

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

British Property Law and Human Rights: Possible Lessons from the United States Constitution

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I. Introduction

The adoption of the Human Rights Act 1998 (HRA)¹ has “brought home” the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention)² to British domestic law.³ Historically, property lawyers in the United Kingdom ignored any possible human rights aspects of their work.⁴ This was probably an error⁵ since the Convention has been enforceable in Great Britain since 1966,⁶ but the prevailing opinion was that British law, in practice, already protected the applicable human rights and so the incorporation of the

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1. Human Rights Act 1998, 1998 Chapter 42 (United Kingdom).
2. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (Council of Europe) [hereinafter Convention].
3. Richard Buxton, *The Human Rights Act and Private Law*, 116 L.Q.R. 48, 49 - 50 (Jan., 2000).
4. Jean Howell, *Land and Human Rights*, 1999 CONV. & PROP. LAW. 287, 287 (Jul./Aug. 1999).
5. *Id.*
6. Vincent Pace, *Partial Entrenchment of a Bill of Rights: The Canadian Model Offers a Viable Solution to the United Kingdom's Bill of Rights Debate*, 13 CONN. J. INT'L L. 149, 158 n. 56. (While domestic courts in the UK could not enforce the Convention prior to the HRA, British citizens could seek enforcement of the Convention by bringing an action before the European Court of Human Rights, at least against government actions.).

Convention would have little impact.⁷ Whatever the impact of the Convention in Great Britain before the HRA, it is clear that it must be taken into account now that the HRA is British law.

Some British commentators have argued that the only possible application of the HRA would involve a direct violation of an individual's Convention rights by the government, the so-called "vertical" impact.⁸ This "vertical" impact results from Section 6 of the HRA which requires that any government action must be consistent with the Convention.⁹ Other commentators argue that the adoption of the HRA also applies the Convention to suits between individuals when the cause of action involves violation of their human rights, the so-called "horizontal effect."¹⁰ It has been argued that the "horizontal" impact also results from HRA Section 6, which makes it unlawful for any public authority, specifically including the courts, to act incompatibly with the Convention, arguably including application of common law or statute to the adjudication of a dispute.¹¹ Separately, it is argued that HRA Section 3, which requires British courts to interpret statutes and common law to be consistent with the Convention also results in a horizontal effect.¹² Whether the HRA in fact applies to disputes between private parties is still being hotly debated, but it is clear that the Convention does apply, vertically, to governmental actions.¹³

The *amount* of impact in either dimension will depend on the degree of difference between existing British law and the human rights requirements of the Convention.¹⁴ But the amount of the *horizontal* impact depends on the degree to which British courts, as a public authority, are determined to have an obligation to apply the Convention when applying the law to a specific private party dispute.¹⁵

The cases considered shortly after the adoption of the HRA found only the narrow, vertical application.¹⁶ However, commentators as reputable as the Lord Chancellor, Lord Irvine of Lairg,¹⁷ noted early on that the HRA and its

7. Buxton, *supra* note 3 at 61.

8. *Id.* at 48.

9. Richard Clayton, *Developing Principles for Human Rights*, 2 E.H.R.L.R. 175, 181 (2002).

10. William Wade, *Horizons of Horizontality*, 116 L.Q.R. 217, 217 (Apr. 2000).

11. *Id.*

12. Nicholas Bamforth, *The True "Horizontal Effect" of the Human Rights Act 1998*, 117 LQR 34, 34 (2000).

13. ROGER J. SMITH, *PROPERTY LAW*, 15-17 (Pearson Education Ltd., 5th ed. 2005).

14. Buxton, *supra* note 3, at 49 n.8.

15. *Id.* at 50.

16. Charles Harpum, *Property Law – The Human Rights Dimension: Part 2*, 4(2) LANDLORD & TENANT R. 29, 29 (2000).

17. The Lord Chancellor is the head of Great Britain's judiciary, responsible for the

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

incorporated human rights from the Convention may have a fairly broad impact since “future English judges will have at hand a clear legislative statement, a single source that will raise the prominence of human rights throughout English law.”¹⁸

This Comment will argue that a study of how human rights provisions of the United States Constitution have impacted American property law will enrich the HRA development of British property law, and, likely, advance the broad application of the HRA, as Lord Chancellor suggested. While not analyzing in-depth the ways the human rights provisions of the American Constitution have affected property law in America, this Comment will illustrate, by example, how property law and human rights issues now being explored under the HRA have already been addressed in the United States. It is argued that America’s constitutional experience indicates that the potential impact of the Convention on British property law will be significantly greater than British commentators expect.

This Comment will first examine the history of the Convention on Human Rights in Great Britain, including examples of cases from both the European Court of Human Rights (the Strasbourg court) and British courts under Convention. The example cases will focus on four subject areas where Convention in Great Britain and the Bill of Rights in the United States may affect (or have affected, in the case of the United States) the outcome of property law disputes: Regulatory Takings, Discrimination, Due Process, and Adverse Possession.¹⁹ Secondly, this Comment will compare the role of the Constitution in American law in protecting human rights to the protection offered by the “sovereign Parliament”²⁰ structure of British law, and the potential for change in Great Britain’s legal structure that has been triggered by adoption of the HRA. This Comment will conclude with a discussion of how a study of American constitutional law may inform consideration of current British property law issues.

development and implementation of government policy on the legal system and for administration of the courts. The Lord Chancellor also presides over the House of Lords, one of the two Houses of the British Parliament. Lord Irvine served as Lord Chancellor from 1997 to 2003. See “Lord Chancellor”, http://news.bbc.co.uk/1/hi/uk_politics/82530.stm (last visited Mar. 22, 2007).

18. LORD IRVINE OF LAIRG, *THE COMMON ORIGINS OF ENGLISH AND AMERICAN LAW*, reprinted in *HUMAN RIGHTS, CONSTITUTIONAL LAW AND THE DEVELOPMENT OF THE ENGLISH LEGAL SYSTEM* 217 (2003) [hereinafter LORD IRVINE]. (The Common Origins of English and American Law was originally published as “Millennium Lecture in The English Legal System in the 21st Century” by the Honorable Society of the Inner Temple.)
19. See DEBORAH ROOK, *PROPERTY LAW AND HUMAN RIGHTS* (Blackstone Press 2001). These topic areas were suggested by the discussion in the chapter entitled “Implications of the HRA 1998 on Property Law.”
20. LORD IRVINE, *supra* note 18, at 225.

II. Background – Convention on Human Rights and the HRA

A. History of the European Convention on Human Rights in Great Britain

The European Convention on Human Rights and Fundamental Freedoms was created shortly after the end of World War II²¹ in reaction to the atrocities that had occurred during that war.²² The Convention contains an enforcement procedure that allows citizens to bring grievances to the European Court of Human Rights in Strasbourg, France.²³ Although Great Britain was a signatory to the Convention, the Convention had little direct legal effect on British law since treaties in Great Britain are not self-executing.²⁴ It was not until 1966 that the United Kingdom allowed its citizens to seek enforcement of human rights in the Strasbourg court.²⁵ Further, until the HRA became effective in October 2000, *domestic* courts in Great Britain could not directly enforce the Convention.²⁶ British citizens could only file a grievance in Strasbourg, but only after the House of Lords, Great Britain's highest appellate court, had adjudicated the case.²⁷ As a result, prior to adoption of the HRA, the impact of the Convention on British domestic courts considering property cases was minimal,²⁸ even though alleged failures by the British government to protect Convention rights could be appealed to Strasbourg.²⁹

Some commentators have suggested that the Convention had this minimal direct impact because the concepts on which the Convention is based are already represented in Great Britain's common law.³⁰ However, other commentators argue that the large number of cases brought against Great Britain in the Strasbourg court strongly suggest that the status quo in British law has "too often failed to protect

21. The Convention, *supra* note 2, was adopted by the eight original members of the Council of Europe on November 4, 1950, and was ratified by England, a Council member, in 1951.

22. Cherie Booth and Max Du Plessis, *Home Alone? The US Supreme Court and International and Transnational Judicial Learning*, 2 E.H.R.L.R 127, 130 (2005).

23. Pace, *supra* note 6, at 157.

24. Buxton, *supra* note 3, at 49.

25. *Id.*

26. *Id.* at 158.

27. *Id.*

28. Howell, *supra* note 4, at 303 n.6 (citing MURRAY HUNT, USING HUMAN RIGHTS LAW IN THE ENGLISH COURTS (Oxford, 1998), Appendix 1.) In a study by Murray Hunt of 478 cases considered between 1964 and 1996 which made reference to the Convention, only 4 cases made reference to the First Protocol of the Convention which is concerned with protecting "possessions," a concept that Howell feels clearly includes land (Howell, *supra* note 4, at 287).

29. Pace, *supra* note 6, at 157.

30. Clayton, *supra* note 9, at 176.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

individual liberties.”³¹ In fact, “[a]mong signatories to the Convention, the United Kingdom has compiled the second worst record before the European Court of Human Rights.”³² This poor record indicated the need to better integrate human rights into British law.³³ The Human Rights Act 1998 sought to bring that integration into effect.³⁴

B. Property-Related Convention Rights

For cases involving land, there are four Articles that have been identified as the basis for an alleged Convention violation — Article 1 of Protocol I, and Articles 6, 8 and 14 of the Convention;³⁵ with Articles 1, 6 and 8 having the most direct application.³⁶ Article 1 of the Convention, although not adopted until two years after the primary Convention, provides the broadest application to property law by guaranteeing the “peaceful enjoyment of possessions.”³⁷ While the term “possessions” is not defined in the Convention, it arguably covers a wide variety of “property” interests, including the rights inherent in the possession of freehold estates and leases, easements, restrictive covenants, and options to buy or lease property.³⁸ The Strasbourg Court has noted that this Article contains three distinct but related elements: 1) the general principle of peaceful enjoyment of one’s possessions; 2) a general, but conditional, protection from deprivation of those possessions; and 3) the limitation of the right by State determination that control of possessions is necessary in the general (or “public”) interest.³⁹ Each of these elements will have an impact on the application of the Convention to property law, particularly in the areas of “Takings,” as this concept is called in the American Constitution.⁴⁰

31. LORD IRVINE, *supra* note 18, at 224.

32. Pace, *supra* note 6, at 159.

33. *Id.*

34. *Id.* at 152.

35. Howell, *supra* note 4, at 303, n.4.

36. SMITH, *supra* note 13, at 16.

37. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Protocol I, Article 1, March 20, 1952 [hereinafter Convention, Art. 1] (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.”).

38. Howell, *supra* note 4, at 292-93.

39. Harpum, *supra* note 16, at 29.

40. U.S. Const. amend. V, cl. 5.

British Property Law and Human Rights 567

The next major Article of the Convention with application to property law is Article 6 of the original Convention, which provides that, in the determination of civil rights, everyone is entitled to a fair and public hearing before an independent and impartial tribunal.⁴¹ The Article mainly discusses this right in the context of criminal charges. However, Article 6 is most appropriately referred to as a “right to a fair hearing” since the scope of Article 6 extends, per the first clause, to civil and administrative matters and is not limited to criminal trials alone.⁴² The equivalent concept in American Constitutional law is “Due Process,” the right to notice and a fair hearing before any deprivation of any right.⁴³ Article 6 of the Convention is usually used in conjunction with other Convention rights when dealing with property law cases.⁴⁴ For example, in a survey of Strasbourg cases heard in 1999, one of the three alleged violations of Article 1 was combined with Article 6, and two of the Article 6 cases also involved Article 1 as a secondary point of violation.⁴⁵ As Peter Halstead wrote, regarding the need for fair hearing:

[W]hen a person is deprived of property, such deprivation has to be effected fairly and in a lawful manner, taking into consideration all relevant circumstances, weighing the particular rights of the individual against the collective rights of the community and achieving a fair balance between them, ensuring that payment of compensation is made (if appropriate) and that the whole process is undertaken and completed without unreasonable delay.⁴⁶

Numerous property law cases are brought under a human rights laches principle,⁴⁷ due to the failure of the state to provide a timely, and thus fair, hearing under Article 6.⁴⁸ Italian cases seem to be a particularly common source of Article 6 property claims, arising from lack of timely police assistance in enforcing a

41. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Art. 6 [hereinafter Convention, Art. 6] (The first line of Article 6 reads: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”).

42. Peter Halstead, *Human Property Rights*, 2002 CONV. & Prop. Law. 153, 164 n.7 (Mar/Apr 2002).

43. ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPAL AND POLICIES* 523 (2nd ed. 2002).

44. Halstead, *supra* note 42, at 158.

45. *Id.*

46. *Id.* at 159.

47. Laches is an equitable doctrine in which the court denies relief to an applicant who has unreasonably delayed asserting a claim in such a way as to prejudice the party against whom relief is sought. See BLACK’S LAW DICTIONARY 879 (7th ed. 1999).

48. Halstead, *supra* note 42, at 159.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

possession order; but other countries have also been subject to Article 6 claims.⁴⁹

The third Convention right with particular application to property law is Article 8 which protects the individual's right to one's home.⁵⁰ This Article grants a more specific, but therefore more limited, right than the general right of Article 1 in regards to the peaceful enjoyment to one's possessions.⁵¹ The Strasbourg court has held in various cases that Article 8 applies to a wide variety of potential interferences with one's peaceful enjoyment of their home.⁵² The Strasbourg court has interpreted Article 8 to not only require the state to refrain from such interferences directly, but also to impose on the state a positive obligation to prevent others from such impositions.⁵³ This potentially broader protection of one's right to his or her home is illustrated by a case involving eviction of a long-term tenant due to failure to pay a minor service charge.⁵⁴ The court found that it had no jurisdiction under Article 1 because the eviction was the result of a private contract between the landlord and tenant. However, the court left open the question as to whether there might be a violation of Article 8, commenting that there might be a positive obligation for the state to prevent a disproportional interference with the tenant's home.⁵⁵

The final Convention right commonly raised in property cases is Article 14.⁵⁶ Article 14 involves discrimination.⁵⁷ By its plain terms, Article 14 is always coupled with another Convention right since it only protects individuals from

49. *Id.* at 172 (citing *Guglielmina Tieghi v. Italy* E.Ct.H.R. (C L Rozakis P) 5/4/2001, Document No. G0001232 (2001)).

50. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Art. 8 [hereinafter Convention, Art. 8] (Article 8, Cl.1 reads: "Everyone has the right to respect for his private and family life, his home and his correspondence.").

51. Howell, *supra* note 4, at 296.

52. ROOK, *supra* note 19. (*See generally* Chapter entitled *Article 8*, which noted that Strasbourg Court decisions have extended protection under Article 8 to: 1) a right of access to the home; 2) a right of occupation of the home; 3) a right not to be evicted, and 4) protection against intrusion into the home by the state in order to arrest, search, seize, or inspect.)

53. *Id.*

54. Harpum, *supra* note 16, at 30 (citing *Di Palma v. United Kingdom*, reported as App. No. 11949/86, (1988) 10 E.H.R.R. 149).

55. *Id.*

56. Howell, *supra* note 4, at 303 n.4.

57. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Art. 14 [hereinafter Convention, Art. 14] ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.")

discrimination in regards to the “enjoyment of the rights and freedoms set forth in this Convention.”⁵⁸ In this sense, Convention Article 14 is similar to the Fourteenth Amendment of the American Constitution which protects persons from denial of the “equal protection of the laws,”⁵⁹ which will be discussed later in this Comment.

C. Does the Convention Apply to Private Disputes

British commentators and courts generally agree that the Convention in itself is only applicable to actions by the state and does not extend, at all, to actions between two private parties.⁶⁰ There is limited application because the Convention is a treaty, binding only the signatory *governments*, thereby only allowing the Convention rights to be asserted by an individual against his or her national government.⁶¹

Commentators observed that in pre-HRA Convention rights cases, with only a few hints at exceptions, the Convention rights were applied only to actions of the state against an individual, and not to claims between private individuals.⁶² The Strasbourg cases show that even where a loss of possessions or interference with one’s home resulted from legal action by the state in the form of a court action, Strasbourg would not find a violation of a Convention right if the root of the case is a private contract and the court’s only role was as an intermediary enforcing that private agreement.⁶³ Secondly, even with respect to applications of Convention rights to direct state action against an individual, the Strasbourg court grants significant *discretion* to the state by balancing the general interests of the community against the impact on an individual’s rights.⁶⁴ Even the compulsory transfer of property from one individual to another under state law, without compensation, has been held to not violate Convention rights where a public benefit from the transfer is recognized.⁶⁵ And, finally, the Strasbourg court will allow a great deal of loss of property value to result from state *control* of the use of property, as contrasted to outright *acquisition* of the property, even where there is

58. Harpum, *supra* note 16, at 34.

59. U.S. Const. amend XIV, § 1, Cl. 4.

60. Howell, *supra* note 4, at 288.

61. Buxton, *supra* note 3, at 49 (emphasis added).

62. Harpum, *supra* note 16, at 29.

63. *Id.* at 30.

64. Howell, *supra* note 4, at 290.

65. *Id.* at 294 (citing *James v. United Kingdom*, 8 E.H.R.R. 123 (1986)).

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

little or no compensation for the loss.⁶⁶

Whether the HRA similarly applies Convention rights only to governmental acts, or whether it will extend those rights to disputes between individuals, has been hotly debated among British commentators.⁶⁷ As will be discussed later in Section III C, the experience in the United States with application of the Bill of Rights to private disputes through the doctrine of “state action,” may provide an insight to this controversy in English law.

D. Does the HRA make Convention Rights More Applicable to Private Disputes — the Vertical and Horizontal Effect

Prior to the adoption of the Human Rights Act 1998, the Convention was not part of Great Britain’s domestic law⁶⁸ and did not give rise to enforceable rights in British courts.⁶⁹ While the Convention did create rights that an individual could exercise against his or her state government,⁷⁰ the individual could only exercise them by means of a cumbersome process of exhausting all domestic court avenues of relief before petitioning for relief in Strasbourg.⁷¹ In a White Paper by the British government⁷² prior to adoption of the HRA, it was stated that one of the main purposes of the Act was simply to “bring the Convention home,” in other words to lift the Convention rights out of the Strasbourg context and make them enforceable in domestic law.⁷³ The HRA would thus provide an easier, or at least more convenient, route for British plaintiffs to claim their rights.⁷⁴ When the Act came into effect in October 2000, British courts could begin to directly apply Convention rights.⁷⁵ In fact, the HRA *requires* public authorities, including the courts, to implement primary and secondary legislation “in a way which is compatible with Convention rights.”⁷⁶

66. Harpum, *supra* note 16, at 33.

67. See Wade, *supra* note 10 and Bamforth, *supra* note 12; *But see* Buxton, *supra* note 3.

68. Pace, *supra* note 6, at 161.

69. Buxton, *supra* note 3, at 49.

70. *Id.*

71. Pace, *supra* note 6, at 161.

72. United Kingdom Parliament, Making New Law, *available at* <http://www.parliament.uk/works/newlaw.cfm> (last visited Jan. 28. 2006). White Papers are formal documents prepared by the English government to explain or advocate for proposed legislation.

73. Buxton, *supra* note 3, at 49–50.

74. ROOK, *supra* note 19, at 20.

75. Buxton, *supra* note 3, at 49.

76. Human Rights Act 1998, 1998 Chapter 42 Sec. 3, Cl. (1) (“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights.”)

British Property Law and Human Rights 571

Further, it is clear from the wording of Sections 6 and 8 of the Act, that the HRA applies to actions of government officials and agencies and compels them to act compatibly with the Convention.⁷⁷ Some commentators felt that simplifying the process of raising human rights issues was basically *all* that the HRA did, arguing that such a “high level of conformity. . . already exist[ed] between the requirements of the Convention and the principles of the common law” so that reference to interpretations of Convention rights would be rarely needed.⁷⁸ Under this expectation of the impact of the HRA, the only issue would be the degree to which direct *government* actions (and, maybe, actions of entities performing a public function⁷⁹) interfered with an individual’s Convention rights.⁸⁰ Some minor broadening of the impact of Convention rights could occur depending on the breadth of definition given to “functions of a public nature” by the courts⁸¹ but, overall, the HRA’s reach would be no greater than the Convention.

However, authoritative commentators have argued that the HRA will have a much broader reach through direct application to disputes between private parties.⁸² These commentators felt that bringing the Convention into British domestic law would have a more significant impact because the HRA not only “brings the Convention home”⁸³ but also is likely to change the way judges approach legal disputes.⁸⁴ Case law, after the HRA became effective, has indicated this change in judicial approach has already occurred in public law cases. For example, in *R. v. A. (No. 2)*, the court held that a rape-shield law protecting rape victims from exploration of past sexual history violated the right of fairness to the defendant under Article 6.⁸⁵ The argument is that, since the HRA requires the court to act compatibly with the Convention in all of their actions, the court similarly must evaluate the application of Convention rights even in purely private

77. Human Rights Act 1998, 1998 Chapter 42 Sec. 6, Cl. (1) (“It is unlawful *for a public authority* to act in a way which is incompatible with a Convention right.” (emphasis added) 1998 Chapter 42 Sec. 8, Cl. (1) reads: “In relation to any act (or proposed act) *of a public authority* which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.” (emphasis added)).

78. Buxton, *supra* note 3, at 61.

79. Dawn Oliver, *Functions of a Public Nature under the Human Rights Act*, P.L. 329, 330 (2004).

80. Buxton, *supra* note 3, at 49.

81. Oliver, *supra* note 79, at 331.

82. See Wade, *supra* note 10; Bamforth, *supra* note 12; Oliver, *supra* note 79.

83. Buxton, *supra* note 3, at 50.

84. Howell, *supra* note 4, at 288.

85. *A. v. R (No. 2)*, 2 W.L.R. 1546 (2001).

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

dispute cases.⁸⁶

This potential impact of Convention rights on British domestic law is not clear, however, since within the terms of the HRA, the Convention is not directly incorporated into British law and only obligates the courts to interpret and apply the law in a manner compatible with Convention rights.⁸⁷ This language might provide an “out” for the British courts with respect to the Convention, since they are not “bound” by the Convention.⁸⁸ However, courts could also consider the requirement to act compatibly with the Convention as a broad mandate both to protect individuals from abuses by the state *and* to prevent state processes, like court enforcement actions, from being used by individuals to abuse the rights of others.⁸⁹ One basis for this consideration of the HRA as a broader mandate comes from the opening text of the HRA itself, which describes the HRA as “an Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.”⁹⁰ Thus, there may develop “a whole new jurisprudence” based on truly incorporating the human rights of the Convention into British domestic law.⁹¹ This distinction between application of the Convention to suits by a plaintiff against the government versus application of the Convention when private parties seek government (e.g., court) intervention to resolve their private disputes has been termed the “vertical” effect of the HRA, as opposed to the “horizontal” effect.⁹²

Since the HRA became effective in late 2000, there has been time for only a few reported appellate-level cases involving the HRA and property law.⁹³ Therefore, the main source of evaluation regarding the impact of the HRA on British property law has been from academics.⁹⁴ These commentators generally agree that the HRA will have some impact on British property law, although there is disagreement as to the type and the depth of that impact.⁹⁵ With respect to the vertical question, it is clear from Section 3 of the HRA that all public authorities in Great Britain, except Parliament, are now bound by the Convention.⁹⁶ So the

86. Howell, *supra* note 4, at 287.

87. Clayton, *supra* note 9, at 178.

88. *Id.* (quoting Lord Hoffman in *R. (Alconbury) v. Secretary of State for the Environment*).

89. Howell, *supra* note 4, at 288.

90. Human Rights Act 1998, 1998 Chapter 42.

91. Howell, *supra* note 4, at 310.

92. Bamforth, *supra* note 12, at 34.

93. SMITH, *supra* note 13, at 17.

94. Clayton, *supra* note 9, at 194-95, n.42 (listing eighteen separate articles on the subject published between 1998 and 2002).

95. Halstead, *supra* note 42, at 153.

96. Human Rights Act 1998, 1998 Chapter 42, Section 3, Cl. (3) (“In this section, ‘public

question is not whether acts of public authorities are covered by the Convention, rather it is whether the application of Convention rights results in any *significant* change in English land law.⁹⁷ However, even within this narrow scope of the HRA, some commentators have noted early cases suggesting that private entities providing public-like services are also covered by the Section 3 requirements.⁹⁸ It is noted for future discussion that courts in the United States have developed the doctrines of “entanglement” and “public function” to extend many of the rights protected under the Constitution to actions of private entities.⁹⁹

Greater uncertainty applies to the impact of applying the HRA and Convention rights to purely private disputes.¹⁰⁰ “Amongst the less expected [challenges to practitioners and the courts] have been suggestions . . . that the H.R.A. will have a significant effect not only on public law issues . . . , but also upon private law relationships between one citizen and another.”¹⁰¹ There are two sections of the HRA which commentators¹⁰² argue give this “horizontal” effect: Section 3 which requires legislation to be “read and given effect in a way which is compatible with the Convention rights;”¹⁰³ and Section 6, which makes it unlawful for a court (as a specific “public authority”) to “act in a way which is incompatible with a Convention right.”¹⁰⁴ Nicholas Bamforth argues that “Section 3 is clearly not confined to ‘vertical’ cases,” suggesting that courts are required by the Act to apply Convention rights through ‘statutory interpretation’ in disputes between private parties.¹⁰⁵ Additionally, William Wade argues that since Section 6 includes “courts” in the definition of “public authorities,” if a Convention right is at issue, a court must decide the case involving either public or private defendants, in accordance with that right.¹⁰⁶ In private party disputes, the horizontal application of the HRA and the application of Convention rights raise questions concerning *both* the extent of difference between English law and Convention rights *and* the

authority’ includes (a) a court of tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include any House of Parliament or a person exercising functions in connection with proceedings in Parliament.”).

97. Buxton, *supra* note 3, at 61.

98. See Oliver, *supra* note 79.

99. CHEMERINSKY, *supra* note 43, at 488.

100. SMITH, *supra* note 13, at 16.

101. Buxton, *supra* note 3, at 48.

102. See Bamforth, *supra* note 12 and Wade, *supra* note 10.

103. Human Rights Act 1998 Sec 3, *supra* note 76.

104. Human Rights Act 1998 Sec. 6, *supra* note 77.

105. Bamforth, *supra* note 12, at 37.

106. Wade, *supra* note 10, at 217-18.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

extent to which the HRA and Convention law apply at all.¹⁰⁷

Unfortunately, the case law development to date of the horizontal impact of the Convention by means of the HRA has not been significant.¹⁰⁸ However, in a variety of non-final-appeals court cases, the fact has been well established that HRA Section 3 does require the British courts to interpret legislation in private party disputes in a manner consistent with the Convention.¹⁰⁹

Article 8 of the Convention may also result in horizontal application of human rights to individual disputes. The potential positive obligation of the state under Article 8 to prevent private interference with one's home was strengthened by the case of *Arrondelle v. United Kingdom*.¹¹⁰ The Strasbourg court held that although noise was generated by private aircraft, the state was sufficiently tied to that activity to allow enforcement of the Convention since the airport (Gatwick) was operated by a public airport authority and the British government had assisted in the airport's location and development.¹¹¹ It is interesting to note for future discussion at Section IV A, the parallel to the U. S. Supreme Court case of *Shelley v. Kraemer*,¹¹² where state enforcement of a private agreement alone was sufficient to trigger the protections of the Fourteenth Amendment, thus prohibiting court enforcement of a racially discriminatory private covenant.

The growing likelihood of horizontal application, and the certainty of vertical application, suggests that the potential for the HRA to substantially affect property law is significant.¹¹³ In the absence of a developed and applicable British jurisprudence, it is particularly in the developing field of the application of the HRA to private party disputes that the American experience may provide a useful guide to the British legal system.

107. See Buxton, *supra* note 3, at 51.

108. Clayton, *supra* note 9, at 182.

109. *Id.* at 182-83 (citing, as examples, two cases, *Wilson v. First County Trust* and *Wilson v. First County Trust (No. 2)* where Articles 1 and 6 of the Convention must be applied to the particular legislative bar against enforcing a credit agreement, even though the litigants were both private parties.)

110. *Arrondelle v. United Kingdom*, (1983) 5 E.H.R.R. 118.

111. Howell, *supra* note 4, at 291.

112. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

113. Howell, *supra* note 4, at 302.

III. Background – Human Rights and Property Law

A. Sample Cases Applying Convention Rights to Property Law Issues

Although there are few British land-law cases that have been considered under the Convention to date, property law issues related to Convention human rights have been raised in cases from other European countries. Those decisions lay the best foundation for consideration of the future impact of the HRA's "bringing home" of the Convention on British land law.¹¹⁴ To create a justiciable issue under the Convention, there must first be an alleged violation of a designated right, a victim,¹¹⁵ and, second, all domestic remedies must be exhausted.¹¹⁶ This is equivalent to the requirements in America that there must be a case or controversy¹¹⁷ and that all non-constitutional arguments must fail before arguing a constitutional right.¹¹⁸ Once the hurdles of finding a Convention right violation and exhausting all domestic remedies have been overcome, the dispute may then be considered on the merits of the human rights claim. The discussion of human rights as applied to property law cases under the Convention, and later under the Constitution, will focus on four issues — Regulatory Takings, Discrimination, Due Process, and Adverse Possession — to generally examine how the American experience may apply to the British development of law under the HRA.

Article 1,¹¹⁹ addressing Deprivation of Possessions, or *Takings*, has potentially broad application to property law.¹²⁰ For example, "possessions" arguably includes "property," but "possessions" also includes a wide variety of interests including some, such as licenses, which might not be defined as "property" by the individual country.¹²¹ Secondly, although there may be a deprivation of a possession, thus triggering Article 1 in the first element,¹²² the deprivation in the second element may not be a violation of Article 1 because the action is either "in the public interest" or is "control" allowed by the third element of Article 1.¹²³

114. *Id.* at 288.

115. *Id.* at 290.

116. *Id.* at 304 n.12 (citing *Howard v. United Kingdom*, 9 E.H.R.R. 116 (1987)).

117. *CHEMERINSKY*, *supra* note 43, at 49.

118. *Id.* at 52-53.

119. Convention, Art. 1, *supra* note 37.

120. Howell, *supra* note 4, at 293.

121. *Id.* at 293 (noting *Bentham v. Netherlands*, 6 E.H.R.R. 283 (1984) where a license was held to be "proprietary" because it was assignable).

122. *See supra* text at 6-7.

123. Howell, *supra* note 4, at 294 (noting *James v. United Kingdom*, (1986) 8 E.H.R.R. 123 where the compulsory transfer of property under the Leasehold Reform Act 1967 was not

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

Whether a given action is deprivation, is in the public interest, or is control and not deprivation, is dependent upon the facts and circumstances of the individual's right to peaceful enjoyment of his possessions.¹²⁴ For example, in *Sporrong and Lönnroth v. Sweden*,¹²⁵ the Strasbourg court found that there had been a violation of Article 1¹²⁶ although there was neither a deprivation of the property in fact, nor an intent to control its use or ownership.¹²⁷ The test that the Strasbourg court has applied to distinguish "control" from "deprivation" was whether the state's action has taken away all meaningful use of the land from the plaintiffs.¹²⁸

Another factor that had significant importance in pre-HRA Article 1 "takings" cases is whether the state compensated the property owner.¹²⁹ In a case involving compensation to shipbuilding companies that had been nationalized, the Court noted that "the taking of property . . . without payment of compensation is . . . justifiable only in exceptional circumstances."¹³⁰ However, the Strasbourg court does not appear to require full value compensation for property taken by the state, but rather considers compensation in determining whether a "fair balance had been struck between the various [public and private] interests at stake."¹³¹ This language is interesting in comparison to the United States Supreme Court cases on regulatory takings, such as *Penn Central Transportation Co. v. City of New York*,¹³² discussed below.

Article 6 of the Convention protects the right that is called *Due Process*¹³³ in American jurisprudence, that is, the right of everyone to a fair and public hearing before an independent and impartial tribunal.¹³⁴ In the five years since the HRA became effective, there has been time for only a few cases to pass through the full British trial and appeals process, and even within these relatively few cases, the due process impact of the Convention is mixed. First, it is unclear to what extent

held to violate the Convention because the deprivation achieved a greater public purpose).

124. Harpum, *supra* note 16, at 31-32.

125. *Sporrong and Lönnroth v. Sweden*, (1983) 5 E.H.R.R. 35 (involving the Stockholm City Council issuing expropriation permits but then not executing them for several years. This action effectively froze the property, denying the owners a reasonable opportunity to sell or use the land.).

126. Harpum, *supra* note 16, at 31.

127. *Id.*

128. *Id.* at 32.

129. *Id.* at 33.

130. *Id.* (citing *Lithgow v. United Kingdom*, (1986) 8 E.H.R.R. 329.

131. Harpum, *supra* note 16, at 33.

132. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

133. CHEMERINSKY, *supra* note 43, at 557.

134. Convention, Art. 6, *supra* note 41.

the application of Convention rights will alter the decisions of British courts.

For example in the case of *Leeds City Council v. Price*,¹³⁵ the Court of Appeal held that they were bound to follow the precedent set by the House of Lords decision in *London Borough of Harrow v. Qazi*,¹³⁶ even though the court acknowledged that the *Qazi* decision appeared to conflict with a recent interpretation of the Convention in Strasbourg¹³⁷ in *Connors v. United Kingdom*.¹³⁸ In *Connors*, the Strasbourg court held that requisite procedural safeguards must be provided, including a statement of justification for the interference with a Convention right, thus limiting the unqualified right of a public authority under British domestic law to reclaim its land.¹³⁹ In *Qazi*, the House of Lords held that the Convention rights could not operate to deprive the property rights of others as defined by domestic law.¹⁴⁰ The Appeals Court in *Price* held that it was bound to follow the interpretation of the Convention from the House of Lords rather than the interpretation by the Strasbourg court. This decision would appear to be unexpected given the text of the HRA, Section 2, which states a court must take into account the decisions of the Court of Human Rights in Strasbourg.¹⁴¹ On March 8, 2006, the House of Lords on appeal of the lower court's decision in *Price* held that a public authority landlord's unqualified right of possession under domestic law would automatically supply the justification under Article 8(2) of the Convention for interference with an occupier's right to respect for his home provided by Section 8(1), thus affirming the position taken in *Qazi*.¹⁴² At least one commentator feels it is unlikely that the Strasbourg court would uphold the decision in *Price* should it be appealed to them.¹⁴³

135. *Leeds City Council v. Price*, (2005) 1 W.L.R. 1825 (involving the question of whether gypsies who had camped on land owned by the Leeds City Council could be evicted without a hearing since they had no camping permit).

136. *London Borough of Harrow v. Qazi*, (2003) U.K.H.L. 43 (involving whether a husband could be evicted from a public housing unit originally leased jointly to the husband and wife if the wife, having left the husband, no longer lived there, resulting in the husband's sole occupancy which violated the lease terms).

137. *Planning and Gypsies*, J.P.L. (2005, May) B9, B9.

138. *Connors v. United Kingdom* (2005) 40 E.H.R.R. 9 (involving eviction of a gypsy from a camping site run by the Leeds City Council after there were allegations of misbehavior).

139. *Planning and Gypsies*, *supra* note 137.

140. *Qazi*, U.K.H.L. 43 at para. 122.

141. Human Rights Act 1998, 1998 Chapter 42, Sec. 2, Cl. (1) ("A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights...").

142. *Leeds City Council v. Price*, (2006) U.K.H.L. 10 (summary available at <http://www.lawreports.co.uk/WLRD/2006/HLPC/mar0.7.htm>).

143. *Planning and Gypsies*, *supra* note 137, at B10.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

In perhaps the most significant HRA case to be decided to date is *R. (Alconbury) v. Secretary of State for the Environment*,¹⁴⁴ the House of Lords again tended to diminish the impact of the Convention on British law.¹⁴⁵ This case involved a “planning permission” (a type of development approval) that was “called in” (taken over by) the Secretary of State, preventing a potentially negative local vote on a major redevelopment of a closed military airfield.¹⁴⁶ Residents of the area appealed the Secretary’s action under the Convention on the grounds of Article 6, which requires a fair hearing before an independent tribunal.¹⁴⁷ The residents claimed that since the Secretary was a government official and since the government would benefit from the redevelopment, the Secretary could not be an “independent tribunal.”¹⁴⁸ The House of Lords found no conflict with the Convention, although this due process case is being appealed to Strasbourg.¹⁴⁹ This case is interesting because not only is there the issue of whether the Secretary of State for the Environment can be an impartial tribunal in these circumstances, but also because the House of Lords itself may not be an impartial tribunal to render decisions involving alleged “public authority” violations of Convention rights. After all, the House of Lords is not only a part of the government that is benefiting from the development, but it is also a part of the legislature that adopted the planning permission that allegedly would interfere with the residents’ peaceful enjoyment of their property.

Article 8 of the Convention,¹⁵⁰ and Article 1,¹⁵¹ apply to cases of *Adverse Possession*. Although specifically based on Convention Article 1 and a claim of violation of the claimant’s right to peaceful enjoyment of his possessions,¹⁵² the legal reasoning of *Beaulane Properties LTD v. Palmer*¹⁵³ equally applies to challenges raised under Article 8. In this case, Palmer had been given permission to graze horses on a certain property, then took further action to fence that property and appeared to use it exclusively for twelve years, the statutory minimum for adverse possession rights.¹⁵⁴ When the true owner sought to evict Palmer, Palmer

144. *R. (Alconbury) v. Secretary of State for the Environment*, (2003) 2 A.C. 295.

145. Clayton, *supra* note 9, at 191.

146. *Alconbury*, 2 A.C. 295, 295.

147. *Id.*

148. *Id.*

149. Clayton, *supra* note 9, at 191.

150. Convention, Art. 8, *supra* note 50.

151. Convention, Art. 1, *supra* note 37.

152. *Beaulane Properties LTD v. Palmer*, (2005) 3 W.L.R. 554, 555.

153. *Id.*

154. *Id.* at 562.

raised not only the claim of adverse possession, but also a claim under the HRA and Convention Section 1, Protocol 1 to the right of peaceful enjoyment of his possession¹⁵⁵ (the claimed land) against the counterclaim of the true owner.¹⁵⁶ The court acknowledged that it was bound by the HRA to interpret the statutes governing adverse possession and “registration” (Great Britain’s property ownership recording system) in a manner consistent with the Convention,¹⁵⁷ but held that the applicable statutes could best be interpreted with respect to the Convention by finding that Palmer had not met the test of exclusive possession that was adverse to the claim of the true owner.¹⁵⁸ The court thus affirmed the application of the HRA to private disputes, and sidestepped the question of violation of a Convention right by interpreting the internal meaning of the applicable statutes against the specific facts of the case.

An example of the coupling of Article 14’s protection against *Discrimination*¹⁵⁹ with other rights protected by the Convention is the case of *Chassagnou v. France*.¹⁶⁰ In this case, the Strasbourg court found that there had been a deprivation of property in violation of Article 1 under a French law that required small property owners to transfer hunting rights on their land to hunting associations, granting them, in compensation, the right to hunt on all lands controlled by that association.¹⁶¹ The deprivation of hunting rights was found to be a discriminatory violation of Article 14 because the compensation provided was of value only to small land owners who were hunters, thereby discriminating against non-hunting landowners who would derive no value from being granted association hunting rights.¹⁶² While the court took the “unusual”¹⁶³ step here of finding the deprivation was discriminatory, the reasoning of the court in general suggests that the social aim sought to be achieved will be given great weight by the court when determining the proportionality between the legislative restriction’s means and ends.¹⁶⁴

Additionally, other cases indicate that, with respect to some social aims, like

155. Convention, Art. 1, *supra* note 37.

156. *Beaulane*, 3 W.L.R. at 559.

157. *Id.* at 555, para. 2.

158. *Id.* at 555, para. 3.

159. Convention, Art. 14, *supra* note 57.

160. *Chassagnou v. France*, Application No. 25088/94, (1999) 29 E.H.R.R. 615.

161. *Id.*

162. *Id.* at ¶¶ 89, 95.

163. Harpum, *supra* note 16, at 34.

164. *Id.*

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

housing, the court will give the state wide latitude, a “margin of appreciation.”¹⁶⁵ In an Italian case referencing the *Chassagnou* decision, the Strasbourg court observed it would “respect the legislature’s judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation.”¹⁶⁶ “By implication, in matters less central to a state’s welfare and economic policies, the Court (sic) will be much less ready to defer to the state. . .”¹⁶⁷

Although these decisions indicate minimal impact on the actual outcome of decisions due to application of the HRA and the Convention, commentators have found that the Human Rights Act “has significantly influenced the style and content of decision-making.”¹⁶⁸ The question addressed by this Comment is whether the American experience with the Bill of Rights and property law might inform this “style and content of decision-making” and may indicate that application of the Convention will affect the outcome of future litigation.

B. Conceptual Comparison of American Constitutional Rights to Convention Rights Under the HRA

Before looking at examples of application of American constitutional rights to property law issues, it is necessary to establish that such applications would meaningfully relate to the HRA’s application of similar rights in Great Britain. Great Britain does not have a constitution that codifies fundamental rights. It has instead relied on precedent, customs and Acts of Parliament to collectively safeguard basic rights.¹⁶⁹ However, Parliament, by simple majority vote, has had the power to repeal any such rights established by prior legislation.¹⁷⁰ The judiciary has not been able to protect fundamental rights because the British courts lacked the power of judicial review based on an established code of rights as American courts do.¹⁷¹

The HRA has, at least partially, changed this. Commentators argue that the HRA is a constitutional instrument in at least three ways.¹⁷² First, the HRA bases application of human rights to individual cases by reference to a specific body of

165. *Id.*

166. *Id.* at 35.

167. *Id.*

168. Clayton, *supra* note 9, at 176.

169. Pace, *supra* note 6, at 151.

170. *Id.*

171. *Id.*

172. Clayton, *supra* note 9, at 194.

principles that are independent of the current legislature.¹⁷³ Second, the HRA provides an independent framework for interpretation of other legislation.¹⁷⁴ Third, the substantive values embodied in the Act provide it with a distinctively constitutional status.¹⁷⁵ This status is important because a set of rights will not be sufficiently protected from governmental encroachment if it is “only given the status of ordinary domestic legislation.”¹⁷⁶ However, the HRA is not a fully entrenched set of rights; it does not fully give British judges the authority to overturn an act of Parliament. The most the courts can do is to declare that specific legislation at issue is incompatible with the Convention.¹⁷⁷ However, by at least partially “entrenching” the human rights of the Convention into domestic law, Great Britain’s judges often will be able to interpret government actions to minimize the frustration of these rights, giving them powers similar to American-style judicial review.¹⁷⁸

The impact of the HRA’s incorporation of a written body of human rights on British law in many ways appears to echo the early formation of American, as distinguished from Colonial, law. In his Millennium Lecture to the Inner Temple, the Lord Irvine noted the strong linkage between British and American law, based on a shared heritage of historical common law.¹⁷⁹ However, following American Independence, the American legal system rejected the British legal system’s sole reliance on common law precedence and the democratic law-making process of Parliament¹⁸⁰ and replaced it with the Constitution’s “core of basic rights that trump common law or statutory intervention.”¹⁸¹ This difference can be summed up as an American reliance on entrenched statements of basic rights as the safest defense of liberty in contrast to the British reliance on liberty protected by the processes of a democratic legislature.¹⁸²

To protect liberty, British law has relied on two principles: the principle of precedence and common law as the basis of legal judgments concerning rights,¹⁸³ and the principle of the sovereign Parliament establishing those rights.¹⁸⁴ The first

173. *Id.* at 194-95.

174. *Id.* at 195.

175. *Id.*

176. Pace, *supra* note 6, at 160.

177. Human Rights Act 1998, 1998 Chapter 42, Section 4, Cl. (1).

178. Pace, *supra* note 6, at 160.

179. LORD IRVINE, *supra* note 18, at 210-11.

180. *Id.* at 211-12.

181. *Id.* at 214.

182. *Id.* at 212.

183. *Id.* at 214.

184. *Id.* at 220.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

principle resulted in a right, being once applied to a legal situation, continuing to be applied to the same, or similar, legal situations.¹⁸⁵ The second principle reflected a philosophy that a democratically elected Parliament would be a better protector of rights than a non-elected judiciary interpreting a written, and unchanging, set of statements of rights.¹⁸⁶ The American legal system has substantially retained the former, but limits the latter with the “veto power” of the rights embedded in the Constitution, as interpreted and applied by the courts.

Proponents of embodying fundamental rights as part of written British law seek to establish in Great Britain “the institutional and procedural protections that the United States accords in its Bill of Rights.”¹⁸⁷ “[T]he Human Rights Act will do much to reduce the gap between England and America . . . [by] provid[ing] a clear statement of fundamental rights with sufficient democratic credentials to be directly upheld by an English court.”¹⁸⁸ Because of this similarity between the position of Convention rights in Britain after adoption of the HRA and the position of American constitutional rights, it is reasonable to expect that the American experience with application of such rights to property law may serve as a model for Great Britain. As Lord Irvine concluded:

The Human Rights Act provides a fine example of the ways in which English law can benefit from American experience We have come to accept that American experience shows that a written declaration provides a more certain safeguard of individual rights than procedural democracy through a sovereign Parliament¹⁸⁹

C. Examples of Impact of American Constitutional Rights on American Property Law

The lessons to be learned from protection of human rights through application of the American Constitution are both positive and negative. For example, numerous instances of protecting and advancing such rights can be found in the decisions of the Warren and Burger Courts,¹⁹⁰ but numerous examples can also be found where the Supreme Court defeated legislative efforts to extend human rights by freeing the slave, guaranteeing civil rights to minorities, or protecting

185. LORD IRVINE, *supra* note 18, at 210.

186. *Id.* at 220.

187. Pace, *supra* note 6, at 152.

188. LORD IRVINE, *supra* note 18, at 224.

189. *Id.* at 225.

190. Pace, *supra* note 6, at 180.

economically hard-pressed farmers.¹⁹¹ Nonetheless, property law in the United States has been deeply impacted by the application of constitutional rights by the American courts over the past eighty years (since the Supreme Court upheld zoning as a constitutional exercise of a state's police power),¹⁹² and especially over the past fifty years (since the Court held that involvement of the government in enforcing property rights could trigger constitutional protections, even between private parties).¹⁹³

To begin with, an examination of the American application of human rights to private party actions through the doctrine of "state action"¹⁹⁴ can inform the British debate concerning the vertical and horizontal application of the HRA. Inherently, the Constitution's protection of human rights only applies to the government since, similar to the Convention, the Constitution is a compact between different governments.¹⁹⁵ However, in *Shelley v. Kraemer*,¹⁹⁶ in a dispute between two parties over a racially restrictive covenant, the Supreme Court held that since one property owner was seeking to use the court to enforce a discriminatory covenant against another, there was sufficient state action to require consideration of the constitutional rights of the disadvantaged party.¹⁹⁷ It is clear, however, something more than passive action, such as the running of a statutory time limit for bringing a lawsuit, is needed; overt, significant assistance of the state in enforcing a private party claim is needed to trigger constitutional rights.¹⁹⁸

American jurisprudence also has developed the concept of state action through the doctrines of "public function"¹⁹⁹ and "entanglement."²⁰⁰ These two doctrines operate to extend the application of the U.S. Constitution, which otherwise would

191. *Id.*

192. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

193. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

194. CHEMERINSKY, *supra* note 43, at 469.

195. *Id.* at 480, 486 (In the Convention, the compact is between different nations, while in the Constitution, it is compact between the national and state governments.).

196. *Shelley*, 334 U.S. 1 (1948).

197. *Id.* at 20 ("State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.")

198. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486 (1988).

199. CHEMERINSKY, *supra* note 43, at 478 ("[T]he 'public function exception,' [] says that a private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government.")

200. *Id.* at 487 ("[T]he 'entanglement exception,' [] says that private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.")

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

apply only to actions of governments, and not to private parties. An interesting extension of the state action doctrine is found in *N.A.A.C.P. v. Alabama*.²⁰¹ This case involved a court order requested by the State of Alabama that the N.A.A.C.P. release their full membership list, which likely would have put such members at risk of harm.²⁰² This case is remarkable in two ways. First, the Court held that governmental action may be struck down, even if the action is totally unrelated to a protected liberty right, if the indirect consequence of that action would interfere with a protected right.²⁰³ Secondly, state action itself does not need to interfere with an individual's rights if the action would result in private, third party, action that would interfere with protected rights.²⁰⁴ These cases and doctrines appear to be directly applicable to the debate over whether the HRA. By requiring public authorities, including the courts,²⁰⁵ to act compatibly with the Convention,²⁰⁶ the HRA requires an English court to extend Convention rights to private disputes.

With respect to the four exemplar issues (Regulatory Takings, Due Process, Adverse Possession, and Discrimination), American Supreme Court jurisprudence, over the past fifty years in particular, has spoken directly to the equivalent issues in Great Britain. With regard to *Regulatory Takings*, the Supreme Court has a long history of cases on point.²⁰⁷ It should be noted that "takings" is much more directly an issue in American property law than in British law. The Framers of the United States Constitution felt private property was so important to individual liberty that the Fifth Amendment explicitly protects it from governmental deprivation.²⁰⁸ In contrast, British land law is not primarily concerned with ownership, rather it is concerned with possession and use.²⁰⁹ As a result, the nature of ownership is rarely litigated in Great Britain, but the extent of rights of possession and use of the land by individuals is frequently litigated.²¹⁰ The lack of litigation over government taking of possession of private land is so profound that one of the leading British texts on property law has no chapter on the subject at

201. *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

202. *Id.* at 462.

203. *Id.* at 461.

204. *Id.* at 463.

205. Human Rights Act 1998, 1998 Chapter 42, Section 6, Cl. (3)(a).

206. *Id.*, Cl. (1).

207. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (which carefully distinguished regulation under the police power from a taking, even when that regulation (banning manufacture of bricks at a clay quarry) eliminated ninety-five percent of the property's value).

208. U.S. Const. amend. V.

209. SMITH, *supra* note 13, at 6.

210. *Id.*

all.²¹¹ However, the issue of taking one's possessions, including land, is raised directly by the HRA because it brings Convention Article 1, Protocol I into British law, explicitly protecting one's possessions from government deprivation.²¹²

A leading Supreme Court case on Regulatory Takings is *Pennsylvania Coal Co. v. Mahon*,²¹³ in which the United States Supreme Court introduced the concept of proportionality. The Supreme Court held that the state legislation that prohibited mining that would cause surface subsidence went "too far"²¹⁴ and, therefore, was a constitutionally prohibited taking, even though the state had not taken title to the mine.²¹⁵ This use of a proportionality test was further amplified in *Penn Central Transportation Co. v. New York City*.²¹⁶ In *Penn Central*, a case involving a regulation limiting redevelopment of a designated historical structure, the Supreme Court held that that, while a regulation that goes too far would be a taking, determining what is "too far" must be determined by balancing the severity of the impact of the regulation against the promotion of the general welfare.²¹⁷ It is noted that *Penn Central* also provides an informative summary of the evolution of the concept of regulatory takings for the half century between *Hadacheck* and *Penn Central*.²¹⁸

Regulatory takings jurisprudence has continued to evolve in America. In *Lucas v. So. Carolina Coastal Council*,²¹⁹ the Supreme Court held that a regulation that denies the property owner all economic use of his land is a taking for which compensation must be paid. However, the amount of compensation, and even if the regulation is in fact a taking at all, entails a balancing of what uses would be otherwise allowed under common-law.²²⁰ Thus, all construction on the property might be able to be denied through regulation (as was done here) without it constituting a taking if such construction would otherwise be prohibited, for

211. *Id.* at v – xiii "Contents."

212. Convention, Art. 1, *supra* note 37.

213. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) ("[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

214. *Id.*

215. *Id.*

216. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

217. *Id.* at 136.

218. *See id.* at 123–28.

219. *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003 (1992) (involving a prohibition of construction of a house in a sensitive beach area that, according to the trial court, reduced the property's value to zero).

220. *Id.* at 1022–23.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

example, as public or private nuisance.²²¹ But on the other hand, any regulation that is clearly to obtain a public benefit (as opposed to avoidance of a public detriment), even a regulation that has relatively minor impact on the value of the property, will trigger a takings claim for compensation, as held in *Nollan v. California Coastal Commission*.²²² That case involved a condition on a building permission for a house on beachfront property that the property owner had to grant an easement along the beachfront for public access, since, arguably, the house would impede public access from a public road across the property to the ocean.²²³ The Supreme Court held that there was not a sufficient connection, or “nexus,” between the possible impediment of road-to-beach access and the Coastal Commission’s requirement for lateral access along the beach.²²⁴ Without this connection, the Supreme Court held that the condition was merely requiring the Nollans to contribute to the arguably good idea of a continuous publicly accessible beach.²²⁵ The balance required by *Penn Central* was not present because the regulation did not relate to the imputed impact of the development. Therefore, if the Commission wanted the easement, they would have to pay for it.²²⁶

Using this same principle of proportionality, the Supreme Court held in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* that a temporary (two and a half year long) deprivation of property use is not a takings for which compensation must be paid, provided that temporary deprivation is necessary to achieve a significant public benefit.²²⁷ The Supreme Court has also determined that land that is acquired by the government from one private owner can be transferred for use by another private owner, as long as the transfer serves a significant public purpose.²²⁸

Regarding the second topic of *Due Process*, the main issue in Great Britain appears to concern a litigant’s right to a fair and impartial tribunal. This issue is of particular, and somewhat unique, concern in Britain due to the structure of its government and the lack of separation between the judicial system and the

221. *Id.* at 1030–31.

222. *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

223. *Id.* at 828.

224. *Id.* at 841.

225. *Id.*

226. *Id.* at 842.

227. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

228. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Kelo v. City of New London*, 126 S.Ct. 24 (2005).

legislative system.²²⁹ In American law, most of the development of the law concerning fair and impartial hearings has been in the field of administrative law. For example, in *Tumey v. Ohio*, the Supreme Court held that a defendant is deprived of due process under the Fourteenth Amendment if the adjudicator has a “personal, substantial, pecuniary interest in the outcome.”²³⁰ Even the *appearance* of bias or prejudgment has been ruled to be sufficient to disqualify a decision-maker from participating in an adjudication of rights.²³¹ Cases involving the direct issue of overlap between judiciary and other branches of government are rare in the United States due to its structure of government with its constitutional separation of powers,²³² but there are some cases on point where an administrative agency is in the position of adjudicating specific rights. In these circumstances, it is settled law that “[when] an agency performs a quasi-judicial . . . function its independence must be protected.”²³³

American law regarding *Adverse Possession* still retains close ties to its British roots.²³⁴ Whether adverse possession is in conflict with the constitutional protection against takings has been addressed directly by the American Supreme Court in several cases.²³⁵ The American legal response has been that property interests are not created by the Constitution, but are defined by state law.²³⁶ Since “property” is a legal construct, a bundle of rights defined by statute, states are free to establish the parameters of those rights.²³⁷ In the case of adverse possession, one of the state-defined attributes of property is a time dimension; one’s interest in land may be defined by the state to exist for as long as he pursues that interest to the exclusion of others over a specified period of time.²³⁸

229. LORD IRVINE OF LAIRG, BRITAIN’S PROGRAMME OF CONSTITUTIONAL CHANGE, *reprinted in* HUMAN RIGHTS, CONSTITUTIONAL LAW AND THE DEVELOPMENT OF THE ENGLISH LEGAL SYSTEM 93-4 (2003) (Text from speech originally given to the Canadian Institute of Advanced Legal Studies, Queen’s College, Cambridge, July 16, 1999.).

230. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

231. *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 138 U.S. App. D.C. 152 (D.C. Cir. 1970).

232. *See generally* U.S. Const. art. I, II and III (establishing the Legislative, Executive and Judicial Branches of the federal government).

233. *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1546 (9th Cir. 1993).

234. JESSE DUKEMINIER AND JAMES KRIER, PROPERTY, 126 (Aspen Publishers, 5th ed. 2002).

235. *See generally* *Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982) for general description of the relationship of the doctrine of adverse possession and the Constitution.

236. *Id.* at 525.

237. DUKEMINIER AND KRIER, *supra* note 234, at 93.

238. *Texaco*, 454 U.S. at 526 (“From an early time, this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time.”).

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

Finally, over the past fifty years, the Supreme Court has developed an extensive jurisprudence regarding *Discrimination* and property law, although one may argue whether there is a clear progression to this jurisprudence. For example, in *United States v. Stanley*, the Supreme Court explicitly held that the protections of the Fourteenth Amendment²³⁹ only applied to state legislation and not to any private acts, under any conditions.²⁴⁰ The Supreme Court did not even consider whether anything other than overt discrimination by state legislation was covered by the Constitution for over sixty years. Finally, with *Shelley v. Kraemer*, the Supreme Court established the principle that the Fourteenth Amendment could be used to apply Constitutional rights to private disputes, if the private parties entangled the court in enforcing an agreement that violated those rights.²⁴¹ But there must be some specific involvement of the state in the discrimination (or the enforcement of discriminatory private activities) to trigger the constitutional protection.²⁴²

The Supreme Court has held that prohibited discrimination is not limited to race, holding in various cases that equal protection under Fourteenth Amendment also applies to national origin, gender, marital status of one's parents, age, disability, wealth, and sexual orientation.²⁴³ Basically, the American constitutional protections against discrimination will be triggered when any legislation or court decision applies a different legal treatment to one group versus another; for most of the classifications noted above, the legislation or court decision will be sustained only if the distinction is necessary to achieve a substantial public purpose.²⁴⁴ Further, it is clear from American jurisprudence that such protection is not a right in and of itself, but only in relationship to otherwise legitimately established rights.²⁴⁵ This also appears to be the case with the Convention right against discrimination.²⁴⁶ While this quick summary of American jurisprudence on

239. U.S. Const. amend. XIV, §1, Cl 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

240. *United States v. Stanley*, 109 U.S. 3, 25–26 (1883).

241. *Shelley*, 334 U.S. 1, 20.

242. *United States v. Morrison*, 529 U.S. 598, 625 (2000) (involving sexual harassment of a woman by a member of a college football team. After the Court found that federal legislation, the Violence Against Women Act of 1994, was not within the powers of Congress to adopt, the Court held that since there was no state action involved, the constitutional protections against discrimination were not triggered by a purely private act of one individual against another).

243. CHEMERINSKY, *supra* note 43, at 649.

244. *Id.* at 646.

245. *Morrison*, 529 U.S. at 627.

246. Convention, Art. 14, *supra* note 57.

discrimination indicates more of a process of consideration than a final conclusion as to who is protected against discrimination and when, the point of this Comment is that the human rights issues raised by the application of the Convention to British law under the HRA have been extensively explored in American law.

IV. American Experience as Guidance for Interfrating the HRA and British Property Law

A. Introduction — *Have Convention Rights been Consistently Applied to British Property Issues*

Many British commentators hold that adoption of Convention rights will have little impact because British law is already largely consistent with these rights.²⁴⁷ But “largely” does not mean “perfectly.” The *degree* of conflict will depend on the court’s interpretation of the HRA and the Convention, as well as existing British law. “It is a truism to say that everyone is likely to be affected sooner or later by the ramifications of the incorporation of the Convention . . . into English law by the Human Rights Act 1998.”²⁴⁸ The HRA requires the courts, and other public officials, to interpret existing law to be consistent with the Convention to the extent reasonably possible.²⁴⁹

Because the application of the Convention under the HRA to British law is still new, inconsistent interpretations are readily found. For example, in *R. (Alconbury) v. Secretary of State*,²⁵⁰ the House of Lords declared its dual functions of legislature and judiciary to be consistent with the Convention. But in *McGonnell v. United Kingdom* (2000),²⁵¹ the Strasbourg Court held that “independent” required even more than *actual* independence of the tribunal, it also required the *appearance* of independence.²⁵² The Strasbourg Court held that the membership of the decision making body must be limited to parties who have not had a role in creating the disputed legislation,²⁵³ which appears to directly conflict with the holding in *Alconbury*. Such conflicts in interpretation illustrate that during the integration of the body of Convention rights into British law there will be

247. See, e.g., Buxton, *supra* note 3, at 61; Bamforth, *supra* note 12, at 41; or Howell, *supra* note 4, at 310.

248. Halstead, *supra* note 42, at 153.

249. Human Rights Act 1998, Sec. 3, *supra* note 76.

250. See *R. (Alconbury) v. Secretary of State for the Environment*, 2 A.C. 295 (2003).

251. *McGonnell v. United Kingdom*, 30 E.H.R.R. 289 (2000).

252. *Id.* at 300.

253. *Id.*

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

uncertainties and differences for which Great Britain's judiciary, lacking a strong grounding in judicial interpretation of legislation against an independent body of rights, is ill equipped to handle.²⁵⁴

The experience of other legal systems which have faced this same task will arguably assist this transition. And the legal system that is closest to Britain's, and which has faced precisely the same challenge of applying a body of fundamental human rights to day-to-day adjudication, is the legal system of the United States.²⁵⁵ It should be acknowledged that comparison will not be precise since the two governmental systems are not completely parallel. The U.S. Constitution is more definitive than the Convention (for example, constitutionally requiring compensation for a taking),²⁵⁶ in contrast to the judicial consideration of compensation as a measure of proportionality under the Convention.²⁵⁷ Further, the comparison will not be precise because of the differences between American property ownership law and British right-of-use property law. However, two major similarities can be drawn. Both systems, America under its Constitution and Great Britain under the HRA, have a written set of "superior" rights that bind governmental actions. Secondly, after the HRA, both systems have a defined, independent set of rights as their foundation, as compared to the pre-HRA British situation where human rights were, at least theoretically, as changeable as the government might chose.²⁵⁸

British commentators must take care in searching for lessons from United States property and constitutional law jurisprudence because this body of law stems mainly from judicial interpretation of the U.S. Constitution. By strict wording, only a few Constitutional rights have direct application to property law in the U.S.²⁵⁹ For example, an British lawyer researching the question of American Constitutional rights applied to private party disputes might conclude that there is no such constitutional language, *unless* the lawyer read the United States Supreme Court opinion in *Shelley v. Kramer* holding that Constitutional rights apply to

254. Pace, *supra* note 6, at 186.

255. LORD IRVINE, *supra* note 18, at 225.

256. U.S. Const. amend. V, Cl. 4.

257. Harpum, *supra* note 16, at 31.

258. Pace, *supra* note 6, at 151.

259. These few rights include: the guarantee of freedom to contract, which includes contracts in land (Art. I, Section 10, Cl.1); the right not to have troops quartered in one's home without consent (Amend. III); the right to compensation when property is taken for a public purpose (Amend. V); the right to due process, defined as the opportunity to be notified and be heard, in any government action affecting an individual's land or property rights (Amend. V & XIV); and protection against discrimination, including discrimination in the exercise of property rights (Amend. XIV).

British Property Law and Human Rights 591

private parties whenever they seek to entangle the government (a court or other agency) in enforcement of a private obligation.²⁶⁰ But with appropriate study, the British lawyer will see, as in this example, that the question of horizontal application of human rights has indeed been addressed in the United States and may offer informative comparisons as Great Britain comes to grips with the Convention. Indeed, British lawyers will recognize the logic of *Shelley*, having experienced this same reasoning in the decision by the Strasbourg court in *Arrondelle v. United Kingdom* where it was used to apply Convention rights to a private party dispute over aircraft noise.²⁶¹

B. Takings

There are several important parallels between the protection of possessions under the Convention and protection of property under the Fifth Amendment. Both begin with the protection of the property, and both then limit that protection by allowing a deprivation in the public interest.²⁶² Further, both separate *taking possession* from *controlling the use of* those possessions.²⁶³ To be sure, there are distinguishing elements between American and Convention law on this issue. For example, American law simply requires that property cannot be taken for a public use without compensation,²⁶⁴ as contrasted to the Convention where compensation is not mentioned, but may be a factor in determining “proportionality.”²⁶⁵

The concept of proportionality itself has been well developed in American jurisprudence, especially in the line of cases from *Pennsylvania Coal*,²⁶⁶ through *Penn Central Transportation*,²⁶⁷ and onto the most recent cases of *Nollan*²⁶⁸ and *Lucas*.²⁶⁹ While the debate over proportionality still goes on in the United States

260. *Shelley*, 334 U.S. 1, 20-21.

261. *Arrondelle v. United Kingdom* (1983), 5 E.H.R.R. 118.

262. Comparing the text of Protocol I, Article 1 with the text of U.S. Const. amend. V, Cl. 4.

263. Comparing the text of Protocol I, Article 1, Cl 3 with Supreme Court jurisprudence such as *Hadacheck*, 239 U.S. 394, which carefully distinguished regulation under the police power from actual taking of possession of the property.

264. U.S. Const. amend. V, Cl. 4 (“[N]or shall private property be taken for public use, without just compensation.”).

265. Harpum, *supra* note 16, at 33.

266. *Pennsylvania Coal Co.*, 260 U.S. 393 (where the concept of going “too far” with a regulation first introduced proportionality to American takings law).

267. *Penn Cent. Transp. Co.*, 438 U.S. 104 (which held that “too far” was measured by balancing the severity of the impact on the individual with the benefit to the general welfare).

268. *Nollan*, 483 U.S. 825 (where “control,” a condition of approval, had to have a nexus to the land use permission sought to avoid being a taking).

269. *Lucas*, 505 U.S. 1003 (where a regulation which removed all economic value was a taking,

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

(as witnessed in the controversy over the Supreme Court's decision in *Tahoe-Sierra* that a two and a half year moratorium on development was not a taking of property rights),²⁷⁰ the legal reasoning in these cases should be readily adaptable by Great Britain's judges in evaluating whether a land use control is a disproportionate burden and a violation of the Convention under Article 1.

C. Due Process

The body of American law on the right to a fair and impartial trial goes much further than the present state of British law under the HRA. Compared to the British cases of *Price*²⁷¹ and *Alconbury*,²⁷² American law requires a much more careful process of notice and independence of the hearing body. American cases like *Tumey*²⁷³ and *Cinderella Career*²⁷⁴ set a much higher standard not only for the actual independence of the tribunal but also for the appearance of that independence. The issue of the guarantee of legal due process by means of an independent judiciary may, in many ways, be the most difficult potential impact of bringing the Convention into British law since it conflicts with the long standing doctrine of a sovereign Parliament as the peak of Great Britain's legal system.²⁷⁵

D. Adverse Possession

The issue raised by incorporation of the Convention's protection of one's possessions²⁷⁶ is whether adverse possession can still be sustained. Basically, adverse possession takes one party's property and gives it to another with the mere passage of time.²⁷⁷ This transfer of property interest by statutory action would appear to conflict with the Articles 1 and 8 of the Convention. The legal reasoning of cases like *Texaco v. Short*²⁷⁸ would appear to resolve the apparent conflict

the economic value was measured by what the property owner would be allowed to do under common law concepts of nuisance and interference with others' rights in land).

270. *Tahoe-Sierra*, 535 U.S. 302 (in which three Justices dissented, including the Chief Justice).

271. *Price*, 1 W.L.R. 1825, 1838 (where appeal was denied allowing the lower court decision that no notice at all was felt to be required before removing the right to occupy property to stand).

272. *R. (Alconbury)*, 2 A.C. 295 (where the same body that had written the law was considered to be an adequately neutral tribunal to hear a case involving application of that law against the interests of the affected private property owners).

273. *Tumey*, 273 U.S. 510.

274. *Cinderella Career*, 425 F.2d 583.

275. *Pace*, *supra* note 6, at 155–56.

276. Convention, Art. 1, *supra* note 37.

277. *DUKEMINIER AND KRIER*, *supra* note 234, at 126.

278. *See Texaco*, 454 U.S. 516.

between the ancient doctrine of adverse possession and Convention, and would apply equally to Great Britain under the HRA. Reasoning that property has meaning only as defined by the state, there is no deprivation of either possessions or home if the state includes a time element in the definition of property.

E. Discrimination

America has an extensive body of law on the application of the constitutional prohibitions against discrimination, particularly the Fourteenth Amendment, to various exercises of property rights. That body of law has established two basic criteria: first, discrimination will be upheld only if the state can show the different treatment of the parties is necessary to achieve a substantial public purpose,²⁷⁹ and second, that there must be both a discriminatory effect and a discriminatory intent.²⁸⁰ These criteria appear similar to that used by the Strasbourg court in *Chassagnou* where the court suggested that the social aim of the state in controlling property rights will be a significant factor in deciding whether a violation of Section 14 of the Convention would be allowed.²⁸¹ Because of this similarity, the extensive American exploration of when a distinction between two groups becomes discrimination, and when such discrimination becomes illegal because it does not advance a legitimate government interest can be used by the British courts as they develop their own jurisprudence.

V. Conclusion

The evolution of British land law over the next few years should be interesting to watch as the Human Rights Act 1998, applying the European Convention on Human Rights, begins to impact Great Britain's ancient laws of property. On one hand, commentators like Lord Buxton may be correct that there will be little impact since British law already includes the same precepts that are contained in the Convention.²⁸² On the other hand, as Sir William Wade noted, the specific wording of the Convention, and the fact that that wording is now binding on all official government actions, gives a different weight to those precepts than has previously existed in British law.²⁸³ Regardless of the degree that Great Britain's

279. DUKEMINIER AND KRIER, *supra* note 234, at 646.

280. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

281. Harpum, *supra* note 16, at 34-5.

282. Buxton, *supra* note 3, at 61.

283. Wade, *supra* note 10, at 221.

5 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 2 (2007)

courts, now or in the future, are felt to be bound to the Convention, it is clear that “incorporation of the Convention will have an effect on the way in which judges approach issues which either directly or indirectly raise Convention points.”²⁸⁴ If the American experience with application of constitutional rights to land law over the past several decades is any guide, the change to British land law will be far greater than is currently anticipated, and, in the words of the Lord Chancellor, “the Human Rights Act will do much to reduce the gap between England and America.”²⁸⁵

284. Howell, *supra* note 4, at 288.

285. LORD IRVINE, *supra* note 18, at 224.