

Part One

The enforcement of human rights and civil liberties

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Human rights and civil liberties: definition, classification and protection

Introduction

In *R (G) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795, it was held that a ban on smoking in mental health units did not engage the inmates' right to private life under Article 8 of the European Convention on Human Rights, and in any case the ban was necessary to protect the health of patients. Similarly, in *R (Howitt) v Preston Magistrate's Court* (19 March 2009) it was held that the Health Act 2006, which made it an offence for pub landlords to allow smoking on their premises, was not incompatible with any article of the European Convention.

In *Friend v UK; Countryside Alliance v UK* (Application Nos 16072/06 and 27809/08), the European Court of Human Rights held that the ban on hunting with hounds was not in breach of anyone's right to private life, association or peaceful assembly, and that any interference with property rights was justified on grounds of public morals.

In May 2010 the conditions of an Anti-Social Behaviour Order that a young man should not wear low-slung trousers and hooded tops were withdrawn by the Magistrate's Court because such conditions interfered with the boy's human rights.

These cases, and hundreds of others, will be explored in this text to examine whether there has been a violation of a human right and if so whether that interference can be justified. But how do the courts decide whether a human right has been engaged, and whether any interference is justified?

This chapter introduces the reader to the meaning, scope and protection of human rights and civil liberties, and the legal and moral dilemmas involved in their recognition, interpretation and limitation. In particular the chapter will examine:

- The definition of human rights and civil liberties and different theories on human rights protection.
- The classification of human rights.
- The mechanism for protecting rights and liberties, at both the national and international level (including the protection of human rights in Europe).
- The dilemma of protecting human rights and civil liberties and the balance with other rights and interests.

Included at the beginning and end of the chapter are case studies, allowing you to study human rights disputes and to reflect on the legal and other issues raised by the case.

At the end of the chapter the reader should be able to appreciate the mechanics of protecting human rights, and the incidental dilemmas, using that knowledge to study the remaining chapters of the text on national and international machinery for enforcement (chapters 2 and 3) and substantive human rights covered in the remaining chapters of the book.

What are human rights and civil liberties?

We often hear individuals or groups of individuals claim that their human rights or civil liberties have been violated – those who claim to have been ill-treated in detention, those denied welfare benefits – but what do they mean? Are they merely seeking to make their claim sound more important, or are those terms actually capable of definition?

This section of the book will attempt to explain the fundamental importance of human rights and civil liberties and to explore the main theories behind their recognition and protection. Subsequent sections will then examine the classification of such rights, the mechanisms for their protection and the dilemmas of protecting them when they come into conflict with other rights and interests. With respect to the United Kingdom, most people now relate the terms ‘civil liberties’ and ‘human rights’ to the passing of the Human Rights Act 1998 and the European Convention on Human Rights, which has been given effect to via the 1998 Act. That Act, passed to ensure that our domestic law complies with the standards laid down in the Convention with respect to the protection of fundamental rights, has raised the profile of such rights and this textbook deals essentially with the 1998 Act and the Convention and uses those terms in that context.¹

‘Human rights’ and ‘civil liberties’ refer to those rights that for one reason or another are regarded as fundamental or basic to the individual, or group of individuals, who assert them. Thus, human rights and civil liberties are primarily *individual* rights, claimed by the individual or group of individuals as part of, and which relate to, the position of the individual within an organised state.² Accordingly, the collective rights of society to peace, security or freedom from crime have not traditionally been classed as human rights or civil liberties, although they will be strongly protected by society via the traditional law, and can, in many cases engage individual human rights.³ Instead, these rights and liberties are referring to individual benefits and enjoyment, for example the right to freedom of speech. Such rights are seen as inherent to our status as human beings – violations of them being considered as an

¹ Accordingly this section will refer to those instruments and such rights when attempting to explain the meaning of the general terms ‘human rights’ and ‘civil liberties’.

² The present definition does not cover fundamental rights such as environmental rights, which more obviously directly benefit society as a whole.

³ For example, the failure of the state to protect property and personal safety would engage the right to property, private life, and in some cases, the right to life. The ‘right’ of society to peace and security, etc. can also be used to justify the limitation of individual human rights.

affront to that status – and regarded as fundamental and in need of protection from arbitrary interference. Primarily couched in negative terms, they represent a notion of individual liberty and are usually given an enhanced status in each country's constitutional arrangements, limiting the power of government to legislate or act in contravention of these liberties or freedoms.⁴

These rights, or liberties, or freedoms, are contained in both domestic and international instruments and although there may be arguments as to why one right or claim should be fundamental, these domestic and international documents display a reasonably common content. Thus the legal system of a state, and international treaties, will attempt to protect rights such as the right to life, the right to property, the right to a fair trial and freedom of expression and peaceful assembly. Similarly, basic needs – the right to food, shelter, clothing, and the right to education – will be regarded as fundamental by most societies and accommodated in the legal and constitutional system in some way. The fact that these liberties and rights are bolstered by international treaties supports the assertion that they are regarded, globally, as fundamental, and the fact that there will be great controversy over their weighting with other interests should not detract from the premise that such claims are superior to other rights or interests. Thus, for example, the right to free speech and freedom of assembly will be regarded as more important than other manifestations of individual liberty and autonomy. Consequently the right to protest should generally override the 'right' to shop in an area free from demonstrations. Although the latter interest might, in some circumstances, override our fundamental right, there is no serious argument that the right to shop has a fundamental status and is, therefore, worthy of inclusion in any domestic or international bill of rights.⁵ Similarly, taking part in pursuits and pastimes will not, generally, engage one's fundamental rights.⁶

Fundamental rights, thus have a common quality: they are regarded as basic to human worth and dignity or individual liberty and are protected as such. This is illustrated in the case of *R (G) v Nottingham Healthcare NHS Trust*.⁷ In this case the applicants sought to quash regulations made under the Health Act 2006, which provided a temporary and partial exemption from smoking in public places for mental health units as being incompatible with Article 8 of the European Convention. The court recognised that the right under Article 8 covered many facets such as development and autonomy, physical and moral integrity, mental stability, the integrity of identity and the protection of private sphere and space, but refused to accept that it was coextensive with the right of absolute independence so as to protect anything that a person might want to do in a private space. In the court's view, preventing a person from smoking did not generally involve such adverse effect upon the person's physical or moral integrity or other facets, above, so as to amount to an interference with the right to private or home life. Thus the court did not accept a right to smoke wherever one is living.

⁴ For an overall account of human rights theory, see Gorman, *Rights and Reason: An Introduction to the Philosophy of Rights* (Acumen Publishing 2003). See also Harris, *Human Rights and Mythical Beasts* [2004] 120 LQR 428.

⁵ The fundamental right to protest might, of course, interfere with business and property interests, which will be regarded as more important and might engage Article 1 of the First Protocol to the Convention.

⁶ See *R (Countryside Alliance) v Attorney General and Another* [2007] 3 WLR 922; *Friend v Lord Advocate* [2008] HRLR 11, detailed in the case study, below.

⁷ [2009] EWCA Civ 795. See also *R (Foster) v Secretary of State for Justice* [2010] EWHC 2224 (Admin), where the disciplining of a young prisoner by withdrawing his tobacco allowance was held not to engage the right to private life under Article 8 of the European Convention.

The court then considered whether, had it been wrong on the first issue, the regulations were a disproportionate and arbitrary interference with the applicants' Article 8 rights; the claimants' argument being that the regulation went further than necessary to achieve any legitimate aim and that it would have been proportionate to allow the continuation of the exemption where it was not feasible for patients to smoke outside. On this issue, the court felt that given the need to protect both health and the rights of others in the enclosed environment of mental health units, and the security reasons for restricting outdoor access to many patients, the measures could be regarded as necessary and proportionate.

CASE STUDY

***R (Countryside Alliance) v Attorney General and Another* [2007] 3 WLR 922; *Friend v Lord Advocate* [2008] HRLR 11; *Friend v UK*; *Countryside Alliance v UK* (Application Nos 16072/06 and 27809/08) (2010) 50 EHRR SE 6**

This dispute has been chosen for our first case study for two primary reasons. First, it highlights the controversy surrounding human rights claims and the social, economic and political arguments that need to be resolved when passing and interpreting legal measures. Secondly, and more specifically, it provides us with some guidance as to what is, and what is not a human rights claim, and can thus be used in the context of our present discussions. In addition, as you will see, the dispute raised issues under both European Convention law and EU law, allowing you to see how such laws and claims are separate. The dispute, heard in both the domestic courts and the European Court of Human Rights, revolved around the passing of legislation which made it unlawful to use a live quarry (for example a fox) whilst hunting.

You will revisit some of the areas raised in the case in more detail in subsequent chapters, so do not be too concerned about the details of the issues at this stage.

The facts and decision in the domestic proceedings

In *Countryside Alliance* the appellants claimed that the Hunting Act 2004 was incompatible with the European Convention on Human Rights and inconsistent with the European Community (EC) Treaty 1957. The applicants included those involved in hunting for their occupation and livelihood, and landowners who either permitted the pursuit on their land or managed their land for that purpose. A second set of appellants included dog breeders who had formerly sold their dogs in the United Kingdom, and UK providers of livery services, all of whom were, they claimed, affected by the ban. The first set of appellants claimed that the ban infringed Article 8 of the Convention – guaranteeing the right to private life and the home – because it adversely affected their private life, their cultural lifestyle and the use of their home; all resulting in the loss of their livelihood. They also argued that the ban interfered with their right of association and assembly under Article 11 of the Convention; their property rights under Article 1 of the first protocol to the Convention; and that they were subjected to adverse treatment with respect to the enjoyment of the above rights on the basis of their 'other status' within Article 14.

The second set of appellants argued that the Act was inconsistent with both Articles 28 and 49 of the EC Treaty. Article 28 prohibits national non-fiscal measures which prevent

the free movement of goods and Article 49 prevents Member States employing rules which restrict the provision of services by EU nationals. The appellants requested that the preliminary reference procedure, under Article 234 EC Treaty, be invoked and the Court of Justice (ECJ) asked to rule on whether national measures prohibiting the economic activity of hunting breached Articles 28 and 49 where it diminished the market for products and thus reduced cross-border trade and prevented providers of hunting-related services from providing those services.

The decision of the House of Lords

With respect to Article 8 of the ECHR, the House of Lords held that fox hunting was a very public activity, lacking the personal and private aspects inherent in Article 8. Thus, the appellants' claims – based on autonomy, cultural lifestyle, the use of the home, and loss of livelihood – all failed to engage Article 8. Although the term 'home' should not be too strictly defined, it could not cover land over which the owner permitted a sport to be conducted. Equally, the activities of the hunting fraternity did not show the characteristics of a distinctive group with a traditional culture and lifestyle that was sufficiently fundamental to form part of its identity. Dissenting on this specific point, Lord Rodger of Earlsferry was prepared to accept that taking part in the hunt was sufficiently integral to their identity to engage the right to private life under Article 8, although felt that the public spectacle of the event took it outside the article for that reason. Their Lordships also rejected the claim that the ban impacted on and interfered with the right of association and assembly as guaranteed by Article 11 of the Convention. Their position was no different from that of other people who wished to assemble in a public place for sporting or recreational purposes, and fell well short of the kind of assembly whose protection was fundamental to the proper functioning of a modern democratic society.

Their Lordships then held that if the above rights had been engaged, any interference was both in accordance with the law (the clear provisions of the Hunting Act 2004) and necessary in a democratic society for the 'protection of morals'. Although many people did not consider that there was a pressing social need for the hunting ban, nevertheless a majority of the country's democratically elected representatives (parliament) did, and had decided otherwise. The democratic process was likely to be subverted if, on a question of moral and political judgment, opponents of the Act could achieve through the courts what they could not achieve through parliament.

Their Lordships did, however, find that the appellants' property rights had been clearly engaged under Article 1 of the First Protocol to the Convention – because the legislation restricted the use to which certain property could be put. However, that interference was justifiable and respected the recent and closely considered judgment of parliament on this matter. Finally, the House of Lords rejected the claim that the ban engaged the appellant's rights under Article 14 of the Convention – to enjoy their Convention rights free from unjustifiable discrimination. Even if the appellants had been the subject of any adverse treatment compared to those who did not hunt, such treatment was not on the grounds of 'other status' within Article 14 because the treatment could not be linked to any personal characteristic of any of the appellants or anything that could be meaningfully described as status.

With respect to the claims under EU law, Articles 28 and 49, the House of Lords held that the measures under the Hunting Act 2004 were not caught by these provision, but even if those articles were engaged, Lord Bingham was of the opinion that the Hunting Act 2004 was justified on the grounds of ‘... social reform, not directed to the regulation of commercial activity...’. Citing the ECJ’s acceptance of infringement of human dignity as justification for a measure preventing the exploitation of games involving simulating the killing of people in *Omega Spielhallen -und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (36/02) [2004] ECR I – 9609, Lord Bingham felt that parliament justifiably considered that the ‘real killing’ of wild animals similarly infringed a fundamental value.

At the same time the House of Lords heard the appeal in *Friend v Lord Advocate*, where it held that the restrictions imposed by the equivalent Scottish legislation (The Protection of Wild Mammals (Scotland) Act 2002) was lawful and not incompatible with the European Convention on Human Rights.

In particular the House of Lords rejected the submission that the ban infringed Article 9 of the Convention, guaranteeing freedom of thought, conscience and religion. Hunting with hounds was a pastime mainly for pleasure and relaxation and a person’s belief in his right to engage in a recreational activity, however fervent or passionate, could not be equated with beliefs of the kind that were protected by Article 9. The Act did not compel anyone to act contrary to his conscience or to refrain from holding and giving visible expression to his beliefs about the practice of hunting in the way he dressed.

Further, there had been no violation of Articles 8 or 11. Hunting with hounds did not involve issues of personal autonomy. It was conducted in public and had social aspects involving the wider community; the right to establish and develop relationships with others was only protected to a degree and could not be extended to a generalised right of respect for minority community interests. Article 11 (freedom of assembly and association) also did not extend the right of assembly for purely social purposes and the hunter’s position fell well short of the kind of assembly whose protection was fundamental to the proper functioning of a democratic society.

Finally, the appellant in the present case failed to prove that Article 14 (prohibition of discrimination in the enjoyment of Convention rights) had been violated. To prove a case under Article 14 it was necessary to prove that other articles had been engaged or the case fell within the core of the values guaranteed by those articles. In the present case the activity was one that individuals were free to participate in (before the ban) but not one which had been provided previously by the state or which restricted on the core issues of the relevant Convention rights.

The decision of the European Court of Human Rights (admissibility)

In *Friend v United Kingdom; Countryside Alliance v United Kingdom*, the European Court declared as inadmissible applications alleging that the ban on hunting with hounds was in breach of the European Convention.

With respect to Article 8 it was held that not every activity a person might engage in with others was protected by the article. Article 8 will not protect interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link

between the action or inaction of the state and a person's private life. Hunting, by its very nature, was essentially a public activity and the hunting community could not be regarded as an ethnic or national minority or represent a particular lifestyle which was indispensable to a person's identity. The concept of home did not include land over which the owners practised or allowed sport to be practised and there was no evidence that the applicants would indeed lose their homes as a result of the ban. Also the ban had not created serious difficulties for earning one's living.

In respect of Article 11 the Court held that the ban did not prevent or restrict the applicants' right to assemble with other huntsmen and to engage in alternatives; the ban had been designed to eliminate the hunting and killing of animals for sport in a manner causing suffering and being morally objectionable – the ban had been introduced after extensive debate by the democratically elected representatives of the State on the social and ethical issues raised by that type of hunting.

Finally, as to Article 1 of the First Protocol the Court found that it was not arbitrary or unreasonable not to compensate for the adverse consequences of the ban, given the fact that there had been extensive debate, above, and that people had continued to gather for hunts without live quarry after the Act had been passed. (The claims under Articles 9, 10 and 14 were also dismissed as manifestly ill-founded.)

Questions

- 1 What 'human' rights were being claimed by the parties to the domestic proceedings?
- 2 Is it possible to distinguish between fundamental human rights and other rights?
- 3 Why did the House of Lords reject all but one of the claims based on the European Convention on Human Rights?
- 4 Do you agree with the House of Lords with respect to its findings in 2, above? In particular, do you agree that the claims lacked the necessary ingredients to be labelled fundamental (Convention) rights?
- 5 What effect does such a finding have on the enforceability and status of the claims made by the hunters and landowners?
- 6 Why did the House of Lords reject the claim based on the landowner's property rights?
- 7 Do you agree that the ultimate decision upholds the democratic legitimacy of parliament's decision in this area?
- 8 Does the European Court of Human Rights' decision vindicate the House of Lords' decision?
- 9 Is it possible to answer any of the above questions without reference to your personal or political views on the ban?
- 10 If the law was changed by a subsequent parliament so as to allow 'hunting with hounds' are there any human rights claims that could be brought to *challenge* such a law?

Why protect human rights and civil liberties?

Where does the notion of fundamental rights come from? The text will now explore some of the leading theories on human rights and civil liberties, thus providing you with some idea as to why those rights are fundamental and why they are given enhanced protection in both national and international law.

■ Human rights and the social contract

Many theories on fundamental rights derive from the idea of individual liberty, based on the notion of the 'social contract' as expounded by such writers as Locke and Rawls.⁸ John Locke (1632–1704) was a British philosopher who greatly influenced the political ideas of the eighteenth century. Although versions of the social contract theory had existed before Locke, his version, in its more basic format, held that in being a member of the state every individual enters into a contract with the state under which the latter agrees to protect the fundamental rights of each citizen. Thus, although each citizen agrees to allow the state power to regulate and govern, and to abide by the actions and laws of that state, that agreement is made in return for the guarantee of certain fundamental rights. The citizen's promise of allegiance to the state is, therefore, conditional on the retention of these fundamental claims, which include the right to life, liberty and property. The notion of the social contract has been expanded in more recent times by John Rawls (1921–2002), an American professor at Harvard and regarded as one of the last century's most important philosophers. He imagined a hypothetical social contract, whereby each individual, not yet knowing his or her ultimate destination or choices, seeks to achieve a society that will best allow him or her to achieve those individual goals and enjoy the 'good life'. Thus, to achieve that good life the individual will require freedom of choice, including freedom of religion and expression, and freedom from arbitrary arrest and detention. Importantly, he or she will demand these rights irrespective of social standing and the choices that he/she ultimately makes, insisting on a society that is tolerant and which does not have the arbitrary power to interfere with the enjoyment of those rights. These theories form the basis of the majority of national and international human rights documents, which we will examine later in this chapter.

Of course, social contract theory is not popular with those who feel that the main purpose of the state is to protect the state as a whole, and who thus see the protection of individual liberty at the expense of the public or state interest as dangerous and divisive. This view, commonly known as **utilitarianism**, does not see individual liberty as a good in itself, and its followers are thus prepared to sacrifice individual liberty for the common good.⁹ Although utilitarianism is not opposed to individual rights, and indeed sees their protection as beneficial to society as a whole, its basic principles are cited today by those fearful that increasing the rights of individuals via such documents as the European Convention on Human Rights and the Human Rights Act 1998 will be detrimental to the public good. In response, it must not be forgotten why such documents were agreed to in the first place, and why indeed the idea of the social contract was devised. Such instruments and ideals were introduced to combat the threat of despotic and arbitrary governments, who were prepared to violate individual freedoms at any cost. Thus, as the public, aware from past experience of the dangers of the exercise of individual freedom, are naturally sceptical of the notion of the social contract, so too civil libertarians draw on previous state abuse of human rights to justify their views.

⁸ See Locke, *The Second Treatise of Government* (1698); Rawls, *A Theory of Justice* (Harvard University Press 1972).

⁹ The theory is often credited to Jeremy Bentham (1748–1832) who described the notion of natural rights as 'nonsense upon stilts', and the American Declaration of Independence as 'bawling upon paper': Bowring (ed.) *Collected Works of Jeremy Bentham* (Edinburgh, William Tait 1843).

■ Human rights and the protection of human dignity

The next theory that we will examine is the idea that protecting human rights is essential to maintaining the dignity and integrity of the human being. Thus human rights uphold the basic dignity of the individual as a human being; every human being, because they *are* human, is said to deserve humane treatment, and they should not, therefore, be subject to torture or other ill-treatment, or to slavery and servitude, as such treatment is an affront to human dignity. Those who advocate the abolition of the death penalty, therefore, do not always do so for practical reasons such as the possibility of sentencing the wrong person to death, but do so because they feel that such an activity is inconsistent with human dignity and of civilised behaviour. Equally, restricting an individual's right of choice, whether it be to what religion they are allowed to practise, or what they choose to say or who they are allowed to marry or associate with, could be said to be an attack on human worth and dignity. More specifically, discriminating against an individual or group of individuals because of their sex, race, religion, etc. could be said to amount to a violation of human dignity and pride.¹⁰

This basis for protecting human rights is, of course, vulnerable to attack from those who feel that certain individuals, because of their conduct, have forsaken their right to dignity. For example, prisoners claiming that their basic rights are being denied while in prison are often reminded by politicians and members of the public that they themselves have violated their victims' rights and should consider this when staking their claim. Such critics find it difficult to accept that documents such as the European Convention on Human Rights protect individuals from attacks on their dignity and worth irrespective of what they have done or what danger they pose to society or to particular individuals. This attack on the protection of rights can be answered in a number of ways. First, the prohibition of torture and other ill-treatment does not merely protect and benefit the individual; provisions such as Article 3 of the European Convention ensure that states do not violate the standards of civilised society. There is, therefore, a public benefit in the prohibition of torture, or arbitrary censorship or discrimination. Secondly, the vast majority of people will agree that there are limits to the manner in which an individual should be treated. Arguments about whether a person should serve life in prison, or the conditions in which they will serve their sentence, are ones of *degree*; in general everyone agrees that nobody should be subjected to torture or degrading treatment, but some feel that the state should be allowed the choice to elect a particular penalty. Thirdly, past experience tells us that these choices cannot be the sole prerogative of public opinion or of the state. It is preferable, therefore, to have a rule that insists that *all* individuals are treated with a minimum amount of respect and dignity, and that the relevant thresholds be decided within the parameters of human rights principles.

■ Human rights and equality

The next theory that we will examine is the idea that human rights and civil liberties are a necessary product of the notion of equality. Many human rights in domestic and international treaties are based on the idea of equality and freedom from discrimination.

¹⁰ For an analysis of the role of equality and dignity in the protection of human rights, see Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP 2002), chapter 3. See also the Special Issue of *European Human Rights Law Review* on Human Dignity and Equality [2006] (6) EHRLR.

International treaties and domestic bills of rights insist that rights are enjoyed free from discrimination on a variety of grounds, such as sex, race, national origin and religion. Equally, specific laws will be passed to ensure that individuals and groups are not subject to unlawful discrimination, often providing the individual with a specific remedy against the perpetrator of the discrimination. In addition, discriminatory treatment might give rise to a violation of another human right, such as freedom from inhuman or degrading treatment.

More generally, the principle of equality is often put forward as the theoretical basis for human rights protection. Treaties such as the European Convention on Human Rights advocate that the rights contained in the Convention are available to all, irrespective of personal or group characteristics, or of what the person is or has done. This principle is expounded by Ronald Dworkin (1931–), an American Professor and a leading exponent of rights and equality, who believes that every state has a duty to treat all of its citizens with equal concern and respect.¹¹ This is a modification of the social contract theory, and ensures that every person, particularly those who espouse unpopular views and who would not otherwise benefit from the choices made for the majority of society, are allowed to enjoy these fundamental rights. Thus, the European Convention has been used consistently by groups such as prisoners, sexual minorities and those whose views and expression of their views cause offence, providing evidence that those groups are most vulnerable to human rights abuses, and that their rights require protection from the traditional law and its enforcement. The protection of such groups gives rise to enormous public controversy, which will be examined later in this chapter, and such protection is defended via the principles of dignity and equality, which are so entrenched in all human rights documents.

■ Human rights and the rule of law

The fourth theory that we will examine is based on the notion that human rights uphold and maintain the basic tenets of the rule of law. Most international treaties on human rights stress the fundamental importance of the protection of such rights in upholding the rule of law. The idea that people are ruled by the law and not by men has been a central feature of democratic government since the birth of civilisation and ultimately human rights and individual liberty depend upon its maintenance. The doctrine accepts that the law has essential characteristics which distinguish it from arbitrary and unfair rules and in turn the human rights movement presupposes that the legal system will reflect those characteristics and provide the basis for protecting our fundamental rights. The doctrine is an essential feature of the British Constitution and as all students of constitutional law will recall was encapsulated by A.V. Dicey in his ideas of the predominance of regular law and the absence of arbitrary power, of equality under the law, and of the notion that individual rights will be protected by the courts.¹²

In essence the rule of law insists that states and governments follow basic principles of constitutional fair play. Law should be open, clear, general, prospective and stable,¹³ and

¹¹ Dworkin, *Taking Rights Seriously* (Duckworth 1977). See also McColgan, Principle of Equality and Protection from Discrimination in International Human Rights Law [2003] EHRLR 157; Singh, Equality: The Neglected Virtue [2004] EHRLR 141.

¹² A.V. Dicey, *The Law of the Constitution* (Macmillan 1959).

¹³ See Raz, *The Rule of Law and its Virtue* (1977) 93 LQR 195.

government should not interfere with people's rights in an arbitrary fashion. The rule of law also insists on equality, in the equal application of the law to all classes, including government officials, and on due process, including the principles of a fair trial, the presumption of innocence, the prohibition of retrospective penalties and the guarantee of judicial impartiality and independence. All these aspects of the rule of law not only protect the individual from arbitrary, irrational and unreasonable interference, but also provide a public good – an impartial and independent judiciary, an accountable and restricted government and the appearance of fair play and equality.

The 'due process' rights in the European Convention on Human Rights provide the clearest examples of how human rights can assist the rule of law. The Convention – the main treaty protecting human rights to Council of Europe countries – will be examined in detail later in this chapter and in chapter 2, but for present purposes we will examine its provisions to see how they reflect and uphold the rule of law. For example, Article 5 of the Convention provides that everyone has the right to liberty and security of the person and that such a right can only be interfered with in a number of specific circumstances, including lawful arrest and detention for specified purposes, and then only 'in accordance with a procedure prescribed by law'. Article 6 then provides that everyone has the right to a fair trial, upholding the principles of the rules of natural justice, of the independence and impartiality of the judiciary and the right of equal access to justice. More specifically, Article 7, which prohibits retrospective criminal law and penalties, supports the principle that there should be no punishment without law and that laws should be prospective and foreseeable.

Apart from the due process rights, the requirements of certainty and accountability are present throughout the Convention. Article 2 of the Convention, guaranteeing the right to life, includes the duty to conduct proper investigations into unlawful killings.¹⁴ The 'conditional rights', contained specifically in Articles 8–11 of the Convention,¹⁵ can only be interfered with when such restrictions are prescribed by law, or in accordance with law, and this has been interpreted by the European Court to mean that the relevant restriction must not only have a legal basis, but also that it be accessible and sufficiently certain to allow an individual to foresee the likely consequence of his or her actions.¹⁶

Treaties such as the European Convention on Human Rights and the Human Rights Act adopt, to some extent at least, the rights theories that have been examined above, giving a special status to individual freedom and individual rights. This does not mean that these rights can be enjoyed absolutely, or that individual freedom will always win when pitted against other interests. What these theories do espouse, however, is that these rights are normally more important than anything else, and can only be overridden in exceptional circumstances and under certain prescribed conditions. Thus, in *A v Secretary of State for the Home Department*¹⁷ the House of Lords stressed that even in a terrorist situation the domestic courts were not precluded from discharging their role of interpreting and applying the law, which was an essential feature of democracy and the cornerstone of the rule of law.

¹⁴ See *Jordan and Others v United Kingdom* (2003) 37 EHRR 2.

¹⁵ Even other articles, such as freedom from discrimination, and the right to marry and found a family, which do not employ such phrases, have been interpreted so that they can only be violated by restrictions which possess the characteristics inherent in specific phrases such as 'prescribed by law'.

¹⁶ See *Malone v United Kingdom* (1984) 7 EHRR 14 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

¹⁷ [2005] 2 AC 68.

Questions

What are human rights and civil liberties and what are their essential characteristics?
 What are the principal arguments in favour of protecting human rights and civil liberties?
 Do such rights protect a good beyond the protection of the individual, and, if so, what public good do they promote?

The classification of human rights and civil liberties

Why do some people refer to their 'human rights' and others to their 'civil liberties'?

Although the terms 'human rights' and 'civil liberties' are related – primarily because of their fundamental status – you should be aware that at times the terms are used deliberately in order to distinguish particular rights and claims. This section will examine the ways in which these terms are used in various circumstances.

■ Civil liberties as civil and political rights

First, the phrase 'civil liberties' is often employed to refer to rights labelled as 'civil and political rights' – those rights which regulate an individual's relationship with the state *vis à vis* their liberty and security. These rights form the main content of documents such as the European Convention on Human Rights (and the Human Rights Act 1998) and a variety of other international treaties and national bills of rights. Often referred to as 'first generation' rights, they include the right to life, freedom from torture and slavery, freedom of the person, the right to a fair trial, the right to private life, freedom of thought, conscience, religion, speech and assembly and association, the right to marry and found a family, the right to vote and the right to personal property. They are regarded as part of every person's birthright and thus should be enjoyed against, and protected by, the state. On the other hand in this context 'human rights' refer to what are called economic, social and cultural rights, or 'second generation' rights. These include the right to food, shelter and housing, the right to education and the right to employment, and are consistent with every person's basic human needs in that society, thus attracting the liability of the state to provide such needs. International and national law will often distinguish these rights and provide different machinery for the recognition and protection of such rights. Thus, from the Universal Declaration of Human Rights there was formed both the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), covering respectively these different, albeit overlapping, rights.

■ Human rights in an umbrella sense

Secondly, the phrase 'human rights' is also used in a generic or global sense to include *all* rights or claims that are regarded as fundamental or inalienable, and thus including first, second, and indeed third generation rights, such as the right to self-determination and the right to enjoy the environment. For example, the Universal Declaration on Human Rights

(1948) contains both groups of rights, and the European Convention on Human Rights contains the phrase 'human rights' in its title, and includes the right to education,¹⁸ which might be regarded as belonging to economic, social and cultural rights.

■ Human rights and civil liberties as positive and negative rights

Thirdly, the distinction between 'human rights' and 'civil liberties' may be drawn with regard to the terms 'rights' and 'liberties'. Human rights, in the form of economic and social or cultural rights, may refer to those claims that an individual has a *right to*, imposing on the state a positive obligation to provide the necessary resources so that individuals can gain such rights. Civil liberties on the other hand usually involve the individual claiming a *freedom from* interference with that claim and thus imposing a negative duty on the state not to violate that claim. Thus, in its full title the European Convention refers to human rights and *fundamental freedoms* and, to a great extent, concentrates on the individual's right to be left alone and to enjoy his fundamental liberty. However, this distinction is not watertight. The European Convention often refers to rights, such as the right to life and the right to a fair trial, and these rights are included alongside fundamental freedoms such as freedom from torture, freedom of speech, conscience and religion, and freedom of assembly. In addition, although many of the rights in the Convention can be enjoyed by non-interference from the state, many of the rights, or aspects of those rights, do depend on the state providing resources for their enjoyment, such as the right to education, the right to a fair trial and the right to vote, which will require enormous financial and other resources. Equally, the enjoyment of freedom of speech and the right to private life demands not only non-interference, but also freedom of and access to information. In addition, although many of the 'second generation' rights are absent from the European Convention, and the Human Rights Act, the failure to provide such rights may lead to a breach of Convention rights.¹⁹

■ Human rights as opposed to residual liberties

Fourthly, the terms 'rights' and 'liberties' can be used to distinguish between the legal status of a particular claim. Thus, whereas human rights are often equated with legally enforceable claims against the state and/or other individuals, civil liberties represent the residual liberty to do anything that one wants unless the law provides otherwise. Such a distinction is drawn between the traditional method of protecting civil liberties in the United Kingdom, and the system employed under the Human Rights Act 1998. Whereas before the Act a person had the residual right to enjoy their liberty, including their fundamental civil liberties, the Human Rights Act provides a system of rights, which are laid down in statutory form and which are enforceable in a court of law against those who violate them.

Notwithstanding this, a bill of rights might give a special legal status and entrenchment to either, or both, civil and political rights and social and economic rights. What is relevant is the extent to which those rights or liberties can be legally enforced, and to what extent the normal law can override them. It is in this respect that the distinction between rights, liberties

¹⁸ In Article 2 of the First Protocol to the European Convention on Human Rights.

¹⁹ For example, a failure to provide adequate welfare benefits may lead to a breach of the right to family life or, in extreme cases, may amount to inhuman or degrading treatment or punishment: see (*R*) *Limbuella v Secretary of State for the Home Department* [2005] 3 WLR 1014.

and immunities becomes central. Wesley Hohfeld (1879–1918), an American jurist, stated that whereas a person who enjoys a right can enforce such a claim legally, other people having a legal duty not to interfere with that right, a person enjoying a liberty merely does no wrong in exercising that liberty; other people have no corresponding duty to allow the claimholder to exercise that liberty.²⁰ For example, it might be said that a person has the liberty to assemble, provided he does not break any other law, but that he has no such right to assemble, because others will not be in breach of the law if they interfere with that liberty. On the other hand, freedom from discrimination becomes a right if a person who is discriminated against can bring a legal action against another who violates that right. Liberties thus are legally vulnerable and inferior to rights.

As both residual liberties and legal rights are often subject to legal interference and change, the classification of claims into *immunities* becomes fundamental. An immunity is a claim enjoyed by a person that another may not interfere with. Thus, bills of rights, whether national or international, often attempt to give certain claims an enhanced status, elevating them above regular rights and protecting them from legal and other interference. This characteristic of fundamental rights is central to the protection of both human rights and civil liberties, and provided such rights and liberties are given *legal* protection in respect of this immunity, the individual will at least start from the strongest position possible.

Question

What do you understand by the terms ‘human rights’ and ‘civil liberties’? What have those terms got in common and when is it necessary to distinguish between them?

The mechanism for protecting rights and liberties at national and international levels

Although it is easy to talk of the need to protect human rights and to impose moral obligations on states to protect them, both national and international law will need to provide some mechanism whereby such rights can be recognised, protected and enforced; otherwise talk of rights becomes meaningless.

This section of the text will examine the methods by which human rights and civil liberties can be recognised and protected in both domestic and international law (including how human rights are protected in Europe). It will also examine the manner in which both systems can both complement and conflict with each other.

■ Protecting human rights and civil liberties in domestic law

Every legal system will need to decide how human rights and civil liberties will be protected, and what status to give them in relation to other rights and interests.²¹ Central to this issue

²⁰ Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning* (Yale University Press 1920).

²¹ See Gearty, *Civil Liberties* (OUP 2007).

will be the role of the courts, and whether they will have a power to question or set aside the acts and decisions of the other organs of government.²² It will also involve the question of whether international human rights treaties and norms will form part of domestic law and what will be the position when national and international laws come into conflict.

One method might be to identify the rights and liberties in the constitution of the state, thereby giving those rights and liberties some special constitutional standing. Thus, the protection of these fundamental rights can be stated in the constitution to be one, or the main, aim of the state. This declaration may be merely aspirational in that the constitution does not provide any mechanism for the *legal* enforcement of these rights or liberties, but more often than not the constitution will provide some way of ensuring that these claims are given some higher or entrenched legal status. This position is then usually, but not always, supported by giving the ultimate power of interpretation and enforcement to the courts, thus restricting the power of the lawmakers and the executive to interfere with these rights. The best-known example of this 'constitutional' method of protection is the constitution of the United States, under which the courts have the ultimate power to interpret both the Constitution and the Bill of Rights and are allowed to declare legislative acts unconstitutional.²³

Another method, and the one adopted by the United Kingdom before the passing and coming into force of the Human Rights Act 1998, is to resolve human rights disputes within the regular law. In theory at least, human rights law will have no higher or different status than any other law; the law will be passed and declared in the same manner, there will be no constitutional court, and there will be no formal system of entrenching these rights and protecting them from the regular law or the institutions of the state. This approach, referred to as the 'common law' method when applied to the system adopted by the United Kingdom, is contrasted with the 'constitutional' method employed by the vast majority of other states. It should be noted, however, that although fundamental rights might not be contained in a formal document, and given a formal special status within the legal and constitutional order, that does not mean that such rights are not regarded as fundamental and given an enhanced protection by both lawmakers and the judiciary.

As we shall see, even in the absence of a formal constitutional document, fundamental rights can be recognised and protected by the courts by a process of implied constitutional interpretation that protects such rights from arbitrary and unreasonable interference. Equally, a formal system of rights protection depends heavily on the content of the bill of rights document, the number of restrictions permitted by it and the attitude of the judiciary in interpreting that document. Ultimately, therefore, the effectiveness of a system of rights protection should not be judged by the formal method adopted within that state, but by determining whether these rights, in law and practice, are given adequate protection, and whether that system results in unjustifiable restrictions on those rights.

Whatever formal system is adopted, state law will need to address two fundamental questions. First, who is to be the final arbiter on whether these rights are to be afforded protection against legislative or other interference? In other words, will the constitution give the courts the power to declare legislative and administrative acts as inconsistent with fundamental

²² For a discussion on the variety of domestic methods of protection, including under the Human Rights Act 1998, see Black-Branch, *Parliamentary Supremacy or Political Expediency?: The Constitutional Position of the Human Rights Act under British Law* [2002] Stat LR 59. See also, Hiebert, *Parliamentary Bills of Rights: An Alternative Model?* (2006) MLR 7.

²³ *Marbury v Madison* 1 Cranch 137 (1803) and *Roe v Wade* 93 S Ct 705 (1973).

rights, or will it give a residual power to the legislature and/or the executive to compromise these rights in the name of social justice or other interests? Secondly, what restrictions will the constitution allow on these rights and liberties, and what procedural or substantive limits will it place on lawmakers or law enforcers if they are allowed to compromise these rights?²⁴

In relation to the first question, even within a formal system the constitutional and legal order may allocate judicial power in a number of different ways. Thus, as with the American constitution, the constitution might give the courts the power to enforce the constitution, including its bill of rights, against incompatible legislative and executive acts. Accordingly, the legislative and the executive are disentitled from passing or executing inconsistent provisions. A similar method – but one which allows the legislature the ultimate power to interfere with fundamental rights – is the one adopted by the Canadian constitution. Under this system the legislature is allowed to pass legislation with a ‘notwithstanding’ clause, so that legislation is regarded as legitimate notwithstanding the fact that it is inconsistent with the fundamental rights contained in the Canadian Charter on Fundamental Rights.²⁵ This reflects the Westminster parliamentary model and the desire to maintain legal and political sovereignty.²⁶ Another system, and one that is adopted by New Zealand, and by the Human Rights Act 1998, is for parliament to give the judiciary the power to interpret legislation, wherever possible, in conformity with fundamental rights, but leaving the legislature the power to pass clearly inconsistent legislation that overrides such rights.²⁷ Thus, although the judiciary is allowed to presume that parliament intends the government to uphold human rights and to abide by human rights standards, it will not be given the mandate to strike down clear legislative provisions which parliament clearly intends to apply irrespective of the potential violation of human rights. In this way, parliamentary sovereignty is retained and the democratically elected government remains the ultimate arbiter on questions relating to the protection of human rights and civil liberties. On the other hand, in the absence of such clear legislative intent the courts are given a wide power to uphold human rights and to protect them from encroachment where such violations would offend constitutional or international standards.

With regard to the second question, all legal systems will need to provide for circumstances where it is permissible to violate, or compromise, fundamental rights. This can be done, as is evident in the European Convention, by either stating express exceptions to the scope of a particular right or by allowing interferences provided they possess the characteristics of legitimacy and reasonableness.²⁸ In addition, even where fundamental rights appear to be guaranteed absolutely, they can in practice be limited by judicial interpretation. For example, although the first amendment to the American Constitution provides that no law shall be passed which abridges freedom of speech, the American courts have limited the enjoyment of freedom of expression by deciding either that certain speech is not within the ambit of the article (or that certain speech is *less* worthy of protection than others), or by

²⁴ For an excellent overview of the various methods employed by domestic jurisdictions in the protection of human rights, see Alston (ed.), *Promoting Human Rights Through Bills of Rights* (OUP 1999).

²⁵ See Beatty, *The Canadian Charter of Rights: Lessons and Laments* (1997) 60 MLR 481; Ison, *A Constitutional Bill of Rights – The Canadian Experience* (1997) 60 MLR 499.

²⁶ See G. Anderson (ed.), *Rights and Democracy: Essays in UK Canadian Constitutionalism* (Blackstone Press 1999).

²⁷ See the New Zealand Bill of Rights Act 1990. See Taggart, *Tugging on Superman’s Cape* [1998] PL 266.

²⁸ Thus, Article 2 of the European Convention protects the right to life but provides for exceptions, for example, in cases of the defence of others from unlawful violence. In addition, the Convention makes certain rights, for example freedom of expression, conditional, allowing interference with that right provided it is prescribed by law and necessary in a democratic society for the purpose of achieving a legitimate aim.

developing a number of instances and conditions where it is permissible to restrict this fundamental right.²⁹

In a system where fundamental liberty is residual and conditional on non-interference by the law, there appears to be no limit to the restrictions that could be placed on the enjoyment of those rights. For example, although one might say that everyone has the residual freedom to demonstrate subject to relevant laws prohibiting such demonstrations, unless there are means to ensure that those laws are necessary and proportionate, then the very essence of the right to demonstrate will be cancelled out by such laws. However, provided democracy and the rule of law thrive, both lawmakers and the judiciary will impose limits on the power of the law to interfere with these basic rights. As with the method of enforcement, whether the more formal and entrenched system is more effective than one that relies on the goodwill of legislators, public opinion and judges cannot be answered simply by looking at the type of system adopted within that jurisdiction. Rather, one must examine the practice of that system and see whether it complies with recognised standards of legality and fairness, which are enshrined in documents such as the European Convention, and which insists that restrictions are clear and accessible, serve a legitimate aim and are necessary and proportionate.

Questions

What constitutional and legal difficulties are involved in the protection of human rights and civil liberties in domestic law?

Which system of rights protection do you feel is most desirable in resolving those difficulties?

■ The protection of human rights in international law

In addition to the domestic law's attempts to uphold the fundamental rights of its citizens, the protection of such rights has benefited from the movement to protect these rights in international law.³⁰ Such a movement gives human rights a global significance and provides a mechanism by which to use universally agreed standards to judge the legitimacy of each state's record of protecting such rights.³¹

The dilemma of protecting human rights in international law

The protection of human rights at the international level gives rise to a number of diplomatic, legal and moral dilemmas. As international law was traditionally concerned with the relationship between member states, the protection of individual human rights raises issues regarding the proper role of international law and its institutions. Most significantly, any treaty that prescribes the manner in which a signatory state treats its individual citizens impinges on that state's right to self-determination, a fundamental principle in international law. Thus, whatever enforcement mechanism a particular treaty adopts, a balance will need to be maintained between the right of each state to its individual autonomy and the protection of individual fundamental human rights.

²⁹ See Abraham, *Freedom and the Court* (OUP 1977); Tushnet, *Living with a Bill of Rights*, in Tompkins and Gearty, *Understanding Human Rights* (OUP 1995).

³⁰ For a comprehensive coverage of this topic, see Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals* (OUP 2007, 3rd edn). See also Rehman, *International Human Rights Law* (Longman 2010, 2nd edn), and Moeckli et al., *International Human Rights Law* (OUP 2010).

³¹ See Lord Hoffmann, *The Universality of Human Rights* [2009] 125 LQR 416, where it is argued that such rights are universal in the abstract, but national in their application.

Even if a state recognises the legitimacy of international intervention and of universal rights, there will be difficulty in achieving a consensus among member states on what rights should be included in such treaties and to what extent they should be protected.³² Although such rights are referred to as universal, inalienable and fundamental, there will often be a basic disagreement on the validity and importance of such claims, particularly from states which do not regard the protection of individual freedom and human rights as the primary objective of their society. For many societies, freedom of speech and religion or the right to equality on grounds of sex and race are regarded as inferior, or contrary, to the fundamental aims of that society. Even if there is a basic agreement in this respect that, for example, the rights to life and freedom from torture are fundamental, there will be deep disagreements as to whether such rights preclude, for example, the death penalty, corporal punishment or different treatment of women or racial or other groups.

These differences, articulated in the phrase 'cultural relativism',³³ can be accommodated in a number of ways. First, a particular state may be allowed to make a reservation when ratifying a treaty, reserving its right to carry out a practice that might otherwise be regarded as incompatible with its treaty obligations. Secondly, human rights treaties will make provision for the state to derogate from its obligations in time of war or other emergency. Thus, Article 15 of the European Convention on Human Rights, and Article 4 of the International Covenant on Civil and Political Rights, provide for the right of derogation in times of war or other public emergency. This compromise will be particularly appropriate in the case of states that do not enjoy the political, social and constitutional stability necessary to provide for the protection of fundamental rights. Thirdly, the international machinery for enforcing these fundamental rights might allow some latitude to each individual state in how they achieve the basic aims of the treaty. In relation to treaties that are enforced judicially, such as the European Convention on Human Rights, this will involve the adjudicating body, the European Court of Human Rights, allowing each member state a certain margin of appreciation, or margin of error, in how they achieve a proper balance between the protection of human rights and the power to achieve other social or individual interests.

Enforcing international human rights standards

Consequently, it is unsurprising that the methods of enforcement fall short of the full judicial method often adopted at national level. If such a method is available under the relevant treaty, as with the European Convention and the International Covenant on Civil and Political Rights, then member states will wish to either make reservations or opt out of these optional enforcement machineries. Alternatively, they will insist that the enforcement body afford to them a wide margin of discretion in attaining the universal standards. Accordingly, a more cautious and less confrontational method of enforcement is often available. For example, the United Nations Charter lacks any machinery for the enforcement of the rights it espouses and relies purely on declaring the importance of such rights and their protection by each and every member state. This method can also be bolstered by a body responsible

³² See Feldman, *Human Rights Treaties, Nation States and Conflicting Moralities* (1995) 1 *Contemporary Issues in Law* 61. See also Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals* (OUP 2007, 3rd edn), chapters 5 and 6.

³³ For discussions on this concept, see Tierney, *Beyond Cultural Relativism: Re-thinking the Human Rights Debate* [2004] *Juridical Review* 75; Walker and Poe, *Does Cultural Identity Affect Countries' Respect for Human Rights?* (2002) *Human Rights Quarterly* 237.

for the promotion of particular fundamental rights, such as the UN Economic and Social Council. In this way human rights might be enhanced by greater awareness and international support. Another, non-judicial method is the one adopted by such treaties as the International Covenants on Civil and Political and Economic, Social and Cultural Rights, involving a system of state reporting, whereby each member state makes periodic reports to an international institution, giving details of the measures adopted so as to secure fundamental rights within their jurisdiction and the success of such measures. This will give the international body the opportunity of inspecting those measures and, in certain cases, of commenting critically. A similar, but slightly more proactive, method of international enforcement is the one adopted under the European Convention on the Prevention of Torture 1987.³⁴ Under this Convention, the European Committee for the Prevention of Torture is charged, *inter alia*, with the duty to make visits to member states, visiting various places where individuals are detained, for the purpose of assessing whether the conditions of such detention constitute torture or inhuman or degrading treatment or punishment.³⁵

All these non-judicial and non-binding methods are very different from the methods employed by domestic law and by bodies such as the European Court of Human Rights, and might be regarded as ineffective. The various methods should, however, be seen as fulfilling the aims of international recognition, respect, promotion and protection of fundamental rights and should not be dismissed solely on the grounds that they do not involve judicial enforcement of such rights.

■ International human rights treaties: the United Nations³⁶

The United Nations Charter 1945

Although not strictly an international treaty for the protection of human rights, the preamble to the Charter states that the peoples of the United Nations reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women. Further, Article 1 of the Charter states that one of the purposes of the United Nations is to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.³⁷ Although the Charter and its declarations are no more than aspirational, those ideals nevertheless reflect the principles of liberty and individual freedom, which form the basis of the rights theory that we have discussed earlier in this chapter.

The Universal Declaration of Human Rights 1948

Article 68 of the United Nations Charter provides that the Economic and Social Council of the United Nations shall set up commissions in economic and social fields and for the promotion of human rights. Accordingly, the Council established the Commission on Human Rights, who in turn drafted the Universal Declaration of Human Rights, which was

³⁴ The full title is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

³⁵ For a comprehensive account of Convention and the work of the European Committee, see Morgan and Evans, *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (OUP 1999).

³⁶ See Alston and Megret, *The United Nations and Human Rights: A Critical Appraisal* (OUP 2010).

³⁷ Under Article 62 of the Charter the United Nations Economic and Social Council can make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

adopted by the UN General Assembly in 1948.³⁸ This Declaration, which is not binding on member states in international law, contains a commitment to the protection of human rights and lists a full range of both civil and political and economic and social rights.³⁹

Although the Declaration was only intended to be aspirational, the United Nations did establish a system whereby the UN Commission of Human Rights could consider communications that appeared to reveal a consistent pattern of gross violations of human rights and fundamental freedoms.⁴⁰ This represented a radical departure from the basic principles of international law, which stated that such law was concerned with the relationships between states and should not interfere in the domestic affairs of each state. It also led the way to the passing of two separate covenants on human rights – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both examined below) – with their own mechanism for enforcement. In addition, the UN Commission, and its Sub-commission, performed a variety of tasks with regard to the promotion and encouragement of human rights protection, including undertaking investigations into the position of human rights in particular countries. In 2006 the Commission was replaced by the Human Rights Council by UN Resolution 60/251. The Council will take over the functions of the Commission and it is proposed that it will have the power to undertake a universal periodic review of the fulfilment of each state's obligations and commitments.⁴¹

The International Covenant on Civil and Political Rights 1966

This Covenant was adopted by the UN General Assembly in 1966 and came into force in 1976.⁴² It contains a list of civil and political rights similar to that of the European Convention, although there are a number of differences with regard to the ambit of such rights.⁴³ The Covenant also contains a number of exceptions and restrictions similar to those contained in the European Convention. For example, a power of derogation is contained in Article 4 of the Covenant, and rights such as freedom of expression, contained in Article 19, are subject to restrictions which are provided by law and necessary for the respect of the rights or reputations of others, or for the protection of national security, of public order, or of public health or morals.⁴⁴

³⁸ See Klug, *The Universal Declaration of Human Rights: 60 Years On* [2009] PL 205.

³⁹ The Declaration also refers to a number of 'third generation' rights, such as the right to freely participate in the life of the community (Article 27), and the right to a social and international order in which the rights laid down in the Declaration can be realised (Article 29).

⁴⁰ ECOSOC Resolution 1503.

⁴¹ The status of the Council will be reviewed in 2011 and it may at that time become a full organ of the UN.

⁴² For general reading, see Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (OUP 2004, 2nd edn); Alston and Steiner, *International Human Rights in Context: Law, Politics, Morals* (OUP 2007, 3rd edn), chapter 3; Rehman, *International Human Rights Law* (Longman 2010), chapter 5.

⁴³ For example, under Article 24 every child is guaranteed the right to protection of his or her status as a minor, and Article 10 contains specific protection for those deprived of their liberty, stating that such persons shall be treated with humanity and with respect for the inherent dignity of the human person. In addition, the equality clause under Article 26 is wider than that contained in Article 14 of the European Convention, in that it provides that all persons are equal before the law and entitled without any discrimination to the equal protection of the law.

⁴⁴ Note that the Covenant does not use the phrase 'democratic society', employed in various articles in the European Convention, when qualifying the enjoyment of its rights.

The Human Rights Committee

The Covenant is monitored by the Human Rights Committee, established under Article 28, which has three principal functions: to receive and study reports submitted by the state parties (Article 40); to receive communications to the effect that a state party is not fulfilling its obligations under the Covenant (Article 41); and to receive communications from individuals claiming to be a victim of a violation of his or her Covenant rights by a state party (Optional Protocol to the Covenant, Article 1). The state reporting system consists of self-regulation whereby each state reports to the Committee on how it has given effect to the rights recognised in the Covenant. The second process, of receiving communications from other state parties, is more dynamic and requires a declaration from the relevant state recognising the competence of the Committee to receive and consider such complaints. In such cases, however, the Committee has no power to make a binding judgment, but may use its powers to achieve a friendly settlement between the parties.

The power to receive individual communications under the Optional Protocol is similar to the enforcement mechanism employed under the European Convention on Human Rights. Communications can be received by an individual, either personally or through another individual where the victim is prevented from communicating directly and is claiming to be a victim. The Committee has the power to declare communications inadmissible, and must be satisfied that the complainant has exhausted all available domestic remedies and that the complaint is not being considered by any other international procedure. The defendant state party is provided with the opportunity to forward its views on the allegations, but if it finds against the state the Committee has no power to enforce the finding and must leave it to the state to take any remedial action.

The United Kingdom has decided not to ratify this optional protocol, and is thus bound only by the process of state reporting explained above. The initial reluctance to sign up to the Protocol might have been that the United Kingdom, as with any other state, did not want to commit itself to a binding judicial process in relation to human rights violations. However, its commitment to the enforcement mechanism of the European Convention appears to refute that reason, and a better explanation would appear to be that as the government is already a party to the European Convention's machinery there is little need to commit itself to the Covenant in a similar fashion. In addition the International Covenant's system is less predictable than that of the European Convention in the sense that its provisions are more general and its jurisprudence less well established.⁴⁵

The International Covenant on Economic, Social and Cultural Rights 1966

This Covenant is concerned with the protection of what has been generally defined as 'second generation' rights.⁴⁶ In the preamble to the Covenant it is recognised that these rights derive from the inherent dignity of the human person and that the idea of free human beings enjoying freedom from fear and want can only be achieved if everyone enjoys his or her economic, social and cultural rights, as well as his or her civil and political rights.

⁴⁵ For an analysis of the compatibility of United Kingdom law with the Covenant, see Harris and Joseph, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995).

⁴⁶ For a full account of the Covenant and its operation, see Craven, *The International Covenant on Economic, Social and Cultural Rights* (Clarendon 1995); Baderin and McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007). See also Steiner and Alston, *International Human Rights in Context, Law, Politics, Morals* (OUP 2007, 3rd edn), chapter 4; Rehman, *International Human Rights Law* (Longman 2010), chapter 6.

Thus, Article 1 states that all peoples have the right of self-determination and the right to pursue their economic, social and cultural development, and Article 3 that the state parties undertake to ensure the equal right of men and women to enjoy the rights laid down in the Covenant. These general statements and duties are then supplemented by more specific rights, such as the right to work, including the right to just and favourable conditions of work (Articles 6 and 7); the right to form trade unions (Article 8); the right to social security (Article 9); the right to an adequate standard of living, including adequate food, clothing and housing (Article 11); the right to enjoy physical and mental health (Article 12); the right to education (Article 13); and the right to take part in cultural life (Article 14).

These rights are phrased in a very general manner, imposing on each state the general duty to attempt to ensure the conditions whereby such rights might be realised. This reflects the nature of economic and social rights, which impose a positive obligation on the state to provide resources and which are, therefore, heavily dependent on the economic resources of each individual state. This is duly reflected in the enforcement mechanism in the Covenant, which is based on the principle of self-monitoring and regulation. Thus, under Article 16 of the Covenant, the state parties agree to submit reports on the measures that they have adopted and the progress made in achieving the observance of the rights recognised under the Covenant.⁴⁷ Despite the general lack of direct judicial enforcement, the commitment to such economic, social and cultural rights can inform domestic law and practice, and domestic and international charity work, in this area. In addition, some of these rights are related to the more enforceable civil and political rights contained in the International Covenant on Civil and Political Rights and the European Convention. For example, the lack of social security provision might constitute inhuman or degrading treatment, and the lack of education and access to a cultural life might impact on an individual's right to freedom of expression.

Questions

Why is there a need for human rights protection at the international level?

What difficulties are evident from attempting to protect human rights at this level?

What can international law realistically seek to achieve in this area?

■ Human rights and Europe

Human rights (civil and political and economic and social) are protected regionally in Europe via a number of organisations and treaties. This section of the text will concentrate on the treaties that are the product of the Council of Europe and the European Union. A third body, the Organisation for Security and Co-operation in Europe (OSCE), is also charged with protecting and monitoring human rights in Europe, but will not be examined in this text.⁴⁸

The European Convention on Human Rights and Fundamental Freedoms 1950

The European Convention on Human Rights will be studied in detail in chapter 2 of this text, but for present purposes it is worth noting the central characteristics of the Convention with regard to the protection of human rights in international law. The European Convention

⁴⁷ These reports are submitted to the Secretary-General of the United Nations, who transmits copies to the Economic and Social Council for consideration.

⁴⁸ All three bodies' work are examined in Rehman, *International Human Rights Law* (Longman 2010), chapters 7 and 8.

on Human Rights and Fundamental Freedoms is a regional treaty, applicable to members of the Council of Europe. This feature of the Convention is significant in that the member states shared many common characteristics in terms of their constitutional and legal systems and their views on the identification and protection of human rights and fundamental freedoms. This feature is now not so distinct because of the extension of membership and ratification to and by many new members of the Council of Europe, including a number of eastern European countries. Accordingly, membership of the Council of Europe is no longer dictated entirely by western democracies, giving rise to potential conflict over the protection of human rights in Europe.

The most striking feature of the European Convention as an international treaty on human rights relates to the machinery for the enforcement of the rights and freedoms that are contained within the main text of the Convention. Although many states will be reluctant to commit themselves to a binding and legally enforceable obligation with respect to the protection of human rights, the European Convention establishes a judicial body – the European Court of Human Rights – which not only has the power to make judicial declarations on the Convention, which are then binding in international law on the relevant state party, but which also has the power to award remedies, including compensation, in the form of ‘just satisfaction’. In addition, the Court has the power to receive applications from individuals claiming to be a victim of a violation at the hands of a member state.

One of the central aims of the Convention is to effect incorporation of the Convention and its principles into the domestic law of member states. Thus, Article 1 of the Convention provides that the High Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms set out in Section 1 of the Convention. Accordingly, Article 1 not only places a duty on each member state to ensure that the standards of the Convention are applied in domestic law, but also, albeit implicitly, calls for incorporation of the Convention into the domestic legal structure. With regard to the United Kingdom, the Human Rights Act 1998 all but incorporates European Convention rights into domestic law, and even before the Act the Convention had a very large impact on the development of human rights principles in domestic law.

The European Social Charter

The European Social Charter (ESC) is a product of the Council of Europe. Signed in 1961, it attempts to complement the European Convention on Human Rights by providing for the enjoyment of a variety of social rights by those within the jurisdiction of the member states.⁴⁹ Part One of the Charter imposes a flexible duty on the Contracting Parties to ‘accept as the aim of their policy’ to pursue all appropriate means to attain the conditions in which the rights laid down in Part One may be effectively realised. Part One then lists a number of rights, including the right to earn a living, the right to just conditions of work and to safe and healthy working conditions, the right to a fair remuneration, the right to freedom of association and the right to bargain collectively. There are also references to the rights of children and young persons and to maternity and welfare benefits. Part Two of the Charter then expands on these rights, stating that the Contracting States consider themselves bound by the obligations to ensure the observance of such rights.

The ECS operates by means of a reporting system whereby Contracting Parties submit reports to the Committee of Experts, a body appointed by the European Convention’s

⁴⁹ See Harris, *The European Social Charter* (Virginia Press 1984). See also Betten and Grief, *EU Law and Human Rights* (Longman 1999), pages 42–52.

Committee of Ministers. A revised version of the Charter entered into force in 1999, establishing a system of adjudication to deal with collective complaints by employers' and trade union organisations with regard to alleged breaches of the Charter. However, although the United Kingdom has signed the Revised Charter, it has not ratified it and will not be bound by the collective complaints system even after ratification.

■ Human rights and the European Union

This textbook concentrates on the rights contained in the European Convention on Human Rights as enforced under the Convention machinery and domestically via the Human Rights Act 1998. However, this section provides a brief overview of the position of human rights within the European Union and how that recognition complements the position under the Convention and the 1998 Act.

A common confusion among law students, and others, relates to the distinction between the European Convention on Human Rights and European Union (EU) law. First, the European Convention on Human Rights is a product of the *Council of Europe*, a larger body than the EU (originally the European Community), whose main concern was the recognition and protection of fundamental human rights in European states. Secondly, the judicial body of the European Convention is the *European Court of Human Rights*, and not the *European Court of Justice*, which is the judicial arm of the EU. Thirdly, an essential feature of EU law is its primacy over domestic law. EU law is by the nature of treaty membership supreme and thus overrides domestic law,⁵⁰ whereas the European Convention on Human Rights is not necessarily supreme, Article 1 of the Convention merely imposing a duty on each member state to protect the rights identified in the Convention. The extent to which the Convention is binding is, as explained below, left to each member state. Fourthly, although the decisions of the European Court of Human Rights are binding on the member states in international law, imposing on that state a duty to pay compensation or to change its law, such decisions, unlike those of the European Court of Justice, do not automatically change domestic law or allow a person to rely on that decision in contradiction to the existing domestic law. Fifthly, and in respect of the United Kingdom, EU law became part of domestic law as a result of the European Communities Act 1972, which *incorporated* EU law (and its binding status) into English law, whereas the European Convention on Human Rights was *given effect* to by virtue of the Human Rights Act 1998.

Despite this, and even though European Community (Union) law is *primarily* concerned with economic rights and security, and not with the protection of those human rights that are contained in documents such as the European Convention, the European Union and its organs play a vital role, both directly and indirectly, in the protection of human rights in the domestic states.⁵¹

⁵⁰ See *Costa v ENEL* [1964] ECR 585. This includes the power of the domestic courts to disapply an Act of parliament that is inconsistent with EU law: *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70.

⁵¹ For a detailed account of human rights and the EU, see Alston (ed.), *The EU and Human Rights* (OUP 1999); Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2004); Betten and MacDevitt (eds), *The Protection of Fundamental Rights in the European Union* (Kluwer International 2006). For a briefer account, see Betten and Grief, *EU Law and Human Rights* (Longman 1998). See also Craig and De Burca, *EU Law: Text, Cases and Materials* (OUP 2007, 4th edn), chapter 11; Arnull et al., *Wyatt and Dashwood's European Union Law* (Sweet & Maxwell 2006, 5th edn), chapter 8.

First, certain rights protected by the treaties of the European Union, such as freedom of movement and freedom from discrimination on the grounds of sex, belong to the class of human rights that we have identified above, and can be equated with such rights as liberty and security of the person, contained in Article 5 of the European Convention, and the prohibition of discrimination, contained in Article 14. As we shall see, these EU provisions will be interpreted and applied in conformity with certain principles of fundamental human rights, and often the case law of both the European Court of Justice and European Court of Human Rights can be used complementarily.⁵² In addition, much EU law has inspired the protection of privacy and equality laws in domestic law. For example, domestic law relating to sex discrimination, in the form of the Sex Discrimination Act 1975 and the Equal Pay Act 1970, and the Data Protection Acts 1984 and 1998, were passed and have been amended so as to comply with relevant EC provisions.⁵³

Secondly, although the European Convention has not been formally adopted as EU law,⁵⁴ the Convention has been allowed to inform EU law and indirect use is made of the Convention by the organs of the EU.⁵⁵ Thus, although the European Court of Justice has held that the Community did not have the power to become party to the European Convention on Human Rights,⁵⁶ Article (6)(2) (formerly F(2)) of the Treaty on the European Union states that the EU will respect fundamental rights as recognised by the European Convention. Although the ECJ initially refused to accept that it had jurisdiction to question national or European Community law that was inconsistent with fundamental human rights,⁵⁷ later cases accepted that human rights were enshrined in the general principles of Community law and that such law should be interpreted to avoid conflict with those principles.⁵⁸ For example, in *Internationale Handelsgesellschaft*⁵⁹ the ECJ observed that the protection of fundamental human rights must be ensured within the framework of the structure and objectives of the Community, and in *Nold v Commission of the European Communities*⁶⁰ it held that both it and the domestic courts should have regard to those fundamental rights when reviewing or interpreting domestic and EC laws.

Thirdly, both EU law and the European Convention on Human Rights have adopted principles such as certainty, legality, equality and proportionality in determining the legitimacy

⁵² For example, in *P v S and Cornwall CC* [1996] ECR I-2143 the ECJ held that transsexuals were protected by the Equal Treatment Directive on the basis that the Directive protected the principle of equality, one of the fundamental principles of Community law.

⁵³ The sex discrimination provisions derived from such provisions as Article 119 of the Treaty of Rome (now Article 141 of the EC treaty). The data protection laws derive from the European Convention for the Protection of Individuals with regard to the Automatic Protection of Data, 17 September 1980.

⁵⁴ The draft reform Treaty expresses the unanimous intention of the European Union member states to proceed to the accession of European Convention rights. At the time of writing the European Union member states have expressed a unanimous intention to proceed to accession to the Convention (Lisbon Agreement). In July 2010 discussions took place between the Secretary General of the Council of Europe and the Vice President of the European Commission on the EU's accession to the European Convention.

⁵⁵ See Jacobs, *Human Rights in the European Union: The Role of the Court of Justice* (2001) 26 ELR 331.

⁵⁶ Opinion 2/94 [1996] ECR I-1759.

⁵⁷ *Stork v High Authority* [1959] ECR 17 and *Geitling v High Authority* [1960] ECR 423.

⁵⁸ *Stauder v City of Ulm* [1969] ECR 2237. For a more recent example, see *Carpenter v Secretary of State for the Home Department*, Case C-60/00, [2002] CMC 64, where the European Court of Justice held that the deportation of an immigration overstayer was in breach of both Article 49 EC and Article 8 of the European Convention on Human Rights.

⁵⁹ [1970] ECR 1125.

⁶⁰ [1974] ECR 491.

and reasonableness of measures that interfere with fundamental rights. These principles have been used by the ECJ in enforcing EU law, and have been used by the domestic courts to increase their powers of judicial review in areas such as natural justice and the doctrine of legitimate expectations.⁶¹ For example, the ECJ has used the doctrine of proportionality to measure the legitimacy of acts and decisions of domestic authorities and EU institutions, including those that interfere with fundamental human rights.⁶² Thus, in *Fromançais SA v FORMA*⁶³ it was held that the Court should ask whether the disputed measure was the least restrictive which could be adopted in the circumstances and whether the means adopted to achieve the aim correspond to the importance of the aim.

Although European Union law and the European Convention operate according to different rules of direct effect and enforceability, the two systems are often connected and in many cases an individual will bring an action making claims under both treaties.⁶⁴ In such a case the domestic courts will need to adjudicate on domestic law and practice with regard to both European Convention and EC principles. For example, in *R v Chief Constable of Sussex, ex parte International Trader's Ferry*,⁶⁵ the House of Lords had to decide the legality of the Chief Constable's decision to limit the number of police at a protest at the applicant's premises. In doing so their Lordships not only had to judge the reasonableness of the decision in line with traditional principles of judicial review, but also had to consider the impact the decision had on the fundamental right of peaceful assembly and the right of movement of goods under Article 34 of the EC Treaty.⁶⁶

The case of *Gough, Miller and Lilly v DPP*,⁶⁷ concerning the lawfulness of banning orders placed on football spectators provides another example. A number of people had received banning orders under s.14A of the Football Spectators Act 1989 after being convicted of violent offences at football grounds. The orders prohibited the claimants from attending football matches for a period of six years and also prevented them from travelling to football matches abroad for a period of two years. It was argued that the penalties derogated from the rights of freedom of movement and freedom to leave their home country as conferred by Articles 1 and 2 of Council Directive 73/148/EEC and that they infringed Articles 6 and 8 of the European Convention on Human Rights. The Court of Appeal held that the EC Directive did not provide an absolute right to leave one's country and thus allowed a public policy exception. The orders were only imposed where there were strong grounds for concluding that the individual had a propensity for taking part in football hooliganism, and it was proportionate that those who had shown such a propensity should be subjected to a scheme that restricted their ability to indulge in such behaviour. Dealing with the claims under the European

⁶¹ See *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622.

⁶² For a useful account of the ECJ's use of the doctrine of proportionality, see Craig and De Burca, *EU Law: Text, Cases and Materials* (OUP 2007, 2nd edn), chapter 15. See also Fordham and de la Mere, Identifying the Principles of Proportionality, in Jowell and Cooper (eds), *Understanding Human Rights Principles* (Hart 2001).

⁶³ [1983] ECR 395.

⁶⁴ See, for example, *R (Countryside Alliance) v Attorney General and Another* [2007] 3 WLR 922, detailed in the case study at the beginning of this chapter.

⁶⁵ [1999] 2 AC 418.

⁶⁶ The House of Lords held that the decision was both reasonable and a proportionate measure on grounds of public policy under Article 36 of the EC Treaty. Contrast *Eugen Schmidberger Internationale Transporte Planzugen v Austria* [2003] 2 CMLR 34.

⁶⁷ [2002] 3 WLR 289. For an account of the case, see Deards, Human Rights for Football Hooligans? (2002) 27 ELRev 206.

Convention, the Court held that although the legislation applied a civil standard of proof, that standard was flexible and had to reflect the consequences that would follow if the case for such an order was made out. Further, the Court was satisfied that provided that a banning order was properly made, and that any interference with the individual's right to private life was justified on the grounds of the prevention of disorder, as permitted under Article 8(2), then such a ban was not in violation of the applicants' right to private life.

The Community Charter of Fundamental Social Rights for Workers

In addition to the European Social Charter, above, as part of EU law the Community Charter of Fundamental Social Rights for Workers constitutes a political declaration of intent by Heads of State of the European Community relating to the protection of various social and economic rights of workers. By virtue of the Treaty of European Union 1992, the Community and its member states became committed to a number of objectives, including the promotion of high employment, improved living and working conditions and equal pay for equal work. The United Kingdom accepted the Community Charter in 1997 and the Treaty of Amsterdam 1997 contains in its preamble an undertaking that member states confirm their attachment to fundamental rights as defined in both the European Social Charter and the Community Charter. Thus, by drawing economic and social rights into primary EU Law, there now exists a firmer basis for the protection of social and economic rights under EU law. For example, the 1997 treaty expands the jurisdiction of the ECJ to various matters relating to cooperation between member states in justice and home affairs, and the Council of Ministers may under Article 13 of the consolidated treaty take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, age or sexual orientation.

The EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights seeks to further the EU's recognition and protection of human rights.⁶⁸ The Charter, drawn up by a special body including representatives of the member states, of the national parliaments and of the European parliament, was published in May 2000 and contains a variety of both civil and political rights – including (in Article 1) the right to human dignity – and social and economic rights.⁶⁹ Although the United Kingdom's stance is that the Charter should remain totally aspirational, other member states believe that it should become part of EU law. If the latter approach is adopted, then the full, or at least fuller, range of human rights will become legally enforceable under the protection of supreme EU law.⁷⁰ This would represent a radical departure of rights protection in international law, which has always distinguished between civil and political, and economic and social rights with regard to enforcement mechanisms.⁷¹

⁶⁸ See Jacobs, *Human Rights in the European Union: the Role of the European Court of Justice* (2001) 26 ELRev 331.

⁶⁹ For an account of the Charter and its formation, see De Burca, *The Drafting of the European Union Charter of Fundamental Rights* [2001] 26(2) ELR 126; Fredman, *A New EU Charter of Fundamental Rights* [2000] PL 170. See now Peers and Ward, *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Hart 2004); Arnall et al., *Wyatt and Dashwood's European Union Law* (Sweet & Maxwell 2006, 4th edn), chapter 9; Denman, *The Charter of Fundamental Rights* [2010] EHRLR 349.

⁷⁰ There already exists the European Social Charter, a Treaty of the Council of Europe, and the Community Charter of Fundamental Social Rights for Workers, which recognise a number of social, economic and employment rights. For an account of those treaties, see Betten and Grief, *EU Law and Human Rights* (Longman 1999).

⁷¹ See Ashiagbor, *Economic and Social Rights in the European Charter of Fundamental Rights* [2004] EHRLR 62.

Questions

How are human rights protected under both EU law and the European Convention on Human Rights?

What advantages might there be to the United Kingdom in having obligations under the European system as well as in international law generally?

■ Other international and regional treaties

In addition to the UN and European treaties outlined above, there is a plethora of other international and regional treaties concerned with the recognition and protection of human rights and fundamental freedoms. Many of these treaties attempt to address a particular issue of human rights, such as the protection of refugees, women, children or prisoners.⁷² Thus, in addition to the general UN Conventions, there exist UN treaties such as the Convention on the Elimination of All Forms of Discrimination 1966, which imposes an obligation on all states to make it an offence to disseminate ideas based on racial superiority or hatred; the Convention on the Elimination of All Forms of Discrimination Against Women 1967, supplementing anti-discrimination provisions contained in more general international treaties and monitored by the Committee on the Elimination of Discrimination Against Women; and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), monitored by the Committee Against Torture.

The dilemma of protecting human rights and civil liberties

'The Human Rights Act has introduced a culture that has inhibited law enforcement . . .'

David Cameron, Conservative Party Leader, in a speech to the Centre for Policy Studies, June 2006

This section of the chapter examines the various moral and legal difficulties inherent in the recognition and protection of human rights and civil liberties in practice: in particular, of giving such rights and liberties an elevated status in domestic and international law when such rights conflict with other rights and interests. Although this textbook is not exclusively about the European Convention and the Human Rights Act 1998, the introduction of the 1998 Act has brought about many decisions which highlight the complex nature of human rights and civil liberties issues. The following passages will therefore consider how both the Convention and the Act and the case law resulting from them have tackled contentious areas, for the purpose of illustrating and, to an extent, resolving many dilemmas which are involved in human rights disputes and which give rise to so much concern.

The Human Rights Act 1998 was passed for the primary purpose of bringing the European Convention of Human Rights, and its case law, into domestic law.⁷³ Although one of the aims

⁷² See Wallace and Dale-Risk, *International Human Rights: Text and Materials* (Sweet & Maxwell 2001, 2nd edn) for a comprehensive list of such treaties.

⁷³ See Straw and Boateng, *Bringing Rights Home: Labour's Plans to Incorporate the ECHR into UK Law: A Consultation Paper*, 1997. The background to the introduction of the Human Rights Bill, and the passing of the Act, will be examined in detail in chapter 3.

of the Act was to enhance human rights protection in domestic law, the European Convention, and most notably the cases that had been decided by the European Court of Human Rights against the United Kingdom government, became the main focus of attention. The traditional method of protecting rights and liberties in the United Kingdom was to be enhanced and, to an extent, replaced, by a system that has been responsible for highlighting a variety of laws, administrative practices and judicial decisions that were held to be incompatible with the Convention and its principles. The future of the protection of rights in domestic law is to be, and has been, fundamentally informed by the cases that have been brought before the Convention machinery, together with those decided in the post-Human Rights Act era.

Since the first decision of the European Court of Human Rights relating to an individual application was decided,⁷⁴ the United Kingdom has regularly been found to be in violation of the European Convention. The decisions have covered a variety of areas, including prisoners' rights, freedom of expression, the right to peaceful assembly, private and family life, the right to a fair trial, arrest and detention, deportation and extradition, corporal punishment and the right to life.⁷⁵ Almost all of the cases have been controversial in the sense of arousing intense political, constitutional and legal debate regarding the importance of human rights and civil liberties and the need for the state to limit such rights and liberties for some national or individual good.⁷⁶ We will now examine some of the fundamental moral and legal dilemmas that the Convention and the Act have illustrated.

■ Absolute rights and the European Court of Human Rights

The first issue we shall examine is the controversy surrounding cases where the European Court has found states in contravention of what are referred to as 'absolute' rights: those rights that cannot be interfered with whatever the justification. The cases below involved the interpretation of Article 3 of the Convention, which states that no one shall be subject to torture or to inhuman or degrading treatment or punishment. Although the European Court has never found the United Kingdom government in violation of the right to be free from 'torture' under Article 3, the government has on a number of occasions been found guilty of inflicting inhuman or degrading treatment or punishment. In *Ireland v United Kingdom*⁷⁷ the European Court held that the application of various interrogation techniques applied to individuals suspected of terrorist offences amounted to inhuman and degrading treatment. In addition, the United Kingdom has violated Article 3 in relation to decisions to deport or extradite persons to states where they faced a real risk of being subjected to ill-treatment.⁷⁸ The government was also found to have violated Article 3 when a nine-year-old boy had been beaten by his stepfather, the Court finding that he had been subjected to inhuman and degrading treatment or punishment.⁷⁹

⁷⁴ *Golder v United Kingdom* (1975) 1 EHRR 524.

⁷⁵ See Foster, *The Protection of Human Rights in Domestic Law: Learning Lessons from the European Court of Human Rights* [2002] 53 NILQ 232.

⁷⁶ These cases are detailed in both chapters 2 and 3 of this text, and throughout all chapters dealing with specific rights.

⁷⁷ *Ireland v United Kingdom* (1978) 2 EHRR 25.

⁷⁸ See, for example, *Soering v United Kingdom* (1989) 11 EHRR 439 and *Chahal v United Kingdom* (1997) 23 EHRR 413, examined in chapter 5 of this text.

⁷⁹ *A v United Kingdom* (1999) 27 EHRR 611. This case raises another issue of whether states should be liable for violations of human rights committed by private individuals as well as state actors and public authorities.

Article 3 is referred to as an 'absolute' right, allowing no possible justification for any violation. Article 3 thus poses a number of dilemmas, not least of a legal nature. How do the courts determine the criteria upon which they are to decide whether treatment or punishment falls within the terms used in the Article? The Court will attempt to employ internationally accepted standards of civilised behaviour, but in doing so it will need to decide whether particular treatments or punishments carried out in different jurisdictions are acceptable. The Court will have to decide whether to reflect the different cultures of each member state, or to strive for a common standard applicable to all states, thus outlawing a practice regarded as acceptable within a particular community. The Court will then face the difficulty of applying the relevant criteria to the facts of the case, involving difficult and often clinical decisions regarding the amount of suffering that the victim has been subjected to.

In the *Ireland* case, above, the Court held that the subjection of the victims to the so-called five techniques,⁸⁰ which included subjecting the detainees to noise and depriving them of sleep and food, constituted inhuman and degrading treatment, but not torture. Thus the Court had the *legal* difficulty of defining the particular terms and of applying them to that case, finding that the treatment did not constitute a deliberate and particularly cruel form of inhuman treatment. The Court also held that the treatment of the detainees could not be justified in any circumstances, even though the authorities were employing the techniques in an attempt to protect national security by combating terrorism and gathering intelligence information for that purpose. The Convention, therefore, outlaws such practices whatever their social utility.⁸¹ Many people would find it hard to accept that a court can legitimately place restrictions on the powers of domestic authorities to deal with the suppression and detection of crime, particularly in the case of acts of terrorism where others' rights and social stability are threatened. Indeed it might be argued by many that the 'victims' in this case were not deserving of the Convention and the Court's protection, and had forgone their rights when they took part in their criminal activities. Notwithstanding the fact that the victims in this case were suspects, rather than convicted terrorists, the Convention offers everyone protection against such treatment. This aspect of the Convention's protection was highlighted in the House of Lords' decision in *A v Home Secretary (No 2)*⁸² where it was held that the Convention, and other international treaties, outlawed the admissibility of torture evidence in any legal proceedings.

Further legal and moral problems are evident in extradition and deportation cases. The Court has established that one member state can be responsible for the violations, or likely violations, of the Convention rights of individuals committed by another state, for example where one state deports an individual who is then subjected to ill-treatment in the receiving state.⁸³ Such cases give rise to a number of difficulties, some of a legal or jurisdictional nature; for example, whether the Convention can engage the liability of a member state in cases where the deporting or extraditing state has not committed any direct violation of Article 3 itself and it is the receiving state which commits the actual violation. This inevitably gives rise

⁸⁰ The techniques are detailed in the judgment. For an analysis of the judgment and of rights protection, see Waldron, *The Law* (Routledge 1990), chapter 5.

⁸¹ For a discussion of this dilemma, see Ginbar, *Why not Torture Terrorists?: Moral, Practical and Legal Aspects of the Ticking Bomb Justification for Torture* (OUP 2009).

⁸² [2005] 3 WLR 1249. The case will be examined in chapter 5 of this text.

⁸³ *Soering v United Kingdom*, n 78 above. The UK government's efforts to modify this principle in the context of terrorism is considered in chapter 5 of this text.

to legal and diplomatic concerns, and the British judiciary has declared incompatible detention provisions passed by the British parliament to deal with such a situation.⁸⁴ A similar jurisdictional concern is evident when individual rights are violated by other private individuals. Thus in *A v United Kingdom*⁸⁵ the European Court held that the United Kingdom government were responsible for the actions of an abusive stepfather because domestic law failed to provide adequate protection and remedies to persons who were subjected to ill-treatment within Article 3. The Convention and the Court will, thus, need to determine the possible 'horizontal' effects of the state's obligations.

■ **The balancing of rights and liberties with other interests: necessity and proportionality**

The second issue we shall consider relates to the difficulty of balancing rights and liberties with conflicting interests or other rights. As we shall see throughout this text, some human rights conflict with other fundamental rights, and in such cases the legal system must provide an answer as to how those rights will be balanced. In doing so, the system is not denigrating the value of the rights in question, but simply offering a method by which those rights can be most effectively reconciled with other rights and interests. In other cases a human right might be compromised by a claim that is not regarded as fundamental. To allow the fundamental right to be compromised in such a situation *does* at least threaten the sanctity of that right and systems must be in place to make sure that the value of those rights are not lost for unnecessary or unsubstantiated reasons.⁸⁶

This involves placing restrictions on the validity of any provision or act that interferes with fundamental rights. One method is to elevate the fundamental right, by perhaps including it in a bill of rights, thereby giving it a superior status over other claims. By doing this, any interference with such a right is regarded as *prima facie* unlawful, and although this will not prohibit *any* interference, those who seek to restrict the fundamental right will need to justify that breach from a weak position. Initially, any interference will need to have a foundation in law. In setting these limits treaties such as the European Convention try to ensure that interference with fundamental rights is the exception rather than the norm, protecting such rights from arbitrary, unnecessary and convenient compromise.⁸⁷

Thus, some rights are regarded as 'conditional' and can be interfered with in particular circumstances. For example, freedom of expression and the right to private life are expressly stated in the European Convention to be subject to restrictions, provided those restrictions are in accordance with the domestic law and are deemed necessary for the purpose of achieving some legitimate purpose.⁸⁸ In these cases the domestic authorities, and ultimately the European Court of Human Rights, will need to carry out a balancing exercise to determine whether the Convention right has been justifiably interfered with. This balancing exercise is beset with difficulties of a legal and moral nature, raising all manner of questions as to how

⁸⁴ See *A v Secretary of State for the Home Department* [2005] 2 AC 68, examined in a case study in chapters 6 and 14.

⁸⁵ See n 79 above.

⁸⁶ See Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006).

⁸⁷ See Gearty, *Principles of Human Rights Adjudication* (OUP 2005). These principles and their application are discussed in detail in chapters 2 and 3 of this text.

⁸⁸ For an excellent explanation and analysis of these principles, see Gearty, *Principles of Human Rights Adjudication* (OUP 2005), chapters 4 and 7.

that exercise should be carried out, by whom, and what weight should be given to each conflicting interest.

In the case of the United Kingdom, a country which principally follows the rule of law and which respects the notion of human rights, most human rights disputes will fall into this category and the European Court has been asked on innumerable occasions to determine whether the United Kingdom has got the balance right. For example, the European Court has held that the domestic law of contempt of court was applied disproportionately to a newspaper which commented on the 'Thalidomide' disaster;⁸⁹ that the prohibition of homosexuals serving in the armed forces was a disproportionate and unnecessary restriction on the applicants' right to private life;⁹⁰ and that the arrest and detention of demonstrators who were handing out leaflets outside a conference centre was a disproportionate interference with their right to freedom of expression and liberty of the person.⁹¹ In these cases the domestic law and practice has attempted to balance the applicants' human rights with other interests, but the European Court has nevertheless found that there has been a violation of the Convention.

It may indeed be questioned whether the European Court, or indeed any court, is an appropriate body to judge on the appropriateness and necessity of the state's laws and practices. The European Court must not only be satisfied that the domestic state has considered the problem of balancing rights with other rights and interests, and thus has made provision for such in their domestic law, but that such restrictions are both legitimate in their nature and necessary in a democratic society for the fulfilment of that aim, for example, public safety. This is a role which has, theoretically, been alien to the United Kingdom judiciary, and involves judges (as opposed to elected representatives) and, worse still, judges from other countries, making decisions on the facts of the case and in relation to the respective merits of the parties' case. In addition, these cases will pose a host of legal and moral difficulties for the judges who have to balance those rights and interests, and indeed for the drafters of the Convention:

- Will it be sufficient that the relevant legal restriction is accepted as law in that domestic state, or will that law have to conform to certain requirements that are consistent with the rule of law?
- Will the courts simply balance those rights or interests in a pragmatic, utilitarian manner, or is it permissible to give certain rights or conflicting interests a superior status, thus making it more difficult, or easier, to interfere with certain rights in particular circumstances?
- To what extent will the Court be equipped or prepared to interfere with particular decisions?⁹²
- To what extent should the cultural and legal differences inherent in each state be relevant in determining those questions?

⁸⁹ *Sunday Times v United Kingdom* (1979) 2 EHRR 245. The litigation concerned the use of the thalidomide drug by pregnant women which caused their babies to be born with deformities.

⁹⁰ *Smith and Grady v United Kingdom* (2000) 29 EHRR 493; *Lustig-Prean and Beckett v United Kingdom* (2000) 29 EHRR 548.

⁹¹ *Steel v United Kingdom* (1999) 28 EHRR 603.

⁹² This was highlighted most dramatically in *A v Secretary of State for the Home Department* [2005] 2 AC 68, where the House of Lords had to decide not only whether there was an emergency threatening the life of a nation so as to justify the government's derogation from the Convention, but also whether particular measures were proportionate and non-discriminatory.

Turning to the examples given above, it is apparent that the rights claimed by the applicants are in conflict with other interests. In the *Sunday Times* case, the newspaper's right to comment on the possible negligence of the company in manufacturing a drug which caused deformities in children was in conflict with the laws of contempt, which attempt to safeguard the impartiality and independence of the judiciary – an aim which is expressly recognised as legitimate in Article 10 of the Convention. In fact, that right was also in conflict with a person's right to a fair trial, which is a right recognised by the Convention itself, not just as a reason to interfere with free speech, but as a fundamental right.

Nevertheless, the Court decided that the interference in question, albeit applied for legitimate reasons, was a disproportionate and unnecessary response. Cases such as *Steel and Smith and Grady* (above) are also controversial. The Convention has relegated these conflicting interests – public order and national security – to mere legitimate aims, which *might*, in exceptional cases, justify the interference with the fundamental rights laid out in the Convention articles themselves. This poses the question *why* the right to demonstrate, or the right to private sexual life, is more important or fundamental than the right to enter a building without being troubled by demonstrators, or to insist on measures which ensure that the country has an effective and confident fighting force. To reply that the right to private life and the right to assemble peacefully *are* guaranteed in the European Convention, while the other claims are not, and that fundamental rights cannot be compromised on grounds of intolerance or of convenience, will not satisfy those who believe that individual rights should not be enjoyed at the expense of other people's rights and that any right should be enjoyed in the context of majority public opinion.

■ Human rights and the protection of unpopular causes

The third issue we shall consider is the difficulty of protecting the rights of unpopular causes, which was touched upon earlier in this chapter. When one looks at the case law of the Convention, particularly the high-profile cases, what is revealed is that on a high number of occasions the Convention has been used by persons who can be categorised as minority groups who will not attract the sympathy and support of the public.⁹³ The European Court has found that young offenders who have murdered had their liberty, and their right to a fair trial, violated by ministerial discretion.⁹⁴ Similarly, prisoners who have received life sentences for manslaughter or serious sexual offences were found to have had their right to liberty violated, domestic law and practice being found to be incompatible with the Convention and its principles.⁹⁵ Individuals who pose a threat to national security and public safety, and who have allegedly committed offences in other countries, have had their deportations or extraditions challenged on the grounds that such decisions would subject them to the risk of torture or other inhuman or degrading treatment.⁹⁶ Those individuals have also had their rights to

⁹³ This discussion excludes traditional and recognised minority groups, such as children, racial and ethnic groups.

⁹⁴ *Hussain and Singh v United Kingdom* (1996) 22 EHRR 1; *V and T v United Kingdom* (1999) 30 EHRR 121.

⁹⁵ *Weeks v United Kingdom* (1987) 10 EHRR 293; *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666. This protection was also extended to mandatory life sentence prisoners in *Stafford v United Kingdom* (2002) 35 EHRR 32, and recognised by the House of Lords in *Anderson and Taylor v Secretary of State for the Home Department* [2002] 3 WLR 1800.

⁹⁶ See *Chahal v United Kingdom* and *Soering v United Kingdom*, n 78 above; *D v United Kingdom* (1997) 24 EHRR 423.

due process upheld by the British judiciary, despite strong arguments on behalf of the government that their rights should be compromised for the purpose of national security.⁹⁷ In addition, those who practise non-traditional sexual practices have had their rights recognised and respected under the Convention.⁹⁸

Indeed in most of the cases that have been tested under the machinery of the Convention, there are relatively few cases that involve what many might refer to as 'popular' applicants. Accordingly, the European Convention is seen by some as a 'rogues' charter', there to protect those who have deliberately transgressed society's laws or morals, and who, in extreme cases, have forfeited their rights, fundamental or otherwise.⁹⁹ For many, therefore, human rights treaties should protect 'innocent' victims of unnecessary and arbitrary acts of government, and not provide those who have broken legal and moral standards and who now seek legal protection of their so-called basic human rights and civil liberties. In addition, even if the majority of society believes that everyone should retain their basic rights, in cases such as those above, many people are unwilling to relinquish the power to punish and deal with such individuals and to agree that some form of bill of rights, policed by a court of law, should set the limits of those powers.

The protection of human rights and civil liberties, therefore, gives rise to various dilemmas and difficulties. Although the protection of these rights and liberties is not unique in this respect, the dilemmas are perhaps more pronounced and controversial than in other legal areas, even those areas which impact on and are developed by social policy. The protection of human rights and civil liberties comes at enormous cost and involves what appear to be irreconcilable differences of opinion.

■ States of emergency, terrorism and the protection of human rights

The fourth issue relates to the difficulty of protecting individual human rights in times of war or other public emergency, such as the threat of terrorism. In such situations the need to secure public safety and national security can justify the compromising of individual liberty and other rights, and it might be argued that fundamental human rights have to come second to the protection of the state and its citizens. As the former Prime Minister, Tony Blair, famously stated in the aftermath of the London bombings in 2005, 'the rules of the game have changed'. Indeed, following an increase in terrorist attacks around the world the British government introduced new measures to provide greater powers to the police and other authorities with respect to the arrest and detention of those suspected of terrorism.¹⁰⁰ This dilemma will be examined in detail in chapter 14 of the text.

In such situations both international and domestic law have to decide where the balance lies between the protection of human rights and the protection of the state, and how that

⁹⁷ See *A v Secretary of State for the Home Department*, n 92, above; *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642; *AF v Secretary of State for the Home Department* [2009] 3 WLR 74.

⁹⁸ *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Sutherland v United Kingdom*, *The Times*, 13 April 2001; *ADT v United Kingdom* (2001) 31 EHRR 33. All these cases declared restrictive legislation and its application contrary to the right of private sexual life; they are dealt with in detail in chapter 13.

⁹⁹ These arguments will be examined briefly in chapter 3 when considering recent suggestions for the reform of the Human Rights Act 1998.

¹⁰⁰ These measures, beginning with the Anti-Terrorism, Crime and Security Act 2001, are discussed in chapters 6, 7 and 14 of this text.

balance is achieved will, inevitably, fuel debate between politicians, judges and the public. International law allows states to 'derogate' from their normal treaty obligations in times of war or other emergencies which threaten the life of the nation,¹⁰¹ and similar provisions exist in the domestic Human Rights Act.¹⁰² Although this right to derogate will be subject to certain procedural limitations, the real dilemma is faced when the domestic lawmakers decide the extent to which the law must erode civil liberties, and the domestic judges decide the extent to which they are going to subject that decision to judicial control.

To allow the government and parliament an unqualified margin of discretion in such cases might appear to accord with democracy: fundamental issues of public safety and national security will be decided by elected and accountable politicians free from supervision by unelected judges. However, as the House of Lords have recently reminded us, the protection of individual liberty and other rights to due process are part and parcel of a civilised, democratic society, and an attack on such individual freedoms might be regarded as an affront to those collective democratic goals.¹⁰³ This does not resolve the substantive issue of whether the courts should ultimately decide the legality and reasonableness of government measures intended to combat terrorism, but at least it reminds us of the advantages of upholding human rights, from both the individual and the collective perspective. It should also defeat the argument that in times of terrorism we simply cannot afford to protect individual human rights, for such an argument ignores the fact that democratic societies cannot afford *not* to uphold them.¹⁰⁴

Questions

What moral and legal dilemmas are posed by the protection of human rights and civil liberties? Can the law of human rights ever hope to rationally balance the enjoyment of human rights with other rights and social interests?

CASE STUDY

V(enables) and T(hompson) v United Kingdom (1999) 30 EHRR 121

This case has been chosen because it raised many of the dilemmas that have been identified in this chapter, in particular the availability of human rights to 'unpopular' individuals and the challenge of executive action. The case can also be used to examine how the courts can employ human rights principles to uphold fundamental values of liberty and fairness. The case study concentrates on the proceedings before the European Court of Human Rights, but an outline of the domestic law proceedings has been given to provide a complete picture of the legal and other issues raised by the case.

¹⁰¹ See, for example, Article 15 of the European Convention on Human Rights, discussed in chapters 2 and 3, and Article 4 of the International Covenant on Civil and Political Rights 1966.

¹⁰² Section 14, Human Rights Act 1998.

¹⁰³ See, in particular, Lord Hoffmann in *A v Home Secretary*, n 84.

¹⁰⁴ See Sottiaux, *Terrorism and the Limitation of Rights* (Hart 2008); Feldman, *Human Rights, Terrorism and Risk: The Role of Politicians and Judges* [2006] PL 364; Dickson, *Law versus Terrorism: Can Law Win?* [2005] EHRLR 11; Walker, *Prisoners of 'War all the Time'* [2005] EHRLR 50; McKeever, *The Human Rights Act and Terrorism in the UK* [2010] PL 110.

Once you have read the case study, and when you are studying this area in detail, you can access the full report of the case(s) to see whether the courts' views coincide with yours and to examine the courts' rationale in detail in the context of your study of that area (chapters 6 and 7).

The case arose out of the murder of two-year-old James Bulger by two young boys, Robert Venables and John Thompson, in 1993. The horrific nature of the kidnapping and the murder attracted an enormous amount of publicity and the boys' trial had taken place in an adult court accompanied by the expected level of media coverage.

The two boys were charged with and convicted of murder and were sentenced to be detained at Her Majesty's Pleasure by virtue of s.53 of the Children and Young Persons Act 1933. Acting under his powers under that legislation the Home Secretary set a tariff period (the minimum period that a prisoner should serve in prison before being considered for release) of 15 years for the boys. In setting that tariff period, the Home Secretary ignored the recommendations of both the trial judge and the Lord Chief Justice, who had proposed shorter tariff periods, and took into account public opinion, and in particular a petition which had been signed by readers of the *Sun* newspaper which had called on the Home Secretary to impose a substantial period on the boys.

The boys challenged the decision of the Home Secretary in domestic law, claiming that he had acted unlawfully in setting the tariff and had taken into account irrelevant factors in setting that period. In the House of Lords (*R v Secretary of State for the Home Department, ex parte Venables and Thompson* [1998] AC 407) it was held that the Home Secretary had acted unlawfully by expressly taking into account public opinion when setting the tariff period. The House of Lords also held that the Home Secretary had acted unlawfully by treating the offenders in the same way as adult offenders for the purpose of setting their tariff periods.

As a result of the decision of the European Court of Human Rights in *Hussain and Singh v United Kingdom* ((1996) 22 EHRR 1), those detained under the 1933 Act received the same rights as discretionary life sentence prisoners, and were released on the order of the Parole Board. Thus, s.28(4) of the Crime (Sentences) Act provided that the Parole Board had the discretion to release a young offender after the expiry of the tariff period and that such a recommendation had to be accepted by the Home Secretary. Meanwhile, Venables and Thompson brought proceedings under the European Convention on Human Rights, claiming that their trial for murder contravened their rights under Article 3 (freedom from inhuman or degrading treatment or punishment) and Article 6 (guaranteeing the right to a fair trial). In addition, they claimed that the Home Secretary's tariff period had violated their rights under Articles 3 and 6 of the Convention, and their right, under Article 5, to liberty and security of the person. The European Commission declared their applications admissible and their cases were referred to the European Court of Human Rights (*V and T v United Kingdom* (1999) 30 EHRR 121).

The trial proceedings

The Court first considered whether the attribution of criminal responsibility to the applicants amounted to a violation of Article 3 of the European Convention, which states that

no one shall be subject to inhuman or degrading treatment or punishment. The Court held that as there was no common European standard among the member states on this issue, the domestic law, which attributed criminal responsibility to a person from the age of 10, was not so disproportionate as to amount to a violation of Article 3. The applicants also argued that their subjection to the trial proceedings constituted a violation of Article 3. In this respect the Court held that while the public nature of the proceedings exacerbated feelings of anguish, distress, guilt and fear, it was not satisfied that those features caused, to a sufficient degree, suffering beyond that which would have inevitably been engendered by any inquiry, whether carried out in public or private, or in the Crown Court or a youth court.

The applicants then argued that the subjection to an adult trial with such intense media coverage constituted a violation of their right to a fair trial and thus a violation of Article 6 of the Convention. The European Court held that it was essential that a child charged with an offence should be dealt with in a manner which took full account of his age, level of maturity and intellectual and emotional capacities, and that steps should be taken to ensure his ability to understand and participate in the proceedings. In the Court's opinion that might mean that in the case of a young child charged with a grave offence attracting high levels of media and public interest, the hearing should be held in private so as to reduce the child's feeling of intimidation.

In the present case, the Court noted that the trial had taken place over a period of three weeks, in public and in an adult court, and had generated high levels of press and public interest. Despite the measures taken to ensure that the applicants understood the surroundings and the proceedings and to shorten the hearing times, the court found that the formality and ritual of the Crown Court must at times have been incomprehensible and intimidating for a child of 11. In addition, the measure taken to raise the defendants' dock – to ensure that the boys could see what was going on – had the effect of exposing them further to the scrutiny of the press and thus increased their sense of discomfort. It was accepted that at the time of the trial the applicants were suffering from post-traumatic distress and had found it impossible to discuss the offence with their lawyers. In the Court's opinion, given the tense courtroom atmosphere and the public scrutiny it was unlikely that the applicants would have felt sufficiently uninhibited to consult freely with their lawyers and to be able to cooperate with them so as to provide the necessary information for the purpose of their defence. Accordingly the Court found that in relation to the trial proceedings there had been a violation of Article 6.

The sentences

The applicants argued that because of their ages the imposition of detention at Her Majesty's Pleasure amounted to a violation of Article 3 of the Convention. The Court held, however, that the punitive element in the tariff period did not by itself give rise to a violation and that in all the circumstances of the case, including the applicants' ages and the conditions of their detention, it could not be said that the length of their detention (at that stage six years) amounted to inhuman or degrading treatment or punishment. Further, the Court held that the European Convention did not prohibit states from subjecting a child or young person who had been convicted of a serious crime to an indeterminate sentence. Thus the Court found no breach of Article 3 in this respect.

The applicants then argued that the imposition of the tariff by the Home Secretary constituted a violation of Article 6 of the Convention. The Court held that Article 6 of the Convention covered all the proceedings, including the determination of the sentence. In deciding that the tariff-setting function of the Home Secretary amounted to the fixing of a sentence for those purposes, the Court drew a distinction between mandatory life sentence prisoners and those subject to the provisions of detention at Her Majesty's Pleasure. In the Court's opinion, the former sentences constituted punishment for life, whereas the latter were open-ended; thus in those cases once the tariff is complete the offender can only be detained if it appears necessary for the protection of the public. Accordingly, the fixing of the tariff for the applicants was a sentencing exercise and fell within Article 6. As the decision maker was the Home Secretary and not the court, and there had been no hearing or opportunity for the applicants to call psychiatric or other evidence, and the Home Secretary had retained the discretion to decide how much of the material that was before him was presented to the applicants, there had been a violation of Article 6. The Court held that this article guarantees a fair hearing by an independent and impartial tribunal and that meant a body which is independent of the executive. As the Home Secretary is clearly not independent of the executive, it followed that there had been a violation of Article 6.

Finally, the applicants had argued that their detention was contrary to Article 5 of the Convention, guaranteeing liberty and security of the person. The Court held that there had been no violation of Article 5(1) of the Convention as the applicants' detention was clearly 'a lawful detention of a person after conviction by a competent court' as required by Article 5(1)(a). The applicants' detention was clearly prescribed by law and was not arbitrary. However, the Court found that there had been a violation of Article 5(4) of the Convention, which guarantees that everyone deprived of his liberty 'shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful'. Given that the Court had found the failure of the courts to set the applicants' tariffs constituted a violation of Article 6, the applicants' right under Article 5(4) had not been guaranteed by the trial court's sentence in these cases. Moreover as the domestic courts had quashed the Home Secretary's tariffs and no new tariffs had been set, the applicants had been denied the opportunity to access a tribunal for the periodic review of the continuing lawfulness of their detention. The European Court thus found a violation in this respect.

Using their powers under Article 41 of the European Convention to award 'just satisfaction', the European Court awarded legal costs of £18,000 to T and £32,000 to V. As a result of the European Court's judgment the government introduced new rules on the conduct of trials. In addition the boys' tariffs were reset by the Lord Chief Justice, LORD WOOLF CJ, in accordance with his Practice Statement (Juveniles: Murder Tariff) ([2000] 1 WLR 1655). Applying those principles the Lord Chief Justice recommended a period of seven years and eight months, which meant that the boys would not serve a sentence in an adult prison, provided the Parole Board ordered their release. That decision was challenged by James Bulger's father, but it was held that the family of a murder victim did not have legal standing to seek judicial review of any tariff set in respect of the murder (*R v Secretary of State for the Home Department and Another, ex parte Bulger* (*The Times*, 7 March 2001)).

In December 2000 Thompson and Venables applied for an injunction to restrain the publication of any information relating to their identity, whereabouts and physical appearance and any other confidential information relating to time in detention and throughout the immediate and long-term future. The High Court granted the injunction, holding that in exceptional circumstances the Court had jurisdiction to extend its protection where not to do so would be likely to lead to serious physical injury, or the death of a person seeking that protection (*Venables and Thompson v MGN* [2001] 2 WLR 1038). Departing from the normal practice of granting injunctions, these particular injunctions applied to the whole world.

Questions

- 1 On what basis did the domestic courts find that the Home Secretary's powers had been misused? What principles of fairness and justice did the courts rely on and were the courts exceeding their constitutional powers in deciding that the Home Secretary had acted unlawfully?
- 2 In particular, why was it unlawful for the Home Secretary to set a tariff on the basis of public opinion and outrage?
- 3 In the European Court of Human Rights, what fundamental principles did the Court feel had been violated by the Home Secretary and during the domestic legal proceedings?
- 4 To what extent is it true to say that the European Court ignored the nature and extent of the applicants' crimes and the level of public opinion and outrage?
- 5 Why, in the context of the European Court decision and any relevant human rights principles, were the changes regarding the trial of young offenders and the setting of their tariffs necessary? Do they substitute executive discretion with excessive judicial discretion?
- 6 Why wasn't the father of James Bulger allowed to challenge the judicial tariff? What human rights problems would that cause?
- 7 As a postscript, one of the defendants, Jon Venables, was returned to prison in 2010 for breaking the terms of his license. The Justice Secretary refused to identify the nature of his conduct for fear of jeopardising any subsequent trial. What human rights were in conflict in that situation and was the Justice Secretary correct to make such a decision?

Further reading

There is a wealth of literature on human rights theory and the protection of human rights and civil liberties at both the domestic and international level. The footnotes to this chapter make constant reference to other sources, but students should also consult the references listed below.

Human rights theory

Feldman's *Civil Liberties and Human Rights in England and Wales* (OUP 2002, 2nd edn), chapter 1 provides an excellent introduction, along with comprehensive references to further reading in this area. Harvey, *Talking About Human Rights* [2004] EHRLR 500 and Harris, *Human Rights and*

Mythical Beasts [2004] 120 LQR 428, also provide enlightening reading on modern approaches to human rights theory. See also Gearty, *Civil Liberties* (OUP 2007) for an incisive and interesting overview of human rights theory and protection. With respect to the dilemmas of protecting human rights, students are also advised to consult Gearty, *Principles of Human Rights Adjudication* (OUP 2004) and Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006).

Protection of human rights in domestic law

Alston, *Promoting Human Rights through Bills of Rights* (OUP 1999) provides an excellent overview of various domestic methods for protecting human rights. In addition, consult Huscroft and Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (Hart 2002) and Campbell, Goldsworthy and Stone, *Protecting Human Rights* (OUP 2003).

Further reading on the protection of human rights in the United Kingdom will be provided in chapter 3.

International human rights

For international human rights, students should consult Steiner and Alston, *International Human Rights in Context* (OUP 2007, 3rd edn), for a definitive coverage of the topic, and may consult Rehman, *International Human Rights Law* (Longman 2010, 2nd edn) or Smith, *A Textbook on International Human Rights* (OUP 2009, 4th edn) for good, more concise, accounts. For a detailed account of the ICCPR, see Joseph, Shultz and Castan, *Cases and Materials on the International Covenant on Civil and Political Rights* (OUP 2004, 2nd edn) and Conte, Davidson and Burchill, *Defining Civil and Political Rights* (Ashgate 2004).

European human rights

Alston (ed.), *The EU and Human Rights* (OUP 1999); Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2004); Peers and Ward, *The EU Charter of Fundamental Rights; Politics, Law and Policy* (Hart 2004); Betten and MacDevitt *The Protection of Fundamental Human Rights in the Europe Union* (Kluwer International 2006).

Further reading on the European Convention on Human Rights will be provided in chapter 2.

Visit www.mylawchamber.co.uk/fosterhumanrights to access regular updates to major changes in the law, further case studies, weblinks, and suggested answers/approaches to questions in the book.

