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## The Development of Human Rights in the United Kingdom

Lord Gordon Slynn\*

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Lord Gordon Slynn

## **Abstract**

There are two myths about the United Kingdom. The first is that we do not have a constitution and did not have any human rights law until very recently. The second myth, very much tied to the first, is that human rights is a new topic. I find that most law students seem to think that they alone have thought about fundamental human rights and that the rest of the world knows nothing about it. As with most myths, however, none of these is absolutely true.

# THE DEVELOPMENT OF HUMAN RIGHTS IN THE UNITED KINGDOM\*

Lord Gordon Slynn\*\*

There are two myths about the United Kingdom. The first is that we do not have a constitution and did not have any human rights law until very recently. The second myth, very much tied to the first, is that human rights is a new topic.<sup>1</sup> I find that most law students seem to think that they alone have thought about fundamental human rights and that the rest of the world knows nothing about it. As with most myths, however, none of these is absolutely true.

Let us address the second myth first. The origin of human rights law extends back to the beginning of Western civilization, to the Greeks and the Romans.<sup>2</sup> Much of what we now consider modern human rights law can be found in the basis of fundamental rights widely recognized by Greek and Roman lawyers.<sup>3</sup> Natural law, or what the Romans called *ius naturale*, was a central theme of Roman political and legal thinking.<sup>4</sup> When Saint Paul

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\*\* The Right Honourable The Lord Slynn of Hadley was appointed the Queen's Counsel in 1974, then moved to the judiciary in 1976 as Judge on the High Court of Justice (Queen's Bench Division). He was subsequently appointed to the Employment Appeals Tribunal. In 1981, he became Advocate-General at the European Court of Justice and then Judge of that Court in 1988. He has since been named as one of the law lords of the House of Lords, the highest court of the United Kingdom.

1. See Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L. J. 329, 331-32 (2002) (arguing that although no "self-contained" written document exists "differentiated from other areas of law," this is not the only definition of a constitution); see also Simon Lee, *Bicentennial Bork, Tercentennial Spycatcher: Do the British Need A Bill of Rights?*, 49 U. PITT. L. REV. 777, 779 (1988) (arguing that England already has a Bill of Rights and is about to celebrate its tercentenary).

2. See Martha C. Nussbaum, *Human Rights on the Eve of the Next Century: Beyond Vienna and Beijing*, 66 FORDHAM L. REV. 273, 295-96 n.87 (1997).

3. See generally FRED D. MILLER, JR., NATURE, JUSTICE, AND RIGHTS, IN ARISTOTLE'S POLITICS (1995) (noting the Greek and Roman origins of human rights ideas).

4. See David V. Snyder, *The Romanist Tradition in Louisiana: Legislation, Jurisprudence and Doctrine*, 56 LA. L. REV. 423, 424-25 (1995) (explaining relationship of *ius naturale* to idea of "natural obligation" and other legal concepts in Roman law); see also David Novak, *Judaism and Natural Law*, 43 AM. J. JURIS. 117, 130-31 (1998) (discussing *ius gentium* and *ius naturale* as tools of Roman imperialism).

said, "Yes, I am [a Roman citizen],"<sup>5</sup> he was insisting on those fundamental rights to which, as a Roman citizen, he was entitled. One distinction between Saint Paul's statement and human rights today, of course, is that in Saint Paul's time, only Roman citizens could enjoy fundamental human rights.<sup>6</sup> It is important to be aware, however, that these ideas were not all concocted in the twenty-first century. They have been around a long time and have been elaborated on over the centuries by critical notions of Christian, Islamic, and Judaic teaching.<sup>7</sup> Thus, we begin with the development of human rights law in the United Kingdom by going a long way back indeed.

In the times since the Greeks and the Romans, major developments in human rights law have also had an enormous impact on human rights in England. Magna Carta,<sup>8</sup> to which U.S. judges and lawyers have always attached such great importance, made a considerable contribution to the notion of fundamental rights.<sup>9</sup> According to Magna Carta, "[n]o man shall be punished except by the judgment of his peers or the law of the land . . . to none should justice be denied."<sup>10</sup> Then follows the familiar phrase, "due process of law should be observed."<sup>11</sup> Most U.S. lawyers, even academics, tend to give the impression that the phrase "due process" is a U.S. invention.<sup>12</sup> Although discussion of due process of law today most commonly occurs in the con-

5. Acts 22:27 (NIV); cf. Acts 22:25 ("Is it legal for you to flog a Roman Citizen who hasn't even been found guilty?").

6. See Alan Watson, *Thinking Property at Rome*, 68 CHI. KENT L. REV. 1355 (1993) (discussing the implications of the Roman consideration of slaves as both "property and human beings" who are "denied legal personality"). See generally ALAN WATSON, *ROMAN SLAVE LAW* (1987).

7. See, e.g., Novak, *supra* note 4, at 130-31 (discussing the history of natural law in Jewish thought).

8. MAGNA CARTA (1215).

9. Both the British and the U.S. Bill of Rights drew much of their influence and inspiration from the Magna Carta. See U.S. CONST. amends. I-X; see also ENGLISH BILL OF RIGHTS (1689), available at <http://www.yale.edu/lawweb/avalon/england.htm> (last visited Dec. 28, 2004).

10. MAGNA CARTA ch. 39 (1215), reprinted in J.C. HOLT, *MAGNA CARTA* 327 (1965) ("No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful [judgment] of his peers or by the law of the land").

11. *Id.*

12. See generally JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* (2003) (tracing the history of due process from its origins in medieval England to its applications in American constitutionalism).

text of constitutional theory, many of its fundamental principles actually originated in Magna Carta, which laid the foundation centuries ago.<sup>13</sup> In the United Kingdom, these ideas from Magna Carta, as well as from the Greeks and the Romans, have been developed over the centuries. In seventeenth-century England, for instance, notions of due process were incorporated into the English Bill of Rights,<sup>14</sup> which along with Magna Carta, continues to be cited in the courts today.<sup>15</sup> In a recent appeal before the Privy Council, five Jamaican men sentenced to death by hanging initially claimed that they were wrongfully convicted, and subsequently appealed the constitutionality of the death sentence itself.<sup>16</sup> On a third appeal, they accepted their guilt as well as the constitutionality of the death sentence, but alleged that the method of the sentence's execution constituted a form of cruel and inhuman punishment contrary to both Magna Carta and the English Bill of Rights.<sup>17</sup> Unfortunately for the men in this case, Magna Carta has been subject to subsequent parliamentary statutes identifying death by hanging as the only means of execution in Jamaica.<sup>18</sup> Thus, though Magna Carta did not do any good for the men in this case, its appearance does provide some insight into just how far back such thinking can be traced.

In addition to native English ideas, human rights declarations in other countries have also influenced the development of human rights in the United Kingdom. The almost universal impact of the Declaration of the Rights of Man,<sup>19</sup> approved by the National Assembly of France in 1789, provides a case in point.<sup>20</sup>

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13. See *id.*; see also National Archives and Records Administration, *Magna Carta and Its American Legacy*, at <http://www.archives.gov> (last visited Oct. 3, 2004).

14. ENGLISH BILL OF RIGHTS (1689).

15. See, e.g., Lee, *supra* note 1, at 779.

16. See *Lewis v. Attorney-Gen. of Jamaica*, [2001] 2 A.C. 50 (P.C. 2000).

17. See *id.*

18. See *id.*; see also *Seeking Justice Closer to Home*, BBC NEWS, Nov. 27, 2002, available at <http://news.bbc.co.uk/1/hi/world/americas/2478665.stm> (discussing the status of the death penalty in former British colonies of the Caribbean).

19. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] (France 1789) [hereinafter DECLARATION OF THE RIGHTS OF MAN].

20. See Christine Loudes, *The Emergence of the Political Myth of Human Rights: The French 1789 Declaration of the Rights of Man and the Citizen*, U. NOTTINGHAM STUDENT HUM. RTS. L. CENTRE NEWSL., Feb. 14, 1997 (arguing that the influence of the 1789 Declaration is greater than that of the English Bill of Rights or American Petitions of Rights).

According to the introduction, "[t]he aim of all political association is the conservation of the natural and inalienable rights of man, such rights being liberty, property, security, and resistance to tyranny."<sup>21</sup> Appearing two years before the French Declaration, the Constitution of the United States expressed similar sentiments, many of which have also had an enormous impact on the development of English law.<sup>22</sup>

It is important to note that the United Kingdom differs from other countries in that it has not promulgated any written constitutional statement of human rights.<sup>23</sup> English courts have also refrained from positively creating rights within their decisions.<sup>24</sup> English law has developed on the basic presumption that individuals can do what they like as long as it is not contrary to the law.<sup>25</sup> As a result, England has not needed any laws affirming such fundamental rights as freedom of expression: one can speak freely as long as the speech is not defamatory, treasonable, or sacrilegious.<sup>26</sup> In the United Kingdom, the right to freedom of expression remains unlimited unless there is positive restriction.<sup>27</sup> The same doctrine applies to freedom of movement and to property rights: there being no need to declare the right to property, since people can own and develop property as long as such ownership or use does not contravene an existing law.<sup>28</sup> Human rights in England have therefore developed negatively in response to a lack of common law restrictions.<sup>29</sup> Hence, though the United Kingdom does not have a modern Bill of Rights like the French Declaration or the American Constitution, its citizens have never felt that they suffer from human

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21. DECLARATION OF THE RIGHTS OF MAN, *supra* note 19.

22. See Loudes, *supra* note 20.

23. See Christopher D. Jenkins, *The Institutional and Substantive Effects of the Human Rights Act in the United Kingdom*, 24 DALHOUSIE L.J. 218, 220 (2001).

24. See *id.* at 226.

25. See *id.* at 227. The United Kingdom has traditionally adopted a negative approach to fundamental rights based on the idea that the citizen enjoys the freedom to do as she pleases and that any interference must be justified by law. See Vick, *supra* note 1, at 341; see also Attorney-Gen. v. Guardian Newspapers Ltd. (No. 2), 1 A.C. 109, 283-84 (H.L. 1990) ("Whereas [A]rticle 10 of the [European] Convention . . . proceeds to state a fundamental right and then to qualify it, we in this country . . . proceed rather upon the assumption of freedom of speech, and turn to our law to discover the established exceptions to it").

26. See Jenkins, *supra* note 23, at 228.

27. See *id.* at 228-29.

28. See *id.* at 229.

29. See *id.* at 227.

rights violations any more than anyone else.<sup>30</sup>

Up through the nineteenth century, human rights had been almost entirely limited to the domestic sphere. Countries generally developed their own human rights traditions and standards, many of which were enforceable only within their own borders and very often available only to their own citizens.<sup>31</sup> Following the appalling incidents of the twentieth century, however, came one of the most fundamental changes to human rights discourse, not only within the United Kingdom, but throughout the world.<sup>32</sup> This came about through the emergence of the Charter of the United Nations ("U.N. Charter")<sup>33</sup> and the Universal Declaration on Human Rights ("UDHR"),<sup>34</sup> which provided the foundation for an entirely new direction in the development of human rights.<sup>35</sup> This new era did not come about through a revolution, as it had in France or the United States.<sup>36</sup> Rather, it was a reaction to the atrocities committed in the 1930s and 1940s in Europe; atrocities which made people realize the failure of ordinary law to prevent such occurrences.<sup>37</sup> One could not simply rely on judges to protect human rights against the sort of savage violations perpetrated in Germany and other European countries during this period.<sup>38</sup> Thus emerged the development, not just of national human rights law, but of international

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30. But see Anthony Lester, *The British System Isn't Working*, GUARDIAN, Aug. 3, 2004, at 18 (arguing that a written constitution is necessary to protect basic civil and political rights in England).

31. See Fred L. Morrison, *The Significance of Nuremberg for Modern International Law*, 149 MIL. L. REV. 207, 210 (1995) (citing OPPENHEIM, INTERNATIONAL LAW § 124 (1st ed. 1905) (stating that "a State may treat its subjects according to its discretion")).

32. See Steven Greer, *A Guide to Human Rights Act 1988*, 24(1) EUR. L. REV. 3 (1999).

33. U.N. CHARTER (proclaiming the universal existence of human rights and establishing the United Nations as the entity to ensure their protection).

34. Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

35. See Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. 31, 34 (1996) (arguing that the U.N. Charter heralded the birth of international human rights).

36. See Henkin, *supra* note 35, at 40 n.34.

37. See Ema Orji, *Issues on Ethnicity and Governance in Nigeria: A Universal Human Rights Perspective*, 25 FORDHAM INT'L L.J. 431, 482 n.1 (2001).

38. See Kristin N. Wuerffel, *Discrimination Among Rights?: A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 VAL. U. L. REV. 369, 374-75 (1998) (claiming that World War II atrocities led to a realization of the centrality of human rights and the need to develop international standards for their protection).

human rights law.<sup>39</sup> According to even post-War editions of Oppenheim's *International Law*, international law does not protect individual human rights in any way.<sup>40</sup> Nor could anyone complain before an international court that his rights had been violated.<sup>41</sup> This is the change that took place, and the basis for the post-war development of universal human rights in the United Kingdom and around the world.<sup>42</sup> Beyond the U.N. Charter and the UDHR, dozens of international conventions have formed over the years, covering everything from the elimination of racial discrimination to the protection of civil and political rights as well as social and cultural rights.<sup>43</sup> The following is an attempt to discuss how these international agreements have affected the United Kingdom.

According to Judge Rosalyn Higgins, currently the British judge on the International Court of Justice in The Hague, "the great change came in the States when international law provided a yardstick by which human rights could be measured. The conduct of States had to be regulated by what the Charter said."<sup>44</sup> This had two consequences. In order for the United Nations to establish a means of enforcing human rights around the world, it first had to come up with a universal definition of human rights.<sup>45</sup> The U.N. Charter's references to "fundamental human rights" suggest that rights are absolute and, as such, capable of expression and enforcement in the same way in every country

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39. See Natan Lerner, *A Secular View of Human Rights*, 14 J.L. & RELIGION 67, 75 (2000); cf. Morrison, *supra* note 31, at 211 (pointing out the importance of nationality as a prerequisite for the enforcement of international human rights by Western Nations).

40. See Lerner, *supra* note 39, at 68; see also Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law*, 96 AM. SOC'Y INT'L L. PROC. 219, 221 (1992) (stating that States' international legal obligations relating to individuals were owed to States whose nationality individuals possessed).

41. See Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON POVERTY L. & POL'Y 139, 155 (1998) (listing five methods of promoting and protecting human rights under international law).

42. See Stephen P. Marks & Burns H. Weston, *International Human Rights at Fifty: A Foreword*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 113, 114-15 (1998) (noting the enormous impact of UDHR on national and international human rights).

43. See Lerner, *supra* note 39, at 68.

44. Judge Rosalyn Higgins, Remarks at the Hague Academic Lecture.

45. See Lord Johan Steyn, *Human Rights: The Legacy of Mrs. Roosevelt*, 2002-AUT PUB. L. 473, 475-76 (2002) (noting various attempts to come up with a definition of human rights following the establishment of the U.N. Charter).



around the world.<sup>46</sup> It is easy to see why this idea would never work out. In the first place, the sort of rights requiring protection in an Asian country or an African village are quite different from those people would expect to have in New York or in the United Kingdom.<sup>47</sup> It also became clear that the enforcement mechanism set up by the United Nations, based on mandatory State reporting mechanisms and individual petitions alleging human rights violations, did not offer sufficient protection either within the United Kingdom or anywhere else.<sup>48</sup> This is where Europe has taken the lead with respect to the rest of the world.<sup>49</sup> It is not surprising considering the terrible conditions in Europe during the middle of the twentieth century, but it is remarkable — and people in the future will find it remarkable — that European States realized that something had to be done and that they took the initiative to develop a more effective system.<sup>50</sup> Hence, the creation of the European Convention on Human Rights (“European Convention”),<sup>51</sup> intended to give effect to the U.N. Charter.<sup>52</sup> Perhaps more remarkable is that the United Kingdom, and even previously warring countries like France and Germany, were able to come together and agree that human rights ought to be expressed and enforced in a way which would be acceptable to all of them.<sup>53</sup>

How have such rights been enforced and how has this affected the human rights tradition of the United Kingdom? England helped draft the European Convention and became one

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46. See *id.* at 476 (discussing the initial failure of the U.N. Charter to gain international legitimacy).

47. See *id.* at 477 (noting that differences in culture, economics, and politics among countries made an agreement on a uniform text difficult to achieve).

48. See Nigel S. Rodley, *The Evolution of United Nations' Charter-Based Machinery for the Protection of Human Rights*, 1 EUR. HUM. RTS. L. REV. 4 (1997). Despite its ostensible aim to defend fundamental rights, the U.N. Charter refrained from addressing general and individual reports of human rights violations for the first 20 years of its existence. See *id.*

49. See Rolv Ryssdal, *The Coming of Age of the European Convention on Human Rights*, 1 EUR. HUM. RTS. L. REV. 18, 19 (1996) (highlighting three crucial developments initiated by the European Convention on Human Rights (“European Convention”) that significantly changed the structure of traditional international law).

50. See *id.* at 29 (noting that the European Convention allows States to commit themselves fully to an international system of human rights protection).

51. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*].

52. See Steyn, *supra* note 45, at 479-80.

53. See Liv Jaeckel, *The Duty to Protect Fundamental Rights in the European Community*, 28(4) EUR. L. REV. 508, 526 (2003).

of the first to sign and ratify it.<sup>54</sup> This did not mean, however, that an English citizen could go directly to an English judge and ask him to enforce Article Four or Five of the European Convention. Under British law, no international treaty or convention is enforceable in the national courts unless the United Kingdom Parliament first makes it part of domestic law.<sup>55</sup> Therefore, though the European Convention had aroused enthusiastic support since its ratification, the national courts did not initially enforce it. If a British subject wished to allege a violation of the European Convention, he had to appear before the trial court, court of appeal, and the House of Lords in order to claim his right as expressed in the European Convention.<sup>56</sup> In judgments passed down during the 1950s, 1960s, and 1970s, English judges circumvented the problem by basing their decisions on the recognition, in English common law, of well-established rights similar to those expressed in the European Convention.<sup>57</sup> In other words, one could say what one liked as long as it was not blasphemous, defamatory, sacrilegious, or seditious.<sup>58</sup>

It is easy to see why this was not satisfactory. It is quite absurd that English judges should lack the power to investigate or enforce many of the fundamental rights declared in the European Convention, and equally ridiculous that citizens should be forced to go all the way to the European Court of Human Rights in Strasbourg ("Strasbourg Court") in order to enforce those rights.<sup>59</sup> I remember going to Strasbourg to represent the British government in a case where a prisoner had sought to write a letter to solicitors alleging a violation of his rights as a prisoner.<sup>60</sup> The governor, however, had the power under a British statute to stop this correspondence from leaving the prison, and he did not allow the letter to go forward.<sup>61</sup> Not surprisingly, the pris-

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54. See Steyn, *supra* note 45, at 479.

55. See *id.* at 479.

56. See, e.g., *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, 1 All E.R. 881 (C.A. 1977) (stating that international law has no validity except as adopted by domestic law).

57. See, e.g., *Sci. Research Council v. Nasse*, A.C. 1028, 1068 (H.L. 1980); see also Greer, *supra* note 32, at 4 (noting the concern that incorporating European Convention into domestic law would compromise parliamentary sovereignty and subject common law to the influence of foreign judiciaries).

58. See *supra* notes 23-30 and accompanying text.

59. See, e.g., David Feldman, *Remedies for Violations of Convention Rights Under the Human Rights Act*, 6 EUR. HUM. RTS. L. REV. 691, 691-92 (1998).

60. See *Golder v. United Kingdom*, [1979] 1 Eur. H.R. Rep. 524, 528.

61. See *id.* at 524.

oner found a lawyer willing to argue that the governor's act constituted a violation of his rights under the European Convention. The case eventually went to the European Commission, but the prisoner was forced to travel to Strasbourg to bring it. It was quite absurd. Any judge in the United Kingdom would have come to the same conclusion merely by looking at the text of the Convention itself.<sup>62</sup>

Very much based on United Nations documents, the European Convention laid down a number of important rights.<sup>63</sup> The right to life would seem fairly obvious. The law should protect everybody's right to life, and should not intentionally deprive anyone of his life, save in execution of a court sentence following his conviction for a crime for which the death penalty is provided.<sup>64</sup> It sounds like a simple statement: you shall not take a person's life. The Strasbourg Court, however, was asked to say that it also requires the State to ensure that a person's life is protected under circumstances in which the State is responsible for him. Last year, the House of Lords gave a judgment on a case involving an English prisoner murdered by his cellmate.<sup>65</sup> An English prisoner, obviously psychotic and extremely racist, murdered a man of Asian extraction. Following the murder, the Commission for Racial Equality inquired as to how this had come about.<sup>66</sup> The victim's family claimed that the State's failure to prevent the murder violated the victim's right to life, for which the State was ultimately responsible.<sup>67</sup> The State, of course, had not killed him. This case did not involve a policeman or soldier shooting and killing somebody under unlawful circumstances, and yet the State had custody of the prisoner when the murder took place. According to the victim's family, by placing a known racist prone to violence in the same cell as an Asian prisoner, the State had subjected the victim to a serious

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62. See generally Feldman, *supra* note 59.

63. See, e.g., Todd Howland, *Rael v. Taylor and the Colorado Constitution: How Human Rights Law Ensures Constitutional Protection in the Private Sphere*, 26 DENV. J. INT'L. L. & POL'Y. 1, 16 (1997).

64. See European Convention, *supra* note 51, art. 2(1).

65. See Regina (Amin) v. Sec'y of State for the Home Dep't, 1 A.C. 653 (H.L. 2004).

66. See *id.* ¶ 12.

67. See Regina (Amin) v. Sec'y of State for the Home Dep't, 4 All E.R. 336, ¶ 1 (C.A. 2002).

risk of injury or death.<sup>68</sup> Moreover, by refusing to hold a public inquiry into the circumstances surrounding the murder, the State allegedly violated not only the victim's rights, but also those of his next-of-kin.<sup>69</sup>

Over the years, the Strasbourg Court has held that the right to life does not simply prohibit the taking of life.<sup>70</sup> The State also has a responsibility to take reasonable steps to protect a person under its custody.<sup>71</sup> Because the right to life has now become part of domestic law, the case was allowed to come before the English courts, where the State was held to have clearly violated its obligations to protect this particular prisoner.<sup>72</sup> The Court of Appeal reversed, holding that the State could only be liable if the murder had taken place at the hands of a State employee, in this case a prison officer.<sup>73</sup> The House of Lords, however, held that this was far too narrow an interpretation and that the State had clearly violated the prisoner's right to life pursuant to Article Two of the Convention.<sup>74</sup> Specifically, the authorities failed to do two things: to protect the prisoner by ensuring that he did not share a cell with a violent racist, and to investigate how the murder had occurred.<sup>75</sup> This may seem somewhat of an extension, but as a result of the Strasbourg decisions, the right to life has begun to include the right to have a full inquiry made as

68. *See id.* ¶ 30.

69. *See id.* ¶ 47 (noting that the next-of-kin of the victim must be involved in the investigative procedure to the extent necessary to safeguard his or her legitimate interests).

70. *See id.* ¶ 30; *see also* *McCann v. United Kingdom*, [1996] 21 Eur. H.R. Rep. 97, 137, ¶ 181 (stating that Article 2(1) is one of the European Convention's most fundamental provisions).

71. *See Osman v. United Kingdom*, [2000] 29 Eur. H.R. Rep. 245, 277, ¶ 89 (noting that Article 2(1) enjoins a State to take appropriate steps to safeguard the lives of those within its jurisdiction); *see also* *Salman v. Turkey*, [2002] 34 Eur. H.R. Rep. 425, 483, ¶ 103 (holding that authorities have a duty to protect persons in custody).

72. *See Regina (Amin) v. Sec'y of State for the Home Dep't*, EWHC Admin. 719, ¶ 91 (Q.B. 2001), *available at* 2001 WL 1135068 (noting that "serious human failings" contributed to the prisoner's death).

73. *See Regina (Amin) v. Sec'y of State for the Home Dep't*, 4 All E.R. 336, ¶ 75 (C.A. 2002) (holding that the Secretary of State's refusal to hold a public inquiry of the circumstances surrounding the prisoner's death at the request of victim's family did not violate Article 2 of the European Convention).

74. *See Regina (Amin) v. Sec'y of State for the Home Dep't*, 1 A.C. 653, ¶ 30 (H.L. 2004) (holding that Article 2 includes a duty to take steps to prevent life being taken and therefore an obligation to investigate circumstances surrounding a prisoner's death).

75. *See id.* ¶ 40.

to how and why its deprivation could have occurred.<sup>76</sup>

Article 3 of the European Convention prohibits torture.<sup>77</sup> This may seem an unlikely issue for a case originating in an English countryside or suburb to come before the Strasbourg Court, but there have been some quite serious cases involving allegations of torture which have resulted in judgments against the United Kingdom.<sup>78</sup> Article 5 of the Convention provides the right to liberty and security, a seemingly simple matter for the English courts to address but one which has led to a large number of cases involving a violation of the right.<sup>79</sup> I heard a case in which individuals who had come to England seeking political asylum were detained in a camp for a week so that their applications might be investigated more quickly.<sup>80</sup> The camp at which they stayed was comfortable, had provisions for medical attention, and contained remarkable facilities for education and religious worship. The fact remained, however, that these people had been detained. They had lost their liberty, and the question before the court was whether such detention constituted a violation of Article 5.<sup>81</sup> While the trial judge answered in the affirmative, the House of Lords adopted a more realistic approach by balancing the benefits of a speedy decision regarding asylum-status in the United Kingdom against the harm caused by their detention.<sup>82</sup> Given that the plaintiffs were detained for a relatively short time and that their cases were dealt with relatively quickly, the House of Lords concluded that their detention was not unreasonable and therefore not a violation of Article 5.<sup>83</sup>

One of the provisions of the European Convention which has had the greatest impact in the United Kingdom has been the

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76. See *id.* ¶ 31 (discussing the procedural duty of the State to publicly investigate the death of individuals in custody before an independent judicial tribunal so as to ensure that all facts are disclosed).

77. According to Article 3, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, *supra* note 51, art. 3.

78. See, e.g., *A v. United Kingdom*, [1999] 27 Eur. H.R. Rep. 611; *Z & Others v. United Kingdom*, [2002] 34 Eur. H.R. Rep. 97.

79. See European Convention, *supra* note 51, art. 5. See generally 1 COUNCIL OF EUROPE, DIGEST OF STRASBOURG CASE — LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 282-87 (1984).

80. See *R (Saadi) v. Sec'y of State for the Home Dep't*, 1 W.L.R. 3131 (H.L. 2002).

81. See *id.* ¶ 27.

82. See *id.* ¶ 47.

83. See *id.* ¶ 49.

right to a fair trial.<sup>84</sup> The Convention provides that a trial shall be held in public within a reasonable time and shall be subject to all necessary safeguards.<sup>85</sup> United Nations documents contain similar provisions, though most of them pertain to trials themselves.<sup>86</sup> But what about individuals who are denied a trial? Does the right to a fair trial include the right of access to a court? Many have argued that English law contains no such provision guaranteeing people the right of access to a court, and that the right to a fair trial therefore applies only once you make it into court.<sup>87</sup> The Strasbourg Court, however, held that the right to a fair trial in England includes a right of access to a court in due time and a right to adequate legal representation.<sup>88</sup> Such rulings demonstrate the pervasive effect of the European Convention on human rights law in the United Kingdom.

One could talk extensively about the detailed articles which the Strasbourg Court has enforced within the United Kingdom over the last fifty years. Protection of property has been crucial, as well as the right to education.<sup>89</sup> The English government has also complied with the rulings of the European Court of Justice ("ECJ").<sup>90</sup> Given that the decisions of the Strasbourg Court tend to be liberal, however, some have criticized it for recognizing rights that appear absurd to British eyes.<sup>91</sup> One famous case in-

84. See generally John Andrews & Ann Sherlock, *Right to a Fair Trial*, 19(4) EUR. L. REV. 433 (1994) (surveying prominent case-law from the Strasbourg Court dealing with alleged infringements of rights described in Article 6 of the European Convention).

85. See European Convention, *supra* note 51, art. 6.

86. See, e.g., Statute of the International Court of Justice, 1978 I.C.J. Acts & Docs. 5, arts. 42, 46, 59, available at <http://www.icj-cij.org> (last visited Dec. 28, 2004).

87. See generally Tom Hickman, *The "Uncertain Shadow": Throwing Light on the Right to a Court Under Article 6(1) ECHR*, 2004-SPR PUB. L. 122-45 (2004).

88. See *id.*; see also 2 COUNCIL OF EUROPE, DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 425-41 (1984).

89. See, e.g., *Air Canada v. United Kingdom*, [1995] 20 Eur. H.R. Rep. 150; *Campbell & Another v. United Kingdom*, [1982] 4 Eur. H.R. Rep. 293.

90. For a discussion of the circumstances under which the European Court of Justice has invalidated member State action, see Darcy S. Binder, *The European Court of Justice and the Protection of Fundamental Rights in the European Community*, at <http://www.jeanmonnetprogram.org/papers/95/9504ind.html> (last visited Nov. 18, 2004).

91. See, e.g., Lord Leonard Hoffman, *Human Rights and the House of Lords*, 62 MOD. L. REV. 159, 164 (1999) ("Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be. . . [thereby] challenging the autonomy of the Courts and indeed the Parliament of the United Kingdom to deal with what are essentially social welfare questions").

volved a student who had been caned by the headmaster of his school, and who claimed that the caning constituted a form of cruel and inhuman punishment in violation of the European Convention.<sup>92</sup> In a majority decision, the Court ruled this form of corporal punishment to be impermissible.<sup>93</sup> Writing separately, however, the British judge stated that he did not believe that the caning had done any harm and certainly did not consider it torture or inhuman treatment.<sup>94</sup> Recent cases concerning freedom of the press, the rights of transsexuals, and the rights of people of the same sex have also led to the creation of important precedent within the United Kingdom.<sup>95</sup> Thus, if the first phase of human rights development in England was exemplified by the British rule that one can do what one likes so long as it is not unlawful, the second strand was initiated in the U.N. Charter, developed in the European Convention, and enforced through the Strasbourg Court.

The effect in the United Kingdom of its membership in the European Union, then the European Community, also remains important. The Treaty of Rome<sup>96</sup> does not deal with human rights as such.<sup>97</sup> It does, however set forth equal pay for equal work as a basic human right.<sup>98</sup> This provision led, in the United Kingdom, to many decisions in favor of women's rights in the employment sphere.<sup>99</sup> It is curious that most of the cases involving women's right to equal treatment,<sup>100</sup> equal work,<sup>101</sup> and

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92. See *Costello-Roberts v. United Kingdom*, [1995] 19 Eur. H.R. Rep. 112.

93. See *id.*

94. See *id.* at 138 (concurring Opinion of Freeland, J.) ("I have not been satisfied that, in its own particular circumstances, the nature, purpose and effects of the punishment . . . were sufficient to bring it within what is in my view the true scope of the protection afforded by [Article 3 of the European Convention]").

95. See, e.g., *Bowman v. United Kingdom*, [1998] 26 Eur. H.R. Rep. 1; *Sheffield & Horsham v. United Kingdom*, [1999] 27 Eur. H.R. Rep 163; *Smith & Another v. United Kingdom*, [2000] 29 Eur. H.R. Rep. 493.

96. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

97. See generally *id.*

98. See *id.* art. 119.

99. See, e.g., Bob A. Hepple, *Social Rights in the European Economic Community: A British Perspective*, 11 COMP. LAB. L. 425, 431 (1990); see also SACHA PRECHAL & NOREEN BURROWS, *GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY*, 205-30 (1990).

100. See Council Directive No. 76/207, O.J. L 39 (1976) [hereinafter Equal Treatment Directive].

equal pay<sup>102</sup> have come from the United Kingdom.<sup>103</sup> This is largely because no previous provision in English legislation provided for equal rights for women in employment.<sup>104</sup> The ECJ recognized equal rights for women in employment in certain areas.<sup>105</sup> A provision in the Treaty of Rome also prohibits discrimination on the ground of nationality,<sup>106</sup> a provision that, according to the ECJ, reflects a general principle of law.<sup>107</sup> Thus, in England, the third strand of human rights law — equal pay, equal treatment, and the principle of non-discrimination on the ground of nationality — derived from the European Union.

There is no provision in the Treaty of Rome itself, however, that enforces human rights within the European Community.<sup>108</sup> This is where the ECJ came in. In the beginning, the ECJ had indicated that it would not enforce the European Convention because the responsibility rested with the Strasbourg Court.<sup>109</sup> The European Convention did not include the European Community as a party because only States may constitute European Convention parties.<sup>110</sup> The ECJ also held that the European Community did not have the power to accede to the European Convention.<sup>111</sup> At first, therefore, it appeared that the ECJ could not enforce human rights in the European Community. But this was not the end of the road,<sup>112</sup> for the ECJ then held that the member States of the European Community must have intended that some fundamental rights were to be available to citizens and residents of the European Community. There were

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101. See *Perceval-Price & Ors v. Dept. of Economic Development & Ors*, [2000] I.R.L.R. 380 (I.R. C.A.).

102. See EEC Treaty, *supra* note 96, art. 119; Equal Treatment Directive, *supra* note 100, art. 1.

103. See Rachel A. Cichowski, *Constitutional Articulations: Women's Rights, the European Court, and Supranational Constitutionalism*, 38 *LAW & SOC'Y REV.* 489, 496-98 (2004).

104. See *Hepple*, *supra* note 99, at 431-32; see also *PRECHAL & BURROWS*, *supra* note 99, at 91-94, 142-44.

105. See generally *PRECHAL & BURROWS*, *supra* note 99.

106. See EEC Treaty, *supra* note 96, art. 6.

107. See *Kenny v. Insurance Officer*, Case 1/78, [1978] E.C.R. 1489, 1503.

108. See generally EEC Treaty, *supra* note 96.

109. See ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 211 (1999).

110. See Nanette A. Neuwahl, *The Treaty on European Union: A Step Forward?*, in *THE EUROPEAN UNION AND HUMAN RIGHTS*, 1, 18 (Nanette A. Neuwahl & Allan Rosas eds., 1995).

111. See *id.* at 20; see also ARNULL, *supra* note 109, at 214-15.

112. See ARNULL, *supra* note 109, at 215-17.



therefore certain fundamental rights that the ECJ was prepared to enforce.<sup>113</sup>

As the cases went by, the ECJ developed this reasoning in an important way. It began in *Stauder v. Ulm*,<sup>114</sup> in which a German pensioner claimed that he should be able to buy butter at a reduced price.<sup>115</sup> Filling in a form in which he had to provide his name and address was the only way for the pensioner to get the butter at a reduced price.<sup>116</sup> In effect, the pensioner either had to proclaim his poverty or buy butter that he could not afford at the market price. The pensioner's pride made him feel as though being forced to claim his poverty and give these details to the officials, and possibly to his neighbors, constituted a violation of his right to privacy.<sup>117</sup>

The petitioner alleged that the forced disclosure of identity and financial status was discriminatory against beneficiaries of the discount and amounted to a violation of his fundamental human rights under Germany's basic law.<sup>118</sup> The ECJ in this early case did not make an order in his favor, declaring that the regulations did not actually require him to give his name at all and therefore did not violate the law.<sup>119</sup> The Court acknowledged, however, that there are certain fundamental human rights which the ECJ would enforce, rights similar to those enforced through the Strasbourg Court.<sup>120</sup>

Beginning with the landmark case of *Stauder*, the Court began to talk about respect for fundamental rights as forming an integral part of the general principles of laws that it would protect.<sup>121</sup> It therefore indicated that it would respect certain fundamental rights even though the European Community is not a party to the European Convention.<sup>122</sup> Where does one find

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113. *See id.*

114. Case 29/69, [1969] E.C.R. 419.

115. *See id.* at 420.

116. *See id.* at 419.

117. *See id.* at 420.

118. *See id.*

119. *See id.* at 428.

120. *See* HJALTE RASMUSSEN, ON LAW AND POLICY IN THE LUXEMBOURG COURT OF JUSTICE 396, 420 n.24 (1986).

121. *See* L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 397 (2000).

122. *See* ANNE-MARIE SLAUGHTER ET AL., THE LUXEMBOURG COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE 317 (1998); *see also* ARNULL, *supra* note 109, at 204.

those rights apart from the Convention? This is where an important development took place through judge-made law.<sup>123</sup> The ECJ judges in Luxembourg said that most of the European countries recognize certain important rights through their constitutions, or, as in the case of the United Kingdom, through traditional jurisprudence.<sup>124</sup> Finding that these rights existed in one form or another in the various member States, the Court determined that it must therefore protect these rights as part of the structure of the European Community.<sup>125</sup> In this way, the Convention has become the basis for parallel ideas supporting the constitutional traditions of the various member States.<sup>126</sup> In a remarkable way for civil lawyers, the ECJ has recognized these fundamental human rights over the years, a trend which has had as much an effect in the United Kingdom as elsewhere.<sup>127</sup>

But it did not stop there, for the Parliament of the European Union and the Council, consisting of the legislative body and the Commission, all passed a resolution wholly approving and endorsing what the Court has done through judge-made law and recognizing that the precedents had become part of Community Law.<sup>128</sup> Through an amendment, the European Union then resolved to protect fundamental rights as guaranteed by the European Convention and as a result of the constitutional traditions common to the member States as general principles of community law.<sup>129</sup> The Treaty of Rome also recognized these fundamental rights and gave the Council of the European Union the power to make regulations prohibiting violations of specific human rights.<sup>130</sup> One of the more recent regulations

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123. See ARNULL, *supra* note 109, at 223.

124. See *id.* at 204.

125. See *id.* at 204, 219.

126. See *id.* at 219.

127. See *id.* at 219, 223.

128. See SIEGBERT ALBER, REPORT ON THE RELATIONSHIPS BETWEEN INTERNATIONAL LAW, COMMUNITY LAW AND THE CONSTITUTIONAL LAW OF THE MEMBER STATES 10 (1997).

129. See Consolidated version of the Treaty on European Union, art. 6, O.J. C 325/5, at 11 (2002), 37 I.L.M. 67 [hereinafter Consolidated TEU], incorporating changes made by Treaty of Nice amending the Treaty on European Union ("TEU"), the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice] (amending TEU, Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty).

130. See EEC Treaty, *supra* note 96.

and directives deal with discrimination on the grounds of sex or racial origin or ethnic origin, religion or belief, disability, age, or sexual orientation.<sup>131</sup> And so the third strand has become an important one.

Historically, the European Convention, and, subsequently, the European Union, have laid down laws which the British courts in the European Community must enforce.<sup>132</sup> Those rights, however, only cover Community areas. A famous case from Ireland involving students distributing leaflets advertising abortion facilities in a London Clinic illustrates this point.<sup>133</sup> The government prosecuted the students for violating an Irish criminal law prohibiting advertising and encouraging abortion.<sup>134</sup> The students claimed that advertising and expressing views on abortion clinics which were respectable in London, was permissible, and that it was therefore protected as a fundamental right under the third strand of European Community law.<sup>135</sup> While an interesting argument, the Court ruled against it in the end because the students had not exercised a community right.<sup>136</sup> They had not exercised freedom of movement; they had simply claimed the right of free speech, which was not part of European Community law.<sup>137</sup> If the clinics themselves had advertised, it would have been an interference with their freedom to provide services, a Community law right.<sup>138</sup> The students, however, could not rely on European Community law to exercise this right.<sup>139</sup> Thus, in this third strand, the European Union imposed obvious limits, and so we move to the fourth strand.

By 1998 many people had come to realize that it was quite absurd for the British citizen who wanted to claim a right under the European Convention to go to Strasbourg.<sup>140</sup> Hence, while the lawyers enjoyed trying cases in Strasbourg, the clients wanted

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131. See European Commission, Amended Proposal for a Council Decision Establishing a Community Action Programme to Combat Discrimination (2001-2006), COM (2000) 649 Final (2000).

132. See generally European Convention, *supra* note 51.

133. See Attorney General v. X & Others, [1992] 1 I.R. 1, [1992] 2 C.M.L.R. 277 (Ir. S.C.).

134. See *id.*

135. See *id.*

136. See *id.*

137. See *id.*

138. See *id.*

139. See *id.*

140. See European Convention, *supra* note 51.

legal redress in the English courts. Many lobbied for a long time that the Strasbourg Convention should become part of British domestic law enforceable via statute.<sup>141</sup> Then in 1998 came the enactment of the Human Rights Act,<sup>142</sup> which included all the rights set out in the Strasbourg Charter except the right to an effective remedy.<sup>143</sup> It was argued that the Human Rights Act provides that the right to life and all of these other rights are spelled out the same way, and that the courts should therefore have the power to strike down any legislation by Parliament or by government minister inconsistent with the European Convention.<sup>144</sup> In other words, give the courts the same power that they have under European Community law to strike down any legislation inconsistent with the Treaty of Rome or any other subordinate legislation.<sup>145</sup>

England's Labour government knew, however, that if they accepted this proposal, many people would oppose it.<sup>146</sup> Therefore, they adopted a modified form of power for the National Court to exercise, and ordered English judges to take into account any judgment of the Strasbourg Court, or any opinion given by the Commission when considering any question under the European Convention.<sup>147</sup> The British Government did not bind judges to Strasbourg Court decisions, but simply told them to take such decisions into account.<sup>148</sup> Does "take into account" mean read it, smile and ignore it, give some effect to it, or follow it absolutely?<sup>149</sup> The House of Lords heard a case in which the government minister failed to do what obviously ought to have been done and the question arose whether the British courts

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141. See *The Luxembourg Court of Human Rights*, available at <http://www.bbc.co.uk/crime/law/echr.shtml> (last visited Oct. 4, 2004).

142. Human Rights Act, 1998, ch. 42 (Eng.).

143. See *id.* § 9.

144. See *id.* § 2.

145. See *The Luxembourg Court of Justice and Case Law*, available at <http://www.eurole-gal.org/yurp/ecj.htm> (last visited Oct. 4, 2004).

146. See *id.*

147. See, e.g., *Publications: Briefings*, available at <http://www.farrer.co.uk/Default.aspx?sID=17&cID=528&ctID=11> (last visited Sept. 12, 2004).

148. See Press Release, Elizabeth Andersen, Human Rights Watch, U.K.: New Anti-Terror Law Rolls Back Rights (Dec. 14, 2001), available at <http://www.hrw.org/press/2001/12/Ukbill1214.htm> (last visited Sept. 12, 2004).

149. See United Kingdom Parliament, *Lord Hansard Text* (Nov. 27, 1997), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldhansrd/vo971127/text/71127-19.htm>.

should follow a very clear decision of the Strasbourg Court.<sup>150</sup> Although the obligation is only to take into account Strasbourg Court decisions, judges should follow the Strasbourg Court's judgment if it is clear and unqualified. If the English judge does not follow the jurisprudence of the Strasbourg Court, the citizen could still go to the Strasbourg Court and challenge the decision of the House of Lords, in which case this court must give effect to the claim.<sup>151</sup> In any case, a clear following of Strasbourg jurisprudence by the British courts remains necessary.<sup>152</sup>

The courts are also given the power to make declarations as to whether legislation in the United Kingdom is compatible with Strasbourg jurisprudence, leaving it to the Parliament and the minister, if he so chooses, to take steps to put the law right.<sup>153</sup> If the minister thereby finds that the House of Lords or the Court of Appeal has declared something to be unlawful and the Strasbourg Court has said the same thing, the minister can himself make legislation to give effect to it. Perhaps most importantly, the courts have the duty to read primary and subordinate legislation as far as possible in a way which remains compatible with the Convention.<sup>154</sup> As a result, English judges spend a great deal of time, instead of giving the ordinary meaning to words, trying to give a definition or meaning consistent with the European Convention.<sup>155</sup> This is not always an easy task, and judges should not be required to go to absurd lengths in order to construe English legislation in accordance with the European Convention

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150. *Regina (Alconbury) v. Secretary of State for the Environment, Transport and the Regions*, 2 A.C. 295 (H.L. 2003).

151. See, e.g., *Singh v. Entry Clearance Officer (New Delhi)*, EWCA Civ. 1075 (C.A. 2004), available at <http://www.bailii.org/ew/cases/EWCA/Civ/> (last visited Mar. 19, 2005) (deferring to Strasbourg Court's interpretation regarding legal concept of family life); see also *What are the Differences Between the Human Rights Act 1998 and the European Convention on Human Rights?*, YourRights.org.uk, available at <http://yourrights.org.uk/faqs/human-rights-act/human-rights-act-differences.shtml> (last visited Sept. 13, 2004).

152. See *id.*

153. See Eurolegal Services, *UK Human Rights*, available at <http://www.eurolegal.org/british/ukhumanrights.htm> (last visited Sept. 13, 2004).

154. See *Regina* (on the application of Ullah) v. Special Adjudicator, 2 A.C. 323, (H.L. 2004), available at <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040617/ullah-1.htm> (last visited Feb. 8, 2005) ("It is indeed unlawful . . . for a public authority, including a court, to act in a way which is incompatible with a Convention right."); see also *Human Rights: The European Convention*, Sept. 29, 2000, available at <http://news.bbc.co.uk/1/hi/uk/948143.stm> (last visited Sept. 13, 2004); *UK Human Rights*, *supra* note 153.

155. See *UK Human Rights*, *supra* note 153.

unless it can be done reasonably.<sup>156</sup> Though it is often better for the judge to say the law is bad and then to leave it to the Parliament to change it, the courts do their best to construe legislation so as to make it compatible with the European Convention.<sup>157</sup>

Many difficult questions have arisen under the Human Rights Act.<sup>158</sup> Article 6, for example, prohibits the court from violating the right to a fair trial, and lawyers are ingeniously arguing that there are violations of this right in almost every aspect of the criminal law process.<sup>159</sup> If the judge agrees and the case arose before the Act came into force, the position remains obvious: the judge must declare it to be unlawful and there must be another trial or the man must be acquitted.<sup>160</sup> Suppose, however, that the failure to provide a fair trial took place before the Act came into force.<sup>161</sup> If, for example, somebody was convicted and a criminal procedure was followed before the Act came into force, could the convicted person go to the courts and say that the procedure violated the Human Rights Act and that therefore his conviction must be set aside?<sup>162</sup> Judges have been very much divided on this question. We decided 3-2 in *Regina v. Lambert* that courts must not set aside the conviction.<sup>163</sup> In the following case, three members of the House of Lords held that the courts should set aside the conviction. The House, however, stood behind its earlier decision.<sup>164</sup> Although three of the judges thought the law was wrong, it remains the law.<sup>165</sup> Then we decided a third case in which the House of Lords went a step further, saying that the question is not one which they should review anymore.<sup>166</sup>

There remains one final strand to discuss. The European Convention is now a bit out of date, in that it does not address several rights which people in 2003 would expect to be enforced. Therefore, the European Community decided four or five years

156. See FINANCIAL SERVICES ON MARKETS, FIRST REPORT, 1999, Cm.

157. See Human Rights Act, 1998 (Eng.).

158. See FINANCIAL SERVICES ON MARKETS, *supra* note 156.

159. See, Human Rights Act, 1998, ch. 6 (Eng.).

160. See *Regina v. Lambert*, 2 A.C. 545, 561-63 (H.L. 2002).

161. See *id.*

162. See *id.*

163. See *id.*

164. See *Regina v. Kansal* (No. 2), 2 A.C. 69, 81 (H.L. 2002).

165. See *id.* at 93-95.

166. See *Regina v. Rezvi*, 1 A.C. 1099 (H.L. 2003).

ago that a commission should be established to reassess the declaration of rights in the European Convention. The Commission drafted the Charter of Fundamental Rights of the European Union ("CFREU"), and the States of the European Community approved it in Nice.<sup>167</sup> It is a remarkable document, and declares many rights which nobody would have thought of in 1950 when States first considered the European Convention: the right to data protection,<sup>168</sup> the right to DNA information,<sup>169</sup> and the right to physical and mental integrity,<sup>170</sup> including the right not to have your body used for purposes with which you disagree, either in life or even after death.<sup>171</sup> Nobody in 1950 would have ever thought of including these rights in the Convention, e.g., in the fields of biology and medicine. The following principles were also included in the Convention: free and informed consent of the person concerned,<sup>172</sup> the right to liberty and security which is similar to the one granted in Article 5 of the European Convention,<sup>173</sup> a right to freedom of expression,<sup>174</sup> and a right to education.<sup>175</sup> Scientific research is now a human right which shall be free of constraint.<sup>176</sup> The freedom to found educational establishments with due respect for democratic principles, as well as the right of parents to ensure that the education of their children is in conformity with their religious, philosophical, and pedagogical convictions, is also guaranteed in accordance with national laws governing the exercise of such freedom.<sup>177</sup> This is a much broader statement than anything the Convention considered before.<sup>178</sup> The CFREU also guarantees the right to asylum.<sup>179</sup>

In addition, the CFREU prohibits discrimination, not just

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167. See Charter of Fundamental Rights of the European Union, O.J. C 364/1 (2000) [hereinafter CFREU], pmb.

168. See *id.* art. 8, § 1.

169. See *id.* art. 3, § 2.

170. See *id.* art. 3.

171. See *id.* art. 3, § 2.

172. See *id.* art. 8, § 2.

173. See *id.* art. 6; see also European Convention, *supra* note 51, art. 5 ("Everyone has the right to liberty and security of person").

174. See CFREU, *supra* note 167, art. 11 § 1.

175. See *id.* art. 14, § 1.

176. See *id.* art. 3, §§ 1, 13.

177. See *id.* art. 14, § 3.

178. See, e.g., European Convention, *supra* note 51, art. 2.

179. See CFREU, *supra* note 167, art. 18.

with respect to wealth and nationality, but also based on sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age, and sexual orientation.<sup>180</sup> In its current form, the CFREU seems to contain almost everything that someone could think of. In ten years time, however, somebody will have thought of other things which ought to be protected against discrimination.

The question remains as to what effect the CFREU will have on the laws of the States that have agreed to and signed it.<sup>181</sup> Prime Minister Blair returned to London, stating firmly that the CFREU is simply a catalogue of existing rights.<sup>182</sup> It is not currently enforceable as such in the National Courts.<sup>183</sup> In future, other States may give effect to it.<sup>184</sup> This does not mean, however, that the CFREU does not have any effect on the courts of the United Kingdom.<sup>185</sup> In a number of cases, the Advocate-General of the ECJ has stated firmly that although the CFREU is not binding, it does give an indication of what a democratically elected group of people think human rights should include.<sup>186</sup> Britain should therefore seek to construe human rights in accordance with the CFREU.<sup>187</sup> The Commission of the European Union in Brussels now checks new legislation against the CFREU to ensure that there are no violations.<sup>188</sup> The European Union ombudsman in Brussels also judges complaints, not just with respect to the jurisprudence of the courts, but in relation to the CFREU as well.<sup>189</sup>

The European community is currently engaged in numerous discussions as to whether it should adopt a written constitu-

180. *See id.* arts. 21, 23.

181. *See* Ian Black, *Members Back Citizens' Charter: Human Rights Articles Aim to Give EU 'Moral Dimension'*, *GUARDIAN*, Dec. 8, 2000, at 6.

182. *See id.*

183. *See id.*; *see also* CFREU, *supra* note 167, art. 52.

184. *See* Black, *supra* note 181.

185. *See, e.g.,* Commission v. Jago-Quere, Case C-263/02 P, [2004] E.C.R. \_\_, [2003] 2 C.M.L.R. 44; *see also* R v. Visitor of King's College London, E.L.R. 29 (Q.B. 2004).

186. *See* Sionaidh Douglas-Scott, *The Charter of Fundamental Rights as a Constitutional Document*, 7 *EUR. HUM. RTS. L. REV.* 1, 37, 49 (2004).

187. *See id.*

188. *See, e.g.,* Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 *INT'L J. CON. L.* 56 (2004).

189. *See* CFREU, *supra* note 167 art. 43.



tion.<sup>190</sup> Those involved in its drafting have agreed on most of the provisions which will be discussed by the States.<sup>191</sup> Many of these provisions will undoubtedly lead to serious disagreement, but the general view appears to be that the CFREU should be a part of any such constitution.<sup>192</sup> If such a constitution is drafted, the CFREU will become legally binding and the citizens will have the right to go to the national courts not only to enforce the European Convention, but to enforce the rights set out in the CFREU as well. The citizens will do so, not as part of the laws of the Council of Europe Convention, but as part of European Union law, which the judges are bound to enforce. Lawyers are going to have an extremely interesting and difficult time coping with some of these new ideas. Judges, too, will no doubt find it difficult to enforce such provisions as those calling for the right to academic freedom. Nonetheless, the CFREU will have a profound effect on human rights in the United Kingdom if it becomes a law.

The five strands discussed above will all come together and English judges will not simply have to say, "Well, if it's not forbidden, you can do it." They will have to say, "Here is a right declared not just by the Council of Europe, here is a right declared by the European Union, which is binding on the National Court and has to be enforced."

This continues to be an enormous topic of which scholars have only begun to scratch the surface, but it is also one with the potential to have a dramatic effect on the lives of ordinary people in the United Kingdom. As time goes by, we will be in a better position to judge how the enforcement of human rights in the United Kingdom compares to that in the United States.

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190. See *Straw Supports an EU "Constitution"*, BBC NEWS, Feb. 21, 2002, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/1833286.stm](http://news.bbc.co.uk/1/hi/uk_politics/1833286.stm) (last visited Sept 14, 2004). See generally Roger J. Goebel, *The European Union in Transition: the Treaty of Nice in Effect; Enlargement in Sight; a Constitution in Doubt*, 27 FORDHAM INT'L L.J. 455 (2004).

191. See Goebel, *supra* note 190, at 485-501.

192. See *id.*