Rights and liberties; their legal protection in the UK

# Part 1

In many Western democracies the rights of citizens are enshrined in a constitutional document usually known as a Bill or Charter of Rights. As Chapter 3 will explain, the rights protected under such a constitutional document are often given a special status; in a number of countries they are entrenched. Until the inception of the Human Rights Act 1998 (HRA), the UK had no similar charter of rights. The Magna Carta 1215, while influential as a very early statement of rights, is not comparable to a modern Bill of Rights in terms of extent or impact on current law.[[1]](#footnote-1) In 2000, the HRA afforded further domestic effect to the European Convention on Human Rights, as discussed in Chapter 4. But even under the HRA, the rights are not entrenched, meaning that the HRA or parts of it could be repealed just as any other statute can be. However, as Chapter 1 explains the inception of the HRA means that protections previously recognised as liberties are now recognised as rights.

Traditionally, pre-HRA, in order to discover which freedoms were protected and the extent of that protection, it was necessary to examine the common law, statutes and the influence of treaties to which the UK is a party, especially the European Convention on Human Rights. Civil liberties were traditionally defined as residual, not entrenched as in other countries. In other words, once the restrictions had been defined the area of liberty was the residue that could be recognised as remaining. Thus, traditional judicial reasoning in civil liberties cases quite often consisted merely of the application of the law deriving from statute and common law precedents; the negative liberty was simply what was left over after the scope of the restrictions had been determined. Often there was an application of common law precedents or a mechanistic approach to statutory interpretation, which was devoid of principle in the sense of recognising that any important issues were at stake requiring a departure from that normal judicial technique. This approach was very marked in freedom of assembly cases.[[2]](#footnote-2) In the first edition of this book it was necessary to confront a mass of common law and statutory restrictions on liberties to consider the width of these restrictions in order to determine the size of the residual area left within which liberty could be exercised.[[3]](#footnote-3) This did not mean that civil liberties were without protection and in the late 1990s, the immediate pre-HRA era, certain common law ‘rights’ found recognition, as Chapter 3 explains. Thus, it was often said that civil liberties in the UK were in a more precarious position than they were in other democracies with Bills of Rights, although this clearly did not necessarily mean that they were inevitably less well protected: some Bills of Rights offered only a theoretical protection to freedoms which was far from being reflected in practice. As Chapter 3 explains, freedoms obtained significant recognition under the common law pre-HRA, and continue to do so in the HRA era. The mere fact that a freedom falls within the area of an ECHR right, does not mean that further enquiry as to its protection under the common law should be abandoned.[[4]](#footnote-4)

Certain characteristics of the UK Constitution have determined and, under the HRA, are continuing to determine – albeit with some modification – the means of protecting fundamental freedoms in the UK. The doctrine of the supremacy of Parliament means that constitutional law can be changed in the ordinary way – by Act of Parliament. As every student of constitutional law knows, Parliament has the power to abridge freedoms that in other countries are seen as fundamental rights. It follows from this that, aside from EU law, all parts of the law are equal – there is no hierarchy of laws and therefore constitutional law cannot constrain other laws. In general there is no judicial review of Acts of Parliament. If, for example, a statute is passed containing a provision which in some way limits freedom of speech, a judge must apply it, whereas in a country with an entrenched Bill of Rights the provision might be struck down as unconstitutional. As Chapter 4 explains, s 3 HRA has placed significant pressure on this traditional position, but technically it still subsists. Under the HRA, a judge is not able to declare a statutory provision invalid because it conflicts with a Convention right protected by the Act. These constitutional arrangements have not been fundamentally changed by the HRA but, as Chapter 4 indicates, they have been placed under considerable pressure because the HRA effected a difficult compromise between protecting parliamentary sovereignty and achieving effective rights protection.

However, where fundamental rights are protected by EU law, which also reflects the principles of the European Convention on Human Rights, they take precedence over statutory provisions due to the supremacy of EU law. Thus if a domestic provision comes into conflict with an EU provision, the judge will decide to ‘disapply’ it, unless the conflict can be resolved. Parliamentary sovereignty has therefore suffered some limitation. Where EU law does have an impact on fundamental freedoms, it provides a protection which may broadly be said to remove certain freedoms, or aspects of them, from the reach of Parliament, at least while the UK is a member of the EU.

That is the constitutional background to the HRA. It is still of great significance since it is crucial in the development of civil liberties in this country and because the HRA has been greatly influenced by the domestic constitutional traditions. This Part will seek to show that although the HRA is of immense constitutional significance, it has not brought about a fundamental constitutional transformation. It has allowed the European Convention on Human Rights to be relied on directly in domestic courts, and in the fifteen years that the HRA has been in force there have been some signs – but not many - that the judiciary are prepared to give a domestic effect to the rights that affords them a broader scope than they have been afforded at the Strasbourg Court (the European Court of Human Rights).[[5]](#footnote-5) Further, although under the HRA judges cannot strike down legislation, they can change its provisions through interpretation, which includes implying ‘missing’ words into it, or declare the incompatibility between such provisions and one or more ECHR rights. Where they take the latter course, the government, as Chapter 4 shows, normally tends to respond.[[6]](#footnote-6) Thus the HRA has shown a resemblance to a Bill of Rights, despite its limitations, which were imposed on it in accordance with British constitutional traditions.[[7]](#footnote-7) This notion of the transition over the last fifteen years from an instrument giving an international instrument domestic effect to something resembling a Bill of Rights forms a key theme in this Part, and indeed in this book as a whole. But this edition of this book is written at a time when pressure to repeal the HRA is apparent, partly due to the rising fear of Islamic terrorism.

The HRA was introduced by the Labour Government in 1998 on the basis that the Convention rights were, finally, to be ‘brought home’.[[8]](#footnote-8) There were expectations at that time that the HRA would revive the civil liberties tradition – there was a sense of a break with the erosions of liberty of the past.3 But before the HRA had had a chance to gain acceptance among politicians and the British people generally, the world was hit by the devastating 9/11 attacks. The same Labour government that passed the HRA was then responsible for an unprecedented incursion into peace-time civil liberties in an effort to address the terrorist threat. The legislative response began only one year after the HRA came into force, in 2001, when the Labour Government derogated from one of the most fundamental freedoms – the right to liberty.[[9]](#footnote-9) The Labour government followed this derogation with further legislation that curbed freedoms which had long been entrenched as civil liberties before the inception of the HRA, including the Regulation of Investigatory Powers Act 2000 (see chapter 10), the Serious and Organised Crime Act 2005 (see chapter 12) and, in response to the 7/7 bombings, the Terrorism Act 2006 (see Chapter 14). The Coalition government of 2010-2015 built on that legislation in passing the Counter-terrorism and Security Act 2015, and the current Conservative government proposes to introduce further legislation to combat extremism in Autumn 2015, in response to the spread of ISIS and the shooting of 30 Britons in Tunisia on 26th June 2015, the greatest loss of British life in a terrorist attack since the 7/7 bombings.

Thus, a key aim of this book is to consider the impact which the HRA has had in enhancing the protection for liberty in the face of a range of statutes enhancing state power very significantly since 9/11. At the same time it will examine the extent to which expansive interpretations of Convention rights are currently being retreated from at Strasbourg, in Parliament and in the courts. There is the possibility that, in Parliament, the rights have at times been treated as guarantees partly emptied of content which cast a legitimising cloak over rights-abridging legislation and executive action.

This book will argue that the core values that human rights protect – whether recognised under the ECHR, the common law, or in future under a British Bill of Rights - should be afforded a genuine efficacy, since the alternative would be likely to lead to a *decrease* in state accountability and an obscuring of political discourse as to the nature of state power and countervailing rights. The fact that the UK may have a British Bill of Rights or a measure – the HRA - that looks something like a Bill of Rights, in the tradition of other democracies, should not necessarily be taken to suggest that rights protection is secured. Countervailing concerns are especially pressing at the present time, in 2015, after a number of terrorist incidents, including the murder of Lee Rigby in 2013, and the foiling of a range of terrorist plots. Indeed, such concerns are leading to the current demand for departure from ECHR standards. The interaction between the HRA and the interests of unpopular minority groups, including suspected terrorists and prisoners, has fuelled the move to repeal the HRA. The perception that the HRA stands in the way of adopting necessary security measures, in addition to various concerns that the Act is overly generous towards the morally culpable (such as prisoners and terrorists) has gradually become established in the popular consciousness. After fifteen years of the HRA, the Conservative government, now unrestrained by being part of a Coalition (albeit with a limited majority), and threatened by the anti-HRA rhetoric of UKIP, has stated that it intends to consult on repeal of the HRA in 2017 or 2018 and its replacement with a British Bill of Rights.[[10]](#footnote-10)

It is argued in this book that the popular assessment of the HRA is largely unfounded and is the result of the failure of the British public to grasp its real nature and significance. The lack of popular support is a result of various problems with the popular image of human rights and with their operation in the UK under the HRA specifically. Human rights represent complex requirements whose specific content is often controversial (see Chapter 1). Furthermore, they create a profound legal challenge that redefines the role legal institutions play in developing the law in a common law jurisdiction, such as the UK. Finally, as discussed in Chapter 2, the practical enforcement of human rights in the UK is parasitic upon an international legal instrument (the European Convention of Human Rights). The rights are not ‘owned’ by the British people in the way that Canadians appear to own their Charter or US citizens their Constitution.

All these difficulties with the popular image of human rights in the UK have been preyed upon by the British news media, which has been almost uniformly hostile to the HRA. This is a striking feature of the UK human rights debate (and the Bill of Rights debate, discussed in Chapter 3) since the news media are the traditional guardians of and even *recipients* of civil liberties and human rights (in particular, the right to free expression; see Part 2). The reason for such hostility, in addition to the fertile ground for misunderstandings about the protection of human rights, is perhaps that the traditional conception of civil liberties in the UK undoubtedly gave greater weight to the right to free expression relative to the countervailing right to privacy (see chapter 10).

So the HRA is under immense pressure at the present time, a time when, ironically, in a number of respects it has shown its ability to change the face of rights-protection in the UK. This is an age in which counterterrorist and organised crime concerns dominate the political agenda, and when the need for an instrument that can curb executive tendencies to introduce in response hasty, over-broad rights-abridging measures is especially pressing. But at the same time it will acknowledge that the maintenance of security is an essential prerequisite for the enjoyment in practise of the benefits of rights.

In this Part Chapter 1 will offer an indication of the theoretical basis of rights and liberties and of the distinction between them, seeking to demonstrate that a shift from liberties to rights has occurred in the UK. Chapter 2 will undertake analysis of the Treaty which has been afforded further effect in domestic law and which is currently tending to act, in effect, as the basis of a UK Bill of Rights – the European Convention on Human Rights (ECHR). Chapter 3 will consider the nature and adequacy of the traditional domestic arrangements which protected fundamental freedoms mainly as liberties and the extent to which the Convention influenced the domestic protection of civil liberties in the pre-HRA era; it will also consider the current resurgence in 2013-15 of common law rights, not reliant on the HRA.[[11]](#footnote-11). It will also discuss the proposal for the future replacement of the HRA with a British Bill of Rights. Chapter 4 will consider the nature of the instrument that has received the Convention into domestic law – the HRA. Chapter 5 will consider the influence of the ECHR upon anti-discrimination law, and the protection of equality in the UK.

Chapter 1

An introduction to the nature of rights and liberties

# 1 Introduction

This book is intended to provide an analysis of the legal protection given to civil liberties and human rights in the UK.[[12]](#footnote-12) The term ‘civil liberties’ denotes the broad class of liberties often referred to as civil and political liberties as they are traditionally recognised in the UK,[[13]](#footnote-13) while the term ‘human rights’ broadly refers to rights that can be claimed against state bodies, recognised internationally in the Universal Declaration on Human Rights. In order to develop a conception of these requirements a theoretical position will be outlined from which to mount an internally consistent critique of the state of civil liberties and human rights in the UK today.[[14]](#footnote-14) This chapter will therefore aim to provide an outline account of the nature of and underlying justification for state acceptance of civil liberties and human rights.

# 2 The nature of civil liberties and human rights

Both rights and liberties are fundamentally *requirements*.To have a right is to be able to (validly) require another person to do or not do something. As requirements they can be broken down into various elements: firstly the requirement must have an object, i.e. it must be about some thing or action (eg not to be killed); secondly the requirement must have a subject, a person (S) who is owed the object; thirdly it must have a respondent (R), who owes S the object.

This section will provide an outline account of the constituent elements and relations that define rights and liberties as requirements. This outline will be used to define the nature and operation of human rights and civil liberties which as pertaining to the UK is the focal concern of this book.

## 2.1 Legal rights and moral rights

Before considering the content of rights as requirements it is first necessary to establish their validity. In other words, why should a respondent state accept that it owes a duty towards an individual who is the subject of a right? Validity is at the essence of the distinction between a legal and a moral right. The endeavour to distinguish legal from moral rights involves a central issue in jurisprudence, namely, the relationship between law and morality, on which there is a vast literature and a number of clearly defined schools of thought. Only the barest indications of the various positions on this tendentious issue are possible here.

There are two familiar scenarios within which ‘rights’ and ‘liberties’ are commonly referred to. The first such scenario is one where an individual makes a claim that he has a right/liberty from the state by virtue of a specific legal authority, such as a statute. For example, if an individual who will be called Sam is arrested by police with no given reason and attacked by the same officers while in custody, he could claim that the state has violated a number of his rights (including his rights to privacy and liberty; see Chapters 10 and 12). Sam could refer to the various relevant legal authorities proscribing the actions of the police, such as the offence of assault.[[15]](#footnote-15) Thus Sam’s rights would be vindicated in a legal sense. The second scenario arises where the individual claims that his rights/liberties are infringed, but there is no such legal authority vindicating his rights. For example, if pre-HRA Shirley, a male to female transsexual teacher seeking to receive social acceptance for her transition, finds that her personal life is exposed in various newspapers in lurid terms, with intimate details obtained by secret filming, before she can talk to her pupils about her transition, she would not be able to refer to authorities proscribing the newspapers’ actions, as Sam could. Prior to the developments that occurred after the passing of the Human Rights Act she would not have been able to vindicate her right to private life in UK law in this situation.[[16]](#footnote-16) She could still argue that the newspaper had infringed her right to privacy, but her putative right would not be enforced in UK law.

The two scenarios represent – very crudely – the division between a legal and moral right put forward by the school of jurisprudence known as legal positivism, whose central insistence is that there is no *necessary* connection between law and morality.[[17]](#footnote-17) A positivist would argue that in the second scenario there is no *law* justifying Shirley’s claim and, instead, that she is merely asserting a moralright. A positivist would argue that while Shirley could argue that her claim *ought* to be given legalforce through the enactment of a specific legal right, this is in no respect equivalent to her possession of a legal right.

To a member of the natural law school in its traditional form,[[18]](#footnote-18) by contrast, the question of whether Shirley’s claim was moral or legal would not be decided empirically (eg by consulting the statute book), but rather by examining the normative claim made by her. If her claim was supported by *moral* law, then an empirical authority purporting to deny her claim would not be accepted as a valid law since it would be unjust. The approach sounds extreme, but was employed during the Nuremberg trials as the underlying justification for what might otherwise have been seen as the retrospective criminalisation of those who committed their crimes under the Nazi laws thought valid at the time.

The views of Ronald Dworkin[[19]](#footnote-19) provide a middle ground between these two theories – a ‘third theory of law’.[[20]](#footnote-20) His theory is highly complex, but in essence it is more inclusive than the positivist theory; recognising rights set forth by empirical authorities,[[21]](#footnote-21) it insists that the law may contain *further* rights which have never yet been recognised by a statute or in any judicial decision. Thus, Shirley could correctly claim she had a right, on Dworkin’s account, if (a) the right would be consistent with the bulk of existing empirical authority and (b) it would figure in the best possible interpretation of those authorities. By this, Dworkin means that the relevant past judicial decisions would be most satisfactorily justified by showing them all to have been concerned with protecting the right at issue, even if previous individual judgments did not explicitly recognise its existence. This exercise involves *moral* analysis in that the criteria for determining the ‘best interpretation’ consist of an evaluation of how far the relevant laws adhere to a principle of equal concern and respect. Such a claim might well, of course, be controversial, but it is precisely this that is at the root of Dworkin’s disagreement with the positivists: finding out what the law is, he argues, will require not merely an empirical test of the law’s *pedigree* (does it emanate from a particular institution?), but rather a complex inquiry which will, as he puts it, carry the lawyer ‘very deep into moral and political theory’.[[22]](#footnote-22)

If one is convinced by Dworkin’s ingenious argument, the existence of a legal right can be adduced through interpretation (at least in common law jurisdictions) that is partially moral in character. The resulting laws thus posited are ‘legal-moral’ in that they amount to authoritative determinations whose authority stems from moral *and* empirical law. Returning to Shirley’s situation above, a judge deciding on the validity of her claim should, on Dworkin’s view, seek to identify a consistent line of authority valuing analogous rights and then adopt the ‘best’ interpretation of such authorities in order to determine whether Shirley possesses the relevant right. By ‘best’ is meant very broadly that the judge adjudicating on Shirley’s claim, which might be loosely based on an existing but doubtfully applicable cause of action, could take account of countervailing legal considerations but also the recognition of the right in international Human Rights Treaties and in the Bills of Rights of comparable democracies.[[23]](#footnote-23)

## 2.2 The Hohfeldian conception of rights and liberties

Having given an account, in general terms, of the nature of rights and liberties as legal and moral requirements it is now necessary to consider the content of such requirements. Their content is fundamentally derived from the relationship of obligation between the subject (eg an individual) and the respondent (usually the state or an emanation of it, such as the police service) involved in the assertion of a right or liberty. One of the more influential attempts to analyse closely the nature of a right or a liberty was made by the American jurist Wesley Hohfeld.[[24]](#footnote-24) Hohfeld attempted to demonstrate that claims of rights in everyday language can in fact be broken down into three more specific claims: a claim-right, a liberty an immunity and a power.[[25]](#footnote-25)

### 2.2.1 Claim-right

If it is claimed that the subject, an individual (eg Sam) has a right proper or a ‘claim right’ to the object of the right, then this means that the respondent (eg a state or ‘public’ body)[[26]](#footnote-26) is under a specific corresponding duty to ensure that Sam has access to that object. These rights are among the most ‘powerful’ rights to possess since the duties typically require the respondent to act to fulfil its duty to the subject. An example would be the right to freedom of expression recognised by Article 10 of the European Convention of Human Rights. If for example Sam was fined or imprisoned for publishing material which was deemed an ‘obscene publication’[[27]](#footnote-27) then he could claim that this interference was contrary to his Article 10 right.

### 2.2.2 Liberty

If Sam has only a liberty (what Hohfeld calls a privilege) to enjoy the object of his right, this far weaker claim merely means that he does no wrong in doing so. The state has no duty to enable him to achieve the object of his liberty. Thus if a statute bans all assemblies in public places consisting of more than 10 people whereas persons did no wrong in assembling in any numbers in public, then a liberty of persons to assemble has been severely encroached upon. Since individuals cannot claim a right to assemble, they have no clear means of challenging the new statutory power when applied by the police to arrest persons assembling in a group of more than ten. On the other hand, persons representing the state, such as the police, need a specific power to encroach on a liberty. Liberties are assumed to exist unless specifically curtailed by legal powers. A historical example, which could have arisen in Britain prior to the general statutory power of stop and search created by the Police and Criminal Evidence Act, is provided by the lack of a general statutory power for police to detain and search individuals.[[28]](#footnote-28) If the police were to seek to stop and search a hypothetical suspect, Sam, in the absence of specific common law or statutory authority – he could assert that he was under no duty to consent to their search. Obviously, by asserting his liberty he is not asserting a claim-right (eg to non-interference with his person), but he is asserting that there is no power to interfere with his liberty. In that instance in the absence of a specific power of stop and search, the assertion of a claim right or of a liberty would lead to the same legal result – that the police would be found to have acted unlawfully. But the creation of a general statutory power of stop and search would obviously destroy Sam’s liberty to go about his business in public free from police interference, assuming that he satisfied the conditions in the statute allowing the police to stop and search him. If however he had a claim right to non-detention by police, even for the brief period of a stop and search, then he could challenge the stop and search on the basis of non-compliance with the terms of that right (as set out in the relevant Bill of Rights), even if the terms of the statute allowing the police to stop and search him were fulfilled.

### 2.2.3 Immunity

Both the previous requirements considered so far, claim rights and liberties, are *primary* rules that directly require the respondent to do something (claims) or that the subject has no duty not to do something (liberties). An immunity, in contrast, is a *secondary* rule. Rather than refer to rules requiring action directly (claims/liberties), the immunity refers to the right to *change* such rules. More specifically, if one has an immunity, then the respondent (eg a public authority) is disabled from creating a rule requiring the subject to act contrary to the object of the immunity. An immunity has a corollary – a power – which, rather than disable the alteration of primary rules, enables such alteration; however, unlike an immunity, a power is not a feature of the civil liberties or human rights considered in this work and is therefore not considered further in this chapter.[[29]](#footnote-29)

An immunity works most effectively in tandem with a liberty; that is because a liberty refers to the absence of a duty to act contrary to its object (eg above Sam had no duty to acquiesce to a police stop and search in the absence of a statutory provision allowing such police action), while an immunity disables the creation of a duty contrary to the object of the immunity (eg no statutory provision can be created authorising police stop and search). In general the UK does not recognise immunities in its constitutional arrangements, since Parliament can in theory legislate to abridge any human right. However, an example of a de facto immunity in the UK is the right to silence since while Parliament is free to abolish it completely,[[30]](#footnote-30) it has such a long pedigree in the UK that such an eventuality is unlikely. This right could be said to operate currently as an immunity in the sense that it is a requirement that a court is disabled from exercising its authority to convict a suspect purely on the basis of remaining silent in court or in the face of police questioning since that would fundamentally violate his right to silence (which is the object of the immunity). To return to the example of Sam, his right to silence means that while adverse inferences could be drawn in court from his refusal to answer police questions about a suspected offence, he can nevertheless refuse to answer such questions. His immunity provides that he will only be convicted if a court finds him guilty of the offence withoutrelying solely on such adverse inferences.

### 2.2.4 Conclusions on the Hohfeldian framework

The above outline emphasises two significant distinctions. Firstly, and most straightforwardly, claim-rights impose an obligation upon the respondent(the state) to act, while liberties do not and instead indicate that there is no obligation upon the subject (an individual) to do anything in the absence of a legal rule preventing a particular exercise of a liberty. Secondly, rights involve two basic *types* of rules: primary rules that establish the existence of an obligation upon the respondent to secure the individual’s right - a claim-right, or in the case of a liberty of no-obligation upon the subject to act contrary to his liberty, and secondary rules that disable the creation or alteration of the individual’s claims or liberties (an immunity). These two, basic, distinctions are important when considering the practical implementation of human rights, since it is human *claim*-rights as primary rules requiring the state to act or not to act where it otherwise would that cause the greatest difficulty in deploying rights in practice. For example the right of access to legal advice captured in Article 6(3) requires the state to ensure that such provision is made (see Chapter 2), regardless of the financial cost.[[31]](#footnote-31) The claim-right to freedom from torture or inhuman and degrading treatment (Article 3 ECHR, scheduled in the HRA) has been applied to suspected Islamic terrorists so as to prevent deportation to their country of origin on the basis that they might be subject to treatment contrary to that Article.[[32]](#footnote-32) This application of Article 3 is controversial due to the burden it places upon the UK government, especially given its responsibility to safeguard the lives of its citizens from the actions and influence of such suspects.

## 2.3 What are ‘human rights’ and ‘civil liberties’?

To address this question it is useful to summarise briefly what has already been established. Rights are requirements with an individual subject, object, respondent, which are justified by reference to both moral and legal principle on Dworkinian lines, as discussed above. The word ‘right’ can denote a primary rule requiring a respondent to act to secure the right (a claim-right) or merely the absence of a duty upon the subject to act or refrain from acting (a liberty). Secondary rules can affect the respondent’s ability to alter the subject’s claim-rights or liberties (powers/immunities), but they are not of significance in the UK context. This section will therefore outline the areas of consensus and division as to what is generally accepted to constitute the subject, object, respondent of civil liberties and human rights as relevant to this work. The relations between civil liberties and human rights will also be considered.

### 2.3.1 Civil liberties and rights

Liberties are termed ‘civil’ liberties in the UK because they refer to freedoms of citizens within the civic state. The term civil is also used in contrast to the term ‘social and economic’, referring to matters such as ‘a right to housing’ which would fall within the area of social and economic rights. The subjects of civil liberties are straightforwardly citizens, and the respondent is the ‘state’, meaning an emanation of the state (public authorities, such as the police or prison service). The object of civil liberties is the freedom to act except as is prohibited by law (eg to take part in a protest or go about one’s everyday life without interference from the police except as designated in legal rules governing police powers). The basis of civil liberties is the existence of laws which impliedly designate the areas of freedom that citizens can enjoy. In other words, it is clear that the existenceof a civil liberty depends on the non-existence of a conflicting legal enactment (eg a statute). The relationship between the citizen and the state is that of a Hohfeldian liberty: only when a citizen is not placed under a duty to refrain from exercising the liberty, such as his freedom of expression, does he have a civil liberty. In other words, he has an area within which the liberty in question can be exercised, delineated by laws that designate the extent of the area. That notion is explored in Part 2 in relation to freedom of expression.[[33]](#footnote-33)

From the 17th Century onwards, liberal theorists and politicians have argued that citizens should be able to benefit from claim-rights rather than civil liberties.[[34]](#footnote-34) Rather than enjoying freedoms to act in ways not proscribed by law, there was increasing pressure post-Enlightenment to recognise civil liberties as legal rights*.* Virtually all Western democracieshave introduced Bills or Charters of rights which usually accord citizens claim-rights. But, as mentioned at the beginning of this Part, the UK only recognised such rights as civil liberties until the inception of the Human Rights Act 1998.

### 2.3.2 Human rights

The subjects implied by ‘human rights’ would appear straightforwardly to be ‘humans’. However, it is not generally accepted that humans at all stages of development are the subject of human rights. There is no consensus as to whether a ‘foetus’ counts as a subject of human rights[[35]](#footnote-35) and it is not accepted that infants should possess certain rights, such as to marry.[[36]](#footnote-36) Similarly, it is not generally accepted that humans who lack certain capacities can benefit from certain rights, so that the mentally disordered may not be able to benefit in certain circumstances from the right to personal autonomy, an aspect of the right to respect for private life (Article 8 ECHR), since in relation to certain decisions that Article 8 might potentially protect it requires that rational self-oriented decisions alone should be respected.[[37]](#footnote-37)

One interpretation of the subject of human rights is that the subject of certain ‘human’ rights is more aptly defined as relating to beings with the capacity for autonomous self-determination which is, so far as we know, unique to human beings.[[38]](#footnote-38) Without going into detail, this view did not lead to determining that young children, the mentally ill or unconscious humans (eg in a PVS state) would be excluded from enjoying the benefits of a range of rights. For example, very young children would obviously be able to benefit from a range of human rights, such as the right to be free from torture or inhuman or degrading treatment (see Article 3 ECHR). But this view is disputed by those who argue that it could deny the protection of human rights to a far greater range of human beings than is generally considered to be morally acceptable.[[39]](#footnote-39) The better view is that all humans (except the foetus up to a certain stage of development) are the subject of human rights.

There is a general agreement among legal scholars that the respondent to human rights is the state (under the HRA the respondents are ‘public authorities’).[[40]](#footnote-40) Human rights instruments, such as the ECHR, refer to the obligations that fall upon the ‘contracting parties’ and not upon individuals within those states. However, even this matter is not entirely without controversy. As this book discusses in relation to the right to privacy (see Chapter 10) there are a range of instances in which individual citizens are affixed with an obligation to respect the human rights of others. This position may be referred to as the ‘indirect horizontal effect’ of a human rights instrument.[[41]](#footnote-41) As explained in Chapter 10, the creation of rights *between* individuals is considered to be an aspect of the UK’s obligation to secure the Article 8 right to respect for private life effectively. For instance, in the example given as regards Shirley above in relation to claim-rights, the invasion of her privacy was not by the state but by a newspaper, but the state has an obligation under Article 8 scheduled in the HRA to ensure that her privacy is protected from private actors as well as from the state. In practice the state becomes involved when a *court* is asked to interpret the rights and obligations of Shirley and the newspaper if she brings an action against the newspaper.[[42]](#footnote-42)

As regards the proper object of human rights there is arguably little agreement between theorists.[[43]](#footnote-43) This book considers human rights to expression (Part 2), privacy (Part 3) and liberty (Part 4). One view is that human rights should be understood to be most fundamentally claims to the conditions that are necessary for ‘humans’ to live freely and with dignity; human rights that reflect this rationale are the rights to life (Article 2 ECHR) and freedom from torture (Article 3, ECHR).[[44]](#footnote-44) But civil human rights are mainly though not solely aimed at enabling full participation in the political life of civil society (rights to freedoms of expression, assembly, association, and to vote). The human right to privacy generates by far the greatest controversy; for example, the tabloid media has (with dubious good faith) ridiculed the idea that this human right extends to a spectrum of further human rights, such as the right of a prisoner to receive IVF.[[45]](#footnote-45) There is also controversy over the validity of claims by certain Treaties to establish economic and social human rights as well as civil and political rights since the former depart from traditional enlightenment ideas of the object of human rights.

To describe the rights considered in this book in terms of their Hohfeldian incidents, the rights to freedom of expression, liberty and privacy are straightforwardly understood as Hohfeldian claim-rights, due to the operation of the Human Rights Act, which places obligations on public authorities to abide by those rights.

The above provides an outline of the basic nature of human rights. However, the theoretical disputes as to their nature are somewhat removed from the immediate concerns generated by the legal application of such rights. Rather, it is the *operation* of such rights that form the primary concern of this book, and in particular the scope of the rights and the exceptions to them. This is particularly the case as regards the operation of human *claim-rights*. Therefore it is to this aspect of the nature of human rights that this chapter will now turn.

## 2.4 The operation of human claim-rights: conflicts with other claims

There are many situations where an individual has a claim to a right but it is justifiable for the respondent state not to fulfil its obligation to deliver the right. The right may come into conflict with the claims of society, such as that a certain standard of morality should be upheld. Clearly, in resolving such a conflict, a judge will inevitably draw upon his or her background political theory. If, for example, a judge in the European Court of Human Rights, who is a utilitarian by conviction, has to consider a convincing demonstration by a defendant government that the particular application of the right to free speech claimed by the applicant will, on balance, make society worse off as a whole, he or she will be inclined to find for the government and allow the infringement of the right. Such infringement will, of course, be more readily allowable if the right is framed or has developed in such a way as to be open-ended in scope with in-built exceptions.

Both Dworkin and Rawls have argued persuasively against making rights vulnerable to utilitarian considerations in this way. The idea that ‘[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override’[[46]](#footnote-46) lies at the centre of Rawls’s political thought. The idea of such inviolable rights may seem extreme, but is in fact accepted by all civilised countries in the case, for example, of torture. It is not thought to be a sound argument for a government to assert that it is justified in torturing certain of its citizens on the grounds that it can increase the general welfare thereby. The acceptance of this principle is attested to by the non-derogability of the right to freedom from torture in all international human rights treaties, including the European Convention on Human Rights (Art 15(2)).

Dworkin has addressed the specific question as to the means of understanding a legal right in an adjudicative context in some detail. Earlier, the distinction between moral and legal rights was discussed. Here it should be noted that Dworkin also distinguishes between rights that have ‘trump’ status and those that do not. He gives as an example of the latter a legal right to drive either way on a two-way road: such a right is a ‘weak’ legal right, because it is not an important human interest which is likely to be denied to certain groups through the influence of external preferences. It follows that such a right could justifiably be overridden by the government (through making the road one-way) if it thought it in the general interest to do so. By contrast, his conception of the strength of ‘trump’ rights leads to his insistence that an assertion of (for example) a right to free speech held by citizens ‘must imply that it would be wrong for the government to stop them from speaking, even when the government believes that what they say will cause more harm than good’.[[47]](#footnote-47)

It can be seen, then, that Dworkin gives us a very clear prescription for the approach that a judge should take in weighing strong or ‘trump’ rights against the general welfare of society. He roundly condemns the idea that a judge, in adjudicating upon a right or a government in framing it, should carefully weigh up the right of the citizen against the possible adverse social consequences, accepting that it is sometimes preferable to err on the side of society, sometimes on the side of the individual, but on the whole getting the balance about right. ‘It must be wrong’, he argues, to consider that ‘inflating rights is as serious as invading them’. For to *invade* a right is to affront human dignity or treat certain citizens as less worthy of respect than others, while to *inflate* a right is simply to pay ‘a little more in social efficiency’[[48]](#footnote-48) than the government *already* has to pay in allowing the right at all. Thus, for Dworkin, if one asserts a ‘trump’ right, ordinary counter-arguments about a decrease in the welfare of society as a whole are simply irrelevant.

In what circumstances, then, may a strong individual right be overridden? Dworkin has argued[[49]](#footnote-49) that there are three general justifications for infringement and these appear to be generally accepted by liberal thought. This section will consider the three common situations in which rights may be overridden, but will indicate that Dworkin’s view as to resolution of clashes between rights and societal interests has not been fully accepted. Firstly, there are clash of rights situations in which a state’s right-based duty conflicts with another duty under a conflicting claim-right. Secondly, there is the situation in which its duty conflicts with another duty under a conflicting non-rights-requirement (ie a societal interest such as the protection of national security). Thirdly a situation may arise in which the state is unable to fulfil its duty because it lacks the resources to do so.

Before considering the operation of human claim-rights in these situations it is useful to consider a preliminary point briefly. Does a respondent state retain its obligation even if it is unable to fulfil it? A maxim of practical ethics is that ‘ought implies can,’[[50]](#footnote-50) by which is meant that an impossible to fulfil requirement cannot be a moral requirement. That is because a moral requirement fundamentally refers to an individual able to exercise a capacity to act that he currently possesses. Human claim-rights must respect this maxim if they are to be rationally defensible as practical requirements, and therefore modern Treaties of human rights include limitations on certain rights. For example, Article 8 (ECHR) sets out the right to respect for private and family life in the first paragraph, but accepts that a public authority may justifiably interfere with an individual’s right where that interference is prescribed by law and is “necessary in a democratic society” to protect the rights of others or to secure various important public interests (such as national security or health).

### 2.4.1 Conflicts between rights

Rights conflict occurs where there is a clear competing individual claim, so that the exercise of the original right will directly infringe the competing right. A paradigmatic example of such a collision of rights, considered in Chapter 11, arises where one individual (eg Albert as a newspaper editor) exercises his right of free speech to invade the right to privacy of another (eg Brenda). Another is where Albert uses his right to free speech to incite violence against Brenda, thus infringing her right to security of the person. In such cases rights theorists divide as to the way in which this conflict could be resolved. On the most commonly held view it may be possible to resolve the conflict by undertaking a balancing act between the two rights based on proportionality,[[51]](#footnote-51) the result of which is determined by reference to the rule/principle justifying the existence of the right. This may be termed the conflict view of rights.[[52]](#footnote-52) In most of the instance of a clash of rights covered in this book, that is the way that the conflict is resolved.[[53]](#footnote-53)

If avoidance of conflict was impossible, a determination might be made as to the damage inflicted on each right if the other is allowed to prevail. In the case of incitement to violence, the damage inflicted if free speech was allowed to prevail might be almost irretrievable, since the group affected might be placed at great risk for a period of time. In contrast, the damage to free speech created by avoidance of the risk might be of a lesser nature, although undesirable: the speech could be uttered in another form or another forum, so that its meaning was not lost, but it was rendered less inflammatory. Alternatively, utterance of the speech could be delayed until the situation had become less volatile. The words advocating immediate violence might be perceived as outside the area of protected speech and so might be severed from the accompanying words which could be permitted.

On another view the conflict can be resolved by redefining the scope of the right, or applying a limiting definition to its scope where a more expansive one could have been available, so that either Albert or Brenda are unable to claim that they can validly exercise their right in a way that infringes the other’s exercise of their right. The question of whose right is to be non-expansively defined or redefined to allow for the other’s exercise can similarly be resolved by reference to the rule/principle justifying the existence of the right. This may be termed the non-conflict view of rights,[[54]](#footnote-54) but it is rarely invoked in the clash of rights instances covered in this book. Deploying a limiting redefinition of the scope of a right is much more relevant to a potential clash between a right and a societal interest, considered below, where deploying such a redefinition allows the societal interest to prevail.[[55]](#footnote-55) That may occur in relation to human rights that are expressed as absolute requirements (eg Article 3 ECHR, the prohibition on torture).[[56]](#footnote-56)

However, the influence of a non-conflict view of rights can be discerned when courts adopt strategies to find that in the instant case the values underlying the right in question are not fully at stake. This strategy finds that rights have a ‘core’, the invasion of which will constitute an actual overriding of the right which cannot be tolerated, but they also have a ‘penumbra’ – an area in which the value the right protects is present only in a weaker form.[[57]](#footnote-57) An invasion of the penumbra may be said to constitute only an *infringement* of the right and may therefore be more readily justified, whether in relation to a clash with another right or with a societal interest. The argument that commercial speech should not be afforded the same protection as other kinds of speech would appear to rest precisely on the argument that it is in the penumbra of free speech;[[58]](#footnote-58) by contrast, political speech is clearly in the ‘core’ of free speech.[[59]](#footnote-59) Clashes between Article 8 (the right to respect for private life) and Article 10 protecting freedom of expression have been resolved by finding that celebrity gossip in newspapers – ie privacy-invading expression – is not in the core of free expression since it has very little speech-value.[[60]](#footnote-60) Therefore while Articles 8 and 10 are balanced against each other in such a situation, the Article 10-based argument will tend to be quite readily overcome.

### 2.4.2 Conflicts between rights and societal interests

The operation of rights-requirements in practice will frequently involve conflict with other non-rights-based requirements, particularly important matters of public policy. An obvious instance arises where the exercise of a right may pose a real danger to society. In such instances, liberals are unwilling to take danger to mean danger to some abstract attribute to society, such as its moral health,35 but rather insist that the danger must ultimately amount to a threat to some concrete aspect of its citizens’ well-being. Thus, typically, liberals are hostile to characterising the likelihood of shocking or offending citizens as a concrete harm justifying the suppression of the right of free speech. Dworkin’s own rather unrealistically stringent, test is that the ‘risk to society’ justification for overriding rights is only made out if the state demonstrates ‘a clear and substantial risk’ that exercise of the right ‘will do great damage to the person or property of others’.36 It seems unlikely that governments would be prepared to accept such a test; the criterion laid down, for example, by the European Court of Human Rights for curtailing the right of free expression as set out in Art 10 does not even approach Dworkin’s prescription in either stringency or clarity; instead, it has adopted the somewhat weak and uncertain phrase, ‘a pressing social need’.37 Dworkin’s rights analysis should not, therefore, be taken as a description of the way rights and liberties are *actually* treated in the UK under the ECHR.

The rights-as-trumps view finds that it is only meaningful to describe an individual as having a right when the justification for his claim is a value that is fundamental to the legal system. The fundamental status of these values means that the legal system can only condone their abrogation when similarly fundamental values are at stake. This view is one that is associated with liberal political theory, since rights are individually oriented requirements, and thus when a society accepts that the protection of rights is among its fundamental legal values it has committed itself to demonstrating respect for the liberty of individuals. However, the competing societal interest at stake may also relate in a general sense to the liberty, security and well-being of individuals in the society in question, even if it cannot be said or is not claimed that a specific clash of rights is present.[[61]](#footnote-61) For example, a mass public protest may significantly impede the use of the highway by passers-by; it may also be threatening or harassing to such persons. The use of anti-terrorist legislation may reduce the scope for terrorist attacks putting lives at risk and may lead to a reduction in the use of security measures in a range of circumstances, impeding free movement of persons generally. Refusal to rely on hearsay evidence where the victim-witness in question is too intimidated to come to court, or too badly injured to do so may be detrimental to the interests of that victim and potential victims.[[62]](#footnote-62) Thus respect for liberty in the society in general does not depend only on elevating respect for individual rights on the Dworkinian model above societal concerns that also relate to liberty.

Thus, the approach to such conflicts under the ECHR, whether domestically under the HRA or at the Strasbourg Court, rely on balancing/proportionality approaches rather than the more absolutist Dworkinian approach. The view taken is that rights should be treated as particularly weighty requirements, but that sometimes public policy concerns can outweigh the right, as discussed in Chapter 2.

### 2.4.3 Respondent unable to fulfil duty due to lack of resources

A respondent state may be ableto respect an individual’s human claim-rights in *isolation*, but a state such as the UK has many similar claims upon its actions and, in their totality, the state may be unable to fulfil them.[[63]](#footnote-63) It is therefore necessary in practice for such a respondent to recognise a hierarchy of obligations if it is to act to fulfil them. The nature of this hierarchy will depend upon the *justification* for the right, since the courts or legislative bodies must determine which obligations are more ‘weighty;’[[64]](#footnote-64) such a determination requires an analysis of the relationship between the various obligations and their justifying basis.

The rights discussed in this book refer to state actors with extensive responsibilities and limited resources. The *object* of these rights – even seemingly basic rights, such as the right to life – can require extensive action in certain situations. Furthermore, if a legal regime that respects these rights is to be administered effectively, then resources must be deployed to enable legal officials to prioritise the differing obligations. All of these considerations have resulted in a consensus among rights-theorists that human claim-rights must impose *minimal* or even entirely *negative* obligations.[[65]](#footnote-65) Negative obligations require individuals merely to refrain from acting to interfere with another’s right depending upon the justification advanced for its existence; they are contrasted with (minimal) positiveobligations that do require the state to secure the right by positive action, although not all obligations deemed ‘positive’ do require the expenditure of significant resources.[[66]](#footnote-66)

A separate problem in respect of positive obligations is raised by libertarian theorists. Libertarians consider that natural rights exceed their justificatory basis when they require another to act to further the purposes of the rights-holder.[[67]](#footnote-67) This view has not found purchase in European human rights law. The European approach reflects a social liberal approach that is closer to the views of theorists, such as Gewirth, who do not recognise an absolute limitation on positive rights.[[68]](#footnote-68)

# 3 The justifications for human rights

This chapter will discuss the main criticisms of, and justifications for, the existence of a duty upon the state to protect human rights. The section will begin by setting out key criticisms of human rights from utilitarian, Marxist and critical legal studies perspectives. The chapter will then turn to the justification for human rights; the position adopted will reflect the particular brand of political liberalism expounded by John Rawls and Ronald Dworkin, in so far as their theories converge.

## 3.1 Opposition to the liberal conception of human rights

### 3.1.1 Utilitarianism

Utilitarianism has historically been generally hostile to the idea of rights, most famously to the notion of natural and inalienable human rights as set out, for example, in the American Declaration of Independence, which was characterised by Jeremy Bentham as merely so much ‘bawling upon paper’.[[69]](#footnote-69) The opposition of utilitarians to the notion of *natural* rights sprang mainly from their legal positivism – their belief that a legal right only exists if there is a specific ‘black letter’ provision guaranteeing it. But in general, since utilitarianism sets out one supreme goal of happiness or, in its more modern version, preference maximisation, it would clearly follow that rights under utilitarianism can have only a contingent justification.[[70]](#footnote-70) In other words, they are to be respected if they help bring about the goal of maximum satisfaction of preferences, but not otherwise. It may seem odd to postulate an opposition between utilitarianism and human rights, bearing in mind that JS Mill combined utilitarianism with a passionate belief in the desirability of free expression and civil rights generally. It should be noted, however, that Mill’s arguments for free speech depend essentially on a belief that allowing free speech will, in the long term, have good effects – such as increasing the likelihood that the truth will be discovered – rather than on a belief that free expression is a good in itself or something to which human beings are entitled without reference to its likely effects. A utilitarian, confronted with a situation in which infringing a right would undeniably benefit society as a whole, would have no reason to support the inviolability of the right; for example, he or she would find it hard to explain why criminal suspects should not be tortured if it were proved that reliable evidence would be derived thereby, leading to increased convictions, deterrence of crime and substantial consequential benefit to society.

A further variant of the theory which has sometimes been termed ‘rule utilitarianism’, however, states that the goals of utilitarianism can best be reached by constructing rules which it is thought will, in general, further the goal of happiness or ‘preference maximisation’ and then applying these rules to situations as absolutes rather than considering in each individual situation what can best further the goal (for discussion, see Smart and Williams).[[71]](#footnote-71) Such rules could, of course, consist, at least in part, of a set of human rights. In relation to the example of torture given in the text, a rule utilitarian could plausibly maintain that a general rule of humane treatment of citizens is likely to lead to the greatest happiness. In deciding whether to torture an individual suspect, this would mean that instead of considering whether in this case overall utility would be increased thereby, the state should apply the rule of humane treatment, even if in the particular case it would lead to a decrease in utility. It can be seen that for rule utilitarians, the good (the goal of preference maximisation or greatest happiness) is prior to the right, in opposition to Rawls’s clearly expressed conviction that the right (a system of just entitlements of citizens) is prior to any conceptions of the good – the substantive moral convictions by which individuals will live their lives (see below, 3.2.2).

### 3.1.2 Marxism

The former socialist bloc of states – the Soviet Union and Eastern Europe – was the driving force behind the international recognition of economic, social and cultural rights. This was at least partly due to the fact that there is a measure of hostility within Marxist thought to civil and political rights.[[72]](#footnote-72) Such hostility exists mainly because Marxism advocates establishing a state which, far from being neutral amongst its citizens’ varying conceptions of the good and guaranteeing them the liberties necessary to pursue their private goals, instead imposes a particular conception of the good upon society. Since it regards the protection of this conception (the achievements of the revolution) as the supreme value and duty of the state, the exercise of liberties which threaten this achievement can be justifiably curtailed; hence the consistently poor record of the former Soviet bloc states and Communist China on such civil rights as freedom of speech. A theoretically related, but more moderate, critique of the Western liberal conception of human rights can be found in the writings of the so-called communitarians.[[73]](#footnote-73)

### 3.1.3 Critical Legal Studies

The Critical Legal Studies movement (CLS) attacks the whole liberal conception of law as neutral, objective and rational. It seeks to expose the value judgments, internal inconsistencies and ideological conflicts which it sees as concealed under law’s benevolent exterior of impartial justice.[[74]](#footnote-74) Since the whole structure of legally guaranteed human rights is a creature of the liberal conception of law, the CLS attack fastens by extension onto the liberal notion of rights. Mark Tushnet, for example, has made four main criticisms of the liberal theory of rights in what he calls ‘a Schumpeterian act of creative destruction’. He asserts that rights are: first, unstable – that is, meaningful only in a particular social setting; secondly, they produce ‘no determinate consequences if claimed’; thirdly, ‘rights talk . . . falsely converts into empty abstractions . . . real experiences that we ought to value for their own sake’; and fourthly, if conceded a dominant position in contemporary discourse, rights threaten to ‘impede advances by progressive social forces’.[[75]](#footnote-75) It would be inappropriate to attempt a detailed refutation of the CLS position here.19 Perhaps the most important weakness in its critique of rights is that, as many writers have pointed out,20 it offers no guidance whatsoever as to how the interests of vulnerable minorities are to be protected without the institution of legal rights.

## 3.2 The liberal justification for human rights

The liberal conception of human rights and civil liberties can be seen to owe its antecedents to the school of so-called social contractarians which found perhaps its earliest advocate in the writings of John Locke.[[76]](#footnote-76) Locke imagined an actual social contract between individuals and the state at the setting up of civil society in which citizens, in order to secure the protection of their property, handed over certain powers (most importantly, a monopoly of coercive force) to the government in return for the guarantee of certain rights to ‘lives, liberties and estates’. Locke thus introduced the idea, which is still central to liberalism today, that the overriding purpose of the state is the securing and protection of its citizens’ basic liberties.

The idea of the social contract is clearly an immensely potent one and it is John Rawls’s revival and radical revision of the idea in his *A Theory of Justice*[[77]](#footnote-77) which has almost single-handedly transformed the face of political theory; as HLA Hart has commented, rights-based theories have replaced utilitarianism as the primary focus of attention.[[78]](#footnote-78) Robert Nozick, a right-wing critic of Rawls whose work *Anarchy, State and Utopia* mounts a sustained attack upon Rawls’s theory, has written: ‘Political philosophers now must either work within Rawls’s theory or explain why not’.[[79]](#footnote-79)

Rawls imagines not an actual, but a hypothetical, social contract taking place in what he terms ‘the original position’. The essential feature of this position is that the contractors (Rawls’s men) are devising amongst themselves the outlines of ‘the foundation charter of their society’ whilst behind ‘the veil of ignorance’. The men are ignorant not only of what will be their positions in the future social hierarchy, but also of their skills, weaknesses, preferences and conceptions of the good life – whether, for example, they will be strict Muslims or humanist academics. Since none of the contractors knows what mode of life he will wish to pursue, he is bound (if he is rational) to choose a tolerant society and one which guarantees him the rights necessary to pursue any individual goals he may in future choose. In other words, the men will wish to put in place the means whereby they will, in future, be able to pursue their goals rather than adopting structures which might in future prevent them from doing so. Thus, almost any conception of the good life will require, for example, freedom from arbitrary arrest, the right to a fair trial and freedom from inhuman treatment. In addition, the man who will become a Muslim might *in future* wish to restrict freedom of speech on religious matters but, *at present*, self-interest dictates that he consider the possibility that his conception of the good life might necessarily include the exercise of freedom of speech. Thus Rawls’s men adopt, *inter alia*, ‘the first principle’, stating that ‘each person is to have an equal right to the most extensive, total system of equal basic liberties compatible with a similar system of liberty for all’.[[80]](#footnote-80) These basic liberties are identical with any familiar list of civil and political rights in a human rights Treaty such as the ECHR or in a domestic Bill or Charter of Rights.

Although similar to Rawls in political outlook, Ronald Dworkin offers a theoretical construct which derives rights in a different manner, and indeed has criticised Rawls’s theory, arguing that a *hypothetical*, unlike an *actual*, contract provides no grounds for binding actual people to its terms.[[81]](#footnote-81) Dworkin attempts to derive rights from the premise, to which he hopes all will agree, that the state owes a duty to treat all of its citizens with equal concern and respect – a premise which he argues persuasively is the deep assumption underlying Rawls’s use of the contract device. Dworkin is not concerned with defending rights from despotic and repressive governments and indeed he sees no need to protect – by designating them as rights – those individual interests which the *majority* would like to see protected, since these will in any case be ensured by the democratic process which he assumes as a background to his theory. Dworkin’s particular concern is to justify the protection of *unpopular* or minority rights – or those whose exercise may on occasion threaten the overall well-being of the community – because such rights would potentially be put at risk if their validity were to be determined through a democratic vote.

Clearly, the institution of democracy and most familiar sets of political policies, such as seeking the economic betterment of the majority, seem to be satisfactorily explained by an underpinning utilitarianism. Dworkin hypothesises that the great appeal of utilitarianism is owed at least in part to its appearance of egalitarianism through its promise to ‘treat the wishes of each member of the community on a par with the wishes of any other’,[[82]](#footnote-82) taking into account only the intensity of the preference and the number of people who hold it. This appeal is evinced in the utilitarian maxim: ‘everybody to count for one, nobody for more than one.’ Dworkin finds, however, that raw utilitarianism betrays this promise, since it fails to distinguish between what he denotes external and personal preferences. For example, if the question of whether homosexual partners should be able to contract marriage were to be decided by a majority vote (*preference maximisation*) in certain states, many homosexuals would probably express their personal preference for freedom to choose to marry. Certain heterosexuals, however, might vote against allowing this freedom, because their external preference is that homosexuals should not be free to marry.

Thus, resolution of the question could be affected by the fact that certain citizens think that the homosexual way of leading family life is not deserving of equal respect; a decision would therefore have been made at least partly on the basis that the way of life of certain citizens was in some way contemptible. If the government enforced this decision through the use of coercive force (the criminal law), it would clearly have failed in its central duty to treat its citizens with equal concern and respect. In other words, utilitarianism – and therefore democracy – has an in-built means of undermining its own promise of equality. Since for Dworkin protecting this promise of equality is the central postulate of political morality, he finds that homosexuals should be granted a right to moral autonomy which cannot be overridden even by a majority decision-making process.

## 3.3 Conclusion on the liberal justification for human rights

The fundamental basis of the liberal justification for human rights presented in this section is the equal intrinsic value of individuals. This is reflected in Rawls ‘original position’ device and the fundamental value of ‘equal concern and respect’ alluded to by Dworkin. Both theories seek to address criticisms of the individualism of human rights by emphasising that majority preferences to protect majority-rights are a primary goal of liberal theory, but seek to adjust such rights via rationalism. However, Dworkin goes further than Rawls by imposing a *moral* adjustment in favour of equal concern and respect. It is the development of a rational and moral theory in favour of *substantive* rights for individuals that provides a justification for human rights.

The outline of the liberal justificatory approach to human rights set out in this chapter provides the foundation for the evaluation of the relevant law discussed in this work. It is important to emphasise that this evaluation does not assume that the responsibility for protecting human rights is mainly a judicial responsibility. Obviously, the responsibility of Parliament should be emphasised since it is the democratically accountable institution. However, to under-emphasise judicial responsibility risks undermining underrepresented minority rights in favour of majority rights. In the current climate of popular hostility to human rights which sometimes assumes that judges, especially judges in the Strasbourg Court, are imposing alien, anti-common-sense standards of rights’ protection in Britain, it is more important than ever for those engaging with law to appreciate these concerns.

# 4 Challenges for the legal protection of human rights in the UK

The most significant challenges created by the legal protection of human rights are that the obligations imposed upon the state by claim-rights can be particularly onerous and the reasons for the imposition of such obligations can be complex. These challenges contrast with the relatively weaker, and more straightforward, traditional approach to civil liberties in the UK prior to the Human Rights Act (HRA).[[83]](#footnote-83) When the HRA came fully into force many of the British Hohfeldian liberties became rights in Hohfeldian terms since, as Chapter 4 explains, public authorities were laid under a positive duty to respect them and are acting unlawfully if they do not (s 6(1)).[[84]](#footnote-84)

The HRA clearly represented a dramatic shift in rights protection in the UK, away from residual freedoms towards positive rights. The liberal ideal was therefore realised to an extent under the HRA, and – as this book discusses – the legal protection of human rights has been bolstered in a number of respects. However, crucially for the continued protection of human rights in the UK, various criticisms of its operation have gained considerable traction with the current Conservative government and the voting public, who support the current government’s anti-HRA stance. To an extent these criticisms stem from the difficulties with the operation of human rights discussed in this chapter.

The most powerful criticism is that judges usually in the Strasbourg Court, but also at times in domestic courts under the HRA, have failed to balance individual rights with the rights of others and societal interests correctly. This general criticism is made most forcefully in relation to the legal protection of human rights in the terrorism context; for example, in respect of Abu Qatada whose deportation to face terrorism charges in Jordan was successfully challenged (under Article 6 ECHR), due to concerns that he would not receive a fair trial.[[85]](#footnote-85) Another criticism is that the administrative burden of securing human rights in law is disproportionately great. Again, this criticism is made particularly as regards rights-protection in the terrorist context, where challenges to the detention of a small number of suspected terrorists have resulted in prolonged and extremely costly litigation.[[86]](#footnote-86) However, while both criticisms raise important challenges that any legal system seeking to protect human rights must face, it is not the case that in other democratic societies where such rights receive legal protection there is a popular movement to repeal such protections. In the USA, for example, the Constitution retains support from voters and politicians on both sides of the political spectrum, despite leading to the protection of rights – such as abortion[[87]](#footnote-87) and gay marriage[[88]](#footnote-88) – which were, at the times in question, hugely unpopular with large sections of its population. The HRA faces an objection that goes deeper than the practical operation of human rights in that the rights-settlement that the HRA represents is not the product of a popular revolution, as occurred in European countries, but was instead created by a standard legislative process and was not ‘sold’ to the British people via some form of educational programme.

The cultural transition from liberties to human rights has therefore not taken a favourable hold in the popular imagination; instead, human rights are associated with European institutions, such as the European Court of Human Rights. Judicial reasoning has confirmed the impression that the divergence between civil liberties and human rights amounts to a European imposition. Judges have had limited success in developing a *domestic* interpretation of human rights and have sought rather to *mirror* Strasbourg.[[89]](#footnote-89) As Chapter 3 discusses, repeal and replacement with a British Bill of Rights creates an opportunity to create a new *popular* British rights-settlement, building from the traditional protection of civil liberties. However, Conservative proposals to repeal the HRA in tandem with the creation of a neutered Bill of Rights, might simply return the UK to the inferior protections of the previous rights-settlement in the UK, partially removing effective judicial opposition to legislative incursions into the various rights discussed in this work, and failing to call the executive fully to account.

1. See H Fenwick ‘Origins of Rights and Freedoms’ in Halsbury's Laws. Lord Mackay of Clashfern and Falkowski, D (eds) (LexisNexis: London, 2013). [↑](#footnote-ref-1)
2. See Chap 00 pp00. [↑](#footnote-ref-2)
3. See further: Gearty, C and Ewing, K *Freedom under Thatcher,* 1990, OUP; Feldman, D *Civil Liberties* 1st edn, 1993, Clarendon; Gearty, C and Ewing, K *The Struggle for Civil Liberties*, 2000, Clarendon. [↑](#footnote-ref-3)
4. See Chap 3 pp00. [↑](#footnote-ref-4)
5. See pp 00. [↑](#footnote-ref-5)
6. See pp00. [↑](#footnote-ref-6)
7. See F Klug *A Magna Carta for humanity: horning in on human rights*, 2015, Routledge; Klug, F ‘The Human Rights Act: a “third way” or “third wave” bill of rights?’ (2001) EHRLR 361; Klug, F Starmer, K ‘Incorporation through the front door, an evaluation of the Human Rights Act in the courts’ [2001] PL 654; Klug, F *Values for a Godless Age, the story of the UK's new bill of rights*, 2000, Penguin. [↑](#footnote-ref-7)
8. See *Bringing Rights Home: Labour’s plans to incorporate the ECHR into UK Law: A Consultation Paper*, December 1996 (1997) and the White Paper, *Rights Brought Home*, Cm 3782, October 1997; see also Straw, J and Boateng, P ‘Bringing Rights Home: Labour’s plan to incorporate the European Convention on Human Rights into UK law’ (1997) 1 EHRLR 71. [↑](#footnote-ref-8)
9. See Lord Cooke ‘The British embracement of human rights’ (1999) 3 EHRLR 243; Feldman, D, ‘The Human Rights Act and constitutional principles’ (1999) 19(2) LS 165. [↑](#footnote-ref-9)
10. See eg Michael Gove the Secretary of State for Justice HC Deb Vol 596 Col 291, 28th May 2015. The implications of the current proposal from the Conservative government to repeal the HRA in 2017 or 2018 and replace it with a British Bill of Rights are considered at a number of points, and specifically in Chap 3 pp00. [↑](#footnote-ref-10)
11. Masterman, Rand Se-shauna, W ‘A Common Law Resurgence in Rights Protection?’ (2015) EHRLR 57. [↑](#footnote-ref-11)
12. Texts referred to throughout this book: Klug, F, *A Magna Carta for all Humanity: Homing in on Human Rights,* 2015, Routledge;Feldman, D, *Civil Liberties and Human Rights in England and Wales*, 2002; Klug, F, Starmer, K and Weir, S, *The Three Pillars of Liberty: Political Rights and Freedoms in the UK*, 1996, Routledge; Gordon, R and Wilmot-Smith, R (eds), *Human Rights in the UK*, 1997, OUP; Van Dijk, P and Van Hoof, F, Van Rijn, A, Zwask, L, *Theory and Practice of the European Convention on Human Rights*, 4th edn, 2006, Intersentia; Mowbray, A, *Cases and Materials on the European Convention on Human Rights*, 3rd edn, 2012, OUP; Janis, M, Kay, R and Bradley, A, *European Human Rights Law*, 3rd edn, 2008, OUP; Harris, D, O’Boyle, K, Bates, E, and Buckley, C, *Law of the European Convention on Human Rights*, 2014, OUP; Dickson, B (ed), and Connelly, A, *Human Rights and the European Convention*, 1996, Sweet and Maxwell; Farran, S, *The UK Before the European Court of Human Rights*, 1996, Blackstone. Background: Beddard, R, *Human Rights and Europe*, 3rd edn, 1980, CUP; Fawcett, JES, *The Application of the European Convention on Human Rights*, 2nd edn, 1987, Clarendon; Jacobs, F, *The European Convention on Human Rights*, 1975, OUP; Nedjati, ZM, *Human Rights under the European Convention*, 1978, Merrills, JG and Robertson, AH, *Human Rights in Europe*, 4th edn, 2001, Juris Publishing. [↑](#footnote-ref-12)
13. The term ‘civil and political rights’ is used in contradistinction to the term ‘economic and social rights’ to denote first generation rights – those which have long been recognised in the Western democracies from the time of the French and American Declarations of the ‘Rights of Man’ in the eighteenth century. [↑](#footnote-ref-13)
14. The literature is immense, but the following are of particular importance. Simmonds, NE, *Central Issues in Jurisprudence*, 1986, Sweet and Maxwell, provides a brief but extremely lucid introduction to relevant jurisprudential issues. Substantive texts: Rawls, J, *A Theory of Justice*, 1972, Clarendon; Dworkin, R, *Taking Rights Seriously*, 1977, Duckworth, and *A Matter of Principle*, 1985, Clarendon; Hart, HLA, *The Concept of Law*, 1961, Clarendon, and *Essays in Jurisprudence and Philosophy*, 1983, Clarendon; Waldron, J (ed), *Theories of Rights*, 1984, OUP. [↑](#footnote-ref-14)
15. Criminal Justice Act 1988 s39. [↑](#footnote-ref-15)
16. See chap 11 pp 00. [↑](#footnote-ref-16)
17. For a full discussion of this issue, see Hart, HLA, ‘Positivism and the separation of law and morals’, in *Essays in Jurisprudence and Philosophy*, 1983. [↑](#footnote-ref-17)
18. For the classical exposition of this theory, see Aquinas, T, ‘*Summa theologica’*, in d’Entreves, P (ed), *Selected Political Writings*, 1970, Blackwell. [↑](#footnote-ref-18)
19. See Dworkin, R, *Taking Rights Seriously*, 1977, Duckworth. Dworkin sets out his account judicial adjudication in Chapters 2–4, in which his theory is cast mainly in the form of a critique of legal positivism. For a fuller development of the theory, see *Law’s Empire*, 1986, Fontana. [↑](#footnote-ref-19)
20. The term was coined by Mackie, J, ‘The third theory of law’, in Cohen, M (ed), *Ronald Dworkin and Contemporary Jurisprudence*, 1984. [↑](#footnote-ref-20)
21. For criticism of this position see eg Simmonds, NE, ‘Imperial visions and mundane practices’ [1987] CLJ 465 and Cotterell, R, *The Politics of Jurisprudence*, 1989, Butterworths, pp 172–81. [↑](#footnote-ref-21)
22. Dworkin, R, *Taking Rights Seriously*, 1977, Duckworth, p 67. [↑](#footnote-ref-22)
23. Dworkin, R Law's Empire, 1986, Fontana Press. [↑](#footnote-ref-23)
24. Hohfeld, W, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, 1920, particularly pp 35–41. [↑](#footnote-ref-24)
25. While Hohfeld referred to a power, that concept is not of relevance to the discussions in this book. [↑](#footnote-ref-25)
26. See Chap 4 pp00. [↑](#footnote-ref-26)
27. Under the Obscene Publications Acts 1959 and 1964. See chap 7 pp 461. [↑](#footnote-ref-27)
28. See chap 12, p 1113. [↑](#footnote-ref-28)
29. Civil liberties and human rights are very rarely framed as powers, since these must typically be earned and are associated with individuals in a position of power, while civil liberties and human rights are typically conceived of as restraints on the (illegitimate) use of power by the state. An example of a power that is also protected as a human right is the power to transfer one’s property (an aspect of the protection of property, ECHR Protocol 1, Article 1). This is a power because the subject of such a power has the right to alter the claims-rights/liberties associated with his property ownership (such as to exclude others from it) by transferring them to another who will then benefit those claim-rights/liberties. [↑](#footnote-ref-29)
30. See PACE Code C, Annex C; the right has already been undermined but not abolished in the Criminal Justice and Public Order Act 1994; see chap 12, pp 1234-1234. [↑](#footnote-ref-30)
31. Pp00. [↑](#footnote-ref-31)
32. See *Othman v UK* (2012) 55 EHRR 1; *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA 808; *Chahal v UK* (1996) 23 EHRR 413. [↑](#footnote-ref-32)
33. See pp00. [↑](#footnote-ref-33)
34. See eg Mahoney, J, *The Challenge of Human Rights*, 2007, Blackwell, chap 1. [↑](#footnote-ref-34)
35. See eg in relation to the ECHR *Vo v France* (2005) 40 EHRR 12, especially para 82. [↑](#footnote-ref-35)
36. Article 12 ECHR states that ‘men and women of marriageable age have the right to marry’. [↑](#footnote-ref-36)
37. See eg in relation to assisted suicide and refusal of vital medical treatment, *Pretty v UK* (2002) 35 EHRR 1, para 63. [↑](#footnote-ref-37)
38. Gewirth, A, *Reason and Morality,* 1978, Chicago University Press, 64 *et seq*. [↑](#footnote-ref-38)
39. See for discussion eg Griffin, J, *On Human Rights,* 2008, OUP, 32 *et seq*. [↑](#footnote-ref-39)
40. See Chap 4 pp 00. [↑](#footnote-ref-40)
41. See Chap 4 pp 00 and Chap 10 pp 00. [↑](#footnote-ref-41)
42. A significant limitation on the operation of indirect horizontal effect is that there must be an existing cause of action which is unable to vindicate the right in question, but is sufficiently relevant to the vindication of the human right in question that it can be developed by the court so as to do so. However, this issue goes beyond the scope of the current chapter; see further chap 10 pp 00. [↑](#footnote-ref-42)
43. Griffin, J, *On Human Rights,* 2008, OUP, pp 14 *et seq*. [↑](#footnote-ref-43)
44. See eg Gewirth, A, *Reason and Morality,* 1978, Chicago University Press, 64 *et seq*. [↑](#footnote-ref-44)
45. Doyle, J, ‘Murders and drug dealer to get IVF in prison and you’ll be paying! Criminals using European Human Rights laws to start families at taxpayers expense’ *Daily Mail*, 27th December 2012; see at <http://www.dailymail.co.uk/news/article-2253943/Murderers-drug-dealer-IVF-prison-youll-paying-Criminals-using-Human-Rights-laws-start-family-taxpayers-expense.html> (last accessed 00.00.00). [↑](#footnote-ref-45)
46. Rawls, *A Theory of Justice*, 1972, p 3. [↑](#footnote-ref-46)
47. Dworkin, R, *Taking Rights Seriously*, p 191. [↑](#footnote-ref-47)
48. Ibid, p 199. [↑](#footnote-ref-48)
49. Ibid, p 200. [↑](#footnote-ref-49)
50. See for discussion in relation to human rights eg Gewirth, A, *Reason and Morality,* 1978, Chicago University Press, 64, 263. [↑](#footnote-ref-50)
51. See eg Chap 2 pp 00. [↑](#footnote-ref-51)
52. Green, A ‘An absolute theory of Convention rights: why the ECHR gives rise to legal rights that cannot   conflict with each other’ (2010) UCL Jurisprudence Review 75. [↑](#footnote-ref-52)
53. See in particular Chap 11 pp00. [↑](#footnote-ref-53)
54. Green, *op cit*. [↑](#footnote-ref-54)
55. See eg *Othman v UK* (2012) 55 EHRR 1; *Austin v UK* (2012) 55 EHRR 14. [↑](#footnote-ref-55)
56. See eg Mavronicola, N, ‘What is an "absolute right"? Deciphering absoluteness in the context of article 3 of the European Convention on Human Rights’ (2012) 12(4) HRL Rev 723. [↑](#footnote-ref-56)
57. This view is not attributed to Dworkin, although he does accept that there will be situations in which the core value of the right will not be at stake. Dworkin has comprehensively rejected Hart’s theory of statutory construction and application of the rules from past cases based around the notion of a core of certainty and a penumbra of uncertainty (for Hart’s position, see *The Concept of Law*, 1961, Clarendon; for Dworkin’s critique, *op cit*, fn 3, Chapters 2–4). Dworkin argues that the areas of a rule which form the core and those which fall in the penumbra, can only be elucidated through a judge’s interpretation, which will carry him or her far from the specific words of the statute. [↑](#footnote-ref-57)
58. See eg the Judgment of US Supreme Court, *Bolger v Youngs Drug Products Ltd* (1983) 103 Ct 2875, 2880–81. [↑](#footnote-ref-58)
59. The House of Lords appeared to recognise the central importance of free political speech in their pre-HRA decision that neither local nor central government could pursue an action in defamation: *Derbyshire CC v Times Newspapers* [1993] 1 All ER 1011. [↑](#footnote-ref-59)
60. See *Von Hannover v Germany* (2005) 40 EHRR 1. [↑](#footnote-ref-60)
61. An example in the context of assisted suicide is the ECtHR’s treatment of the right to personal autonomy balanced against the state interest in preservation of life (eg *Pretty v UK* (2002) 35 EHRR 1 para 74). [↑](#footnote-ref-61)
62. *Horncastle v UK* (2015) 60 EHRR 31. [↑](#footnote-ref-62)
63. See eg Gewirth, A *Reason and Morality*, 1978, University of Chicago Press, 223 *et seq*. [↑](#footnote-ref-63)
64. An example is arguably provided by *Firth v UK*, Appl 47784/09, judgment of 12th August 2014, which concerned compensation for prisoners who were denied the right to vote (protected by the ECHR Protocol 1, para 1). [↑](#footnote-ref-64)
65. See eg Griffin, J, *On Human Rights,* 2008, OUP, p 191. [↑](#footnote-ref-65)
66. See eg *Hamalainen v Finland* [2015] 1 FCR 379; the claim was deemed to concern a positive obligation but would have involved minimal resource to satisfy it. [↑](#footnote-ref-66)
67. See eg Nozick, R, *Anarchy, State and Utopia*, 1974, Basic Books. [↑](#footnote-ref-67)
68. See eg Gewirth, A, *The Community of Rights,* 1996, University of Chicago Press. [↑](#footnote-ref-68)
69. Bentham, J, ‘Anarchical fallacies’, in Bowring, J (ed), *Collected Works of Jeremy Bentham*, 1843, p 494. [↑](#footnote-ref-69)
70. Utilitarianism is a major political philosophy. The original conception of utilitarianism espoused by Jeremy Bentham saw the aim of government as being to promote the greatest happiness of the greatest number of people (see Burns (ed), *Collected Works of Jeremy Bentham*, 1970). A more recent and fashionable version states that an ideal society is one in which there is the maximum amount of preference satisfaction (see, generally, Smart, C and Williams, B, *Utilitarianism: For and Against*, 1973, CUP). References in the text will be to this latter version, known as ‘preference utilitarianism’. [↑](#footnote-ref-70)
71. Smart, C and Williams, B, *Utilitarianism: For and Against*, 1973, CUP. [↑](#footnote-ref-71)
72. See eg, Marx, K, *On the Jewish Question*, 1843. [↑](#footnote-ref-72)
73. See, e.g., Sandel, M, *Liberalism and the Limits of Justice*, 1982, CUP. [↑](#footnote-ref-73)
74. Unger, R, *The Critical Legal Studies Movement*, 1986, Harvard University Press. [↑](#footnote-ref-74)
75. Tushnet, M, ‘An essay on rights’ (1984) 62(18) Texas L Rev 1363. [↑](#footnote-ref-75)
76. Locke, J, *The Second Treatise of Government*, 1698. [↑](#footnote-ref-76)
77. Rawls, J, *A Theory of Justice*, 1972, HUP. [↑](#footnote-ref-77)
78. See Hart’s comments on this phenomenon generally in ‘Between utility and rights’ in Cohen, M (ed), *Ronald Dworkin and Contemporary Jurisprudence*, 1984, Duckworth. [↑](#footnote-ref-78)
79. Nozick, R, *Anarchy, State and Utopia*, 1974, Blackwell, p 183. [↑](#footnote-ref-79)
80. For this reference and a brief summary of the theory, see Rawls, J, *A Theory of Justice*, 1972, HUP, pp 11–15. [↑](#footnote-ref-80)
81. Dworkin, *Taking Rights Seriously*, 1977, Duckworth, Chapter 6. [↑](#footnote-ref-81)
82. Dworkin, *Taking Rights Seriously*, 1977, Duckworth, p 275. [↑](#footnote-ref-82)
83. Prior to the HRA most freedoms were merely liberties; one did no wrong to exercise them, but there was no positive duty on any organ of the state to allow or facilitate them. For example, the Public Order Act 1986 nowhere placed upon chief constables a duty to ensure freedom of assembly and speech. It should be noted that some of our entitlements clearly had and have the quality of Hohfeldian claim rights in that they are protected by a positive correlative duty, such as the right of access to a solicitor while in police custody (s 58 of the Police and Criminal Evidence Act 1984). Similarly equal treatment in certain contexts is provided for under domestic and EU instruments. Even when a citizen held a right, there were – under domestic law – no *legal* guarantees that the legislation providing the positive protection would not be repealed. Similarly, a citizen enjoying a liberty could not be certain that legislation would not be introduced into a previously unregulated area, thus destroying or limiting that liberty. [↑](#footnote-ref-83)
84. Unless the only possible reading of contrary primary legislation is that the right must be infringed. Even in that instance, a court may issue a non-binding declaration that the law is incompatible with the claimed human right (s 4), and the protection of human rights in law has then been secured by introducing remedial legislation (which has happened in almost all such instances of a declaration of incompatibility). [↑](#footnote-ref-84)
85. *Othman v UK* (2012) 55 EHRR 1, see Chap 14. [↑](#footnote-ref-85)
86. See chap 14 pp 00. [↑](#footnote-ref-86)
87. Roe v Wade (1973) 410 US 113. [↑](#footnote-ref-87)
88. *Obergefell v Hodges,* Dockett No. 14-556, Supreme Court judgment of 26th June 2015. [↑](#footnote-ref-88)
89. See eg *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323; see further Chap 4 pp 00. [↑](#footnote-ref-89)