~ Human Rights-Rights and Freedoms

Key Points

After reading this chapter, you will be able to:

*j!)* desaibe the traditional residual approach to freedom in Britain; *p* explain the background to the Human Rights Act 1998.

Introduction

1-Until recently, any discussion of the legal protection of human rights in England

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and Wales has taken place in a context of civil liberties, not civil rights. 2-This

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distinction was not simply a matter of a choice of words, but had profound consequences for the nature of freedom in this country.3- To say that a person is at liberty to do something is fundamentally different from saying that a person has a right to do something. Freedom in English law had always been an essentially **residual** concept=one was free to do everything left over once the law had said what one cannot do.

This notion that one is free to do anything except that which is prohibited by law (with its implicit reference to the traditional figure of the "free-born Englishman") was a superficially attractive one. However, its attractions are less clear when we remember that there are no legal constraints on a sovereign Parliament to enact further restrictions on even the most fundamental of freedoms.

Clearly, some restrictions on absolute freedom can be justified either to protect or balance individual interests or the collective interest as represented by the State. Nevertheless, it was the case that, as Geoffrey Robertson put it, "Liberty in Britain is a state of mind rather than a set of legal rules". This approach was increasingly thought to be inadequate to protect our most fundamental freedoms, particularly as an ever more politically, socially, economically and ethnically diverse Britain moved into the twenty-first century. It was this pressure for change that brought about the introduction of more formal protection for human rights under English law with the **Human Rights** Act 1998 (the case for change is set out in the White Pa~"Rights Brought Home"-that preceded the Act). We should not underestimate the importance of this legislation. As John Wadham (Director of the civil liberties campaign organisation Libtrty) stated, it is "a landmark in human rights protection, the most significant human rights reform in the post-war period. . . . The Act will make a real difference to individual rights and freedoms such as privacy and family life".

1-تا همین اواخر، هر بحثی درمورد حمایت های قانونی ار حقوق بشر در انگلستان و ولز دربافت آزادی های مدنی و نه در حقوق مدنی مطرح شده است.2- این تفاوت فقط موضوع انتخاب کلمات نیست بلکه نتایج عمیقی در طبیعت آزادی این کشور دارد.

**The Convention Rights**

The European Convention on **Human Rights** was adopted by the Council of Europe in 1950 and, since 1966, Britain has accepted the right of individual petition to the European Court of Human Rights. The rights protected by the Convention are:

* Article 2-the right to life;
* Article ~freedom from torture, inhuman or degrading treatment or punishment;
* Article 4---freedom from slavery and forced labour;
* Article 5-freedom of the person;
* Article &-the right to a fair, public and independent trial;
* Article 7-freedom from retrospective criminal laws;
* Article 8-the right to respect for private and family life, **home and** cx,rrespondence;
* Article 9-freedom of thought, conscience and religion;
* Article IO-freedom of expression;
* Article 11-freedom of assembly and association;
* Article 12-the right to marry and found a family;
* Article 13-the right to an effective remedy before a national authority for violation of any rights or freedoms protected under the Convention;
* Article 14---freedom from discrimination;

The First Protocol to the Convention added:

* Article 1-the right to the enjoyment of private property;
* Article 2-the right to education;
* Article 3-the right to free elections by secret ballot;

We should note, however, that some of these are not absolute rights or freedoms, as the Convention sometimes allows for restrictions to protect national security, public order, health or morals, and the rights and freedoms of others. Nevertheless, there is an important distinction here from the residual approach. The presumption is **against** restrictions, and the validity of any restriction can be tested in the Court.

**Revision Notes**

You should now write your revision notes for Rights and Freedoms. Here are some suggested headings:

**We-why the *HM?***

* trad. residual approach inadequate
* more formal approach needed in increasingly diverse society
* HRA likely to have major impact Oohn Wadham-Liberty)

R&r~Residual Approach R&~Why the HRA? R&Fe-ECHR Rights

Using your cards, you should now be able to write a short paragraph in response to each of the following questions:

1. What was the approach to freedoms under English law prior to the Human Rights Act 1998?
2. What were the main reasons for the enactment of the 1998 Act?
3. What major rights and freedoms are protected by the European Convention on Human Rights?

**Useful Websites**

~ For the Home Office Human Rights Unit, visit [**www.homeoffice.gov.uk/hract/**](http://www.homeoffice.gov.uk/hract/)**hramenu.htm**

~ For the text of the Human Rights Act 1998, visit [**www.hmao.gov.uk/acta/**](http://www.hmao.gov.uk/acta/)**actal998/19980042.htm**

~ For the various guidance documents issued by the Human Rights Unit, visit [**www.homeoffice.gov.uk/hract/guidlist.htm**](http://www.homeoffice.gov.uk/hract/guidlist.htm)

~ For the "Rights Brought Home" White Paper, visit [**www.official-documents.eo.uk/**](http://www.official-documents.eo.uk/)document/hoffice/righta/righta.htm

~ For a briefing paper on the Human Rights Act issued by *Liberty,* the civil liberties campaign organisation, visit [**www.liberty-human-righta.org.uk/mpolicl.html**](http://www.liberty-human-righta.org.uk/mpolicl.html)

~ Human Rights-Restrictions and Limitations

Key Points

Aft« reading this chapter, you will be able to:

deaaibe the position regarding iestridiona under the Convention; *p* explain the nale of law in relation to the Convention;

explain the principle of propoltionality;

explain the ''margin of **appreciation"** ;

deaaibe the poaition under UJC. law in relation to Article 5; *p* **deaaibe** the position under UJC. law in relation to Artide 8; *p* deaaibe the position under UJC. lawin relation to Article 10; *p* **deaaibe** the position under UJC. law in relation to Artide 11.

The position under the Convention

As noted in the previous chapter, not all the Convention rights are absolute. The abaolute rights include Articles 3, *4* and 7. Others, such as Article 5, are specifically limited by the Convention itself. Finally, others, such as Articles 8, 9, 10, and 11, may be quaWiecl where:

* the qualification has its basis in law;
* it is necessary in a democratic society-this means it must fulfil a pressing social need

in pursuit of a legitimate aim and be proportionate to that aim.

We should oonsider some of the elements of this principle of qualification in further detail. The rule of law

}J noted in the previous chapter, under a Convention rights approach there is a presumption against restriction or qualification of thole rights. Any qualification must be authorised by

law. In the absence of precise, specific, and detailed legal authorisation, any interference with a Convention right, however justified, will be a violation of that right.

**The principle of proportionality**

Under English law prior to the **Human Rights Act 1998,** actions by the government could only be challenged by way of judicial review if they were "irrational"-a decision so "outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (Lord Diplock). However, where there has been a prima facie violation of a right protected by the Convention, the European Court of Human Rights has adopted a more stringent standard in considering whether the State can justify the limitation of that right-the principle of proportionality. This means that even if a particular policy or action which interferes with a Convention right is pursuing a legitimate aim **(e.g.** the prevention of crime) this will not justify the interference if the means used to achieve that aim are excessive in the circumstances.

The margin of **appreciation**

In relation to some Convention rights (particularly those requiring a balance to be struck between competing considerations) the European Court of Human Rights may allow a "margin of appreciation" to the domestic authorities. This means that it may be reluctant to substitute its own views of the merits of the case for those of the national authorities in determining whether a limitation is necessary in a democratic society. In ***Hondyside*** *v. U.K.* (1976), the Court stated,

"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 those requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."

Some commentators, such as *Libmy,* have argued that since the margin of appreciation is, strictly speaking, a concept belonging to international law it should not prevent the U.K. courts examining the merits of a decision, policy or law and the reason for its adoption. Others, however, have suggested that the U.K. courts may develop a principle similar to the margin of appreciation. It is not possible, in advance of the Act coming into force, to say precisely how this will work in practice. In some cases the court may conclude that there are insufficient reasons to support the decision, policy or law. However, in others it may be

willing to accept the opinion of expert decision-makers, such as a government department, health authority or Parliament

The position under U.K. law

We will now oonsider the current position under U.K. law in relation to four particular Convention rights, and what the effect of the 1998 Act may be when in oomes into force in October 2000.

Article 5-Nght to liberty and security This Article states:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his **liberty save** in the following cues and in accordance with a procedure presaibed by law:

**(a) the** lawful detention of **a person** after oonviction by a competent court;

(b) the lawful an-est or detention of a person for non-compliance with the lawful order of a ex>urt or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful an-est or detention of a person effected for the purpose of bringing him **before the** oompetent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his ex>mmitting an offence or fleeing after having done so;

( d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the ex>mpetent legal authority;

**(e) the** lawful detention of persons for the prevention of the spreading of infectious diseases, of penons of unsound mind, alooholics or drug addicts or vagrants;

(f) the lawful an-est or detention of a person to prevent his effecting an unauthorised entry into the ex>untry or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arTeSted shall be informed promptly, in a language which he understands, of the reasons for his an-est and of any charge against him.

3. Everyone arTeSted or detained in accordance with the provisions of paragraph l(c) of **this Article shall be** brought promptly before a judge or other officer authorised by law to exercise judicial **power and** shall be entitled to trial within a reasonable time or to release pending trial. Release may be oonditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a oourt and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in oontravention of **the**

provisions of this Article shall have an enforceable right to oompensation.''

Under current English law, State powers in each of these areas are regulated by statute: the Polic:e and Criminal Evidence Act 1984, Bail Act 1976, and Criminal Justice Ad 1991 (as amended). (For a more detailed examination of police powers, see Chapter 6.) The rights of people in their relations with the police are also proteded by the ancient writ of *habeus corpus* (requiring detention to be justified to a court), the right to legal advice, the duty solicitor schemes, and the activities of the Police Complaints Authority. Furthermore, a number of civil actions may be used to remedy any unlawful infringement of personal freedom: assault, wrongful arrest, false imprisonment and malicious prosecution. Regarding mental health, under the Mental Health Act 1983, a person suffering from a mental disorder can be detained against their will, provided two dodors certify that this is necessary to proted the individual himself or society at large. Specific protedion is offered as the validity of any such detention (or its oontinuation) may be challenged before the Mental Health Review Tribunal. *Liberty* has observed that some "stop and search" provisions may need to be revised in order to comply with the Convention. It may also be that imprisonment for oontempt of court in civil cases will need to be reviewed.

**Article 8-Right *to* respect for private and family life**

This Article states:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence,

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the oountry, for the prevention of disorder or crime, for the protedion of health or morals, or for the protedion of the rights and freedoms of others."

This is the one right under the Convention that is not already reoognised to some degree by statute or oommon law. It is likely to have important oonsequences regarding the interception of oommunications, whether written, telephonic or electronic *(t.g.* emails). It may also require some revision to the rules relating to data protedion. We should note that privacy is not limited to the home but extends, for example, to the workplace. However, the limitation of the duties under the Act to "public authorities" means that this does **not** create a general right to privacy ***(e.g.*** privacy from media intrusion).

**Article 10-Freedom of expression**

This Article states:

"1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Freedom of expression is an essential democratic right. However, it is also one that is subject to significant restrictions under existing English law. A general level of censorship is imposed by the **Obscene Publications Act 1959** and common law offences of corrupting public morals and outraging public decency. More specific powers to censor, regulate and certify exist under the **Cinemas Act 1985,** the **Video Recordings Act 1984,** and the **Indecent Displays (Control) Act 1991.** Television broadcasting is regulated by the **Broadcasting Act 1990** and the **Broadcasting Standards Commission.** Newspapers are, for the moment, subject to self­regulation by the **Press Complaints Commission.** This is an area that generates almost constant controversy. The possibility of Article 10 defences may well add to this.

The **Official Secrets Act 1939** protects information sensitive to national security. However, the Act has been criticised on many occasions for being too widely drawn, and a number of prosecutions *(e.g.* of Clive Ponting in 1985) have proved controversial. There have been repeated calls for greater openness and freedom of information in government. However, the law has a difficult task here in balancing legitimate national security concerns with the equally legitimate need for a democratic government to be subject to public scrutiny. The incorpora­tion of the Convention rights may require reform in this area, particularly regarding the use of Public Interest Immunity Certificates (so-called ''gagging'' orders).

Less controversial restrictions are imposed by the law of **defamation,** designed to protect an individual's reputation from untrue and damaging allegations. The balance between the

general interest in free speech and the individual's interest in protecting his good name is maintained through the availability of various defences (for example, fair comment on a matter of public interest). It is likely that Article 10 will strengthen the public interest defence. Furthermore, a duty not to disclose information (personal or commercial) may exist under a contract **(e.g.** of employment) or in tort a (duty of **confidentiality).**

**Article 11-freedom of assembly and association**

This Article states:

" 1. 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.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are 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. This 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."

The freedom for people to associate together **(e.g.** in political parties, pressure groups or trade unions) and to assemble together **(e.g.** to hold meetings, rallies or protest marches) **are, again,** essential democratic rights. However, this needs to be balanced against the need to maintain public order and to enable others to pursue their own lawful and legitimate activities. Therefore, there are restrictions on freedom of association under the **Public Order Act 1936** (which outlaws quasi-military organisations and the wearing of uniforms or military **insignia** by political groups-originally introduced to counter the rise of the fascist ''blackshirts" in the 1930s), and the prevention of terrorism legislation (which outlaws paramilitary groups). Regarding freedom of assembly, the Public Order Act 1986 grants the police, together with local authorities, the power to regulate protest marches, and also incorporates three specific public order offences: riot; violent disorder; and affray. Further restrictions were introduced, despite considerable public opposition, by the Criminal Justice and Public Order Act 1994 in relation to "raves", "travellers" and protests. It may well be the case that those facing criminal proceedings in this area will seek to raise both Article 11 and Article 10 defences.

Revision Notes

You should now write your revision notes for Restrictions and Limitations. **Here** is **an** example for you and some suggested headings:

**ftc!IL(p-llestrlctlons under the Convention**

* not all Convention rights are absolute
* absolute inc. Arts 3,4,7
* limited (specific limitations in Convention) inc. Art.5
* qualified (may be qualified by state where qualification has basis in law and is necessary in a democratic society [pressing social need/legitimate aim/ proportionate]) inc. Arts 8,9,10,11

R&L<D-Restrictions under the Convention R&Ub-Rule of Law R&Le-Proportionality

R&L©-Margin of Appreciation R&I.$-Art.5 Liberty

R&~Art.8 Privacy

R&L0-Art.10 Expression R&l.$-Art.11-Assembly

Using your cards, you should now be able to write a short paragraph in response to each of the following questions:

1. Explain the basis of restrictions under the Convention.
2. Explain the principle of the rule of law under the Convention.
3. What is meant by the "principle of proportionality''?
4. Explain the notion of the "margin of appreciation".
5. Discuss the position under English law in relation to the following convention rights, including the possible effects of the Human Rights Act 1998:

(a) Article 5 (Liberty)

(b) Article 8 (Privacy)

(cl Article 10 (Expression) (di Article 11 (Assembly)

**Useful Websites**

~ See those listed at the end of Chapter 34.

~ Human Rights-Protection and Enforcement

Key Points

After reading this chapter, you will be able to:

~ describe the main provisions of the Human Rights Act 1998; ~ explain the duty on public **authorities;**

~ **define a** ''victim" under the Act;

~ di8CU88 the role of the U.K. courts under the Act;

~ di8CU88 the **position** of the European Court of **Human Rights;** ~ **ClOmider whether a Human Rights Commission** is **required;**

~ **explain** how **laws** found to be in breach of the Convention can **be rectified;** ~ explain the remedies available to the victim.

The Human Rights Act 1998

The Convention rights are incorporated into English law by section 1. We must now consider the main provisions of the Act in relation to the duties it imposes, the powen it grants, and the remedies it provides.

The duty on public authorities

By **section 6,** it is unlawful for a "public authority'' to act in a manner incompatible with the convention. This coven all aspects of the public authority s activities including:

* Drafting rules and regulations;
* Internal staff and penonnel issues;
* Administrative procedures;
* Decision-making;
* Policy implementation;
* Interaction with members of the public.

The term "public authority'' covers three broad categories:

1. obvious public authorities such as a Minister, a government department or agency, local authorities, health authorities and trusts, the Armed Forces and the police;
2. courts and tribunals;
3. any person or organisation that carries out functions of a public nature. Under the Act, however, they are only considered a public authority in relation to their public functions c~.g. *Railtradc* is a public authority in relation to its work **as a** safety regulator for the railways, but not when **acting as a** commercial property developer).

We should note that Parliament is expressly excluded from the scope of the Act This means that Parliament remains fully sovereign and free to enact incompatible legislation should it so wish. By section 19, the minister promoting a Bill must, before second reading, make a written statement either that, in his view, the provisions of the Bill are compatible with the Convention, or that, although not compatible, the government nevertheless wished to proceed with the Bill.

The victim

By section 7, a person is able to rely on their Convention rights by bringing proceedings (e.g. judicial review) or in any proceedings brought against them (e.g. by way of counterclaim or defence). However, they may only do so if they are (or would be) a victim of the unlawful act A "victim" is someone who is directly affected by the act in question. Victims can include companies as well as individuals and may also be relatives of the victim where a complaint is made about his death. An organisation, interest group, or trade union cannot bring a case unless it is itself a victim, but there is nothing to stop it providing legal or other assistance to **a** victim.

The U.K. courts

By section 3(1), the courts must, so far as it is possible to do so, interpret legislation in such a way as to make it compatible with the Convention. However, as noted above, the Act expressly preserves the full sovereignty of Parliament Thus, while the courts may quash decisions or actions incompatible with Convention rights, or annul delegated legislation on

grounds of incompatibility, they cannot disapply an Act of Parliament **(section** 3(2)(b)). The government **gave** its reasons for this in the **"Rights Brought Home" White Paper:**

"The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parlia­ment is competent to make any law on ariy matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change."

This echoes the fears expressed by some that the Human Rights Act will politicise the judiciary in response to the many Convention-based arguments they are expected to receive when the Act comes into force. *Liberty* has identified 70 areas of law, ranging from police powers to access to health care, where they believe urgent action is required to avoid violations of the new law. However, it is at least questionable whether the judges will be as open to Convention-based arguments as some anticipate. Wall J., in *Rt F (minors--aire procmlings~ntoct)* (2000), stated that he would be disappointed if the Convention were to be routinely paraded as a makeweight ground of appeal. In *A National Health Sm,ia Trust v. D* (2000), Cazalet J. held that a medical decision to provide only palliative care, thus allowing a patient to "die with dignity" was not a violation of either Articles 2 or 3. Thus, it seems that common law common-sense may well prevail over any risk of a politicised judiciary.

**The European** Court of Human **Rights**

It will still be possible for a person to petition the European Court of Human Rights, but only where all domestic remedies, including any action under the Act, have been exhausted. In this respect, we should also note that, by section 2(1)(a), the English courts are required to have regard to the jurisprudence and case-law of the European Court when dealing with any case involving the Convention.

A Human **Rights** Commission?

Some commentators, such as the leading civil rights lawyer Lord Lester, see the decision not to establish a Human Rights Commission to oversee the working of the Act **as a** serious

**weakness.** However, in the "Rights Brought Home" White Paper, the Government expressed concerns **regarding** an unnecessary overlap between any Human Rights Commission and the work of the Commission for Racial Equality, the Equal Opportunities Commission and the new Disability Rights Commission. Nevertheless, the White Paper also states that the government has not closed its mind to the idea of a Commission at some future stage in light of practical experience of the working of the Act.

**Remedies** To **the law**

As we noted earlier, the Act does not allow the courts to disapply primary legislation incompatible with the Convention. However, by section 4, the courts may, in such circum­stances. issue a declaration of incompatibility. Following this, the relevant minister may amend the offending legislation by statutory instrument (Schedule 2, **Paragraph** 1(2)). As this involves the·exceptional power to use secondary legislation to amend primary legislation, any such statutory instrument is subject to the positive affirmation procedure in Parliament **(Paragraph** 2)-for more details on this procedure, see Chapter 2.

**for the** victim

By **section 8,** the court may, following a violation of the Convention by a public authority, grant such relief or remedy, or make such order as it considers just and appropriate. However, the court may only award damages where, taking into account all the circum­stances of the case (including any other relief or remedy granted or order made), it is satisfied that damages are necessary to ensure just satisfaction for the victim.

Conclusion

The residual approach to freedoms resulted from a traditional view of England, and a peculiarly English view that liberty is best defined and protected by an informal consensus, emerging from the shared values of an essentially homogeneous society. However, while this view may have had some validity in the distant past (and even this is questionable), it hardly corresponds to British society today. Societies and their political systems develop and evolve, and the law must itself develop to meet these new challenges. Indeed, the European Court of Human Rights regards the Convention as a "living instrument" that must be interpreted in the light of present day conditions. Britain today is an increasingly diverse and heterogeneous culture. This has placed increasing strains on the present constitutional settlement The Government has sought to address this in a number of ways: devolution in Scotland, Wales

and Northern Ireland, reform of the House of Lords, and the introduction of the Human Rights Act 1998. Hopefully, this will create a modem constitution to replace the informal guarantees of a social consensus that no longer exists-a new legal consensus that allows social diversity to flourish within a secure framework of judicially-protected fundamental rights and freedoms.

**Revision Notes**

You should now write your revision notes for Protection and Enforcement Here is an example for you and some suggested headings:

* can still petition
* only when domestic remedies (inc. under Act) exhausted
* U.K. cts must consider jurisprudence/case law of ECHR (s.2(1)(a))

P&E<D-Duty on P As P&E~Victims P&E~U.K. courts P&E©-ECHR

P&E$-Human Rights Commission? P&E$-Remedies (law) P&E0-Remedies (victim) P&E$-Conclusion

Using your cards, you should now be able to write a short paragraph in response to each of the following questions:

1. Explain the duty on public authorities under the Human Rights Act 1998.

1. Who may be a victim under the Act?
2. Explain the obligations on the U.K. CX>Urts under the Act.
3. What is the position of the European Court of Human Rights following the Act?
4. Disc:u,s whether there should **be a** Human Rights Commission.
5. How can law found incompatible with the Convention be remedied?
6. What remedies are available to the victim of a Convention violation?
7. Consider what the overall oonaequences of the Act may be.

**Useful Websites**

~ **See those** listed at the end of Chapter 34.

j37j Law and Morality

Key Points

After reading this chapter, you will be able to:

*fl>* compare and contrast the characteristic features of moral and **legal codes;** *fl>* explain the reasons for the **~lationship** between law and morality;

*fl>* **examine** the **moral influenc:e** on **English law;**

*fl>* **consider** the **approaches** the law may take to issues of **moral controversy.**

Introduction

Both law and morality are concerned with the regulation of social conduct. Therefore, they share many similar, though not synonymous, features:

**Moral Codes**

General statements of principle. Voluntary subscription.

Informal enforcement (e.g. through peer group pressure).

Concerned with how people ought to behave

**Legal Codes**

precise rules or norms of behaviour. Compulsory subsaiption.

Formal enforcement *(t.g.* through the police and the courts).

Concerned with how people shall behave.

It is this contrast between "ought'' and "shall", highlighting concerns over whether the law should be used to enforce particular moral values, that has proved the most problematic aspect of the relationship between them.

This relationship exists for both historical and functional reasons:

Historically, legal codes tend to emerge from moral codes. In primitive societies, there is often little or no difference between the two. However, as a society grows larger and more

sophisticated, this close relationship begins to fracture. As the society becomes more diverse (socially, culturally, economically and morally), the need for a distinct and universally applicable set of rules (a legal system) emerges. Thus, while links between the legal and moral codes remain, these tend to become increasingly insecure and sometimes controversial.

**functionally,** both law and morality are used to perform similar social tasks-to preserve order and maintain acceptable standards of behaviour through the promotion and enforce­ment of rules and principles.

Thus, it is not surprising that the relationship between law and morality is a complex one, and that moral influences pervade much of the law. However, this is not to suggest that all that may be regarded as immoral is necessarily illegal *(e.g.* adultery) or vice versa **(e.g.** parking offences).

**The Moral Influence in English law**

Moral notions form the background or context of many aspects of English law, with its concerns for the protection of the person, property, the family, etc. This reflects the influence of an essentially judaio-christian moral tradition. However, as noted above, the legal rules will tend to be more specific and precise than their moral counterparts, *e.g.* while there may be a general moral precept against telling lies, this will only be illegal in certain specific circumstances (e.g. perjury and fraud). In the vast majority of instances, this moral context or background is uncontroversial. Indeed, we may see it as beneficial, as it tends to enhance the legitimacy of the law and encourage observance of legal rules.

However, problems may arise where moral issues become foregrounded, rather than merely providing a background context, ***ie.*** where the law is used specifically to enforce particular moral positions. In the legislative sphere, we can see this in the **Abortion Act** 1967, the **Obscene Publications Act 1956** (with its problematic test of a tendency to deprave and corrupt), and more recently in the debate regarding the repeal of **Section 28** of the Local Government Act 1988 (banning the "promotion" of homosexuality). Similarly, in the judicial sphere, this is evident in the common law offences of conspiracy to corrupt public morals *(Shaw v. DPP* (1962); *Knulkr (Publishing, Printing and Promotions) Ltd v. DPP* (1973)) and conspiracy to outrage public decency (R. *v. Gibson* (1991)). Moral values can also be seen to have exercised a clear, though indirect, influence in a range of other cases, ***e.g.*** those relating to sexual conduct *(R. v. Brown* (1993)). The legal foregrounding of particular moral positions becomes problematic where the social consensus on that issue has broken down or fragmented-and, as indicated above, the more diverse a society becomes, the **greater the** potential for fragmentation.

In these circumstances, the- law cannot simply withdraw unless and until consensus is restored-there can be no "no-go" areas. The law must, therefore, identify an acceptable approach to issues of moral controversy.

Ubertarian approach. Some writers, such as Schur and Hart, have argued that the law should not interfere in private behaviour except in order to prevent harm to others. However, it is sometimes difficult to identify the boundaries between private and public conduct and the limits of harm, *e.g.* drug use may be a "private" activity but can have "public" and "harmful" consequences, such as additional burdens on the public health system and criminal activity to feed the habit Furthermore, it is arguable that consent of the participants does not necessarily make an activity "victimless", and that there may be circumstances where it is justifiable to use the law to override individual consent

Uberal approach. This is typified by the Wolfenden Committee on Homosexual Offences **and Prostitution,** which reported in 1957. The view of the Committee was that the law should not interfere in private behaviour except where necessary to preserve public order and decency, to protect against the offensive and injurious, and to safeguard individuals (particularly the most vulnerable) against corruption and exploitation. However, difficulties arise with this approach due to the subjective nature of the criteria advanced.

**Duty/aspiration approach.** This arguably more satisfactory approach was advanced by Lon Fuller. He distinguished between the morality of duty and the morality of aspiration. The morality of duty indicates the standard of behaviour that most people would be prepared to tolerate, *i.e.* the bare minimum level of acceptable conduct. The morality of aspiration indicates the standard of behaviour to which most people should aspire. Thus, Fuller is seeking to come to terms with the problematic distinction between "ought" and "shall" indicated earlier. Fuller's solution was that while the law may be employed to enforce the morality of duty, it cannot and should not be used to enforce the morality of aspiration, *i.e:* it is legitimate to use the law to prevent people behaving badly, but not to use it in an attempt to force people to behave virtuously. This was echoed by Lord Devlin, when he argued that "the law is concerned with the minimum and not with the maximum". We can also see it in the famous "neighbour principle" advanced by **Lord Atkin** in *Donoghue v. Stevmson* (1932):

''The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law: you must not injure your neighbour, and the lawyer's question: who is my neighbour? receives a restricted reply".

**Conclusion**

The link between law and morality is a close and complex one. Furthermore, for both historical and functional reasons, such a relationship is inevitabl~it is impossible to conceive of or construct an amoral legal code. In many respects, this is both uncontroversial and beneficial, as it reflects a general moral consensus in society, thereby enhancing the legitimacy of the law and encouraging observance. However, difficulties exist **regarding** the proper response of the law to issues where this consensus has fragmented. Given the benefits that may be gained from social development and diversity, the law must seek to establish a stable social framework within which such diversity can flourish safely.

**Revision Notes**

You should now write your revision notes for Law and Morality. Here is an example for you and some suggested headings:

* only intervene to prevent harm to others (Schur, Hart)
* boundary between public/private? **(e.g. drug** use)
* really "victimless"?
* paternalist intervention justified?

UrM<D-lntro (nature of legal/moral codes) UrMe-Historical/Functional links UrM~oral Influence in English law UrM©-Libertarian Approach UrM$-Liberal approach

UrM$-Duty / Aspiration Approach UrM0-Conclusion

Uling your cards, you should now be able to write a short paragraph in responae to each of the following questions:

1. Define and differentiate between legal and morals a»des.
2. Why do legal codes tend to have a moral a,mponent?
3. What evidence is there for a moral element in the development of English law?
4. What approaches might the law take to isaues of moral controversy?

~ Law and Justice

Key Points

After reading this chapter, you will be able to:

*,f:J* explain the different definitions of abstract justice;

*,f:J* explain the role of formal justice in the English legal system; *,f:J* explain the role of **substantive** justice in English law.

Introduction

It seems obvious to say the primary aim of any legal system is to deliver justice. However, it is far from obvious what this actually means, as the concept of "justice" is extremely difficult to define. Not only are there different definitions of justice, but the question "what is justice?" means different things in different contexts-is a particular law just? is the legal system just? does the combination of law and system produce a just result?

Definitions of Justice

Aristotlean Justice. One of the earliest attempts to formulate a theory of justice was that of **Aristotle.** He argued that the basis of justice is fairness, and that this takes two forms:

* **clutributive** justice-whereby the law is used to ensure social benefits and burdens are fairly distributed throughout society;
* **a,rrective** justice-whereby the legal system acts to correct attempts by individuals to distwb this fair distribution.

However, we can argue that this simply replaces the question "what is just?" with "what is fair?"

Utilitarian theory. The central principle of utilitarianism is that society should be organised to achieve the greatest happiness for ~ greatest number. Thus, a law is just where it brings

about a net gain in happiness for the majority, even if this results in increased distress or unhappiness to a minority. It is the willingness to trade the unhappiness of the minority against the happiness of the majority that liberal theory finds most objectionable in this approach.

**Liberal (or natural rights) theory.** Liberal theory, in contrast to utilitarianism, judges the justice of any form of social organisation by the extent it protects its minorities and most vulnerable groups. Therefore, liberal theories tend to incorporate notions of natural rights-that there are certain basic rights (God-given or otherwise) to which all people are entitled. However, this approach has its own problems, not least in establishing agreement over the content and extent of any list of "natural" rights, *e.g.* the right to vote is now regarded as an essential and universal right However, for many years this was subject to a property qualification, and not one to which women were entitled until this century. A recent attempt to identify a universal set of rights and principles was undertaken by John **Rawls.** Rawls' theory is based upon a hypothesis of what a group of individuals, placed in what he termed the "original position", would agree upon. The original position exists behind a "veil of ignorance", *i.e:* the individuals would not know of their individual talents and circumstances (whether they are rich or poor, young or old, male or female, able or disabled, etc.). Therefore, Rawls argues, rational self-interest would lead them to **agree a** set of basic rights and principles that each would find acceptable if it turned out they were the least advantaged of the group. However, persuasive though this hypothesis may seem, it does not resolve the question of precisely what those rights and principles should be. In fact, it seems to lead back to Aristotle's question-what is fair?

Libertarian (or **market-based) theory.** Libertarian theory, such as that of Nozick, argues intervention in the natural (or market) distribution of advantages (as required by the other theories) is an unjust interference with individual rights. Libertarian analysis only permits very limited intervention to prevent unjust distribution *(e.g.* through theft and fraud).

Therefore, the question of abstract justice seems as much a political as philosophical one.

Justice and the English Legal System

Whether a particular law is just is, therefore, essentially a political question. However, consideration must also be given to whether the system is just, and whether it produces a just outcome. This involves both formal justice (regarding the system) and **substantive** justice (regarding outcomes):

formal justice. This requires a system of independent tribunals for the administration of law and the resolution of disputes. The formal trial and appellate courts, together with the various

fonns of alternative dispute resolution, ensure the English legal system meets this require­ment. Formal justice also requires these institutions follow known and fair rules and procedures. Again, this is met through the rules of due process and fair procedure, rules **regarding the** admissibility of evidence, limitation periods, etc. An important contribution is also made by the rules of natural justice, *e.g. oudi oltemn partan* (both sides must be heard). Finally, it is important that any citizen with a grievance has access to these institutions. Here we can argue that more needs to be done to ensure this, particularly for the poorest and least­advantaged sections of society. Refonns under the Aaless to Juatfoe **Act 1999** will hopefully improve this situation.

**5ubst.antive Justice.** The English legal system has a variety of mechanisms to ensure just outmmes. Regarding the common law, the principle of *sto~* d«isis, together with devices such as overruling and distinguishing, enable the courts to work towards both the just develop­ment of the common law itself and a just outcome in any given case. A good example of this in the civil law is negligence. First of all, liability will not be imposed on the defendant unless they were at fault in causing injury or loss to the claimant Secondly, the defence of contributory negligence allows the court to apportion liability in a just and fair way where the claimant was partly responsible for their own damage. In the criminal law, the principles of sentencing seek to achieve a just balance between the interests of the victim in achieving retribution, of society through deterrence and rehabilitation, and the defendant in ensuring the punishment fits the crime and is not excessive. The courts may also tum to the principles of Equity where the strict application of common law rules would lead to injustice. Furthermore, where the courts are unable to resolve such issues, because they are dealing with statute or they have reached the limits of proper common law development, Parliament may act to remedy matters through legislation (e.g. **Law Reform (Frustrated Contracta) Ad** 1943). Indeed, it is this capacity to be self-correcting that is one of the most important aspects of the English legal system's ability to ensure just outmmes.

Conclusion

Given the variety of essentially subjective, often vague, and sometimes contradictory notions of abstract justice, perhaps the best that any system of justice can hope to achieve is justice according to law. It seems this is a task the English legal system is well-equipped to perform, not least in its capacity for development and self-correction.

Revision Notes

You should now write your revision notes for Law and Justice. Here is an example for you and some suggested headings:

**W~IJustJce**

• Formal justice requires:

* Independent tribunals (ELS-trial and appeal courts, ADR, independent judiciary)
* Fair procedures (ELS-due process, admissibility, limitation periods, rules of natural justice)
* Equal access (~less successful here-unmet need-reforms in AJA 1999)

L&J<D-Intro L&J~Aristolean Justice L&Je-Utilitarian Justice L&J®-Natural Rights Theory L&J~ Theory L&J.\_Formal Justice L&J0-Substantive Justice L&J~onclusion

Using your cards, you should now be able to write a short paragraph in response to each of the following questions:

1. Why is such an apparently simple idea as "justice" so problematic?
2. Desaibe and comment upon the major theories of justice.
3. To what extent does the English legal system achieve formal justice?
4. To what extent does the English legal system deliver substantive justice?

~ **The Judge as Law-maker**

**Key Points**

After reading this chapter, you will be able to:

*/;)* describe how judges are involved in the law-making process; */;)* dilCUU the different judicial styles of law-malcing;

/:J **dilCU88** the difference between issues of principle and issues of policy; */;)* **evaluate** the proper role of the judiciary in the law-making process; */;)* identify potential improvements to the process of judicial law-malcing.

**The Role of the Judge**

Judges are involved in the law-malcing process in a number of ways, through:

* their participation in various advisory committees, commissions and inquiries;
* the participation of the Law Lords in the legislative business of the House of Lords-­though this is limited by convention to law reform measures and issues of **legal** technicality;
* their role as the definitive interpreters of legislation;
* their responsibility for the development and evolution of the common law and Equity.

For many years the judiciary denied any law-malcing role, arguing they merely declared the **law as** laid down by statute or fundamental principles of common law. However, the modern judiciary has increasingly abandoned the fiction of this declaratory approach and aclcnow­**ledged** they do exercise a law-malcing role.

**Lee argues** there are three main factors that influence judicial law-malcing: • previous history of legislative development

* consequences of the present law and the likely consequences of any given change.
* judiciary' s own perception of the proper limits of their law-making role.

**Principles and Policies**

Given this variety of influences, it is not surprising that differences can be observed in judicial approach. Harris contrasts two judicial "styles":

* **Formal Style,** characterised by caution and a tendency to rely on formal devices such as distinguishing.
* **Grand Style,** characterised by boldness and a willingness to recognise issues of policy as well as principle.

**Paterson** observed similar variations in judicial approaches to "hard" cases:

* **Positive response** (similar to the Grand Style).
* **Adaptive response** (similar to the Formal Style).
* **Withdraw** on the basis that the proposed change is properly one for Parliament to

make.

The majority of judges would seem to adopt the formal or adaptive position. However, a minority of judges, particularly in the higher courts, have always followed a more adven­turous path *(e.g.* the different positions adopted by **Lords Wilberforce** and Scarman in *Mcloughlin v. O'Brian* (1982)). More recently, the House of Lords, dealing with an appeal regarding manslaughter by provocation, allowed Liberty, Justice for Women and Southall **Black** Sisters to make submissions on behalf of domestic violence victims (R. *v. Smith* (2000)). These different styles or responses draw our attention to the distinction between law-making according to established principles and law-making according to policy considerations. It is generally felt judges should confine their attention to issues of principle, as these are seen as politically neutral. It is for Parliament to determine the political acceptability or otherwise of any judicial development according to principle. However, this is something of a false distinction as the boundary between principle and policy is easily blurred Furthermore, Parliament, as we have seen earlier, cannot be expected to legislate for everything. In **a** common law system, judges not only have scope for law-making but, as **Lord Lane** pointed out in *R. v. R. (rape: marital exemption)* (1991), are under a duty to do so, provided this is done in the context of a proper regard for the superior role of Parliament One judge to have written on this relationship was Lord Devlin. He drew a distinction between:

* **activist** law-making-by which he meant changing and developing the law **in response to** changes in the social consensus.
* **dynamic** law-making-by which he meant changing and developing the law **in order**

**to promote** change in the social consensus.

For Lord Devlin, while it was proper for judges to engage in activist law-making, dynamic law-making should be left to Parliament. He also pointed out judges had far less scope and authority for law-making when dealing with statute than with the common law.

Therefore, while allowing for variations in judicial approach, it seems clear there are three main constraints on judicial law-making:

* the judge is bound by the rules of precedent when dealing with the common Jaw;
* the judge is bound by the rules of statutory interpretation when dealing with statutes;
* the judge is bound by his own perception of the proper limits of the judiciary's law­making role and of the superior role of Parliament in the law-making partnership with the courts.

**Improving the System**

Defined and limited in this way, judicial law-making is an important and beneficial aspect of the law-making process in a common law system. The fact that much of the law of contract and negligence is still the product of common law development, with only limited statutory intervention, is proof of the judiciary's capacity to develop sound and just principles of law. There are, however, a number of reforms that could enhance the effectiveness of this role:

* **formal procedure** by which the courts could refer issues to Parliament when it is felt that further development is beyond the scope of legitimate judicial law-making;
* introduction of an **independent advisor** in the appellate courts to perform a similar role to the Advocate General in the Court of Justice of the European Union;
* provision of **research attorneys** to the judiciary in the appellate courts. Following a pilot scheme in 1997, judges in the Court of Appeal are now provided with **Judicial Assistants** (appointed on a full or part-time basis for up to one year). In 2000, this was extended to the House of Lords with the appointment of **Legal Assistants** on one-year contracts to assist the Law Lords.

We should also note that if the judiciary is to continue with its law-making role, and give increasing consideration to issues of policy, at least in the higher courts, then it becomes even more urgent to take steps to ensure:

* the judiciary is trained effectively to discharge this role;
* the social, racial and gender composition of the judiciary **becomes more** representative of society at large.

Conclusion

Regarding the judge as law-maker, it is clear that judicial law-making must **be an** important element within any common law system. It is a role that the English judiciary currently performs both well and responsibly, though steps could be taken to improve this still further, most notably through enhancing the provision of research attorneys to the senior judiciary.

Revision Notes

You should now write your revision notes for The Judge as Law-maker. Here is an example for you and some suggested headings:

*JIJ'ff>--,Judao* and *Parliament*

* In CL system, judges under duty to develop law in partnership with **Parl .**
* Judges' approach must reflect superior role of Parl, and that judges' role is to follow consensus, not promote own policy.
* Devlin:

./ Activist-changing law in response to changes in **social consensus.** ~ Dynamic-changing law to promote change in **social consensus.**

JLM©-Intro (judicial involftmmt in **law-making)** JLMa>-Judicial Styles

JLMe-Principle v. Policy

JLM©-Judges and Parliament JLM$-Improvements

JLM$-Conclusion

Using your cards, you should now be able to write a short paragraph in response to each of the following questions:

1. Describe the various ways judges are involved in law-making.
2. What different styles of judicial law-making have been observed by commentators?
3. Discuss the difference between considerations of policy and principle.
4. What is the proper role of the judges in developing the law in partnership with Parliament?
5. How could the system be improved to help judges in their law-making role?

**Useful Websites**

~ For websites relating to the judiciary, see those listed at the end of Chapter 10.

~ fault and Liability

Key Points

After reading this chapter, you will be able to:

/;J deacribe and evaluate the role of fault in aiminal liability; /;J deacribe and evaluate the role of fault in **tortious** liability; /;J desaibe and **evaluate** the role of fault in contractual liability.

Introduction

We have seen in our earlier examination of the aiminal law, tort, and contract that liability is frequently bound up with notions of fault, However, we have also seen that different forms of liability employ different notions of fault, and indeed in some instances proof of fault is not required at all. We should now consider the extent to which fault both is and should be the basis of liability.

Crime and fault

The aiminal law is perhaps the most obvious candidate for fault-based liability. A person should not be found guilty of a aime and, at least potentially, deprived of their liberty without proof of individual fault This insistence upon fault can be seen in the general requirements of liability-the *octus* m,s and *mens* rm. We can also argue the absence of fault is the underlying rationale for the various general defences. Finally, the degree of fault shown is a major determining factor in sentencing.

Regarding the *octus mis,* the **general** requirement of a positive, voluntary act and the limited liability for omissions are evidence of the need for fault, as is the requirement of

causation in relation to result crimes-if the defendant did not cause the unlawful conse­quence, it is not his fault and hence he is not liable.

The different states of mind employed to construct the *mens rta* of different offences demonstrate the relationship between degree of fault and liability. Generally, **a person can** only be convicted of the most serious offences on proof of intention to commit that offence. Less serious offences may be committed recklessly, and minor offences, frequently of a regulatory nature, can be committed negligently.

Some defences, such as automatism, operate by showing lack of fault through the involuntary nature of the defendant's conduct. Others, such as insanity and intoxication, operate by establishing a lade of mental control or awareness on the part of the defendant Still others, such as duress and self-defence, operate by establishing that the defendant's conduct was justified or should be excused. Finally, the partial defences to murder, such as provocation and diminished responsibility, demonstrate a lesser degree of fault resulting in conviction for the lesser offence of manslaughter.

The degree of fault on the part of the defendant also plays a very significant role in sentencing. Both the type of sentence imposed (custodial, community or fine) and its severity is in large part determined by the degree of fault shown by the defendant This can also be seen in the impact of both aggravating and mitigating factors. This is why some are opposed to the use of minimum and mandatory sentences, as they break the relationship between the degree of fault present in the offence committed and the sentence imposed.

However, we have also seen there is a limited role for strict liability in the criminal law. In relation to both regulatory offences and offences of social danger, we can argue the interests of society as a whole, determined by Parliament-the courts are extremely reluctant to create strict liability offences at common law, or even to recognise them in statute-can sometimes justify the imposition of liability without fault Nevertheless, the degree of fault still plays a role in determining the sentence following conviction.

Therefore, both fault and the degree of fault on the part of the defendant can rightly be said to play a central role in both establishing criminal liability and sentencing.

**Tort and fault**

The aim of tort is to provide a remedy (usually in the form of financial compensation) for the victims of wrongs, and fault on the part of the defendant is the device most generally used to attach liability for this. Negligence liability is clearly dependent upon proof of lault--a failure

to take reasonable care-on the part of the defendant While" nuisance liability, as we have seen, may sometimes take on the appearance of strict liability, it remains essentially fault­based-the defendant is liable for failing to meet the reasonable expectations of his neighbours. Furthermore, the general defences in tort can be said to have their basis in the absence or lesser degree of fault in the same way as those in criminal law.

However, it is true to say that strict liability plays a larger role in tort than criminal law. This is generally in areas where we can argue there are overriding social concerns in encouraging the greatest possible (rather than merely reasonable) care-in ensuring products are safe, hazardous materials and activities are safely dealt with. Hence, strict liability in tort is to some extent deployed regarding defective products, the keeping of animals, and certain forms of industrial and environmental activity. Those engaged in such activities will frequently choose, and are sometimes obliged, to insure against liability.

Furthermore, while there are clear arguments in favour of a fault-based system of liability **regarding** torts such as negligence, the present insistence of fault in these areas can place significant obstacles in the path of the very people the system is intended to benefit. This has given rise to increasing concerns, particularly regarding personal injury cases.

**The arguments in favour of fault-based liability**

* It is a just approach to the apportioning of liability. Where fault indicates the person responsible for the damage, justice requires that person compensate the victim. However, it is at least questionable whether justice requires that in the absence of fault, the loss should be borne by the blameless victim.
* The requirement of fault acts as an incentive to take care, as if liability were to be imposed regardless of fault, people would take less care because no advantage would accrue to the careful. However, this rests on the rather dubious assumption that people take care to avoid injuring others solely or largely in order to avoid legal liability.
* The requirement of fault deters deliberate self-maiming. It is true that in jurisdictions with no-fault systems there have been instances of people injuring themselves in order to obtain compensation. However, the numbers currently denied access to compensa­tion by the requirement of fault far exceed any likely number of self-maiming claims. Furthermore, it should be possible to build safeguards into a no-fault system to deal with such cases.
* To move to a no-fault system would involve a massive extension of liability and place an excessive burden on defendants. Whether this would in fact result depends upon how the system is funded, but even under the present arrangements the bulk of any additional costs would be spread throughout society at large, through a rise in insurance costs, rather than falling directly upon individuals.

The arguments against fault-based liability

* The practical consequences of a fault-based system are unacceptable. The difficulties in establishing both fault and causation make the system a "forensic lottery''. Further­more, it is an extremely inefficient mechanism. The Pearson Commission (1978) found the administrative costs of the tort system were equivalent to 85 per cent of sums paid in compensation, amounting to 45 per cent of the total compensation and administra­tion costs. By contrast, compensation via the social security system would involve administration costs amounting to only 11 per cent of the total, providing a substan­tially cheaper and quicker compensation mechanism.
* A fault-based system is wrong in principle as well as practice. While fault may provide **a good** reason for taking money from defendants, it is an inappropriate basis to decide which victims will receive compensation. Furthermore, except where there is joint liability or contributory negligence, the present system takes no account of the degree of fault. Thus, an act of momentary carelessness that results in serious damage will give rise to far greater liability than an act of gross negligence which results in only minor harm. Also, because the aim is to compensate the victim, the assessment of damages takes no account of the defendant's ability to pay ( unlike the criminal law when assessing the level of fines). Finally, we can argue that the present system has itself recognised these failings by allowing (and even in some cases making com­pulsory) the use of loss-distribution devices such as insurance and developing notions such as vicarious liability.

**The main alternative-a no-fault system**

The main alternative is a no-fault compensation system (such as that in New Zealand), financed either through compulsory private insurance or public revenues. Critics of such schemes often point to the fact that levels of compensation are lower than those provided by damages at common law. However, the fact remains that a system that ensures adequate compensation for all would seem preferable to a system that provides full compensation for only a few.

Contract and fault

By contrast with both criminal law and much of the law of tort, contractual liability is essentially strict. The reasons for this are fundamentally pragmatic rather than based on any clear difference of principle. An example may be helpful here. A person buys a new washing machine from a high street retailer. The first time the machine is used, it brealcs down. The "fault" may in fact lie with the manufacturer of a defective component who has supplied that

component to the manufacturer of a larger component, who has in tum supplied that component to the manufacturer of the machine, who then supplies the machine to **a** wholesaler who in tum supplies it to the retailer. However, it would clearly be absurd to require the purchaser to undertake the trouble and expense of identifying where this fault ultimately lies. It makes far more practical sense to establish a chain of liability from retailer to wholesaler to manufacturer to component supplier and, as we have seen earlier, this is precisely what the law of contract does.

Having said this, there are circumstances where the fault principle does tweak the conscience of contract law: the remedies available to a misrepresentee are, in part, determined by the degree of fault on the part of the misrepresentor; where a contract is void for illegality, the normal principles of restitution will not apply; where a contract is discharged by frustration, the law seeks to achieve a fair apportioning of loss between two innocent parties.

**Conclusion**

We can argue that all forms of liability at least commence from the basic proposition that a person should not be liable without fault In the criminal law, where the liberty of the citizen or his reputation is at stake, we have seen that this principle can only, quite rightly, be displaced in exceptional circumstances, and usually only when sanctioned by Parliament. By contrast, in the law of contract, very sensible practical considerations result in a regime of essentially strict liability, with fault playing only a limited role in order to mitigate occasional harshness. It is one of the great virtues of a common law system that it is able to employ such a sensitive mix of principle and pragmatism. However, this is not to argue that English law always gets the balance right. There are some problematic areas resulting from the law's attachment to the fault principle, most notably **regarding** personal injury compensation.

**Revision Notes**

You should now write your revision notes for Fault and Liability. Here is an example for you and some suggested headings:

*fault$--Tort* a *Strict Uablllty*

* larger role than in Criminal law
* areas with overriding social reasons to enoourage greatest care
* *e.g.* product safety, keeping animals, industrial/environmental protection
* people often choose (sometimes obliged) to insure against this liability

Fault<D--Intro

Faul~rime &r Fault Faulte-Crime &r Strict Liability Fault©-Tort &r Fault Faul~Tort &r Strict Liability Fault$-Fault/No-Fault debate Fault0-Contract &r Fault Faulte-Conc

Using your cards, you should now be able to write a short **paragraph** in response to each of the following questions:

1. Discuss the role of fault in the criminal law.
2. Discuss the role of fault in the sentencing process.

3. 'What role does strict liability play in the criminal law?

1. Discuss the role of fault in tortious liability.
2. Discuss the role of strict liability in tort.
3. What difficulties may arise from fault-based tortious liability?
4. Discuss the role of fault in contractual liability.