
CONSOLIDATION ACTIVITY

Civil liberties in perspective (allow 1 to 3 hours depending on the need for revision)

This is designed to take you through the process of revision, and refinement of your opinions in stages. We have divided the activity into parts, and you should complete each part and consider the comments before you go on to the next.

PART 1

Please use the table below to identify the right which may have been infringed in the following examples 1 to 5, and match the right against the constitutional protection it is given.

- 1 Parliament passes an Act which permits the police to carry out random arrests (without reasonable suspicion) in areas with high rates of burglary. A is arrested under the Act.
- 2 Parliament passes an Act permitting employers to pay women less than men in specified occupations. B is paid a lower amount than her male colleagues.
- 3 A journalist (C) is committed for contempt of court because he refuses to reveal his sources of information, when directed to do so in court proceedings. C appeals to a higher court.
- 4 Under a discretionary power given in broadcasting legislation to ban ‘any matter or class of matter’, the Home Secretary bans the broadcasting of ‘South Park’, on the grounds that the programme will damage the development of children. D applies for judicial review on behalf of the broadcaster.
- 5 Parliament passes an Act which permits immigration officers to refuse entry to the UK to British citizens who have committed crimes abroad. E, a British citizen, is refused entry on his return from the USA, and applies for judicial review.

	Right infringed	Court can apply Convention	Court can declare statute incompatible with right	Court can disapply statute	No court remedy
1					
2					
3					
4					
5					

COMMENT

Your table might look like this:

	Right infringed	Court can apply Convention	Court can declare statute incompatible with right	Court can disapply statute	No court remedy
1	Liberty of the person (Article 5(1)(c) of the Convention)		✓		
2	Right to equal pay (Article 157 TFEU)		✓	✓	
3	Limited right not to reveal sources (s. 10, Contempt of Court Act 1981 and Article 10, Convention)	✓			
4	Freedom of expression (Article 10, Convention)	✓			
5	Right of abode of British citizen (under Immigration Act 1971); possibly right to private life or family life (Article 8, Convention)				✓

Notes:

- Under s. 19 of the HRA the Government would have had to state whether the Bill giving the random power of arrest was compatible with the Convention, or if unable to make such a statement, a statement to the effect that it nevertheless wished to proceed with the Bill. Once enacted, if the court was unable to interpret the Act in accordance with the Convention right of liberty of the person (Article 5), it nevertheless would not be able to set the Act aside, even if it was clearly incompatible with the Convention right. The High Court (or a higher court) could then make a declaration of incompatibility, although this would not constitute an actual remedy for A, who has been arrested under the Act.
- Equal pay is not covered by the Convention, but it is covered by Article 157 of the Treaty on the Functioning of the European Union, which is directly effective.
- The court can apply the Convention by construing s. 10 of the Contempt of Court Act 1981 consistently with the Convention right of freedom of expression (s. 3 of the HRA). There should be no need for a declaration of incompatibility.

- 4 The court in review proceedings can apply the Convention by construing the discretionary power so that the legislation is given effect in a way which is compatible with Convention rights. The ban would therefore be unlawful as exceeding the power given by the statute, and there would be no need for a declaration of incompatibility.
- 5 Rights of residence of British citizens are not protected by the Convention, or generally by EU law.
If E has established a private life or a family in the UK, there may be a breach of Article 8.

PART 2

Do you think that the Convention should have been incorporated in the same way as EU law — so that courts would have the power to disapply statute for breach of a Convention right?

COMMENT

The answer to this really lies with whether you feel that constitutional guarantees are really necessary. Is it likely that Parliament would, for example, legislate to erode the right of a British citizen to enter the UK, a circumstance in which you might want the courts to have the power to disapply the statute?

If the approach used by the HRA was considered to be necessary to preserve the role of Parliament as ultimate guardian of the public interest in the area of human rights, why should the same system not be used to give effect to EU law?

PART 3

Which Convention rights do you think are particularly relevant to criminal law? (You will begin to study criminal law in Unit 15.)

COMMENT

- Article 2: requires the law to protect the right to life. (In what circumstances can killing be lawful?)
- Article 3: can affect criminal penalties (degrading punishments).
- Article 5: liberty of the person, particularly affects criminal procedure, for example, detention before trial, but also governs the minimum requirements for lawful detention under sentence of a court.
- Article 6: the right to a fair trial.
- Article 7: perhaps the most significant for criminal liability, bans retrospective criminal liability.

Other Articles restrict criminal liability to what is necessary to protect privacy, freedom of the person and property, freedom of expression and assembly.



Online

PART 4

Using the legal databases to which you have access, please find and read the case of *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39.

Please consider the following questions as you read:

- 1 With which criminal offences under English law were the defendants charged?
- 2 Why did the case raise issues under the Convention?
- 3 Why did the court decide that there was no violation of the Convention?

4 Does the ECtHR's decision establish what the content of English criminal law must be in this area?

COMMENT

- 1 The defendants were charged with a series of offences based on assault — primarily causing bodily harm and wounding, contrary to ss. 47 and 20 of the Offences against the Person Act 1861.
- 2 The defendants claimed to be victims of a breach of Article 8 in that their acts were an expression of private morality, and the conviction an infringement of their right to respect for private life, contrary to Article 8.
- 3 The court decided that there was no violation of the Convention because:
 - the State was entitled to regulate the infliction of physical harm;
 - the point at which harm could be justified by consent was a matter for the national authorities.

The national authorities were entitled to consider any interference with private life to be 'necessary in a democratic society' for the protection of health.

- 4 In so far as the ECtHR decides that there was no infringement of a right to respect for private life, the case establishes that the Convention does not determine the content of English law on sado-masochistic practices.

In so far as it accepts that any infringement was justifiable for the protection of health, it again leaves the content of the law to be determined by the English courts.

Would Parliament therefore be free to legalise consensual sado-masochistic sexual practices?