

#1

Sources of law I: International sources of law

Key facts

- The law of the English legal system has many sources, custom being the oldest with the most modern sources being delegated legislation and international sources of law: European Union (EU) law, and the European Convention on Human Rights and Fundamental Freedoms.
- The European Union has its origins in the 1950s when six Member States signed up to three foundation treaties in order to promote peace and cooperation within Europe following the Second World War. The European Union presently has 27 Members. The UK joined the EU on 1 January 1973 when the provisions of the [European Communities Act 1972](#) came into force. Where EU law conflicts with UK law, EU law prevails and can override domestic forms of law. The legislative ability of the UK Parliament has been limited due to membership of the European Union.
- The primary form of EU law is the treaties – these combined stipulate the objectives of the European Union and create/detail the operation/composition of the various European institutions such as the Commission, Parliament, and Court of Justice. The most recent treaty created is the Lisbon Treaty which was enacted in December 2009.
- The secondary forms of EU law include regulations, directives etc. There are various institutions involved in the creation of these forms of law such as the Commission, Parliament, etc. Courts of Member States if unsure how to implement or interpret EU law can apply for a ruling from the Court of Justice of the European Union. Once a ruling is made then it must be implemented/applied by the court which has requested it.

Key facts

- The European Convention on Human Rights and Fundamental Freedoms is not a part of European Union law and is thus not enforced or developed by the European Union institutions. The Convention creates numerous rights and freedoms which can be enjoyed by citizens within the various Member States that have signed up to the Convention and its protocols, eg the right to a fair trial, right to life, etc. If these rights and freedoms are breached then a citizen can take a case to the European Court of Human Rights for a remedy against the offending Member State.
- The [Human Rights Act 1998](#), which came into force in 2000, incorporates the Convention into UK law – now if an article is breached then the citizen can enforce their rights and obtain satisfaction direct from UK courts.

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Introduction

The law of England has been built up gradually over many centuries. The various sources of law in historical order are:

- custom
- common law
- books of authority
- equity
- legislation
- delegated legislation
- international sources of law – European Union law and the **European Convention on Human Rights and Fundamental Freedoms**.

Historically, the most important way of creating the law was through local customs and then decisions of the judiciary. Alongside the development of the common law, equity was formed remedying the common law defects. Eventually Parliament became the most powerful law creator and statute law became the primary source of law. However, the judiciary still play an important role by interpreting statutes and developing areas of the common law, which are not covered by statutory provisions. During the twentieth century, two new sources of law became important: delegated legislation and European law. All of these sources combined make up the law of the English legal system.

This chapter will focus on the international sources of law: European Union law and the European Convention of Human Rights. Chapter 2 will focus on UK legislation, including the legislative process, legislative interpretation, and delegated legislation. Chapter 3 will focus on the common law, equity, custom law, and books of authority.

Revision tip

When selecting relevant case law to revise in order to provide support, initially select those cases that have facts that you can easily remember and are of interest to you. Once you have learnt those cases then learn the more difficult cases. The more cases and legal support, eg judicial comment, academic comment, and statutory provisions, that you can provide in any examination question, the more credit you will obtain and the better your answer will generally be.

European Union law

The European Union (EU) has grown dramatically both in terms of the number of members (it started with 6 and is now at 27), and in the scope of its powers. The European Economic Community (as it then was) was set up in 1957 with just six members. Historically the EU was formed after the two world wars and was created to try to maintain peaceful relations between the European states. The origins of the European Union can be traced back to the

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foundation treaties created between 1951 and 1957. The first treaty of the European Union, the **Treaty of Paris** was designed to create political unity within Europe and prevent future conflict between European states. As a result, the European Coal and Steel Community was established by Italy, France, West Germany, Belgium, Luxembourg, and the Netherlands. This placed the production of coal and steel in all Member States under the ambit of one Community organization, indirectly controlling arms production.

In 1957 the **Treaty of Rome** was created which formed the European Economic Community (EEC). The aim of the EEC, now known as the European Union, was to create a single market in the European continent, which promoted the abolition of restrictions in order to promote the free movement of workers, goods, and money between Member States. It was designed to compete on an economic and political basis with the US and Japan. The resulting single market would be available to producers within all the Member States. It established the European Atomic Energy Community known as Euratom. This organization was designed to promote cooperation in relation to nuclear research and further enhance the profile of the Community.

The EU consists of individual countries (Member States), which have agreed to join and be bound by the rules and laws created by the EU institutions. Each Member State has agreed to concede its own sovereignty in the areas governed by the EU (most of the EU law is to do with trade, though it is expanding to include other areas, such as social areas). Each Member State plays a part in deciding on those laws but is bound by the overall decisions and laws of the European Union. (EU law is deemed to be *supranational* law, ie it sits *above* national law – as opposed to *international* law – agreements *between* States.) Member States have sacrificed their sovereignty in exchange for the economic and social benefits which the EU provides. The common market allows all Member States to trade more freely within each other's territories. Citizens of the Member States are also citizens of Europe and have certain individual rights as a result, eg the right to travel, live, and work in other Member State countries.

The UK joined on the 1 January 1973 following the passing of the **European Communities Act 1972**. Under s 2:

- All EU regulations and other directly applicable European law (passed before or after the UK joined the EU) are part of English law, and enforceable by the English courts, without any further enactment.
- The Government can implement EU directives by subordinate legislation, without having to go through the full parliamentary process.
- All domestic enactments (passed before or after accession) have effect only subject to directly applicable rules of EU law. This overrides the usual presumption that any later enactment overrides any earlier law inconsistent with it.

Joining the European Union has created a new important source of law which impacts on the English legal system. In **HP Bulmer Ltd v J Bollinger SA (No 2) [1974]** Lord Denning

stated that the EU law is 'like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.'

Membership of the EU has reduced the sovereignty of the UK Parliament in the following ways:

- There is now an external body competent to make laws affecting the UK, which are applied by the English courts irrespective of the wishes of Parliament.
- The UK is obliged to legislate to implement obligations arising from EU membership.
- Parliament is no longer free to legislate without restriction in areas governed by EU law. The European Court of Justice is in no doubt that Community law overrides any national law that conflicts per *Van Gend en Loos v Netherlands* [1963]. This was confirmed in *R v Secretary of State for Transport ex p Factortame* [1991].

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R v Secretary of State for Transport ex p Factortame [1991] 3 All ER 769

Spanish fishermen claimed that the UK law as contained within the *Merchant Shipping Act 1988* was contrary to EC law. This statute contained provisions under which fishing licences were granted only to boats whose owners and crews were predominantly British. The court held it violated *Article 52 EC Treaty*. As a result of this ruling the UK Government was obliged to amend the legislation to ensure that there was no conflict with EC law.

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- All the rights and obligations created by EU law are incorporated by the **European Communities Act 1972** into our domestic law, and take precedence even over primary legislation where this is inconsistent.

Changes were due to be made to the operation of the EU and European institutions to cope with the European Union's expanded membership through the passing of a new **European Constitution**. The Constitution within **Part I** contained wide-ranging reforms, *inter alia*:

- explicitly stating that EU law had priority over domestic law of Member States
- the Constitution would be the highest form of law
- EU legal instruments would be reclassified to provide a clear hierarchy distinguishing between administrative and legislative forms
- the EU would have stronger political profile with the creation of a Commission President and a Minister of Foreign Affairs
- the number of Commissioners would be reduced to two-thirds the number of Member States
- the European Parliament would be restricted to 750 members and its legislative role would be increased

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- the President of the European Council would be appointed for two and a half years rather than six months
- the system of voting within the European Council would be changed.

Part II of the **European Constitution** contained a Charter of Fundamental Rights. These provisions covered:

- civil rights
- political rights
- economic rights
- social rights.

However, voters in France and the Netherlands rejected the **European Constitution**. As a result the treaty, signed in Lisbon in December 2007, was drawn up to replace the draft European Constitution. The **Lisbon Treaty** was initially rejected by Irish voters in a referendum on 12 June 2008. Under EU rules, the treaty could not enter into force if any of the 27 Member States failed to ratify it. The plan was for all 27 to ratify the treaty but by the end of 2008 France's Europe Minister Jean-Pierre Jouyet had spoken of a possible 'legal arrangement' with Ireland at the end of the ratification process. The treaty got overwhelming support in a second referendum in the Irish Republic on 2 October 2009. The treaty was finally ratified by all 27 Member States in November 2009 and came into force on 1 December 2009. The **Lisbon Treaty** was ratified by the UK on 19 June 2008 under the **European Union Amendment Act 2008**. The last country to ratify the treaty was the Czech Republic, which completed the process on 3 November 2009. The Constitution attempted to replace all earlier EU treaties and start afresh, whereas the new treaty merely amends the **Treaty on European Union** and the **Treaty Establishing the European Community**, without replacing them. It provides the Union with the legal framework and tools necessary to meet future challenges and to respond to citizens' demands. The **Lisbon Treaty** contains many of the changes the Constitution attempted to introduce.

To realize its full potential, the European Union needed to modernize and reform. The European Union of 27 members was operating with rules designed for an EU of 15. Over the last decade, the European Union had been looking for the right way forward to optimize the instruments at its disposal and reinforce its capacity to act. At the same time, there was increasing support for the EU to work together on issues that affect all Member States, such as climate change and international terrorism. As the EU has grown and its responsibilities changed, it made sense to update the way in which it worked. *Inter alia*, the **Treaty of Lisbon**:

- explicitly recognized for the first time the possibility of a Member State withdrawing from the Union
- amalgamated the functions of the High Representative for common foreign and security policy (CFSP) with those of a Vice-President of the Commission. (This was designed to

strengthen coherence in external action and raise the EU's profile in the world giving Europe a clear voice in relations with its partners worldwide)

- created the European External Action Service which will provide support to the High Representative
- stipulated new policy objectives designed to tackle the twin challenges of climate change and functioning of the energy market, in particular energy supply, the promotion of energy efficiency and energy saving, and the development of new and renewable forms of energy
- placed freedom, justice, and security at the centre of its priorities – promoting and supporting action in the area of crime prevention and to tackling terrorism through the freezing of assets, and ‘Solidarity clauses’ indicating that the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the target of a terrorist attack or the victim of a natural or man-made disaster
- provided a commitment to the development of a common immigration policy
- provided special arrangements for national parliaments to become more closely involved in the work of the Union – within the legislative process consultation by the Commission before a proposal is considered in detail by the European Parliament and the Council of Ministers
- introduced the European Citizens’ Initiative – 1 million citizens coming from a significant number of Member States may take the initiative of inviting the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required
- increased the number of policy areas where the directly elected European Parliament has to approve EU legislation together with the Council comprising national ministers (the ‘co-decision’ procedure)
- extended qualified majority voting to new policy areas, in order to adopt a more streamlined approach to decision-making within the EU
- stipulated that the European Parliament is to have a maximum of 751 members
- implemented changes to the term of office of the President of the European Council
- introduced the Charter of Fundamental Rights into European primary law – rights that the EU believed all citizens of the Union should enjoy, giving them legal embodiment in the Union. It preserved existing rights whilst introducing new ones. The six chapters of the Charter covered individual rights related to dignity, freedoms, equality, solidarity, citizenship status, and justice. These rights are drawn essentially from other international instruments, like the European Convention on Human Rights. The institutions of the Union and Member States must respect the rights written into the Charter (especially when legislating). The Court of Justice is given the role of ensuring that the Charter is applied correctly.

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Looking for extra marks?

In relation to any question that relates to European Union law and its sources of law you may wish to mention some recent developments – the provisions contained within the Lisbon Treaty and how it differs from the original proposed European Constitution. An excellent source of information on the contents of the Lisbon Treaty can be found at the following websites: http://europa.eu/lisbon_treaty/glance/ and http://europa.eu/lisbon_treaty/faq/index_en.htm#8.

What are the main forms of EU law?

The Commission, Parliament, and Council all play a role in the creation of European Union legislation. Historically the Commission and Council were primarily responsible via the different legislative processes. Parliament's role was purely advisory only. This attracted significant criticism in relation to the perceived democratic deficit. The Parliament was the only institution where citizens of the various Member States elected the individual members who sat. However, it was the institution with the least involvement in the actual creation of law. The role of the Parliament within the various legislative processes was significantly increased by the **Single European Act**, the **Maastricht Treaty**, **Amsterdam Treaty**, and the **Lisbon Treaty**.

The primary legislative process is the co-decision process, now known as the ordinary legislative process following changes made by the Lisbon Treaty. The co-decision procedure was originally introduced by the **Treaty of Maastricht**. It gives the European Parliament the power to adopt instruments jointly with the Council. In practice, it has strengthened Parliament's legislative powers. The **Treaty of Amsterdam** and the **Lisbon Treaty** simplified the co-decision procedure, making it quicker, more effective, and more transparent, and its use was extended to new areas. **Article 294 Treaty on the Functioning of the European Union** stipulates the basic procedure as follows:

1. The Commission formulates a proposal for new legislation.
2. This proposal is sent to the Parliament and the Council for consultation (outline of proposal also sent to national parliaments for consideration).
3. The Parliament will debate the proposal and formulate its opinion.
4. The Parliament's opinion will be sent to the Council.
5. The Council will deliberate on the Commission proposal and the Parliament's opinion. If it agrees with the unamended proposal or to any amendments made by Parliament then it may recommend that the legislative proposal is adopted. If it disagrees with the proposal and amendments it will provide a statement to Parliament as to why it disagrees.
6. This will be sent back to the Parliament for its second reading. The Parliament then has three months to either:
 - (a) approve (or refrain from reacting to) the Council's Common Position, in which case it will be adopted and become law

- (b) amend the Common Position in which case a Committee is set up. (This Committee consists of equal representatives of the Council and the Parliament who negotiate the amendments which are subsequently adopted or rejected)
 - (c) reject the Common Position outright in which case the Council can convene the Conciliation Committee and commence negotiations as (b) above.
7. If the Conciliation Committee reaches an agreement and approves the Common Position it becomes law. If the Common Position is rejected by Parliament at this stage by a qualified majority the proposal is lost and does not become law.

Revision tip

When revising the legislative processes and the various forms of law of the European Union ensure that you revise from the most up-to-date sources. For example the European Union has its own website which provides up-to-date information on the forms of law and legislative processes and detailed flowcharts to accompany this information. See <http://ec.europa.eu/codecision/index_en.htm>. Also ensure that you are aware that there are other legislative processes which have existed dependent on the subject matter being considered by the relevant European institutions, eg consultation, assent, etc.

The main forms of EU law are:

- treaties
- regulations
- directives
- decisions.

Treaties

The **Treaty of Rome 1957**, **Single European Act 1985**, **Treaty of Maastricht 1992**, **Treaty of Amsterdam 1996**, **Treaty of Nice 2001**, and the **Lisbon Treaty** are the primary sources of European law. The treaties are superior to all other law, European or domestic, and any amendment or addition to the treaties requires the unanimous agreement of all Member States. The treaties lay down the objectives of the European Union, the creation of the institutions, and the legislative processes that create other forms of EU law and in some circumstances create rights and obligations themselves. The treaties are binding on all Member States, and on all individuals so far as they apply to them. In practice the treaties govern mainly the organization of the Community and relationships between the Member States, but some of them affect individuals directly.

Regulations

These become part of the law of each Member State as soon as they are created: eg **Council Regulation 1612/68** sets out principles for promoting the free movement of workers (including students) by abolishing discrimination as regards employment,

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remuneration, trade union rights, housing, family life, social and tax benefits, and access to training.

Leonasio v Italian Ministry for Agriculture and Forestry [1973] ECR 287

An EU regulation encouraged the reduction of dairy production and provided that a subsidy would be payable to farmers who slaughtered cows and agreed not to produce milk for five years. Leonasio, a farmer, fulfilled this requirement but was refused payment because the Italian constitution required legislation to authorize government expenditure. The European Court of Justice stated that once the claimant fulfilled the relevant stipulations of the regulation, then payment must be made. The Italian Government could not use its own laws to frustrate this right.

Directives

These are designed to harmonize the law throughout the EU. They are aimed at a particular Member State or States and direct them to introduce their own version of the provisions of the directive within a stipulated time period. The directive allows the Member State the choice of how it actually enacts the provisions. Directives in the UK are implemented via an Act of Parliament or by Statutory Instrument. For example, the **Product Liability Directive 85/374** was implemented in the UK by the **Consumer Protection Act 1987**, and the **Unfair Contract Terms Directive 93/13** was put into effect (six months after the deadline) by the **Unfair Terms in Consumer Contracts Regulations 1994**.

If a Member State fails to implement a directive, it is in breach of its obligations and can be called to account by the Commission before the Court of Justice. Where a Member State persistently fails to comply, the European Court of Justice (ECJ) has power to impose a financial penalty. An individual citizen may even be able to claim compensation in relation to a failure to implement a directive.

Van Duyn v Home Office [1974] 1 WLR 1107

The Home Office refused Van Duyn permission to enter the UK, because she was a member of a religious group, the Scientologists, which the Government wanted to exclude from the country at the time. Van Duyn argued her exclusion was contrary to provisions in the Treaty of Rome on freedom of movement. However, the Government highlighted that the treaty allowed exceptions on public-policy grounds. A subsequent directive, however, stated that public policy could only be invoked on the basis of personal conduct. Here Van Duyn had done nothing personally to justify such an exclusion. The ECJ found that the obligation conferred on the Government was clear and unconditional and so created enforceable rights. To hold otherwise would allow Member States to deny individual rights by their own wrongful failure to implement.

Francovich v Italy [1992] IRLR 84

A company went into liquidation but failed to pay its employees arrears of salary. The Italian Government at the time had not implemented the requirements of an EU directive which required a compensation scheme to be put in place to cover such situations. *Francovich*, one of the company employees, sued the Italian Government. It was held that the Italian Government was required to pay the litigant compensation.

Decisions

These can be addressed to Member States, to corporations, or to individual citizens. A decision is binding only on the person to whom it is directed, eg **Commission Decision 84/381** was addressed to United Breweries and the Carlsberg Brewery and granted exemptions from competition rules for particular contracts. **Decision 92/213** imposed a fine on Aer Lingus for unfair trading practices and was addressed only to Aer Lingus.

Institutions of the EU

There are, following the **Lisbon Treaty**, six EU institutions:

- the Commission
- the Council of Ministers
- the European Council
- the European Parliament
- the Court of Justice of the European Union
- the European Central Bank.

The *Commission* has 27 members called commissioners. They are appointed by the relevant Member States for a five-year period. Commissioners do not represent the interests of the national government of their Member State. Their role is to represent the interests of the European Union. The Commission represents EU interests and its relationship with other trading blocs and countries around the world, for instance dealing with accession of new members and negotiating trade agreements. It draws up the budget for the EU and has a role to play in creating European legislation. It is responsible for ensuring Member States uphold the law of the European Union. It brings offending Member States before the European Court of Justice. This is in addition to its role in relation to creating legislation.

The *Council of Ministers/European Council* represent the interests of the individual Member States. Though technically separate institutions they have the same powers. The European Council consists of the 27 heads of state from the various Members States of the

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European Union and the President of the Council. This individual is appointed for a term of two and a half years, replacing the six-monthly rotating presidency between the Member States. The present President is Herman Von Rompuy. The members of the Council of Ministers are drawn from each Member State and are chosen by the individual Member State on the basis of the subject matter under discussion. It therefore does not have a permanent membership. The European Council meets at least biannually, whereas the Council of Ministers will meet usually on a weekly basis where it will agree proposals for new policy initiatives for the European Union. They also play a role in the legislative process of the European Union.

Under amendments made by the **Lisbon Treaty**, the *European Parliament* has a maximum of 751 members known as MEPs. Each Member State is allocated a number of seats within the Parliament on the basis of size of population. MEPs sit within the Parliament on the basis of political grouping. Citizens within each Member State elect them. Such elections are held within the UK every five years. The Parliament is involved in the various legislative processes. It supervises the Commission, which has to submit a budget for its approval. It can appoint and dismiss the Commission as a whole, known as censure. Parliament can, if there has been a purported failure to implement EU law, bring an action against other EU institutions. An ombudsman appointed by the Commission can investigate complaints about maladministration by Union institutions/ MEPs.

The *Court of Justice* of the European Union consists of three courts:

- the European Court of Justice (the ECJ)
- the General Court
- Civil Service Tribunal.

The court of primary importance is the **European Court of Justice**. The Court is situated in Luxembourg. It has 27 judges appointed by the Member States for six years and appointments are renewable. Such individuals will have previously held high judicial office within Member States. They are assisted by eight Advocate Generals who produce opinions on the cases assigned to them. The opinions will highlight the relevant issues and suggest potential conclusions. The Court delivers a single judgment with no indication on the number of judges who dissented.

Proceedings against Member States can be brought by other Member States or by the Commission alleging breaches of EU law. Proceedings against EU institutions may be brought by Member States or other EU institutions because, for instance, treaty powers and procedures have been misused and abused.

Article 267 of the Treaty on the Functioning of the European Union (formerly Article 234) provides that any court or tribunal of a Member State can refer a question on EU law to the ECJ. The **preliminary reference procedure** promotes uniformity of interpretation throughout the EU. The case in the domestic court is adjourned until the European Court of Justice directs the English court on the correct interpretation to be implemented. The domestic court must then apply the ECJ's ruling to the facts of the case before it. A reference

must be made if the national court is one from which there is no further appeal, eg the UK Supreme Court (the former House of Lords).

HP Bulmer Ltd v Bollinger SA No 2 [1974] Ch 401

In this case, Lord Denning stated that to save expense and delay no reference should be made where:

- it would not be conclusive of the case and other matters would remain to be decided
 - there had been a previous ruling on the same point
 - the court considers that point to be reasonably clear and free from doubt
 - the facts of the case had not yet been decided.
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A Court of First Instance with limited jurisdiction was established in 1988 under **Article 225 of the EC Treaty** in order to assist and reduce the workload of the European Court of Justice. It is now known as the *General Court* following changes made by the Lisbon Treaty. In order to hear disputes between the European Institutions and its civil servants a new *Civil Service Tribunal* has in addition been created to deal with such matters.

The **Lisbon Treaty** also officially recognized the *European Central Bank* based in Germany as an institution of the European Union. It is responsible for organizing and coordinating both the monetary and the economic policy of the Member States of the European Union that have adopted the Euro, the single European currency. It is independently responsible for keeping inflation under control and setting interests rates within the Eurozone.

Revision tip

When covering the area of sources of law and the EU institutions ensure you support your points with relevant treaty provisions, regulations, directives, decisions, and case law. In addition, you need to ensure that you highlight the relationship between EU law and UK domestic courts and law-making institutions – again supporting points with relevant statutory provisions, eg the **European Communities Act 1972**; relevant case law, eg *Factortame*; and even judicial comment on the impact of this form of law.

Human rights law – European Convention on Human Rights and Fundamental Freedoms

The **European Convention on Human Rights and Fundamental Freedoms** (ECHR) is an international treaty. It is *not the same as* and *not part of* EU law although many of the signatories are the same. If a country fails to protect the rights listed in the Convention, then an individual can take the country to the **European Court of Human Rights** for a remedy (but only after having tried and failed to seek a remedy in the offending country). The ECHR protects fundamental civil rights and liberties.

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The provisions have subsequently been expanded via the use of protocols. The rights protected by the ECHR include, *inter alia*:

Figure 1.1

Article 2	Right to life
Article 3	Freedom from torture, inhuman, or degrading treatment
Article 4	Freedom from slavery or forced labour
Article 5	The right to liberty and security of the person
Article 6	The right to a fair trial
Article 7	The prohibition of retrospective criminal laws

These rights and freedoms were brought into the domestic law of the UK by the **Human Rights Act 1998**. Fundamental rights may be subject to limitation for various reasons. Some rights are non-derogable (eg the right not to be tortured or enslaved), but some are subject to exceptions and others are subject to restrictions in time of war or other comparable public emergency. For example, Art 2 European Convention on Human Rights states:

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

It goes on to state:

- (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 15 European Convention on Human Rights states:

- (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(1) and 7 shall be made under this provision.

Article 8 European Convention on Human Rights states:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The **Human Rights Act 1998** provides that:

- New Acts of Parliament should be checked to confirm they do not breach the ECHR.
- Courts must interpret all Acts so as not to breach the Convention rights – see information in relation to the statutory interpretation later in this chapter.
- Courts are obliged to interpret and develop the common law so as to comply with Convention rights.
- Any public body carrying out a public function can be sued in the UK courts if they breach Convention rights.
- It does not remove the right to take the UK to the European Court of Human Rights if the domestic courts fail to provide a remedy.

An example of case being taken to the European Court of Human Rights following determination by the UK courts is **Laskey, Brown & Jaggard v United Kingdom** (1997).

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Laskey, Brown & Jaggard v United Kingdom (1997) 24 ECHR 39

A number of men who had engaged in consensual sado-masochism were convicted of unlawful wounding and other offences under the **Offences Against the Person Act 1861** and imprisoned for up to six months. They appealed to the House of Lords but their grounds for appeal were dismissed and their conviction upheld. The men subsequently took a case to the European Court of Human Rights arguing a breach of the European Convention Art 8. The Court unanimously rejected Laskey et al's claim that the conviction by the UK court violated their right to privacy under Art 8, and upheld the intervention of the law as justified due to the need to protect health and morals.
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Revision tip

When dealing with issues of European Union law and human rights law ensure that you revise them separately; this will ensure that you do not get confused between the two areas which is a common fault of students within examinations – though the European Union Constitution would have incorporated such fundamental freedoms and rights into EU law this was rejected by numerous Member States. Therefore, they are still separate areas and sources of law, and are enforced by different courts. Ensure that you are aware of the impact of such sources on the creation and interpretation of UK law.

Key cases

✓ Looking for extra marks?

An excellent discussion on the historical development of EU law and institutions, human rights law, and their relationship with UK law, can be found in the following text: A Gillespie, *The English Legal System* (Oxford University Press, 2009), Chapter 4, pp 89–135 and Chapter 5, pp 138–71. The chapter also provides further information in relation to the operation of certain forms of EU law, such as directives, and highlights a wide range of case law and judicial comment. A detailed list of the provisions of the European Convention and the operation of the **Human Rights Act 1998** can be found in G Slapper et al, *The English Legal System*, 11th edn (Routledge & Cavendish, 2010), Chapter 1, pp 21–76.

* Key cases

Case	Facts	Ratio/Principle
<i>Francovich v Italy</i> [1992] IRLR 84	A company went into liquidation, but failed to pay its employees arrears of salary. The Italian Government at the time had not implemented the requirements of an EU directive which required a compensation scheme to be put in place to cover such situations. Francovich, one of the company employees, sued the Italian Government.	It was held that although the provisions of the directive were not directly effective the Italian Government was required to pay the litigant compensation.
<i>Leonesio v Italian Ministry for Agriculture and Forestry</i> [1973] ECR 287	A regulation designed to encourage reduced dairy production stated that a cash premium should be payable to farmers who slaughtered cows and agreed not to produce milk for five years. Leonesio fulfilled this requirement but was refused payment because the Italian constitution required legislation to authorize government expenditure.	The ECJ stated that once the claimant fulfilled the relevant stipulations of the regulation, then payment must be made; the Italian Government could not use its own laws to frustrate this right.
<i>R v Secretary of State for Transport ex p Factortame</i> [1991] 3 All ER 769	Spanish fishermen claimed that the UK law as contained within the Merchant Shipping Act 1988 was contrary to EC law. This contained provisions under which fishing licences were granted only to boats whose owners and crews were predominantly British.	The Court held it violated Art 52 EC Treaty and the UK Government was obliged to amend the legislation to ensure that there was no conflict with EC law.

Case	Facts	Ratio/Held
<i>Van Duyn v Home Office</i> [1974] 1 WLR 1107	The Home Office refused Van Duyn permission to enter the UK because she was a member of a religious group, the Scientologists, which the Government wanted to exclude from the country at the time. Van Duyn argued her exclusion was contrary to provisions in the Treaty of Rome on freedom of movement. The Government responded by pointing out that the Treaty allowed exceptions on public policy grounds but Van Duyn relied on a later directive which said that public policy could only be invoked on the basis of personal conduct.	The ECJ found that the obligation conferred on the Government was clear and unconditional and so created enforceable rights. To hold otherwise would allow Member States to deny individual rights by their own wrongful failure to implement.

? Exam questions

Essay question 1

Highlight the role and composition of the European Court of Justice and explain the basis upon which the UK domestic courts can request a ruling on European Union law issues.

An outline answer can be found at the end of this book.

Essay question 2

Lord Denning in *HP Bulmer Ltd v J Bollinger SA (No 2)* [1974] described European Union Law as being:

like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.

In light of the above comment highlight the various forms of European Union law, how such forms are implemented within the UK, and the impact on the sovereignty/supremacy of Parliament.

An outline answer is available online at <<http://www.oxfordtextbooks.co.uk/orc>>.