The European Convention on Human Rights

Introduction

In Al-Saadoon and Mufdhi v United Kingdom the European Court of Human Rights had to decide whether the handing over by the British forces to the Iraqi authorities of two suspected murderers would be in violation of the right to life, freedom from torture and the right to a fair trial. The domestic courts had already held that the European Convention was not applicable and that in any case the death penalty did not necessarily constitute inhuman treatment or was in violation of the right to life. The European Court held that the individuals were within the UK’s jurisdiction and that the death penalty was in breach of Article 3 of the Convention, which prohibits torture and inhuman and degrading treatment and punishment.

The case is but one of thousands of judgments made by the European Court, but is a good example of the importance and significance of its case law. In this case the Court had to decide whether to follow the judgment of the domestic courts; it also had to decide whether the death penalty was contrary to the Convention and international law in general. There were also, clearly, diplomatic issues at stake as to whether states should be liable for rights violations committed by other states and whether such liability is compromised during times of war and by other principles of international law and relations.

This chapter will examine the workings of the European Court and how it interprets and applies the Convention and its principles and case law to disputes brought against Member States of the Convention.

This chapter attempts to explain the role and impact of the European Convention on Human Rights, both in international and domestic law. In addition to explaining its background and its method of enforcement, particular attention will be paid to the principles underlying the Convention and the jurisprudence and case law of the European Court of Human Rights. Particularly, although not exclusive, regard will be made to decisions of the Court and Commission involving claims made against the United Kingdom, although examples of cases against other member states will be used in order to provide a fuller picture of the Convention’s case law.

1 For a detailed account of those principles and their relationship with the Human Rights Act 1998 see Jowell and Cooper (eds), Understanding Human Rights Principles (Hart 2001).
Included in the chapter is an overall view of the Convention’s substantive rights, contained in the articles and optional protocols of the Convention, most of which have been given effect to by the Human Rights Act 1998, examined in chapter 3 of this text. Many of these rights will be examined in detail in subsequent chapters, and thus this chapter provides an overall account of the rights, only providing details of the rights and relevant case law where that right is not covered elsewhere.

Thus, this chapter will cover:

- An examination of the background, purpose and scope of the European Convention on Human Rights.
- An explanation of the machinery for enforcement of the Convention, including the role and powers of the European Court of Human Rights and the application process.
- An analysis of the various human rights norms that have informed the European Court’s role and which have been given effect to in domestic jurisprudence via the Human Rights Act 1998.
- An overall examination of the rights which are protected under the Convention, including a study of some of the most pertinent case law where necessary.

**Background and scope of the Convention**

Although the United Kingdom is a signatory to a variety of international human rights treaties, the European Convention on Human Rights\(^2\) has had the greatest impact on the protection of human rights and civil liberties in domestic law.\(^3\) Whenever domestic law and practice is measured against international human rights norms, this is almost invariably referring to the provisions and case law of the European Convention.\(^4\) The European Convention has, therefore, become central to the understanding and study of human rights and civil liberties in domestic law for two central reasons. First, the massive amount of case law involving claims against the United Kingdom government\(^5\) has highlighted the deficiencies of our method of protecting human rights and civil liberties in domestic law and has, in many cases, resulted in important changes to domestic legislation and judicial interpretation.\(^6\) Secondly, the Convention has had a major impact on the legal system and the enforcement of human rights and civil liberties in domestic law. Even before the European Convention was given

\(^2\) The full title of the Convention is the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). It will be referred to as the European Convention on Human Rights, or the European Convention, throughout the text.


\(^4\) Note, however, that in *A v Home Secretary (No 2)* [2005] 3 WLR 1249 the House of Lords held that the courts could and should have regard to other international human rights instruments in assessing the legality of domestic law and practice – in this case in deciding whether it was permissible to consider evidence that may have been obtained via torture.


effect to in domestic law via the Human Rights Act 1998, the courts were guided by the Convention and its case law when determining disputes with a human rights context and although the Convention was not directly enforceable in the courts, both advocates and judges nevertheless made constant reference to it.  

The Council of Europe

The European Convention on Human Rights is not a product of the European Union and is not, directly at least, part of European Union law. This, as we shall see, has profound effects with regard to the status of the Convention in domestic law. The European Convention, not being part of European Union law, was not incorporated via the European Communities Act 1972, but instead was an indirect source of domestic law until it was given further effect by the Human Rights Act 1998. The European Convention was devised by the Council of Europe, a body similar but more extensive in composition to the European Union, which was set up after the Second World War to achieve unity among its members in matters such as the protection of fundamental human rights.

The European Convention was drafted in the light of the atrocities that took place before and during the Second World War. Accordingly, in its preamble the European Convention reminds the member states (referred to as the High Contracting Parties) of the common heritage of political traditions, ideals, freedom and the rule of law shared by their governments and resolves for them to take steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights 1948. The Convention was signed by the High Contracting Parties in 1950, and entered into force in 1953. It was ratified by the United Kingdom in 1957, and in 1966 the government of the United Kingdom accepted both the compulsory jurisdiction of the European Court and the power of the (then) European Commission of Human Rights to receive applications from individuals and other non-state bodies claiming to be victims of violations of their Convention rights. The main body of the European Convention is supplemented by additional protocols, which may be ratified by each High Contracting Party.

The Parliamentary Council of Europe has recommended the creation of the post of Public Prosecutor and that the Commissioner for Human Rights is allowed to intervene and bring cases before the European Court in cases of gross violations of human rights in cases where the European Convention is inapplicable.

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7 See Hunt, Using Human Rights Law in English Law (Hart 1998). This aspect of the Convention will be addressed in chapter 3, which will assess the impact of the Convention, including its ‘incorporation’ via the Human Rights Act 1998, on the development of human rights and civil liberties in domestic law.

8 See chapter 3 of the text.

9 This, and other differences between the European Convention and EU Law, is explained in chapter 1 of this text.

10 Although the European Convention on Human Rights dominates the work of the Council of Europe, that body is also responsible for a vast array of treaties and processes that monitor the protection of human rights in Europe. A full list of such treaties, and other EU treaties, can be found in Part Six of Brownlie and Goodwin-Gill, Basic Documents on Human Rights (OUP 2010, 6th edn).


12 This acceptance is renewed every five years.

CHAPTER 2 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Question
Why was the European Convention on Human Rights drafted and ratified? In what ways might it enhance the international protection of human rights?

Machinery for enforcing the Convention

Although the European Convention provides legal machinery for enforcing human rights, including a European Court of Human Rights possessing the power to make judicial decisions, which are then enforceable on the member states, the main purpose of the Convention is to promote the protection of human rights by each and every member state. Thus, as with other international treaties dealing with the recognition and enforcement of human rights, the European Convention seeks to ensure that a citizen’s rights and freedoms are protected in domestic law by the state’s authorities and systems. The Convention machinery, therefore, is subsidiary to this purpose, and is only called upon when the individual fails to get adequate redress at a domestic level.

This is reflected in the provisions of the Convention. Thus, as we shall see, individuals and others can only make a claim under the Convention machinery if they have exhausted all effective domestic remedies. 14 The Convention, therefore, expects individuals to gain a remedy at the domestic level, under laws and procedures that hopefully reflect the principles and standards laid down in the Convention. More generally, Article 1 of the Convention provides that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention. In this sense, therefore, the Convention attempts to create within each member state a culture of human rights protection that is consistent with both the ideals contained in the preamble and the specific rights laid out in Section 1. The European Court of Human Rights has referred to this provision on a number of occasions to justify its cautious approach towards the challenge of certain domestic laws and practices. 15

The Committee of Ministers

This body comprises one representative from each High Contracting Party, usually the Foreign Secretary of each government, and was set up by the Statute of the Council of Europe in 1949. Prior to the introduction of Protocol 11 to the European Convention in 1998, the Committee had the power in certain cases to make a judicial determination on a case. Under Article 32 of the Convention, where a case was not referred to the European Court of Human Rights within three months of its transmission by the European Commission to the Committee of Ministers, the latter had the power decide, by a two-thirds majority, whether there had been a violation of the Convention. 16 After the new protocol, the Committee’s

14 Article 35 of the European Convention.
15 The provision is, therefore, central to the adoption of the doctrine of the margin of appreciation, discussed below, which allows suitable deference to be shown towards the sovereignty of each member state in its efforts to protect and balance human rights in their individual jurisdictions. See, for example, the European Court’s approach in Handyside v United Kingdom (1976) 1 EHRR 737.
16 For a description of the composition and role of the Committee of Ministers, including its former judicial function, see Robertson and Merrills, Human Rights in Europe: A Study of the European Convention on Human Rights (Manchester University Press 1993), chapter 9.
main function, under Article 46, is to supervise the execution of the European Court’s judgments. This includes supervising the execution of any just satisfaction award made by the Court under Article 41, and, where appropriate and necessary, ensuring that domestic law is modified so as to comply with the Court’s finding.

The Committee’s powers are augmented by Protocol No 14 to the Convention, considered later on in this chapter. Under Article 16 of that protocol if the committee faces difficulty with the implementation of any judgment it may refer the case to the Court for an interpretation of the initial judgment. Further, after it has warned a state about non-compliance, it may refer the case to the Court to decide whether the state has in fact implemented the judgment; if the Court determines that it has not, the case will be referred back to the Committee to consider what measures should be taken. This protocol came into force in April 2010.

The European Commission of Human Rights

Before the coming into operation of Protocol 11, the European Commission of Human Rights considered the admissibility of both inter-state and individual applications, was empowered to secure a friendly settlement between the parties to the complaint, and had the power to consider the merits of the application and to consider whether there had been a violation of the Convention on the facts. Finally, the Commission had the power to refer a particular case to the European Court of Human Rights. After the coming into effect of Protocol 11 of the Convention, the Commission no longer exists and the above roles are performed by the full-time European Court of Human Rights, although the former Commission’s role in the jurisprudence of the Convention is still significant.

The European Court of Human Rights

Article 19 of the European Convention establishes a European Court of Human Rights to ‘ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto’. In addition to its main role, discussed below, the Court has, under Article 47 of the Convention, power to give an advisory opinion on legal questions concerning the interpretation of the Convention and its protocols. Such opinions, however, cannot deal with any question relating to the content and scope of the rights and freedoms in the Convention or its protocols, or with any question which the Court or Committee might have to consider in relation to any proceedings under the Convention.

17 The Committee also has the power under Article 47 to request an advisory opinion of the European Court of Human Rights, and will, under Article 49, have such opinions communicated to it.
21 The Court delivered its first advisory opinion under Article 47 of the Convention in February 2008. Asked by the Committee of Ministers to consider the compatibility of the gender balance with respect to judges it held that it was incompatible with the Convention for a list of candidates for election to be rejected on the sole ground that there was no woman on the list: Advisory Opinion on Female Candidates of Stares for Court, 12 February 2008.
Following the introduction of Protocol 11 it functions on a permanent basis and is the sole body responsible for deciding the admissibility and merits of both inter-state and individual application made under the Convention.22

Article 20 provides that the Court shall consist of a number of judges equal to that of the High Contracting Parties, although each judge sits on the Court in his or her individual capacity. The judges are elected by the Parliamentary Assembly of the Council of Europe, and under Article 21 must be of high moral character, possessing the qualifications required for appointment to high judicial office. Further, during their term of office they must not engage in any activity that is incompatible with their independence or impartiality, or with the demands of a full-time office. Under Article 23, they are appointed for a six-year period,23 and they cannot be dismissed from office unless the other judges decide by a majority of two-thirds that he or she has ceased to fulfil the required conditions.24

The European Court of Human Rights comprises Committees (which consist of three judges), Chambers of seven judges,25 and a Grand Chamber of 17 judges.26 The Court’s Committees consider the initial admissibility of applications made under the Convention,27 and possess the power, under Article 28, to strike out cases from its list.28 The Chambers of the Court then decide on the admissibility and merits of the application, combining the roles formerly carried out respectively by the Commission and the old European Court. The Grand Chamber of the Court then fulfils three functions: under Article 31 it has the power to determine applications which have been relinquished by a Chamber of the Court under Article 30; it acts as an appeal court by considering requests for referrals under Article 43; and it can consider requests for an advisory opinion under Article 47. The procedure of the Court is regulated by the Rules of the European Court of Human Rights, which contain over 100 rules covering matters such as the organisation and working of the Court, its Presidency and procedure, the institution of proceedings, proceedings on admissibility, hearings, judgments and advisory opinions, and matters of legal aid.

State and individual applications

Applications under the European Convention can be either brought by member states on behalf of individual victims or from individual applicants claiming to be victims of a violation of the Convention.

23 Under Article 2 of Protocol No 14 to the Convention it is proposed that the period is extended to nine years.
24 Article 24 of the European Convention.
25 Under Article 6 of Protocol No 14 to the Convention, it is proposed that the Committee of Ministers can, for a period, decrease this number to five.
26 For a detailed discussion, see Drzemczewski, The Internal Organization of the European Court of Human Rights: The Composition of Chambers and the Grand Chamber [2000] EHRLR 233. See the proposals for one-judge committees in Protocol No 14, discussed below.
27 See the proposal for increasing powers of the three-man committees under Protocol No 14, considered below.
28 Under Article 29(2) a full Chamber of the Court decides on admissibility in inter-state cases.
Inter-state applications

Article 33 of the Convention provides that any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention or the protocols by another High Contracting Party. Such applications are subject to some of the admissibility criteria laid down in Article 35 in that the Court can only deal with any application after all domestic remedies have been exhausted and within a period of six months from the date on which the final decision was made. The applicant member state may bring an application in relation to individual victims other than their own nationals, although such applications will normally involve the applicant state’s own citizens.29

Although the idea of inter-state applications is more consistent with international law, which, traditionally, was concerned with responsibilities between states, the number of state applications has been relatively few.30 Such cases are often brought (or perhaps not brought) for political reasons as well as on human rights grounds. For example, in Ireland v United Kingdom31 an application was brought by the Irish government in relation to the treatment of Irish nationals by British authorities in army barracks in Northern Ireland, claiming that such treatment constituted a violation of Articles 3 and 5 of the European Convention.32

Individual applications

Article 34 of the Convention provides that the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.33 For this purpose, ’a person’ includes both natural and legal persons, such as companies.34 A non-governmental organisation or group of individuals is eligible provided it is not in any way a public body performing public duties.35 Individual applications are made to the Court Registry which registers the complaint and, in certain cases, takes a preliminary decision on admissibility.36 Otherwise, the case will be referred to the Court for a determination on admissibility, considered below. Such applications may only be brought against a High Contracting Party,37 although it is possible that such a party might be ’vicariously’ liable for the violations of another state, even one which is not party to the Convention.38

29 Under Article 36 of the Convention, where the High Contracting Party’s national is the applicant, that party has the right to submit written comments and take part in the proceedings. In addition, the President of the Court may invite any High Contracting Party not a party to the proceedings (or any person concerned who is not the applicant) to submit written comments or take part in hearings.
31 (1978) 2 EHRR 25.
32 The case is dealt with in chapter 3, covering Article 3 of the Convention.
33 The applicant does not have to be a national of the defendant state provided he or she was within the state’s jurisdiction at the time of the alleged violation.
34 For example, in Sunday Times v United Kingdom (1979) 2 EHRR 245, the applicants were both a natural person (the editor) and a legal person (Times Newspapers).
35 Ayuntamiento de M v Spain (1991) 68 DR 209, where the European Commission held that a local authority could not bring an application against the national government.
36 For a detailed account of how to bring applications under the European Convention, see Leech, Taking a Case to the European Court of Human Rights (OUP 2005, 2nd edn).
37 The extra-territoriality of the Convention, and the Human Rights Act 1998, is discussed in the next chapter.
38 Thus, in a number of cases brought under Article 3 of the Convention, the European Court has ruled that the liability of a High Contracting Party can be engaged when it has taken action, or failed to take action, which has then resulted in an individual being subjected to a violation of their Convention rights. See, for example, Soering v Unied Kingdom (1989) 11 EHRR 439.
Article 34 also states that the High Contracting Parties undertake not to hinder in any way the effective exercise of the right contained in that article and the European Court can find a separate violation of this article. For example, in McShane v United Kingdom the European Court held there had been a violation of Article 34 when the police had taken disciplinary action against the applicant’s solicitors, alleging that the solicitor had disclosed witness statements to the applicant’s representatives before the Court. In the European Court’s view this action had a chilling effect on the exercise of the right of individual petition by the applicants and their representatives. Further, there may be a violation of Article 34 even where on the facts the Court is not satisfied that there is a breach of any substantive Convention right.

In addition, the Court has the power to adopt interim measures, pending the determination of any application, where it considers that there is an imminent risk of irreparable damage to the applicant. This can be done at the request of the applicant or other persons, or at the Court’s own motion. This power was exercised by the European Court in Al-Saadoon and Mufdhi v United Kingdom, where the European Court granted an interim injunction to stop the handing over of two suspected terrorists to the Iraqi authorities, pending their claim that such a measure would contravene their Convention rights. In that case the European Court subsequently held that the failure of the United Kingdom government to abide by the interim injunction violated Articles 34 and 13 of the Convention. In the Court’s view, the failure by the government to inform the Court of any attempt it had made to explain the situation to the Iraqi authorities or to reach a temporary solution which would have safeguarded the applicants’ rights constituted a violation of Articles 34 and 13 of the Convention.

The requirement to be a victim

Applications under Article 34 may only be brought by persons claiming to be a ‘victim’ of a breach of the Convention. In Klass v Federal Republic of Germany the European Court held

50 This is separate from the right to an effective remedy under Article 13 of the Convention, and to any procedural right within a specific substantive article such as the right to a proper inquiry under Article 2.
52 See also Mamakulov v Turkey (2005) 41 EHRR 25, where the European Court found a violation of Article 34 when the government extradited the applicant in breach of an interim order made by the European Court of Human Rights, and Cotlet v Romania (Application No 38565/97), decision of the European Court, 3 June 2003, where a prisoner’s correspondence with the Strasbourg authorities had been interfered with by prison authorities.
53 Calina v Spain (Application No 24668/03), decision of the European Court, 10 August 2006. The applicant had been deported to Peru to face terrorist charges in defiance of the European Court’s interim measure not to deport. The refusal to obey the order constituted a breach of Article 34 even though the Court held that there was an insufficient risk of a violation of Article 3.
54 Rule 39(1) of the Rules of the European Court.
55 In Hussein v United Kingdom and others (Application No 2327/04), the Court refused to grant interim measures sought by Saddam Hussein, who alleged that his handing over to the new Iraqi authorities to face trial violated the United Kingdom’s obligations under the Convention not to condemn anyone to the death penalty or to inhuman or degrading treatment or punishment. It was held that Article 1 of the Convention was not engaged and the argument that the states in question had de facto control over his detention because they were in coalition with the USA who had arranged his trial was dismissed.
57 See also the admissibility decision of the European Court in Ahmad and others v United Kingdom (Application Nos 24027/07, 11949/08 and 36742/08), considered in chapter 5, at page 259.
that the applicant must be affected by the alleged violation and that it is not possible for a person to make a claim against a law or practice in abstracto: in other words merely to test the legitimacy of a particular provision or practice in domestic law. The law or practice must, normally, have been applied to the applicant’s detriment, although in the above case the Court accepted that an individual might be directly affected by a provision even where it has not been specifically implemented or applied against that person.\textsuperscript{48} In addition, in the recent case of \textit{Gafgen v Germany},\textsuperscript{49} the European Court held that a detainee who had been threatened with severe physical pain during interrogation was no longer a victim once the domestic courts had found the officers guilty and had excluded any resulting evidence at the trial. This, in the Court’s view, was sufficient redress in a case where the applicant had been \textit{merely threatened} with acts of violence.

The Court is also prepared to accept applications from family representatives of the actual victim, where the latter is unable to bring proceedings personally.\textsuperscript{50} However, the Court will not accept all representative actions brought by family members. In \textit{Fairfield v United Kingdom},\textsuperscript{51} the European Court held that the children and executors could not bring a case under Article 10 of the Convention on behalf of a person who had been convicted under s.5 of the Public Order Act 1986 for using insulting words by referring to homosexuals as immoral and had subsequently died.\textsuperscript{52} The Court held that the applicants had not been directly affected by the conviction, and distinguished other cases where the true victim had died after bringing an application. The Court also noted that a different, more flexible test applied in cases under Article 2 of the Convention, because of the importance of that right and the fact that the true victim’s life had been taken.

\section*{Admissibility}

Any person or body wishing to make use of the Convention machinery has to pass through a number of technical rules relating to the eligibility of their claim. The purpose of these rules is principally two-fold. First, they ensure that the defendant member state is protected from unmeritorious or unsubstantiated allegations. Thus, Article 34 allows the Court to declare an application inadmissible if it is anonymous, or an abuse of the right of petition, or manifestly ill-founded. Secondly, they ensure that the Convention agencies only deal with cases that are appropriate to such machinery. Accordingly, Article 34 provides that an application can only be made by a person claiming to be a ‘victim’ and that such a person should have exhausted all effective remedies. These ensure that the sovereignty of each member state and its legal system can operate side by side with the supervision under the Convention.

\textsuperscript{48} Thus, in \textit{Klass}, the applicants could prove that a system of secret surveillance had the potential to be applied against them and were thus victims under the Convention. \textit{Also, in Dudgeon v United Kingdom (1982) 4 EHRR 149}, it was held that the applicant was a victim of a violation of his private sexual life even though he had never been prosecuted for his homosexual activities. In the Court’s judgment the mere existence of the law, accompanied with the limited threat of legal action being taken against him, made him a victim of that violation.


\textsuperscript{50} Most commonly in cases where the actual victim has lost his or her life and the representatives are bringing proceedings under Article 2 of the Convention. See, for example, \textit{McCann v United Kingdom (1995) 21 EHRR 97}, and \textit{Keenan v United Kingdom (2001) 33 EHRR 38}, considered in chapters 4 and 5.

\textsuperscript{51} Application No 24790/04, decision of the European Court, 8 March 2005.

The admissibility criteria

Article 35 provides that the Court may only deal with the matter (whether an inter-state or individual case) after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.\(^{53}\) In *De Becker v Belgium*\(^ {54}\) it was held that the six-month rule related to the requirement to exhaust all effective remedies and was justified on the basis that the High Contracting Parties should not have their past judgments constantly called into question. The rule does not apply to continuing breaches of the Convention, in other words where the legal provision in question gives rise to a permanent state of affairs for which there is no effective domestic remedy. In *De Becker*, therefore, the applicant could bring his application after six months of the domestic court’s decision because the violation, the forfeiture of his civil rights, was a continuing one lasting his whole life.

Exhausting effective remedies

The applicant must make normal use of remedies likely to be effective and adequate so as to remedy the matters of which he claims.\(^ {55}\) This rule only applies to remedies that can be effectively exercised in practice: it does not apply to inter-state cases where the applicant state alleges a practice of widespread and linked breaches of the Convention.\(^ {56}\) Similarly, in individual applications the rule has been held inapplicable where it could be established that an administrative practice existed of such a nature as to make domestic proceedings futile or ineffective.\(^ {57}\) In such cases it is recognised that the rule of law and principles of government accountability have broken down, thus frustrating any legal or other remedy for human rights violations.

Equally, any remedy that is available under domestic law must be effective in substance in that it is capable of providing effective reparation for any violation. Thus, if domestic law is capable of addressing the specific allegation the applicant should employ such domestic remedies.\(^ {58}\) For example, in *Spencer v United Kingdom*,\(^ {59}\) an allegation of breach of private life by several newspapers was declared inadmissible because the applicant had not pursued a remedy in the domestic law of confidence. Equally, the applicant should in normal cases pursue any effective appeal against an initial decision, but is not required to do so when the relevant law is clear, rendering any appeals futile. In *Handyside v United Kingdom*,\(^ {60}\) the applicant was not required to appeal against his conviction for obscenity when it was clear that the initial court’s finding was within domestic law and where any appeal would almost certainly fail.

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53 If domestic law does not provide any remedy, the six-month period runs from the relevant act or decision which it is alleged violates the applicant’s Convention rights: *X v United Kingdom* (1976) 8 DR 212–13.


55 *Donnelly v United Kingdom* (1975) 64 DR 4. In that case the applications were declared inadmissible when several of the applicants had received adequate compensation for their ill-treatment via civil proceedings, and others had failed to bring such proceedings in domestic law. More recently, in *D v Ireland* (2006) 43 EHRR SE16, the Court declared inadmissible a claim that the lack of abortion facilities in Ireland constituted a violation of her Convention rights, because the applicant could have applied for an exemption under the general rule against abortion.


57 *Akdivar v Turkey* (1996) 1 BHRC 137.


60 (1976) 1 EHRR 737.
Other admissibility criteria

In addition to the above requirements, individual applications under Article 34 are subject to further restrictions. First, Article 35(2) of the Convention provides that the Court shall not deal with an application under Article 34 that is anonymous or substantially the same as a matter that has already been examined by the Court, or has already been submitted to another procedure of international investigation or settlement and contains no new information. Although individual applications must not be anonymous, the applicant is allowed to request that certain documentation remains confidential, and often the name of the applicant will not appear if the claim refers to intimate aspects of the applicant’s (or his or her family’s) private life. With regard to similar applications, the rule only applies to proceedings brought by the particular applicant, and in cases where there has been such a claim by the applicant the Court must be satisfied that there exists relevant new information, and that the applicant is not merely putting forward fresh arguments regarding the Convention and its interpretation, as opposed to supplying new facts.

An application will be rejected where it asserts a right that is not contained in the Convention or its protocols. For example, in Bertrand Russell Peace Foundation v United Kingdom, the European Commission rejected an application that alleged that the United Kingdom had failed to put sufficient diplomatic pressure on the Soviet Union to deliver mail sent by the applicants, the Commission observing that no such right to diplomatic protection existed under the Convention. The rule also applies where the defendant state has either lodged a derogation or reservation in respect of the right that has allegedly been violated, or where it relates to a right in a protocol that the defendant state has not ratified.

An application will be regarded as an abuse of the right of application where it appears that it has been brought for purely political or personal reasons and where as a consequence there appears to be no foundation for the claim. Thus, in M v United Kingdom, the European Commission declared an application inadmissible where the applicant and his wife had brought a series of applications against the government as part of a long-running dispute regarding their treatment by the English legal system. The Commission found that the disputes were substantially similar and raised no prima facie case. An application may also fall foul of this rule if the applicant has been guilty of conduct that compromised the propriety or confidentiality of the Convention proceedings.

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61 As the United Kingdom is not party to the optional Protocol to the International Covenant on Civil and Political Rights 1966, it is unlikely that applications against the United Kingdom will fail for the reason that another institution has already received the complaint. In Council of Civil Service Unions v United Kingdom (1987) 50 DR 228, the European Commission held that as the complaint had been referred to the ILO by the TUC as opposed to the applicants themselves, the application was not inadmissible for that reason.

62 See, for example, ADT v United Kingdom (2001) 31 EHRR 33 (applicant charged with gross indecency with other men). Such a measure will also be used where the applicants are children: A v United Kingdom (1999) 27 EHRR 611.

63 Although if such a similar application had been unsuccessful the Court might use that as justification for rejecting a claim by another applicant.

64 X v United Kingdom (1981) 25 DR 147.

65 14 DR 117 (1978).

66 The United Kingdom has only ratified Protocols 1, 6 and 13.

Claims that are manifestly ill-founded

By far the most common reason for rejection is where the application is determined to be manifestly ill-founded; where the applicant has failed to show a prima facie case against the respondent. At this stage the Court might be of the opinion that either the Convention, on its proper construction, does not give the applicant a right as claimed, or that the violation is clearly covered by one of the exceptions in the Convention, for example that a violation of the applicant’s right to free speech is clearly necessary in a democratic society. This determination will involve a consideration of the merits of the application and is a means of filtering out hopeless cases. This function was formerly carried out by the European Commission of Human Rights, and gave a wide discretion to this non-judicial body to interpret the Convention and to determine its scope. Since the introduction of Protocol 11, this role has been carried out by the European Court (and its Committees).

Friendly settlements and the striking out of cases

Article 38 of the Convention makes provision for the European Court of Human Rights to effect a friendly settlement between the applicant and the defendant state in relation to any claim brought under the Convention. After receiving the application and deciding on its admissibility, the Court shall place itself at the disposal of the parties with a view to securing a friendly settlement of the matter on the basis of respect for human rights. Article 40 then provides that if such a settlement is effected the case will be struck out of the Court’s list. Although the procedure of friendly settlements has been criticised as providing governments with a convenient and non-binding method of settling allegations of human rights violations, it is defended on the basis that it allows the individual state to resolve the matter without resorting to the confrontational, and last resort, remedy provided by the European Court.

Such friendly settlements may or may not involve an admission of liability of a violation of the Convention on behalf of the defendant state. In some cases the member state may be prepared to accept that they have violated the individual’s Convention rights, and will be prepared to settle the matter by the payment of compensation and/or a promise to amend the relevant law or practice. For example, in Sutherland v United Kingdom a case was struck from the Court’s list and a friendly settlement was achieved between the parties when the government agreed to amend the relevant legislation and to equalise the age of consent for both heterosexual and homosexual sexual relations. Other friendly settlements are effected without any admission of liability, and the member state settles the matter, usually by payment of compensation to the applicant, without accepting that it had breached its obligations

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69 If a Committee of the Court decides on admissibility, Rule 53(3) of the Rules of the European Court requires unanimity. However, where admissibility is determined by a Chamber of the European Court, a majority decision will suffice.
70 For example, in X v Iceland (Application No 8941/80), the Commission declared a case inadmissible when it ruled that Article 3 of the First Protocol did not give a person the right to insist that the country’s electoral system represented the undiluted principle of majority rule.
71 The Times, 13 April 2001.
72 The Sexual Offences (Amendment) Act 2000.
under the Convention. For example, in *Amekrane v United Kingdom*, the European Commission effected a friendly settlement, in the form of £30,000 compensation paid to a relative, when it was alleged that the United Kingdom government had violated Article 3 of the Convention by sending a member of the Moroccan Armed Forces back to his country to face the death penalty after he had fled to Gibraltar after deserting from his post.

Under the proposed Protocol No 14, below, it is intended to complement the existing facility of effecting friendly settlements in order to reduce the Court’s case load. Under Article 15 of this protocol, the European Court should take note of any settlement and briefly record its terms, and the Committee of Ministers will be responsible for enforcing the settlement.

**Admissibility and Protocol No 14 of the European Convention on Human Rights**

The popularity of the Convention and the creation of a full-time European Court of Human Rights have led to concern regarding the Court’s workload and a resultant backlog of cases. This has led to proposals for further reform of the Court’s procedure, and specifically the Council of Europe proposed new admissibility criterion, considered below. On 13 May 2004, the Committee of Ministers of the Council of Europe endorsed Protocol No 14 of the Convention. This contains various proposals for the reform of the European Convention machinery to deal with the backlog of cases pending before the Court.

Under the Protocol, in cases which are clear-cut a single judge can decide on admissibility, or strike cases out, such decisions being final. In addition, three-man committees can decide on admissibility and the merits provided there is well-established case law of the Court on the relevant issue. Again such decisions will be final and binding and as a consequence the work of the current seven-man committees will be substantially decreased. More controversially it is proposed to amend Article 35(3) of the Convention, above, so that applications can be declared inadmissible where the applicant has not suffered a serious disadvantage, and where respect for human rights does not require the court to examine the merits of the case. This proposal would both encourage the resolution of disputes at the domestic level and allow the Court to concentrate on alleged violations which have seriously impacted on individual rights, or where otherwise a serious issue as to the protection of Convention rights is raised by the application. To safeguard the right to individual redress, the provision will not apply where the case has not been duly considered by a domestic tribunal. Further, a new procedure will enable the committee of ministers to bring proceedings before the Court.

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74 See Lester, The European Court of Human Rights after 50 Years [2009] EHRLR 461.
75 See, for example, the recommendations made in Lord Woolf’s ‘Review of the Working Methods of the European Court of Human Rights’ (December 2005), which is available at www.echr.coe.int. In particular, Lord Woolf recommends greater use of alternative dispute resolution, including the mediation and the effecting of friendly settlements.
77 Article 7, Protocol No 14. The judge will be assisted by appointed rapporteurs.
78 Article 8, Protocol No 14.
where a state refuses to comply with the judgment and European Court judges will be appointed for a single, nine-year term.

Following Russia’s eventual ratification, Protocol 14 came into force in April 2010. This will allow for a speedier processing of cases.

Judgments of the European Court of Human Rights and their effect

Under Article 46 of the Convention the Court is bound to give reasons for its decisions, and this duty also applies where the Court declares an application inadmissible. Where the judgment of the Court does not represent, in whole or in part, the unanimous opinion of the judges, any judge is entitled to deliver a separate opinion. The decisions of the European Court are binding in international law to those states that have accepted the compulsory jurisdiction of the Court, and place a duty on the state to comply with judgment, in respect of both paying any just satisfaction awarded by the Court and of making any necessary changes to domestic law and practice.

The decisions of the Court do not automatically change domestic law, unless the Convention and its case law have been fully incorporated into domestic law so as to achieve that result. In the United Kingdom, although the Human Rights Act 1998 allows the courts to take the decisions of the European Court into consideration when interpreting and applying the law, the status of such decisions with regard to a change of the law remains the same, and the domestic law remains in force until amended by parliament. This situation was illustrated by the House of Lords decision in R v Lyons and Others, where a number of individuals sought to have their convictions quashed on the basis that the original convictions appeared to be in contravention of Article 6 of the Convention. The House of Lords held that the convictions were at the time lawful under domestic law and that the decision of the European Court could not have the effect of retrospectively disturbing those convictions. Any remedy provided to the individuals in that case was the result of the Court exercising its jurisdiction under the Convention, and such a judgment did not have the effect of overturning domestic law. The decision of the House of Lords was confirmed by the European Court of Human Rights when it declared inadmissible a subsequent application under the Convention.

It should also be noted that even in the post-Act era a finding of a violation of the Convention by the European Court will not automatically invalidate a domestic decision.

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80 The decisions of the European Court of Human Rights are reported in the European Human Rights Law Reports, and the judgments of the Commission and the Court are available on the European Court’s website: www.echr.coe.int.

81 Article 46 of the European Convention. Under Article 44 of the Convention, a decision of a Chamber of the European Court becomes final either at the expiry of three months of the decision, where both parties declare that they will not request a reference to the Grand Chamber, or when the Grand Chamber rejects such a request.

82 For example, after the Court’s ruling in Malone v United Kingdom (1984) 7 EHRR 14, the government was bound to initiate legislative changes to comply with the ruling. As a consequence, parliament passed the Interception of Communications Act 1985, but until that legislation became effective, the domestic legal situation remained as before.

83 [2002] 3 WLR 1562.

84 Saunders v United Kingdom (1996) 26 EHRR 313.

85 If the trial had taken place after the coming into operation of the 1998 Act then the defendants could have used Article 6 to challenge the charges and any subsequent convictions.

86 Lyons v United Kingdom (Application No 15227/03), decision of the European Court, 8 July 2007.
relating to the same proceedings. Thus, in *Dowsett v Criminal Cases Review Commission*\(^8^7\) it was held that the Commission was entitled to refuse to refer the claimant’s case for appeal despite the fact that the European Court had ruled that his Article 6 rights had been infringed in his original trial.\(^8^8\) The High Court pointed out that a finding of a violation of Article 6 did not necessarily render a conviction unsafe and in breach of Article 6 and that in this case the breach had probably not made any difference to the outcome of the trial. Similarly, in *Eastaway v Secretary of State for Trade and Industry*\(^8^9\) it was held that a finding by the European Court that there had been an unreasonable delay in the claimant’s disqualification proceedings did not entitle him to have those proceedings invalidated. The European Court had simply found that there had been an unreasonable delay and not that a fair trial was impossible in such circumstances.

Article 43 of the Convention states that a party to the case may in exceptional circumstances, request that the case be referred to the Grand Chamber, provided that is done within three months from the date of the judgment. In such a case a panel of five judges of the Grand Chamber will consider whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance. If the case is referred to the Grand Chamber, then it will make a judgment on the case, which by virtue of Article 44 will become final and binding.

### Just satisfaction

Under Article 41 of the European Convention, where the Court finds a violation of the Convention and the internal law of the relevant High Contracting Party allows only partial reparation to be made, it is empowered to award just satisfaction to the injured party.\(^9^0\) The general aim of such awards is to place the victim into the position had the violation not occurred, compensating him or her for any financial or other loss resulting from the violation. The phrase ‘just satisfaction’ is employed in s.8 of the Human Rights Act 1998 and after the coming into force of the Act the domestic courts must ensure that the remedies awarded by the domestic courts reflect the principles in Article 41 of the Convention, including its relevant case law.\(^9^1\)

The Court’s awards come under three headings. First, pecuniary damage compensates the applicant for any direct financial loss caused by the breach itself, including loss of property and depreciation of value of property,\(^9^2\) or sums incurred as fines or compensation that have subsequently been declared unlawful under the Convention.\(^9^3\) Secondly, the court may award damages for non-pecuniary damage where the applicant has suffered because of the nature of the violation. This heading is particularly relevant when the applicant has suffered loss of

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91 Under s.8(4) of the Act, in determining whether to award damages, and what amount should be awarded, the Court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41.
93 *Jersild v Denmark* (1994) 19 EHRR 1, where the European Court reimbursed a fine imposed on the applicants under domestic law for aiding and abetting racist remarks.
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... liberty, or where he or she has suffered physical and/or mental distress from a violation of the European Convention. For example, in *Smith and Grady v United Kingdom*, the European Court awarded non-pecuniary loss for what it saw as clear and especially grave interferences with the applicants’ private lives when the applicants had been interrogated regarding their sexual orientation and subsequently dismissed from the armed forces. Thirdly, the Court can compensate for legal costs and expenses ‘actually, necessarily and reasonably incurred by the applicant’.

In appropriate cases the Court has the power to award no compensation other than costs and expenses. Thus, in *McCann v United Kingdom* the European Court dismissed a claim for non-pecuniary loss after finding that a number of persons had been killed by state officials in violation of Article 2 of the Convention. In the Court’s view, the fact that the victims were terrorist suspects made it inappropriate to award just satisfaction under this heading. The Court may also refuse to grant compensation where it is of the opinion that there has simply been a technical breach of the Convention or otherwise where a finding of a violation is a sufficient remedy in itself. Thus in *Kingsley v United Kingdom* it was held that the European Court’s earlier finding of a violation of Article 6 of the Convention was sufficient satisfaction for non-pecuniary damage under Article 41. The European Court’s Grand Chamber was of the opinion that the domestic decision was well-founded and that it had reached a decision that a properly constituted body would have reached. Further, there was no evidence that the applicant had not been provided with a fair hearing in those, and the judicial review proceedings.

Questions
What is so novel and effective about the machinery of enforcement under the Convention?
When does the Convention machinery come into play and how does it co-exist with the domestic law of each state?

The role of the European Court of Human Rights

The principal role of the European Court is to interpret and apply the European Convention. This involves the Court deciding whether there has been a violation of one of the substantive rights in the Convention and, in many cases, whether any and sufficient justification existed for any violation of that right. The Court will need to interpret the rights contained in the Convention so as to determine their true scope and in doing so it will attempt to determine...

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94 Yagci and Sargin *v Turkey* (1995) 20 EHRR 505, where the unlawful detention had been aggravated by mistreatment by the authorities. The Court is more reluctant to award just satisfaction in cases where it is uncertain whether the applicant would have been detained in the absence of a violation of the Convention.

95 In *Ribitsch v Austria* (1995) 21 EHRR 573, the European Court suggested that relatively high sums should be awarded in such cases so as to encourage applicants to bring court proceedings.


97 The criteria are set down by the European Court in *McCann v United Kingdom* (1995) 21 EHRR 97. Since 1996 the Court awards default interest for delayed settlement of just satisfaction awards.


101 The Court did, however, grant costs for legal expenses incurred in both the domestic proceedings and the proceedings before the European Court of Human Rights.
the intention of the drafters of the Convention not just from the words used in the Convention, but in the light of certain democratic and fundamental principles. The Court will also be conscious of the need to reflect recent philosophy on the protection of human rights and will thus interpret and apply it as a living instrument.\(^{102}\)

The European Court is not an appeal court from the domestic courts of the member states on questions of law and fact. Indeed, by the time a case reaches a full hearing of the European Court it is assumed in the vast majority of cases that the domestic courts or other authorities have interpreted and applied the domestic law correctly.\(^{103}\) This is backed up by the fact that all applicants have to show that they have exhausted all effective remedies at the admissibility stage. Rather, the role of the Court is supervisory – to see whether the domestic law and its application in a particular case were consistent with the rights laid down in the Convention. For example, if an applicant had been prosecuted under the Obscene Publications Act 1959 for publishing an obscene article – the domestic court having decided that the article tended to deprave and corrupt – it would not be the European Court’s task to decide whether that article did, in fact, come within that legal definition. Instead, the Court’s role would be to determine whether the prosecution of that article under existing domestic law was compatible with the principles of free speech and the doctrines of legality, necessity and proportionality that are contained in the Convention. Thus the European Court might take issue with the law itself, or an illiberal interpretation of that restrictive law,\(^{104}\) but it would not, generally, be concerned with whether the domestic courts interpreted the law correctly.

The role of the European Court of Human Rights can, therefore, at least to a certain extent, be equated with the traditional function of judicial review in domestic law. The Court’s function is to see whether the domestic law and its application fit within certain guidelines which are laid down by the Convention, rather than to decide the case afresh. Of course, the European Court’s role is wider than that of the court in a traditional judicial review case. The Court may consider not just the legality of the law or its application, but also its compatibility with human rights, and the Convention itself, by referring to concepts such as ‘necessary in a democratic society’, allowing the Court to judge the merits of a particular law and its application by the domestic authorities. However, as democracy and the acceptance of the limited role of the judiciary place restrictions on the courts’ jurisdiction in domestic law, so too the margin of appreciation and the general acceptance of self-determination place similar restrictions on the European Court, ensuring that it does not interfere too lightly with the decisions of democratically elected lawmakers and the decisions of the domestic courts.

### Principles of human rights’ adjudication

**Human rights norms**

The Court and Commission have developed a number of principles that have assisted them in determining the scope of the Convention rights and the legality of any interference. In the


\(^{103}\) An example of a case where the Court was of the opinion that the domestic law had not been applied correctly was the case of *Steel v United Kingdom* (1999) 28 EHRR 603, considered in chapter 10.

\(^{104}\) As in cases such as *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Goodwin v United Kingdom* (1996) 22 EHRR 123.
preamble to the Convention the High Contracting Parties refer to their common heritage of political traditions, ideals, freedom and the rule of law and thus reaffirm their belief in those fundamental freedoms which are the foundations of justice or peace. The Convention is, accordingly, drafted and interpreted and applied in the light of these democratic and liberal principles. In addition, the Court has noted that the Convention, being a living instrument, will be interpreted in the light of present-day conditions, reflecting the Court’s and the member states’ growing commitment to the protection of fundamental human rights.

The rule of law, including the requirement of government accountability, clear and prospective laws and of procedural fairness, is at the heart of articles guaranteeing the right to liberty and security of the person and the right to a fair trial. Such articles also promote concepts such as access to the courts and the presumption of innocence, and have provided the basis of many challenges to arbitrary detention imposed by executive government rather than impartial judicial officers. Such principles have also helped the European Court and Commission to determine the legality and reasonableness of certain restrictions, which under the terms of the Convention can only be justified if they are ‘prescribed by law’ and ‘necessary in a democratic society’.

The Court and Commission have also relied heavily on the basic principles of democracy in interpreting and applying those articles guaranteeing rights such as freedom of expression, freedom of association and peaceful assembly. The Court has stressed the need for every society to possess a free press and to encourage free speech and freedom of peaceful assembly, including the reasonable but trenchant criticism of those in power. Further, the European Court has referred to freedom of expression as one of the essential foundations of a democratic society, being one of the basic conditions for its progress and for the development of every man. Accordingly, pluralism, tolerance and broadmindedness demand that Article 10 is applicable not only to information and ideas that are favourably received, but also to those that offend and shock the state or any sector of the population.

The Convention is also interpreted in the light of principles of equality and the protection of minorities. As a consequence, groups such as prisoners, asylum seekers and sexual minorities have enjoyed the protection of the Convention. In these cases, the Court and Commission have insisted that such groups are not automatically excluded from the enjoyment of Convention rights, and that in cases involving private sexual life, it would be contrary to principle to allow the majority an unqualified right to impose its standards of private sexual morality on the whole of society.

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105 For a thorough discussion, see Merrills, The Development of International Law by the European Court of Human Rights (Manchester University Press 1993), particularly chapter 6. See also Greer, The European Convention on Human Rights: Achievements, Problems and Prospects (Cambridge University Press 2006), chapters 4 and 5.


107 See, for example, Thynne, Wilson and Gunnell v United Kingdom (1990) 13 EHRR 666; V and T v United Kingdom (1999) 30 EHRR 121. See also Stafford v United Kingdom (2002) 35 EHRR 32.

108 See, for example, Lingens v Austria (1986) 8 EHRR 407.

109 Handyside v United Kingdom (1976) 1 EHRR 737.


111 See Golder v United Kingdom (1975) 1 EHRR 524.

Permissible interferences with Convention rights

Many of the rights contained in the Convention are conditional and may be interfered with in particular circumstances. For example, freedom of expression is not intended to be absolute and there will be many cases where it will be regarded as lawful and necessary to infringe that right. However, these permitted infringements must possess certain characteristics if they are to be acceptable within the Convention and its case law. The conditional rights, contained in Articles 8–11 of the Convention, contain a particular mechanism for testing the legality of any restriction or interference: any such interference must be prescribed by, or in accordance with, the law, and be necessary in a democratic society for the protection of one of a number of legitimate aims which are recognised and listed in the Article itself. These conditions are intended to ensure that any interference with fundamental rights meets generally recognised standards of legality or fairness and allows us to distinguish between permissible and arbitrary interferences with fundamental human rights.

Prescribed by law/in accordance with law

Under the European Convention member states will need to show that any interference with a Convention right was, at the very least, justified by reference to some provision of domestic law. For example, Article 2 of the Convention allows the right to life to be taken intentionally by the sentence of a court, but only for a crime for which the penalty is prescribed by law. Freedom from arbitrary interference with Convention rights is also protected by Article 5 of the Convention, which allows interference with a person’s liberty and security of the person only in accordance with a procedure prescribed by law. Such a phrase, and the phrase ‘lawful arrest or detention’ employed in that same Article, means not only that the law must have a legitimate source, but also that it complies with the fundamental ideals of the rule of law in that it is sufficiently fair, impartial and clear. Again, the conditional rights contained in Articles 8 to 11 of the Convention insist that any interference with those rights are ‘prescribed by law’ or ‘in accordance with the law’, safeguarding human rights from arbitrary and unlawful interferences and ensuring that domestic law is consistent with ideas of procedural and substantive fairness.

The phrase ‘in accordance with the law’ was considered by the European Court of Human Rights in Malone v United Kingdom, a case involving the tapping of the applicant’s telephone on the authority of government circulars. According to the Court, for a measure to be prescribed by law it had to display the following characteristics: first, it must have a legal basis, in other words the law must be identified and established; secondly, the rule must be accessible – those affected by it must be able to find out what the law says; and thirdly, the rule must be formulated with sufficient certainty to enable people to understand it and to regulate their conduct by it. Similarly, for any interference to be ‘prescribed by law’, the law has to meet the above standards and safeguards, and in Silver v United Kingdom it was held that the same criteria should be applied to the phrases used in Article 8 and Articles 9, 10 and 11 of the Convention, both phrases to be interpreted and applied in an identical manner.

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113 See, for example, Winterwerp v Netherlands (1979) 2 EHRR 387; Steel v United Kingdom (1998) 28 EHRR 603.
115 The European Court concluded in that case that the rules relating to telephone tapping, being included in secret administrative guidance, were not in accordance with law as required by Article 8(2) of the Convention.
Any provisions that interfere with Convention rights must be subject to sufficient control. Thus, in *Malone* the European Court held that there must be a measure of legal protection against arbitrary interference by public authorities with the rights in Article 8 of the Convention, especially where a power of the executive is exercised in secret where the risks of arbitrariness are evident. Provisions must exist which are sufficiently independent of those who administer them and which accordingly regulate such persons, although such provisions do not have to be in the form of primary or secondary legislation. For example, in *Sunday Times v United Kingdom*, it was held that provided the law was sufficiently accessible and clear, it was not fatal that the provisions came from the common law. The key, therefore, is whether the law imposes a sufficient element of control over the relevant decision maker so as to avoid the exercise of unfettered and arbitrary action.

**The requirement of accessibility**

The second requirement, that the rule has to be accessible, insists that a person who is likely to be affected by the rule should have access to it. If, as in *Malone v United Kingdom*, the rules and their scope are only available to the government or those responsible for administering the rule, such provisions will not be regarded as in accordance with law. A breach of this requirement was evident in the case of *Silver v United Kingdom*, a case involving the regulation of prisoners’ correspondence via administrative guidance produced by the Secretary of State for the Prison Service. In that case the European Court held that most of the restrictions on prisoners’ correspondence could be gleaned from the content of the formal law (the Prison Act 1952 and the Prison Rules 1964). However, those restrictions contained only in non-legal and non-published Standing Orders, and which did not sufficiently refer to the formal law, were not in accordance with law within Article 8(2).

**The requirement of certainty**

Whereas the first requirement is primarily concerned with regulating the arbitrary activities of administrators and other decision makers, the third requirement looks at the provision from the perspective of those who are to be governed by it. Law should be sufficiently clear to allow individuals to govern their future behaviour. Thus, in *Sunday Times v United Kingdom*, it was held that a law had to be formulated with sufficient precision to enable the citizen to regulate his or her conduct: that person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not, however, be foreseeable with absolute certainty. While the Court noted that certainty is desirable, it also accepted that excessive rigidity

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117 In that case, the Court held that it could not be said what elements of the power to intercept communications were incorporated in legal rules and what elements remained within the discretion of the executive.

118 Barthold *v Germany* (1985) 7 EHRR 383. In *Silver v United Kingdom*, n 116 above, the Court held that provided any limits of relevant discretion were referable to primary or secondary legislation then the fact that an administrator relied on non-legal guidance was not in violation of Article 8.

119 (1979) 2 EHRR 245.


122 (1983) 5 EHRR 347.

123 (1979) 2 EHRR 245.
should be avoided and that laws are inevitably couched in terms which, to some extent, are
vague and whose interpretation and application are questions of practice. Similarly, although
the law itself may be vague, its meaning and scope may become apparent after it has been
construed and applied by the courts. Thus, in the *Sunday Times* case, although the law of
contempt of court was inevitably uncertain and dependent on interpretation, a person could,
by examining its application via the case law, predict with a sufficient degree of certainty
whether the publication of an article would be caught by the law.124

If a rule is couched in terms which are so vague that its meaning and extent cannot be
reasonably predicted, then the rule will not be regarded as law as required by the Convention
and the interference will be unlawful irrespective of its necessity. Therefore, in *Hashman and
Harrap v United Kingdom*,125 the European Court held that the power of the domestic courts
to order a person to desist in conduct that was *contra bone mores* (conduct which is seen as
wrong in the eyes of the majority of contemporary citizens), was too vague to be prescribed
by law for the purposes of Article 10(2), as it failed to give sufficient guidance to the appli-
cants as to what conduct they were not allowed to partake in. In contrast, in *Steel v United
Kingdom*126 the European Court held that the concept of breach of the peace, as defined and
restricted by the domestic courts, was sufficiently prescribed by law to satisfy both Articles 10
and 5 of the Convention.

**Legitimate aims**

As with most developed bills of rights, the European Convention recognises that the rights
laid down in the Convention and its protocols may be interfered with for legitimate reasons.
Specifically, in Articles 8–11, the Convention lists a number of legitimate aims, allowing the
claimed right to be interfered with provided it was prescribed by or in accordance with the law
and necessary in a democratic society to do so. For example, Article 10, guaranteeing the
right to freedom of speech and expression, allows interferences on the grounds of national
security, territorial integrity, public safety, the prevention of disorder or crime, the protection
of health or morals, the protection of the reputation and or rights of others, the prevention
of the disclosure of information received in confidence and the maintenance of the authority
and impartiality of the judiciary.127 Any interference with the above Convention rights has to
accord to such a legitimate aim and the member state must show that the relevant legal pro-
vision pursued one of the aims laid down in the Convention, and was genuinely applied to
the applicant in a particular case. Thus a legitimate aim cannot be used as a pretext for a
measure taken for another, improper, purpose.128 Thus, in *Kunstler v Austria*,129 it was held

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124 Contrast *Kruslin v France* (1990) 12 EHRR 547, where the European Court found that the French law on wire-
tapping, both written and unwritten, did not indicate with reasonable certainty the scope and manner of exercise
of the relevant discretion conferred on public authorities and was, therefore, not in accordance with law.
127 Article 8, guaranteeing the right to private and family life, contains similar legitimate aims, but includes the
economic well-being of the country, and Articles 9 and 11, guaranteeing, respectively, freedom of thought,
conscience and religion, and freedom of association and peaceful assembly, contain a limited number of the
above aims. Article 11 also states that the Article shall not prevent the imposition of lawful restrictions on
the exercise of these rights by members of the armed forces, of the police or of the administration of the state.
128 Note Article 18 of the Convention, which states that the restrictions under the Convention shall not be
applied for any purpose other than those for which they have been prescribed.
that the government could not rely on public morals as a reason for banning the exhibition of a painting when the legislation in question safeguarded individual ownership and honour rights, and was not intended to uphold public morality as such. However, a measure may pursue a legitimate aim despite its being flawed or unequal in its application. Thus, in Choudhury v United Kingdom\textsuperscript{130} the European Commission held that the English law of blasphemy pursued the legitimate aim of the protection of the rights of others, even though the law applied only to Christianity.

In addition to the wording of those ‘conditional’ rights, the Convention allows other interferences by laying down exceptions or qualifications to a specific Convention right. For example, Article 5 of the Convention permits interference with liberty and security of the person in a number of circumstances, such as a person’s lawful detention after conviction by a competent court, provided it is in accordance with a procedure prescribed by law. Again in Article 6 of the Convention, although everyone has the right to have their judgment pronounced in public, the press and the public can be excluded for a number of legitimate reasons, such as in the interests of morals or of juveniles.

**Necessary in a democratic society**

Articles 8–11 of the Convention require that all restrictions are necessary in a democratic society for achieving one of the legitimate aims listed in the article. Thus, it is not sufficient that the member state interfered with the applicant’s rights for a legitimate purpose. The Court must also be satisfied that the restriction was necessary in the circumstances. This involves the Court making a qualitative decision regarding the merits of the relevant domestic legal provision and its application. Thus, although it may be beyond doubt that the prosecution of a person under the Obscene Publications Act was for a legitimate purpose – the protection of health and morals – the Court will enquire further into the necessity and reasonableness of enforcing that law on the applicant, given that such a prosecution has interfered with the applicant’s fundamental rights. In this respect, although the Court’s supervisory jurisdiction is limited, its role is more extensive than the one traditionally exercised in judicial review by the domestic courts. The doctrine of proportionality is at the heart of the Court’s investigation into the reasonableness of the restriction, and although the Court offers a margin of appreciation to the member state and its institutions (see below), the Court’s main role is to ensure that the rights laid down in the Convention are not interfered with unnecessarily.

**Interpreting the phrase ‘necessary in a democratic society’**

The Court must define the term ‘necessary in a democratic society’, the definition of the word ‘necessary’ determining the extent of the Court’s power to interfere with a legislative provision or a court decision which allegedly restricts the applicant’s rights. In addition, if the Court is to be able to assess the necessity or reasonableness of any restriction it needs to define the concept of a ‘democratic society’ and to decide what characteristics such a society should possess and practise. In assessing whether a restriction is necessary in democratic society, the Court has stated that it must ask the following questions: is there a pressing social need for some restriction of the Convention? If so, does the particular restriction correspond to that need? If so, is it a proportionate response to that need? In any event, are the reasons

\textsuperscript{130} (1991) 12 HRLJ 172.
advanced by the authorities relevant and sufficient? 131 The Court has stressed that in deciding whether a restriction is necessary it is not faced with a choice between two conflicting principles, but with a principle of, for example, freedom of expression subject to a number of exceptions, which must be narrowly interpreted. 132 Thus, although the Court may give a margin of appreciation to the member state, its prime role is to safeguard the fundamental rights in the Convention from unnecessary interference.

In *Handyside v United Kingdom* 133 the European Court ruled that the word ‘necessary’ did not mean ‘absolutely necessary’ or ‘indispensable’, but neither did it have the flexibility of terms such as ‘useful’ or ‘convenient’: instead the term meant that there must be a ‘pressing social need’ for the interference. Thus, although the Court rejects the idea that a member state would need to show that society or the legal system could not possibly do without the legal restriction, it is not prepared to accept a restriction merely because its existence and use in practice provides a useful tool in achieving a social good, particularly where there is little evidence that such a good is being achieved. Accordingly, the Court insists that there is strong objective justification for the law and its application. For example, although it might be useful or convenient to have a law that prohibits the publication of material likely to cause offence or annoyance to the majority of society, it would not for that reason alone be ‘necessary’ to have such a law. The existence of that law may well appease the majority of society, and provide a useful way to prohibit or sanction conduct which the majority of people regard as annoying or distasteful, but there would have to be evidence of a greater harm before one could accept that it is legitimate to restrict free speech. In such a case the Convention insists that the member state can point to a real social harm, that the legal restriction exists to preserve a legitimate aim – such as public morals or the rights of others – and that the employment of that law is, and was, necessary to achieve that aim. 134

### The doctrine of proportionality

This doctrine insists that a fair balance is achieved between the realisation of a social goal, such as the protection of morals or the preservation of public order, and the protection of the fundamental rights contained in the Convention. Restrictions should be strictly proportionate to the legitimate aim being pursued and the authorities must show that the restriction in question does not go beyond what is strictly required to achieve that purpose. 135 The extent to which the Court is prepared to conduct such an inquiry may well depend on other factors such as the importance of the right that has been interfered with and the nature of the legitimate aim: the more important the right that is interfered with, and the greater that interference in the particular case, the more evidence the Court will require as justification. The Court will, therefore, have regard to factors such as the fundamental character of the right in

131 *Barthold v Germany* (1985) 7 EHRR 383.
132 *Sunday Times v United Kingdom* (1979) 2 EHRR 245.
133 (1976) 1 EHRR 737.
134 For example, in *Dudgeon v United Kingdom* (1982) 4 EHRR 149, the European Court noted that, as opposed to the time when the legislation prohibiting homosexual conduct was passed, there was evidence of a greater understanding and tolerance of such conduct. Accordingly, the blanket prohibition of such conduct, irrespective of the age of the participants, did not correspond to a pressing social need.
135 *Barthold v Germany* (1985) 7 EHRR 383.
question, the extent to which the right was violated, the urgency of the pressing social need, and the sanction imposed on the right user, including whether there was a less restrictive alternative available to the domestic authorities.

The European Court has adopted a variety of approaches in determining the necessity of restrictions, including whether the member state has advanced relevant and sufficient reasons for the interference. This seemingly liberal approach might be applied in a case where the Court feels that there is little evidence of a common European approach to the matter (such as in cases concerning public morality), and where the Court thus wishes to give the state a wide margin of appreciation. Conversely, where the Court is intent on thorough scrutiny, and where there is evidence of a common European standard, it might ask whether the domestic authorities had available to them a less restrictive alternative than the one applied to the applicant. This test can be employed to attack excessive penalties or sanctions, imposed by domestic law on those who have exercised their Convention rights. The Court and Commission have also asked whether the restriction destroys the very essence of the Convention right in question. For example, in *Hamer v United Kingdom*, the European Commission of Human Rights held that the prohibition on prisoners marrying while in prison destroyed the very essence of the right to marry contained in Article 12 of the Convention.

Questions

What essential human rights principles underlie the Convention and its enforcement machinery? In particular, how has the European Court of Human Rights defined and applied the terms ‘prescribed by/in accordance with law’ and ‘necessary in a democratic society’?

The margin of appreciation

As we have seen, in many of its Articles the European Convention provides that Convention rights may be interfered with in certain circumstances and on certain conditions. Although the European Court has denied that this involves a true balancing exercise, it is prepared to accept that in certain cases it would be wrong for it to interfere with the laws and decisions of a member state when those laws or decisions have a proper legal basis, fulfil a legitimate aim, and where the domestic authorities have made a genuine and reasonable effort to balance the Convention right with those other rights or interests. Although many commentators have criticised this concept, there may be a number of reasons to justify it.

First, the Court has recognised that its role under the Convention is subsidiary to the system of rights protection adopted and carried out by each member state. Article 1 of the Convention provides that it is the obligation of the High Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms in the Convention and accordingly the Court has stressed that the main purpose of the Convention is to ensure that the rights laid down in the Convention are protected at the domestic level, and that the role of the European Court in pronouncing on possible violations of the Convention is secondary.

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137 (1979) 24 DR 5.
to that role. Secondly, natural judicial reticence might dictate that the Court would be unwilling to interfere in certain aspects of supervision relating to the law and decision-making. The Court might be comfortable with deciding whether a domestic legal regulation has the necessary qualities so as to be ‘prescribed by law’ or in ‘accordance with the law’. In such a case the judge merely has to apply an established legal principle and decide whether that regulation meets the required standards. Similarly, in deciding whether a law achieves a legitimate aim the Court is merely deciding whether the reason for the law and its enforcement falls within a list of purposes that the Convention itself has decided are legitimate. On the other hand, deciding whether a restriction, albeit lawful and relevant, is necessary and proportionate requires the Court to make a judgment on the merits of the law and its operation, and whether the law has achieved a proper balance between the protection of these fundamental rights and the realisation of these other legitimate interests. Thirdly, it might be difficult to decide whether a particular law and its application are in conformity with the standards laid down in the Convention. This will be the case where it is difficult to obtain the necessary evidence to decide whether there is a pressing social need for the existence or operation of the law, or where, given the nature of the law and its legitimate aim, it is difficult to establish any form of common European standard by which the necessity of a particular law or practice could be measured.

The doctrine was first used in the context of Article 15 of the Convention (see below, page 73), which allows member states to derogate from the Convention in times of war or other emergency. In doing so, the state is only allowed to derogate to the extent strictly required by the exigencies of the situation, and the European Court made it clear that in deciding what measures to adopt, including whether there was a state of emergency, the state, being best placed to determine the facts surrounding the derogation, would be given ‘a margin of error’. This margin of error – or margin of appreciation as it is referred to in this context – has been employed by the European Court and Commission in determining whether a restriction on a Convention right is necessary in a democratic society. Thus, in *Handyside v United Kingdom*, the European Court stressed that the machinery of the Convention is subsidiary to the national systems safeguarding human rights, and that consequently provisions such as Article 10(2) of the Convention leave to each state a margin of appreciation, given both to the domestic legislature and to the bodies called upon to interpret and apply the laws. This margin of appreciation, according to the Court, goes hand in hand with its powers to give the final meaning on whether a restriction is compatible with the Convention right in question.

### The margin of appreciation in practice

Although the case law of the European Court on the margin of appreciation is often difficult to predict, there do appear to be some guiding principles determining the extent of discretion which the Court will allow each member state. These guidelines – the status and importance of the right in question, whether the restriction infringes the enjoyment of entirely private

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140 (1976) 1 EHRR 737.

141 For a discussion and analysis of this case law see Kavanaugh, Policing the Margins: Rights Protection and the European Court of Human Rights [2006] EHRLR 422.
rights, and whether there is a discernible common European standard that the Court is able to apply – are apparent in the case law of the Convention and help us to reconcile what at first sight appears to be random application of a convenient doctrine.

The Convention organs have always afforded a wide margin of appreciation in cases where a matter of public morality is at issue. Thus, in *Handyside*, the European Court, noting that it was not possible to find a uniform conception of morals within the Council of Europe, held that states, by reason of their direct and continuous contact with the vital forces of their countries, were in a better position than the international judge to give an opinion on the exact content of the requirements of morals, as well as to the necessity of any restriction or penalty intended to meet those requirements. Thus, in that case the European Court upheld the prosecution of the applicant for obscenity for distributing a publication that was freely available in most other parts of Europe, holding that the prosecution was both necessary and proportionate. The case shows the reluctance of the Court to interfere in the area of public morality when the domestic decision is at least sustainable on legitimate grounds.142 It also displays a propensity on behalf of the Court to defer to the member state on social issues, which it feels are better determined by the domestic authorities.143

The Court has given a very much narrower margin of appreciation where the restriction in question impinges on the enjoyment of the individual’s right to private life, as opposed to the control of information disseminated to the public. This approach seeks to protect minorities from the will of the majority and in such cases the Court requires strong evidence in order to justify a violation of the applicant’s Convention rights. For example, in *Dudgeon v United Kingdom*144 the European Court held that as the prohibition on homosexual acts concerned a most intimate aspect of private life, accordingly there had to exist particularly serious reasons before interference on the part of public authorities could be legitimate under Article 8(2) of the Convention. The Court needed to be satisfied not only that the overriding majority of society would object, on bona fide and moral grounds, to a change in the law, but also that such a change would seriously injure the moral standards of the community. Similarly in *Smith and Grady v United Kingdom*,145 it held that a restriction placed on homosexuals from remaining in the armed forces was not necessary for the purpose of achieving national security and public order. The negative attitudes of heterosexuals towards homosexuals could not, of themselves, justify the interferences in question. The European Court is, however, prepared to allow some margin to member states in the control of private life.146

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143 See also *Müller v Switzerland* (1988) 13 EHRR 212; *Marlow v United Kingdom*, decision of the European Court, 5 December 2000 (Application No 42015/98). A similarly wide margin of appreciation has been applied in the area of blasphemy and free speech: see *Otto-Preminger Institute v Austria* (1994) 19 EHRR 34; *Wingrove v United Kingdom* (1996) 24 EHRR 1. Note the margin will be narrower if the indecent material amounts to political satire: *Kunstler v Austria* (2008) 47 EHRR 5.
146 See, for example, the case of *Laskey, Jaggar and Brown v United Kingdom* (1997) 24 EHRR 39 on the liability of individuals for taking part in consensual sado-masochistic sexual acts. See also *KA and AD v Belgium* (Application No 45558/99), decision of the European Court of Human Rights, 17 February 2005. Contrast *ADT v United Kingdom* (2001) 31 EHRR 33, where the European Court held that the conviction of the applicants for gross indecency for taking part in group homosexual activity was disproportionate and thus contrary to Articles 8 and 14 of the Convention.
The Court’s margin of appreciation is, of course, subject to change if it is satisfied that there has, since its earlier case law, been a change of attitude in European society with respect to a particular issue, or if the Court believes that the balance between rights and the interests of the state need redressing. For example, the European Court now applies a relatively narrow margin of appreciation in relation to the treatment of transsexuals, whereas previously it had taken a hands-off approach. Further, even in cases where it would normally allow a wide margin of appreciation, it has not allowed the member state a complete discretion when domestic law interferes with the essence of a Convention right, particularly where the state has not considered the appropriate balance between rights and the respective legitimate aim.

The Court has been prepared to take a robust supervisory approach, and thus to give only a narrow margin of error to the member state, in the area of press freedom. The Court regards the concept of free speech and press freedom as fundamental to the operation of any democratic state and is prepared to apply the doctrine of proportionality to its fullest extent. In *Sunday Times v United Kingdom*, the Court accepted that the laws protecting the administration of justice from unreasonable interference, unlike domestic laws of obscenity and indecency which would inevitably vary from state to state, displayed a much more common approach, allowing the Court to more easily judge the necessity of any particular interference. In such a case a more extensive European supervision corresponds to a less discretionary power of appreciation. It was also clear from that case that the Court regarded the duty of the press to inform the public on matters of great public interest as essential to the operation of any democratic society. Thus, in that case the Court was prepared to submit the law and the measure in question to the utmost scrutiny in a desire to ensure that the press was free from all but the most necessary restrictions.

Questions
What role does the ‘margin of appreciation’ play in the jurisprudence of the Convention? Do you agree that it is a necessary aspect of the European Court’s role in resolving human rights disputes?

**CASE STUDY**

*Handyside v United Kingdom (1976) 1 EHRR 737*

This case concerned the compatibility with Article 10 of the European Convention on Human Rights of the applicant’s prosecution and conviction under the Obscene Publications Act 1959. The European Court of Human Rights had to decide whether the action taken against the applicant constituted a justifiable interference with his freedom.

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149 See, for example, the Grand Chamber’s decision in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, where the European Court held that the failure of parliament to address the question of the extent to which prisoners should forgo their right to vote fell outside the state’s margin of appreciation.
150 (1979) 2 EHRR 245.
of expression (and his right to peaceful enjoyment of possessions under Article 1 of the First Protocol), and in particular whether it was necessary in a democratic society. The case is a good example of the process of adjudication employed by the Court in the case of conditional rights. It is also instructive with regard to the role of the international court when reviewing the compatibility of domestic law and its application. The case illustrates the role of the ‘margin of appreciation’ in such a process and the Court’s attempt to balance that concept with its role of ensuring that the fundamental rights laid down in the Convention are upheld by member states.

You can return to this case study when you acquire a more detailed knowledge of freedom of expression, covered in chapter 8, in particular when you study the domestic law relating to obscenity and indecency in that chapter.

The applicant owned the British publishing rights in the Little Red Schoolbook, a Danish publication that had been translated into several languages and sold in different countries. It was intended as a reference book on sexual matters and contained chapters on topics such as abortion, homosexuality, sexual intercourse and masturbation. Several hundred review copies were distributed and the book was advertised for sale at 30 pence. After several thousand copies had been sold in the United Kingdom, a number of complaints were received and the Metropolitan Police obtained a warrant to search the applicant’s premises. A number of copies were seized during the search and the applicant was subsequently charged under s.1 of the Obscene Publications Act 1959 with having in his possession for gain several hundred copies of an obscene publication. He was fined £50 by the magistrates’ court, and after his appeal to the Inner London Quarter Sessions was unsuccessful the remainder of the books were destroyed. Subsequent, unsuccessful, prosecutions were brought in Scotland, but no proceedings were brought in Northern Ireland, the Isle of Man or the Channel Islands, and the book circulated freely in most European countries. A revised edition of the book was allowed to circulate freely.

The applicant registered a complaint under the European Convention, claiming that the seizure and destruction of the books was contrary to his right of freedom of expression under Article 10, and of his right to peaceful enjoyment of possessions under Article 1 of the First Protocol. The European Commission declared the application admissible, deciding that the applicant had not failed to exhaust all effective domestic remedies by not appealing to a higher court against the decision of the Quarter Sessions. However, the Commission found no violation on the facts and referred the case to the European Court of Human Rights. The Court found that the applicant’s criminal conviction and the seizure and destruction of the books was undoubtedly an interference with his Convention right to freedom of expression, thus constituting a violation unless falling within one of the exceptions provided by Article 10(2). It was also accepted by the Court, and by the applicant, that the interference was prescribed by law in that it had a legal basis in the Obscene Publications Acts 1959/1964 and that the Act had been correctly applied in the present case. The Court thus had to decide whether the interference was necessary in a democratic society for the purpose of achieving the legitimate aim of the protection of morals.

The Court found that the Act had the legitimate aim of the protection of morals in a democratic society. (The Court later rejected a claim that the book had been penalised
purely for its anti-authoritarian views and that accordingly the restriction was not imposed for a legitimate purpose.) Accordingly, the question for the Court was whether the restriction was necessary in a democratic society for that legitimate purpose. In this respect the Court attempted to lay down the rules on determining whether an actual restriction or penalty was necessary in a democratic society. The majority of the European Commission of Human Rights was of the opinion that the Court need only ensure that the English Courts acted reasonably, in good faith and within the limits of the margin of appreciation left to the states, while the minority saw the Court's task as reviewing the publication directly in the light of the Convention and nothing but the Convention. The Court stressed that the machinery of protection established by the Convention was subsidiary to the national legal systems safeguarding human rights in that the Convention leaves to each contracting state, in the first place, the task of securing the rights and freedoms it enshrines. Thus, the Convention machinery only becomes involved through contentious proceedings and after all domestic remedies have been exhausted.

This, in the Court's opinion, applied notably to Article 10(2) of the Convention. In particular, it is not possible to find in the domestic law of the various states a uniform conception of morals; the view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era that is characterised by a rapid and far-reaching evolution of opinions on the subject.

By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as the 'necessity' of a 'restriction' or 'penalty' intended to meet them. (para 48)

The Court then considered the meaning of the word 'necessary' in the context of Article 10(2). In the Court's view, while the word was not synonymous with 'indispensable', neither did it have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, Article 10(2) leaves to the contracting states a margin of appreciation, this margin being given both to the domestic legislator and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. Nevertheless, the Court noted that Article 10(2) does not give the state an unlimited power of appreciation. The Court is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression. Thus, the domestic margin of appreciation goes hand in hand with European supervision, such supervision concerning both the aim of the measure challenged and its necessity, and covering not only the basic legislation but also the decision applying it, even one given by an independent court.

The Court then turned its attention to the principles of a democratic society. In its view the Court was obliged to pay respect to the principles of such a society and noted that freedom of expression constituted one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also
to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic ‘society’. This, in the Court’s view, means that every formality, condition, restriction or penalty imposed must be proportionate to the legitimate aim pursued. On the other hand, the Court noted that a person who exercises his freedom of expression undertakes ‘duties and responsibilities’, the scope of which depends on his situation and the technical means he uses. The Court must take this into account when deciding whether the ‘restrictions’ or ‘penalties’ were conducive to the ‘protection of morals’ which made them ‘necessary’ in a ‘democratic society’, and it is in no way the Court’s task to take the place of the domestic courts, but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation. The Court must decide whether the reasons given by the national authorities to justify the actual measures of ‘interference’ they take are relevant and sufficient under Article 10(2).

Having established the guidelines of its inquiry, the Court then considered the decision of the domestic court with regard to the publication. In this respect, the Court attached particular significance to the readership of the book, a factor that drew attention from the domestic court. The book was aimed at children and adolescents aged from 12 to 18. It was also direct, factual and reduced to essentials in style, making it easily within the comprehension of even the youngest of such readers. Although the book contained correct and useful factual information, it also included (particularly in the chapter on sex and in the passage ‘Be yourself’ in the chapter on pupils) sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful to them or even to commit certain criminal offences. In these circumstances, despite the variety and constant evolution in the United Kingdom of views and ethics and education, the domestic judges were entitled, in the exercise of their discretion, to think at the relevant time that the publication would have pernicious effects on the morals of many of the children and adolescents who would read it.

Finally, the Court considered the measures in dispute. The applicant had argued that the failure to take legal action in other parts of the United Kingdom, that the book appeared and circulated freely in the majority of the member states of the Council of Europe, and that, even in Scotland and Wales, thousands of copies circulated without impediment despite the domestic court’s ruling in 1971, showed that the judgment was not a response to a real necessity, even bearing in mind the national authorities’ margin of appreciation. The Court, however, rejected those arguments. In particular, with regard to the practice of other states, it accepted that the contracting states had each fashioned their approach in the light of the situation obtaining in their respective territories, each having regard to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed did not mean the contrary decision of the Quarter Sessions was in breach of Article 10. The Court also accepted that the failure to take proceedings in other parts of the United Kingdom did not call into question the necessity of the proceedings in England, and that the subsequent failure to prosecute the book was explainable on the grounds that by that time the book had been revised, in order to omit some of the more objectionable passages.
FURTHER RESTRICTIONS ON CONVENTION RIGHTS

Questions
1. Why, given that the applicant had not appealed to the House of Lords, did the European Commission and Court of Human Rights accept that he had exhausted all effective domestic remedies?
2. What aspect of freedom of expression had been interfered with in this case? Is there any evidence from the judgment to suggest that the Court regarded this type of speech as less important than other expression, such as political speech?
3. Do you think that the protection of morals can be, and was in this case, a legitimate reason for restricting freedom of expression?
4. How did the European Court define the term ‘necessary’ when deciding whether the restriction was ‘necessary in a democratic society’?
5. What did the Court identify as the necessary ingredients of a democratic society?
6. Why, in the Court’s opinion, is it necessary to give the respondent state a margin of appreciation, and what sort of margin is available in cases of this type?
7. Do you think that the Court achieved a correct balance between protecting fundamental rights and preserving the state’s right to protect public morals?
8. The case was decided in 1976. Having regard to changing moral values, the changing role of the European Court of Human Rights, and its subsequent case law, do you think that the case would be decided differently today?

Further restrictions on Convention rights

This section of the text examines those articles of the European Convention which allow further restrictions to be placed on the enjoyment of a person’s Convention rights, including the powers of derogation (Article 15) and reservation (Article 57) and the restriction of the rights of aliens (Article 16) and those whose claims threaten the rights of others (Article 17).

Article 15 – Derogations in times of war or other public emergency

In times of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Article 15 of the Convention recognises that different considerations may apply to the safeguarding of human rights in times of war or other situations of emergency. It thus allows a member state to ‘derogue’ from its strict Convention obligations by, for example, passing provisions or taking action in order to deal with that emergency situation without breaching its obligations under the Convention. During such times there is often an increased threat to national security or territorial integrity, or to public safety, and in such situations it is common for a state to grant state authorities greater powers to arrest and detain individuals, to restrict free speech which might otherwise endanger national security or the successful prosecution of the war effort, to seize property or, more positively, to force individuals to comply
with civic duties such as military conscription. All these measures will have an impact, or an increased impact, on the enjoyment of individual rights and liberties, and thus the obligations of the state under such treaties as the European Convention.151

Article 15 qualifies the right of derogation in several respects and any measures will need to be passed or carried out for a legitimate, and objectively justified, purpose and will also need to be reasonable and proportionate. First, a High Contracting Party can only take such measures as are strictly required by the exigencies of the situation. Not only does the Convention retain control over the member state during these times, deciding what measures are necessary, but by using the phrase strictly required, it also indicates that the measures must correspond to a very pressing social need and meet a strict test of proportionality. Thus, although the member state will be afforded quite a wide margin of error in such situations, Article 15 gives the Convention organs the right to monitor the emergency situation and to provide some objective review of the emergency and the measures necessary to deal with such. Secondly, the measures taken by the member state must not be inconsistent with its other obligations under international law. This provision strengthens the supervisory role of the Convention and makes it clear that any derogation must comply with other internationally accepted standards applying to war or other emergency situations.

Thirdly, Article 15 provides that no derogation is allowed in respect of certain Convention rights. Thus, no derogation is possible in relation to Article 2 (the right to life), (excluding deaths resulting from lawful acts of war), Article 3 (prohibition of torture, etc.), Article 4(1) (prohibition of slavery or servitude) or to Article 7 (prohibition of retrospective criminal law). This reflects the view that there are certain rights which should never be transgressed, whatever the circumstances or possible justification, and accordingly certain things which should never be carried out in the defence of the state and of social justice. Finally, Article 15 lays down a procedure that must be followed by a member state if it wishes to take advantage of its powers of derogation. Any High Contracting Party using the right of derogation must keep the Secretary-General of the Council of Europe informed of the measures which it has taken, along with the reasons thereof (the state must also inform the Secretary-General when such measures have ceased to operate and that the provisions of the Convention are being fully executed).

Both the European Court and Commission of Human Rights have considered Article 15 in a number of cases. In the early case of Lawless v Ireland (No 3),152 although the Court found that the detention of the applicant without trial for a period of five months was in violation of Article 5(3) of the Convention, it held that the Irish government was entitled to derogate from its obligations by virtue of the existence of a public emergency. The Court stressed that the measures governments can take when derogating are strictly limited to what is required by the exigencies of the situation and must not be in conflict with other international law obligations. However, the Court was satisfied that those strict limitations were met in the present case. The Court held that the respondent government should be afforded a certain margin of error or appreciation in deciding what measures were required by the situation,


152 (1961) 1 EHRR 15.
and it was not the Court’s function to substitute for the government’s assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism.\(^\text{153}\) Moreover, the Court must arrive at its decision in the light of the conditions that existed at the time that the original decision was taken, rather than reviewing the matter retrospectively.

The legality of derogation measures was considered in the case of *Brannigan and McBride v United Kingdom*,\(^\text{154}\) concerning the United Kingdom’s derogation in relation to Article 5 following the European Court’s decision in *Brogan v United Kingdom*.\(^\text{155}\) In *Brogan* the European Court held that the detention provisions contained in the Prevention of Terrorism Act 1978 were in contravention of Article 5(3) of the Convention, which guarantees the right of detained persons to be brought promptly before a judge or other officer. The government then lodged a derogation in respect of Article 5(3), claiming that the emergency position in Northern Ireland justified such derogation. This derogation was challenged in *Brannigan and McBride*, but the European Court held that it was justified, even though the derogation had not been lodged before the Court’s decision in *Brogan*. The Court accepted the government’s contention that there was an emergency situation, and held that the derogation was not invalid merely because the government had decided to keep open the possibility of finding a means in the future of ensuring greater conformity with Convention obligations. The Court was also satisfied that there were effective safeguards such as the availability of *habeas corpus* to safeguard against arbitrary action. The derogation was withdrawn by the United Kingdom government in 2001 when the Terrorism Act 2000 was passed,\(^\text{156}\) but another derogation was lodged by the government in respect of Article 5(1)(f) of the Convention and the deportation of terrorist suspects.\(^\text{157}\)

### Article 57 – The power to make reservations

In addition to the right of derogation under Article 15, Article 57 of the Convention allows a state to make reservations to particular provisions of the Convention when it is ratifying the Convention. This reservation must be in relation to laws which exist at the time of ratification of the Convention and which are not at that time in conformity with the particular provision. Article 57 does not allow reservations of a general character, and any reservation shall contain a brief statement of the law concerned. The right to make reservations under an international treaty is quite common and accommodates the position where the enforcement of some rights, or their enforcement to a particular degree, would be in conflict with that state’s cultural or social values. Although the Convention contains no formal control mechanism

\(^{153}\) In *A v Secretary of State for the Home Department* [2005] 2 AC 68, the majority of the House of Lords appeared to draw a distinction between the question of whether there was a public emergency (primarily a political question for politicians to decide) and whether the measures were proportionate (primarily a legal question for the courts to determine). The case is discussed fully in chapters 6, 7 and 14 of this text.

\(^{154}\) (1993) 17 EHRR 539.

\(^{155}\) (1989) 11 EHRR 117.

\(^{156}\) This was achieved by the Human Rights Act (Amendment) Order (2001) SI 2001/1216.

\(^{157}\) The Human Rights Act (Designated Derogation) Order (2001) SI 2001/3644. This derogation was placed to accommodate provisions of the Anti-Terrorism, Crime and Security Act 2001 and was successfully challenged in *A v Secretary of State for the Home Department*, n 153, above, and in *A v United Kingdom* (2009) 49 EHRR 29. The case is explored in chapters 3, 6 and 14 of this text.
of this power of reservation, because reservations are made at the time of ratification, the Council of Europe will have the ultimate say on whether a state is allowed to ratify and thus unreasonable reservations can be controlled at that stage.

The United Kingdom made a reservation with regard to Article 2 of the First Protocol to the Convention, which states that no person shall be denied the right to education and which imposes a duty on each state to respect the rights of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. When ratifying the Convention the United Kingdom government made a reservation in respect of this Article which states that the duty to ensure teaching in conformity with religious and philosophical convictions is accepted only so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.\(^{158}\)

### Article 16 – Restrictions on the political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 16 of the Convention seeks to restrict the rights of political aliens to enjoy their rights of freedom of expression, freedom of association and peaceful assembly. It seeks to justify, on grounds of national security and territorial integrity, a lesser protection of those rights in relation to an alien’s political activities. The article also allows restrictions to be placed on the right of freedom from discrimination in the enjoyment of their Convention rights under Article 14. However, this only applies in relation to the political activity of such persons, leaving unaffected their other Convention rights, such as the right to life, freedom from torture, liberty and security of the person and the right to a fair trial where this does not involve the political activity of such persons.

The provision has been interpreted quite restrictively,\(^{159}\) and the Council of Europe has called for its abolition.\(^{160}\) Further, at the domestic level, in \textit{R v Secretary of State for the Home Department, ex parte Farrakhan},\(^{161}\) the Court of Appeal held that Article 16 was not engaged where a person was refused entry into the country in order to prevent him from exercising his right to free speech, and the government would need to rely on the restrictions in Article 10(2) of the Convention. In the Court’s view, Article 16 only applies where entry is refused, or the person is expelled, for reasons wholly independent of the exercise by the alien of Convention rights, even where the consequence is that such rights will be curtailed. In any case, it exists independently of the member state’s right to take such action to protect itself and its citizens on grounds such as national security. Thus, the Court may widen the margin of appreciation given to states when dealing with matters such as the deportation of persons on the grounds of public good, provided such person’s basic rights are not violated.\(^{162}\)

\(^{158}\) This reservation is contained in Schedule 3 of the Human Rights Act 1998.

\(^{159}\) \textit{Piermont v France} (1995) 20 EHRR 301.


\(^{161}\) \[2002\] 3 WLR 481.

\(^{162}\) See, for example, \textit{Chahal v United Kingdom} (1997) 23 EHRR 413.
Article 17 – Prohibition on the abuse of rights

Nothing in this Convention shall be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Although many Convention breaches can be justified provided they meet the requirements of legality and necessity laid out in the Convention and the relevant case law, Article 17 goes further in excluding the enjoyment of Convention rights by those whose activities destroy the Convention rights and freedoms of others. In most cases the breach of the applicant’s right can be justified within the other provisions of the Convention, such as Article 10(2). Article 17, therefore, operates to disqualify the applicant from even relying on the Convention right, allowing the Court to dispense with the case on the grounds that the claim is inconsistent with the terms of the Convention.

The provision is aimed particularly at extremist groups, whose primary agenda is the destruction or denial of the human rights and fundamental freedoms of others. For example, groups with a racist agenda, who take action for the sole purpose of undermining and destroying the rights of others, will fall outside the Convention’s protection as that body’s activities are considered to be inconsistent with the spirit of the Convention. In *Glimerveen and Hagenbeek v Netherlands* the European Commission applied Article 17 in a case where the applicants had been prosecuted for the possession of leaflets likely to cause racial hatred, and had further been excluded from local elections. Hence, the applicants’ claims that those measures violated their right to free speech and the state’s duty to hold free elections were declared inadmissible.

Article 17 is, however, subject to limitations. It only applies to activities that threaten the enjoyment of others’ Convention rights. Thus, the article does not apply to take away rights that do not impinge on others’ rights, such as the right to a fair trial or liberty and security of the person. In addition, any measures taken under Article 17 must be proportionate to the threat to the rights of others. In the light of these restrictions, most cases will be decided on the basis of whether the restriction was in accordance with the justifiable restrictions laid down in provisions such as Articles 8–11. Otherwise, Article 17 might be used to disqualify certain actions or bodies by reference only to the unacceptability of that body’s political or other ideals, thus sidestepping questions regarding the legitimacy and reasonableness of the particular measure. Article 17 will, thus, be reserved for those rare cases where the person or group has resorted to acts of violence or clear racial hatred. This approach is supported by Article 18 of the Convention, which provides that the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. This provision stops the imposition of restrictions on the enjoyment of Convention rights when such restrictions cannot be justified either.

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163 (1979) 18 DR 187.
164 *Lawless v Ireland* (1960) 1 EHRR 1.

In this case the court held that the expression of ideas did not constitute an ‘activity’ within the meaning of Article 17.
166 See, for example, *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121.
under provisions such as Article 10(2) or in cases where the exclusion of the right is justified
under provisions such as Articles 15–17.

Nevertheless, Article 17 was used in conjunction with Article 10(2) of the Convention to
restrict racially offensive speech in the case of Norwood v United Kingdom.\textsuperscript{167} In this case the
applicant had been convicted of a racially aggravated public order offence when he had
displayed a banner proclaiming ‘Islam out of Britain’.\textsuperscript{168} The European Court declared his appli-
ication inadmissible because the expression fell within Article 17. In the Court’s view a general
and vehement attack against a religious group was incompatible with the values of the
Convention. The decision could be criticised on the basis that it allows the Court to sidestep
the requirements of legality and necessity in Article 10(2) and that it instead prohibits speech
of a particular nature. However, provided the Court examines Article 17 claims in the light of
those requirements, Article 17 can be justified in prohibiting pure hate speech that is dam-
aging to both individual rights and democratic values.\textsuperscript{169}

Questions
What purpose is served in allowing a state to derogate from its obligations or to make reserva-
tions under the Convention? Are those powers destructive of the values of the Convention?
What purpose does Article 17 of the Convention serve with respect to upholding the values
of the Convention?

The Convention rights

The substantive rights guaranteed under the European Convention are contained in Section 1
of the Convention, Articles 2–18. This section of the Convention also guarantees an effective
remedy in relation to enforcement of those rights and provides the right to enjoy those rights
free from discrimination. These rights are also supplemented by subsequent protocols, which
contain additional rights such as the right to education and the enjoyment of property. This
part of the Convention also permits restrictions on the enjoyment of Convention rights in
certain circumstances, such as war or other public emergency (Article 15), and Article 17
provides that the rights under the Convention cannot be used for the destruction of other
people’s rights under the Convention (see above).

Absolute and conditional rights

Some of the rights under the European Convention and its protocols are referred to as abso-
lute rights, whereas others are referred to as conditional. This distinction is based on two
factors. First, certain rights under the Convention are regarded as so fundamental that they
are not capable of being derogated from, even in situations of war or other public emergency,
as provided in Article 15. For example, Article 3, prohibiting torture and other forms of

\textsuperscript{167} (2005) 40 EHRRR SE 11.
\textsuperscript{168} Norwood v DPP, The Times, 30 July 2003.
\textsuperscript{169} See Geddis, Free Speech Martyrs or Unreasonable Threats to Social Peace: ‘Insulting’ Expression and Section 5
ill-treatment, cannot be violated by a member state under any circumstances. Similarly the rights contained under Article 2— the right to life (although Article 15 makes an exception for deaths resulting from lawful acts of war), Article 4(1)— freedom from slavery, and Article 7— prohibition of retrospective criminal law, are similarly excluded from Article 15, thus attaining an absolute status under the Convention.170

Secondly, and more generally, the Convention makes the distinction between absolute and conditional rights in relation to whether that right can be interfered with in normal circumstances. In this sense some of the Convention rights, including the right not to be subject to torture or other ill-treatment, are regarded as absolute, while rights such as freedom of speech and the right to private life are expressly subject to restrictions, allowing the state to interfere with those rights within certain limits. Thus, in the case of Article 3, once it has been established that a violation has taken place, there can be no justification for that violation. In comparison, once it is established that a person’s freedom of expression has been violated under Article 10, a member state may justify that violation by proving that the restriction was prescribed by law and was necessary for the purpose of achieving a legitimate aim, such as public morality. Freedom of expression is, therefore, a conditional right: it is not to be enjoyed absolutely in every situation and has to be balanced against other interests.

This distinction between absolute and conditional rights determines the role of the European Court of Human Rights, which is primarily to interpret and apply the terms of the Convention. In the case of an absolute right, such as freedom from torture under Article 3, the Court’s role is to interpret the term ‘torture’ and then to decide whether the particular case before it reveals a violation of that term. Once that function is performed there is no further inquiry into possible justifications for that act, the right is absolute and the Court’s finding determines the case.171 In the case of conditional rights, however, the Court must first determine whether there has been a violation of that right on the facts. This will involve the Court in determining the meaning and scope of particular terms in the relevant article, such as ‘private life’ or ‘expression’. The Court must then determine whether there has been a violation of that right on the facts, for example whether the applicant’s freedom of speech was interfered with in that case. Once the Court determines that there has been a prima facie violation, it must then consider whether that violation can be justified within the exceptions allowed under the Convention: whether the interference was prescribed by law, whether it pursued one of the legitimate aims laid down in the Convention, and whether the interference was necessary in a democratic society. Thus, the Court seeks to perform some sort of balancing act between that right and other rights or interests with which the Convention right appears to conflict.172

There are also rights which appear to be absolute but which have been interpreted either to include implied exceptions or to be subject to legitimate and necessary restrictions. For example, Article 14, which provides that no one shall be subject to discrimination in the

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170 That is absolute in the sense of the right being non-derogable. Both Articles 2 and 7 contain express limitations making the right not absolute in every sense.

171 It is, however, argued that the European Court employs the principles of necessity and proportionality in the interpretation of the terms employed in Article 3. See Palmer, A Wrong Turning: Article 3 ECHR and Proportionality [2006] CLJ 438.

172 In such a case the Court is concerned not with a choice between two conflicting principles, but with a principle of freedom of expression subject to a number of exceptions which must be narrowly construed: Sunday Times v United Kingdom (1979) 2 EHRR 245.
enjoyment of their Convention rights, has been interpreted to allow rules or practices of discrimination that have a reasonable and objective justification, and which are legitimate and proportionate according to the tests applied to interferences with conditional rights such as freedom of expression.  

173 Similarly, some Convention rights appear to allow a member state an unlimited discretion to exclude persons from the enjoyment of their Convention rights, yet the European Court has insisted that they must only be applied to a degree that does not destroy the essence of that right, and in accordance with principles of proportionality. For example, although the right to marry in Article 12 is stated to be dependent on national laws governing the exercise of that right, any limitations must not destroy the essence of the right to marry.  

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### Article 2 – The right to life

Everyone’s right to life should be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law.

Article 2 of the Convention protects the most fundamental of human rights, the right to life.  

The right cannot be derogated from even in times of war and other public emergency, except in respect of deaths resulting from lawful acts of war, but under Article 2(2) the taking of a person’s life can be justified when it results from the use of force, which is no more than absolutely necessary, in order, for example, to effect a lawful arrest. Article 2 applies to deliberate and disproportionate acts committed by state officials, the acts of private individuals, which the state authorities should have prevented, and the deliberate acts of the victim. It also imposes a duty on every member state to carry out a proper investigation into any deaths that have occurred within its jurisdiction.

The death penalty is expressly provided for in the first sentence of Article 2, although optional Protocol No 6 of the European Convention provides that the death penalty shall be abolished and that no one shall be condemned to such penalty or executed, and Protocol No 13, abolishes the death penalty in all circumstances. Both protocols have been ratified by the United Kingdom. In addition, it is has now been held that the death penalty is contrary to Article 3 of the Convention, prohibiting inhuman treatment.


174 See, for example, *Hamer v United Kingdom* (1979) 24 DR 5 – a prohibition on convicted prisoners marrying while in prison was contrary to the right to marry under Article 12. See also *B and L v United Kingdom* (2006) 42 EHRR 11, dealt with in chapter 12.

175 This right is examined in detail in chapter 4 of this text.

176 In *Pretty v United Kingdom* (2002) 35 EHRR 1, it was held that the right to life under Article 2 did not guarantee the right to die, and in *Vo v France* (2005) 40 EHRR 12 it was held that Article 2 did not guarantee the right to life of the unborn child.


181 *Al-Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9, re-considering the previous judgment in *Ocalan v Turkey* (2005) 45 EHRR 1. The case will be dealt with in detail in chapters 4, 5 and 14 of the text.
Article 3 – Freedom from torture and inhuman and degrading treatment and punishment

No one shall be subject to torture or to inhuman or degrading treatment or punishment.

This right is absolute in the sense that it admits of no exceptions or reservations once the Court is satisfied that the minimum level of severity to find a violation has been reached on the facts. The role of the European Court is simply to define the terms ‘torture’ and ‘inhuman and degrading treatment or punishment’ to see what type and level of treatment is capable of falling within their scope and then decide whether a violation has taken place.\(^\text{183}\)

Article 3 imposes on each member state a positive obligation to ensure that a person does not suffer ill-treatment at the hands of others, including private individuals,\(^\text{184}\) and state officers who are responsible for the care of individual persons, such as social workers.\(^\text{185}\) A member state can also be responsible for the violations committed by another state, if they deport or extradite individuals when there is a sufficient risk of harm.\(^\text{186}\)

Article 4 – Prohibition of slavery and forced labour

No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour.

Article 4(1) prohibits slavery and servitude in absolute terms and no derogation is allowed of this aspect of Article 4, even in times of war or other public emergency. Slavery and servitude refers to the civil status of a person and denotes total ownership at the hands of the state, whereas forced and compulsory labour is concerned with (usually temporary) work done under threat of some form of penalty. In this respect it has been held that the work in question must be done against the will of the person and that the work to be performed is unjust or oppressive or involves avoidable hardship.\(^\text{187}\) This aspect of Article 4 can be derogated from under Article 15 and is also subject to a number of exceptions listed in Article 4(3), which can apply in peacetime. For example, the phrase ‘forced or compulsory labour’ is stated not to include work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of the Convention or during conditional release from such detention. Thus, work done in the ordinary course of a prison sentence would not normally amount to a violation of Article 4, and it has been held that such work must be aimed at the rehabilitation of the prisoner.\(^\text{188}\) Also, such work must not contravene Article 3 of the Convention.

Article 4(3) also excludes any service of a military character, or in the case of conscientious objectors in countries where they are recognised, service exacted instead of such military service. Thus there is no right to conscientious objection, and in Johansen v Norway\(^\text{189}\) the

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\(^{182}\) Examined in detail in chapter 5 and, with respect to prisoners’ rights, in chapter 8.

\(^{183}\) The terms employed in Article 3 were explored in Ireland v United Kingdom (1978) 2 EHRR 25.

\(^{184}\) A v United Kingdom (1999) 27 EHRR 611.

\(^{185}\) Z v United Kingdom (2002) 34 EHRR 3.

\(^{186}\) Soering v United Kingdom (1989) 11 EHRR 439.

\(^{187}\) In X v FRG (1974) 46 CD 22, the Commission held that a lawyer could not complain of having to act as unpaid or poorly paid defence counsel as he had entered the legal profession knowing that he might have such an obligation.

\(^{188}\) De Wilde, Ooms and Versyp v Belgium (1971) 1 EHRR 373.

\(^{189}\) (1985) 44 DR 155.
European Commission not only upheld the validity of compulsory military service but also held that the exception would, by implication, preclude any claim under Article 9 of the Convention. The state is also provided with discretion whether to recognise conscientious objectors and, at its discretion, to provide alternative compulsory service in lieu of that of a military nature.

Most of the case law has emanated from the other exceptions listed in Article 4(3): service exacted in the case of an emergency or calamity threatening the life or well-being of the community, and any work or service which forms part of normal civic obligations. With regard to the latter exception, the Court and Commission have offered a wide margin of appreciation to each state and have required strong evidence of unjust and arbitrary work conditions. For example, in Van der Mussele v Belgium it was held that there was no violation of Article 4 when a lawyer was ordered to provide pro bono services to some of his clients. Although the Court recognised that the fact that he was aware of such an obligation was not conclusive, it also noted that the obligation involved a relatively short period of time and facilitated an individual’s right to a fair trial as guaranteed by Article 6 of the Convention.

The meaning and application of Article 4 in the context of ‘domestic slavery’ was considered recently by the European Court in Siliadin v France. The applicant, a young Togolese national, had been brought to France by D and had been used as an unpaid help for four years, first by D and her husband and then by another couple (B) who were friends of D. The applicant became a ‘maid of all work’ to the couple, who made her work every day, only giving her special permission to go to mass on certain Sundays. She slept in the children’s bedroom on a mattress on the floor and wore old clothes. During this time she was never paid, although she did receive one or two 500-franc notes from Mrs B’s mother. Criminal proceedings were brought against Mr and Mrs B, but they were acquitted on appeal. The Versailles Court of Appeal considered the case with respect to civil liability and found them guilty of making a vulnerable and dependent person work unpaid for them, but considered that her working and living conditions were not incompatible with human dignity. It ordered them to pay the applicant the equivalent of €15,245 in damages.

The applicant claimed a violation of Article 4 and the European Court held that her treatment did not amount to ‘slavery’ under Article 4 because although she had lost her autonomy there was insufficient evidence that her ‘employers’ had exercised a genuine right of ownership over her. However, the Court found that she had been held in servitude as she was as an unofficial immigrant and thus vulnerable and isolated and entirely dependent on her employers for all assistance. The Court also held that the failure of domestic law to create a specific criminal offence against slavery and the failure to secure a criminal conviction against her abusers for wrongfully using the services of a dependent person, meant that the state were in violation of their positive duty to ensure that individuals were not subject to treatment in violation of Article 4.

190 See Gilbert, The Slow Development of the Right to Conscientious Objection to Military Service under the European Convention on Human Rights [2001] EHRLR 554. An individual might, in extreme cases, have a claim under Articles 3 or 8 of the Convention, or under Article 14.

191 This phrase has been held to include a requirement to serve in the fire brigade or to pay a financial contribution in lieu of such service: Schmidt v Germany (1994) 18 EHRR 513. On the facts the Court held that there had been a violation of Article 14 of the Convention because the requirement applied only to men.

192 (1983) 6 EHRR 163.

The case illustrates the possible liability of the state for modern practices of slavery and servitude, in that although the state might not specifically sanction such practices, its liability under Article 4 may be engaged if it either knowingly condones such practices, or fails to pass or enforce appropriate laws that provide appropriate safeguards or remedies to the individual victim. It is interesting to note, therefore, that s.71 of the Coroners and Justice Act 2009, which came into effect on 6 April 2010, creates a new offence of holding someone in slavery or servitude, or requiring them to perform forced or compulsory labour.

**Article 5 – Liberty and security of the person**

Everyone has the right to liberty and security of the person.

Article 5 protects a person’s liberty rather than the general right of freedom of movement, which is guaranteed by Article 2 of the Fourth Protocol.

The basic right to liberty and security of the person is subject to a number of exceptions contained in Article 5(1)(a)–(f), although any interference must be ‘in accordance with a procedure prescribed by law’ and must safeguard against arbitrary arrest and detention. In addition, Article 5 provides that everyone who is arrested shall be informed properly, in a language which he understands, of the reasons for his arrest and of any charge against him; that everyone arrested or detained shall be brought promptly before a judge; that everyone deprived of their liberty by arrest or detention can take proceedings by which the lawfulness of their detention shall be decided speedily by a court; and that the victim of an arrest or detention in contravention of Article 5 shall have an enforceable right to compensation.

**Article 6 – The right to a fair and public hearing**

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6 guarantees the right to a hearing before an impartial and unbiased court or tribunal, the right of a person to be informed of any accusation made against them, and the right to present one’s case, including the right to be presumed innocent of any criminal offence, the right to legal advice and the right to examine witnesses. It applies to all proceedings where either the applicant is facing a criminal charge, or where his or her ‘civil rights and obligations’ are subject to determination.

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194 Contrast *Tremblay v France* (Application No 37194/02), decision of the European Court, 11 September 2007, where it was held that there was no evidence to suggest that the state’s insistence that the applicant pay family allowance contributions had forced her into a life of prostitution in breach of Articles 3 and 4 of the Convention.

195 In addition, Parliament has passed the Anti-Slavery Day Act 2010, which introduces a national day to raise awareness of the need to eradicate all forms of slavery and human trafficking.

196 See chapter 6 for a detailed analysis of the article.

197 *Gazzardi v Italy* (1980) 3 EHRR 333. See also the House of Lords’ decision in *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642, and *Gillan v United Kingdom* (2010) 50 EHRR 45, both discussed in chapter 6.

198 See chapter 7 of this text for a detailed examination of Articles 6 and 7.
The European Court has held that the right of access to the courts is implicit in the article, and in *Airey v Ireland* it held that the right of access may involve the provision by the state of positive facilities to allow effective access to legal redress. Article 6 also guarantees by implication the right to a fair sentence.

In addition to the general right to a fair trial, contained in Article 6(1), Article 6(2) states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. There are further guarantees to be informed promptly, in a language which one understands and in detail, of the nature and cause of the accusation; to have adequate time and facilities for the preparation of one’s defence; to defend oneself in person or through legal assistance (including the right to free representation when the interests of justice so require); and to examine, or have examined, witnesses and to obtain the attendance and examination of witnesses.

### Article 7 – Prohibition of retrospective criminal law

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time that the criminal offence was committed.

Article 7 of the Convention upholds the basic principle of the rule of law that laws should be prospective rather than retrospective, and lays down two basic principles: that no one shall be guilty of an offence for an act which at the time of its commission was not an offence in domestic or international law; and that no one should be subjected to a heavier penalty than the one which existed at the time of the offence.

Article 7(2) states that the trial and punishment of a person for an act which at the time it was committed was criminal according to the general principles of law recognised by civilised nations will not be in violation of Article 7.

### Article 8 – Right to private and family life

Everyone has the right to respect for his private and family life, his home and his correspondence. Article 8 includes the right to be free from unlawful and unreasonable interferences with the right to private and family life and the state may be responsible for providing the resources necessary for the enjoyment of these rights. The European Court has also accepted that the state must ensure that an individual’s Article 8 rights are not interfered with by private individuals.

The Article covers a variety of private and family interests, including the right to respect for one’s physical integrity, the right to one’s own space, and the right to communicate private

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199 *Golder v United Kingdom* (1975) 1 EHRR 524.
200 (1979) 2 EHRR 305.
201 *V and T v United Kingdom* (1999) 30 EHRR 121.
202 Covered in chapter 7 of this text, alongside the right to a fair trial under Article 6.
203 The right to private and family life is examined in detail under chapter 11 of this text.
204 *Marcx v Belgium* (1979) 2 EHRR 330.
205 See *X and Y v Netherlands* (1985) 8 EHRR 235.
information with others. In addition it has been used to allow individuals to have access to personal information. The right to private and family life also includes the right to a private sexual life, including the right to choose and practise one’s sexual identity, and to forge relationships with others and to enjoy the benefits of family and home life. Article 8 is a conditional right and interferences with the exercise of the right by a public authority are permitted under Article 8(2) provided they are in accordance with law and necessary in a democratic society in pursuance of a number of listed legitimate aims.

**Article 9 – Freedom of thought, conscience and religion**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 9 supplements the rights to freedom of expression and association and protects an individual from persecution on grounds of his or her thoughts, beliefs or religion. Article 9 is not limited to religious beliefs or convictions, but does not apply to every opinion and conviction of the individual. The article also guarantees the right to manifest one’s religion or beliefs, but this right is subject to limitations that are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9 also imposes a positive obligation on the state to allow individuals the right to manifest and enjoy their beliefs peacefully and without undue interference.

**Article 10 – Freedom of expression**

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 10 is concerned primarily with the right of the individual to be free from restrictions on their freedom of expression rather than the general right of freedom of information. The European Court has stated that freedom of expression constitutes one of the essential foundations of a democratic society, and that Article 10 is applicable not only to information or ideas that are favourably received, but also to those that shock, offend or disturb. However, it has placed special significance on public interest speech and press freedom.

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207 Covered in chapter 12 of this text.
208 Arrowsmith v United Kingdom (1978) 3 EHRR 218.
210 Sahin v Turkey (2007) 44 EHRR 5.
211 Dubowska and Skup v Poland (1997) 24 EHRR CD 75.
212 Article 10 is examined in general under chapter 8 of this text and specifically in chapter 9, dealing with freedom of expression and press freedom.
214 Handyside v United Kingdom (1976) 1 EHRR 737.
215 Sunday Times v United Kingdom (1979) 2 EHRR 245.
Article 10 is a conditional right and paragraph 2 of Article 10 states that the exercise of the rights contained in paragraph 1 carry with it duties and responsibilities and are therefore subject to formalities, conditions, restrictions and penalties that are ‘prescribed by law’ and ‘necessary in a democratic society’ for the furtherance of a legitimate aim.

**Article 11 – Freedom of assembly and association**

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Article 11 protects two basic rights: freedom of association with others, including the right to join a trade union, and the right to peaceful assembly.

The right of association with others includes the right to form trade unions, including the right to non-association. However, the Court has confirmed that the inclusion of trade unions in Article 11 did not exclude political parties. Article 11 also protects the right to peaceful assembly, which imposes a positive duty on every member state to ensure that everyone can enjoy the right of peaceful demonstration.

Article 11 is a conditional right and restrictions may be placed on the exercise of those rights provided they are prescribed by law and necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

**Article 12 – The right to marry**

Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of that right.

Article 12 complements Article 8 of the Convention, guaranteeing the right to family and private life, by providing a right to marry and to found a family. The European Court has held that Article 12 does not guarantee the right to divorce; although in *F v Switzerland* it held that if national law did allow divorce, it must not place unreasonable restrictions on a person’s right to remarry. Although traditionally the European Court and Commission had held that the right to marry applied only to persons of the opposite sex, that position has been altered by more recent case law.

Article 12 is a conditional right, although the European Court and Commission have interpreted Article 12 to mean that any restriction on the right to marry must not destroy the very essence of the right contained in the article.

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217 Covered in chapter 10 of this text.
218 *Swedish Engine Drivers’ Union v Sweden* (1976) 1 EHRR 617. It also confers the right of that association to regulate its membership: *ASLEF v United Kingdom* (2007) 45 EHRR 34.
219 *Young, James and Webster v United Kingdom* (1982) 4 EHRR 38.
221 *Platform Ärzte für das Leben v Austria* (1991) 13 EHRR 204.
Article 13 – The right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 13 complements Article 1, which places a duty on member states to secure the rights and freedoms laid down in the Convention, and thus insists that a person should enjoy such rights at domestic level.

Article 13 does not impose an obligation on the state to incorporate the Convention into domestic law provided an individual can enjoy the essence of those rights in domestic law. Thus, there will be a violation of Article 13 if domestic law fails to recognise a particular Convention right, and where a person’s Convention rights have been violated they are entitled to receive compensation in appropriate cases. A person should also be able to argue his or her case in accordance with Convention principles, including the right to argue that any interference was unnecessary or disproportionate.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 seeks to ensure that everyone enjoys the rights and freedoms laid down in the Convention and its protocols, irrespective of their sex, race or colour, etc. It does not provide a ‘free-standing’ right not to be discriminated against, and any complaint of discriminatory treatment under this article must be related to the alleged violation of another Convention right. However, the Court may find a violation of a Convention right when that alleged violation is considered together with a violation of Article 14. In addition, the optional Protocol No 12, not ratified by the United Kingdom, imposes a general prohibition on discrimination, thus establishing a general right of freedom from discrimination.

Article 14 is not an absolute right and in the ‘Belgian Linguistic’ case the European Court held that the principle of equality in Article 14 is only violated if the difference in treatment has no objective or reasonable justification.

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231 Article 14 of the Convention is examined in chapter 13 on freedom from discrimination (pages 708–17).
233 Abdulaziz Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471.
234 (1968) 1 EHRR 252.
**Additional protocols to the Convention**

**Article 1 of the First Protocol – Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

This article guarantees the right to peaceful enjoyment of possessions, which includes all property rights, and states that no one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The article states further that the right does not in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. The article is thus divided into three rules: the principle of peaceful enjoyment of property; the deprivation of possessions; and the right of states to control the use of property in the public interest. The article can also be used in conjunction with other Convention rights, such as the right to private and family life. Thus in *Gillow v United Kingdom*, it was held that the law of Guernsey prohibiting the applicants from residing in their own house because they failed to satisfy residence criteria was a disproportionate interference with their right to private and family life.

The Article leaves a wide discretion to each member state to deprive a person of his right to his possessions, and to regulate the ownership and use of personal and real property, including the right to raise taxes. The Court has held that the state will be afforded a wide margin of appreciation in deciding what measures are necessary in the control of a person’s possessions, particularly in the area of planning control. This wide area of discretion in balancing the public and individual interests was evident in *James v United Kingdom*, where it was held that the Leasehold Reform Act 1967, which forced landlords to sell the freehold of their properties or to extend current leases, was justified as being in the public interest. The Court found that the legislation had a legitimate aim and that the scheme itself, including the provision for compensation payable to the landlords, was within the wide margin of appreciation available to the state. The Court stressed that it would not interfere unless the judgment of the national parliament was manifestly without reasonable foundation in the enactment of the statute. Similarly, in *National and Provincial Building Society v United Kingdom* it was held that retrospective legislation passed to validate tax regulations, allowing income tax to be collected in respect of the applicant’s building society accounts, was not in violation of Article 1. There was an obvious and compelling public interest to ensure that private entities did not enjoy the benefit of a windfall created by a changeover to a new tax regime, and the applicants were aware of parliament’s intention to legislate in this area.

235 In *Nerva and Others v United Kingdom* (2003) 36 EHRR 4, it was held that waiters’ tips came within the term ‘possessions’.


237 (1987) 13 EHRR 593. Article 1 of the First Protocol could not be relied upon because Guernsey was not bound by that protocol.


239 (1986) 6 EHRR 123.

However, the exercise of such powers must accord, at least to a reasonable degree, with the principles of legality and proportionality. For example, in Sporrong and Lonnroth v Sweden\(^{241}\) it was held that the right to peaceful enjoyment of possessions requires the Court to strike a fair balance between the interests of the community in general and the protection of the individual's fundamental rights. In that case it was held that the expropriation of the applicants' property was in violation of Article 1 as the relevant expropriation laws were inflexible and did not take into account the fact that the applicants' permits to use the land had been in force for extremely long periods of time. Further, there should have been some provision for review of the permits at reasonable intervals.\(^{242}\)

Further, if an individual’s property rights are subject to interference under domestic law, that law should provide sufficient procedural safeguards against potential unfairness.\(^{243}\) This issue has been the subject of recent litigation regarding the domestic laws of adverse possession and in Pye (Oxford) Ltd v United Kingdom\(^{244}\) the European Court held that there had been a violation of Article 1 when landowners had lost possession of their land under the domestic rules on adverse possession, allowing a non-owner’s rights to usurp those of the true owner after a period of undisputed possession.\(^{245}\) In the Court’s view the laws provided inadequate protection to the true owners, particularly as there was no statutory right for them to be notified of the possessor’s intention to claim those rights.\(^{246}\) However, on appeal that decision was overturned, the Grand Chamber concluding that the law did, in fact, provide sufficient protection to the original owner.\(^{247}\) The Grand Chamber held that a rule preventing the owner from recovering possession of land could not be said to be manifestly without reasonable foundation. Further, the rules, including the limitation period, had been in force for many years and the owners were aware of them. The fact that no compensation was payable was understandable given the purpose of limitation periods and the law had struck a proper balance between the interests, particularly as the owners could take steps to stop the limitation period from running.

**Article 2 – The right to education**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

\(^{241}\) (1982) 5 EHRR 35.

\(^{242}\) See also Edwards v Malta, (Application No 17647/04), where the Court found a violation of Article 1 when the applicant’s house and adjoining land had been requisitioned by the government 30 years ago to provide homes for the homeless and he had received the sum of €67 per year in compensation for the loss of his house. The Court concluded that the government had imposed an excessive burden on him to provide accommodation to another family and thus had not achieved a proper balance between the interests of the community and the applicant’s right to profit from his property rights.

\(^{243}\) In Stretch v United Kingdom (2004) 38 EHRR 12, the European Court found a violation of Article 1 when the applicant had been denied the option of a further term of 21 years under an existing lease. The refusal, by the local council, disrupted his legitimate expectation and thus was a disproportionate interference with his property rights.

\(^{244}\) (2006) 43 EHRR 3.

\(^{245}\) JA Pye (Oxford) v Graham [2003] 1 AC 419.

\(^{246}\) The Land Registration Act 2002 rectified this discrepancy but did not provide protection to the applicants at the time of their dispute.

\(^{247}\) (2008) 46 EHRR 45.
Under this Article everyone has the right to education, which has been interpreted to mean that individuals have the right to avail themselves of the means of instruction that are provided by the state at any given time. Consequently, Article 2 simply imposes an obligation to regulate its educational system in such a way that it gives access to education without discrimination. For example, in A v Essex County Council, the Supreme Court held that the article does not impose on the state a positive obligation to provide education that catered for the special needs of a small, but significant, portion of society which could not benefit from mainstream education. The question in such cases is whether the person has been denied the very essence of the right to education and in the present case a delay of 18 months in finding a suitable school for an autistic child after he had left a special needs school because of his behaviour did not constitute a breach of Article 2.

Further, in X v United Kingdom, it was held that the state had the right to regulate scarce resources by restricting access to certain courses to the most able students. With respect to the United Kingdom, the government made a reservation in relation to this article, and the reservation is contained in Part II of Schedule 3 of the Human Rights Act 1998 by virtue of s.17 of the Act, which allows for such reservations. The reservation is in respect of the second sentence of the protocol – guaranteeing parents the right to have their children taught in conformity with their religious and philosophical convictions – and states that its obligations are restricted to the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

In addition, under Article 2 parents are given the limited right to insist that their children are taught in conformity with their religious and philosophical convictions, thus complementing the rights to private and family life under Article 8 and the right to manifest one’s religion under Article 9. The Article imposes a positive obligation to provide necessary educational resources, although the Court has decided that there is no obligation to establish or fund any particular type of educational institution. The right of parents to have their children taught in conformity with their philosophical convictions was raised in Campbell and Cosans v United Kingdom. Here it was held that the imposition of corporal punishment in a school attended by the applicant’s children constituted a violation of Article 2 of the First Protocol in that it interfered with the parents’ convictions on discipline, which the Court accepted as falling within the phrase ‘philosophical convictions’. The Court’s view the duty to respect parental convictions could not be overridden by the alleged necessity of striking a balance between the conflicting views involved and although the right to education guaranteed by Article 2 by its very nature calls for regulation by the state, such regulation

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248 Belgian Linguistic case (1968) 1 EHRR 252.
249 [2010] 3 WLR 509.
250 (1980) 23 DR 228.
251 For example, in R (Begum) v Governors of Denbigh High School [2006] 2 WLR 719, it was alleged that the exclusion of the applicant for refusing to adhere to the school’s dress code was in violation of both Article 9 and Article 2 of the First Protocol. Both claims failed and the case is discussed in chapter 12 of this text.
252 Belgian Linguistic case, n 248, above.
254 As a consequence of the Court’s ruling the Education (No 2) Act 1986 was passed, prohibiting corporal punishment in state schools. The domestic courts have ruled that parents do not have the right under this Article to insist that their children are subject to reasonable physical punishment at school; see R (Williamson) v Secretary of State for Education [2003] 1 All ER 385.
should never injure the substance of the right or conflict with other rights in the Convention and its protocols.\textsuperscript{255}

On the other hand, the right to education, including parental choice, might have to bow to wider issues of public interest and the rights of others. Thus, in \textit{Sahin v Turkey}\textsuperscript{256} it was held by the Grand Chamber that although the exclusion of the applicant from University for wearing religious dress did engage the right to education (disagreeing with the European Court’s decision on this point), the rules did not destroy the very essence of the applicant’s rights under that article, the rule balancing the rights of religious observance with the protection of secularism. Similarly, in \textit{R (Begum) v Denbigh High School Governors}\textsuperscript{257} it was held that a schoolchild who had been refused entry to school because of her unwillingness to comply with a dress code had not been denied the right to education under Article 2 of the First Protocol. The disruption to her schooling had been caused by her unwillingness to comply with a rule that the school was entitled to adhere to, and by her failure to secure prompt admission to another school where her religious convictions could be accommodated.

\section*{Article 3 – The right to free elections}

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choice of the legislature.

This Article imposes both a positive obligation on each member state to hold free elections, and a negative duty not to restrict such.\textsuperscript{258} The article thus promotes democracy and complements other democratic rights such as freedom of speech and freedom of assembly.\textsuperscript{259} Although the Article principally protects the collective right to free elections, the European Court has held that the article also bestows in general an individual right to vote. Thus, in \textit{Mathieu-Mohin and Clerfayt v Belgium}\textsuperscript{260} it was held that the article implied both the right to vote and the right to stand for election to the legislature.\textsuperscript{261} In that case the applicants were French-speaking Belgian parliamentarians who lived in a Flemish district of Brussels and who under the devolved linguistic constitutional arrangements in Belgium were unable to participate in the decision making of the Flemish Council. The European Court held that the claim fell within the scope of the Article but found that the restrictions fell within the wide margin of appreciation afforded to each state.

In \textit{Mathieu-Mohin} it was accepted that the right to vote and stand for election was subject to implied limitations and that the domestic authorities could impose restrictions provided they were legitimate and proportionate and that the very essence of the duty to ensure free

\begin{itemize}
\item \textsuperscript{255} See also \textit{Folgero v Norway} (2008) 46 EHRR 47, discussed in chapter 11 of this text.
\item \textsuperscript{256} (2007) 44 EHRR 5.
\item \textsuperscript{257} [2007] 1 AC 100.
\item \textsuperscript{258} The article does not impose an obligation on the state to adopt a particular type of electoral system, provided the adopted system complies with the essence of the article; see \textit{Liberal Party v United Kingdom} (1980) 21 DR 211.
\item \textsuperscript{259} See, for example, the case of \textit{Bowman v United Kingdom} (1998) 26 EHRR 1.
\item \textsuperscript{260} (1987) 10 EHRR 1.
\item \textsuperscript{261} In \textit{Ahmed v United Kingdom} [1999] IRLR 188, the European Court did not address the question of whether local elections came within the scope of the article. In that case the Court found no violation of Article 10 when local government officials were prohibited from standing for election. See also \textit{Gitonas v Greece} (1997) 26 EHRR 691, where the Court upheld the three-year prohibition on former public servants standing for election to the Greek parliament.
\end{itemize}
elections is not undermined. Accordingly, the Court and Commission have given a wide margin of appreciation in this area, reflecting the variety of state practices within the Council of Europe.\footnote{262} For example, in \textit{Py v France},\footnote{263} it was held that there had been no violation when the applicant had been denied the right to participate in referendums and elections in New Caledonia because he failed to comply with a 10-year residency requirement. In the Court’s view the ‘local requirements’ applying to New Caledonia warranted such restrictions.

A similar margin can be granted with respect to the right to sit in parliament. Thus in \textit{Yumak and Sadak v Turkey},\footnote{264} the Grand Chamber held that a requirement that a party may not obtain seats in parliament unless they obtained 10 per cent of the vote in elections was within the state’s margin of appreciation and thus not in violation of Article 3 of the first protocol. The requirement ensured non-fragmentation in parliament and was consistent with that state’s party system. In the Grand Chamber’s view, provided that elections were held freely and at regular intervals there was no obligation to ensure specific systems such as proportionality. In the circumstances the very essence of the right of free elections had not been interfered with as the parties still operated and the threshold had been subject to constitutional review.

In \textit{Matthews v United Kingdom}\footnote{265} the European Court held that Article 3 of the First Protocol applied to give the individual the right to vote in non-national elections. In this case a British citizen residing in Gibraltar was excluded from voting in the elections to the European parliament because Gibraltar was not included in the franchise for such elections. The Court held that although the European Union could not be challenged, each member state was responsible for ensuring that Convention rights were guaranteed within their jurisdiction.\footnote{266} Further, although the Convention did not envisage the role and place of the European parliament, the Convention was a living instrument and the Court was not precluded from determining that the European parliament fell within the definition of ‘legislature’. Accordingly, as the applicant had been denied any opportunity to express her opinion in the choice of that legislature, there had been a violation. In addition, any lawful and rational restriction should not be executed in a manner which interferes with the effective enjoyment of the right to vote.\footnote{267}

\textbf{Article 3 and prisoner disenfranchisement}

A margin of appreciation will also be offered with respect to the disenfranchisement of prisoners. For example in \textit{H v Netherlands},\footnote{268} the European Commission upheld a domestic law that disenfranchised any prisoner sentenced to prison for more than one year for a period exceeding the length of his sentence by three years. The restriction was not in violation of the Convention and the legislator of each individual state is competent to determine the conditions under which the right to vote is to be exercised.

\footnote{263} (2006) 42 EHRR 46.
\footnote{265} (1998) 28 EHRR 361.
\footnote{266} As it is a British territory, the Convention and its protocols extend to Gibraltar.
\footnote{267} In \textit{Santora v Italy}, decision of the European Court, 2 July 2004, it was held that although disenfranchising the applicant following his conviction for a criminal offence was a lawful and proportionate measure, as the penalty had been unreasonably delayed, causing the applicant to be ineligible for voting at the time of parliamentary elections, there had been a violation of Article 3 on the facts.
\footnote{268} (1974) 33 DR 242.
Presently, convicted prisoners in England and Wales are not entitled to vote in either general or local elections by virtue of s.3 of the Representation of the People Act 1983, which specifically disenfranchises convicted prisoners. This provision was challenged under the Human Rights Act, but in *R v Secretary of State for the Home Department, ex parte Pearson and Martinez; Hirst v Attorney-General*,269 the High Court refused to make a declaration of incompatibility, finding that domestic law was within the wide margin of appreciation given to member states.270 In the Court’s opinion, disenfranchisement of convicted prisoners was based on legitimate grounds — relating to elements of both punishment and electoral law — and was not disproportionate to those aims. The Court further held that there were legitimate grounds for disenfranchising life sentence prisoners after they had served their tariff period, because in such cases the prisoner was of sufficient risk to the public to justify his or her further detention.271

Following that decision the prisoner petitioned the European Court of Human Rights, and in *Hirst v UK (No 2)*,272 the Court found that domestic law and practice was in violation of Article 3. The Court was prepared to find that the ban served a legitimate aim as either preventing crime and facilitating punishment or enhancing civil responsibility and respect for the rule of law. However, in the Court’s view the blanket ban applied to all convicted prisoners was disproportionate and beyond the state’s margin of appreciation in this area.273 In particular the Court noted that the domestic legislature had never sought to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners. The decision was confirmed by the Grand Chamber of the European Court of Human Rights,274 where it was stressed that the right to vote was not a privilege and could only be taken away on legitimate grounds.

Despite the ruling the Grand Chamber left the United Kingdom government to decide on the choice of means for securing the rights guaranteed by Article 3. In December 2006 a consultation document was published by the Department of Constitutional Affairs, setting out the principles of prisoner enfranchisement and the options available to the United Kingdom following the judgment of the Grand Chamber.275 This was followed by the Ministry of Justice’s second-stage consultation document, outlining the government’s initial proposals for prisoner enfranchisement.276 The government suggested a number of options of enfranchisement, but favoured the idea that prisoners sentenced to less than one years’ imprisonment would be automatically entitled to vote (subject to certain exceptions based on the type of

271 For a detailed analysis of that case and the subject of prisoner disenfranchisement, see Lardy, *Prisoner Disenfranchisement: Constitutional Rights and Wrongs* [2002] PL 524.
273 The Court reached a similar decision in *Kiss v Hungary* (Application No 38832/06), decision of the European Court, 20 May 2010, with respect to the total disenfranchisement of the mentally ill.
276 Voting Rights of Convicted Prisoners within the United Kingdom, Consultation Paper CP6/09, 8 April 2009. See Foster, *Reluctantly Restoring Rights [2009] (3) HRLR 489*. On 8 December 2009 the Committee of Ministers of the Council of Europe adopted an interim resolution urging the United Kingdom to adopt the necessary measures in order to comply with the judgment.
offence for which the prisoner had been convicted). Thus, those sentenced to a term of one year or more would not be entitled to vote. 277

In the meantime, a test case was brought to challenge the present ban on prisoners’ voting rights, but in R (Chester) v Secretary of State for Justice, 278 the Administrative Court refused to grant a declaration of incompatibility with respect to the Representation of the People Act 1983 and the government’s decision not to allow post-tariff life sentence prisoners the right to vote. The court would not consider granting a declaration until the statutory provision was in place, otherwise the parliamentary process would be interfered with. 279 Therefore, by May 2010, the time of the General Election, no law had been passed to address the judgment in Hirst, leaving the government vulnerable to claims brought by prisoners under the Human Rights Act.

A further issue arose following the judgment of the European Court of Human Rights in Frodl v Austria. 280 In that case the Court held that there had been a violation of Article 3 of the First Protocol when a prisoner had been disenfranchised after committing an offence with intent that carried a sentence of more than one year. Although the Court accepted that the ban was less restrictive than the one considered in Hirst, it found that the lack of judicial input into the decision to disenfranchise the particular prisoner constituted a violation of Article 3. This suggests that any legislative measure passed in England and Wales would need to include this impartial judicial safeguard, although the judgment in Hirst indicated that such a safeguard was merely desirable rather than compulsory. More recent developments are referred to in the preface.

Protocol No 6 – Rights relating to the abolition of the death penalty 281

The death penalty shall be abolished. No one shall be condemned to such penalty or executed. Although Article 2 of the Convention provides an exception to the right to life by permitting executions by a sentence of a court following conviction of a crime for which the death penalty is provided by law, 282 the European Court has recently decided that the death penalty is contrary to Article 3 of the Convention (prohibiting inhuman and degrading punishment), effectively negating the death penalty exception contained in Article 2. 283

Further, Protocol No 6 represents the growing international movement to prohibit the death penalty and provides that no one shall be condemned to such penalty or be executed.

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277 The government did not intend to enfranchise post-tariff or indeterminate prisoners, believing that such a move is not required by the judgment in Hirst and that the continued dangerousness of such offenders makes it inappropriate to extend the franchise. However, such a view appears inconsistent with the finding of the European Court, which noted that an anomaly arose in the case of post-tariff life sentence prisoners, and that it was difficult to justify a link between the government’s rationale and the loss of the vote in such cases.

278 [2010] EWHC 63 (Admin); upheld by the Court of Appeal: The Times, 17 January 2011.

279 A declaration had been made by the Scottish courts in Smith v Scott [2007] CSIH 9.

280 (Application No 20201/04), decision of the European Court, 8 April 2010.

281 This protocol is examined in chapter 4 of this text, alongside an examination of the right to life and the legality of the death penalty.

282 Similarly, Article 6 of the International Covenant on Civil and Political Rights permits the death penalty, provided it is for the most serious crimes and in accordance with the law in force at the time of the commission of the crime.

283 Al-Saadoon and Mufdhi v United Kingdom (2010) 50 EHRR 9. The case will be examined in detail in chapters 4 and 5 of this text.
This Protocol, and an Optional Protocol to the International Covenant on Civil and Political Rights, calls for the complete abolition of the death penalty during peacetime. In addition, Protocol No 13 provides for the complete abolition of the death penalty in all circumstances, including times of war or emergency. The United Kingdom has ratified both these Protocols, thus outlawing the remaining provision allowing the death penalty in domestic law (in relation to treason) and committing the government to not reintroducing the death penalty.

Other Convention protocols

In addition to Protocol No 12 on freedom from discrimination, referred to at page 87 above, there are a number of other protocols which grant particular rights, but which have not been ratified by the United Kingdom government. For example, Article 1 of Protocol No 4 provides that no one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation. Article 2 of the same protocol guarantees freedom of movement, providing that everyone lawfully within the territory of the state shall, within that territory, have the right to liberty of movement and freedom to choose his residence and stating that everyone shall be free to leave any country, including their own. Article 3 then provides that no one shall be expelled from the territory of the state of which he is a national and that no one shall be deprived of the right to enter the territory of the state of which he is a national. Finally, Article 4 prohibits the collective expulsions of aliens.

Protocol 7 also contains a number of additional guarantees. This includes the right of an alien lawfully resident in the territory of a state not to be expelled except in pursuance of a decision reached in accordance with law (Article 1). That article also provides the right of such a person to submit reasons against his expulsion, to have his case reviewed and to be represented for these purposes, although such rights may be lost when such expulsion is in the interests of public order or is grounded on reasons of national security. Article 2 provides for the right of those convicted of a criminal offence to have his conviction reviewed by a higher tribunal, the exercise of such right being governed by law. Article 3 provides for the right to compensation for those who have been wrongfully convicted, or pardoned on the ground that there had been a miscarriage of justice, and who have suffered punishment as a result of such conviction. Article 4 states that no one shall be liable to be tried or punished

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285 For those states that have not ratified Protocol No 13, Article 2 of the Sixth Protocol allows a state to make provision in its law for the death penalty in respect of acts committed in times of war or imminent threat of war. Other than that exception, Article 3 of the Protocol states that no derogation under Article 15 of the Convention is allowed, and Article 4 of the Protocol prohibits any such reservations of the Protocol under Article 57 of the Convention.

286 In Ocalan v Turkey (2005) 41 EHRR 45, the Grand Chamber of the European Court held that until every state ratifies Protocol No 13 it would not be appropriate to declare that the death penalty was contrary to Article 3 of the Convention, prohibiting inhuman treatment and punishment. See now Al-Saadoon and Mufdhi v United Kingdom, n 283 above. See chapter 4 for a fuller discussion on this issue.

287 The article provides that no restriction shall be placed on the exercise of those rights other than such as are in accordance with law and are necessary in a democratic society for pursuing a number of specified legitimate aims. In addition the right to liberty of movement is said to be subject to restrictions imposed in accordance with law and justified by the public interest in a democratic society.
again in criminal proceedings for an offence for which he has already been acquitted or convicted in accordance with the law of the state. Finally, Article 5 provides that spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of dissolution, although it is further provided that the state may take such measures as are necessary in the interests of the children.

Questions

What type and range of rights are contained within the Convention and its protocols?

Do you feel that the Convention should adopt a broader range of human rights?

Further reading

There are a number of excellent texts on the European Convention, its machinery for enforcement and its case law. For a definitive and up-to-date overview consult Harris, Warbrick, Bates and O’Boyle, Law of the European Convention on Human Rights (OUP 2009, 2nd edn); van Dijk and van Hoof (eds), Theory and Practice of the European Convention on Human Rights (Intersentia 2006, 4th edn); Clayton and Tomlinson, The Law of Human Rights (OUP 2009, 2nd edn). Students can also read Ovey and White, Jacobs and White: The European Convention on Human Rights (OUP 2010, 5th edn); Janis, Kay and Bradley, European Human Rights Law (OUP 2007, 3rd edn). There is also Amos, Human Rights Law (Hart 2006), which examines the Convention rights and case law (of both the European Court and the domestic courts under the HRA) and principles in detail.


Students can access the European Court of Human Right’s website, www.echr.coe.int/echr, for case law, press releases and other information on the work of the Court.

Visit www.mylawchamber.co.uk/fosterhumanrights to access regular updates to major changes in the law, further case studies, weblinks, and suggested answers/approaches to questions in the book.