‘The much heralded deployment of human rights in English law has had significant effects in many areas. In land law, however, the effects have been muted and, in truth, hardly noticeable.’ Discuss.

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Over the past seventy years, human rights have become an increasingly important part of the legal and political landscape in the UK and across Europe. However, the developments that have ensued have not been uniform. From the outset, the rights that were codified reflected particular priorities by the drafters, and the impact on various aspects of domestic law has been influenced both by these initial priorities and by the interpretations of these codified rights by the domestic and international courts. This essay will therefore attempt firstly to identify the characteristics of domestic and international human rights discourse and of English land law that have been pertinent to this interaction. Secondly, it will examine the extent to which the development of land law has been affected by human rights discourse, and attempt to apply the findings of the previous section to understand why this is so.

Human rights: history and theory

There have been many attempts to define and codify a set of rights which are to be considered fundamental. Early examples include the Declaration of Independence, Constitution, and Bill of Rights of the United States, and the Declaration of the Rights of the Man and of the Citizen of revolutionary France. These in turn inspired a number of other constitutions and declarations over the next centuries, culminating in the post-war promulgation of

the United Nations' Universal Declaration of Human Rights and the Council of Europe's European Convention on Human Rights. Each of these can be seen to share certain common elements, such as a right to freedom of expression or to a fair trial; other rights have less commonly been adopted, such as the right to bear arms. Other 'proto-human-rights' documents, such as the English Bill of Rights and Magna Carta, while not extending their reach to all human beings, all citizens, or even all adult males, can still be seen to share certain of these concerns; the English Bill of Rights, for example, enshrines a right to freedom of speech that is still (for the most part) in force today.

The European Convention on Human Rights is, for the purposes of English law, the most relevant of these codes, in particular (but not only) since its incorporation into the Human Rights Act 1998. As such, it is necessary to consider which rights were considered worthy of inclusion, and which were not. Additionally, the Convention includes a number of optional protocols which states may choose to ratify; the United Kingdom has ratified (and incorporated) some but not all of these, and this in turn has a bearing on the extent to which land law can be influenced by human rights.

Thus in English law there is now a right to life; to freedom from torture; to a fair trial and due process; to freedom of expression and of religion; to marriage; and to freedom from discrimination, for example. By virtue of the protocols to the convention, there is also a right to protection of property, to education, and to free elections, as well as a prohibition of the death penalty. However, it can be seen even from this brief overview that the nature of these rights tends to limit their applicability to land law. While the right to a fair trial, for example, might have great significance, it is difficult to envisage circumstances where that right depended on land law in any regard. It is true that the rights themselves can be interpreted broadly; the right to a private and family life, in particular, has found applications that may not have been envisaged by the drafters; but it remains the case that only one article (protocol 1, article 1) has a straightforward relation to land.

To explain the particular focus of the ECHR, it may be useful to look at the context in which it was drafted: following the Second World War, with the domestic and international legal and political influences which that period implies. First of all, simply that there *was* a context: the Convention did not arise out of nowhere, but was an amalgamation and formalization of centuries of legal and political philosophy, including English law. It is no surprise, then, if some areas of law have not needed alteration in the face of human rights legislation, simply because the rights themselves were drawn

from the laws which are then required to be compliant.

Furthermore, the ECHR was part of the movement towards greater international cooperation and in particular European integration in the wake of that conflict: along with, for example, the United Nations (the UDHR being almost contemporaneous), NATO, and what would eventually become the European Union. Notably, some of the impetus for these projects came from concerns about the growing influence of the Soviet Union and Communism. Conversely, in the UK itself, it is also the period which gave rise to the NHS and nationalized rail and industry, among other things. It is this which gave rise to one disagreement over the contents of the Convention: while some parties wished to include a right to the 'quiet enjoyment' of private property, others (including this British government) were concerned that this would interfere with its plans for expansion of state ownership. This disagreement led to the right to property being enacted only later, as an optional protocol to the Convention (albeit one which most parties have now ratified), rather than as part of the Convention itself.[1]

One theoretical framework which may help to understand the rights which became part of the Convention, in contrast with other potential rights which did not, is that proposed by Hohfeld.[2] In particular, he distinguishes between rights *sensu stricto*, where the right of one person implies the existence of a duty on the part of another, and those rights which might more accurately be called privileges or liberties, which merely imply the lack of a right on the part of others to prevent the exercise of the right. In the Western liberal tradition, most of the rights given legal recognition fall under the second category: for example, freedom of expression is the freedom to express oneself with no right on the part of the state (in particular) to prevent that expression, except within limited circumstances. The right to peaceful enjoyment of property, too, is a clear example of this kind of right, implying no right on the part of others to prevent said enjoyment.

Certain rights, however, have been interpreted in ways that might be better understood under the first category. For example, in the *McLibel* case,[3] the ECtHR considered that the British government's failure to provide legal

[1] Edward Bates, *The evolution of the European Convention on Human Rights* (OUP 2010).

[2] (1913) 23 Yale LJ 16, (1917) 27 Yale LJ 710; cited in Ian McLeod, *Legal Theory* (2010).

[3] *McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366; *Steel & Morris v United Kingdom* [2005] ECHR 103.

aid in a long-running and ultimately expensive libel lawsuit constituted an infringement of the right to a fair trial; that is, not only was there an obligation upon the state not to behave unfairly, but a positive duty to ensure 'equality of arms'. The Court's judgment in this case could easily be applied more broadly, holding as it did that 'the Convention is intended to guarantee practical and effective rights'.

Indeed, other international human rights instruments have codified rights of the first kind, rather than the privileges or liberties of the ECHR. The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations in 1966, enumerates a number of rights not covered in the ECHR. These include the right to an adequate standard of living (explicitly including housing) as well as healthcare, education, and workplace rights. Clearly, a right to housing, if incorporated into UK law, would have the potential to have a drastic effect on land law; most obviously, in the law of mortgages and of landlord and tenant, but also with the possibility of second-order effects through, for example, compulsory purchase and planning law. However, though the UK has ratified the ICESCR, it has never been given explicit legal effect as the ECHR was, and as such its influence can be at most advisory (as the ECHR was before the Human Rights Act came into force). The contrast between the ICESCR and ECHR in this regard suggests that one reason for the lack of impact of human rights on land law is quite simply the political decision, by successive governments, not to give binding legal effect to economic, social, and cultural rights.

Human rights in practice

Despite the apparently limited scope for human rights to be applied in land law disputes, there have nevertheless been a number of relevant cases, some of which relied upon protocol 1 art 1, while others addressed other rights.

An example of the first category may be found in *Pye v UK*,[4] an appeal to the ECtHR against the House of Lords' decision in *Pye v Graham*.[5] This was an adverse possession case; the claimant landowner had lost land to the defendant of the initial case, a former licensee; when the defendant's claim was upheld, the claimant alleged that UK law violated the right to property. (It may be worth noting at this juncture that the claimant in this case was a company; protocol 1, article 1 departs from the other provisions of the

[4][2007] 41 EG 200, [2007] ECHR 700.
[5][2002] UKHL 30, [2003] 1 AC 419.

ECHR in that it explicitly includes legal persons, as well as natural persons, as rights–holders.) At first, the ECtHR upheld the claim; the British government then successfully appealed against the decision; adverse possession was not a human rights violation.

Several salient points may be made here. Firstly, that the scope of this decision is unavoidably limited; the matter at hand had taken place under the old scheme of land registration, and it was noted by the House of Lords that similar cases would in future be increasingly rare, given the recent enactment of the Land Registration Act 2002. Secondly, that the ECtHR found for the Government based, in part, on the qualifications to the right specified in the article: that deprivation of possessions could be done "in the public interest and subject to the conditions provided for by law", and that states retained the right to "control the use of property in accordance with the general interest". This is a formula found in many articles of the Convention, and thus is illustrative of a broader principle of Convention rights: that very few rights are considered to be universal and absolute. In this case, the claimants had been deprived of their land, not arbitrarily, but by a long-established and statutorily-defined process, which could be justified in the public interest, and which, as professionals rather than laypeople, the claimants could be expected to understand and guard against (as the Government submitted in their appeal to the Grand Chamber).

The right to property has not been limited to real property, and a number of cases involving other forms of property may have implications for land law. For example, in *A, B, C, and D v United Kingdom*,[6] the properties in question were shares in a steel company that was subsequently nationalized. Naturally, the applicants argued that the deprivation of property they had suffered was a violation of their rights. Nevertheless, the Court considered that there was a legitimate and proportionate basis for the action, specifically, the national interest in the economic security of the steel industry. (Perhaps ironically, this also indicates that the British government's earlier concerns regarding protocol 1, article 1 were misplaced.) However, in a later case, *Lithgow v United Kingdom*,[7] the Court made clear that the power to nationalize was not unlimited. In that case the applicants had not objected to the nationalization in principle, but rather claimed that the compensation they had received was inadequate. The Court considered that, in principle, deprivation of property without compensation would be 'justifiable only in exceptional circumstances' and would otherwise constitute an unrea-

[6] [1967] ECHR 34.
[7] [1986] ECHR 8.

sonable interference with property. Nevertheless, the details of compensation were such that 'opinions within a democratic society may reasonably differ widely', and on the facts of the case the compensation was adequate and as such there had been no violation.

Other rights were touched upon, *obiter*, in *Barca v Mears*;[8] specifically, the increasingly broadly-interpreted article 8 right to a private and family life. The case involved the power of sale in the event of bankruptcy. While, ultimately, the human rights argument was not successful in this instance, the court did recognize that article 8 required a 'balancing act' between the needs of the creditors and those of the bankrupt individual.

In principle, the observation from *Barca v Mears* could apply much more broadly than bankruptcy, and be extended to any situation where an occupier faces eviction.[9] The most obvious case would be a mortgage in default; absent any other defence against repossession, the occupier might claim as a last resort that eviction would a violation the right to a private and family life. This might also be applied to leaseholds, for example. In this way, the right to a private life is being made to serve as an *ersatz* right to a home. However, as was noted in *Barca*, the extent of this right could not be unlimited: not least because it must be balanced against the right to property. In particular, while a process that operated automatically or semi-automatically (such as the sale under s335A of the Bankruptcy Act 1986 in *Barca* itself) might be found to a be violation, it is by no means certain that an interactive process, which had already accounted for the particular circumstances of the case, would also constitute a violation. Moreover, while human rights might in general be considered to be universally applicable, their current status in English law is, for the most part, one of only 'vertical' effect; that is, while public authorities are prohibited from acting incompatibly with Convention rights, no such prohibition applies to private individuals or companies. A human rights claim, therefore, is more likely to be seen in an action against a local authority in its capacity as a landlord, for example, or in response to a compulsory purchase order, rather than against the actions of a private landlord or mortgagee.

Another case revolving around the article 8 right to a private life, while less directly relevant to English law (it concerned Guernsey) was *Gillow v United Kingdom*.[10] In that case, Guernsey's laws regarding a residence requirement for property ownership were argued to be in violation, *inter alia*,

[8] [2004] EWHC 2170 (ch), [2005] FLR 1.

[9] Martin Dixon, *Modern Land Law* (Routledge 2016) 447.

[10] (1989) 11 EHRR 335.

of article 8 (protocol 1, article 1 did not have legal effect in Guernsey at the time). The legislation per se was not found to be in violation, as it was proportionate and for a legitimate purpose, that of ensuring an adequate housing supply among other things. However, given the facts of the particular case, whereby the applicants were prevented from returning to live in a home they had built and had previously lived in, the procedure by which the legislation was enforced was considered to be a violation of their right to a home.

A number of potential effects can be extrapolated from this, beyond the specific context of the legislation in question. It is clear, for example, that a certain degree of government regulation over property ownership can be considered a legitimate restriction of the right to a private life; of particular relevance is the fact that the law in question was, in part, intended to ensure that there was a sufficient supply of housing for other Guernsey residents; i.e., the rights of a given property owner must be balanced against those of other islanders. Government policies that controlled the purchase of residential property, or land with the potential of being used for residential property, or that restricted residence rights in particular areas, for example, could be justified in these terms if they were to alleviate a housing shortage (either long-term, such as that caused by rising house prices, or short-term, for example after a disaster such as the Grenfell fire).

However, the extent of the *Gillow* decision is not unlimited. In *Buckley v United Kingdom*,[11] a refusal to grant planning permission for the establishment of a home was not considered to be a violation of the right to a private life. While the government's claim that the right simply did not apply until a home had legally been established was dismissed, the denial of planning permission was considered to be proportionate. There was no obligation, therefore, for the local authority to grant planning permission simply in order to provide the applicant with a home. Thus, this limits the usefulness of article 8 as an *ersatz* right to a home in the ICESCR sense: while article 8 requires respect for an *existing* home, and the *Buckley* decision interprets 'home' broadly to protect even a tenuously-established home, it does not impose a positive duty on the state to provide a home where one does not already exist.

Similarly, in *McDonald v McDonald*,[12] the Supreme Court confirmed the decision of the Court of Appeal to the effect that eviction, in itself, is not an article 8 violation. This conclusion was reached primarily on the basis that

[11](1997) 23 EHRR 101.

[12][2016] UKSC 28, [2017] AC 273.

the Human Rights Act could only be invoked against a public authority (the fact that a court order was required was not considered to be sufficient to make this an act of a public authority in the sense of s6 of the Act); however, the court also noted the necessary conflict that would be entailed between article 8 on the part of the tenant, and protocol 1, article 1 on the part of the landlord, such that a balance would need to be struck were the Act to be applied against private landlords.

The cases discussed so far have the common feature (as, indeed, do many human rights cases) that a *prima facie* violation was considered, under the circumstances, to be a proportionate means of achieving a legitimate goal. There is little UK case law as to when the alleged violation would indeed be found to be disproportionate, at least within the realm of land law. However, a number of cases elsewhere within the jurisdiction of the ECtHR may be indicative of the scope of the rights.

A number of cases have revolved around rent control legislation, for example *Hutten-Czapska v Poland*[13] and *Gauci v Malta*.[14] In both cases, national legislation that restricted the frequency or magnitude of rent increases, or both, was held to be in violation of protocol 1, article 1. In the Polish case, this was because the legislation was considered to put the burden of the national housing shortage unfairly upon one social group (i.e., landlords); in the Maltese case, the extent of the restrictions on rent increases, as well as the strict limitations on the termination of leases, were considered to be disproportionate to the stated (and, in itself, justifiable) goal. However, it is not the case that rent controls and protected leases are per se in violation of the right to property. In *Mellacher v Austria*,[15] the Court confirmed that rent control legislation, provided it meets the requirements of proportionality, would not contravene protocol 1, article 1.

Conclusion

It is clear, when reviewing the case law, that there has been no shortage of attempts to challenge English land law on human rights grounds. These have mostly been in the form of either the right to quiet enjoyment of property, or the right to respect for the home. However, as we have also seen, few of these challenges have resulted in a significant change to the law. It is difficult to say with any certainty why this might be so. How-

[13] [2006] ECHR 628.
[14] [2009] ECHR 1280.
[15] [1989] ECHR 25.

ever, it might be argued that the pre-existence of property rights in English law, along with the lack of any radical upheaval to the system of land law since the Second World War, has meant that there have been very few circumstances that have presented a clear violation of individual rights. This contrasts with the examples from Poland and Malta, among others, where previously-justifiable restrictions on property rights were considered to be disproportionate when still in force decades later. In particular, the 'margin of appreciation', whereby it is understood that certain policies may be justifiable and proportionate in certain circumstances and that the national courts are best placed to make this determination, has permitted English law to remain unchanged when, in other circumstances, a similar policy might be unjustifiable and therefore illegal. This conclusion, furthermore, depends on the particular rights that were included into the European Convention of Human Rights and the nature of their incorporation into English law by the Human Rights Act 1998. If, for example, a right to housing had been included, drafted in such a way as to impose a positive duty on the state, or if the Human Rights Act imposed the duty of compliance with Convention rights on private individuals and not only public bodies, the impact on land law could have been very different.

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