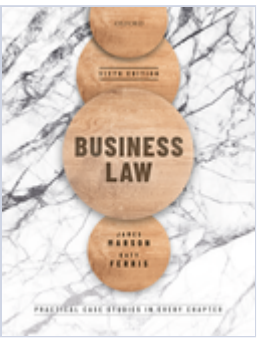

Business Law (6th edn)
James Marson and Katy Ferris

p. 15

2. The English Legal system, Constitution, and Human Rights

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Published in print: 07 May 2020
Published online: September 2020

Abstract

This chapter, in discussing the English legal system and its features, begins by outlining what the law is and some important constitutional principles. The discussion is primarily based on the institutions and personnel involved in the practice and administration of justice. It therefore involves a description and evaluation of the courts, tribunals, and the judiciary, including their powers and the rationale for such authority, as well as the mechanisms of control and accountability. The aim of this chapter is to demonstrate how the mechanisms of the justice system work. The English legal system exists to determine the institutions and bodies that create and administer a just system of law. It should be noted here that the UK does, in fact, possess a written constitution, it is merely uncodified.

Keywords: constitutional principles, English legal system, justice, courts, tribunals, judiciary, just system of law, UK

Businesses are predominantly concerned with civil law (law between private parties), but an awareness of criminal law and the courts governing this jurisdiction is also necessary. By having an appreciation of Parliament's authority to make laws, and the underlying rules that govern the actions of those within Parliament; and by understanding key principles such as the 'separation of powers' and 'supremacy of Parliament', you will have a better understanding of English law. This in turn will make understanding the role of judicial decisions and precedent, and its impact in contract and torts, for instance, much more relevant, and will be invaluable when considering the implications for the United Kingdom's (UK) membership of the European Union (EU). Further, human rights laws are becoming ever more prominent in employment relations and the operation and regulation of businesses.

Business Scenario 2

Ms Betabita was employed by SecureCash Ltd as a receptionist. Betabita is a Muslim and her job involved dealing with customers from both the public and private sectors. Part of the contract SecureCash Ltd have with their employees is a prohibition of employees from wearing visible signs of their political, philosophical, or religious beliefs whilst in the workplace. This, they are told, is because the employer wants to maintain a position of neutrality in its contacts with customers. Betabita attended work wearing her Islamic headscarf and was informed this was against work rules and was asked to leave and come back wearing compliant attire. Betabita returned to work the next day wearing the headscarf, she again received the same warning about her behaviour and was suspended pending an investigation.

At the conclusion of the employer's investigation into the matter, Betabita was dismissed because of her continuing insistence on wearing her Islamic headscarf to work. Betabita wishes to challenge the legality of the dismissal according to her human rights and in accordance with European law.

Learning Outcomes

- Identify the sources that establish the constitution of the UK (**2.5.1–2.5.1.5**)
- Identify the essential features of the constitution (**2.5.2–2.5.2.4**)
- Explain the roles of the main institutions of the EU (**2.6.2–2.6.2.5**)
- Identify the sources of EU laws (**2.6.3–2.6.3.2**)

p. 16

- Identify the rights protected through the European Convention on Human Rights (**2.7.1–2.7.1.2**)
- Explain the impact on the judiciary and legislature of the incorporation of the Human Rights Act (HRA) 1998 (**2.7.2–2.7.2.2**).

2.1 Introduction

Studies of the English legal system primarily consist of a description, and an evaluation, of the institutions and personnel involved in the practice and administration of justice. Therefore, the courts, tribunals, and the **judiciary** are discussed; their powers and the rationale for such authority are outlined; and the mechanisms of control and accountability identified. The aim of such study is to demonstrate how the mechanisms in the justice system work, and to give confidence in these or to outline aspects that require greater control. The English legal system exists to determine the institutions and bodies that create and administer a just system of law.

A just legal system incorporates principles including equality before the law, laws are accessible to all and are applied by an independent judiciary, a system of review of decisions is available, and a system of 'checks and balances' of State institutions are present. These are fundamental to a fair society. In the first three chapters of

substantive law considered in this text, the English legal system is discussed, and each of these features is considered. This chapter begins by outlining what the law is and some important constitutional principles. Remember at this stage, the UK does possess a **constitution**, and it is uncodified not unwritten.

2.2 The development of english law

The law consists of a body of rules, created through **Parliament**, the common law, and equity, whose jurisdiction extends to private and public bodies. The law provides for remedies and sanctions for transgressions, and establishes a system of rules to regulate behaviour at individual and State levels. Legal disputes may be initiated by individuals or an organization of the State, and these are heard in a relevant court or tribunal. Such a system of laws is necessary for the functioning of any society, and for these to be codified and developed in a representative democracy such as the one in the UK, ensures, as far as is possible, transparency and equity. It ensures, ***inter alia***, that legislators are accountable to the electorate and have to answer questions on how taxes are raised and where they are spent, it ensures that the State provides a system of public order and safety for its citizens, it enables business relationships to be entered into on the basis that they will be respected and enforced when necessary, and it protects the vulnerable from abuse and provides fundamental rights that cannot be removed.

2.3 The differing sources of law

The common law, equity, and Parliament have each helped to develop the English legal system. Whilst these sources are discussed more fully in **Chapter 3**, it is sufficient at this stage to remark that before Parliament became the supreme law-making body in 1688, the courts in the country had been deciding cases and, in this role, developing rules. Parliament respected the rules established through the common law and would only
p. 17 act to change them ↵ where necessary. Therefore, these three sources of law must be viewed as a system as a whole, each with a positive and important role to play in defining the laws of England and Wales.

The law is also separated into public and private jurisdictions. Public law is primarily concerned with the State and its interaction with private bodies in that State (including the State's interaction with other States in international treaties, challenges by private parties against, e.g., secondary legislation, and so on). Therefore, constitutional matters and the criminal laws are a concern of the State. It is important to note in such proceedings that the case is brought by the State as the offence is contrary to a law in England and Wales. This does not seek, necessarily, to compensate the victim (if any) in the matter but rather to punish the offender/protect the public from the offender. Only the State is permitted to take such action. However, this does not prevent the victim who has suffered a loss from seeking to recover any losses sustained through an action in private/civil law. This generally involves an action for damages (the legal term for monetary compensation) and does not allow the injured party to seek punishment of the offender, only to compensate them for any losses incurred. The majority of this text concerns itself with the civil law, although an incident may involve both criminal and civil law actions.

2.4 Criminal and civil law

It is important to recognize that, as stated earlier, whilst the same situation may involve both civil and criminal liability, they are separate branches of the law and have different procedures and purposes. Criminal law seeks to regulate actions that contravene established laws, and it outlines actions that are 'against the law' rather than identifying what a person is entitled to do. The law and sanctions imposed can act as a deterrent to others, it may seek to protect the public from danger, and it may also seek to rehabilitate the transgressor and reintroduce them back into society. Above all, it acts as a punishment for the illegal act committed. The burden of proof in criminal cases is 'beyond reasonable doubt' and the protection afforded the accused in such cases is that it is the responsibility of the prosecution to find the defendant guilty; they do not have to prove their innocence.

In comparison, civil law regulates actions between parties in agreements they have voluntarily entered or where society has placed an obligation to take reasonable care not to cause damage or injury to others. It provides a mechanism to enable appropriate remedies to be available in such instances. There exist several courts and tribunals that consider civil disputes, specialist forums help to provide a settlement, and the cases are decided on 'the **balance of probabilities**'. The case begins with the **claimant** bringing an action against the defendant/respondent, and the claimant outlines the basis of this legal action, and quantifies the remedy they are seeking (usually damages, but other remedies may be involved depending on the nature of the claim).

2.5 The constitution of the United Kingdom

A constitution is a mechanism that outlines the rights and power of the State in relation to its citizens and indeed the whole system of regulation of the Government (all institutions of the State). As the State has ultimate power to establish laws and imprison its citizens, it is a requirement that specific rules are established to ensure tyranny is avoided. Many countries create a written document called a 'constitution' following a revolution, when they remove an unjust ruling monarchy (e.g. France removing its monarchy on
p. 18 10 August 1792 during the French ↵ Revolution), when they overthrow an occupier (the American Patriots overthrew the British and in the political vacuum established the constitution of the United States of America (USA) on 17 September 1787), or when several countries unite to form a new union. It has often been stated that the UK has an 'unwritten' constitution because it does not possess a single document entitled 'constitution' as do Canada, France, USA, and so on. In fact, the UK's constitution contains several written documents that collectively establish its constitutional underpinnings. In statutory form these include the Magna Carta, the Bill of Rights, the Human Rights Act (HRA) 1998, and the European Communities Act 1972. There is a contribution from case law that further adds to the constitution—see *Entick v Carrington* [1765] and *Malone v Commissioner of Police for the Metropolis (No. 2)* [1979] (see **2.5.1.3**). Therefore, it is more accurate to say that the UK has an uncodified constitution rather than it being unwritten.

Entick v Carrington (1765)

Facts:

Mr Entick had in his possession books and papers that the Secretary of State considered were seditious (treasonous) and sought to seize as evidence. Nathan Carrington and others, acting on the advice of the Secretary, entered Entick's premises relying on a warrant produced by the Secretary. Entick considered this action to be unlawful and brought proceedings against Carrington for the unlawful entry and for seizing property without authority. The Secretary of State insisted that the right to issue the warrant was within the State's power. However, the court held that the action amounted to a trespass and the Secretary of State did not possess the power to issue a warrant. There was no common law or legislative Act that granted to the Secretary the power to issue a warrant, and hence the action was illegal. If the court had provided the State with the power requested by the Secretary, that would have been to elevate its position to legislator, for which, clearly, the court did not have authority.

Authority for:

A State's right to exercise power must derive from some express authority—deriving from legislation or common law. Therefore, the State can only act when it has authority to do so. The reverse is true for individuals in the State. They are entitled to do anything (known as residual freedoms), unless such action is specifically denied by the State.

The significance of the UK having its constitution found in several documents and consisting of general Acts of Parliament (which like any other Act of Parliament can be repealed or altered with no special requirements necessary) is that it is very easy to affect the constitution (see s. 34(2)(d) of the Criminal Justice and Public Order Act 1994). Therefore, the constitution is continually changing and evolving to reflect society's views and needs, and such a 'flexible' constitution may be viewed as an advantage or disadvantage (depending on your point of view).

2.5.1 Sources of the Constitution

The sources of the constitution are relatively complex and a full account cannot be included in a text of this nature. However, the main features of these sources are identified in the following paragraphs.

p. 19

2.5.1.1 Statutory materials

The statutory sources of the constitution include a plethora of texts, some of which have greater application than others, but each is entrenched in the legislative make-up of the UK. One of the first documents written on the constitution was the Magna Carta 1215, and supremacy to Parliament from the monarch was established through the Bill of Rights 1689. More recently, the European Communities Act 1972 not only

formally led to the UK's membership of the Treaty but fundamentally changed the supremacy of Parliament by 'surrendering' parts of it to the EU. The HRA 1998 (in force in October 2000) gave legislative effect to the European Convention on Human Rights and provided rights for individuals against government/State bodies and the public services more generally. The constitution has been altered through devolving powers to the regions through the Scotland Act 1998, the Government of Wales Act 1998, and the Northern Ireland Act 1998, which established rights for their own Parliaments and Assemblies, and provide for certain changes in primary and secondary legislation to be adopted by these bodies. Further pieces of legislation that may be considered to be part of the constitution include the House of Lords Act 1999 and the Constitutional Reform Act 2005. This section does not intend to be an exhaustive list of the legislation establishing the constitution, but rather to demonstrate Acts that exist which have implications for State powers.

2.5.1.2 Treaties

The UK has a dualist constitution, establishing Parliament as the highest legislative authority, and international law as subordinate to this. The UK has held membership, among others, of the International Convention on Human Rights, the European Convention on Human Rights, and the International Labour Organization treaties. Each of these has had an effect on the impact of the State with its citizens and has often existed as an outward sign of a governmental commitment to the important rights detailed in these treaties. However, if a government considered aspects of these treaties to be against the public interest or contrary to its wider agenda, the offending article or provision may have been disregarded or repealed. The major distinction to the general rule of treaties and the effect of international law on domestic law is the EU. The European Communities Act 1972 gave effect to the EU as a body of law and rules, and has led to EU law taking primacy over inconsistent domestic law.

2.5.1.3 Case law/the common law

The common law has been a vitally important source in the establishment of constitutional rules. *Entick* established the judiciary's position to restrict the State from exercising powers without authority. This position was questioned in the following case:

Malone v Commissioner of Police for the Metropolis (No. 2) (1979)

Facts:

Mr Malone was on trial on suspicion of dealing in stolen goods. The prosecution admitted that it had intercepted Malone's telephone conversations under a warrant issued by the Secretary of State. Malone argued that the evidence was gathered through unlawful 'tapping' of his phone.

p. 20

Authority for:

Whilst allowing the evidence and dismissing Malone's argument, Sir Robert McGarry remarked in relation to there being no statute that permitted the police to take the action of phone tapping: 'I am not unduly troubled by the absence of English authority: there has to be a first time for everything …' Essentially, this ruling purported to reverse the authority in *Entick* by allowing the State to take any action not prohibited by law.

2.5.1.4 Conventions/customs

Constitutional conventions may be referred to as 'soft law' and are not enforceable as is legislation or the common law. However, they establish important principles that are respected and followed by the State. Although mainly unwritten in nature, conventions are more frequently being transposed in written documents (such as codes of conduct) that are then distributed to (e.g.) Ministers and Members of Parliament to aid transparency and understanding. Conventions were established to make Ministers responsible for their actions and those of the department they lead, through **individual and collective ministerial responsibility**; they protect the public from abuse by the monarch by ensuring Royal Assent would be given to all the Bills presented by Parliament; they ensure the monarch will ask the leader of the party with a majority (or largest single minority) at a General Election to form a government; the Queen's speech at the opening of Parliament is prepared by her Ministers (the Government); and the Prime Minister will be selected from the House of Commons and not the House of Lords.

2.5.1.5 Prerogative powers

The necessity for constitutional powers (and the basis for Parliament's existence) has been in part because of the existence of prerogative powers. These were often referred to as the Royal Prerogative (as they were exercised by the monarch) but they are now provided to the Government for it to exercise. Prerogative powers are so called because of the power of the body that was empowered to wield them. The monarch, before 1688, held the power as the ultimate legislative authority and therefore held the right to sign treaties, declare war, appoint the judiciary, and so on. These rights have been provided to the Government, and are exercised by government Ministers (in consultation with the monarch). There exist prerogative powers that remain the remit of the monarch (dissolving Parliament, providing Royal Assent to Bills, and so on) but these are increasingly ceremonial in nature. As the Government has the authority to take the actions as listed above, without necessarily requiring the consent of Parliament, then abuse is possible, and whilst unlikely to take place as the UK is a democratic country, Parliament must remain vigilant to potential abuse through holding the Government to account. A system of checks and balances exists through the work of the House of Lords, the committee system, Parliamentary question times, debates, and votes of confidence.

2.5.2 Essential Features of the Constitution

There are underlying principles in which the constitution of the UK operates. These are important to identify and bear in mind, as they have implications for the UK's membership of the EU, and the State's power to legislate and provide a system of justice.

p. 21

2.5.2.1 The rule of law

The theorist Dicey is credited as defining features of what is called the '**rule of law**' and its importance to the constitution to ensure tyranny and abuse are avoided. The rule of law provides for fundamental features of a just and fair society, and whilst when critiqued these may be questioned as to their applicability in the modern era, the broad principles remain as the foundations for a just system of law. Essentially, Dicey identified the rule in three aspects:

1. No one can suffer a penalty except for a clear breach of the law, and there exists the absolute supremacy of regular law as opposed to the influence of arbitrary power. The powers of the State to impose sanctions against the population must exclude arbitrariness and wide discretionary power.
2. Everyone should be equal before the law, subject to the ordinary law of the land administered by the ordinary courts.
3. The rights of the individual are to be secured by the ordinary remedies in private law administered by the courts, rather than through a list of rights outlined in a formal (constitutional) document. The common law developed by the judiciary provides citizens with their rights and freedoms free from undue interference by the State.

Consider

Assume that national law prevents the discrimination against individuals on the basis of their race, religion, or religious beliefs (and non-beliefs). If an (older) EU law contradicts this rule by enabling an employer to maintain a rule of neutrality which applies to everyone, how should domestic courts interpret the national law?

2.5.2.2 Parliamentary supremacy

It has been asserted that the first Parliament was assembled in 1265 to provide counsel to Henry III and consisted of various representatives of the shires, cities, and boroughs in England. Parliament provides legitimacy for decisions that affect the country and achieves this through a system of representative democracy. Whilst the judiciary has made (and continues to make) significant contributions to the body of law, they are unaccountable to the public. Parliament is publicly accountable through direct elections, serving the will of the electorate, and therefore, compared with the common law, Parliament's laws are held to be supreme. Parliament has been, since 1688, the supreme law-making body in the country and as such has the

power to 'make and unmake' any laws. Laws may be enacted, others may be repealed, but it is an essential feature of Parliament that it is free to legislate in the interests of the country. As such, old legislation may specifically be repealed, and hence removed from the **statute** books, but also, more recent laws may be passed that contradict the old legislation. On this basis, the older legislation is to be considered repealed by implication. Therefore, given two Acts of Parliament, the courts will apply and hold applicable the newer of the two if they are in conflict, even if the older legislation purported to be the definitive Act on the subject. This is the doctrine of 'implied repeal' that ensures that Parliament cannot bind successive governments from
p. 22 legislating in whatever way they see fit. ↵

Vauxhall Estates Ltd v Liverpool Corporation (1932)

Facts:

The case involved provisions within the Housing Act 1925 and whether these prevailed over inconsistent laws within the Acquisition of Land Act 1919. The question arose because the latter Act appeared to prevent any change to it by the inclusion of a clause which provided that any future inconsistent provisions 'shall cease to have or shall not have effect'.

Authority for:

Per Avory J: 'I should certainly hold … that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions … [I]f they [the two statutes] are inconsistent to that extent [so that they cannot stand together], then the earlier Act is impliedly repealed by the later.'

However, if it appears to the judiciary that Parliament could not have intended for newer legislation to repeal previous legislation, the judiciary may have the right not to give effect to the newer legislative provision.

Thorburn v Sunderland City Council (2002)

Facts:

Shopkeepers were convicted of breaches of regulations regarding foods to be sold in metric units (which some of the popular press referred to as 'metric martyrs'). The shopkeepers were required to identify goods in both metric and imperial measures as consistent with EU rules. They appealed on the basis that the relevant law (the Weights and Measures Act 1985) impliedly repealed the (earlier) European Communities Act 1972 (which required inconsistent national law to follow/be interpreted in accordance with EU law).

Authority for:

The nature of the EU Treaty was different than other international agreements in that it created a 'new legal order.' On accession, the UK surrendered its sovereignty in certain areas to the EU and the 1972 Act could only be overridden by express provisions. Hence, by enacting the 1972 Act, Parliament could not have intended it to be capable of implied repeal.

Supremacy of Parliament further has the power of ensuring the judiciary are subservient to Parliament and must apply legislation even if they disagree with it. If primary legislation has been lawfully passed, no court in the UK (even the Supreme Court) can call it unconstitutional, invalid, or refuse to enforce it (although hypothetical exceptions apply—see Lord Woolf of Barnes (1995) 'Droit Public—English Style' *Public Law*, p. 57).
p. 23 There is a mechanism available for the courts to review the decisions of public bodies (a government ↵ Minister, local authority planning department, and so on). These bodies are provided with powers and are governed as to the execution of this authority. Where an affected individual claims that the execution of these powers has been breached, or that the decision taken was beyond the powers bestowed on the body that took it, the courts may review the decision and provide a remedy. This system of 'judicial review' enables control of the administration of the power bestowed by Parliament, but this does not extend to reviewing the specific Act passed by Parliament.

2.5.2.3 The separation of powers

Separation of powers is an important facet of the constitution and seeks to establish a system of checks and balances between State institutions and to ensure a degree of separation between their functions. It has been criticized, and has been considered unrealistic and unachievable in reality, but the tenet of the principle is important in the public perception of fairness. The concept of placing too much power in one organ of the State without a means of ensuring accountability is alien to many countries, and those with a written constitution, including Australia, Germany, and the USA, have specific measures included in their constitutions to separate these powers. In the UK, whilst there is no written constitution comparable with the aforementioned countries, the concept of separation of powers is still maintained. This was noted by the French constitutional theorist, Montesquieu, who commented on the UK constitution in the eighteenth century and remarked, 'When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty. Nor is there liberty if the power of judging is not separate from legislative power and from executive power.' There are essentially three organs of the State that hold power: the **executive** (which is responsible for the administration of the country and for initiating legislation), the **legislature** (which is responsible for enacting laws and for holding the executive to account), and the judiciary (which has the role of interpreting and applying the law); and it is necessary that they have distinct domains in decision-making and the legal system. In this way, they can check on the decisions being made and ensure reviews are possible. To this end it is essential that the constitution provides for an independent judiciary to ensure the rule of law.

In conclusion of this section, it should be remembered that no system can have a true demarcation of the powers of the State as outlined earlier, and indeed in many areas the UK has 'transgressed' this constitutional doctrine (e.g. the role of the Lord Chancellor). However, by enabling interaction between these organs, as long as adequate independent 'checks and balances' exist, better government and administration is often the result.

2.5.2.4 No retrospective laws

The general principle is that citizens have a right to know the laws that affect them before any criminal sanctions may be imposed. For this reason, laws are made available through the Internet, in public libraries, and so on, and this is also the reason why ignorance of the law is no defence. As such, a lawful action today should not, retrospectively, be made unlawful by a subsequent Act criminalizing that action, passed tomorrow. However, there are exceptions, such as the War Crimes Act 1991, which covered crimes and illegal acts committed during the Second World War. Obviously, the general rule regarding the distaste for retrospective laws is understandable, and a point expressed through the European Convention on Human Rights Art. 7, but it can be deviated from if the nature of the legislation necessitates.

p. 24

2.6 EU membership

At the time of writing it is unclear whether the UK will leave the EU or if so, on what terms. We outline the main laws of the EU here, and how they affect businesses, but the 'updates' included with the online resources will contain developments on the significant issue of future membership and on what basis that takes place.

2.6.1 Aims of the EEC

The aims of the original Treaty provided:

> **By establishing a common market (now replaced as 'internal market' following the Treaty of Lisbon) and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.**

In order to achieve these goals, a customs union was created where the customs duties and equivalences of the Member States would be harmonized under European law to facilitate the Internal Market. Secondly, this Internal Market was extended to include free movements of goods, services, capital, and workers. The third element was an effective competition policy to ensure companies, markets, and cartels could not restrict the functioning of the Internal Market. These broad aims were established in the Treaty (and have been reviewed and extended in the subsequent treaties) and were given ever greater effect and definition through judgments of the Court of Justice of the European Union (CJEU) and the EU's secondary laws.

With regard to the free movement of goods, the main provisions of this source of law are contained in Arts. 28 (now Art. 34 TFEU), 29 (now Art. 35 TFEU), and 30 EC (now Art. 36 TFEU) concerning the abolition of quantitative restrictions, and all measures having an equivalent effect, on imports and exports (albeit with derogations permissible). It should also be noted that the CJEU has held Arts. 28 and 29 EC (now Arts. 34 and 35 TFEU) to be directly effective. A quantitative restriction may include a ban or quota on goods, or any measure that amounts to a 'total or partial restraint on import … or goods in transit'. The term 'goods' in the legislation is widely defined to include items of economic value such as food, clothing, and vehicles, but has also been extended to utilities such as gas and electricity. The free movement in this respect deals with actions taken at a State level to restrict the movement rather than private entities refusing to buy or stock EU-based products.

A measure having an effect equivalent to a quantitative restriction is not defined in the Treaty, but from the case law of the CJEU, this may include requiring an importer to possess a licence or permit, or certificate of origin; requiring goods to be stored in the Member State for a fixed period before being allowed to be sold (and is not applicable to domestic products); and to fixed national price controls on goods. These are merely a few examples, but they should serve the purpose of demonstrating the regulation of anticompetitive behaviour by Member States.

The free movement of workers (extended to self-employed persons) was a fundamental requirement of the common market to ensure that one of the key aspects to free up the factors of production, along with goods, services, and capital, was achieved. However, the ↵ EU did not see the worker as a mere source of labour or to be regarded as a commodity, but rather as a human being with the fundamental rights of the worker having precedence over the requirements of the Member States' economies. Whilst supplemented through Regulations and Directives, the main provision for this fundamental freedom derives from Arts. 39–42 EC (now Arts. 45–48 TFEU). Article 39 EC (now Art. 45 TFEU) is directly effective and seeks to abolish any discrimination based on the nationality of workers as regards employment, remuneration, and other conditions of work (subject to the derogations of public policy, public security, or public health). This gives the person the right to move freely within the territory of the Member States to take up work or search for work; reside in the State (according to domestic laws), and to remain in the State following employment. A worker is someone who works for another (and the definition of the worker is subject to EU interpretation rather than that of a Member State), and can include a part-time worker, and a person who requires the use of their own savings (or State assistance) to supplement their remuneration if it is below the State minimum subsistence level. The requirement is that it is genuine and effective work, rather than being made for the purposes of the person taking up the work, and the motives of the worker are irrelevant in their decision to be a worker. The rights of workers are provided to citizens of the EU (in each of the 28 Member States) and once established as a worker, they are entitled to the same tax and social advantages as provided to citizens in the State, such as the same grants to students regardless of whether they are a domestic national or EU national.

p. 25

2.6.2 Institutions of the EU

2.6.2.1 The EU Commission

The Commission has had many roles in the EU but its main functions are to initiate legislation (working with the Council and the Parliament) and to enforce the laws of the EU. It has a right of initiative in the legislative process (to propose legislation for the Council and Parliament to pass). It is also known by its title of 'Guardian of the Treaty' where it ensures that the Member States comply with their EU obligations—laws from the Treaty, Regulations, Directives, and Decisions. The Commissioners are selected by their Member States and those Commissioners meet at least once per week (in Brussels or in Strasbourg when the Parliament holds its plenary sessions), although these meetings are not held in public. At present each Member State supplies one Commissioner.

2.6.2.2 The Council of the European Union

The Council is one of the most powerful of the EU institutions and it is the main decision-making body in the EU. Its meetings are attended by the Ministers from the Member States and the EU Commissioners responsible for those areas. The Minister who attends is usually the Foreign Minister of the Member State, but as the Council is not a fixed body, the relevant Minister for whichever subject is being discussed will attend. The Council's role includes concluding agreements with foreign States, taking general policy decisions, and taking decisions based on the Commission's proposals.

2.6.2.3 The European Parliament

The European Union has approximately 510 million citizens and these people, from each of the 28 Member States, have the ability to elect representatives to the European Parliament. The Parliament is elected every five years and its role is to contribute to the drafting of legislation which affects the Member States through Directives and Regulations.

p. 26 ↵ There are 751 elected Members of the European Parliament (MEP) and every Member State decides on how its elections will be held. The MEPs are expected to exercise their mandate independent of their Member State and are grouped by their political affinity (in one of seven Europe-wide political groups) rather than by their nationality. They divide their time between Brussels (Belgium), Luxembourg, and Strasbourg (France) in addition to their home constituencies, attending parliamentary committees and plenary sittings.

There are two forms of legislative procedure, depending upon the law to be passed. The ordinary process is called 'co-decision' and puts the Parliament on an equal footing with the Council in areas including transport and the environment. The second is a special legislative procedure where the Parliament only possesses a consultative role (e.g. in agriculture, visas, and immigration). The Parliament can present legislative proposals to the Council which may then become laws in the EU.

2.6.2.4 The Court of Justice

The CJEU is the body that considers the interpretation and application of EU law. It also has the role of enforcing the EU's laws. It is composed of 28 judges (each one selected from the Member States) assisted by eight Advocates-General who hold office for a renewable term of six years.

The Court may sit as a full Court, a Grand Chamber (of 13 judges in very important cases), or in chambers of three or five judges. Its role is completely independent of the Member States and it holds the responsibility of ensuring the application of EU law is maintained (enforcement function), and of interpreting the EU laws to assist the Member States in adhering to their obligations (interpretative function). These are the two main functions of the CJEU. It only has jurisdiction on matters and laws to do with EU law—it cannot (and will not) hear cases involving domestic national matters. It should further be noted that the CJEU is not an appeal court, nor is it in a hierarchy with domestic courts. It is deemed an equivalent to domestic courts and the cooperation between the CJEU and domestic courts is a crucial facet to the relationship between them.

2.6.2.5 The General Court

The General Court is an independent court attached to the CJEU and consists of 28 judges (one from each of the Member States) who are appointed for a six-year term, which is renewable by the Member State. It was established in 1989 to relieve the pressure on the CJEU in its workload of cases. The General Court sits in chambers of three or five judges but occasionally may only consist of one judge and may even sit as a full court in very important cases. Its main role is to ensure the laws of the EU are observed through interpretation of the law, and the application of the law in the Member States.

2.6.3 Sources of EU Law

2.6.3.1 Primary law—EU Treaty Articles

The primary laws of the EU are found in the Treaty Articles (from the Treaty of Rome through to the Treaty of Lisbon), and through agreements and cooperative initiatives between the EU as a body and other international bodies and countries beyond the legislative scope of the EU's Member States. The important aspect to note about Treaty Articles is that they are the *highest form of EU law*, and as long as they satisfy the test of being *directly effective*, they have a similar legal effect to an Act of Parliament and must be given such
p. 27 an effect in the domestic court without any further action required by the Member ↵ State (they have **direct applicability**). They have horizontal and vertical effect (discussed later), which makes them accessible to all citizens in the Member States.

2.6.3.2 Secondary laws

The secondary laws of the EU are defined in the Treaty under Article 288 TFEU and outline what level of competence the laws have and the requirements imposed on the Member States. **Table 2.1** identifies on whom the laws are binding.

Table 2.1 The binding effect of EU laws

	Treaty Articles	Regulations	Directives
Who does the law bind?	The Member State and individuals	The Member State and individuals	The Member State
The extent to which the law binds	In its entirety	In its entirety	The result to be achieved (the Member State has discretion as to how it does this)
Need for domestic implementing measures?	No (not allowed)	No (not allowed)	Yes–the State has to implement (transpose) the law

Secondary laws—Regulations

The laws created in the form of Regulations have general application to all Member States, they are the highest form of secondary legislation, and once passed, they are directly applicable in the Member States. The important element to remember is that these laws create uniformity in the States, and the Regulation's provisions are reproduced in the Official Journal. This, as a consequence, is a rather rigid and inflexible form of law, as the ability to create the same law in each of the languages of now 28 Member States in the Journal results in differing enforcement as lawyers argue as to the scope, nature, and applicability of the provisions.

A method of enabling the Member States to become involved to a greater extent in the legislative process and create laws which are more likely to be drafted in a form usually found domestically (and hence in theory to be more successfully enforceable) has been Directives.

Secondary laws—Directives

Directives are a tool frequently used by the EU to achieve its legislative goals. They enable the Member State to fulfil its EU obligations, but with a degree of flexibility as to how this may be realized. Directives require the Member States to transpose the effects of the law into their own legal system, in a method which is best suited for itself and its citizens, within a prescribed date (the date for **transposition**—the term is the process of taking the EU Directive and creating an implementing piece of legislation). Whereas Regulations produce uniformity in the laws of the EU, Directives seek harmonization of the laws (the spirit of the Directive is the same but the linguistic detail may be different).

Secondary laws—Decisions

The institutions of the EU have the ability to use Decisions as a method which allows a greater level of detail as to whom the laws will apply. The effect of using a Decision as a tool of law enables the EU to compel a particular Member State if it so chooses, or an individual, to perform or refrain from action. In addition, it can also confer rights or impose obligations on them.

Consider

SecureCash Ltd is attempting to rely on the Equal Treatment Directive (Council Directive 2000/78/EC) to defend its decision to ban the wearing of the headscarf. Would it be able to rely on this in a national court in a case against another private body (i.e. an employee)? Would it make any difference to your answer if the other party was in the public sector? Consider the horizontal and vertical direct effect of the Directive.

2.6.4 Direct Effect

Direct Effect of EU law was developed by the CJEU to allow individuals and organizations to use the provisions of EU law within the Member States' domestic courts, and in the case of Directives, without having to wait for the Member State to fulfil some obligation that it had omitted to do. Direct Effect had been established for primary law (Treaty Articles) and the rationale of the CJEU developing this mechanism was that '... the useful effect (of an EU law) would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law' (*Van Duyn v Home Office*). There has been controversy over the use of Direct Effect in primary law, but the doctrine was largely accepted by the Member States. It was further advanced to secondary laws (namely Directives) and this was to extend accessibility to EU rights, but this is where many problems began.

As Directives are a commonly used source of law, the application of Direct Effect would enable an affected individual to use a Directive's provisions in a domestic court after the date of transposition if the Member State had been guilty of either non-implementation or incorrect transposition. Direct Effect was considered permissible if the tests developed by the CJEU were satisfied. Tests were required as EU laws are often very general in scope and in order for any legislation to give rights to, or provide obligations on, individuals they must be sufficiently clear and precise to allow the affected parties to understand their scope. The tests to be satisfied for an EU law to have Direct Effect are:

1. the provision must be clear and unambiguous;
2. the provision must be unconditional; and
3. the provision must not be dependent on further action being taken by the EU or Member State.

Having established the tests, the application of Direct Effect came to the CJEU. It stated that so far as the tests were satisfied, Treaty Articles having general application would enable a claim using Direct Effect. The same provision applies with Regulations under the same rationale. However, when considering Directives, the CJEU had a major concern. EU laws, having application to individuals as well as the State acceding to the Treaty, resulted in individuals having obligations to follow EU law. This is what made the EU such an important
p. 29 aspect of law in the UK. No other international treaty had placed obligations on individuals ↵ in the Member State—they had only obliged the State to act in a certain way. The EU gave rights to individuals but also placed obligations on them. To ensure that individuals would comply with their obligations, it was only correct that they had access to any rights that they could benefit from. The CJEU, though, had to determine whether a Directive could be used between private parties as well as against the State. In this situation arose the concepts of Horizontal Direct Effect (HDE) and Vertical Direct Effect (VDE) (**Figure 2.1**). HDE is so called because it involves using the provisions of an EU law directly against another private party (horizontal because both private parties have the same legislative power and obligations). VDE is so called because it involves a claim from a private party against the State or emanation of the State (vertical because the private party has no legislative power but the defendant (the State) is of a higher position in terms of legislative authority).

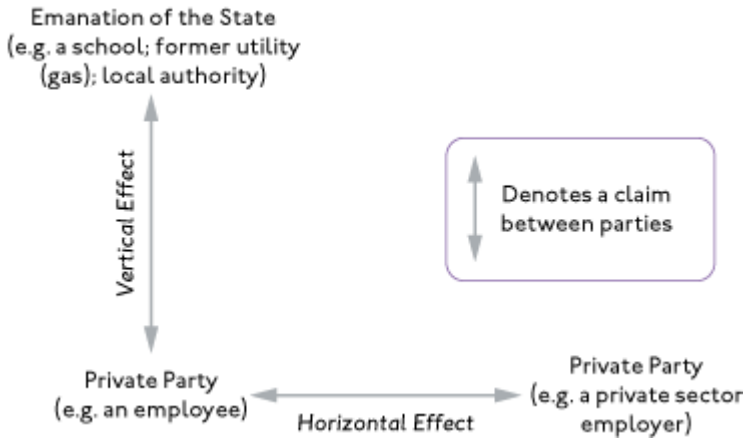

Figure 2.1 Horizontal and Vertical Direct Effect

The issues of HDE and VDE are quite complex and do not require in-depth investigation in this text. It is, however, prudent to consider these issues briefly to appreciate their impact on the EU dimension to the protection and enforcement of rights. HDE of Directives is the use of the law between two private individuals where the court recognizes the EU law and gives it effect as it would a domestic law. The CJEU therefore decided that the application of EU law domestically could only be enforced where the EU considered it had competence–via VDE. HDE has been considered to be beyond the scope of the CJEU because private parties have no legislative power so should not be held responsible when the Member State has failed in its obligations; if it did give the remedy of HDE this would almost be to elevate Directives to the power of Regulations which Article 288 TFEU did not allow; and if the Member State upheld its obligations then this remedy would not be necessary. The denial of HDE of Directives was demonstrated in the UK in the case of *Duke v GEC Reliance*.

Duke v GEC Reliance (1988)

Facts:

p. 30

GEC Reliance had a policy of compelling women workers to retire at 60 years of age compared with 65 years for men (and this was applied to Mrs Duke). The House of Lords had held that the Sex Discrimination Act 1975 was not applicable to retirement ages, and ↵ instead had to consider whether Duke was able to claim directly under the relevant EU law (the Equal Treatment Directive—76/207/EEC). The Lords held that Duke could not use the Directive in her claim as her employer was not 'an emanation of the State', and the Horizontal application of Direct Effect of Directives was not possible.

Authority for:

The CJEU refused to recognize the Horizontal Direct Effect of Directives.

This case demonstrated that whilst EU laws have significant effects on the UK courts and Parliament, Directives themselves may not be used directly against parties in the private sector. This has implications in, for example, employment law where many of the advances in the law have derived from the UK's membership of the EU, and where most workers are employed in the private sector. A claim against their employer would be a claim against a person in the private sector and clearly if the Member State has not taken the correct action in transposing the EU law into domestic legislation, the employee has to look towards Indirect Effect to access their rights as there is no HDE of Directives.

2.6.4.1 Vertical effect

As the CJEU did not consider that it could provide the enforcement mechanism of HDE it began to widen the concept of 'the State' to be of use in VDE claims. The State is no longer considered to be limited to the Government. Through case law, it has been applied by the CJEU to former nationalized utilities, schools, the police force, and hospitals. Essentially, any 'body' where the State possesses some direct control may fall under the remit of VDE. The consequence of this situation is that if the transgressor of an unimplemented EU Directive is an emanation of the State there may be a claim under Direct Effect through VDE; and if the transgressor in the same scenario is a private party there is no claim, as HDE is not allowed.

The CJEU recognized the problem of having two sets of rights depending on who the transgressor (defendant) was, and the perceived unfairness of this situation. It therefore wished to develop a remedy which was applicable to all in the EU and still ensured EU law was given effect and was respected—the doctrine of Indirect Effect was developed.

2.6.5 Indirect Effect

The CJEU was concerned at the problem posed by the lack of access to EU laws through a Member State not transposing a Directive, or doing so incorrectly, and hence how this denied access to rights. Member States were under a duty to give effect to EU laws and as such a method of statutory interpretation was adopted by the CJEU under the doctrine of Indirect Effect. Hence the national law should be interpreted through the courts by reference to the EU law (such as a Directive), and this EU law would allow the judge to 'read into' the existing English law the provisions of the EU law, thus providing access to it (this is purposive statutory
p. 31 interpretation). ↵

Von Colson and Kamann v Land Nordrhein-Westfalen and Dorit Harz v Deutsche Tradax GmbH (1984)

Facts:

The first case involved two women, Von Colson and Kamann, who had applied for jobs as social workers at Werl prison. They were both unsuccessful (the positions were given to two male applicants) and claimed against the administrators of the prison that they were denied the posts due to their sex.

In the second case Dorit Harz applied for a vacancy available to economics graduates but was refused an interview as she had been informed that the position was only available to male applicants.

In each of these cases Germany had not transposed the Equal Treatment Directive (Directive 76/207). The German court therefore referred questions to the CJEU, *inter alia*, establishing whether the Directive could be used directly in the claims. The CJEU held that instead of looking at the issue of Direct Effect and the potential application of that remedy, Member States had an obligation to interpret existing legislation to give effect to EU law and obligations: 'It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.'

Authority for:

Directives may be used directly in domestic courts against a State or emanation of the State defendant (Vertical Direct Effect) but may not be used directly against a private-sector defendant (Horizontal Direct Effect). Therefore, where possible, a system of consistent interpretation of domestic law with EU law should be used (Indirect Effect).

Whilst being a rather contrived way of achieving effectiveness of EU law, Indirect Effect is a method of enforcement that enables *all* those whose rights have been transgressed potential recourse to the EU law's provisions in the domestic court.

Table 2.2 provides an overview of the sources of law and their applicability.

Table 2.2 The extent of the applicability of EU law

	Primary law		**Secondary laws**	
	Treaty Articles	**Regulations**	**Directives**	**Decisions**
Directly effective	Yes (directly applicable)	Yes (directly addressed)	No	Yes (to whom they are applicable)
Horizontal Direct Effect	Yes	Yes	No	No
Vertical Direct Effect	Yes	Yes	Yes	Yes
Uniformity of laws	Yes	Yes	No (harmonization)	No

p. 32

2.7 Human rights

The protection of human rights encompasses a wide range of liberties (including the social rights of accessible and competent healthcare, adequate housing, and the regulation of employment relationships through the prevention of abuses of managerial prerogative and discrimination). Whilst these are undeniably vital for the betterment of society, human rights and the subsequent legislative initiatives have focused on social and political rights, and therefore the European Convention and the HRA 1998 have sought to protect freedoms of assembly, religion, life, voting at elections, and so on. The UK has been signatory to the European Convention on Human Rights (ECHR—the Convention) since 1951, and incorporated these provisions through domestic legislation in 1998 (the HRA 1998, in force on 2 October 2000). However, it had been accepted that the UK respected human rights before membership of the Convention or enactment of the HRA 1998, and these principles were the cornerstone upon which the legal system was based.

Consider

Ms Betabita is arguing that her human rights are being infringed by not being able to manifest her religious beliefs. Which of these, if any, would you think applicable and are these rights absolute or subject to interpretation nationally?

2.7.1 The European Convention on Human Rights

The European Convention was signed in 1950 and ratified by the UK in 1951 (coming into force in 1953). Evidently, this was an international treaty and as such it governed the relations between those States that were signatories to it, ensuring respect for the human rights outlined in the Convention and providing for a system of accountability for abuses. **Table 2.3** sets out the Convention rights and corresponding Article numbers. Being an international treaty, the Convention protected individuals against actions by the State (rather than claims against other individuals), and sought to regulate the State in its legislative activities. It thereby restricted the State from enacting legislation that contradicted the Convention (although, as with other international treaties (including the EU Treaty), various derogations of these rights existed in areas such as war and national security). When the derogations were exercised by the State, it was the duty of the State to inform the Secretary-General of the Council of Europe of the measures (Art. 15).

Table 2.3 Convention rights

Article number	Convention right
2	The right to life

Article number	Convention right
3	Freedom from torture or inhumane or degrading treatment or punishment
4	Freedom from slavery or forced or compulsory labour
6	The right to a fair trial
8	The right to respect for private and family life, his home, and his correspondence
9	Freedom of thought, conscience, and religion
10	Freedom of expression
11	Freedom of peaceful assembly and freedom of assembly
12	The right to marry and found a family
14	The enjoyment of the Convention rights without discrimination on any ground
Article 2 of the First Protocol	The right to an education
Article 3 of the First Protocol	The right to take part in free elections by secret ballot
The Sixth Protocol	The abolition of the death penalty

2.7.1.1 Convention rights

The Convention, and the subsequent extensions to the provisions through the various protocols agreed by the signatory States, ensured that the most significant civic and political rights were to be respected and protected. The rights included in the Convention are further to be enjoyed without discrimination on any ground including 'sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status' as identified in Art. 14.

2.7.1.2 Enforcement

Updated measures to deal with enforcement were effected through the Eleventh Protocol, which abolished the Commission and instead provided for a permanent court. The European Court of Human Rights (ECtHR) (based at Strasbourg) was established with ↵ judges from each signatory State who are selected by the Parliamentary Assembly of the Council of Europe from a shortlist by the State of three judges (Art. 22), and who remain in office for a six-year tenure (after which this tenure may be reviewed). A significant change from the original Convention is that enforcement of human rights now enables individuals to apply directly to have their case heard by the ECtHR. In order to do so, it is expected that the individual claimant has exhausted all domestic remedies and brought their claim within six months of the final decision in the State. The ECtHR then has to ensure that the claim is admissible and involves a point of law that it has not already decided.

p. 33

The composition of the ECtHR is usually three judges sitting in a chamber who determine the admissibility of the claim. If the claim is determined to be admissible through a unanimous vote, then a chamber consisting of seven judges is convened to determine the merits of the case. In the most serious cases involving the provisions of the Convention and Protocols, a Grand Chamber of 17 judges is convened. The decisions of the ECtHR are final (Art. 29) and it is empowered to award 'just satisfaction' to the successful claimant (Art. 41).

2.7.2 The Human Rights Act 1998

The Labour Party and members of the judiciary had commented on the impact of the UK's membership of the European Convention and the difficulty in ensuring individuals had access to their human rights. Whilst it was undeniable that in most situations the UK had recognized human rights and built its legal system on ensuring respect for civil freedoms and political rights, underpinned through accountability, there were groups of people who were affected by powers or decisions of the State which they considered to be a breach of their rights. This was further compounded by the number of successful cases decided against the UK at the ECtHR. Under the UK's dualist system, alleged transgressions of these international laws did not enable the judiciary to provide any meaningful ↵ remedy. In order to seek 'justice', the individual had to travel to Strasbourg and have the case heard before the ECtHR. This gave the impression that individuals may not be able to get justice in the UK, and therefore a change in the legal system was necessary to empower the judiciary to hear claims of abuses of human rights and provide a remedy. Following enactment of the HRA 1998, cases involving European Convention rights can be heard by the UK courts and mechanisms are in place to provide for the application of effective enforcement measures. The HRA 1998 includes Arts. 2–12 and 14 of the Convention, Arts. 1–3 of the First Protocol, and Arts. 1 and 2 of the Sixth Protocol.

p. 34

When enacting legislation, HRA 1998, s. 19 provides that the relevant Minister responsible for the Bill make a statement regarding its compatibility with the Act, or otherwise declare to Parliament that they are unable to offer such a statement of compatibility, but the Government wishes to proceed with the Bill regardless. This ensures Acts that impact on human rights are considered in light of the HRA 1998 and the Convention, and also offers guidance to the judiciary in applying and interpreting the legislation.

2.7.2.1 Powers granted to the judiciary

One concern postulated in the consideration of enacting the HRA 1998 was that courts in the UK would be elevated to 'Supreme Court' status (in the USA model), whereby the court would be able to strike down legislation that transgressed the HRA 1998. This, evidently, would attempt to usurp the power of Parliament to legislate in whichever way it wished, and also would impact upon other constitutional principles such as the separation of powers. Therefore, in order to protect the constitution, the HRA 1998 identified and limited the extent of the powers of the judiciary in matters concerning human rights, and provided for strict rules on the powers of enforcement.

The judiciary has an obligation to interpret primary and secondary legislation, and the common law, consistently with the Convention (and through s. 2 of the HRA 1998 to take into account previous decisions and opinions of the ECtHR), to ensure that as far as possible human rights are given complete effect (s. 3(1)).

Ghaidan v Godin-Mendoza (2004)

Facts:

The protected tenant (under the Rent Act 1977) died and his same-sex partner, who had cohabited and shared a close and stable relationship with him for many years, sought a statutory inheritance of the tenancy. The Rent Act 1977 referred to a 'surviving spouse' of the tenant being entitled to succeed the tenancy, and this was extended in 1988 to include persons living together as husband and wife. The Act did not, however, specifically refer to same-sex couples and this led to the action.

Authority for:

In a previous case (*Fitzpatrick v Sterling Housing Association*) the House of Lords held a same-sex partner did not qualify under the law. This was based on interpretation of the law and that there was no explicit legal protection against discrimination on sexual orientation. When *Ghaidan* came to the courts, such a law (the Human Rights Act 1998) did exist. This allowed the Lords to interpret the national law in accordance with the European Convention on Human Rights (Arts. 8 and 14).

p. 35 ↵ This generally results in courts providing a consistent interpretation of the law in light of the Convention, but exceptions do exist.

R v Horncastle and Others (2009)

Facts:

The appellants had been convicted of serious criminal offences. Evidence was presented at court in the form of witness statements. Statements came from a witness who had died before the trial and another who failed to attend the hearing due to fear of repercussions. The appeals against the convictions were dismissed by both the Court of Appeal and the Supreme Court.

Authority for:

Article 6(3)(d) of the European Convention on Human Rights guarantees everyone who is charged with a criminal offence the right 'to examine or have examined witnesses against him'. Further, the Human Rights Act, 1998 s. 2(1) requires national courts to take into account the jurisprudence of the European Court of Human Rights (*Al-Khawaja and Tahery v UK*). Whilst acknowledging the requirement of the UK courts to adhere to the Strasbourg Court, Lord Phillips explained that the current case was one of the '... rare occasions where this court has concerns as to whether a decision of the Strasbourg Court

sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.'

If a consistent method of statutory interpretation is not possible, then the HRA 1998, s. 4(2) enables the judiciary to issue a 'declaration of incompatibility'. The declaration has no legal force to change the legislation or affect its validity, but rather the incompatibility of the legislation with the HRA 1998 informs Parliament that there is a concern and Parliament may then choose to review the incompatible legislation. Following the review, the Government may amend the legislation that transgresses Convention rights through a 'remedial order' (s. 10 and Sch. 2 of the HRA provide for such an order, but it may also be made following a decision by the ECtHR).

2.7.2.2 Vertical effect of the Act

The HRA 1998, and the Convention upon which it is based, places an obligation on the State, including public authorities, to act in accordance with the rights established in those documents. Direct challenges can be made against public authorities, including local and central government, and the common law is also subject to the Act. HRA 1998, s. 7 allows a party with 'sufficient interest' in the matter to claim against an authority for breach of the Act, or to use it as a defence against an action. Following a successful claim, the court or tribunal is empowered to issue a remedy within its jurisdiction as it 'considers just and appropriate' (s. 8(2) and (3)), although there must be a civil action to be awarded damages. Therefore, the HRA 1998 regulates (in respect of human rights) what legislative action the State may and may not take, and enables a party who feels their rights have been adversely affected by legislation or the powers of a public authority, to bring a claim (effectively against the State (the 'vertical effect')).

As a consequence, the HRA 1998 affects the State in its enactment, amendment, and interpretation of laws with a human rights element, but it does not provide a clear right to use the provisions of the Act in
p. 36 proceedings between private parties ('horizontal effect'). ↵

X v Y (2004)

Facts:

The claimant had been dismissed from his job at a charity after he was cautioned for a public homosexual act and placed on the Sex Offenders Register. He appealed on the basis that under the Human Rights Act 1998, the State has a duty to protect individuals from private acts that breach their rights.

Authority for:

The claimant was unsuccessful. Attempting to use Convention rights (Arts. 8 and 14) in private proceedings involved its 'horizontal' application and this was beyond the scope of the tribunal. However, the Court of Appeal was critical of the approach in tribunals of the use of Human Rights law and suggested a framework for them to use:

1; Do the circumstances of the dismissal fall within the Convention? If not the Convention is not engaged and should not be considered. 2; If those circumstances do fall within the scope of the Convention, consideration should be made of the State's obligation to secure those rights between private persons. Where the State does not have such an obligation (i.e. on its horizontal direct effect), the Convention is unlikely to affect the outcome of an unfair dismissal claim against a private employer. 3; Where the State does have an obligation to secure the individual's rights, the justification for the interference with their right should be justified. (Where it is, the tribunal then proceeds directly to point 5). 4; If the State does not have such an obligation, did a permissible reason for the dismissal exist under national law which does not involve unjustified interference with a Convention right? Where not, the dismissal will be unfair for the absence of a permissible reason for its justification. 5; If an obligation does exist, the dismissal will be assessed for fairness according to national law but interpreting that in relation to HRA 1996, s. 3 to maintain compatibility with the ECHR.

Further, Dyson LJ remarked that from now the HRA 1998, s. 3 applies in its interpretation of national legislation to both public authorities and private individuals as it does between private parties.

It is also worthy of note that whilst a party *may not* rely directly on the HRA 1998 as a cause of action, they may use the Act to interpret existing laws to comply with it, or it may be used to extend existing rights provided through the common law. However, a significant extension to the direct use of Convention rights between private parties was evidenced in the following case:

Eweida and Others v UK (2013)

Facts:

Four cases were heard by the ECtHR in relation to Art. 9 of the ECHR (the right to freedom of thought, conscience, and religion, and a qualified right to manifest one's religion or beliefs) and the compatibility with English law. The four claimants were employees who wished to manifest their religious beliefs in the workplace.

p. 37

1. Ms Eweida, employed by British Airways (BA), wanted to wear a crucifix—visible over her uniform. This was in breach of BA's dress code;
2. Ms Chaplin was a geriatric nurse who wanted to wear a crucifix—visible over her uniform. This was in breach of her employer's dress code;

3. Ms Ladele was a registrar who was required to perform civil partnership ceremonies and refused to do so for same-sex couples; and
4. Mr McFarlane was employed to provide counselling services for the organization Relate. He refused to provide sexual counselling for same-sex couples.

In relation to Ms Eweida, given that the crucifix was discreet and did not appear to have any negative impact on the BA brand, the UK, in not protecting Ms Eweida and thereby protecting her rights, had breached Art. 9. The fact that Ms Chaplin was not allowed to wear her crucifix over her uniform was justified on the basis of her working on a hospital ward and it was a matter of health and safety. Both Ms Ladele and Mr McFarlane's actions involved them treating people differently on the basis of their sexual orientation, which was unlawful, and the employers in each case were justified in taking remedial action.

Authority for:

Indirect effect cases are fact specific but the ECtHR has, in these cases, balanced the ability of an individual to manifest their religious beliefs through the protection which anti-discrimination provides the general population. The courts in the UK must interpret the Equality Act 2010 to conform with the spirit, and to give effect to, the Convention.

Consider

Given the *Eweida* case, how would you conclude? Does Ms Betabita have the right to manifest her religious beliefs in the manner presented and therefore would she likely succeed in a claim for unfair dismissal? The short answer is no. Read Chapter 22 for an explanation of the CJEU's reasoning on this issue in Case C-157/15 *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions*.

Conclusion

This opening chapter of the English legal system has outlined some of the most significant constitutional principles protecting the UK and holding to account those who wield power in State institutions. Human rights are also playing an increasing role not only in establishing restraints on the actions of the State, but also in the relationships between private bodies. Having established these constitutional 'building blocks', the text continues by identifying the various sources of law, and how judicial decisions affect future cases through the doctrine of 'precedent'.

p. 38

Summary of main points

- The laws of England and Wales are created through Parliament, the common law, and equity.
- The two jurisdictions of law, broadly speaking, are criminal and civil.
- Criminal laws regulate actions that contravene established laws.
- In civil law, the innocent party instigates the claim against the defendant and the case is decided on the 'balance of probabilities'.

The constitution

- A constitution is a mechanism to regulate the powers of the State, and its use of these powers.
- In the UK, the constitution was developed over many centuries and the UK has a written, but uncodified, constitution.

The sources of the constitution

- There are various sources of the UK's constitution.
- Statutory materials include the Magna Carta, the Bill of Rights, the EC treaties, the Human Rights Act 1998, and the Constitutional Reform Act 2005.
- Case law/the common law has been a mechanism where constitutional rules were developed by the courts. These sought to restrict the powers of personnel of the State from exercising powers that had not been granted.
- Conventions and customs are not enforceable in the way that legislation and the common law is, and as such it is often referred to as a form of 'soft law'. For example, conventions have established codes of practice for the conduct of Members of Parliament and the responsibilities they undertake.
- Prerogative powers empowered the monarch to exercise powers such as dissolving Parliament and declaring war (although most of these powers are now exercised by the Government).

Membership of the EU

- The original aims included the establishing of a common market. This was extended to incorporate the fundamental freedoms—free movement of goods, services, capital, and workers.
- The *Council*'s roles include: concluding agreements with foreign States; taking general policy decisions; and taking decisions based on the Commission's proposals.
- The *Commission* has two main roles, it operates a legislative function taking the initiative from the Council and Parliament. Its other substantive role is of ensuring the Member States follow EU laws and as such is known as the 'Guardian of the Treaties'.

- The *Parliament* is elected every five years and its role is to contribute to the drafting of legislation that affects the Member States through Directives and Regulations. It does so through the co-decision procedure with the Council and Commission.
- The CJEU is a court of reference that assists the Member States through interpreting EU laws to apply in cases (under Art. 267 TFEU). It also hears the actions taken under Art. 258 TFEU when it is alleged that Member States have not adhered to their obligations under the Treaty.
- Primary law: The *Treaty Articles* which, if deemed to possess 'Direct Effect' are directly applicable in the Member State with no further action required by the State.
- The secondary laws are defined under Art. 288 TFEU. *Regulations* are the highest form of secondary laws, they are binding in their entirety, and have direct applicability. *Directives* are binding as to the result to be achieved upon each Member State to which it is addressed, but allows each State to decide how it will give effect to the aims of the Directive. A *Decision* establishes the scope of the legal provision and is binding in its entirety upon those to whom it is addressed (as opposed to *all* Member States).

Essential features of the constitution

- These features are important protections in the restriction of the State's exercise of power and the fundamental rights to which individuals are entitled.
- The rule of law established a set of principles to ensure tyranny and abuse of the State's power are avoided, and to establish fundamental rights that citizens are entitled to benefit from.
- Parliamentary supremacy was formed following the removal of James II as monarch and established Parliament as the supreme law-making body in the country (although the monarch still has to provide Royal Assent to legislation before it becomes effective).
- Parliament cannot bind successive Parliaments—therefore the new Parliament is entitled to repeal or change any previous Act regardless of attempts to entrench it.
- Newer Acts are deemed to implicitly repeal inconsistent prior Acts under the doctrine of Implied Repeal, unless Parliament makes an explicit notice to the contrary.
- Parliament's laws are deemed the highest form of law due to the election of members to this body, whilst the judiciary is not publicly elected. Therefore, the judiciary has an obligation to follow the laws of Parliament and does not have the right to challenge the enacted law as being 'unconstitutional' (as exists in other jurisdictions).
- Separation of powers instils a system of checks and balances where the three main organs of the State (the executive, the legislature, and the judiciary) are separated in an attempt to avoid abuse of power.
- As a general rule, legislation should not be introduced retrospectively. This ensures that citizens have the ability to be aware of laws that could make their actions unlawful.

Human rights

- The UK became signatory to the European Convention in 1951. This sought to regulate the actions of the State and provide a set of fundamental rights for individuals.
- The rights included freedom from discrimination based on sex, race, and religious and political views; the right to life; freedom from torture and inhumane punishment; the right to a fair trial; and freedom of expression.
- The Convention provided for enforcement through the ECtHR (based in Strasbourg).
- An individual with a claim based on the Convention's rights would exhaust all domestic remedies, and then proceed to the ECtHR. As this is an international treaty and the UK has a dualist constitution, the judges in the UK were limited as to the remedies they could provide for a breach of the Convention.
- This led to the UK enacting the HRA 1998, which came into force on 1 October 2000. This legislation provides, essentially, for the same rights as are contained in the European Convention. It enables the individual to have a remedy provided by a domestic court without having to travel to Strasbourg.
- The HRA 1998 must be interpreted in the spirit of the European Convention (using a purposive approach to interpretation) and the UK courts must also use the case law established by the ECtHR.

p. 40

- When enacting new legislation that may have an effect on the HRA 1998, the Minister of the government department responsible for the Bill makes a declaration that the Bill either does or does not breach, or intend to breach, the HRA 1998.
- The HRA is used to interpret other rights. It cannot be used horizontally (a private individual against another private individual) but rather is used by an individual where the State (a concept that is broadly interpreted) has infringed their human rights.
- Following enactment of the HRA 1998, the judiciary may hear cases involving an alleged breach of the Act, and are empowered to issue a 'declaration of incompatibility' if the law, as interpreted with the HRA 1998, contravenes the claimant's human rights. There is no authority to strike down conflicting legislation.
- Following the declaration, Parliament may choose to change the offending statute to conform to the HRA 1998 through a 'remedial order' by the Government.
- If the individual is unhappy with the decision from the domestic courts, appeals are possible to the ECtHR.

Summary questions

Essay questions

1. 'The dualist constitution of the UK is a detriment to individuals as it provides the State with the choice of adhering to international agreements or not. Given this deficit of the constitution, international treaties are not worth the paper they are written on.'

Critically assess the above statement. In your answer, give specific examples of international treaties which the UK has either repealed or disregarded.

2. 'The UK requires a formal written constitution if fundamental rights, evident in most democratic jurisdictions, are not to be abrogated by governments which rely on the apathy of the general public to remove essential protection against tyranny.'

   Discuss.

Problem questions

1. All Bright Consumables (ABC) Ltd operates a business involving the manufacture and sale of various electronic gadgets. The electronics division has seen rapid expansion in the past few months following the successful manufacture and sales of a new tablet computer. As such it wishes to reorganize the business and move to a seven-day production shift pattern.

   Edward was an employee of ABC and is a devout Christian. ABC asked Edward, as part of this expansion, to agree to work some Sundays as part of the shift rotation. He refused. Edward's religious beliefs prevented him from working on Sundays. As a compromise, ABC had offered Edward a different job within the organization which did not include working on Sundays, but he refused. ABC then offered Edward a generous redundancy package if he was unable to work the required Sundays, which he also refused. In light of this inability to work the required shift pattern, following the necessary dismissal procedures, ABC dismissed Edward.

   Edward has lodged an unfair dismissal claim and part of this legal action accuses ABC of breaching European Convention, Art. 9 (concerning freedom of thought, conscience, and religion).

   Consider the likelihood of Edward being successful and how human rights legislation impacts on employment relationships. ↵

p. 41

2. You have recently been appointed as the Human Resources Director of ABC Ltd. The company is aware of the requirements on the board of directors from the Companies Act 2006, s. 172, the Equality Act 2010, and the Human Rights Act 1998.

   Write a briefing memo to the members of the board as to the most applicable human rights issues that will affect the company. Consider in your answer the obligations on the company to protect its workers against discrimination from colleagues and third parties. Further, explain the steps the board should take to govern its relationship with suppliers and manufacturers as part of its sourcing of products from the Far East and India.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-2-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further reading

Books and articles

Clayton, R. (2007) 'The Human Rights Act Six Years On: Where Are We Now?' *European Human Rights Law Review*, p. 11.

Cohler, A. M., Miller, B. C., and Stone, H. (Eds.) (1989) 'Montesquieu: The Spirit of the Laws' Cambridge University Press: Cambridge.

Cohn, M. (2007) 'Judicial Activism in the House of Lords: A Composite Constitutionalist Approach' *Public Law*, Spring, p. 95.

Collins, H. (2006) 'The Protection of Civil Liberties in the Workplace' *Modern Law Review*, Vol. 69, No. 4, p. 619.

Marson, J. (2004) 'Access to Justice: A Deconstructionist Approach To Horizontal Direct Effect' *4 Web JCLI*.

Phillipson, G. (1999) 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' *Modern Law Review*, Vol. 62, No. 6, p. 824.

Skach, C. (2007) 'The "Newest" Separation of Powers: Semipresidentialism' *International Journal of Constitutional Law*, Vol. 5, No. 1, p. 93.

Websites and Twitter links

http://www.amnesty.org.uk *<http://www.amnesty.org.uk>*

@amnestyUK/

https://www.youtube.com/user/HumanTV *<https://www.youtube.com/user/HumanTV>*

Information from the campaigning organization whose purpose is to protect people wherever justice, fairness, freedom, and truth are denied. Many useful resources and links are provided on the website.

http://www.business-humanrights.org *<http://www.business-humanrights.org>*

@BHRRC

Resources focusing on the interaction between business and human rights. It has a global, rather than simply a UK perspective. It includes materials on corporate compliance and assessment with human rights, and contains various links to sources such as the United Nations and the International Labour Organization.

http://www.coe.int *<http://www.coe.int>*

@coe/

p. 42 ↵ https://www.youtube.com/user/CouncilofEurope *<https://www.youtube.com/user/CouncilofEurope>*

Information resources from the Council of Europe with links to the European Convention on Human Rights and other treaties. They contain information on the work of the Council to protect human rights and fundamental freedoms.

http://www.echr.coe.int *<http://www.echr.coe.int>*

@ECHR_Press/

https://www.youtube.com/user/EuropeanCourt *<https://www.youtube.com/user/EuropeanCourt>*

The website and up-to-date resources from the European Court of Human Rights. This provides details of the work and jurisdiction of the Court, and its case law.

http://www.equalityhumanrights.com *<http://www.equalityhumanrights.com>*

@EHRC

https://www.youtube.com/user/EqualityHumanRights *<https://www.youtube.com/user/EqualityHumanRights>*

Information relating to the Equality and Human Rights Commission—containing advice and publications on all aspects of equality issues.

http://www.liberty-human-rights.org.uk/index.php/ *<http://www.liberty-human-rights.org.uk/index.php/>*

@libertyhq

https://www.youtube.com/user/LibertyHumanRights *<https://www.youtube.com/user/LibertyHumanRights>*

Liberty seeks to advance rights and freedoms through public campaigning, test case litigation, parliamentary lobbying, policy analysis, and the provision of free advice and information.

Online Resources

Visit the online resources *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-02>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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