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Human Rights

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Human rights and civil liberties

The absurd device of a bill of rights. (Michael Oakeshott)

Democracy is the will of the people but the people may not will to invade those rights which are fundamental to democracy itself. (Lady Hale in *R (Counttryside Alliance) v Attorney General* (2008))

Key words

- ▶ Law and democracy
- ▶ Interest balancing
- ▶ Constitutional dialogue
- ▶ Individual and community
- ▶ Positive and negative duties
- ▶ Proportionality
- ▶ Deference
- ▶ The limits of interpretation
- ▶ Horizontality

19.1

Introduction: The Bill of Rights Debate

The concept of human rights concerns attempts to identify fundamental human interests which have a special status in the sense that they should not be violated, either at all or only in extreme circumstances. They concern basic needs such as personal freedom, privacy and freedom of religion; political interests such as freedom of expression and association; fairness and justice such as the right to a fair trial before an independent judge. Many of them conflict with each other and may also conflict with social goals such as security and the fair distribution of wealth. Human rights are strongly favoured by liberals but less so by communitarians among whom they may be regarded as divisive, selfish and frustrating community values. Human rights are also favoured by many lawyers because they raise the political importance of courts substituting authoritative pronouncements by judges within a limited framework of formal argument for the wider ranging discussions and compromises of the political forum.

Human rights did not become a prominent legal issue in the UK until the aftermath of the Second World War which produced a worldwide reaction against the atrocities of the Nazis.

There are three interrelated issues. Firstly what is a human right? Is it anything other than a political claim? The classic Enlightenment writers, notably Locke (Chapter 2) thought that there were certain natural rights given by God which it is the state's duty to protect. In his case these were life, health, liberty and property. For Hobbes by contrast there are no rights other than those created and enforced by law. Natural rights are based on the universal human interests of gain, safety and reputation and are essentially rational reasons for action rather than rights as such. They include primarily self defence,

'do-as-you-would-be-done-by' and the honouring of promises. From a utilitarian perspective, Bentham regarded the notion of rights as 'nonsense on stilts' except in the sense of interests protected by particular laws.

There is no agreement as to how we identify human rights. Some claim that they are revealed by God, others that they are based upon the idea that humans have a special 'dignity', others that they are self evident, being derived from basic human needs. For example the UN Universal Declaration of Human Rights (1948, Cmd 7226) is founded on the 'inherent dignity . . . of all members of the human family', equality, rationality and 'brotherhood' (Preamble Article 1). However in the absence of a religious belief it is difficult to see where this 'dignity' comes from. Some, for example Hume (Chapter 2), claim that human rights are driven by our natural sympathy for others and that we create conventions underpinning particular ways of life which we desire to preserve. Others, following Kant, derive them from apparently self evident rational truths such as 'equality' or 'autonomy'. For example Dworkin (*Freedom's Law*, Oxford University Press, 1996) argues that certain interests such as freedom of expression and the right to a fair trial are non-negotiable conditions of a democratic society because they underpin equality, this being the nearest we can get to a bedrock principle.

Such grandiose assertions face the difficulty that they may be too vague to be applied in practice. Indeed politicians and officials drafting laws or international treaties might take refuge in vagueness as a way of producing agreement, while leaving the hard questions to be decided by others such as the courts. Indeed this was the case with the European Convention on Human Rights (ECHR) (see Marsden, 'The UK's Part in the Preparation of the ECHR', 1993, *International and Comparative Law Quarterly* 42:796). Moreover claims to universality face the problem of multiculturalism. Some rights, for example private property, may not be recognised in every culture and different cultures may understand particular rights and their limits in different ways. In the UK this feeds into a debate as to whether our human rights law should be confined by the limits of the ECHR or whether we should develop our own notion of human rights (which might be more or less liberal than the ECHR). At present the UK courts stick closely to Strasbourg jurisprudence.

This leads to the second issue, what is the legal basis for a statement of fundamental rights? The UK relies on the ECHR and the European Court of Human Rights. This came into force in 1953 as an international treaty under the auspices of the Council of Europe, which was established in 1949 and has 41 members. It derives from the Universal Declaration of Human Rights, a resolution of the UN General Assembly (1948) which is not in itself legally binding. As a response to Nazi atrocities the ECHR concentrates on the protection of individual freedom against state interference rather than what are known as 'second and third generation rights', these being respectively social claims such as housing and collective interests such as environmental quality. The ECHR is something of a bland compromise with many exceptions.

The third issue is who should have the last word in disputes relating to fundamental rights? In particular should a bill of rights be protected against being overridden by the democratic lawmaker? Even if we accept that the concept of human rights is meaningful and should be embedded in the law, nothing follows automatically from this as to what is the best mechanism for protecting it. The ultimate decision maker might for example be a court as in the US, an elected lawmaker as in the UK or a special body as in France.

Human rights disputes differ significantly from those with which the courts traditionally deal. There is fundamental and apparently never ending disagreement about the meaning and application of human rights concepts. Rather than requiring the application of an existing rule human rights cases often require the judge to assess the validity of a legal rule or government decision against a vague aspirational concept such as 'freedom of expression' and to decide the extent to which a right should be sacrificed to some important public goal, for example personal freedom against the suppression of terrorism. Thus a human rights dispute often raises wide issues affecting society as a whole going beyond the interests of the particular parties. As we saw in Chapter 2 there are different perspectives upon political values which are incommensurable, lacking any overriding principle against which they can be assessed. For this reason it is often doubted whether the legal process with its limited sources of information, its authoritative solution imposed from above and its formalised narrowly focused participants is an appropriate way of deciding human rights disputes. The legal process is vulnerable to the republican attack that it gives the judge the power of arbitrary domination. In other words human rights might be understood as basic conditions of our collective life and as such pervading all spheres of activity. From this perspective it could be wrong to give the legal sphere a special status.

It is often claimed that the courts are most likely to produce the 'best' outcome being independent, open and guided by intense rational analysis as a forum for public debate. However arguments about what is the best outcome merely repeat the disagreement. Unless we agree as to what counts as a best outcome, we could not agree what mechanism is most likely to produce it. A court is attractive to those who wish to impose philosophical master principles on others but less so to those who rely on a pragmatic accommodation between competing interests. A court is limited by the circumstances and parties in a particular case and the legal process is not comfortable with wide ranging debate. While judges may be good at interpreting and applying linguistic formulae, conflicts between fundamental rights and other important interests go beyond legal rules into territory where judges have no special expertise, requiring them either to be political philosophers or politicians or to resort to semantic evasion. For example, in *Secretary of State for the Home Department v JJ* (2008) disagreement in the House of Lords turned upon the semantic question of the line between a 'deprivation of liberty' and a restriction on liberty, the former but not the latter being a violation of a Convention right.

The main role of a court based on the separation of powers is to apply a legal rule made by others to a specific case using methods which enjoy substantial public agreement. Of course many, if not all, everyday legal principles are to some extent vague and therefore the subject of disagreement. For example does the term 'vehicle' include a child's scooter? This kind of difficulty can usually be resolved pragmatically by reference to the context and purpose of the legislation in question. In human rights cases these are the very matters on which there is often unresolvable disagreement. Moreover in a human rights case the public interest supported by the right usually has to be 'weighed' against a competing public interest. Since there is no objective way of doing this, or at least one which commands widespread support, the task may be more appropriate to a democratic body which may be able to negotiate a solution acceptable to most of those involved rather than to a court.

In *Marper v UK* (2008) the European Court condemned the UK practice of retaining DNA samples indefinitely from people arrested or charged with offences irrespective of whether they were subsequently convicted. The House of Lords had upheld the practice under the Human Rights Act (*R (S) v Chief Constable of South Yorkshire Police* (2004)). The difference between the two courts seems to lie mainly in that the English judges placed less importance on the offence to human dignity involved (Lady Hale dissenting), gave greater weight to the policing advantages of the practice and had greater confidence in the integrity and competence of the police not to misuse the power. Is it possible objectively to choose between these two approaches?

The favourite liberal argument in favour of a court is fear of what De Toqueville called 'the tyranny of the majority'. The argument runs that 'democracy' is more than just the will of the majority and must be policed by certain basic rights of equality and freedom protected against the volatility, corruption or foolishness of the majority. It is argued that handing over power to a court is not anti-democratic but a prudent 'pre-commitment' of a majority anxious to guard against its own weaknesses, for example a panic overreaction to a supposed threat such as that of terrorism. By removing fundamental rights from its control, the majority lessens the risk that it will misuse its power. In particular a court can protect unpopular minorities.

However Waldron draws on the republican argument (Chapter 2) that we sacrifice dignity, equality and control over our lives by letting unelected judges decide whether laws are valid. The appropriate question is what mechanism can most appropriately manage disagreement? Arguably this should be a democratic assembly in which the whole community can participate on equal terms (see Waldron, 1999).

The Human Rights Act (HRA) 1998 recognises this irreducible disagreement by trying to accommodate both sides. It uses the advantages of the courts in applying the law even to the extent of scrutinising statutes for compatibility with the ECHR. On the other hand the Act upholds democracy by leaving the final word with Parliament while empowering the courts to put pressure on Parliament, thereby creating an accommodation in accordance with the separation of powers. In this way the HRA is sometimes said to create a 'constitutional dialogue'.

19.2 The Common Law

English lawyers have traditionally used the terminology of negative freedom (Chapter 2) and civil liberties rather than the positive language of rights. The traditional common law standpoint has been that everyone is free to do whatever the law does not specifically prohibit. In Hobbes' language, 'freedom lies in the silence of the laws'. However in a constitution based on unlimited parliamentary power the problem lies in ensuring that the laws are indeed silent. Moreover the notion of negative freedom assumes that all freedoms are of equal value. For example, Dicey (1915, p.500) may appear complacent:

English law no more favours and provides for the holding of public meetings than for the giving of public concerts . . . A man has a right to hear an orator as he has a right to hear a band or eat a bun.

The common law's residual approach therefore depends on trusting the lawmaker not to enact intrusive laws and trusting the courts to interpret laws in a way sympathetic to individual liberty. This violates republican ideas by treating us as 'happy slaves' content with a kind master. We have met the presumption of statutory interpretation, known as the 'principle of legality', that clear language or necessary implication is required to override fundamental rights (Chapters 7 and 9). However this cannot surmount the creeping erosion of liberty by the accumulation of statutes which, taken individually, are relatively innocuous but which add up to a formidable armoury of state powers. Numerous Acts were passed from 1997 restricting individual liberty in order to combat antisocial behaviour and latterly terrorism (see *Guardian*, 2 April 2006). Moreover legislation enacted to deal with a particular problem may be used for other purposes. The Terrorism Act 2000 for example was used to remove an octogenarian heckler from the 2005 Labour Party Conference and the Serious Organised Crimes and Police Act 2005 to arrest a demonstrator for possession of an article in *Vanity Fair* critical of the government (see HL Deb. 1 Feb. 2006, cols 231, 239; *Guardian*, 29 June 2006).

It is claimed that the common law, being open to any argument and treating all parties as equals, is especially suitable for a liberal society (Allan, *Constitutional Justice*, Oxford University Press, 2001). Indeed until the Human Rights Act 1998 the UK had resisted incorporation of the ECHR on the basis that the common law provided equivalent protection (see *Brind v Secretary of State for the Home Department* (1991) and *Attorney-General v Guardian Newspapers (No. 2)* (1998) at 660 (Lord Goff)). However the two approaches are different in important respects. Firstly the ECHR requires special justification to override a right, whereas in the common law any sufficiently clearly worded statute will do. Secondly the common law, sometimes described as unprincipled, is multifactorial in the sense that it depends on accumulating factors pointing for or against a particular conclusion without necessarily organising these within a formal hierarchy of principles.

19.3 The European Convention on Human Rights

The ECHR imposes duties on the state to comply with the rights embodied in it. A few of the rights are absolute but most can be overridden in certain circumstances by other rights or by the public interest. It is frequently asserted that a principle of 'fair balance' between individual rights and the wider interests of society runs through the whole Convention (for example *Kay v Lambeth London Borough Council* (2006) [32] Lord Bingham; *Sporrong and Lonnroth v Sweden* (1982) [52]). Thus even the 'absolute' rights might be qualified. It has also been proclaimed that the ECHR is a 'living instrument' to be interpreted in the light of changing values and circumstances (for example *Tyler v UK* (1978)).

The ECHR has three roles under the UK constitution.

1. Individuals can petition the European Court of Human Rights in Strasbourg alleging that the state has violated their rights under the Convention. The court may award compensation and require the state to change its law. However its decisions are binding only in international law under the Convention itself and have no direct binding force in domestic law. The court sometimes gives a 'margin of appreciation' to the state. This acknowledges the liberal value of diversity and allows the convention to be applied flexibly in the light of particular variations in the values and needs of different countries. Without this room for manoeuvre it would be difficult to obtain general

acceptance of the court's jurisdiction (see *Handyside v UK* (1976): pornography; *Leander v Sweden* (1987): security). The margin of appreciation is of course limited and does not amount to acceptance of cultural relativism. States cannot disregard fundamental values and standards supported by a consensus among member states and the court will review the reasonableness of the state action (see for example *Funke v France* (1993) [55]–[57]; *Marper v UK* (2008), [102]).

2. As a treaty the Convention should be taken into account by domestic courts when interpreting statutes at least where they are ambiguous. The common law should probably also be developed in the light of the Convention (see *Attorney-General v Guardian Newspapers Ltd (No. 2)* (1998)).
3. The Human Rights Act 1998 which came into force in October 2000 incorporates the main provisions of the Convention, but not the Convention as such, into UK law and provides a special mechanism for applying them. 1 and 2 (above) are not affected by the Human Rights Act. As Lord Bingham pointed out in *R (Al-Skeini) v Secretary of State* (2007) [10], rights under the Convention differ from rights created by the 1998 Act by reference to the Convention. The most significant feature of the Human Rights Act is that it empowers the courts to assess whether an Act of Parliament is compatible with a Convention Right. However the court has no power under the Act to overturn an Act of Parliament so that the traditional doctrine of parliamentary supremacy is preserved. Arguably this is a quibble since a court ruling that a statute does not comply with the Convention has great political force particularly where the government lacks moral authority.

The ECHR is primarily concerned with 'negative' rights protected against state interference as opposed to positive rights requiring state action to give effect to the right. There are two kinds of positive right. The first is where the right requires the state to provide some positive benefit or facility such as welfare services or formal acceptance of a minority status (see *Rees v UK* (1986): transsexuality). In a democracy courts are reluctant to impose this kind of duty on the state since it may involve choices about public spending that are regarded as more appropriate to an elected body. Moreover liberals may object to the impact of positive rights on the free market and the likely conflict with individual liberty and initiative (see Sunstein, 'Against Positive Rights' 2/1 *East European Constitutional Review* 35 (1993)). This raises the irreducible clash between positive and negative freedom which we met in Chapter 2. Only in cases of extreme destitution does the ECHR enter the territory of positive rights in this sense. There are however other international treaties dealing with social and political rights of a positive kind, notably the UN International Covenant on Economic, Social and Cultural Rights (1976). These have not been incorporated into domestic law and contain no enforcement machinery. Some constitutions, notably those in states associated with the former Soviet Union contain a range of economic and social rights.

The second kind of positive right is where the state is required to ensure not only that itself but also that private bodies respect the right in question. It is not enough that the state does not interfere with the right. It must also take active steps to protect the right (see Lord Steyn in *R (Ullah) v Special Adjudicator* (2004) [34]; Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights', 2006, *Public Law* 562). Such positive obligations are unlikely to be absolute and the state will be afforded a margin of discretion in carrying them out (below; see *R (Pretty) v DPP* (2002) [15]). Particular examples include the right to life, respect for privacy and family life and press freedom. Thus the state must

ensure not only that the media is free to inform the public but also that the privately owned press respects the privacy of individuals.

The following provisions of the ECHR are incorporated into the Human Rights Act 1998 (s.1):

► **Article 2: Right to life.**

Except for capital punishment following criminal conviction, defence against unlawful violence, lawful arrest or prevention of unlawful escape, lawful action for quelling riot or insurrection. This requires the state not to take life without qualification and to provide a positive framework of laws to protect life. It must also hold an open, effective and thorough investigation into an unexplained death involving the state (see *R (Middleton) v West Sussex Coroner* (2004); *R (Hurst) v North London District Coroner* (2007); see also *R (D) v Secretary of State for the Home Department* (2006): supervision of suicide risk; *Thompson and Venables v News Group Newspapers Ltd* (2001); *Van Colle v Chief Constable of Hertfordshire Police* (2006): protection of witness). However this duty is not absolute but only to take reasonable precautions. In so far as there is a duty to prevent loss of life it is narrow, requiring a real and immediate risk objectively verified (*Re Officer L* (2007)); *R (Gentle v Prime Minister* (2008): right to life not engaged by decision to go to war in Iraq). In another respect Article 2 has been interpreted narrowly so as not to authorise voluntary euthanasia (*R (Pretty) v DPP* (2002): the right to life is the right not to be killed, not to have control over one's own life). The court emphasised that the Convention is not meant to intervene in controversial moral issues around which there is no consensus. This is one way in which the court deals with the problem that it lacks democratic legitimacy.

► **Article 3: Torture or inhuman or degrading treatment or punishment.**

This is an absolute right which cannot be overridden (see for example *Tyrer v UK* (1978); *Costello-Roberts v UK* (1993): severe corporal punishment; *Ireland v UK* (1978): interrogation of suspected terrorists; sensory deprivation not torture but inhuman treatment). Article 3 was applied to a government decision to withdraw welfare support from asylum seekers where to do so would result in destitution thereby imposing a positive duty (*R (Limbuela) v Secretary of State for Social Security* (2007)). However it was emphasised that Article 3 does not confer a right to be provided with welfare services as such. In *Limbuela* the inhuman treatment resulted from a specific exclusion of failed asylum seekers from the normal provision. The House of Lords emphasised that Article 3 was engaged only when, taking account of all the claimant's circumstances, age, health, gender, other means of support and so on, the claimant was reduced to a sense of despair and humiliation for example by having no access to toilet or washing facilities. The prohibition of torture means that the UK government cannot use evidence which might have been obtained by torture in other countries in legal proceedings here (*A v Secretary of State for the Home Department (No. 2)* (2005): Chapter 21). However it seems that the government might still use evidence obtained by torture overseas as part of its investigations. The government has a positive duty to ensure that private persons do not violate Article 3 rights, for example child beating (*A v UK* (1998)).

► **Article 4: Slavery, forced or compulsory labour.**

Exceptions are prison or parole, military service, emergency or calamity and 'normal civic obligations'.

► **Article 5: Liberty and security of person.**

This relates to deprivation of liberty. Except in prescribed cases in accordance with a procedure prescribed by law, this is an absolute right that cannot be overridden. The main exceptions are criminal convictions, disobedience to a court order, control of children, infection, mental health, alcoholism, drug addiction, vagrancy and in order to prevent illegal immigration or with a view to deportation or extradition. There are safeguards to ensure a speedy trial and adequate remedies against unlawful detention. A person arrested must be informed promptly of the reasons for the arrest, shall be brought promptly before a court and '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 the detention is not lawful'. The right to personal liberty is given especially high importance (see for example *Secretary of State for the Home Dept v JJ* (2008)[37] [107]).

Article 5 has been weakened by drawing a distinction between deprivation of liberty and restrictions upon liberty. The latter does not fall within Article 5 (but could fall within Articles 3 or 8).

In *Austin v Metropolitan Police Commissioner* (2008) the Court of Appeal held that detaining a crowd for two hours within a cordon on the road was only a restriction on liberty and so not protected by the ECHR (see *Guzzardi v Italy* (1980)). It was stated rather curiously that a detention which is justified is not 'detention' at all within Article 5 ([102]–[105]). If this is so, it is difficult to see why the specific exceptions outlined in the previous paragraph are included. This and perhaps echoing the distinction between positive and negative freedom discussed in Chapter 2, the ECHR has held that the placing of a child in a foster home was not a deprivation of liberty since it was done by a responsible authority in the child's own interests (*HM v Switzerland* (2002)).

'Control Orders' made by the government under anti-terrorism legislation impose severe restriction of movement upon terrorist suspects including confinement in the home for many hours. These have also been treated as only restricting liberty. The matter is one of degree depending on all the circumstances but particularly upon the impact on the victim's ability to live a normal life (compare *Secretary of State for the Home Dept v JJ* (2008); *Secretary of State for the Home Dept v MB* (2008); *Secretary of State for the Home Dept v E* (2008)).

► **Article 6: Fair trial.**

'In relation to civil rights and obligations and the determination of any criminal charges against him there is a right to a fair trial in public before an independent and impartial tribunal established by law'. 'Civil rights and obligations' has a wide meaning including loss of employment opportunities and other important social and economic interests (*R (Wright) v Secretary of State* (2009): placing on Child Abuse Register). In a criminal case there must be further safeguards. These include a right 'to be informed promptly and in a language he understands and in detail, of the nature and cause of the accusation', adequate time and facilities to prepare a defence, a right to choose a lawyer and free legal assistance 'when the interests of

justice so require', a right to call witnesses and to examine opposing witnesses on equal terms and a right to an interpreter. However 'charged with a criminal offence' has been defined narrowly to exclude matters relating to sentencing and bail (*Phillips v UK* (2001); *R (DPP) v Havering Magistrates Court* (2001)).

Judgment shall be pronounced publicly. The press and public may be excluded from all or any part of the proceedings in the interests of morals, public order, national security in a democratic society, where the interests of juveniles or the protection of the private lives of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The right to a fair trial as a whole is not subject to exceptions and cannot be overridden by public interest concerns. However *individual ingredients* can be overridden as long as the trial overall is fair. For example in *Brown v Stott (Procurator Fiscal Dunfermline)* (2001), the Privy Council held that the requirement of the Road Traffic Act 1998 section 172(2) to disclose the name of the driver was not in breach of the right against self incrimination. The reason for this was the clear public interest in reducing the high rate of death and injury on the roads. Nevertheless the trial overall must be fair so that any shortfall in one respect must be compensated by scrupulous fairness in others. The court will look at the entire process. Thus where a decision maker is not itself independent and impartial, as in the case of administrative policy decisions, then as we saw in Chapters 16 and 17 judicial review may provide a sufficient safeguard (see *R (Alconbury Developments) v Secretary of State* (2001)). In cases involving claims to state secrecy evidence may sometimes be withheld from an accused person but if the safeguards for fairness are insufficient the trial may not go ahead (see Chapter 22).

Article 6 is primarily concerned with procedural matters. It may sometimes be difficult to distinguish procedural matters from matters of substantive law which might engage other parts of the Convention but not Article 6. For example in *Z v UK* (2002) a local authority was held to be in breach of Article 3 for failing to protect children but not in breach of Article 6. The domestic law of negligence had failed to protect the children, not because of any procedural immunity, but because of the limited scope of negligence law itself in relation to the duties of public bodies (Chapter 18). The same applies to the non-liability of the Crown in certain cases (*Matthews v Ministry of Defence* 2003; Chapter 14). The immunity of an MP, however, is arguably of a procedural nature (Chapter 11).

▶ **Article 7: No retrospective criminal laws.**

Except in respect of acts which were criminal when committed according to the general principles of law recognised by civilised nations.

The following Articles are subject to being overridden by state actions taken in the public interest on a variety of grounds. As we shall see in the following chapter the court is required according to the principle of 'proportionality' to weigh the importance of the right in question not only to the person who is being interfered with but also to the public interest, against the public interest claimed by the state to justify overriding the right. Moreover this group of rights is vague and difficult to define. For these reasons the judicial process is especially problematic in this area.

► **Article 8: Respect for privacy, family life, home and correspondence.**

This is especially vague. Indeed unlike other rights which are phrased as definite entitlements Article 8 gives only an entitlement to 'respect' whatever that means. Article 8 is very wide and susceptible to the different traditions and values of individual states. The court therefore often gives a 'margin of appreciation' to each state (*Rees v UK* (1986): transsexual; *Olsson v Sweden* (1988): child care; contrast *Marper v UK* (2008): DNA samples from innocent people). Article 8 has two aspects. Firstly it protects against intrusion and surveillance. Secondly it embraces respect for personal autonomy and identity and has a social dimension including family and community relationships, culture and lifestyle: 'those features which are integral to a person's identity or ability to function socially as a person' (Lord Bingham in *R (Razgar) v Secretary of State for the Home Department* (2004) [9]; see for example *Wainwright v Home Office* (2003): strip searches; *Pretty v UK* (2002) 35 EHRR 1 [61]: serious disability; *R (G) v Barnet London Borough Council* (2004) [69]; *Chapman v UK* (2001): ethnic group). It protects parenthood, gender and sexual preferences. Article 6 broadly reflects Mill's version of liberalism, namely that in the context of the good of society as a whole, people are happier when they choose for themselves what form of life and lifestyle to adopt (Chapter 2).

However the UK courts are reluctant to treat Article 8 liberally. In *M v Secretary of State for Work and Pensions* (2006) [24–9], Lord Nicholls and Lord Mance took the view that 'family life' did not include same sex couples on the ground that there was no European wide consensus on this matter. Article 8 does not confer a general right to self determination.

In *R (Countryside Alliance) v Attorney-General* (2008) it was argued that the Hunting Act 2004, which makes hunting foxes and other wild mammals with dogs a criminal offence, violated Article 8 in that there was a right to participate in hunting as an aspect of countryside life and as a social activity integral to the personality. The House of Lords held that Article 8 was not engaged. It was accepted that in principle sporting and cultural activities, such as playing music could fall within Article 8 since these were an important aspect of human nature and self development. Hunting as traditionally carried out in the UK fell outside Article 8 because it was carried out in public and was a spectator sport open to all. At the heart of Article 8 is the idea of the personal and intimate. Moreover hunters were not a distinctive group so as to claim an identity analogous to an ethnic group. Some of the claimants were workers who serviced the hunt. It was held that Article 8 can apply to loss of livelihood but only where the loss of a job seriously impinges upon other aspects of Article 8 protection affecting the person's social relationships and status in society as a whole or involving loss of a home.

Article 8 applies to nuisances and environmental pollution although the courts are likely to give considerable weight to the limited resources of public authorities in this context (see *Guerra v Italy* (1998); *Hatton v UK* (2003); *Marcic v Thames Water Utilities* (2004)). Article 8 also applies to the restriction of employment at least where there are

wider social consequences of social exclusion (*R (Wright) v Secretary of State for Health* (2009): placing on Child Abuse Register).

Article 8 protects the inviolability of the home but does not normally confer a positive right to be provided with a home or welfare benefits but only a right to be protected as to the use of an existing home against eviction for example, thus illustrating that the Convention's primary concern is with privacy interests rather than acting as a welfare agency (*Kay v Lambeth London Borough Council* (2006) [191–3]; *Harrow London Borough Council v Qazi* (2004) [50]; *N v Secretary of State for the Home Department* (2005)). However in serious cases Article 8, referring as it does to 'respect', may impose a positive duty to provide a benefit. This may arise in respect of vulnerable groups (for example *Chapman v UK* (2001): gypsies; *R (Bernard) v Enfield London Borough Council* (2002): disabled with children; *Anufrijeva v Southwark London Borough Council* (2004): asylum seekers). However there must be culpability in the sense of a deliberate or negligent failure to act which has foreseeably serious consequences (*Anufrijeva*).

There may also be a positive obligation on the state to enable the expression of personal lifestyles and to protect Article 8 rights against violation by private bodies (see Lord Hope in *Harrow LBC v Qazi* (2004); *Campbell v MGN* (2004): press intrusion; Chapter 20). In *YL v Birmingham City Council* (2007) Lady Hale emphasised that the state has such a positive duty. However as we saw in Chapter 18 she was in the minority in her view that, partly for this reason, a private care home should be treated as having public functions so as to bring it directly within the ambit of the Human Rights Act. The state might however be required to regulate private care homes so as to ensure that they respect the Article 8 rights of their residents.

In one respect Article 8 may be weaker than the other protected rights. In *Harrow LBC v Qazi* (2004) a majority of the House of Lords held that property rights, in that case a right to evict a tenant, always overrode a right based only on Article 8 and that personal circumstances were not relevant. However Lord Steyn (dissenting) remarked [27]:

It would be surprising if the views of the majority . . . withstood European scrutiny . . . The basic fallacy in the approach is that it allows domestic notions of title, legal and equitable rights and interests, to colour the interpretation of Art. 8 (1). The decision of today does not fit into the new landscape created by the 1998 Act.

And so it proved. In *Connors v UK* (2004) the European Court held that a decision by a local authority to evict gypsies from a site that it owned was contrary to Article 8. In *Kay* (above) the House of Lords modified *Qazi* to the extent that, in exceptional cases, personal circumstances could be taken into account. *Connors* was such a case since gypsies are vulnerable minorities. Another might be where the victim has special personal circumstances such as ill health. However Lord Bingham emphasised that personal circumstances which were catered for by statutory welfare services should not be relevant [38]. There shall be no interference by a public authority with an Article 8 right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

► **Article 9: Freedom of thought, conscience and religion.**

This includes a right to manifest religion or belief in worship, teaching, practice and observance. In order to avoid intolerance the courts have not attempted to define religion, which includes any kind of spiritual belief such as vegetarianism and pacifism, nor to assess the validity of a religious belief beyond deciding whether it is genuinely held. However while the 'holding' of a belief is entirely subjective, the 'manifestation' of belief has been subject to a broad objective threshold based on 'seriousness, coherence and consistency with human dignity' (see *R (Williamson) v Secretary of State for Education and Employment* (2005)). Thus despite the importance of respect for minority beliefs there is a tendency towards imposing orthodoxy by assessing the claimant's practices against those of dominant groups within the sect in question (for example *R (Begum) v Head Teacher and Governors of Denbigh High School* (2007): extreme version of Muslim dress lawfully forbidden in school); or by giving a broad margin of distinction to the majority opinion represented by Parliament, for example *R (Williamson) v Secretary of State* (above [50] [51]): 'light' corporal punishment in school in pursuance of fundamentalist Christianity outlawed; *Otto Preminger Institut v Austria* (1994): majority Catholic susceptibilities protected against offensive film. Moreover although in the *Denbigh case* (above) at 111, Lord Bingham emphasised the pluralistic, multicultural nature of our society, religion although important is regarded – as in the protestant tradition but certainly not universally – as essentially a private matter (see *Williamson* (above) [15]–[19]).

In the employment sphere the right to manifest religion has been held to be violated only where the employer fails to take reasonable steps to accommodate the religious requirements of the employee with its own interests. In *Copsey v WBB Devon Clays Ltd* (2005) an employee was dismissed for refusing to work on a Sunday. The employer had compelling economic reasons for Sunday working, had engaged in a long consultation process on the matter and had offered the employee an alternative position which was refused. The Court of Appeal held that in these circumstances Article 8 had not been violated. Mummery LJ appeared to go further, indicating that Article 8 was not engaged at all by requiring work which interfered with the manifestation of religion. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others. *Copsey* (above) illustrates that it may not be clear whether the matter concerns the extent of the right itself or whether an override should prevail. This will be discussed in the next chapter.

► **Article 10: Freedom of expression.**

This includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprise. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the

reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Freedom of expression is discussed in greater depth in Chapter 21.

► **Article 11: Freedom of assembly and association.**

This includes the right to form and to join trade unions. No restrictions shall be placed on these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of those rights by members of the armed forces, of the police or of the administration of the state.

Freedom of assembly is discussed in Chapter 21.

► **Article 12: The right to marry and found a family** according to national laws governing the exercise of the right.

In *R (Baiai) v Secretary of State for the Home Department* (2007) it was held that the courts must be vigilant to protect the right to marry but that it carries less weight than the fundamental rights of personal liberty, freedom of expression and access to the courts. In that case a requirement of Home Office consent for non-Anglican marriages by immigrants was held invalid on the basis that the immigration authority could only interfere with the right to marry in the case of a sham marriage and it must be shown that the marriages targeted made substantial inroads into the scheme of immigration control. Moreover 'marriage' has been narrowly interpreted as referring only to traditional marriages between biological men and women (*Rees v UK* (1986): transsexuals), leaving it to individual states to determine policy on this sensitive issue (for example *Wilkinson v Kitzinger* (2006): civil partnerships).

► **Article 14: Non Discrimination**

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is not freestanding. It applies only where discrimination takes place in relation to one of the other convention rights, although no such right need actually have been violated. For example, although there is no right to be housed, refusing housing for discriminatory reasons is unlawful (*R (Morris) v Westminster City Council* (2005): refusal of housing because dependent child had no immigration rights; *Ghaidan v Mendoza* (2004): inheritance by gay partner). However a tenuous link will not suffice (*A v Secretary of State for Work and Pensions* (2006): differential maintenance payments).

Article 14 was described by Lord Nicholls in *Ghaidan v Mendoza* (2004) [9] [19] as fundamental to the rule of law and calling for close scrutiny and by Lady Hale in the same case as 'essential to democracy which is founded on the principle that each individual has equal value' [132]. Although Article 14 has no express overrides, discrimination can nevertheless be justified on the basis of the overrides relevant to the Articles on which it is parasitic (see *Belgian Linguistics Case* (1968)). One way of

rationalising this is to argue that 'discrimination' in itself means making an *unjustified* distinction so as to violate the principle of equality. However this has the danger of confusing whether discrimination has taken place with whether it should be overridden (see Baker, 'Comparison Tainted by Justification: Against a Compendious Question in Article 14 Discrimination', 2006, *Public Law* 476). Another is to rely on the principle of balance which is said to underlie the Convention as a whole (above).

The courts have often applied the following guidelines in Article 14 cases (see *Wandsworth London Borough Council v Michalack* (2002); compare *R (Carson) v Secretary of State for Work and Pensions* (2006)) recognising however that they overlap:

1. Do the facts fall within the ambit of one or more of the substantive convention provisions?
2. If so, was there differential treatment as respects that right between the complainant on the one hand and the other persons put forward for comparison (the chosen comparators) on the other?
3. Were the chosen comparators in an analogous position to the complainant's situation?
4. If so, did the difference in treatment have an objective and reasonable justification in accordance with proportionality?

In *A v Secretary of State for the Home Department* (2005) a statute failed the fourth test. The Anti-Terrorism, Crime and Security Act 2001 authorised the indefinite detention of a foreign national, whose presence in the UK the Home Secretary reasonably believes is a risk to national security and whom he reasonably suspects is a terrorist, unless the person voluntarily leaves the country. The government claimed that these powers were necessary because a non-national could not be deported to a place where he or she would be at risk of torture or inhuman or degrading treatment (*Chahal v UK* (1996)). The government argued that it would otherwise be impossible to deal with suspects who were too dangerous to be at large but against whom no criminal charges could be brought. The House of Lords held by an 8 to 1 majority that the derogation was discriminatory and without justification in singling out foreign nationals since the threat was no less from British terrorists. In response to *A*, the Prevention of Terrorism Act 2005 put restrictions of movement 'control orders', on non-nationals and nationals alike (see Chapter 22).

Article 14 extends to forms of discrimination other than those listed (for example *Ghaidan v Mendoza* (2004): sexual orientation; *R (Douglas) v North Tyneside DC* (2004): age; *Wandsworth LBC v Michalack* (2002): family membership). It is not easy to identify its limits. In *R (S) v Chief Constable of South Yorkshire Police* (above) the House of Lords took the view that the discrimination must relate to a 'personal characteristic or status' shared by the disadvantaged group as opposed to a matter of behaviour only. Article 14 was therefore not engaged by a policy of retaining DNA samples taken lawfully from suspects who were later found to be innocent since the general category of 'innocent persons' was not capable of being a protected category. In another instance 'rough sleeper' was held not to be a protected category

(*M v Secretary of State for Work and Pensions* (2006)) nor was the hunting community (*R (Countryside Alliance) v Attorney-General* (2008)). Similarly a policy towards releasing prisoners on licence which was geared to the seriousness of the offence did not fall within Article 14 but fell only within Article 5 (*R (Clift) v Secretary of State for the Home Department* (2007)). On the other hand 'overseas resident' and 'person responsible for a child under a residence order' have been held to be protected as having different legal rights and duties to UK residents and natural parents respectively (*R (Carson) v Secretary of State* (2006): claim to pension; *Francis v Secretary of State for Work and Pensions* (2006): maternity grant). A protected category can therefore be something voluntarily assumed. It is difficult to see an underlying rationale such as protecting a sense of identity. However certain 'suspect categories', race and sex being pre-eminent, which are central to identity and over which the victim has no choice, enjoy a high standard of protection in that especially strong reasons are required to justify discrimination on those grounds (see *R (Carson) v Secretary of State* (above), Lord Walker, see also Lord Carson [15–17, 32]; *Walker v UK* (2006)).

▶ **Article 15: Derogation**

States can derogate or reserve from many rights under the Convention 'in time of war or other public emergency threatening the life of the nation' but only to the extent strictly required by the exigencies of the situation. This does not apply to Article 2: right to life, except in respect of a lawful act of war; nor to Article 3: torture and inhuman or degrading treatment or punishment; nor to Article 4(1): slavery or servitude; nor to Article 7: retrospective punishment.

▶ **Article 16:**

Articles 10, 11 and 14 shall not prevent a state from imposing restrictions on the political activities of aliens.

▶ **Protocol 1, Article 1:**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes and or other contributions or penalties.

This protects property rights against confiscation without compensation but does not confer a positive right to acquire property (see *Marckx v Belgium* (1979)). Restrictions on the use of property imposed in the public interest, for example environmental and rent controls are valid without compensation, although the line between use and confiscation may be difficult to draw (*Mellacher v Austria* (1989); *Fredin v Sweden* (1991)). Moreover the courts are not willing to use the Convention in cases where a property right is restricted by the exercise of other property rights (see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2003): charge to repair church roof taking effect as a common law right). Property rights probably have a lower level of protection than the other human rights and the rights the state to override them are wider and less specific (see *R (Countryside Alliance) v Attorney General* (2008)).

- ▶ **Protocol 1, Article 2: Education.** This is a limited right. It does not confer a right to be educated as such. Its primary purpose is to combat state discrimination and indoctrination. It does not require the state to provide education. It means only a right not be excluded from whatever education the state chooses to provide (*A v Head Teacher and Governors of Lord Grey School* (2004)). Nor does it include a right to state funding (*R (Douglas) v North Tyneside DC* (2004)).

The State shall respect the right of parents to ensure such education and training in conformity with their own religious and philosophical convictions.

This raises the conflict between individualistic liberalism and liberal pluralism (Chapter 2) since religious education might favour repression against individuals. It also treats the right as that of the parent rather than that of the child itself, an attitude that could be regarded as misplaced. It probably prevents the state from outlawing 'faith schools' but is subject to the limits on the manifestation of religion mentioned above (*R (Williamson) v Secretary of State for Education and Employment* (2005)). Moreover the UK has made a reservation:

only so far as compatible with 'the provision of efficient instruction and training and the avoidance of unreasonable public expenditure'.

- ▶ **Protocol 1, Article 3: Free elections to the legislature** at reasonable intervals by secret ballot (see *Hirst v UK (No. 2)* (2004)).
- ▶ **Protocol 6: Abolishes the death penalty in peacetime.** The Human Rights Act 1998 abolished the last remaining death penalty provisions in the UK (s.21(5)).

Summary

- ▶ The human rights debate involves attempts to accommodate competing and incommensurable values without any coherent overarching principle to enable a choice to be made. It is therefore arguable that an elected body rather than a court should have the last word. The Human Rights Act 1998 has attempted a compromise by leaving Parliament the last word but giving the court power to influence Parliament.
- ▶ Freedom in the common law is residual in the sense that one can do anything unless there is a specific law to the contrary. It is suggested that this is an inadequate method of safeguarding important liberties. There is a debate as to the extent to which the common law embodies the principles of the ECHR and it is suggested that there are important differences in the approaches of the two systems.
- ▶ The ECHR as such is not strictly binding upon English courts but can be taken into account where the law is unclear or where a judge has discretionary powers. The individual can petition the European Court of Human Rights the decisions of which are binding in international law but unlike those of the European Court of Justice (in relation to European Union law) are not legally binding in domestic law.
- ▶ The HRA 1998, while not incorporating the Convention as such, has given the main rights created by the ECHR effect in domestic law. UK legislation must be interpreted to be compatible with convention rights but parliamentary supremacy is preserved.

Summary cont'd

- ▶ Most convention rights are negative rights which restrain the state from interfering with them. Some have a positive aspect by imposing a duty on the state to ensure that the right in question is respected.
- ▶ Some of the rights are absolute and cannot be overridden by public interest considerations although they might be defined narrowly in the light of the public interest. Other rights are subject to being overridden on prescribed grounds of public interest or of other rights.
- ▶ Some rights, notably deprivation of liberty are narrowly defined, others, notably privacy and family life are broad and vague.
- ▶ Some rights, notably the right to life, protection against torture, deprivation of liberty, freedom of expression and non-discrimination have an especially high status. The right to property may have a lower level of protection than other rights.

Exercises

- 19.1** 'Human Rights are permeated with irresolvable disagreement as to what they mean, how they apply, and as to the nature of disputes about them. The courts are therefore a hopelessly inadequate mechanism for resolving human rights problems'. Discuss.
- 19.2** Explain the scope of Article 14 of the ECHR. Does it go far enough in combating discrimination?
- 19.3** 'Democracy is the will of the people but the people may not will to invade those rights which are fundamental to democracy itself.' Lady Hale in *R (Countryside Alliance) v Attorney General* (2008) Discuss.
- 19.4** Compare the legal effect of the ECHR with that of the European Union (Chapter 10).
- 19.5** What is meant by a deprivation of liberty under the ECHR?
- 19.6** You are the leader of a pressure group representing the hunting community. What arguments could you raise to challenge the decision of the Law Lords in *R (Countryside Alliance) v Attorney General* (2008)?

Further reading

- Alder, J. (2006) 'The Sublime and the Beautiful: Incommensurability and Human Rights', *Public Law* 697.
- Amos, M. (2006) *Human Rights Law*, Oxford, Hart Publishing.
- Campbell, T, Swing, K.D, and Tomkins, A. (eds) (2001) *Sceptical Essays on Human Rights*, Oxford University Press, chapters 3, 6, 7.
- Gearty, C. (2006) *Can Human Rights Survive?* Cambridge University Press (Hamlyn Lectures).
- Harvey, C. (2004) 'Talking about Human Rights', *European Human Rights Law Review* 500.
- Hill, M, Sandberg, R., (2007), 'Is Nothing Sacred? Clashing Symbols in a Secular World', *Public Law* 488.
- Jowell, J. (2003) 'Judicial Deference and Human Rights: a Question of Competence', in Craig, P. and Rawlings, R. (eds) *Law and Administration in Europe*, Oxford University Press.

Further reading cont'd

- Leader, S. (2007) 'Freedom and futures: Personal Priorities, Institutional Demands and Freedom of Religion', *Modern Law Review* 70:713.
- Mahoney, P. (1998) 'Marvellous Richness of Diversity or Invidious Cultural Relativism', *Human Rights Law Journal* 19:1.
- Poole, T. (2005) "Of headscarves and heresies: *The Denbigh High School* case and public authority decision making under the Human Rights Act", *Public Law* 685.
- Symposium (2007) 'Can Human Rights Survive?', *Public Law* 209.
- Tomkins, A. (2002) 'In Defence of the Political Constitution', *Oxford Journal of Legal Studies* 22:157.
- Waldron, J. (2006) 'The Core of the Case against Judicial Review', *Yale Law Journal*, 115(6):1346.
- Williams, A. (2007) 'Human Rights and Law: Between Sufferance and Insufferability', *Law Quarterly Review* 123:133.

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