Case Law and Precedent

THE NATURE OF DECISIONS
Two different theories:
That decisions of the courts are made by judges. Parliament can make legislatives about what they wish but judges may only make case laws. In some cases, judges make law if there is no current statute or law in place. They are only responding not legislating
OR that decisions of the courts are evidence of the law - the so called declaratory theory of the law

THE CONSTITUTIONAL DIMENSION
Assuming that the courts do make law, the real questions are
• What is the extent of their law-making power?
• When should the power be (or not be) exercised?
• What (if any) variations should be there be between different courts - how consistent should judges be with each other?
• Judges lack constitutional legitimacy to be legislators: note doctrines of parliamentary supremacy and separation of powers
• Note the wide effect of their decisions, which have unlimited retrospective effect
• However, a judge can only respond to the situation which has arisen (cf Parliament) and judge made law can be overruled by parliament

A BRIEF STATEMENT OF BINDING PRECEDENT IN A NUTSHELL
• A brief statement of the doctrine:
• In certain circumstances English courts are BOUND to follow earlier decisions
• It is based upon the principle that like cases should be treated alike
• It is also based upon the hierarchy of the courts

THE DOCTRINE OF PRECEDENT FORMALLY STATED
• A proposition stated in one case is binding in a later case if it is
  • A proposition of law
  • Part of the ratio decidendi
  • Decided in a court whose decision are binding on the present case
  • There are no relevant distinctions (ie the material facts are similar) between the two cases. Corkery v Carpenter [1950] 2 All ER 745

THE ADVANTAGES OF PRECEDENT
• Consistency, certainty and predictability - central to ideas of justice and fairness.
• Efficiency: no 'reinventing the wheel'
• Consider the extent to which case law can respond to changing social practices and attitudes

THE DISADVANTAGES OF PRECEDENT
• Subtle variations, sometimes illogical, in decisions can make the law complex
• Binding precedent can render the law rigid
• Development in the law in haphazard, depending on cases brought to court
• UK judges are not required to consider the social and economic effects of their judgments (though sometimes do)
• Retrospective effect

THE RETROSPECTIVE EFFECT OF PRECEDENT