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**ACTIVITY 24**


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**The development of human rights in Britain under an incorporated Convention on Human Rights** (allow 1 hour 45 minutes)

Please re-read the article by Lord Irvine, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' that you considered in **Activity 21**, in particular, the sections 'Implications of the change' and 'The influence on other areas of law'. As you read consider the following questions:

- 1 What interpretative principle was introduced into UK law?
- 2 Do the judiciary have the power to strike down legislation which is incompatible with the Convention?
- 3 What provision is made for a situation where it is not possible to reconcile domestic legislation with the Convention?
- 4 Can you identify any limitations with this system?
- 5 What provision is made for the amendment of incompatible legislation?
- 6 What changes are there to parliamentary procedure?
- 7 Against whom may the Convention be invoked?
- 8 What justification is given for not giving human rights the 'higher status' already afforded to EU law? (Remember the work you did in Units 9 and 10.)
- 9 What argument is put forward against entrenchment of the Human Rights Bill (now the Human Rights Act 1998)?
- 10 What influence will the incorporation of the ECHR have on other areas of law?

**COMMENT**

The only question that you may have had difficulty with is '4. Can you identify any limitations with this system?'.

The declaration of incompatibility has no effect on the legislative process to which it relates, and does not bind the parties in the particular proceedings. There is also no requirement for the offending legislation to be amended. Therefore the person whose case results in a finding of legislative incompatibility will lose in the domestic courts and may of course have no option other than to pursue the case in Strasbourg. However, if a declaration of incompatibility has been made, there is certainly an expectation that the government will respond to it by introducing the necessary legislation to remove the incompatibility. You will see that some examples of this happening are referred to in the Comments on **Activity 25** below.

In the next activity we are going to examine the main provisions of the Human Rights Act 1998.

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**ACTIVITY 25**


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**Examining the Human Rights Act 1998** (allow 1 hour 30 minutes)


Online

Using the internet (e.g. the LexisLibrary or Westlaw UK legal databases), find the Human Rights Act 1998. Please access and study the Long Title of the Act and ss. 1(1)-(3), 2(1), 3(1) and (2), 4(1)-(6), 6(1)-(3), 7(1) and (3), 8(1), 10(1)-(3) and 19(1) and (2).

As we go through the main statutory provisions see if you can interpret the sections and answer the questions posed before looking at the comment. You may find it useful to save a copy of the Act on your computer on which you can then highlight the important words in each provision we consider and use as a basis for your own notes.

- 1 **Long title: What does the long title tell us about the purpose of the Human Rights Act 1998?**
- 2 **Section 1 and sch. 1: What ‘Convention rights’ have been incorporated (subject to any designated derogations or reservations)?**
- 3 **Which article is not specifically designated as a ‘Convention right’ within this definition?**

#### COMMENT

- 1 The long title of the Act indicates that its purpose is principally to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights (i.e. by incorporating the core Convention rights and freedoms into UK law).
- 2 Articles 2 to 12 and 14 of the Convention are incorporated, along with arts 1 to 3 of the First Protocol and art. 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention.
- 3 Article 13 (the right to an effective remedy in a national court) is not specifically designated as a ‘Convention right’ within this definition. It was not incorporated because the government feared that it might give too much power to unelected judges and so threaten parliamentary supremacy.

The problem the government foresaw would arise where an Act of Parliament infringed a ‘Convention right’. If your rights were infringed by such an Act, you could argue that the court was obliged under art. 13 to give you an effective remedy, even if this meant overriding the Act. The Article was excluded with the aim of ensuring this argument could not be raised.

- 4 **Section 2: What does s. 2 require of any court or tribunal?**

#### COMMENT

- 4 Section 2 requires any court or tribunal determining a question which has arisen in connection with a Convention right to take into account the jurisprudence of the European Court of Human Rights, the Commission and the Committee of Ministers. This jurisprudence must be considered ‘so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen’, whenever the judgment, decision or opinion to be taken into account was handed down.

The effect of s. 2 was considered by the Supreme Court quite recently in *R v. Horncastle* [2010] 2 AC 373. The Supreme Court decided that, although s.2 would normally result in UK courts applying principles clearly established by the ECtHR, there could be occasions (albeit rare) when the Supreme Court itself would have concerns as to whether the ECtHR appreciated particular aspects of domestic legal process (in this instance, the effect of the common law hearsay rule). In such circumstances, the Supreme Court could decline to follow the ECtHR ruling.

**5 Section 3: How does s. 3 require primary and subordinate legislation to be read?****COMMENT**

5 Section 3 requires primary and subordinate legislation to be read and given effect in a way which is compatible with Convention rights, so far as it is possible to do so, and whether the legislation in question was enacted before or after the Human Rights Act 1998.

Section 2 and 3 therefore require courts to interpret case-law and legislation so as to be compatible with Convention rights wherever possible and regardless of other interpretations or precedents to the contrary. This applies to legislation passed before or after the Human Rights Act 1998.

**6 What if it is not possible to read legislation so as to give effect to the Convention?****COMMENT**

6 Section 3(2)(b) and (c) provide that this does not affect the validity, continuing operation or enforcement of the legislation.

The Act preserves parliamentary supremacy but it does alter the way in which judges interpret case-law and legislation (see Units 3 and 4).

A key decision of the House of Lords in recent years as to the appropriate use of s. 3 is *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557. The case concerned landlord and tenant legislation which provided for rights to the tenancy of residential premises to be inherited by someone living with the tenant at the latter's death 'as the tenant's wife or husband'. The issue for the court was whether the legislation applied where the deceased tenant had been living in a stable same-sex relationship prior to his or her death.

On its ordinary meaning, the relevant phrase in the legislation did not extend to a same-sex relationship. However, it was possible in the light of art. 8 of the ECHR (respect for private and family life, including the home) and art. 14 (prohibition on unjustified discrimination in relation to Convention rights) to interpret the legislation so as to cover the above situation which, using s. 3, the House of Lords did. Lord Steyn commented that:

'Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a Convention right may be removed by interpretation under s. 3. Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved.'

**7 Section 4: What can a higher court do if it is satisfied that the provision is incompatible with a Convention right?****COMMENT**

7 Higher courts can make a 'declaration of incompatibility'.

Note that the Crown has a right under s. 5 to intervene in proceedings where such a declaration may be made.

You saw earlier the decision of the House of Lords in *A (FC) v. Secretary of State for the Home Department* [2005] 2 AC 68, where a declaration of incompatibility was issued. Another noteworthy example occurred in *R (on the application of Anderson) v. Secretary of State for the Home Department* [2002] 4 All ER 1089. The Home Secretary's statutory power to fix the tariff for life sentences (i.e. the minimum period that the prisoner must serve in prison to satisfy the requirements of retribution and deterrence before any consideration could be given to his or her release on licence) was held to violate a defendant's right to a fair trial by an independent and impartial tribunal under art. 6, and a declaration of incompatibility in respect of the statutory

powers was accordingly issued. One of the members of the House of Lords, Lord Hutton, commented: 'The Home Secretary's continuing role in fixing the tariff has become increasingly difficult to reconcile with the concept of the separation of powers between the executive and the judiciary, which is an essential element of a democracy.' In response, the government announced new legislation whereby the tariff would in future be fixed by judges.

Although you can see from these examples that declarations of incompatibility have led to changes in the law as a result, such a declaration of incompatibility does not per se invalidate the relevant legislation. The declaration is merely a legal statement that, in the opinion of the court making it, the legislation contravenes the Convention. Neither the government nor Parliament is under any legal obligation to alter incompatible legislation (although there may of course be strong *political* pressure for the government to respond constructively to such a declaration.) In *Doherty v. Birmingham City Council* [2008] UKHL 57, the House of Lords took the opportunity to reiterate that primary legislation which could not be read or given effect in a way which was compatible with the Convention was still valid and had to be enforced by the courts unless and until the law was changed.

### 8 Section 10: How might the executive respond to a 'declaration of incompatibility'?

#### COMMENT

8 Section 10 (and sch. 2) provide a 'fast-track' procedure by which the executive can act to amend legislation in order to remove incompatibility with the Convention where a declaration of incompatibility has been made.

### 9 Section 19: How does s. 19 assist, in relation to future legislation, with the presumption that Acts of Parliament are to be read compatibly with the Convention?

#### COMMENT

9 Section 19 provides that when legislation is introduced into Parliament for a second reading, the introducing minister must make a statement, either to the effect that, in his or her view, the legislation is compatible with the Convention, or make a statement that although the legislation is not compatible with the Convention, the government still wishes to proceed.

### 10 Section 6: What is it unlawful for a public authority to do? Are there any qualifications? Who are public authorities?

#### COMMENT

10 Section 6 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is required to do so by primary legislation which cannot be interpreted compatibly with the Convention.

Parliamentary supremacy is therefore preserved by obliging courts and tribunals to give effect to Convention rights except where they are prevented from doing so by statute.

A 'public authority' does not include either House of Parliament, and 'act' does not include a failure to legislate.

Therefore it will not be possible to sue the executive for failing to introduce legislation protecting Convention rights or Parliament for failing to pass it.

Section 6(3)(a) makes courts and tribunals public authorities, and so subject to their own primary duty to act compatibly with the Convention.

Section 6 creates a right of action against public authorities (e.g. government departments, local authorities, police officers and immigration officials) which have breached the Convention without statutory excuse.

You should appreciate that, although there is no direct right of action as such under the Act in a dispute between private individuals (as opposed to between an individual and a public authority), the courts – being themselves public authorities under s. 6 – will seek to give effect to Convention rights wherever possible where they arise in such a dispute. This is sometimes known as the principle of ‘horizontal effect’. For a practical illustration of this, look back at the case of *Campbell v. Mirror Group Newspapers Ltd* [2004] 2 WLR 1232 which was discussed in Part A.

### 11 Section 7: Who can bring proceedings against a public authority?

#### COMMENT

11 Section 7(1)(a) permits a victim of an act by a public authority which infringes a Convention right to bring proceedings ‘in the appropriate court or tribunal’. All courts and tribunals will be able to consider arguments brought under the Convention.

Section 7(1)(b) permits a person to rely on the Convention right or rights concerned in any legal proceedings against the public authority. Note the ‘victim’ requirement in s. 7.

### 12 Section 8: What remedies can a victim obtain?

#### COMMENT

12 Section 8(1) gives a court a wide power to grant such relief, remedies or orders as it considers just and appropriate, provided they are within its existing powers.



As a conclusion to this Part, you may also find it useful to read *Slapper and Kelly*, para. 2.5, which contains an interesting survey of cases decided under the Human Rights Act 1998. Also think back over our discussions as to the consequences of not having a domestic Bill of Rights tailor-made for the UK. Does the Human Rights Act 1998 remedy the problems identified? We will return to this question in Part D.