HUMAN RIGHTS AND CIVIL LIBERTIES

Historical protection of LIBERTIES under English law:

- **Blackstone**: the constitution protects 3 pillars of liberty
  - Personal security
  - Personal liberty
  - Private property
- **Locke**: social contract theory
  - Mutual preservation of their lives, liberties and estates
- **Dicey**: rule of law
  - No one can be punished except for distinct breach of law
  - All are equal before the law – formal equality
  - Constitution arises from the law of the land and individuals
- These *traditional safeguards* to liberty contrast the modern statements of rights
  - Core to British liberty- the fewer laws we have the more liberty
  - Rigour of excessive modern law

Basic principle of the *common law* on rights:

- protection of liberties
- everything is permitted unless expressly prohibited – scope of lawful conduct as a function of prohibitions and isn’t fixed
- residual idea of liberty
- constant risk of erosion
- supported by availabilities of remedies rather than rights
- very weak in face of parliamentary sovereignty

Cases Pre-HRA:

- **Entick v Carrington**
  - Sued for unlawful entry, search and seizure to be remedied
  - Dealt with the government as an individual
  - Didn’t recognize rights – the wrong here was trespass of property
  - Nowadays would be breach of privacy
- **Beatty v Gillbanks**
  - Can only prevent the salvation army from marching if the law prohibits even if know that the skeleton army would cause riots because of this – acting within the limits of the law
  - Residual point – not protected by rights but remedies
  - Nowadays freedom to assemble
- **Malone v MPC/UK**
  - Tapping telephones did not allow redress because there was no trespass on his property / common law didn’t protect people’s privacy – appeal to ECHR
  - Was a breach of Article 8, Parliament passed an Act in 1985 subsequently
- **ex p Brind** [1991]
  - ECHR was not part of UK law then so could not be relied upon
  - Can be used to assist in interpreting ambiguous statute
  - Refused to go directly against government intention and rely on ECHR law ‘through the back door’ when government has refused to incorporate it ‘through the front door’
- **Masterman**: There are so many exceptions that rule doesn’t seem to exist – variety of Strasbourg-avoidance techniques
  - has had damaging effect on political perceptions of HRA in light of BOR debate
  - **Laws LJ**: rigid relationship it promotes increases the likelihood of the Convention being perceived as an alien appendage
  - **Hale**: position of defence from which it is difficult to have an effective dialogue
  - **Kerr**: domestic courts should avoid furthering suggestion that they are merely the ‘modest underworkers’ to the ECtHR
- **Elliot**: dialogue instead of Strasbourg view prevailing; ECHR does not require UK to fall in line with Strasbourg but just that if not abide by final judgment then would be breaching international law obligations
- **Osborn v Parole Board**
  - **AF v SoS for Home Dpt** [2009] – can still prefer own view so can disagree domestically
  - **Pinnock v Manchester CC** [2010] – not bound to follow every ECHR decision – where clearly not consistent with our law then shouldn’t follow

### SECTION 3: AS FAR AS POSSIBLE LEGISLATION CONSTRUED TO BE COMPLIANT

- As opposed to as far as reasonable in New Zealand
- Interpretative obligation
- **Secondary** legislation can be quashed UNLESS primary legislation explicitly gives it the function that makes it incompatible (principle of legality)
- More about effective remedies for people
- **Inverse** relationship with s 1 – represent the conflict of legal and political constitutional status. HRA arguably gives more room to challenge the other 2 branches of government but struggling the concept of possibility in order to fit cases within the s3 category would be constitutionally inappropriate as would be rewriting legislation and excluding P and E from the HR enterprise (Irvine)
  - **R v A (no.2)** [2001] UKHL 25: evidence of sexual history ‘at the same time’ or ‘so similar as not to be a coincidence’
    - The fact of previous consensual sex between C and D could be relevant in a trial of rape, and a refusal to allow such evidence could amount to a denial of the right to a fair trial to a D as ability to cross-examine is deprived
    - Accordingly, where the evidence was so relevant as to make the trial unfair without its admission, the section excluding such admission should be read so as to allow admission of such evidence
    - What constituted ‘at or about the same time’ for the purposes of admission, was to be read accordingly.
    - UKHL read in provision to effect that sexual history would be admitted where justice to accused required it against the blanket ban imposed by the youth crime and criminal evidence Act
    - NOT parliamentary intention – parliament wanted to not use sexual history but courts widened / stretched definition