remaining contents of the bottle into the

tumbler and with it a decomposed snail came from the bottle. As a result of her having drunk part of the impure ginger-beer the appellant suffered from Shock and gastric illness. In an action by her for negligence against the manufacturer of the ginger-beer," Lord MACMILLAN: A person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of those articles. That duty he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship, which he assumes and desires for his own ends, imposes on him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. Again in R v R[14]: A husband (H) appealed against his conviction of the attempted rape of his wife (W) to which he had pleaded guilty, ([1991] 2 W. L. R. 1065). The couple were contemplating divorce and W had left the matrimonial home to live with her parents when the offence took place. The case turned on whether a husband could be found guilty for raping his wife . Held: Appeal dismissed. Overturning the principle set out in Hale's History of the Pleas of the Crown (1736), that a wife irrevocably consented to sexual intercourse with her husband on marriage, their Lordships confirmed that the assumption was no longer applicable in modern times when marriage was viewed as a partnership of equals. There was huge

controversy regarding this law making factor of HL. Then House of lords further explained that the immunity of the husband from raping their wife was common law myth the judgment merely removed that misconception and helped to move common law with changing social circumstance.

However in the famous case of *Bellinger v Bellinger*[15]The House of Lords showed restrictive attitudes towards changing the law and transferred the duty towards parliament. Again in *Pepper v Hart*[16]the HI held that Hansard can be used as an extrinsic instrument of statutory instrument. The HL decision in *R v Smith(Morgan)*[17]was in conflict with a Decision given by Privi Council in *Luc Thiet Thuan v R*[18]. The Privi Council in *Jersey v Holley* [2005] followed it's own decision. Then Court of Appeal in *R v Faquir Mohammad*[19]followed the decision of *Jersey v Holley* instead of following the decision of *R v Smith(Morgan)* which is in violation of principle of stare decisis. Then the CA(court of appeal) clarified that the decision of Jersey's decision represented more recent statutes of law and carried more weight because nine judges took part in the hearing therefore they thought that *Holley* is more authoritative than that of *Smith(Morgan)*. This was further affirmed in *Rv James and R v Karimi*[20]However after the enactment of HRA 1998 the doctrine of binding precedent is slightly influenced by it. As per S. 2(1) of HRA 1998: (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or(d) decision of

the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. From the above subsection it is clear that decisions given by ECtHR are not binding on UK courts. However the UK courts feel that they are bound by the decisions of ECtHR. Again as per s 3 the courts must, so far as possible, interpret legislation in a way which is convention compatible with the ECHR and furthermore, under s 6 it is unlawful for the courts to act in a way which is incompatible with the convention.[21]Taken together, these provisions mean that when any court is considering a statutory provisions or the common law which raises Convention issues, the courts must look at the jurisprudence from Strasburg and interpret the requirements of the convention in the light of the case law. If an earlier binding decision would in view of the court breach the Convention, it is not bound to follow that decision since to do so would cause the court to breach HRA 1998, s 6 and act unlawfully because the courts' duty does not end with interpretation, however. One of the most contested provisions of the Act is the apparently innocuous section (s. 6(3) (a)) which includes a court or tribunal within the definition of a " public authorityThus far, this change has attracted relatively little comment in the courts, although already higher courts have reached decisions in relation to both statutory provisions and the common law which do not follow earlier case law in order to comply with the provisions of the convention. So it can be said that this special feature of HRA 1998 is creating a huge impact on doctrine of binding precedent.[22]Though HRA 1998 had an impact on Doctrine of binding precedent but the main essence of it i. e stare decisis is

still there. If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. However from the above discussion it can be said firmly that because of Practice statement 1966 and HRA 1998 the laws of England have undergone a revolutionary changes, and in future the laws will be changed in order to solve the problems before them, to dispense justice and to develop the law.[23]