

- > UNDERSTAND WHAT EXAMINERS WANT
- > MAXIMISE YOUR MARKS AT EVERY STEP
- > ANSWER QUESTIONS WITH CONFIDENCE

Question&Answer

HUMAN RIGHTS

2nd edition

HOWARD DAVIS

'The only real rival to this Q&A series is face-to-face revision sessions.'

Sue Radlett, Law Lecturer, Holborn College

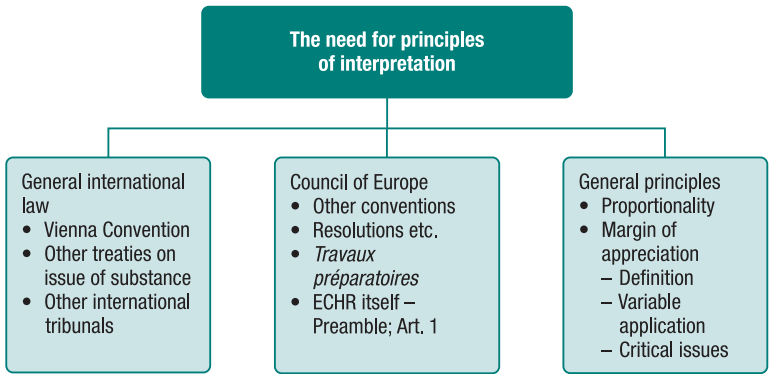
Question&Answer

HUMAN RIGHTS

Answer plan

- ➔ Explain the issue – the differences between states’ domestic and international legal obligations.
- ➔ Consider external legal sources for interpreting the ECHR – e.g. the Vienna Convention.
- ➔ Consider other external sources such as instruments of the Council of Europe.
- ➔ Identify and discuss internal sources: in particular, the Preamble and Article 1.
- ➔ Consider general principles of international law: in particular, the margin of appreciation doctrine.

Diagram plan



A printable version of this diagram plan is available from www.pearsoned.co.uk/lawexpressqa

Answer

¹ This is an important point – it is legal authority for interpretative principles that is under discussion; this shows you understand the issue.

² Here, as elsewhere, your answers need to be sensitive to the ‘level’ of law being discussed – especially whether it is international or domestic.

The European Convention on Human Rights (ECHR) is a constitutional document whose terms need to be interpreted in order to be applied in particular circumstances. Like most constitutional documents, the Convention itself is mainly silent on the principles which, with legal authority,¹ can be applied when it is being interpreted.

The first point to note is that the ECHR is part of international law.² The European Court of Human Rights (ECtHR) must be sensitive to the sovereignty of states but also exercise fully its own role in

³ It is important to stress this – we are exploring legal guidance the Court may choose to follow, not rules that are binding on it.

⁴ Now move on to give examples of these external legal sources – try to both identify them, explain what they are concerned with and give a brief example of their effect at the European level.

remedying violations in individual cases for which the states are responsible. The Court can take into account, and treat as persuasive authority,³ other sources of international law (such as other treaties) and the case law of international courts (such as the International Court of Justice).

The Vienna Convention on the Law of Treaties 1969,⁴ is a UN Convention expressing international agreement on principles which should govern the interpretation of treaties by courts. Its authority has been recognised by the ECtHR from early cases (e.g. **Golder v UK** (1979–80) 1 EHRR 524). For example, the Treaty requires treaties to be given a purposive, context-based interpretation. Time and again the ECtHR has emphasised its role in giving effective application to a human rights treaty in a changing world.

As an international court, the ECtHR can also accept the persuasive authority of other treaties, UN or otherwise, which are focused on the issue before it. The definition of ‘torture’ in Article 3, for instance, has been considered in the light of the UN Convention Against Torture and Inhuman and Degrading Treatment which contains a definition of ‘torture’ (e.g. in **Selmouni v France** (2002) 29 EHRR 403).

Judgments of other judicial bodies dealing with human rights matters (e.g. the UN Human Rights Committee or the International Court of Justice) can also be taken into account. So, for instance, Court judgments sometimes contain a review of relevant international sources of law (e.g. **Scoppola v Italy (No. 3)**, app 126/05 Grand Chamber Judgment of 22 May 2012, on rights of prisoners to vote, The Facts, Part III).

Formal instruments made by the Council, such as other Conventions and recommendations of the Committee of Ministers, can also be cited. They can give the Court a formal, objective measure of social change in Europe.

⁵ The test here is not so much your definition (the term is well known) but, rather, the need to use it properly so that the examiner is confident that you do understand it.

⁶ Now move on to discuss ‘internal’ interpretative authority.

Travaux préparatoires (drafting documents)⁵ can be taken into account by the Court in order to ascertain the purpose of an Article. Their influence (especially in respect of the original text) is not decisive since, if it were, the Convention would lose the living instrument quality.

The Court can also refer to internal sources such as the general parts of the Convention.⁶ The Preamble, for instance, provides further legal justification for taking UN law into account and for invoking a ‘common European heritage’ or ‘democracy’ to justify applying the

3 CONVENTION RIGHTS: ANCILLARY RIGHTS AND PERVASIVE PRINCIPLES

Convention in a particular way. Article 1 is important in its own right on the question of whether a state can be bound by Convention rights when acting outside its own territory; it can also guide interpretation – its reference to human rights applying to ‘everyone’ helps to justify the application of rights to unpopular minorities.

⁷ Now move on to discuss general principles of international law. Remember, the question specifically requires an examination of the margin of appreciation; referring to general principles, and the example of proportionality, is a good way to introduce this.

⁸ In making this point, you show a more general, contextual understanding of the Convention system which will impress the examiners.

⁹ Note the early establishment of the doctrine and then move on to give a brief outline of its general point; in your revision, this would be a matter to prepare.

¹⁰ Now move on to make the crucial point – that the doctrine is variable in its application; there are a range of factors, again, external to the Convention itself and largely of the Court’s own making, that determine the proper application of the doctrine.

There are also a number of general principles of international law⁷ which are used by the ECtHR: proportionality is an example. This embodies the search for a ‘fair balance’ between individual and social interests which is ‘inherent in the whole of the Convention’ (*Sporrong v Sweden* (1983) 7 EHRR 35).

Of particular importance is the ‘margin of appreciation’. Although this is a general doctrine of international law, it is one the ECtHR has made its own.⁸ Through application of the doctrine, the Court is able to apply Convention rights in a way that acknowledges and is sensitive to the different standards and values found amongst European states. The doctrine was established early in the Court’s history (*Handyside v United Kingdom* (1979–80) 1 EHRR 737).⁹ As an international court, the ECtHR acknowledges that it is the states which have the primary duty to protect the rights of their citizens. Many human rights issues involve a balancing of interests, and states can be best placed to judge the necessity for some interference with rights. Furthermore, Council of Europe states, supposed to be pluralist democracies, should have a degree of democratic legitimacy for these judgements. The role of the courts is supervisory. Nevertheless, it remains the ECtHR’s responsibility to review the judgments and actions of states, to set appropriate limits to the margin of appreciation and thereby ensure that, at the least, the core, the essence, of individual rights is not abused.

The ‘width’ of the margin of appreciation depends on a range of factors.¹⁰ ‘Absolute’ rights, such as the ban on torture etc. in Article 3, provide little scope for variable standards throughout Europe even on issues such as where the triggering threshold of severity is to be placed. More scope tends to be given to states in respect of qualified rights (i.e. Articles 8–11) on the issue of proportionality and whether an interference is ‘necessary in a democratic society’. But even here the margin will depend on the issue. ‘Moral’ questions (e.g. obscenity standards) tend to allow a wide margin. It is likely to be narrower on interferences affecting key aspects of a person’s identity (*Evans*

¹¹ Here, as below, supporting your discussion with cases which illustrate your point will gain credit – especially as the application of the margin of appreciation is a context-dependent matter.

v UK (2007) 46 EHRR 34).¹¹ Where the convention standard is 'objective' (as with torture) or where there is a clear European consensus on a matter (e.g. rights of transsexuals, **Goodwin v UK** (2002) 35 EHRR 18), the margin will be restricted. Where matters are controversial within Europe (e.g. the beginning of 'life' for the purposes of Article 2, **Vo v France** (2005) 40 EHRR 12) or where they involve complex political judgments on the distribution of resources, such as welfare policy, the margin is likely to be wider. The difficult issues are, for example, where national security is involved. There are reasons for a wide margin (e.g. information on threat levels are within the exclusive cognizance of the state) but, on the other hand, the interference with rights is likely to be serious, needing careful scrutiny based on a narrow margin. How to apply the doctrine remains a matter of judgment for the Court.

¹² Conclude your answer by pointing out and explaining the controversial nature of the doctrine.

The margin of appreciation doctrine is criticised¹² by those who see it as weakening human rights protection by creating variable standards when they ought to be universal. On the other hand, the doctrine may be central in establishing the legitimacy of an international court. Indeed, an aspect of the reform process, 2010–15, involves enhancing the doctrine by placing greater responsibility on states and their courts. This can both help reduce the Court's backlog but also placate those who see the Court as undermining state sovereignty.



Make your answer stand out

- Discuss the international law background: see, for example, Steiner and Alston (2007), Chapter 11, or Smith (2012); Cannizzaro (2012).
- Examine some of the critical material on 'margin of appreciation': for example, Legg (2012) – a recent full account; Letsas (2006); Kratochvil (2011); Lavender (1997).
- Show awareness of the presence of margin of appreciation in both Convention and EU Charter jurisprudence: Gerards (2011).
- Explore in more detail ECtHR case law on the margin of appreciation – for a useful recent summary by a Grand Chamber see *Marper v UK* (2009) 48 EHRR 50, Para. 102.

Don't be tempted to . . .

- Unbalance the answer by spending too much time either on the general international sources part of the answer or on the margin of appreciation part – the question wants an effective answer on both parts.
- Write much about the situation in domestic law. There is a doctrine of 'deference' which has some similarities with the margin of appreciation (a context-dependent, variable willingness of the domestic courts to accept the assessments of the need for human rights restrictions of the national authorities) but it is important that you keep this answer focused on international law issues.

Question 3

Jones has a contract with a foreign publisher to import and distribute in the UK a book on sadomasochistic practices. UK Customs officials confiscate the book at Dover. They are exercising wide discretionary, statutory powers to confiscate any 'indecent material' which is being imported. A confidential Code of Practice indicates factors that officers should take into account when deciding whether a matter is indecent. There is no right of appeal from the exercise of these powers.

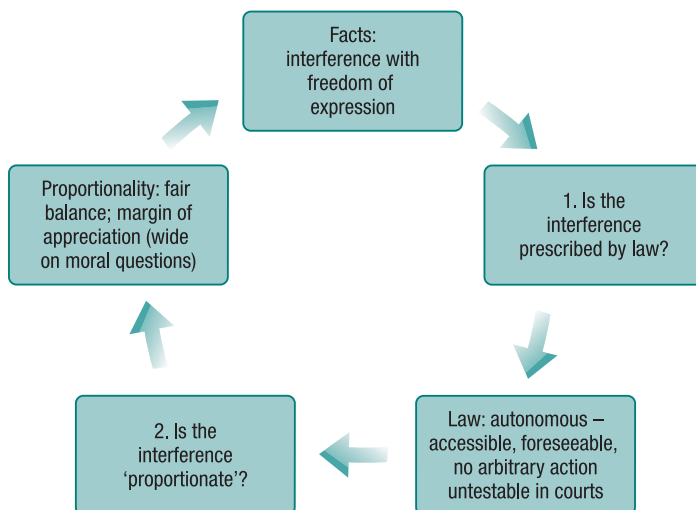
Having lost his legal challenges in the UK Jones applies to the Court of Human Rights in Strasbourg. Jones and the UK Government both accept that there has been an interference with Jones's right to freedom of expression and that the interference served a legitimate purpose (the protection of morals). They disagree on whether the Customs officials' actions were prescribed by law and proportionate (necessary in a democratic society).

Advise Jones on the general principles developed by the Court of Human Rights for dealing with the two areas of disagreement.

Answer plan

- ➔ Has the interference with Jones's freedom of expression been prescribed by law?
- ➔ Consider 'law' as an autonomous concept: accessibility, foreseeability and adequate judicial supervision of discretion.
- ➔ Was the interference with Jones's freedom of expression proportionate?
- ➔ Define proportionality.
- ➔ Consider 'margin of appreciation'.
- ➔ Apply the law to the facts of the case, noting, especially, wide discretion, Codes of Practice, unpublished rules, no right of appeal, and that the issue is about protection of 'morals'.

Diagram plan



A printable version of this diagram plan is available from www.pearsoned.co.uk/lawexpressqa

Answer

¹ Having identified the idea of autonomous concepts, now go on to consider the terms of the autonomous concept of 'law'.

² Briefly noting this point illustrates your understanding of the Convention as a matter of international law.

³ It is important to discuss and apply these two concepts; it is clear from the question that they should form an important section of the answer (the sort of point you should note down as you read through the question).

The requirement that any interference with freedom of expression must be prescribed by law is an express provision in Article 10 and is also pervasive of the Convention. Actions taken by state authorities which interfere with Convention rights and which are unlawful will violate the Convention for that reason alone.

The Convention concept of 'law' is autonomous – it is defined by the Strasbourg institutions and so compatibility with domestic law is not sufficient.

First, the interference must be in accordance with domestic law.¹ This is true in Jones's case since the lawfulness of Customs' actions is confirmed by the UK court, and the European Court of Human Rights (ECtHR) has no jurisdiction to determine UK law.² Secondly, though, under the autonomous concept, a rule of 'law' must be 'accessible' and 'foreseeable'³ (*Sunday Times v UK* (1979–80) 2 EHRR 245). 'Accessible' means that the rules of law relied on by the authorities must be capable of being identified by the applicant or his or her advisors. Secret laws, not publicly promulgated, are not 'law'