Answers to end-of-chapter quick test questions
Chapter 15 – The European Convention on Human Rights and the Human Rights Act 1998

1. Explain the rationale underpinning the introduction of the ECHR.

Following the devastation of World War Two, the Council of Europe was established in Europe with the aim of encouraging peaceful and constructive relations across the various countries, also serving to offer a uniform protection for human rights. This was ensured by the ECHR, introduced in the early 1950s.

2. What do sections 3 and 4 of the Human Rights Act 1998 provide? Do you think that section 4 provides an effective remedy?

Section 3 of the Act sets out the interpretative duty. This imposes on the judiciary a duty always – wherever possible – to interpret primary and secondary legislation in a manner consistent with the ECHR rights. Where this is not possible, the courts have the option to issue a declaration of incompatibility under section 4 of the Act.

The argument suggesting that section 4 does not provide an effective remedy stems from the reality that, in a case where an incompatibility is identified and interpretation under section 3 is not possible, a declaration can be made under section 4. It is, however, then down to the Government and/or Parliament to choose whether that incompatibility will be rectified and, indeed, when. Meanwhile, the case must proceed on the basis of the current law, which would include the incompatible provision.

3. Describe the civil liberties tradition in the UK that existed before the 1998 Act. How does the protection of civil liberties differ from the protection of human rights?

The main feature of the civil liberties tradition that existed in the UK before the ECHR was incorporated was the reality that everything was regarded as lawful unless it was expressly prohibited at law. As such, and in the absence of any positive legal provision setting out particular human rights, it was down to the courts in particular cases to assert and protect the rights of individuals on a case-by-case basis. In *Entick v Carrington*, for instance, in dealing with the challenge to a warrant ostensibly permitting King's messengers to enter Entick's property, the court found that in the absence of lawful authority supporting the warrant, Entick's rights had been breached.

4. Explain the 'mirror' principle from the case of *Ullah*.

The mirror principle is so called due to the manner in which Lord Bingham explained the effect of section 2 of the Human Rights Act 1998 in the *Ullah* case. Bingham stated in the case that 'the House [of Lords] is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court … [t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves

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over time: no more, but certainly no less'.[1] In other words, the domestic courts must – in the absence of special circumstances – mirror the jurisprudence of the ECtHR.

5. What is the difference between political, civil, social, economic, and cultural rights?

Political and civil rights are regarded as essential for the day-to-day operation of democratic society. They are the fundamental rights necessary to enable citizens to live and work freely and safely. They can be said to include the right to life, the right to a fair trial, the right to vote and freedoms of expression, association, and assembly.

Social, economic and cultural rights, though important, are not as fundamental as political and civil rights. They typically cover aspects of life such as rights to work and to leisure, as well as those relating to expected standards of living.

6. How have the courts interpreted the notion of a 'public authority' for the purposes of section 6 of the Human Rights Act?

Section 6 of the Human Rights Act imposes on public authorities a duty to act compatibly with the ECHR rights, also including the courts within the scope of that section. The section, though, offers little by way of a definition of a public authority, just noting that it includes 'any person certain of whose functions are functions of a public nature', with the exception of Parliament, which is excluded. As a consequence, the courts have adopted a case-by-case approach to the notion of a public authority, one that can be described as broad in scope. Indeed, the breadth of this approach is highlighted by the courts' willingness to develop what are known as hybrid public authorities. These are bodies that exercise both private and public functions, their susceptibility to challenge under the Human Rights Act depending on the circumstances. In *Aston Cantlow v Wallbank*, for example, a Parochial Church Council was found to be acting as a private body in the circumstances, even though the courts accepted that there might be other instances where the same body could be regarded as public.

7. What is the rationale behind proposals for a British Bill of Rights?

One of the main drivers behind calls for a British Bill of Rights are criticisms levelled at the Human Rights Act and, in particular, the degree of power it ostensibly gives to judges, most notably through section 3. Moreover, concern for Strasbourg's attempts to overrule decisions of the UK Parliament and overturn the UK courts. In short, a desire for a British Bill of Rights is to achieve a form of rights protection that fits more easily with the unique constitutional circumstances prevailing in the UK.

[1] [2004] UKHL 26 [20]

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