#### SUMMARY QUESTIONS

###### ESSAY QUESTIONS

1. ‘The dualist constitution of the UK is a detriment to individuals as it provides the State with the choice of adhering to international agreements or not. Given this deficit of the constitution, international treaties are not worth the paper they are written on.’

Critically assess the above statement. In your answer, give specific examples of international treaties which the UK has either repealed or disregarded.

**Indicative content outline answer:**

* The UK has a dualist constitution. This means that the law established domestically (by Parliament) is the highest form of law, and international laws are of lower importance.
* Hence, if there is a contradiction between domestic law and the provisions of an international treaty, domestic law takes precedence.
* To demonstrate the distinction, the UK has held membership of various treaties such as the European and International Conventions on Human Rights, the International Labour Organization (ILO). These treaties placed obligations on the Member State, but in the UK this did not enable judges in domestic courts to provide claimants with direct access to their provisions (under the guise of horizontal direct effect).
* By imposing obligations on the State, rather than individuals within the State (such as what happens with the EU Treaty) the State may choose to follow aspects of the treaty and not others. Where this may cause problems, it is a matter between the domestic government and the regulating body provided by the treaty.
* It is probably an exaggeration to suggest that these international treaties are not worth the paper they are written on. They have an authority and the State acknowledges its importance otherwise it would not have agreed to its provisions initially.
* There were various aspects of the ILO which the state did not enforce (particularly in relation to trade union rights) because it did not fit in with its policy. This was deemed a positive aspect of the treaty as it gave the government the right to vary the obligations to meet current needs.
* The exception to these general principles is membership of the EU. Where there is inconsistency between domestic law and the law of the EU, the UK (like the other 27 Member States) is obliged to follow EU law.

2. ‘The UK requires a formal written constitution if fundamental rights, evident in most democratic jurisdictions, are not to be abrogated by governments which rely on the apathy of the general public to remove essential protection against tyranny.’

Discuss.

**Indicative content outline answer:**

* A constitution is a mechanism that outlines the rights and power of the State in relation to its citizens, and indeed the whole system of regulation of the government (all institutions of the State).
* As the State has ultimate power to establish laws and imprison its citizens, it is a requirement that specific rules are established to ensure tyranny is avoided.
* Many countries create a written document called a ‘constitution’ following a revolution when they remove an unjust ruling monarchy, when they overthrow an occupier, or when several countries unite to form a new union.
* The constitution of the UK contains several written documents that collectively establish its constitutional underpinnings. In statutory form these include the Magna Carta, the Bill of Rights, the Human Rights Act 1998, and the European Communities Act 1972. There is a contribution from case law that further adds to the constitution (*Entick v Carrington* [1765] and *Malone v Commissioner of Police for the Metropolis* (No. 2) [1979]).
* The significance of the UK having the constitution being found in several documents and consisting of general Acts of Parliament (which like any other Act of Parliament can be repealed or altered with no special requirements necessary) is that it is very easy to affect the constitution.
* In 1994 The Criminal Justice and Public Order Act s. 34 altered the previous position (and cornerstone of most democratic jurisdictions) of an absolute right for suspects of silence. The result being that if suspect did not disclose information before being charged, or under questioning, which they may reasonably have been expected to do, then the courts and jury may ‘draw such inferences from the failure as appear proper’ (s. 34 (2)(d)).
* Therefore, the constitution is continually changing and evolving to reflect society’s views and needs, and such a ‘flexible’ constitution is often seen as an advantage.
* In the USA, which of course has a written constitution, there exists great difficulty with altering the constitution and has witnessed unfortunate consequences such as ‘the right of people to keep and bear arms’ (a right codifying existing provisions from the English Bill of Rights). When the right was established amidst the concept of the needs of citizens to protect themselves in the absence of a standing army, its imposition was relevant and necessary (the second Amendment to the constitution ratified on the 15th December 1791). In 2008, with the police and armed forces offering ‘adequate’ public protection, is it necessary to continue with a federal right for a private individual to possess weapons to protect themselves and their property?
* The conclusion should focus on a comparison between the UK flexible model and that used by other countries, such as the USA, which has a written document that is entrenched and difficult to alter. Essentially, it is merely a matter of choice and there are advantages and disadvantages for each position.
* The key element to protection of constitutional rights is the apathy of the citizens in the State and the general lack of awareness of such matters. People are often unconcerned about the constitutional principles upon which the State is based, and it is only when there is a problem, that the protection the constitution provides us all can be truly seen.

**PROBLEM QUESTIONS**

1. All Bright Consumables (ABC) Ltd operates a business involving the manufacture and sale of various electronic gadgets. The electronics division has seen rapid expansion in the past few months following the successful manufacture and sales of a new tablet computer. As such it wishes to reorganize the business and move to a seven-day production shift pattern.

Edward was an employee of ABC and is a devout Christian. ABC asked Edward, as part of this expansion, to agree to work some Sundays as part of the shift rotation. He refused. Edward’s religious beliefs prevented him from working on Sundays. As a compromise, ABC had offered Edward a different job within the organization which did not include working on Sundays, but he refused. ABC then offered Edward a generous redundancy package if he was unable to work the required Sundays, which he also refused. In light of this inability to work the required shift pattern, following the necessary dismissal procedures, ABC dismissed Edward.

Edward has lodged an unfair dismissal claim and part of this legal action accuses ABC of breaching European Convention, Art. 9 (concerning freedom of thought, conscience, and religion).

Consider the likelihood of Edward being successful and how human rights legislation impacts on employment relationships.

**Indicative content outline answer:**

* The Human Rights Act 1998 provided access to (most of) the rights established in the European Convention on Human Rights.
* The HRA requires the judiciary to follow the provisions of the Act in its judgments and when interpreting existing laws with a human rights component.
* However, whilst the HRA does affect the law-makers in the UK and the judiciary in its interpretative function, its direct application is largely effective in the vertical direction only. Hence, whilst a party may not rely directly on the HRA 1998 as a cause of action, they may use the Act to interpret existing laws to comply with it, or it may be used to extend existing rights provided through the common law (see Douglas v Hello! [2001] QB 967).
* To identify the limitations of using the HRA in a direct cause of action against another private party the case of *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932 is applicable.
* The facts of *Copsey* are very similar to those presented in the above question. Devon Clays were in a business of quarrying and wished to alter the work shift pattern to a rotating seven-day system. It required the workforce, especially sand processing operators such as Copsey, to agree to the change. Copsey, a devout Christian, refused to working on Sundays. The employer offered Copsey a number of alternative options such as a different role at the company or a generous redundancy package, but he refused each. Consequently, Copsey was dismissed and part of his claim of unfair dismissal included a breach of Art. 9 ECHR.
* The Court of Appeal held that Copsey had not been dismissed due to his religious beliefs, but rather the principal reason was ‘some other substantial reason.’ This is a potentially fair reason to dismiss an employee as identified in s. 98 of the Employment Rights Act 1996. Essentially, the employer is allowed to reorganize their business to reflect changing business requirements. The dismissal was fair and in relation to Copsey’s argument regarding a breach of Art. 9 ECHR, Mummery LJ stated that as a principle of law, where a Christian employee is dismissed for refusing to work Sundays, Art. 9 ECHR is not engaged.
* This remains largely a situation of the interpretation of domestic employment laws in the spirit of the ECHR. However, remember to include the cases of *Eweida & Others v UK*which demonstrated the need to interpret those laws consistently and it should be questioned whether the employee’s request would have any negative impact on the employer’s business. If it would not, it should be seriously considered whether the employer needed to make the decision or whether the employer should allow the employee to manifest their beliefs through the action requested (i.e. not work on a Sunday / wear a crucifix at work).

In drawing conclusions here, even with the protected characteristic of religion provided under the Equality Act 2010 and as interpreted consistently with the ECHR, an employer may ask an employee to work, even if according to their beliefs that this day is the Sabbath. If the work conflicts with the employee’s beliefs, they are free to leave and find a more suitable job.

2. You have recently been appointed as the Human Resources Director of ABC Ltd. The company is aware of the requirements on the board of directors from the Companies Act 2006, s. 172, the Equality Act 2010, and the Human Rights Act 1998.

Write a briefing memo to the members of the board as to the most applicable human rights issues that will affect the company. Consider in your answer the obligations on the company to protect its workers against discrimination from colleagues and third parties. Further, explain the steps the board should take to govern its relationship with suppliers and manufacturers as part of its sourcing of products from the Far East and India.

**Indicative content outline answer:**

* The Human Rights Acts (HRA) 1998, and the Convention that preceded it, places an obligation on the State, including public authorities, to act in accordance with the rights established in those documents.
* Therefore, the HRA 1998 regulates (in respect of human rights) what legislative action the State may and may not take, and enables a party who feels their rights have been adversely affected by legislation or the powers of a public authority to bring a claim (effectively against the State (the ‘vertical effect’)).
* The HRA 1998 affects the State in its enactment, amendment, and interpretation of laws with a human rights element, but it does not provide a clear right to use the provisions of the Act in proceedings between private parties, (called ‘horizontal effect’).
* Whilst a private party may not rely directly on the HRA 1998 as a cause of action against another private party, they may use the Act to interpret existing laws to comply with it, or it may be used to extend existing rights provided through the common law (such as with the right to privacy and the Douglas v Hello! [2001] case).
* *Copsey v WWB Devon Clays Ltd* [2005] demonstrated the limitations of using the HRA 1998 / ECHR directly in employment relationships, it is increasingly something that should be considered – particularly with issues of indirect discrimination and the ruling in *Eweida & Others v UK*. People’s religious views should be taken into account when hiring decisions are made. Further, discrimination can unwittingly take place when employers choose to make redundancies, dismiss workers when they become ill and incapable of work etc. Saying human rights do not affect businesses / employers could be very costly in terms of an organization’s reputation / subsequent damages action.
* The Companies Act 2006, s. 172 imposes a duty on directors to promote the success of the company, a duty based on the common law duty of the director acting in good faith.
* The director must have regard to the likely consequences of decisions in the long term; the interests of the company’s employees; the need to foster relationships with outside organizations (suppliers/customers and so on); the impact of the company’s operations on the community and environment; the company’s reputation; and the need to act fairly as between the members of the company.
* S. 172 goes further than the common law duty upon which it is based and places a positive duty on the director to act in the interests of the members (shareholders) and if this respect to consider / act in the interests of the company’s creditors and employees.
* This is quite an interesting development – particularly in the areas of environment and community. It may be cheap and cost effective to have goods manufactured in, for example the Far East or Indian Subcontinent. This may increase the profitability of the company and be in the financial interests of the company and shareholders. However, what if the companies who provide this out-sourcing use child labour, sweat-shops, or if they pollute the local environment? What if the transport of these goods from the manufacturing plant to their retail destination cause much pollution or if the goods are transported by ship and it causes an oil-spillage due to some disaster?
* The section places an obligation on the board of directors to consider these eventualities when making decisions. It does not require such practices to be out-lawed, but they must take these people’s rights into consideration and take responsibility for foreseeable consequences.
* The Equality Act 2010 codified existing anti-discrimination laws and established the ‘protected characteristics’ of Age (s. 5); Disability (s. 6); Gender reassignment (s. 7); Marriage and civil partnership (s. 8); Pregnancy and maternity (ss. 72-76); Race (s. 9); Religion or belief (s. 10); Sex (s. 11); and Sexual orientation (s. 12). In its broadest sense, people must not be discriminated on the above characteristics thereby imposing a duty on employers (and others) to respect people in these groups.
* The Equality Act 2010 identifies ‘prohibited conduct’ which would breach the protected characteristics (although not each applies to all of the characteristics). Actions amounting to direct discrimination; indirect discrimination; associative discrimination; perceptive discrimination; harassment and victimization are outlawed.