Principles of Public Law

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CIVIL LIBERTIES AND HUMAN RIGHTS

19.1 Introduction

People use the word 'rights' in different senses, and so we need to clarify what they mean.

'Rights' may refer to legally enforceable entitlements or freedoms. Thus, when lawyers talk about the 'right to vote', they may be referring to legal rights contained in the Representation of the People Act 1985 and perhaps also to the international treaty obligations which place a duty on governments to organise elections. For instance, the countries which have ratified the First Protocol to the European Convention on Human Rights (ECHR) 'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choice of the legislature' (Art 3).

'Rights' may also be used to mean something else. Campaigners for voluntary euthanasia in the UK, for example, say that people have the right to die with dignity and with the assistance of their doctor. They are not suggesting that there is currently such a legal right; rather, they use the word 'right' as a rhetorical device to add weight to their moral argument in favour of mercy killing. Many philosophers prefer to avoid using the language of rights in such contexts. Mary Warnock, for instance, asks:

> Why should we not prefer simply to talk about the ways in which it would be right or wrong, good or bad, to treat our fellow humans? This would be to adopt the language of morality itself, with no quasi-legal implications [*An Intelligent Person's Guide to Ethics*, 1998, London: Duckworth, p 63].

People sometimes slip backwards and forwards between the two senses of 'rights'. Indeed, the distinction (or lack of one) between moral reasoning and legal reasoning is a deeply contentious one which divides thinkers. The practical difficulty arises because many constitutional documents confer broadly expressed rights on people (or lay down wide duties on State authorities which create corresponding rights). When originally drafted, some such documents were often no more than rhetorical claims that people be treated in a certain way. As Lord Hoffmann observes in *Matadeen v Pointu* (1999), in a discussion on the right to equality in the French Declaration of the Rights of Man and the Citizen of 1789 ('All men are born and remain free and equal in their rights'):

> ... the notion that [the National Convention's] decrees should be subject to review by a court of independent judges would have been greeted with incredulity.

Today, however, in most liberal democracies, courts have powers to adjudicate on whether State authorities (including democratically elected legislatures) have infringed rights codified in their written constitutions.

19.2 Civil liberties

In the UK, until recently, the ability of people to go about their lives without interference from State authorities tended to be spoken about as their 'civil liberties', rather than as 'human' or 'constitutional' rights. The legal systems of the UK had no codified statement of such liberties. The reasons for this lie in history. In England, power had shifted in important ways from autocratic monarchy in 1688 to Parliament, albeit one which was elected on a narrow franchise (see above, 3.6.6). Although some 18th century British radicals, notably Thomas Paine (1737–1819), demanded a written constitutional code of 'rights' for Britain, such an innovation was, for most people, inextricably tied up with the experiences of Britain's enemies – the freedoms proclaimed in the French and American Revolutions became associated with foreign powers that threatened Britain (see above, 3.7.2). Later, in 1838, one of the earliest socialist movements, the Chartists, campaigned for a 'People's Charter', focusing on the political emancipation of workers and male suffrage on the basis of equality (see above, 3.8.3). These radical demands all met with defeat. As in other countries, these early demands for 'rights' were intended as statements of political claims, not documents containing *legal* obligations upon which courts would adjudicate.

By the time Dicey wrote his *Introduction to the Study of the Constitution* ((1st edn, 1885), 10th edn, 1959, London: Macmillan), the whole notion of a formal document recording people's basic rights seemed an alien and unnecessary exercise (see above, 5.3). For over a century, the lack of a charter of rights in the British Constitution was considered not a 'failure' at all, but one of its great strengths. What people in the UK had to protect them from arbitrary intrusions by government were residual liberties and elected MPs and peers who respected the need for personal liberty and who would not enact legislation which unduly infringed it. British judges had an important role to play in ensuring liberty was protected, Dicey argued, even though they had no power to strike down Acts of Parliament as 'unconstitutional' on the basis of infringing a provision in a charter of rights. The judges had two main tools (see above, 1.7.1): the principle of negative liberty (people were permitted to do everything not specifically prohibited by law); and the requirement that action by State authorities must normally be authorised by a particular legal power recognised as valid by the common law or contained in statutes. Before the incorporation of the ECHR into domestic law by the Human Rights Act 1998 (discussed below), Laws J felt able to assert confidently that:

> The contents of the European Convention on Human Rights, as a series of propositions, largely represent legal norms and values which are either already inherent in our law, or, in so far as they are not, may be integrated into it by the judges ['Is the High Court the guardian of fundamental constitutional rights?' [1993] PL 59].

Many people could not share Laws J's confidence. For one thing, Parliament was able, at any time, to overturn the effect of a court's judgment seeking to protect a liberty right; and, on several occasions, Parliament has been found by the European Court of Human Rights to have violated rights contained in the European Convention on Human Rights (see below, 19.6). Some critics also saw the common law as 'a catalogue of unprincipled decisions' revealing an 'ethical aimlessness' (Lester, A, 'English judges as law makers' [1993] PL 267).

19.3 Human rights

Today, the term 'human rights' is often used to describe people's residual liberties from interference by State authorities. In the wake of the atrocities of the Second World War, the UK, like other countries around the world, came to recognise that rights against State interference and coercion were no longer a question solely for national law. Since the late 1940s, many international treaties have been established under which governments of Signatory States agree with one another to respect the basic freedoms of their citizens. (On the status of international treaties in the UK legal system, see above, 2.12.1.) Under the auspices of the United Nations, the Universal Declaration of Human Rights was established in 1948. Several regional treaties were subsequently created, including the ECHR, which came into force in 1953. These treaties were novel forms of international law. First, the countries which are parties to them agree with one another to respect the rights of *people* within their jurisdiction; hitherto, international law had been regarded as only regulating the relations between States. Secondly, these treaties established tribunals and procedures for monitoring and enforcing the parties' compliance with their treaty obligations.

The term 'human rights' is not limited to the freedoms people have from unjustified coercion by State authorities. Several international treaties seek to protect political rights to participate in collective decision making, such as the First Protocol to the ECHR (see above, 19.1). 'Human rights' also extends to some economic and social entitlements. For instance, the International Covenant on Economic, Social and Cultural Rights (UNTS No 14531, Vol 993 (1996), p 3) , the text of which was finalised in 1966 under the auspices of the United Nations, seeks to protect rights such as 'the enjoyment of just and favourable conditions of work' including 'reasonable limitation of working hours and periodic holidays with pay' (Art 7), 'paid leave or leave with adequate social security benefits' for mothers (Art 10.2), and 'the right of

everyone to the enjoyment of the highest attainable standard of physical and mental health (Art 12.1). Until recently, the status of these as legal rights, rather than just political claims or aspirations, was controversial.

19.4 What is the source of human rights and are they universal?

There are many jurisprudential debates about the nature of rights and how they are expressed in law (for an introduction to some of these, see Raz, J, 'Legal rights' (1984) 4 OJLS 1). Here we can highlight two particular controversies: what is the source of human rights; and are they universally applicable to all times and places? For many legal theorists, human rights exist because they are 'natural' or 'inalienable' attributes to being a human being. Rosalyn Higgins states that:

> Human rights are rights held simply by virtue of being a human person. They are part and parcel of the integrity and dignity of the human being. They are thus rights that cannot be given or withdrawn at will by any domestic legal system [*Problems and Processes: International Law and How We Use It,* 1994, Oxford: OUP, p 96].

In the past, there have been great philosophical debates over whether such 'natural' rights existed, but with the drafting of international legal charters to human rights after the Second World War, these controversies have become less pressing for lawyers and politicians, as they are now able to see those instruments themselves as the source of human rights. But although this has allowed awkward theoretical questions to be put to one side, the problem is that many of the rights instruments drafted during the 1940s and 1950s have (according to some) become outdated. Sir Stephen Sedley, writing of the ECHR, argues that it 'is a full generation out of date. The Convention, devised in 1950, took a limited view of human rights, based on the 19th century paradigm of the individual whose enemy is the State; I don't believe that is a workable premise' ((1994) *The Times*, 10 October). What this criticism has in mind is that the ECHR itself fails to provide for economic rights and rights to health care, housing, education and so on (so called 'red rights' or 'second generation rights') or any comprehensive rights to environmental protection ('green rights').

Another debate around the nature of human rights is, therefore, whether they are universal and timeless, or contingent on culture and temporary. This is often part of a more general debate about the nature of liberal democracy and Fukuyama's claim that we are witnessing the rise of a global civilisation and 'the end of history' (see above, 1.6.4). Some legal scholars are anxious to stress the universal aspects of human rights. Higgins, for instance, writes:

> I believe, profoundly in the universality of the human spirit. Individuals, everywhere, want the same essential things: to have sufficient food and shelter;

> to be able to speak freely; to practise their own religion or abstain from religious belief; to feel that their person is not threatened by the State; to know that they will not be tortured, or detained without charge, and that if charged, they will have a fair trial. I believe that there is nothing in these aspirations that is dependent on culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment [p 97].

Others are less certain. Sedley warns that 'ideas which pretend to universality are historical delusions' ('Human rights: a twenty-first century agenda' [1995] PL 386, p 387). He explains:

> That free speech or family life is today a fundamental individual right is by no means self-evident in a good number of the contemporary world's States, where history and conditions have made it apparent that they are primarily the State's business; and its is entirely conceivable that the States of Western Europe may during the coming century recast their thinking about family life and the right of the incurably or expensively ill to life itself as social and economic pressures bear down on ethics and theology. Who then will be right: our grandchildren or us?

The rights set out in international treaties seeking to protect liberty rights are important to the UK's system of liberal democracy for two main reasons. One is that, as Higgins suggests, rights to liberty go to the core of what it means to be a human being. Without them, a person is little more than an automaton – a member of an army rather than a citizen belonging to a community. In other words, such rights provide a basis from which to argue that there are areas of personal freedom which should not be violated by State authorities (including Parliament and the judiciary). A second reason is that many liberties are the pre-conditions for meaningful democracy (see above, 1.1.2). Parliamentary elections and the process of legislation are valuable ways of making collective decisions for a society only if people's basic freedoms are respected. Suppose, for example, a government calls an election, but bans other political parties, suppresses dissenting opinion, confiscates critical literature, puts its opponents in jail without fair trial, kills them or imposes internal exile. Even if the governing party wins a majority of votes, its election and its subsequent actions would lack legitimacy.

19.5 The European Convention on Human Rights

For people living in the UK today, one international human rights treaty has special importance – the European Convention on Human Rights and Fundamental Freedoms (ECHR). This treaty was created under the auspices of the Council of Europe (see above, 2.12.1), a key objective of which was to secure democracy in Europe after the Second World War. A supra-national judicial tribunal exists to adjudicate on alleged violations of the rights set out

in the ECHR and enforce them against signatory States, currently 41 in number (see below, 19.6). And, since the enactment of the Human Rights Act 1998, people have also been able to argue in British courts that a 'public authority' has violated the ECHR (see below, 19.10), though many other international treaties have not (yet) been incorporated into national law, including the International Covenant on Civil and Political Rights (see above, 19.3).

Among the rights set out in the ECHR are: the right to life (Art 2); prohibition of torture, inhumane and degrading treatment (Art 3); prohibition of slavery and forced labour (Art 4); rights to liberty and security of the person (Art 5); right to a fair trial to determine civil obligations and criminal charges (Art 6); no punishment without law (Art 7); right to respect for a person's private and family life, his home and his correspondence (Art 8); freedom of thought, conscience and religion (Art 9); freedom of expression (Art 10); freedom of assembly and association, including the right to form and join trade unions (Art 11); and the right to marry (Art 12). There are a number of Protocols to the ECHR, not all of which the parties have yet agreed to be bound by. The First Protocol provides that 'every natural and legal person is entitled to the peaceful enjoyment of his possessions' (Art 1), that 'no person shall be denied the right to education' (Art 2) and that the parties to the Protocol 'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature' (Art 3).

Some rights, such as the protection against slavery (Art 4), the prohibition on torture and inhuman treatment (Art 3) and the prohibition on retrospective criminal legislation (Art 7) are unqualified; there are no permissible limitations. Many of the other rights are, however, qualified. Article 5 (right to liberty and security), for example, sets out specific situations where limitations by the State may be permissible. In others, Arts 8, 9, 10 and 11, competing interests which may countervail over the right in question are set out. These include:

(a) the interests of national security or public safety;

(b) the prevention of disorder or crime;

(c) the protection of health or morals; and

(d) the protection of the rights of others.

Articles 8(2) and 11(2) also include the protection of the freedoms of others, and Art 8(2) allows invasions of privacy which are in the interests of 'the economic well-being of the country'. These qualifications must be 'prescribed by law', in pursuit of a 'legitimate aim' and 'necessary in a democratic society'. The ECHR is, therefore, not a charter of libertarian values which upholds individual liberty against the State in all situations.

The Court of Human Rights conducts a strict inquiry into the legality of these qualifications. For a measure 'necessary in a democratic society' to be accepted as valid by the court, a three part test has to be satisfied. First, is the measure rationally connected to the end it purports to serve – in other words, is it at all effective in actually achieving this aim? Did the measure respond to a pressing social need? Secondly, were the effects of the measure in proportion to its aim? Thirdly, even though it fulfils these first requirements, is the measure, on balance, proportionate to the impact on the rights of the individual? In assessing whether the measure is proportionate to the aim, the Court of Human Rights takes into account the 'margin of appreciation' of the signatory State concerned, which means the area of discretion left to signatory States to determine the best solutions to their own national problems.

Since the Court of Human Rights is a supranational body determining liability under an international treaty, it is incumbent on the judges to recognise that governments of the signatory States are in a better position than they are to decide both on the presence of a particular risk and the measures necessary to combat it. The scope of this 'margin of appreciation' varies, depending upon the circumstances and subject matter of the case before a court. We will see from the chapters to follow that the court is reluctant to interfere with national measures which are justified, for example, by reference to public morality (*Handyside v UK* (1979), see below, 24.6). However, in the context of free speech rights (Art 10), the margin of appreciation will be a narrow one; the Court will scrutinise very closely any measure adopted which has the effect of quelling vibrant journalism and free debate in a democracy (*Sunday Times v UK* (1979)).

Article 14 states that:

> 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.

This does not create a free standing right to equal treatment, but is parasitic on other rights. In other words, it is only if a person is able to show that there has been differential treatment in relation to one of the other rights contained in the ECHR that an infringement of Art 14 may be alleged.

19.5.1 Derogations and reservations

Under Art 15 of the ECHR, parties may 'derogate' from complying with some of the articles of the Convention in certain defined circumstances, including the existence of a 'public emergency'. By lodging a formal document with the Council of Europe, a State may remain a party to the ECHR while declaring that it will not comply with a particular provision in it. Thus, in 1988, the UK entered a derogation in relation to Art 5 (rights to liberty and security of the

person) after the Court of Human Rights had held, in *Brogan v UK* (1989), that police powers in the Prevention of Terrorism (Temporary Provisions) Act 1984, allowing suspects to be detained for seven days without charge, were contrary to the ECHR. No derogations are permitted in relation to Arts 3, 4 and 7.

A party may also enter a 'reservation' at the time it signs a Protocol to the ECHR. Thus, in relation to the right to education protected by Art 2 of the First Protocol, the UK agreed to the second sentence ('In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions') only 'in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'.

19.6 The European Court of Human Rights

The ECHR is more than merely a codified text of rights and freedoms. It also establishes a judicial system for adjudicating upon complaints by individuals, companies and groups that they were victims of violations of the Convention by their own country. The UK agreed that, from 1966, people within its jurisdiction could have this right of individual petition (for a fascinating historical account, see Lester, A, 'UK acceptable of the Strasbourg jurisdiction: what really went on in Whitehall in 1965' [1998] PL 237).

At the time when the UK ratified the ECHR in the 1950s, the government was confident that British laws and government practices were 'consistent with our existing law in all but a small number of comparatively trivial cases' (Memorandum to Cabinet by Foreign Office Minister of State, Kenneth Younger, 25 July 1950). In the years which followed, many complaints against the UK have been made. Notable cases include: *Golder v UK* (1975) and *Silver v UK* (1983) (delegated legislation and internal rules under which prisoner refused access to a solicitor was contrary to Art 6 and Art 8); *Republic of Ireland v UK* (1978) (police in Northern Ireland held to have violated Art 3); *Sunday Times v UK* (1979) (common law contempt rules violated Art 10); *X v UK* (1981) (Mental Health Act 1959 violated Art 5); *Brogan v UK* (1988) (Prevention of Terrorism Act 1984 violated Art 5); and *McCann v UK* (1995) (rules of military engagement under which IRA members on bombing mission in Gibraltar were shot contrary to Art 2).

This dismal record dented the belief that the UK enjoyed a 'culture of liberty' and led to a long campaign for the ECHR to be incorporated directly into the UK's legal systems so that British courts would be empowered to adjudicate on Convention rights. But in comparison to the overall incidence of litigation in the UK courts, the number of people going to Strasbourg is relatively small. Between 1959 and 1995, the Court of Human Rights made 60 judgments in relation to the UK, and in 35 of them found that there had been

at least one violation of the ECHR. Many other petitions were rejected at the initial stage as inadmissible (including, for example, that of the GCHQ trade unionists, whose application for judicial review, based on the ground of procedural impropriety, had been refused by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). During 1994, 236 applications against the UK were formally received in Strasbourg; 141 were held to be inadmissible; 16 were declared admissible; and there was one friendly settlement (see below). Up to 1998, the UK was third only to Italy and Turkey in the number of complaints made against it, though this crude statistic says little about the relative human rights record of the signatory States.

19.7 Procedures and remedies in the European Court of Human Rights

'Going to Strasbourg' is not an appeal from a national court, as the proceedings are entirely separate from those in each signatory State. As we shall see shortly, however, a person who intends to complain to the Court of Human Rights is required first to have tried to obtain justice in his own State. Until recently, there were two bodies responsible for dealing with grievances: the European Commission of Human Rights and the European Court of Human Rights. Both these institutions sat on a part time basis. The Commission was responsible for deciding whether a complaint was admissible and, if it was, attempting to reach a 'friendly settlement' between the State and the complainant. If no such settlement was achieved, the case was then adjudicated upon by the Court of Human Rights. The Commission filtered out approximately 97% of the 2,000 to 3,000 petitions received each year. This two tier system of decision making contributed to delays in dealing with cases: on average, it took five years from lodging a petition to the date of judgment.

On 1 November 1998, important procedural changes made by the Eleventh Protocol to the ECHR came into force. An entirely new court (though having the same name as its predecessor) replaces the two bodies. There is one judge from each of the ECHR's signatory States, currently 41 in number, and the new Court of Human Rights sits in permanent session. The judges are elected for terms of six years, and may be reappointed, by the Parliamentary Assembly of the Council of Europe. (Be clear! This institution is not part of the European Union, see above, 2.12.1.) The short term of office and the compulsory retirement of judges at 70 years of age have both been criticised: arguably, these arrangements compromise judicial independence and deprive the court of experienced candidates: see Mowbray, A, 'A new European Court of Human Rights' [1994] PL 540). The UK judge is Sir Nicolas Braza QC, who previously served on the European Commission of Human Rights.

Under the new procedures, a committee of three judges first considers the admissibility of each individual petition registered with the Court of Human Rights. The committee may, by unanimous vote, reject the application as inadmissible. If the committee is not unanimous, the question of admissibility will be determined by a Chamber of the Court. The criteria for admissibility, set out in Art 35, are:

(a) the applicant has exhausted all domestic remedies;

(b) the application is made within six months of having done (a);

(c) the applicant is not anonymous;

(d) the application raises a matter which is not substantially the same as one already ruled upon by the Court of Human Rights;

(e) the application is incompatible with the provisions of the Convention; and

(f) that the procedure is not being used as an 'abuse of right' or on the grounds of a 'manifestly ill-founded claim'.

If an application is held admissible, the parties are encouraged to reach a friendly settlement. If this cannot be achieved, the case then proceeds for hearing. The parties submit written evidence, and there is also power to send delegates to the signatory State to investigate the matters complained about. A chamber of seven judges hears oral submissions from the parties. The court gives judgment. Unlike the European Court of Justice (see above, 7.5.5), the Court of Human Rights' judgments need not be unanimous, and dissenting decisions may be delivered. In Chapters 20–27, we look in more detail at how the court approaches its task of adjudicating on violations of the Convention.

Remedies

Using less than crystal clear language, Art 41 (formerly Art 50) of the ECHR states:

> If the Court finds that a decision or measure taken by [... a signatory State ...] is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

(See, further, Mowbray, AR, 'The European Court of Human Rights' approach to just satisfaction' [1997] PL 647.) In many cases, the Court has regarded the fact of a finding that a Convention right has been violated is sufficient remedy. Compensation may also be awarded for pecuniary damage (financial loss consequent on a breach of a Convention right that can be quantified). It may also be awarded for non-pecuniary loss: for example, where an applicant has been held for an unreasonable period in detention in breach of Art 5, or has suffered distress or anxiety as a result of the violation of any of the protected rights. It is not easy to predict the level of damages that will be awarded for a

breach of a Convention right from the relevant Strasbourg case law; awards for non-pecuniary damage tend to vary widely. Damages for distress and anxiety experienced by applicants as a result of the violation of a particular right have ranged from £1,000 per applicant in one case (*Papamichalopoulos and Others v Greece* (1995)) to £12,000 in another (*Hokkanen v Finland* (1994)).

The legal costs of taking a case to Strasbourg are recoverable if the applicant is successful. The applicant may also have incurred considerable costs at the domestic level, particularly if he or she has lost on the merits in a series of hearings, with consequent costs orders made against him or her. The Court of Human Rights does allow the recovery of domestic costs under Art 41, provided that they were incurred to prevent or remedy breaches of ECHR rights.

Where there is 'a serious question on interpretation or application of the Convention ... or a serious issue of general importance' (Art 43 of the ECHR), a party to an application may request that, within three months of the Chamber's judgment being delivered, the case be referred to a Grand Chamber of 17 judges. This is a re-hearing rather than an appeal, since a number of judges who have sat on the first panel will hear the case a second time. A case may also be referred to the Grand Chamber without first being determined by a chamber.

19.8 Who may be an applicant in Strasbourg?

Complaints under the ECHR may only be brought by 'a person, non-governmental organisation or a group of individuals claiming to be the victim of a violation of a Convention right' (Art 34, formerly Art 25 before the Eleventh Protocol came into force). Legal entities such as companies, and bodies such as trade unions are, therefore, also able to benefit from some of the 'human' rights contained in the Convention, though obviously some rights, such as to marriage, are inapplicable. This reflects the fact that autonomy from the State is important for voluntary associations (see above, 1.2) as well as for individuals, though some critics express unease that business enterprises may be able to claim rights such as freedom of expression (for an analysis, see Penner, R, 'The Canadian experience with the Charter of Rights: are there lessons for the UK?' [1996] PL 104).

The applicant must have been in some way adversely affected by the act complained of, even if the detriment is threatened rather than actual. In *Dudgeon v UK* (1982), an application was made by a gay man who had been questioned under laws in Northern Ireland which made homosexual activity a criminal offence. The fact that no prosecutions had been pursued under these laws in recent years did not detract from his status as victim, since there was always a possibility that the law would be enforced. Although actions by non-governmental organisations are permitted, this is on the premise that they

have suffered the detriment. There is no scope for 'public interest' challenges in ECHR law (compare the position in judicial review in England and Wales (see above, 17.5.2).

The jurisdiction of the Court of Human Rights is not limited to individual complaints. One signatory State may apply to the court for a judgment on an alleged violation of the ECHR by another State. In 1971, Ireland brought an application against the UK which resulted in the Court of Human Rights holding that methods of interrogating suspects in Northern Ireland between 1971 and 1975 amounted to inhuman and degrading treatment contrary to Art 3 (*Ireland v UK* (1971)). In practice, however, between 1956 and 1995, only 12 inter-State applications were lodged.

19.9 Who is subject to challenge in Strasbourg?

The Court of Human Rights enforces the ECHR only against 'the High Contracting Parties' – the States which have ratified the Convention (Art 1). Complaints may allege that any State authority has violated the ECHR, including parliaments in enacting legislation (for instance, *Brogan v UK* challenging the Prevention of Terrorism Act 1984) and courts in deciding cases (for example, *Tolstoy v UK*, challenging a £1.5 m libel award by a High Court jury).

A State may sometimes be held responsible for actions of citizens or businesses. For example, the UK was held answerable for the action of a teacher in a private school who had 'slippered' the child of parents opposed to corporal punishment. The First Protocol to the ECHR states that 'In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. The Court of Human Rights held that 'the State cannot absolve itself from responsibility [to secure an ECHR right] by delegating its obligations to private bodies or individuals' (*Costello-Roberts v UK* (1995)) and, since Acts of Parliament made it mandatory for parents to educate their children, and authorised private schools to provide education, the UK was implicated in such a school's breach (see below, 23.2.10).

The concept of *Drittwirkung der Grundrechte* (German for 'third party effect of fundamental rights') – or 'horizontal effect' – is beginning to be developed. In essence, this is the idea that one of the responsibilities of a State is to ensure that one citizen (or company) does not violate the human rights of another. Thus, if there is a 'right to privacy', this might apply not only to the prying eyes of police surveillance and intrusions of social workers, but may also mean that government should prevent newspaper journalists snooping on people (for instance, by enacting privacy legislation).

19.10 The Human Rights Act 1998

A central feature of the Labour government's constitutional reform programme after the 1997 general election was to 'bring rights home' by incorporating the ECHR into the legal systems of the UK. The UK's dualist approach to international law means that unless specifically transposed into national law by an Act of Parliament, litigants in national courts cannot generally rely upon rights contained in treaties (see above, 2.12.1). There was, therefore, little scope for people in Britain to use the ECHR in their own courts, except perhaps to persuade a judge to interpret an ambiguous statutory provision so that it was in accordance with the Convention. After the enactment of the Human Rights Act 1998, the position has altered significantly. As a last resort, people will still be able to petition the Court of Human Rights, but now they will also be able to advance arguments in British courts about the rights contained in the ECHR.

19.10.1 The duty of interpretation

Section 3 of the Human Rights Act 1998 places the following duty on all courts and tribunals in all types of legal proceedings:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

It is not entirely clear what this means (see Marshall, G, 'Interpreting interpretation in the Human Rights Bill' [1998] PL 167) and it remains to be seen how British judges carry out this new function. UK courts and tribunals must 'take into account' the judgments of the Court of Human Rights and the opinions of the former European Commission on Human Rights (s 2(1) of the Human Rights Act 1998). This means that Strasbourg case law will be influential, although not binding, on the national courts' interpretation of the scope of the rights and limitations set out in the ECHR.

19.10.2 Declarations of incompatibility

If the High Court finds that it is impossible to 'read and give effect' to an Act of Parliament or statutory instrument so that it is compatible with the ECHR, it may make a formal 'declaration of incompatibility' (s 4). Such a declaration has only limited effect as it '(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made'. The limited nature of the remedy is explained by the statement in the White Paper *Rights Brought Home: The Human Rights Bill*, Cm 3782, 1997 (para 2.13):

> The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance with the Government attaches to Parliamentary sovereignty.

The only legal consequence of a declaration of incompatibility is that it may prompt a government minister to use the 'power to take remedial action' in Parliament contained in s 10.

19.10.3 Remedial orders in Parliament

Section 10 empowers a government minister to introduce a statutory instrument to amend or repeal the provision which a British court has declared to be incompatible with the ECHR. This is known as a 'remedial order'. A minister may also use the power to make a remedial order if it appears to him that a finding of the Court of Human Rights suggests that UK legislation is incompatible with the Convention. Section 10 is therefore a 'Henry VIII' clause, enabling primary legislation to be altered by subordinate legislation – something which is potentially of concern, given the limited opportunities for Parliament to scrutinise such legislation (see above, 6.5.2). There is a 'fast track' procedure of 40 days during which both Houses of Parliament debate and pass resolutions affirming the changes proposed by the draft remedial order (s 12). Section 10 grants the minister a power, rather than imposing a duty, to amend incompatible legislation; if a minister decides not to introduce a remedial order into Parliament, he cannot be challenged in the courts for this decision: s 6(6).

Legislation does not normally have retrospective effect. Section 11, however, hints that ministers making remedial orders may deal with the specific circumstances which led a litigant to seek a declaration of incompatibility. The remedial order may 'be made so as to have effect from a date earlier than that on which it is made' and may 'make different provision for different cases': s 11(1)(a) and (c).

19.10.4 Using the ECHR as a ground of judicial review or appeal

Section 6 of the Human Rights Act 1998 states that: 'It is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights'. In effect, this creates a new ground of judicial review in addition to illegality, irrationality and procedural impropriety (see above, 11.2). Section 6 also creates a defence to such a challenge. A public authority will not be held to have acted unlawfully if, as a result of one or more provisions in an Act of Parliament or a statutory instrument, 'the authority could not have acted differently'. In other words, a public authority may argue that it was merely following national legislation. In the chapters which follow, we examine some of the rights contained in the Convention and how they may now be used as the basis for judicial review challenges. For the time

being, however, the focus is on the modifications to the judicial review procedure which occur when a ECHR point is raised.

As we saw, the courts have struggled to devise a workable common law test for determining which decisions of what bodies are amenable to judicial review (see above, 17.5). Broadly, there has been a shift from focusing only on the source of the decision maker's power to looking also at the functions the decision making body is performing (*R v Panel on Take-overs and Mergers ex p Datafin plc* (1987)). Obviously, the Human Rights Act 1998 needs to demarcate in some way which bodies and office holders' actions may be challenged as violating the ECHR. It could have adopted the approach used in the legislation creating ombudsmen (see above, Chapter 10) and merely listed in a schedule to the Act which public authorities fall within its ambit. The Human Rights Act 1998 does not do this, however; instead, it uses a broad and flexible, but also potentially uncertain, definition of 'public authority'. Applicants are allowed to use incompatibility with the Convention as a ground of review only against 'public authorities'. According to s 6(3), this includes:

(a) a court,

(b) a tribunal which exercises functions in relation to legal proceedings, and

(c) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

It is also provided that 'In relation to a particular act, a person is not a public authority by virtue only of sub-section (3)(c) if the nature of the act is private' (s 6(5)). Each of these elements of the definition needs to be considered more closely.

Challenging court and tribunal decisions

Clearly, s 6(3)(a) and (b) includes the types of courts and tribunals which are already amenable to judicial review on the common law grounds of illegality, procedural impropriety and irrationality: for example, magistrates' courts, the Immigration Appeals Tribunal and the Criminal Injuries Compensation Board. The broad term 'court' in s 6 goes further than this, however. It includes the 'superior courts' – in England and Wales, the Crown Court, the High Court, the Court of Appeal and the Appellate Committee of the House of Lords – which have not been subject to judicial review. (This is because judicial review developed historically as a method for supervising decision making of 'inferior' courts, and for the obvious practical reason that the High Court could not review itself or the courts above it in the hierarchy.) The duty of the superior courts to act only in ways compatible with the ECHR cannot, therefore, be enforced by means of a judicial review challenge. Instead, their duty will be enforced by making violation of the ECHR (for instance failing to develop the common law in accordance with Convention rights) a ground of appeal from their judgments.

Challenging self-regulatory and similar bodies

The definition of 'public authority' in s 6 states that

> (3) (c) any person certain of whose functions are functions of a public nature ...
>
> (5) in relation to a particular act, a person is not a public authority by virtue of subsection 3(c) if the nature of the act is private.

This mirrors the common law test propounded in *ex p Datafin*, to define when decisions of non-statutory bodies are subject to judicial review (see above, 17.6.2). Thus, organisations such as the Advertising Standards Authority will have to be wary of infringing Art 10 of the ECHR (freedom of expression), and the Press Complaints Commission, the self-regulatory body of the newspaper industry, will have to ensure that, in its determinations, it does not violate Art 8 (respect for privacy).

By adopting this 'public function' test, the Human Rights Act 1998 may go far further than the Court of Human Rights can in applying Convention rights. In Strasbourg, the ECHR is enforceable only against the signatory States and their agents – though, as we have seen, this may include private institutions (see above, 19.9).

Challenging legislation

Section 6(3) of the Human Rights Act 1998 excludes from its definition of public authorities 'either House of Parliament'. This means that a person cannot directly apply for judicial review of a provision in an Act of Parliament on the ground that it violates one or more Convention rights. This restriction is anomalous for two reasons. First, it *is* possible to challenge directly the validity of an Act of Parliament on the ground that it is incompatible with *European Community* law and for the High Court to grant a declaration to this effect (see *R v Secretary of State for Employment ex p Equal Opportunities Commission* (1995), above, 7.9.2). There seems little good reason to prohibit the court from carrying out the same task in relation to the ECHR. Secondly, under s 3, the court is empowered to make a declaration of incompatibility when it tries, but fails, to 'read and give effect' to an Act in a way which respects Convention rights. In practical terms, the exclusion of Parliament from the definition of 'public authority' therefore means that:

(a) an application for judicial review form (see above, 17.3) cannot boldly name a statutory provision as the 'judgment, order or other proceedings in respect of which relief is sought'; however

(b) if the applicant is complaining about a public authority's decision or action and an issue of interpretation arises, then, in the course of the application, the court may grant a declaration that an Act of Parliament is incompatible with the ECHR.

There are two possible justifications for omitting Parliament from s 6. One is that the restriction is necessary in order to preserve parliamentary

sovereignty; but as the court can make declarations of incompatibility in other circumstances, this carries little weight (see above, 5.2.5 and 19.10.2). A better justification is that a court ought to have a factual context, not just statutory words in a vacuum, in which to examine whether words in an Act are incompatible with the Convention. If people were allowed to challenge statutory provisions under s 6, the court might have to ask itself hypothetical questions to establish whether the words of enactment breached the ECHR.

The Human Rights Act contains no prohibition on a person directly seeking judicial review of a provision contained in a statutory instrument (see above, 6.5.2) on the ground of incompatibility with an ECHR right. In other words, a statutory instrument can be named as the 'judgment, order or other proceedings in respect of which relief is sought' on an application for judicial review form (see above, 7.3). Even though statutory instruments may be debated and affirmed by resolution of one or both Houses of Parliament, they are regarded as 'made' by the office holder or body (normally a minister) stipulated in the enabling Act of Parliament (see above, 6.5.2). They are not 'proceedings in Parliament'. The Human Rights Act 1998 does, however, prevent the court quashing a statutory instrument if it is in accordance with the enabling Act of Parliament and that Act 'cannot be read or given effect in a way which is compatible with Convention rights' (s 6(2)(b)); all an applicant will obtain in these circumstances is a declaration of incompatibility under s 4(4).

Challenging proceedings in Parliament

Section 6 of the Human Rights Act excludes from its definition of 'public authority' any 'person exercising functions in connection with proceedings in Parliament'. This reflects the law on parliamentary privilege and Art 9 of the Bill of Rights 1698, which provides that 'the freedom of speech, and the debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament' (see above, 6.6). Thus, for example. a Member of Parliament being investigated for alleged improper conduct by the Parliamentary Commissioner for Standards (see above, 6.7) will not be able to seek judicial review on, say, the ground that there has been a breach of Art 6 of the ECHR (fair trials). While this exclusion from the Human Rights Act 1998 may protect violations from challenge in the UK courts, parliamentary proceedings have no immunity under the ECHR itself and the Court of Human Rights is able to consider complaints in respect of them (*Demicoli v Malta* (1992)).

19.10.5 Standing to apply for judicial review on ECHR grounds

The requirement for applicants to have 'sufficient interest in the matter to which the application relates' (s 31(3)of the Supreme Court Act 1981) has been considerably relaxed in recent years to allow pressure groups, such as the World Development Movement and Greenpeace, to apply for judicial review in the public interest, even though their own rights have not been affected any

more than those of any other person (see above, 17.5.2). In s 7(3), the Human Rights Act modifies the standing requirement for applicants wishing to use the Convention as a ground of judicial review:

> If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

The test, by introducing a requirement of victimhood, is thus stricter than for applications which do not raise ECHR arguments. The unconvincing justification for this is that the status of victim is a requirement for individuals who, having exhausted their remedies in national courts, wish to take a case to the Court of Human Rights (see Art 34 of the ECHR, discussed above, 19.8). The incorporation by the Human Rights Act of the victim test into national law has the unfortunate consequence that, in judicial review applications brought in the public interest – 'an accepted and greatly valued dimension of the judicial review jurisdiction' (see above, 17.5.2) – the public authority challenged will be able to oppose the application on the basis that the applicant is not a 'victim' and so cannot raise a violation of the ECHR as a ground in the judicial review application – even if the applicant has sufficient interest to argue illegality, irrationality or procedural impropriety.

19.10.6 Damages for violation of the ECHR

Generally, when a public body is held to have acted unlawfully by making a decision which is illegal, irrational or procedurally improper, this in itself gives an applicant for judicial review no basis for claiming damages (see above, 17.4). The applicant has to establish that an actionable tort has been committed in order to obtain damages. Section 8 of the Human Rights Act provides:

> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its jurisdiction, as it considers just and appropriate.
>
> (2) But damages may be awarded by a court which has power to award damages, or order the payment of compensation, in civil proceedings.

The court is prohibited from awarding damages unless it 'is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made' (s 8(3)) and the court 'must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Art 41 of the Convention' (s 8(4)). Section 8 ends by stating that 'unlawful' means unlawful under s 6(1)'.

Section 8(1) thus begins by creating generous empowering provisions, which are then whittled away in each ensuing sub-section. As we have seen, the Court of Human Rights' approach to Art 41 compensation is both cautious and inconsistent (see above, 19.7). If a public authority is following national

legislation which a court declares to be incompatible with the ECHR under s 3, the litigant will not be entitled to damages, because the public authority will not have been acting 'unlawfully' within the meaning of s 6. Damages will, therefore, not be available to buttress the remedy of the declaration of incompatibility (see above, 19.10.2).

19.11 Human rights and European Community law

As we have noted, the European Union and European Community law is a legal system quite distinct from that of the Council of Europe and the ECHR (see above, 2.12.1). There are, however, important interconnections between them. First, all Member States of the European Union are parties to the ECHR.

Secondly, the European Court of Justice in Luxembourg regards the rights protected by the ECHR as forming part of the 'general principles' of Community case law. The manner in which the court has done this has come in for scathing criticism by some academics. It has been argued that the ECJ prefers to interpret Convention rights in a way that best suits the purposes of the Community institutions, the rationale for Community legislation being very different from the guiding principles of the Court of Human Rights. Sceptics of this jurisprudence point out that by 'grabbing the moral high ground' of ECHR principles, the Community institutions are seeking to do no more than promote commercial interests over real human rights priorities maintained by individual Member States. So far, no individual application for judicial review of Community law on ECHR principles has succeeded. (For an introduction to this debate, see Coppel, J and O'Neill, O, 'The ECJ: taking rights seriously?' (1992) 29 CML Rev 699; and, for a contrasting view, Weiler, J and Lockhart, N, 'Taking rights seriously: the ECJ and its fundamental rights jurisprudence' (1995) 32 CML Rev 51).

One interconnection between the two European systems which is missing is that the European Union itself is not a party to the ECHR. (To be accurate, it would be the European Community which would become a party, as it has legal personality, whereas the European Union does not). This means that a person or business claiming that an institution of the European Union (for instance, the Commission) has breached human rights cannot take a case to the Court of Human Rights. There are several reasons why the European Union has not become a party to the ECHR. In Opinion 2/94 *Re Accession of the Community to the European Human Rights Convention* (1996), the Court of Justice held the EC Treaty contained no express or implied powers enabling the Community to become a party to the ECHR. In any event, some Member States take the view that, because the European Community is not a 'State', it ought not, itself, to participate in treaty organisations such as that of the ECHR. It is also far from certain that parties to the ECHR which are not Member States of the European Union would welcome it joining.

The question therefore arises whether one or more Member States of the European Union, which are parties to the ECHR, may be liable before the Court of Human Rights for a violation of the ECHR following a decision reached by the European Union's institutions. The Court of Human Rights has recently answered this in the affirmative. In *Matthews v UK* (1999), a resident of Gibraltar complained that people living there had no vote in elections for the European Parliament (see above, 7.5.2) contrary to Protocol No 1 of the ECHR, Art 3 (set out above, 19.1). Gibraltar is not part of the UK, but people living there are British nationals (see above, 2.4). The provisions of the EC Treaty apply there, though Gibraltar is excluded from the operation of some of its provisions, notably on free movement of goods. In 1976, the Member States of the European Community concluded a treaty agreement between themselves on direct elections to the European Parliament; the Council subsequently made a Decision under EC Treaty, Art 249 setting out in more detail the voting arrangements; Gibraltar was not included in the franchise. The Court of Human Rights accepted that the European Community as such could not be challenged because it was not a contracting party to the ECHR; but it held that the UK, by its actions in participating in making the Council Decision, was responsible for the violation of the ECHR.

19.12 A triumph for judges over elected representatives?

The emergence of broadly expressed legal rights to liberties in international law, European Community law and national laws causes some people concern. Rights such as those we are about to examine in Chapters 20–27 are really 'political' conflicts, it is said, which are not appropriately resolved by litigation processes and the formal legal reasoning used by lawyers and judges. JAG Griffith is one such trenchant critic. He describes Art 10 of the ECHR protecting freedom of expression as sounding 'like a statement of political conflict pretending to be a resolution of it' and he warns us that 'law is not and cannot be a substitute for politics' ('The political constitution' (1979) 42 MLR 1, p 19). Litigation about violation of the Convention, he argues, has for lawyers just become a 'happy and fruitful exercise of interpreting woolly principles and even woollier exceptions'. Keith Ewing and Conor Gearty, looking at US Supreme Court decisions dealing with homosexual rights and abortion, write:

> The difficulty is that on closer inspection these cases do not look very much like a strictly legal search for principle. When their outer layers are peeled away and they are stripped of their grandiloquent language, they resemble far more closely the dressing up of the judges' policy preferences in legal clothes. It is difficult for advocates of sophisticated philosophical theories about judicial law-making to realise that most tough decisions emerge from the personality of the judge – with all the prejudice, chance happenings and experiences which

> come with it' [*Democracy or a Bill of Rights*, 1994, London: Society of Labour Lawyers].

The same is true, some suggest, of decisions of the Court of Human Rights and, after the enactment of the Human Rights Act 1998, of human rights litigation in the UK. The accusation, in short, is that it is wrong for us to have diverted debate about important issues from the political to the judicial arena.

One trend in UK constitutional law is clear: judges in London, Luxembourg and Strasbourg now have more power than ever before to adjudicate on whether legislation passed by elected representatives the UK Parliament matches up to the requirements set by the ECHR and Community law. It is only in relation to Community law that judges have the power actually to set aside an offending legislative provision; but the capacity of British judges to make declarations of incompatibility under the Human Rights Act 1998 and the capacity of the Court of Human Rights to make findings enforceable in international law in reality falls only a little short of this.

Of all the 'sophisticated philosophical theories' which seek to justify the courts' powers to question the enactments of elected legislatures, one of the most persuasive is provided by Ronald Dworkin. Dworkin accepts that democracy based on the wishes of the majority (or their representatives) is a desirable way of organising society. But he argues that certain conditions have to be met before majoritarian decision making has any moral advantage over types of government. What are these preconditions to majority rule? Perhaps the most controversial is what he calls 'moral independence'; for Dworkin, a genuine political community must be a community of independent moral agents: 'It must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on those matters through their own reflective and finally individual conviction' (*Freedom's Law*, 1997, Oxford: OUP, p 26). Some institution other than the representative legislature whose legislation is challenged has to judge whether the preconditions to democracy exist. In most liberal democracies, this function has been assigned to a court, though it could, perhaps, also be carried out by a body of non-lawyers hearing arguments about alleged infringements of constitutional rights.

CIVIL LIBERTIES AND HUMAN RIGHTS

The term 'rights' is used both:

(a) to refer to existing legally enforceable entitlements or freedoms; and

(b) as a rhetorical device to lend weight to an assertion about how to treat other people morally.

The tradition in the UK has been to attach importance to 'civil liberties'. Personal autonomy is the freedom to do anything not expressly prohibited by law and many people have considered that the common law adequately protects these liberties. Until recently, codified statements of people's rights were eschewed by domestic law.

After the Second World War, international treaty organisations were established to protect human rights. The concept of human rights is not limited to protecting people from the improper incursions by the State into personal freedom; it extends to include civil, political, social and economic rights. Many commentators regard human rights as being held universally by all people, everywhere in the world, by reason of the fact that they are human beings. Therefore, such rights in international law 'cannot be given or withdrawn at will by any domestic legal system'.

The European Convention on Human Rights, in force since 1953, is a particularly developed regional system for protecting human rights. There are now 41 parties to it. Although some rights set out in the ECHR (for instance, the prohibition of torture) are held by people without qualification, other rights (such as privacy and freedom of expression) may be lawfully curtailed by government in the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights of others. The ECHR is, therefore, not a libertarian charter.

The European Court of Human Rights in Strasbourg is the judicial body to which individuals may bring a complaint after all domestic remedies have been exhausted. To bring a complaint, a person must be a 'victim' of a violation of the ECHR. Companies and other organisations are entitled to protection in respect of some of the rights in the ECHR. The violation must have been committed by a public authority (which may be a parliament, government or courts), or by a body (such as a private school) which is acting under powers delegated by the State. A State may also be required to ensure that one individual or private body does not violate the human rights of another (*Drittwirkung der Grundrechte*).

In the UK, the Human Rights Act 1998 enacts a scheme for incorporating the ECHR into national law. Courts and tribunals hearing any type of case have an interpretative obligation to ensure that Acts of Parliament and subordinate legislation are, so far as possible, 'read and given effect in a way which is compatible with the Convention rights' (s 3). Higher courts in the UK may make a 'declaration of incompatibility' when it is not possible to interpret a statutory provision in this way. The Human Rights Act 1998 also makes it unlawful for a public authority to act in a way which is incompatible with Convention rights' (s 6). This will, in effect, form a ground of judicial review – but only applicants who are 'victims' of the violation will be permitted to apply for judicial review. Courts may award damages for unlawful action.

The European Community is not a party to the ECHR, though the Court of Justice seeks to uphold human rights as part of the 'general principles' of Community law. The European Court of Human Rights may find Member States of the European Community responsible for violations of the ECHR by Community legislation in which the Member State participated in making.

Not all commentators welcome the emergence of broadly expressed human rights in international law, Community law and national law. Critics fear that law will become a substitute for politics.