ARTICLES

1. After Warnock: the ethics of embryo experimentation 1985 Bulletin of the Australian Society for Legal Philosophy, 3-25


9. ‘Stands Scotland where it did ?’: devolution, human rights and the Scottish Constitution seven years on” (2006) 57 Northern Ireland Legal Quarterly 102-137


13. **Roman Catholicism and the temptation of shari'a** (2009) 15
   *Common Knowledge* (Duke University Press) 269-315


**BOOK CHAPTERS**


17. **The constitutional supremacy of Community Law in the United Kingdom after the Human Rights Act** in de Sousa and Heusel (eds.) *Enforcing Community law from Francovich to Köbler: twelve years of the State liability principle* Volume 37 *Academy of European Law*, Trier, Germany (ERA, 2004) pages 87-113


AFTER WARNOCK:
THE ETHICS OF EMBRYO EXPERIMENTATION

by Aidan O’Neill

In this paper I will consider the ethics of the practice of non-therapeutic experimentation on the human embryo: that is to say experiments not in the interests of the subject. This is a question of legal significance, too, given that, as the Warnock Committee stated, “what is legally permissible may be thought of as the minimum requirement for a tolerable society.” Indeed, both the Warnock and the Waller Committees were set up to examine how best to regulate the emerging bio-technology in accordance with moral standards acceptable within the community.

I shall focus on the topic of experimentation because among the many issues and techniques involved in the in vitro fertilisation (IVF) programmes, this most clearly raises the basic question of “how should we treat the developing embryo?” Only once this question has been answered may we go on to consider other aspects such as the social consequences of in vitro fertilisation. This centres on the status of the embryo allows one also to separate off the general questions of treatment for the infertile. This point may be thought rather odd since the question of embryo experimentation only arose in the course of developing techniques to aid the infertile. However, the justifications now being given for experimentation on embryos refer not so much to the research toward alleviating infertility but to further medical advances using embryonic tissue to investigate adult diseases unrelated to infertility. Certainly, as the Warnock Committee recognised, the relative success-rate of present methods of in vitro fertilisation is a result of the numerous experiments carried out on embryos by R.G. Edwards and Patrick Steptoe throughout the 1970s. But the morality of embryo experimentation should not now be regarded as a scientific fait accompli, and it need not be the case that acceptance of the present use of IVF in an “ideal case” in which no “excess embryos” are created commits one also to the acceptance of future non-therapeutic experimentation on embryo, given the history of the development of present techniques.

Similarly the question of experimentation can and should be distinguished from that of abortion. Abortion deals with the expulsion of an unwanted foetus from the womb, while embryo experimentation is about the deliberate creation, use and destruction of the human embryo. The point may seem one of Jesuitical subtlety, but it is not without moral significance. Mr Enoch Powell’s Private Member’s Bill, currently before the U.K. Parliament, seeks to ban all forms of embryo experimentation and rests on this perceived distinction. Indeed at present the law’s protection extends to any living infant once it is separated from its mother’s womb even where a miscarriage has been deliberately and lawfully induced. And although it may be thought a woman’s right to choose whether to carry her child to full term, the law recognises no right to choose whether the child live or die if viable when expelled from the womb.
The issue of embryo experimentation does raise this very point - the choice of life or death. A measure of the controversial nature of the topic may be seen from the fact that this question split the Warnock Committee. Three of the sixteen Committee members recommended an outright ban on all non-therapeutic embryonic experimentation and a further four recommended that the deliberate creation of embryos for the sole purpose of such experimentation be prohibited, but allowed, in a manner reminiscent of doublethink than double effect, that "spare embryos" produced as a part of an actual in vitro fertilisation programme may be used, rather than implanted, for further research. The nine members who formed the majority recommended only that a limit of fourteen days from the time of fertilisation be allowed for experimentation, after which time the developing embryo should be disposed of. When questioned as to the reason for the fourteen day limit, the chairman of the Committee, Dame Mary Warnock (now Lady Warnock) replied: "If asked when did 'I' become 'me', I should say fourteen days and not before." The reference here is to the differentiation of the embryonic cells around the fourteenth day producing the "primitive neural streak" which will develop into the body of the foetus.

Although the fourteen day limit has been presented as a compromise between two extreme positions, the Catholic and the Utilitarian, the reasoning used in the majority report to justify experimentation has been essentially consequentialist in that the benefits resulting from such research are held to outweigh the negative elements of embryonic destruction. The fourteen day barrier has been arbitrarily selected to allay the moral sentiments of a community which feels that there ought to be "some limits fixed, beyond which people must not be allowed to go" (Par. 5 Warnock Report). However to allow any experimentation on the embryo is effectively to state that the embryo may be used simply as a means to an end. It is to deny that the principle of respect for the life of others applies in the earliest stages of human development. The Report states: "though the human embryo is entitled to some measure of respect beyond that accorded to other animal subjects, that respect cannot be absolute, and may be weighed against the benefits arising from research." It is indeed a limited respect which so gives to the human embryo the status of object, of property. Although the Committee recommended that legislation be enacted to prevent a right of ownership in the human embryo (Par. 10.11), it does envisage the sale and purchase of embryos under licence (recommendation 49) and speaks of the couple's rights of "use and disposal" of their embryo (recommendation 50). Under the Warnock proposals then the human embryo is seen to be in a position of radical inequality vis-à-vis developed adult humanity.

In this essay I wish to examine the philosophical arguments for and against such inequality of status.

As I stated above, the classical utilitarian would have no difficulty justifying embryo experimentation. The medical benefits for allowing such research have been clearly listed by Dr R.G. Edwards, who with Dr Patrick Steptoe was responsible for the birth of a child in 1978, the first successfully conceived in vitro. Embryonic and foetal tissue have remarkable qualities for regeneration in transplantation and may be used in the treatment of various
acquired and inherited deficiencies in adults; research into drug toxicity and efficacy by pharmaceutical companies could proceed more accurately and quickly if embryos were freely available for experimentation; and one also has to note with the Warnock Committee that "advances in the treatment of infertility ... could not have taken place without such research" (Par. 11.18).

The question of inequality in status would not arise for the utilitarian because he grants no particular privileged status either to the embryo or to the adult human. Both might be used as means to end, if the situation warrants it and if the "felicific calculus", the overall estimation of pain and pleasure caused by a proposed action, is favourable. Practically, of course, embryonic research is more likely to be "moral" in the utilitarian sense since it is thought that embryos do not develop the capacity for pain until at the earliest six weeks of development and there will be less indirect utilitarian factor to take account of since people are less likely to object to experimentation on a "bundle of cells" than, say, on mentally defective humans.

However the Warnock Report dismissed classical utilitarianism as an adequate theory of morality and stated in the Report's foreword: "Even if such a calculation [of best overall consequences] were possible, it could not provide a final or verifiable answer to the question whether it is right that such procedures should be carried out. There would still remain the possibility that they were unacceptable, whatever their long-term benefits were supposed to be." [Par. 4]

The problem raised by embryo experimentation is over how we should apply our familiar moral responses or intuitions to unfamiliar situations. Our starting point should be then these moral principles. It may be noted here that I do not intend to speak of moral principles in terms of rights as the concept of "moral rights" is, at the moment, a confused topic and one which cannot lead to clarity in understanding or resolution of argument - compare the "right to life" versus the "right to choose" debate over abortion. Certainly I believe there is a place for talk of moral rights, but they do not strike me as being fundamental concepts, and certainly not constitutive of the whole of morality - thus our moral duties are not restricted to those seen to have the capacity to claim rights. Rather, rights are translations or specific individuations of more general principles dealing with how we should act with ourselves and with others. Where possible then I shall treat of these general principles directly, rather than via the potentially misleading categories of rights and right-holders.

The most clearly relevant principle to the debate over embryo experimentation is that of respect for the lives of others - what we have called the sanctity of life principle. Until very recently in moral philosophy, it had been accepted that this principle was applicable to fellow human beings, simply by virtue of their being human. It certainly was not thought applicable to animals, who could be killed for food or economic convenience or indeed hunted for pleasure. Such a radical disjunction between moral duties owed to men and those owed to animals has been under attack in recent years from such writers as Peter Singer, John Harris, Michael Tooley and Tom
Regan who see such as evidence of an irrational and therefore unjustifiable species-prejudice, which by analogy with such immoral and arbitrary prejudices as racism, sexism, ageism, (dis)ablism, heterosexism, has been labelled "speciesism".

In considering the sanctity of life principle, I shall consider the class of things to which it may be thought applicable and the reasons why it should be thought so applicable. More specifically, I shall examine the arguments against species-prejudice which Singer puts forward to see whether his criticism of at least the past two thousand years of Western morality is a justified one. Singer does not deny the relevance of the sanctity of life principle, as an unreconstructed utilitarian might, but he grants it no "absolute" quality. He holds that it must be based on "morally relevant characteristics" for it to be even prima facie valid. It is what is and is not to count as "morally relevant" which will determine the manner in which any argument can proceed, and the conclusions which may be reached.

Singer's fundamental postulate is that reference to the particular species alone of a subject is no ground for defining the moral duties owed to that subject. To assume that this is the case is to be guilty of "speciesism" and no argument can be validly founded on such an arbitrary and indefensible preference; just as reference to race or gender alone cannot be grounds for differentiating our moral duties. Now Singer's assumption that species-preference is as unwarrantable as racism or sexism colours his whole argument therefrom, and indeed his perception of what may constitute valid counter-arguments. If species is irrelevant, then we must seek other factors in relation to "sanctity of life" which back up our moral intuitions; if species is irrelevant, then we shall have to distinguish between the simple membership of the biological human species, and the individual's possession of actually morally relevant factors which grant her the status of person; if species is irrelevant, then the only counter-argument to embryo experimentation are those which rest on the potentiality argument - refute those and the opposition is left with nothing; if species is irrelevant, the way we treat living organisms at a similar stage of development to the early embryo may be relevant to how we should treat that embryo.

John Harris puts it thus:

We are looking for the basis of our belief that it is morally right to choose to save the life of a person rather than a dog where both cannot be saved and that this choice is not merely a form of species prejudice, arbitrary but understandable. So the features we are looking for, although they will be possessed by normal mature adult human beings will not simply catalogue the differences between such beings and animals.

But is species-prejudice arbitrary? What does it mean to be species-prejudiced? What are the implications for the incorporation of the concept of "speciesism" into our lives?

So the situation is this: faced with the principle of the sanctity of life one may either deny, with the classical utilitarian, that it has any direct relevance to morality, or assert, with the Buddhist or the Jain, that such reverence to life is the basis of
all morality. The problem with the former position is that it would seem to allow anything to be done in the name of morality, while the latter would effectively allow nothing to be done (if the life of a microbe, say, had the same intrinsic value as that of a person). Morality, however, would seem to be a matter of at least setting certain limits on human action, without precluding action altogether. Mary Warnock, following Stuart Hampshire, states her position as being that:

[T]he essence of morality is the existence of a set of not necessarily coherent or unified principles which constitute barriers against what is felt to be wrong-doing, a set of prohibitions. There are, in a society, some things which must not be done, or, if done, must not be condoned.

Both Singer and those who might for convenience be labelled "traditional moralists" seek a position midway between that of the classical utilitarian and the Jains. They agree that the sanctity of life principle is necessary to morality, but that it cannot be an unlimited principle prohibiting killing of any kind. Their disagreement is over where the limit should be placed. Traditionally it has been placed at the species barrier - all human life is to be respected simply because it is human. Singer, however, states that the only defensible limit is one which refers to specifically moral characteristics, of which species-membership is not one - his principle is rather that all self-conscious, rational, autonomous life is to be respected simply because of its possession of those capacities of self-consciousness, rationality and autonomy.

As stated above Singer's stance against "speciesism" seems to be founded on an analogy with racism and sexism. If we accept that the race and gender of all parties concerned when engaging in moral deliberation is irrelevant, then so, too, should we consider particular membership of species. Why should belonging to the class of "featherless bipeds" grant one any privileged moral status?

This denial of the relevance of individual characteristics seems to follow from a general utilitarian methodology, in particular R.M. Hare's interpretation of the principle of universalisation in ethics by which we abstract from our personal identity to ascertain the moral thing that all men should do. We can presume no consensus in our values, given the reality of moral pluralism, and so morality must be founded on non-substantive formal limits. (Compare herein Wittgenstein's later work on the depth of consensus within our society making all communication, logic, mathematics even, possible.) The process of abstraction takes us back to the bedrock of each individual's pre-rational preference - in all other respects we are "disembodied historyless, featureless creatures." The logic of the universalisation of moral judgements, states Hare, leads us to accept "the constraint that we have, other things being equal, to prefer that, were we in the other's exact position, that should happen what they prefer should happen". The moral thing to do then is to act on whoever preference is the stronger.

Singer merely takes Hare's argument one step further by stating that morality requires that we take into account not only the prefer-
ences of humans, but also those of animals. Much of the counter-
argument against Singer has focussed on the idea that we cannot talk
of animals having preferences because without language such
intellectual conceptualising is impossible.9 Beings without
language cannot properly be said to think. This seems to me to rather
miss the point Singer is making which is that animals can and do feel
pain. (We infer this from their behavioural reactions and the
similarity, at least in higher animals, of their brains and neural
structure to our own.) Given that it is pain they feel they would
be happier if such pain could be avoided — we can then impute the
idea of preference to them, without claiming that they can
conceptualise such in those terms. So, given that animals can feel
pain as we do, it would seem prima facie immoral to needlessly
inflict pain on them.

The perspective changes, however, when we consider rights to
or the sanctity of life. One may die or be killed painlessly.
What is wrong then with killing? It would seem, according to Singer’s
logic, that only preferences are morally relevant and so one can
only be said to have a claim to life if one has the actual capacity to
prefer to live rather than to die, which implies that one already has
the high degree of conceptual ability to conceive of life as an
entity, as something valuable; therein is the relevance of “self-
consciousness”. Singer’s abstract disembodied individualist approach
means that only intellectual qualities are selected as morally
relevant. Existence as such is a neutral concept; what matters is our
immediate capacity for self-reflexiveness, the appropriation of the
concept of life, past, present and future as constitutive of the self.

My criticism is, however, that moral thinking is not about
abstraction from the individual, but rather about discovery of self in
community. In arguing against Singer’s assertion that species-
prejudice is arbitrary and indefensible, some three approaches might
be adopted.

1. The first is by appeal to intuition, or moral good sense. This
seems to be the approach taken by the great Dames of English
philosophy, Elizabeth Anscombe and Mary Warnock. Anscombe spoke of
the "corrupt minds" of those willing to allow that the prohibition
against killing the innocent may be broken and her unwillingness/inability
to debate further with them. Mary Warnock in a paper
written before the publication of the Warnock Report states:

   It is not prejudice to work for the survival of one’s own
species; nor is it a culpable injustice to accord to one’s own
species a privileged position with regard to resources and care...
To live in a universe in which we were genuinely species-
indifferent would be impossible, or if not impossible, then in
the highest degree undesirable. I do not therefore regard a
preference for "humanity" as "arbitrary", nor do I see it as
standing in need of any other justification than that we our-
elves are human.

In accord with a position more clearly articulated in the opening
paper of the Warnock Report, moral sentiments or intuitions are seen
to be an essential part of moral argument. Thus species-indifference
is simply stated to be "undesirable", and preference for humanity
stands in no need of justification.
The problem with such an approach is that it precludes further debate and moral disagreement becomes nothing less than an insoluble clash between competing intuitions. Further, Singer claims his position to be based on reason and asserts that the accepted moral intuitions which do not accord with his intuitions are therefore irrational and unreasonable, and ought to give way to reason. The onus is on the traditionalists to provide a defence for their accepted moral intuitions.

2. The second attempt to refute Singer might be termed the consequentialist approach. This involves the creation of scenarios which draw out the implications of the proposed non-speciesist morality and weigh these against common moral intuitions. Singer's theory of morality, unlike say Nietzsche's, is essentially a revisionist one accepting a certain common core of traditional moral intuitions but reinterpreting their salient features such as to alter their open texture, their penumbra of applicability. Thus the sanctity of life principle which was so long interpreted as a prohibition against the taking of innocent human life is reinterpreted by Singer to be rather against the taking of self-conscious human life. It would seem then that capital punishment is a far greater evil than infanticide.

An example used against Singer's account of the moral rights owed to animals is the situation where a starving rat attacks a baby. Which has the greater claim to life? To assert that the rat has the better right would be grossly counter-intuitive, but on what grounds could a new-born infant be said to have greater rights at least on Singer's account? There are a number of disadvantages to such a strategy of consequentialist counter-argument.

i. The trouble with this imaginative consequentialist approach is that we are dealing in mere hypothetical situations whose details are always skeletal - other competing scenarios can be given which back up the new analysis as well as immediate intuitions. (One of Singer's oft-repeated claims is that to object to experimentation on embryos one would need, in consistency, to object also to IUDs, and by corollary if one accept the use of IUDs and therapeutic abortion then one can have no objection to embryo experimentation. All cases after all result in the destruction of the embryo or foetus.)

ii. Alternatively the supposed reductio ad absurdum of a particular theory leading to counter-intuitive results might be embraced, as by the strictest act-utilitarians, as an interesting implication of one's theory which is justified nonetheless by the utilitarian appeal to reason as the calculus of efficient means to the overall good.

iii. The third response might be to refuse to engage in discussion over "fantastic scenarios" saying with R.M. Hare and indeed Elizabeth Anscombe, that they have no relevance to the moral theory as a guide to action here and now.
In all cases it would seem that the consequentialist approach does not get to the heart of the matter and what debate there is does not touch the issues of substantive importance. That said, pointing out the dire consequences of a particular theory is often a good rhetorical point if one that more often clouds rather than clarifies philosophical debate.

3. The third approach, and the one that I should favour, is one that attacks the basic assumptions from which Singer works. The most general way in which this might be done would be to show the inadequacy of the consequentialist approach to moral reasoning, resting as it does on unjustified assumptions as to the commensurability of the goods, and the crudest of moral psychologies. However such an attack on utilitarianism would require at least another paper and is too broad an undertaking for the immediate debate. Instead I shall argue that species is not irrelevant to morality and that the analogy of species-preference to racism and sexism is a bad one. Further Singer’s position (which is shared by other contemporary moralists such as John Harris and Michael Tooley) will be seen to rest on certain questionable assumptions about the nature and importance of the “self” and the “soul” which Anglo-American philosophy of the latter half of this century, following the work of the later Wittgenstein, has sought to exorcise. To challenge these assumptions is to bring us to the heart of the debate and lead us to a reappraisal of the importance of species-membership.

What is wrong with sexism?

Mary Midgley in Animals and Why They Matter comments that accusations of racism and sexism commonly combine at least three assumptions, namely: 1. that the attitude complained of smacks of group selfishness, 2. is meant to perpetrate an existing power relationship and, 3. the distinction thought to justify the subservience/dominance pattern is a trivial one. Thus allegations of racism, sexism, anti-semitism or whatever implicitly claim that differences in gender, cultural background or religious persuasion are not such as may allow the denial of basic political rights for instance. However it is not denied that there are differences which in certain circumstances it may be important to emphasize, for example in the preservation of one’s cultural heritage or common religious practice or in feminist support groups at which only women are welcome.

What is wrong with sexism and racism on Singer’s view is that they imply that our concern for others depends on their individual attributes, their possession of particular characteristics. Rather, says Singer, the basic moral principle is the consideration of the interests or preferences of others equally. What is relevant from the moral point of view is simply the individual’s expression of preference. Her moral status is not affected by her race or her sex, or, indeed as Singer argues, her species. Morality is universally applicable and it is truly universal when truly impartial. To be impartial it should have no regard for race or gender, and particular species-membership is just another factor to be discounted in the search for an objective ethics. The certainty and truth of morality is assured by the denial of such contingent factors, and the flight from the contingent ends in a new Cartesian “ego” whose cry is not that “I think”, but rather “I want”. Reason cannot take us beyond the
level of pre-rational preferences. They exist, simply, without justification; they are "given". Morality for Singer is essentially a mode of resolving disputes between individuals - the pre-rational preferences ground individuality. The moral point of view, then, is to see only such preferences, and to act on the more intense, no matter what or whose it may be. For Singer moral thinking is a form of blindness - blindness to gender, blindness to race, blindness to species.

Midgley however would object to such an analysis. She states:

The general point is that we are not just disembodied intellects, but beings of particular kinds, and to ignore our particular qualities and capacities is insolent. This applies, not only to species, but also to age, sex and culture, though the point is not so extreme and glaring in these cases.

On Singer's view, race and sex are trivial and irrelevant distinctions simply because any reference to individual features is precluded by his morality of preference utilitarianism. Thus the move to assert that species, too, is irrelevant is an easy one, if we assume that it can make sense to talk of animals having preferences.

The implication on which the analogy of speciesism to racism rests is that species is as trivial a matter as race is. But it must be asked: trivial in relation to what? In one perspective, race and sex are not trivial matters - my being male and coming from a particular cultural tradition. I am defined by those characteristics and am treated by others accordingly. To be non-sexist does not mean to treat the other as a sexless being. The complaints of racism and sexism are not ones in which the importance of gender and culture are denied as such, but rather that they are denied to be relevant as appropriate factors in a particular context, most clearly in the context of political rights. It is a question not of individual morality, but of social justice. And to speak of politics and justice is already to speak of the polis, the community. Racism and sexism are wrong because they deny to others, on the basis of irrelevant factors, the opportunity of fully participating within the community. It is here that the disanalogy of species to race and sex becomes evident, for the central case of community has to be intra-specific. Community rests on the possibility of agreement, of communication, the reality of a common language. Being of a different race or sex does not preclude the possibility of a common language, whereas being of a different species, so far as is known, does. Thus Singer's argument that if one objects to discrimination on grounds of race or gender, then one must equally be opposed to discrimination on grounds of species fails. The species barrier has to be recognised as a barrier, though not necessarily an insurmountable one. The implications of the resultant anthropocentrism have to be examined.

Language and Community

To be a member of the human species means to be a member of a language community. Why should this "fact" have moral implications? In what way might it be thought that language is morally relevant?
The reason it is, is that community-membership is the sine qua non of morality. Morality deals with conduct between people, it is essentially a relational concept: morality, in Stuart Hampshire's phrase may be seen as the "grammar of conduct" and like the grammar of language it consists of rules established in the conventions of the community, to step outside of which means that one no longer makes sense within the community. This foundation in customary practice is seen in the word's etymology: "morality" being derived from the Latin word mores, meaning custom, and "ethics" from the Greek ethos for tradition. Insofar as we describe our conduct in language we use publicly recognised concepts. To participate in moral discourse we need to respect the conceptual categories of the community, just as to engage in rational discourse generally is to be held "capable of taking part in rule-governed forms of behaviour - notably the practice known as reasoned argument with its characteristic rules of inference".

The point is this: morality is a "public phenomenon" and as such must be described and identified in a public language. And the very possibility of this discourse supposes a whole manner of agreements in forms of life, at the deepest, most primitive level of response and reaction. As Wittgenstein states: "If language is to be a means of communication there must be agreement not only in definitions but also ( queer as this may sound ) in judgements. Wittgenstein replies to the frustrated metaphysician who asks whether it is simply human agreement that determines truth and falsity that "It is what human beings say that is true and false: and they agree in the language they use. That is not agreement in opinions but in form of life". Similarly in relation to morality human beings agree in the language they use and it is in the context of their agreement that judgements of good and evil are made.

Our lives, our language, our world-view are completely permeated by a consensus that makes thought and communication possible, yet strangely improbable. We agree not only on the existence of particular rules, but in our interpretation of them too. And yet there is nothing which ensures this common interpretation of what is thought to be significant, what pointless, what unacceptable, what amusing. It just is the case and this being the case allows communication, allows the creation, the realisation of the human world. And it is this common human world that is given: on which all our certainties are founded and only assuming which we can begin to doubt. We cannot doubt this consensus itself, because it is the very basis of our mutual intelligibility. Fergus Kerr puts the point thus:

It is when people already share certain reactions, when they can jointly take part in certain activities, when they participate in the multifarious practices, customs, traditions and institutions that constitute a way of living ( a community and a common order ) that the fear and desires of others have grounds to develop that scepticism with regard to knowledge of other minds which brings us to the brink of sanity.

Our whole experience and our ability to make sense of the world are not qua isolated individual, but as a member of a community of like beings. We cannot separate how and what we think from what we
are, bodily, here and now. "Were" species then is of the greatest importance in our conceptual reappropriation of the world, because species is the most basic aspect of community. We are born into a family and are defined as members of that social institution. The experience of nurture, the learning of language, the incultation of consensus, all take place within a community, which is defined physically, biologically, with reference to species. Humanity is that central focus - it may be that, as Midgley argues, the domestication of animals creates a mixed community with possible moral repercussions, but such a process of domestication involves bringing in to an extant community: it is therefore derivative, peripheral. Whereas without species bonding there would be no more specific individuals. Species alone therefore is clearly of great moral import.

I say moral import because our experience of what is valuable in the world follows from our acting together, in forming communities. Our values such as knowledge, beauty, play, reason, friendship are human values - realities through our action and in our common language. They are neither unverifiable and changeless metaphysical entities nor unjustifiable, because pre-rational and subjective, preferences. Morality, being social, is founded on such agreement as to the valuable. Morality then is also a function of the specifically human form of life. The implication of this view is not that we therefore have no moral duties to animals, or to cultured, urbane Martians. We have even yet the passion of sympathy and insofar as we can "find ourselves" in another lifeform we may wish to extend by analogy the moral concepts realised in the "whirl of the (human) organism" and treat those others as if they were, in certain respects, human. Our morality then is centrally founded in the common experience of humanity - beyond the species barrier that morality is not necessarily inapplicable, but rather may be applicable in a different way: but reason does not require it. If we have moral obligations to non-humans, they are of a different order.

The consensus of our common language allows us to conceive of the human world, but at the same time delimits the conceivable. Our conceptual structures are inextricably tied to our experience of being human; we could not conceive what it might be like to be a beetle, or a lion. Outwith the human perspective we simply cease to see. This then is the anthropic principle.

Given all this, it seems odd in the extreme that philosophers such as Peter Singer and Michael Tooley can so casually fail to consider the conceptual importance of the species barrier. Further, the individual child’s acquisition of language skills and its integration into cultural traditions is the process making for the continued existence of the community and so the disjunction in moral status proposed by Tooley in his defence of infanticide between those individuals who cannot yet speak and so conceptualise (infans in Latin) and those who have reached a level of competence in those skills enough to be termed self-conscious, does not seem to be justifiable. Given the communitarian epistemology sketched above, consciousness of the individuality of the other (the third person perspective) is a far more significant stage than consciousness of the self, whatever that may mean. To hold otherwise is to be trapped by the picture that our certainty of the world derives not from agree-
ments in judgements but from our privileged "knowledge" of the self through introspection.

Singer and Tooley reach their conclusions as to the licitness of embryonic experimentation and infanticide guided by just this picture. They assume the validity of a "mentalistic individualistic conception of knowledge". They adopt an approach to morality which correspondingly emphasises the mental at the expense of the material, the individualistic at the expense of the communitarian. Theirs is a dualism in which the body and mind may be imagined as separable and opposing elements, and the soul is seen as prisoner of the body. Such a view of social atomism, not to say autism, seems to me to provide a very shaky basis for any moral philosophy, quite apart from its more general epistemological incoherence. As we have outlined above, to oppose such a view need not be to commit oneself to the extremes of behaviourism or materialism - the truth may lie between the two, in a resolution of the dichotomies of physical and mental. That his moral views are informed by such a Cartesian dualism is clear in Singer's discussion of what constitutes the "wrongness" of killing an adult human being which will be examined in detail below. But first, to summarise our argument thus far: the dispute over the morality of embryo experimentation may be seen as a dispute over where to draw the lines around our moral principles. It is accepted by all parties to the debate (save perhaps the strictest of act-utilitarians) that there exists, and should exist, a general moral principle prohibiting the killing of, and non-consensual experimentation on, adult human beings. Disagreement arises over the underlying reasons held to justify this basic principle, because it is the underlying reasons which will show how the principle might be interpreted and extended to less central cases. The traditionalist's justification has been that the simple fact of being a member of the species homo sapiens is the morally relevant factor underlying the application of the principle, and so it should be applicable to all members of the species regardless of their particular stage of development or individual capacities. Singer however rejects this approach as indicative of an unreasonable and arbitrary prejudice founded on self-preference.

For Singer, ethics must be universalisable and impartial, such as might be chosen from the standpoint of an ideal observer, outside the constraints of the particular, the temporal, the bodily. Never is the possible incoherence of such a notion examined. And so Singer states, in the rejection of speciesism that: "right to life' must be based on morally relevant characteristics: such as consciousness, autonomy, rationality and so on - not on the mere presence of life. If it were then every living thing, including lettuce and the amoeba would have a 'right to life' and it would be a most serious wrong to infringe that right." The argument implicit in his approach seems to be this: one only has a duty to respect the embryo if a coherent case can be made out for the embryo's "right to life". But for the embryo to have any rights, it must have at least the capacities of a "rights holder". Yet it would seem that, of itself, the early embryo has no more immediate capacity than an amoeba or a lettuce. Therefore it follows that the idea of the right to life for the embryo is meaningless. But this only follows given Singer's focus on the individual rather than the relational, and on his interpretation of the concept "right to life", as meaning the individual's conscious claim to or desire for life.
This emotivist interpretation of rights-talk which claims that the phrase "I have a right to" generally or necessarily implies "I have a desire for" would certainly not hold true in a legal context. To state that if I no longer want my car then I no longer have any rights to it would be as absurd as claiming that I have a right to whichever car I want, simply because I want it. And if the equation of right and desire does not hold good in the law, which provides our paradigm for talk of rights, it does not seem clear to me why the relation should be thought true in a moral context, such that I only have a right to life if I desire to live. That such an interpretation has been seriously entertained by philosophers, shows the extent to which contemporary talk of rights in morals has become confused, given its lack of clear agreed conceptual basis.

A better understanding of Singer's argument and suppositions can be obtained if we treat not of rights and rights holders, but of the more general principles on which such talk is based: specifically the question of how we should treat the embryo. Singer denies that species can be a relevant consideration in determining that question, and instead speaks of such "moral characteristics" as consciousness, rationality and autonomy on which claims to moral rights and special status can be soundly based. Certainly these characteristics are "morally relevant", and so Singer's approach has a certain initial plausibility. But they are relevant not in relation to grounding rights and claims to treatment, but in establishing moral agency. If any one of rationality, consciousness or autonomy is found lacking in an agent, then she is held not to be responsible, morally, for her actions: without them one cannot act morally. But this is not then to say that one cannot be wronged, although unable to do wrong. One can still be a moral victim without having been a moral agent. For Singer, however, the (im)morality of an action would seem to be determined not only by the capacities of the agent, but also by the moral and mental capacities of her victim. Thus according to Singer we have a duty not to harm others only to the extent that they can feel pain, and our duty not to kill extends only to those who can conceive of death. The emphasis on the morality of an action being dependent on the immediate subjective appreciation of that action by those affected by it leads to an elision of the hurt/harm or pain/injury distinction. This is to say we can no longer distinguish between being hurt without being harmed (as in a visit to the dentist) and being harmed without being hurt (injuries suffered while unconscious or under anesthetic). This leads to the paradoxical conclusion that it is prima facie immoral to cause an infant or an animal pain in order to prolong its life, since the subject can conceive of and suffer pain, but cannot conceive of and enjoy the prospect of a longer life.

Singer reaches these somewhat startling conclusions through his particular interpretation of R.M. Hare's preference-utilitarianism. Whereas Hare's own application of his meta-ethical principles led him to argue against the morality of unrestricted abortion on the basis of the interest reasonably imputed to the foetus to stay alive, Singer understands the preferences of "preference-utilitarianism" to be conscious desires and so argues for the licitness of infanticides. No justification is given for this fundamental shift in perspective from the objective imputation of interests, to the subjective ascertainment of actual desires. Singer simply states: "we define 'interests' broadly enough so that we count anything people
desire as in their interests". In fact such a move is to narrow rather than broaden the scope of preference-utilitarianism. Instead of reference to the species-barrier, Singer arbitrarily brings down a new limit to his non-speciesist morality in the reference to an agent's actual, conscious desires. The plausibility of a universalist ethic committed to the protection of the interest of all is abandoned in favour of a moral concern restricted to those capable of expressing their desires. Why this should be thought any more justifiable than species-preference is not, alas, made clear.

Singer states: "According to preference-utilitarianism, an action contrary to the preferences of any being is, unless this preference is outweighed by contrary preferences, wrong". Let us consider then, on Singer's terms, what constitutes the wrongness of killing assuming for the moment the validity of the basic principle of preference-utilitarianism.

One can only be said to have a preference, in the sense of a specific desire, to live if one has had the experience of oneself as a being over time: that is to say, if an entity recognises of itself a continuing identity extending from the past, through the present, to the future. Only then can one conceive of the possibility of the denial of that future, the termination rather than simply the frustration of preference, and so have a further preference against such termination. The claim to life then, according to Singer, arises from the self's appreciation of itself, the self-consciousness gained through introspection. And it is on this dubious concept that Singer, following Tooley, bestows the title "person". Only a "person" can be said to have a right to life (since it is only a "person" which can by definition conceive of the value of life). On their analysis the status of being a person, "personhood", is something which is superimposed on mere organic or biological life, and need not be thought restricted to any one particular species. It is a stage into which one may develop and from which one may degenerate. Human growth may be seen as a passing through the stages of "pre-person" when unborn and newborn, gaining personality as one progresses towards adulthood and losing it once more in the slide to senility and mental decay. The severely mentally retarded may never develop the requisite capacity for personhood: they remain always "unpersons" without a right to life or the general respect accorded to humanity.

Personhood may be thought of as a capacity for self-reflexiveness, of the mind being able to conceive of itself as an independent entity, conceptually at least separable from the body in which it happens to find itself. In this it differs little from Descartes' account of the soul. Its primary datum is its awareness of its own existence, its basic stance to the world that of valuing its own life of the mind.

The primacy of mind over body is made clear in a remarkable passage by Michael Tooley reflecting on Kafka's short story Metamorphosis in which the central character of the story wakes one morning to find he has been changed into a giant beetle.

[While it is not a necessary property of me that I shall always be a human being, it is a necessary property of me]
that I shall always be at least a subjunctively rational individual. For when it becomes logically impossible for there ever to be a conscious, rational individual who stands in certain appropriate causal relations to that temporal part of me that now exists, I will no longer exist, though of course my body may continue to exist, either as a mindless human organism, or, conceivably as the body of some other human individual.

A clearer statement of dualism could not be forthcoming: the real self, the entity to which moral respect is due is seen to be the mind standing in a certain contingent "causal relation" to the body. The mind can be conceived of as continuing outwith this particular body, and the organism of the body as continuing to function without the mind.

The main difficulty with such a method, which emphasises the mind's basic certainty of its own existence through introspection, is in relation to how we can be sure of the existence of anything other than the mind. The path of dualism would seem to lead inevitably down the road to solipsism. We are certain of our own existence and of our basic desire to continue in existence. Gradually, from the certainty gained in the fastness of the soul, we become aware of the possibility of other entities, other minds existing like ourselves, and with, if self-conscious, a similar basic desire to continue to exist.

We reach the conclusion that there do in fact exist other minds, other centres of consciousness, by inference, states Singer.33 "Neither in embryos nor in adults do we observe consciousness - we infer it from behaviour, or from the degree of the development of the nervous system" [my emphasis]. Effectively he adopts J.S. Mill's argument from analogy that we see other organisms acting in a way that we would interpret, if done by ourselves, as exhibiting certain qualities of consciousness, such as the ability to feel pain. We therefore generalise from our own case and assume that there are other minds, that other organisms are not automata. He states:34 "We can never directly experience the pain of another being, whether that being is human or not. When I see my daughter fall and scrape her knee... I accept that my daughter feels something like what I feel when I scrape my knee".

Given this basic affirmation, the existence or development of mind, or personhood in an infant (or indeed higher animal), becomes a matter for empirical observation and scientific investigation. In this universe of other minds, our ethical thinking leads to the conclusion that the fact of my preferences being mine is of no particular account. We are therefore morally required to have regard in our actions to the preferences of all others likely to be affected by those acts. Morality is, on this analysis, a process of imaginatively appropriating the preferences of the other, comparing them to one's own desires and acting on whichever is the more strongly felt. But the fundamental unit remains that of the conscious mind and if for whatever reason (for example insufficient development in the cerebral cortex, irreversible brain damage) we cannot infer in another the existence of a mind, then we have no duties towards that organism and we may treat it as we wish.
Uncovering the conceptual infrastructure around which Singer has constructed his argument, we see that his final position is an inherently unstable one. His fundamental assumption is that of the validity of the Cartesian method: a building up of one's world-view from the basic certainties of the self gained through introspection. We may term this "the first person perspective". But as Anscombe states in her influential paper "The First Person": "Self-knowledge is knowledge of the object that one is, of the human animal that one is. "Introspection" is but one contributary method. It is rather a doubtful one, as it may consist rather in the elaboration of a self-image than in noting facts about oneself". Singer's whole approach however is based on the certainties of the private world of the self. It is the self's appreciation of itself that gives value to life. It is the self's pre-rational preferences that alone constitute the subject matter of moral thinking - no reference is made to external, objective standard, of "rightness". But if the "certainties" of this private world are denied, on the argument that there can exist no private language by which they might be established, Singer's case collapses. He is then constrained to accept the primacy of a public language, a conceptual structure founded on community whereby the self is understood not in splendid isolation, but in the context of social practices. His appropriation of the term "person" for the isolated self merely lends a spurious solidity to an uncertain concept. Morality does not deal with mental abilities such as Singer holds establish "personhood", but with the reality of how we (ought to) treat others. The introduction of the term "person" is simply an attempt to disguise the assertion that the mentally defective and the mentally unformed are to be denied respect. The move to restrict morality to those who can moralise is similarly concealed in his restriction of preference-utilitarianism to the comparison of conscious desires, and in his confusion of the concept of right with that of desire.

Central to his method of moralising is the assumption that one can ascertain and evaluate the preferences of those affected by one's actions, whether they be horses, hounds or human beings. The coherence of such a method is never doubted: he assumes that the idea of a standpoint outside the bodies which constitute us, from which we might judge our actions makes sense. In this he is a frustrated absolutist, seeking the certainty of the non-corporeal, the vision of the atemporal. The riposte to any such approach is to reaffirm that we are cultural, embodied beings existing within a particular community and tradition. Alas, with Singer, the problems of any attempt to transcend the specifically human perspective in which we find ourselves are never clearly addressed.

My arguments against Singer (and those such as John Harris and Michael Tooley who echo his denunciation of speciesism) may be summarised thus: his moral conclusion only make sense if predicated on the existence of the isolated self whose values, other than the basic value of self-preservation, are private to self. Harris puts it clearly in his article: "The wrongness of killing another person is on this view chiefly the wrongness of permanently depriving her of whatever it is that makes it possible for her to value her own life... We can thus see what is wrong with ending such a life without in any sense sharing the values that make it worthwhile" [emphasis added].
Such a concept only holds if we can make sense of the idea of a private language, and until specific arguments are brought to challenge Wittgenstein's conclusions against the existence of a private language, the concept remains an illicit one. If, however, our understanding of the self is based on a public language, then the fact of sharing a common language will be morally relevant since we must share basic suppositions about the interpretations of the world for there to be communication. Such a consensus allowing a common language is, as far as we know, restricted to species and so our being human is morally relevant. We do not then choose a moral method which seeks certainty in transcending our physical limitations, but rather we accept those limitations. Our morality is founded on our being in the world, and there is nothing more fundamental to that than our bodiliness for "without our bodies we are simply not ourselves. It is our bodies that individuate us. Without our bodies we should not recognise one another. Without my body I could not be aware of myself".39

The alternative then to Singer's views is to emphasise the importance of the community within which our "selves" are established through interaction, one with another. The perspective becomes that of the "third person". Singer has taken a "first person perspective" in his understanding of the world and grants full moral status only to the self-conscious, which is to say only to those who have the requisite capacity to adopt such a perspective. But why should the "first person" have such privileged status, especially once it is realised that the much vaunted certainty of the self is itself a product of so much prior agreement with others in a consensus of acting in upbringing, in judging and in interpreting the world? It is not "I" who experience and make sense of the world (and impute my experience to all others, as Mill's argument would have it) but we, who learn of and understand the world communally. What is of the first and last importance ontologically, epistemologically and morally is "we" as members of the community, not the disembodied "I" with its private and uncommunicable desires. For even desires and preferences have to be seen in the context of community, choice is structured by the community's sense of the reasonable. Desire is not some autonomous act of the pre-rational will - to put forward such a thesis is to blur the line between sanity and madness. My argument should not however be seen as an apology, for some unthinking moral conservatism for, as Lovibond notes, "to be aware of the historicity of our morality is to be aware also that it might be changed. Certainly the constructive appropriation of tradition is essential to the moral point of view, but this need not mean the taking up of the burden of received opinion. It is within community that we find ourselves. We pray, we sorrow, we curse, we hope together, bound by culture, tradition and language. And such a community, rather than the far more limited relationship of symbiosis, is necessarily based on membership of a common species. Tooley asks rhetorically: "Why should the concept of a class of things capable of interbreeding be thought to be morally significant in a way that other concepts, such as that of a class of featherless things with the same number of feet are not?"

It is hoped that the above considerations as to the importance of community in our realisation of the world will show the absurdity of reducing the idea of common humanity to that of a capacity for inter-breeding. To assume that such is the sole criterion for and
implication of species-membership is to adopt the methodology of scientism.

With the distinction between the perspectives of first and third person clearly established, we may return to the specific topic which inspired this philosophical digression - the ethics of embryo experimentation. We are led to ask not "What are the particular capacities or abilities the embryo now possesses such as may allow it to lay claim to particular consideration as to the manner in which it is treated?"; rather, we ask "How is it appropriate for us to treat a developing, but as yet unborn, member of our own species?".

Now it is clear that embryos cannot be thought of as full participants within the community. They exist in the closest relationship of physical dependence on another - although indeed community may be seen as a whole network of relationships of interdependence. They do not, can not, hope, sorrow, pray or speak with us. And yet they are individual members of the species; they are on their way to becoming full members of the community. Their development is a continuum and bodily they are already a part of the "whirl of the organism" as they age towards birth and infancy. We have argued that this fact of the humanity of the developing embryo is relevant to how we, as similarly embodied human beings, should treat that embryo. It is relevant because within the embryo lies the continuance of the community and it is from that community that our perspective is taken, our values formed. This is not then to say that the earliest embryo is to be held to have the same rights and claims within the community as any fully developed adult, but it is to say that the embryo should receive from us some measure of respect for what it already is, a member of the species homo sapiens.

The Warnock Committee recognised in principle this "speciesist" concern and their recommendations for the setting up of a statutory body to monitor and license, inter alia, research on human embryos and for a fourteen day limit on the age of embryos experimented on reflect a greater public interest in controlling human embryonic experimentation. Animal research is by comparison quite unencumbered. Whether the legislative changes proposed by the Warnock committee actually amount to showing respect for the individual embryo is a matter I would doubt, and my doubt arises from the symbolic significance of non-therapeutic experimentation. Such experimentation is the clearest case of treating another as no more than a means to one's ends. It is to treat the other as object, as property and to state that they are excluded from the community, being of themselves of no account. Now it might be thought that such use • of others might be justified by consequentialist considerations, such as the advance of medical knowledge. But if we consider an historical example of such experimentation on adult humans, it means to me that our moral condemnation will stand (unless one be the strictest of utilitarians, and this is not the place to expound on the incoherence of that notion). The Japanese, during their occupation of Manchuria, carried out a number of experiments on prisoners they held in a general investigation into the possibility of developing a synthetic substitute for human blood. The experiments included the injection of horse blood into subjects, exposing of the subjects to extremes of heat and cold, dipping limbs into liquid nitrogen and allowing them to thaw out. The subjects were not tortured pointlessly but rather were
experimented upon to achieve a good end, the creation of artificial blood which could conceivably save hundreds of lives in wartime. Our condemnation remains however - such experimentation is wrong, it cannot ever be justified.

Now, if respect to the embryo means anything at all, it means not to be used, not to be experimented upon, not to be treated as the means to another's end. And if respect is owed to the embryo, it is owed to it as member of the human species, it is owed to each one individually. To claim that we respect an embryo only if it is wanted or desired by its progenitors or created with a view to implantation is to treat the embryo as property. But it is property relations that seem to provide the paradigm for the embryo's status and such determine what procedures are acceptable to the new bio-technology. The classical formulation of property is the rights of "utiendi, abutendi et fruendi", the rights to use, abuse and enjoy. Such rights are now seen as incompatible with the status of humanity, given our condemnation of slavery. The final question then becomes, "When might the embryo be accorded the status of humanity?"

Certain authorities, theologians such as Bernard Haring and G.R. Dunstan and philosophers such as Peter Singer have seen in the development of the cerebral cortex the beginnings of relational humanity. This occurs about the fortieth day of development, and so they would allow unlimited experimentation up until that time. Singer argues this conclusion on the basis of an analogy with brain-death - if we admit that the brain dead are dead for all moral purposes, we should hold that those who have not yet developed a brain are not then alive for moral purposes. The weakness of this argument may be seen if we regard brain death as being "the equivalent of decapitation" as one commentator puts it.

The brain dead are already objects or things because there is no possibility of their being subjects in relation to their environment. The growing embryo however is in a different position because it is indeed a subject - it attaches itself to the wall of the womb, it controls and creates its environment in forming a placenta, it constantly develops. So the physiological fact of presence or absence of a brain should not determine moral status (unless one holds that we are really "brains in a vat"). What is relevant is our ontological status - as subjects or objects in the world. The embryo is alive, the brain dead are not.

The majority report of the Warnock Committee recommended a fourteen day limit on embryo experimentation, after which stage further research on live embryos should be made illegal and the subjects of the experiments allowed to die. The fourteen day limit is a reference to the development of the "primitive streak" - those cells which differentiate from the cells which will form the placenta, and which will instead form the body of the developing individual. The implicit justification behind the Warnock recommendation is that before the fourteenth day, the embryo's growth is one of undifferentiated cellular multiplication. We do not know what is going to happen to the products of conception: they may develop into a hyda-

identical twins, it may even be that a primitive streak once formed will regress and disappear. It should also be noted that some 40 per cent of embryos fail to develop beyond this stage and miscarry. Development of the embryo prior to the fourteenth day would seem to be relatively unpredictable. The moral implications of this are expressed by a Catholic theologian, Jack Nahoney, S.J. (1972): "[The early embryo] is not yet sufficiently stable and biologically developed to be considered a human individual, or person".

Before the fourteenth day then, no particular respect would seem to be owed to the undifferentiated embryo and experimentation may be carried out with impunity. The reference to the "stability" of the organism as a factor determining its moral status seems to imply that the development of the primitive streak is some chance occurrence, an event whose cause is unknown and unknowable. However if the primitive streak does result from the "products of conception" and goes on to develop into foetus and child, the potential for that development must already have been present on fertilisation. The causal chain of that development is unbroken by any new intervening acts and so I might say that the entity I am now existed from fertilisation: I did not suddenly come into being on the fourteenth day (as opposed to the sixth? cf Genesis 1:27-31). To hold, with Dame Mary, that individual human life begins with the formation of the primitive streak is just as arbitrary as the earlier belief that life began at "quickening", when the movements of the growing foetus could first be felt by the mother. Both options rely on a lack of knowledge as to the mechanics of biological development. It seems to me odd that our moral attitudes should be held on the basis of such ignorance.

If we admit that our expression of respect for humanity entails the condemnation of all methods whereby the other is used merely as a means to our ends, we cannot allow non-therapeutic experimentation on the embryo even at its earliest stages. The entity that I am is genetically unique and physically integrated, and my existence as an organic unity can be traced back to the time of conception — that point marks the beginnings of my bodily life. The formation of the zygote from the fertilisation of ovum by sperm is the moment of creating of a new member of the species. Before fertilisation, sperm and egg may indeed be considered to be alive, but there exists a substantive developing individual, a new human life, only when they are conjoined. That there is a qualitative difference between the zygote and its constituent elements, the sperm and egg, when separate but considered jointly is obvious if one considers an analogy from physical chemistry, the difference between salt and its constituent elements of sodium metal and chlorine gas. That a whole may be greater than the sum of its parts would seem to be a point which escapes Singer.

The argument for a respect which excluded non-therapeutic experimentation is one which rests not on any claim as to what the zygote potentially might be, but rather it rests on what now exists. For as Singer admits it is "possible to claim with strict literal accuracy that a human life exists from conception". That is the only claim made in a morality which recognises the supreme significance of human life.
In denying the morality/licitness of proposed non-therapeutic experiments on the human embryo, our morality accepts its radical anthropocentrism.

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Footnotes

1. Postgraduate student, Department of Jurisprudence, University of Sydney.


10. Warnock, "In vitro fertilisation", supra n.6, at 242.


25. See Singer, Practical Ethics, supra n.12, at p. 82.
26. Ibid, at 82-3.
27. Ibid, at 50 ff; 32ff respectively.
29. Singer, Practical Ethics, supra n.12, at 12.
30. Ibid, at 80-1.
31. Ibid, at 75-6.
34. Singer, Practical Ethics, supra n.12 at 60 (emphasis added). The licitness of any epistemological method which generalises from just one instance has been notoriously attacked by Wittgenstein. See his Philosophical Investigations, supra n.16 (**293-303). Wittgenstein states (P.I. II p. 178) too that my attitude toward a friend is an attitude toward a soul - we do not form the opinion, by inference, that he has a soul. It is how we act that matters. The central question is how to realise respect here and now, in this world.
36. Singer, Practical Ethics, supra n.12, at 89-90.
37. Harris, "In vitro Fertilisation", supra n.5, at 225.

39. Lovibond, Realism and Imagination in Ethics, supra n.15 at 122.

40. Tooley, Abortion and Infanticide, supra n.32, at 70.


42. Peter Singer & Deane Wells, "In vitro fertilisation: the major issues", (1983) 9 Journal of Medical Ethics, 192-5 at 193. Also by the same authors The Reproduction Revolution, supra n.32, at 92.


44. The Tablet, 14/7/84 at 668.

45. On this line of argument see Teresa Iglesias, "In vitro fertilisation: the major issues" in (1984) 10 Journal of Medical Ethics, 32-7 at 36.

46. Singer & Wells, Reproduction Revolution, supra n.23 at 90-1.

47. Id.
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THE LEGAL PHILOSOPHIES OF H. L. A. HART

1. INTRODUCTION

IN 1961 H. L. A. Hart published The Concept of Law\(^1\) and, with this book, revolutionised the study of jurisprudence in the English-speaking world. Since its original publication over a quarter of a century ago, a great mass of literature, both expository and critical, has grown around the work dealing with the particular Hartian vision of the law expounded therein. However, it is the contention of this paper that Hart himself has since abandoned many of the insights of The Concept of Law and has sought to produce a second model of the law which is, it is argued, incompatible with his earlier theory. This later Hart can be discerned in his Essays on Bentham,\(^2\) which contained some previously unpublished material, and in his Introduction to Essays in Jurisprudence and Philosophy.\(^3\)

Both in his earlier and later philosophies Hart has maintained his commitment to the "school of legal positivism" by holding that there must be a strict separation between law and morality—which he believes to be a consequence of the "is/ought" distinction. In so doing, Hart reaffirms his place in a jurisprudential tradition going back to Jeremy Bentham. In the Introduction to his Essays on Bentham Hart states:

"Though I think Bentham's imperative theory of law must be discarded his conceptual separation of law and morality, sensitive as it is to many important empirical connections between them, seems to me a permanently valuable feature of his thought which can and should be retained when his imperative theory is discarded."\(^4\)

In accepting this tradition, Hart is not content simply to enumerate the differences between law and morality, but commits himself to proclaiming that the two concepts are fundamentally distinct.

In two of these Essays on Bentham, namely Chapter 6 on "Legal Duty and Obligation" and Chapter 10 on "Commands and Authoritative Reasons," Hart re-argues the case for the

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\(^1\) H. L. A. Hart (1961).
strong positivist thesis that legal concepts can be adequately developed without reference to extra-legal factors such as social value. To this end, he has to claim that legal rights, legal powers and legal obligations are concepts *sui generis*, established simply by virtue of rules which fulfil the criterion of legal validity by being logically derived from a pre-existing valid norm. His defence of positivism has taken a distinctly formalist turn. The problem for Hart (or the Hartian) is whether this defence can be consistently reconciled with Hart’s central insights in *The Concept of Law*.

While interpretations of the earlier Hart, such as Neil MacCormick’s sympathetic *H. L. A. Hart*, 5 have placed the ideas expressed in *The Concept of Law* so firmly on the notion of social value as to leave little ground for disagreement between Hart’s work and the theories put forward in John Finnis’s seminal *Natural Law and Natural Rights*, 6 it will be seen that Hart himself in his later works has opposed such syncretism and has reformulated his own position so as to place him far closer to the camp of Kelsen and “strict” legal positivism. In so doing, it will be argued, Hart has effectively repudiated much of his earlier work in favour of a position *determined* by this opposition to theories of natural law.

The gist of the matter is this: while Hart thought that he was producing a theory of law compatible with the doctrine of the separation of law and morality demanded by legal positivism in *The Concept of Law*, subsequent interpretation of that work, notably by Neil MacCormick, has brought into doubt whether the idea of law as a social rule can be coherently held together with the proposition that there is no necessary connection between law and morality. The later Hart, rather than abandon this doctrine, has rejected his earlier theory.

2. THE PHILOSOPHY OF THE EARLY HART

Hart’s intention in *The Concept of Law*, as he stated in the Preface thereof, was to produce a model of law which would be true to the insights both of analytical jurisprudence and of descriptive sociology. Only such an approach might do justice to the law’s peculiarly dual aspect as, in the words of the Danish legal philoso-

phan Alf Ross, "at the same time an observable phenomenon in the world of fact, and as a binding norm in the world of morals or values ... as something that exists and something that is valid." 7

Hart’s initial emphasis was on law as matter of fact, as a species of (empirically observable) social rule. He was concerned accurately to reflect the law in practice, and so improve on what he saw as the distorted accounts given by such earlier positivists as John Austin and Hans Kelsen, without falling into the errors of the American and Scandinavian legal realists who downgraded the concept of legal validity. These two extremes were described by Hart as the “Scylla and Charybdis of juristic theory.” 8 For Hart, the concept of law as a social rule was firmly grounded on the idea of social practice, accepted standards of behaviour by which a group guides its actions. Law was seen as centrally related to action and could be distinguished from other social rules, such as those of morality and etiquette, by its degree of systematisation reflected in its division into primary and secondary rules.

The early Hart saw this analysis of law divided into two tiers of rules as the key to the science of jurisprudence: “rules of the first type impose duties; rules of the second type confer powers, public or private.” 9 On Hart’s model, law was seen as the union of these two species of rules, primary and secondary. The primary rules related directly to action; they imposed obligations; they related what “is to be done.” The secondary rules were, in a sense, parasitic on the primary rules in that they were structural rather than substantial: they identified primary rules (rules of recognition); they allowed for the creation, codification and repeal of primary rules by legislation and the exercise of legal powers (rules of change); and they provided for the authoritative determination of disputes about primary rules (rules of adjudication). These secondary rules were said to provide the criteria for legal validity to the existing primary rules of obligation which, up till then, could only be characterised as “pre-legal” practices of a conventional morality. But, logically, these secondary rules needed themselves to be validated before they could themselves confer validity. Hart prevented an infinite regress of validating, but

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9 Ibid., p. 79.
unvalidated norms by subsuming all rules of the legal system under a complex social practice he termed "the ultimate rule of recognition." This rule unified and defined the legal system, it provided the criteria of validity for all the other rules within the system, but it was itself a matter of sheer practice. Hart stated:

"Whereas a subordinate rule of the system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant practice of the court, officials and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact." 11

Validity was seen to be an intra-systemic concept, and so we could not in any intelligible way say that the practice that constituted the ultimate rule of recognition was itself legally valid or invalid: it was, instead, the form of life on which the legal language game was founded.

The early Hart noted: "The violation of a rule is not merely a basis for the prediction that hostile reaction will follow, but a reason for hostility." 12 For Hart, properly to understand rules we could not restrict ourselves to noting external regularities of behaviour which saw the law purely in terms of "observable regularities of conduct, predictions, probabilities and signs." 13 Instead, we needed to appropriate the "insider viewpoint" of one who accepted the rules while adopting the method which MacCormick has termed "the hermeneutic," 14 whereby one may make statements about rules reporting on their bindingness on others without regarding those rules as binding upon oneself. Only then would we be true to ordinary language and accurate descriptive analysis in being able to distinguish the law as a "signal that" particular action will occur from the law as a "signal for" particular action to occur. 15 And so, for the Hartian, the question "What is the law?" could not be interpreted simply as "What laws have been validly passed?" in the manner of classical Kelsenian analysis, nor yet as the sociologists' "What behaviour may be pre-

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10 Ibid., pp. 102-3.
12 Ibid., p. 88.
13 Ibid., p. 87.
dicted of the community?”—but rather “What do people actually do and what interpretation(s) do they put on their doings? What meanings are their actions seen to have (by them)?”

Hart’s analysis of how rules which were seen to impose obligations arose proceeded as follows.¹⁶ A general pattern of behaviour might come to be seen as constituting a particular social rule when a variety of factors are associated with it: when the practice is accepted by the individual as being a standard of behaviour grounding criticisms for deviance therefrom; and when reference to the practice is regarded by those who accept it as establishing a reason for action which supports demands that others conform. The idea that a rule is something consciously internalised clearly distinguishes it from mere habit. Further there exists “social pressure” against non-conformity; the mechanism by which that pressure is realised points to the initial distinction between legal and moral rules. The “seriousness” of the social pressure, the perceived importance of the rule and the possibility of its conflict with desire point to the rule as imposing obligations, as making conduct non-optional.

Thus, for example the law was normative because it was accepted to be such. It was this idea of the acceptance or internalisation of the law which allowed him to distinguish the concept of being under a legal obligation from the situation of simply being obliged by demands backed by force, where John Austin’s idea of the law as command or coercive order could not. To have an obligation implied a reference to a standard which was regarded both as a guide to conduct and as a ground for criticising others’ behaviour.

The problem for Hart qua legal positivist is that such an emphasis on law as founded on general social practice, and of legal analysis as partaking of an insider viewpoint of the participant within the legal system makes the legal positivist insistence on the contingency of all connections between law and morality difficult to maintain. Surely “seriousness of pressure” and “perceived importance of rules” imply value judgments? It is difficult to see how “obligation-imposing rules” can be analysed without reference to their content. Does the “rightness” of a rule accrue as the social pressure increases? How does one really distinguish, if social pressure is all, between the normative term of “obli-

¹⁶ Ibid., p. 85.
gation” with its connotations of rightness and legitimacy and being bound according to a standard and the idea of being simply “obliged” and having to act in a way one would otherwise not in a situation in which the possibility of a truly free choice is frustrated?

Hart is said by such an authority as Neil MacCormick to “over-call his own hand in the matter.” 17 Indeed MacCormick states that:

“Even more fundamentally than he himself recognises, Hart’s whole theory is oriented towards the thesis that people in societies and people as critical individuals do attach themselves to certain values which are both fundamental standards of judgment and the basis for all other less fundamental standards.” 18

It would seem, then, according to one commentator, that in its stress on law as a social rule, the early Hart’s legal theory leads inexorably to a model of the law as necessarily inclusive of social values and individual motivation: the very stuff of morality. MacCormick’s reconciliation of Hartian legal positivism and natural law 19 may however be an example of his noted eirenic qualities leading him astray. Certainly in the previously mentioned two collections of essays, both published since MacCormick’s exposition, 20 Hart has reaffirmed his commitment to a “full-blooded” positivism. In his Introduction to the latter book, Hart stated: “The . . . positivist stress on the elucidation of the concept of law without reference to the moral values which it may be used to promote seems to me to offer better guarantees to clear thought.” 21 A theory of law which remained true to the insights of a descriptive sociology would have to give some account of law as a cause of, or at least influence on, action. A theory of law which remained true to the tradition of legal positivism would have to produce such an account without referring thereby to the values and preferences of the agents. It is from these premises that the later Hart’s theory, which we shall now go on to consider, is developed.

18 Ibid., p. 64.
19 Ibid., p. 162.
3. The Philosophy of the Later Hart

(i) The Later Hart on Legal Obligation

In Chapter 6 of his Essays on Bentham, Hart states that: “To say that an individual has a legal obligation to act in a certain way is to say that such an action may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action.” The line that Hart is developing is that claims or statements about rights, duties or obligations have different meanings in different contexts: thus to claim that someone has a moral obligation is to make a different sort of statement, a claim of a different order, from saying that he has a legal obligation. No reference is made to obligation in general. Hart seeks to restrict the concept of legal obligation to one solely of intra-systemic reference. Thus, to have a legal obligation is simply to be subject to a requirement under the law. What the law is, and therefore what one’s legal obligations are, may be identified by empirical observation without need to refer to the potentially conflicting values of those subject to the law.

Hart’s known commitment to a form of liberalism in political philosophy, evidenced for example in his celebrated debates with both Lon Fuller and Lord Devlin, would seem to indicate that his intention is to formulate an amoral “neutral” model for law which makes no pronouncement on the morality or otherwise of the particular law. Following Austin in this, he would hold that “the existence of the law is one thing; its merit or demerit another.” It would seem that he seeks a theory of law in which the individual is allowed to assess the specific demands of a law according to the lights of his own particular morality and decide whether or not to obey that law. There is no presumption made by the theorist as to the actual obligatoriness of the law. The legality of a provision is one thing, its actual (moral?) bindingness another.

But what claim is the later Hart then making for legal obligation? What is its relationship to actual obligations? Hart states that he seeks to defend the “positivistic semantic thesis” which holds to the proposition that a claim about moral obligation is of

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an entirely different order to a statement of legal obligation. Given too that the later Hart's legal positivism demands that all reference to the reason and values of those subject to the law be excluded, then he is committed to a notion of legal obligation which would seem unable actually to motivate action. Hart's analysis gives us an obligation which does not bind, a demand for action that gives no reason for compliance. The concept of obligation in a legal context would seem to be evacuated of all meaning. A legal duty is analysed as simply a reference to what may be properly demanded of another under the existing valid rules of the legal system. Thus one might say that "simply because a law exists, one legally ought to obey it," but this tells us nothing—pace Hart—about what one in fact ought to do, either prudentially or morally. It gives us no actual reason to perform that action.

The supposed natural law thesis that the later Hart is at pains to deny is that legal and moral obligation are equivalent. According to Hart, such a view might imply that all legal obligations give rise to moral obligations, a view rebutted by the past and continued existence of morally reprehensible laws and legal régimes. He states: "The identification of the central meaning of the law with what is morally legitimate, because orientated towards the common good, seems to me in view of the hideous record of the evil use of law for oppression to be an unbalanced perspective." 24

Alternatively the assumed identification by "natural lawyers" of legal and moral obligation might lead to their claiming that a requirement in law would only constitute a legal obligation if it were already, in some objective sense, a real moral obligation: a view, which for Hart, contradicts ordinary language and common sense. As he states: "It is precisely on the ground that such a view would deny the title of 'law' and 'legal duty' to what are for many good reasons regarded as law and legal duties that this view cannot be correct." 25

However, the later Hart's proposed alternative model goes to the other extreme and more completely denies the "reality" of legal obligation by denying that legal and moral obligation are or can be equivalent for the reason that legal obligation is no obligation at all. He would seem to be committed to asserting that the

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relationship between actual obligation and legal obligation is the same as that between fact and fiction. Legal obligation, for the later Hart, simply describes a relationship within legal discourse but has no external reference to the values and reasoning and therefore the proposed action of the actor. It does not determine what is to be done.

The only account that the later Hart might give for the law’s apparent bindingness would be in terms of its congruence with pre-existing reasons for action. The law-abiding citizen becomes someone whose particular norms happen to coincide with those of the law. Taking the law’s claims seriously, what the law alleges to be an obligation may in fact turn out to be an obligation, just as statements in fiction may turn out to be true. On this account the law creates no duties but may contingently reflect them. But no real account can be given to explain the law’s perceived normativity qua law, because Hart cannot show how the claims of legal duty or obligation can have any weight in the context of the actor’s practical reasoning. The enforcement of the law can be nothing more than an exercise in organised coercion.

It is in the light of these considerations that we might understand Hart’s reassessment of Bentham’s command theory of law in the second of the Essays on Bentham considered herein.

(ii) Hart on Commands and Authoritative Reasons

Chapter 10 of Hart’s Essays on Bentham is entitled “Commands and Authoritative Reasons.” In this paper he seeks to resurrect Bentham’s idea of the law as command. A command is analysed, by Hart, as the expression of one will intended to influence, or provide a reason for, the action of another. But more than this, states Hart, a command is “peremptory”: it is intended to forestall independent deliberations on the pros and cons of the action commanded by the person commanded. He abides by the commander’s will instead of his own. The autonomy, the sense of self, of the individual is therefore extinguished in the command relationship with the imposition of the will of superior over inferior. The subordinate is denied the possibility of free choice and is treated instrumentally. In Kantian terms, at least, it is the paradigm of a relationship of immorality. Given the ever-present possibility of the reassertion of autonomy on the part of the commanded (that is, insubordination), commands are frequently associated with the idea of sanction. Sanctions are,
however, strictly secondary features which come into play only when the command relationship has actually broken down.26

The second feature of commands which Hart considers to be of importance is that of their “content-independence,” the fact that commands are used in a variety of context with changing contents, yet still be able to constitute “reasons for action.” Whether this feature makes commands independent of rather than simply variable in content is not considered by Hart. Leaving aside discussion of Hart’s particular terminology, we may consider the relevance of his analysis of command to the analysis of law.

Hart holds that the idea of the general recognition and acceptance of peremptory and content-independent reasons for action (most clearly realised in the context of a simple command relationship) is essential to understanding the concept of normativity and for coherently relating the notions of authority, legislation and obligation. The ultimate reasons for any general acceptance of, for example, the law as creating reasons for action may be legion, but they are effectively irrelevant since it is the fact of normativity which is important for the legal theorist. Hart goes on to sketch the modifications such a simple command theory would need to undergo to be applicable to a developed legal system; the most important move being “to generalise the notion of a content independent peremptory reason for action and to free it from any necessary or specific connection with the notion of command which would then fall into place as a particular of the general idea.”27 This move seems to parallel Kelsen’s notion of a “de-psychologised command,”28 which the early Hart had dismissed as being as absurd a notion as that of a nephew or niece without uncle or aunt.

In any event, Hart’s emphasis now switches from the will of a personal commander to the practice of recognition by the courts of “law-making events” as constituting peremptory content-independent reasons for action for others. Hart is now in a position to redefine social rule in terms which do not advert to value. He states that: “The general recognition in a society of the commander’s words as peremptory reasons for action is equivalent to the existence of a social rule.”29 Assuming that Hart means here

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26 Ibid., p. 254.
27 Ibid., p. 259.
only to assert a relationship of simple implication rather than formal equivalence (since no argument is provided to support the latter relation) his assertion may be reinterpreted as follows: if there is general recognition in a society of particular forms of words as creating, for the individual members of that society, peremptory content-independent reasons for action, then we may say that there exists a social rule that such "commands" be obeyed. Hart is merely pointing out one way in which a social rule may be said to exist: he has not shown that any such social rule regarding the law as constituting peremptory content-independent reasons for action does indeed exist.

It is here that the differences in methodology between the earlier and the later Hart are most evident. The earlier Hart’s approach was to consider the general notion of social rule and then refine that notion to produce a particular model of the law as a complexus of social rules differing from others, as we have seen, by its greater systematisation, its formal machinery of enforcement and the possibility of its directed change. The later Hart however first defines law as a species of command and thereafter attempts to square this idea with the notion that law is also a social phenomenon. But it must be true that the primary determinant of what makes a social rule social is not that it possess the qualities of peremptoriness or content-independence, but rather that it be generally recognised and accepted within society as a guide to action and a standard of criticism.

(iii) The Force of the Law

Problems arise in this later Hartian analysis when considering the notion of the force of the law. To be true to legal positivism, Hart has to show that the law need not claim moral force in its use of (what looks like) moral vocabulary by an exegesis of the ideas of legal duty, legal right and legal authority in terms which do not refer to any (moral) value. And yet, his basic continuing claim that law is a social rule means that he must show that the law still has some force which ensures its continued efficacy. As Hart states: "In order for a legal system to be in force it is not enough though it is necessary that in general the behaviour of the population be in conformity with its laws."30

If the law does not claim moral force then one might explain its

30 Ibid., p. 155.
efficacy by reference to the citizenry's fear of its threatened sanctions. The early Hart accepted that such a sanctions-centred view of law misrepresented the nature of many legal rules. In Chapter 3 of *The Concept of Law* he had criticised John Austin's theory on the grounds, *inter alia*, of that theory's inability to give a clear account of the idea of the law as conferring legal powers and privileges (such as the ability to make and enforce a contract) in its vision of the law modelled essentially on the criminal. Austin's sanctions-centred view was said, by Hart, to "distort the different social functions which different types of legal rules performed." 31

The later Hart's command theory would seem however to be able to account for the law's continued efficacy without either referring to the values of those subject to the law or over-emphasising the importance of the notion of sanctions. It avoids reference to the will and preferences of the subject of the law because on this theory the citizen's will is *subjugated* and *replaced* by that of the superior's within the system of law. Sanctions feature only as a last resort.

This model does not however fit in well with the early Hart's emphasis on a "critical reflective attitude" towards the law and a readiness to disobey an immoral law. In *The Concept of Law* he spoke of laws that were "too iniquitous to be applied or obeyed" 32 and stated: "The certification of something as legally valid is not conclusive of the question of obedience . . . [H]owever great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to moral scrutiny." 33 But Hart's later theory requires that the citizen's reason be excluded from deliberation of the pros and cons of action commanded by force of law. How, then, may one determine that action's (im)morality?

Hart has placed himself in an antinomy: either the will of the subject, or the will of the superior prevails. The former option seems to lapse into anarchy, the latter leaps to totalitarianism. It is interesting to note here Hart's apparent debt to Thomas Hobbes in both his political philosophy and philosophical psychology. The latter may be seen in Hart's account in the *Concept of Law* of the "minimum content of Natural Law," 34 in which the

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32 Ibid., p. 203.
33 Ibid., p. 206.
34 Ibid., pp. 189-95.
thesis is put forward that given such basic physical facts about the world as the fragility of humanity in an environment which is hostile, human beings need to band together to make their lives slightly less nasty, less brutish and less short. Such enforced group-living requires some minimal rules which regulate, at least within the group, inter-personal violence, deception and dishonesty. The former may be seen in the later Hart’s self-created dilemma which forces him to choose a totalitarian model of society as better able to account for a general system of rules backed by sanctions. In so choosing he is, of course, unable to distinguish between a legal system and rule by the Mafia, thereby confirming St Augustine’s rhetorical question: “What is the state without justice, but a great robber band?”

(iv) Social Rules and Social Values

Hart is committed to producing a model of law which is “non-cognitivist” and does not advert to “controversial notions” of values. He states, in a discussion of Raz’s The Authority of Law (1979): “I do not share but will not dispute here this cognitive account of moral judgment in terms of objective reasons for action.”35 His commitment to legal positivism is grounded in the British empirical tradition of philosophy which regards references to value with scepticism, seeing value judgments as lacking truth status because, as Sabina Lovibond put it, “there is nothing in the world that makes them true in the way that physical conditions of the world make remarks about physical objects true.”36

Hart asks that his formal analysis of legal obligation and his model of law as a command constituting an “authoritative legal reason” which makes no reference to the individual subject’s values, be preferred to those (natural law) models which incorporate within the concept of law disputed and controversial moral notions such as “the common good.” His general methodological principle outlined at the end of Chapter 10 of the Essays on Bentham37 is that, in constructing theories of law, a wider formal structure of minimal substantive input is better than theories which, incorporating problematic notions such as the objectivity of moral values, exclude notions which ordinary language would describe as law or legal.

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36 Lovibond. Realism and Imagination in Ethics, at § 1.1.
How valid is this appeal to ordinary language, however? To whose ordinary language is Hart appealing? Hart, in both his earlier and later analyses of law, seems to see law in terms of its particular linguistic categories and consequently to focus on the formal professional discourse of those who consciously acted in a legal capacity. Precedence has therefore been given by him to the lawyers' view of law rather than the ordinary citizen's. The existence of law as an autonomous discourse or language-game is the presupposition of such "ordinary language jurisprudence." From such premises it is a simple matter to assume that the legal system is a closed order which can be understood entirely within its own terms. From this perspective of the professional legal caste the law is seen not as a guide to present or future action, but as a process for judging past actions.

In any event, as we have seen, Hart's earlier ordinary language jurisprudence of The Concept of Law seems to imply conclusions regarding the fundamental role played by social values in our notion of the law, which were incompatible with legal positivism's insistence on the absolute conceptual separation between law and value. It would seem, however, that it is Hart's commitment to the doctrine of legal positivism, rather than fidelity to the truths revealed by ordinary language analysis, which determined his later philosophy.

In his later philosophy, Hart attempts to break the link between the idea of a social rule and any notions of social value, hoping thereby to retain the idea of law as a social rule without compromising his legal positivism. He does this by altering his primary analogue for the law. In both the earlier and later philosophies Hart elucidated and clarified general concepts of law by considering the ways in which the law was similar and dissimilar to other related notions. In The Concept of Law, as we have seen, the law was presented as a species of social rule, in the same genus as rules of morality or of etiquette. Law differed from such other rules most obviously in its particular degree of systematisation and in the way in which it alone could usefully be analysed as composed of two sorts of rules, primary and secondary. It was this analysis of the law that was, for the early Hart, the "key to the science of jurisprudence." What Hart did not explore in this work was what made a rule a "social rule." It was in exploring the, on the earlier Hartian analysis at least, more fundamental idea of social rules that MacCormick, at least, saw an implicit
reference to general social standards and accepted values in founding the concept of law.

The later Hart's theory of law manages to avoid the social rule/social value nexus by presenting law as primarily a species of command. The general or social aspect of law becomes a secondary attribute, a peculiarity of the genus. Law is a type of command which is, for whatever reason, generally obeyed throughout a society.

Hart's antipathy to any theory of law which adverts to notions of value has led him to produce a theory of law as fundamentally coercive. His later theory may seem to have the virtue of internal consistency in its strictly intra-systemic analysis of the notion of legal obligation as simply being something which may be properly demanded of one according to the law but, as the early Hart pointed out, the law is more than simply a hierarchy of norms. The law, as well as being a seeming self-sufficient self-referential normative structure, is also a complex social practice constituting social rules which actually guide people's actions. The law, after all, regulates not only its own creation, but other people's behaviour. Any description of the law which ignores its nature as a guide to reasoned practical decision-making and action will be a misdescription.

3. Conclusion

In an unjustly neglected essay entitled "Fallacies in Moral Philosophy," written in 1946, Sir Stuart Hampshire contrasted the approach of ancient moral philosophy, such as that of Aristotle, which had as its central focus the problems and arguments of the moral actor having to choose a particular course of action, with the approach of Hampshire's contemporary philosophers whose perspective on moral problems was rather that of the spectator or critic judging as moral or immoral, right or wrong, actions already performed. To assume that the two approaches were dealing with the same questions was, argued Hampshire, to make the same mistake as confusing aesthetic appreciation and artistic creation. Furthermore, Hampshire's contemporary moral philosophers' approach led them to ignore the primary usage of moral judgment, which was to express a moral decision and their analyses were as a result faulty and misleading.

It may be argued that Hart has made a similar error by assuming that a legal theory based on the notion of law as a series of judgments on action would be equally applicable to law related to reasons and choices for action. If the idea of the law as constituted in and by social practices is to be taken seriously, then the model of law as a self-validating self-contained hierarchy of legal norms based on the paradigm of the legal official or judge defined in and by that legal system, will be found too inadequate to express the relationship of law to action—a relationship presupposed in the concepts of legal obligation, legal authority and the conscientiously law abiding citizen.

The implication of this theory is that the model of the soldier reacting to commands barked on a parade ground does not fundamentally misrepresent the relationship between the citizen and the requirements of the law. The law is said by Hart to constitute an “exclusionary reason for action” and to predetermine or, perhaps, exclude altogether the reasoning of those subject to it. Thus the law is to be obeyed, although the particular action demanded might not have been such that the individual would have chosen to do had it not been for the law, or indeed might not have been chosen by the individual had he been legislator. But it is the actual legislator’s word which is authoritative and final. Such a theory demands that the law-abiding citizen abdicate responsibility for his action, that he commit moral suicide, for to accept the obligations imposed by the law is to place oneself under a régime which denies one’s autonomy.

Hart has thus placed himself squarely in the tradition of legal positivism by explaining legal regulation primarily in terms of coercion. The explanations historically put forward by legal positivists for the connection between law and action were in terms of the law’s essentially coercive nature. Thus the citizen was said, by Austin, to obey the law because of his fear of sanctions for non-compliance or, for the early Hart, because of his sensitivity to “social pressure,” or, as in the later Hart, because the law was fundamentally a matter of the imposition of one will over another. In portraying the law in terms of the subordination of an inferior will to a superior, the citizen is seen not as an agent actively participating within the law, but as an object passively manipulated or subdued by it.

Such an analysis of the law as will or power denied the very possibility of the citizen meaningfully raising such questions as
“Why obey the demands of the law?” or “Are the demands of the law justified?” because any answers to such questions were of no practical interest—they were irrelevant to action. The implications of the positivist analysis are that the demands of the law seek to determine the actions of the citizen in the same way that the motion of a particle is determined by the laws of physics, because they attempt to exclude, by coercion, the possibility of free choice. On any moral theory which takes individual autonomy to be a value (for example, the liberalism espoused by Hart in his celebrated debate with Lord Devlin but not the utilitarianism associated with Bentham and Austin) this creates a reason why the law should never be obeyed qua law.

The later Hart’s attempt to explain the idea of obligation in and to the law in a non-cognitive intra-systemic manner must be rejected if one accepts the validity and importance of the question of the concerned citizen—“Why should I obey what the law requires of me?”—because it fails to give an answer to that question.

Hart’s legal theories presuppose the centrality of the viewpoint of the legal official and ignore the perspective of the citizen of law as a guide to action. Hart seeks to isolate legal discourse from general practical discourse and thereby avoid consideration of general ideas of value and motivation. Such an approach is difficult to reconcile with any analysis which sees law as a social rule: we have seen the tensions which result within Hart’s two theories of law. The perspective on the law of the (generally) law-abiding citizen would seem to hold more interest for the legal theorist.

But if law is to be realised in action, it needs to provide actual reasons for compliance therewith—that is, to present the law as a means to a desired end. From this practical point of view as to what is to be done, it is no longer nonsensical to ask for reasons to obey the law. The perspective of the (generally) law-abiding citizen seeking reasons for obeying the law, as opposed to the perspective of the legal official defined in and by the law, means that jurisprudence cannot be conducted as narrow intra-systemic analysis but must be placed in the wider context of a theory of action and practical reason. The nettle of value has to be grasped.

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1. INTRODUCTION

It is easily assumed that the use of the language of fundamental rights protection by the European Court of Justice translates directly into an extension of the actual protection of those rights within the European Community. It is the purpose of this paper to question that assumption.

Whilst it would appear to be widely accepted\(^1\) that the initial motivation for the adoption of the terminology of fundamental rights by the European Court of Justice was a desire to defend the supremacy of Community law over national law, a close analysis of certain recent cases in the European Court shows that the court has begun to use rights talk in a different way.

References to fundamental rights are now being made by the court in order to extend its jurisdiction into areas previously reserved to Member States' courts and to expand the influence of the Community over the activities of the Member States. This shall be termed the 'offensive' use of fundamental rights, to be contrasted with the earlier 'defensive' use.

It will be argued that the court is using fundamental rights 'offensively' in two ways. On the one hand, it is extending the use of the concepts of fundamental rights in specific areas of Community law previously untouched by those concepts. On the other hand, it is undertaking a more general expansion of its jurisdiction, in the guise of fundamental rights protection, into areas previously the preserve of Member States, by means of subtle changes in its formulation of a crucial jurisdictional rule.

With respect to both the offensive and defensive uses of fundamental rights it must be questioned whether the court has ever been motivated by a concern for any supposed lack of adequate protection of fundamental rights within the European Communities. It is the argument of this

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paper that the court has employed fundamental rights instrumentally, so as to accelerate the process of legal integration in the Community. It has not protected these fundamental rights for their own sake. It has not taken these rights seriously.

2. THE DEFENSIVE USE OF HUMAN RIGHTS

Starting in the late 1960s increasing concern was expressed in the courts in Germany and Italy on the question of whether or not the fundamental rights entrenched in their respective national constitutions were recognised and protected within European Community law. Their fear was that these fundamental rights would gradually be eroded as the competences of the Community increased.

In response to the threat that national courts would resolve their dilemma by opting for the supremacy of their own national constitutional provisions on fundamental rights protection the European Court discovered that the protection of fundamental rights was indeed a general principle of European Community law. This development contradicted its own previous case law rejecting the idea of fundamental rights protection within the Community legal order, and was effected notwithstanding the absence of any mention or list of fundamental rights within the texts of the Community treaties.

In a series of cases, in response to references from the German courts, the European Court began to use the vocabulary of fundamental rights protection.

The European Court first proclaimed the new doctrine of fundamental rights protection, in passing, in Stauder v Ulm. Referring to a decision by the Commission to allow butter to be purchased at low cost by, inter alios, senior citizens on proof of their status, the court stated that fundamental rights were 'enshrined in the general principles of Community law and protected by the court'. This reference to 'fundamental rights' was expanded upon by the court in Internationale Handelsgesellschaft to the effect that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.' Then, in Nold the court held that, in addition to Member States' constitutions, international conventions could also supply guidelines which could be


taken into consideration by the court on matters concerning claims to 'fundamental rights'.

Subsequent case law has indicated that these international conventions taken into account by the court include the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter and a number of conventions of the International Labour Organisation.

It is the European Convention on Human Rights, which has been ratified by all the Member States of the Community, which has become, for the court, the most important of these international documents. The European Convention on Human Rights was first specifically referred to by the court in 1975 in Rutili and has since been quoted by the court on numerous occasions.9

The European Convention on the Protection of Human Rights and Fundamental Freedoms was expressly mentioned in the 1987 preamble to the Single European Act10 as one of the sources of the fundamental rights recognised by the Community.

Formal recognition in a Treaty article of the status of the European Convention as a source of fundamental rights to be protected by the Community was given in the Treaty in European Union agreed upon at the Maastricht Summit of December 1991.11

It is now beyond question that the early use of human rights discourse seen from Stauder onward was primarily defensive of the matter of the supremacy of Community law. As Professor Joseph Weiler has stated, on a number of occasions:12

'The surface language of the court in Stauder and its progeny is the language of human rights. The deep structure all about supremacy . . . [It was] an attempt to protect the concept of supremacy threatened because of the apparent (largely theoretical) inadequate protection of human rights in the original treaty systems.'

Subsequent case law has shown that this particular strategy to defend the supremacy of Community law and of the European Court has been a largely successful one, despite initial caution on the part of the German

7. See in particular the cases cited in Toth, 'Human Rights' in Encyclopaedia of European Community Law (1990) p 284 et seq.
11. See art F(2) of the Common Provisions of the Treaty on European Political Union 1992 which is in the following terms: 'The [European] Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of Community Law'.
courts\textsuperscript{13} and some continuing reservations from the Italian courts.\textsuperscript{14} The European Court's policy on fundamental rights appears, thus far, to have averted any significant damage by the courts of the Member States to the integrity, unity and supremacy of the Community legal order.

3. THE OFFENSIVE USE OF HUMAN RIGHTS

1. Specific application of fundamental rights principles to national legislation

In 1989 Mancini J of the European Court summarised the position the court had achieved in relation to fundamental rights:\textsuperscript{15}

'Reading an unwritten bill of rights into Community law is indeed the most striking contribution the court made to the development of a constitution for Europe. This statement should be qualified in two respects. First ... that contribution was forced on the court from outside, by the German and, later, the Italian Constitutional Courts. Second, the court's effort to safeguard the fundamental rights of the Community citizens stopped at the threshold of national legislations.'

One feature of the defensive use of fundamental rights was that these rights were applied only to Community acts. Initially, at least, human rights were not applied directly to the activities of Member States.\textsuperscript{16} It is arguable that the court no longer feels itself constrained to observe any distinction between Community acts and Member State acts, at least in relation to fundamental rights protection. The court has increasingly been applying fundamental rights considerations to the acts of Member States.

The Rutili decision\textsuperscript{17} appeared to lay the foundations for this later development. The French Ministry of the Interior sought to restrict the movements of an Italian national within France, derogating from art 48 of the EC Treaty on the free movement of workers. The grounds stated for such derogation were those set out in art 48(3) namely 'public policy, public security and public health'. The court held that the scope of the public policy derogations could not be determined unilaterally by Member States, but was a matter to be determined by Community law.

However, the court went on to suggest that the limitations on Member State action under Community law were paralleled by certain provisions of the European Convention on Human Rights:\textsuperscript{18}

\textsuperscript{13} See judgment of 4 April 1987 of the German Federal Constitutional Court, \textit{Wunsche Handelsgesellschaft} reported in [1987] 3 CMLR 225.

\textsuperscript{14} See \textit{Frontini v Ministero delle Finanze} Case 183 of 27/12/73 reported in [1974] 2 CMLR 385–90. See also judgment number 232 of 21/4/89 of the Italian Constitutional Court and reported and commented upon by Angiolini, '\textit{Transformazione dei \textquoteright princìpi fondamentali}:' [1991] 1 Rivista Italiana di diritto pubblico comunitario 21.

\textsuperscript{15} Mancini, 'A Constitution for Europe' (1989) 26 CML Rev 595, 611.


\textsuperscript{17} (36/75) [1975] ECR 1219.

\textsuperscript{18} Para 32.
These limitations... are a specific manifestation of the more general principle enshrined in arts 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms... which provides[s], in identical terms that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above quoted articles other than such as are necessary for the protection of those interests "in a democratic society".

The Court alluded to fundamental rights considerations in the context of Member State action. It did not, however, apply them directly, or indeed hold them applicable, to that Member State action. The allusion to human rights is made simply to justify and reinforce the court's interpretation of the Community instruments.

Advocate-General Trabucchi stated in his opinion in Watson and Belmann:

"Some learned writers have felt justified in concluding that the provisions of the [European] Convention must be treated as forming an integral part of the Community legal order, whereas it seems clear to me that the spirit of the judgment [in Rutili] did not involve any substantive reference to the provisions [of the European Convention] themselves but merely a reference to the general principles of which, like the Community rules with which the judgment drew an analogy, they are a specific expression."

In the Advocate-General’s opinion, the novelty of Rutili’s reference to human rights rather lay in the context in which that reference was made, namely in relation to a discretionary act of a Member State which restricted a Community economic freedom.

In Watson and Belmann itself there was argument to the effect that fundamental rights considerations were relevant to considering the validity of certain Italian regulations which provided for the compulsory registration of Community nationals staying in Italy. Advocate-General Trabucchi asserted that the European Court might look at the alleged infringement of a fundamental right by a Member State body at least to the extent to which that infringement impacted also on economic rights protected by Community law. The court, however, did not take up the human rights points, but decided the case on other grounds.

It is not until 1989 that the court was seen openly to take the step of assessing the validity of an act of a Member State on the basis of fundamental rights considerations. In Wachauf v Federal Republic of Germany the plaintiff was a tenant farmer. During the period of his lease he built up his dairy herd to devote his farm exclusively to dairy production. In the process he obtained a milk production quota. Community Regulation 837/84 provided that these milk production quotas transferred on the sale, lease or inheritance of the land to the person taking over the running of the farm, until the surrender of the quota. If the quota were

surrendered to the State, compensation was paid to the milk producer. According to the German Order which implemented the Community milk compensation scheme in Germany a tenant farmer was unable to surrender his quota and claim compensation without the consent of his landlord. In Wachauf's case this consent was withdrawn and he was therefore faced with the situation of being deprived, without compensation, of the fruits of his labour in building up the farm as a milk producing concern.

It was submitted that this result would be incompatible with the requirements of the protection by the European Court of fundamental rights in the Community being potentially an 'unconstitutional expropriation without compensation'.

The court held:22

'[I]t must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.'

Nevertheless, in that case, the pleas with respect to fundamental rights did not cause the court to hold the Community regulations to be invalid. As in Stauder the court held that the Community regulation in question was expressed in broad enough terms as to allow for compensation to be granted, thereby allowing fundamental rights to be respected. Once again the problem was said to lie in the Member State's implementation provisions and not in the Community regulations.

This decision, in effect, rendered the implementing order of the German authorities invalid on fundamental rights grounds. The German court was instructed to look again at the primary Community legislation in the light of fundamental rights considerations set out by the European Court and make their decision accordingly. In the event, the German court came to the conclusion that the relevant section of the German order was void as offending against the principle of equal treatment, and awarded Wachauf compensation.23

The decision in Wachauf is of significance because, for the first time, the European Court applied fundamental rights principles to national acts formulated in implementation of Community legislation. The court held that where a Community provision incorporates the protection of a fundamental right national measures which implement that provision must give effect to the provision in such a way that the fundamental right is respected.

22. Ibid., p 2639, para 19 [emphasis added].
23. The German court's decision is reported as Re the Kuechenhof Farm (Case 1/2-E 62/85) in [1990] 2 CMLR 289. See also a parallel case in Britain R v Minister of Agriculture, Fisheries and Food, ex p Bostock [1991] 1 CMLR 681 at 687.
This may indeed be a conservative interpretation of the implications of Wachauf. The European Court itself, in the subsequent case of *Elleniki Radiophonia Tileorasi (ERT) v Dimotiki Etairia Pliroforisis*,24 interpreted Wachauf in broader terms. The court restated its decision in Wachauf in these terms:25

‘[M]easures which are incompatible with respect for human rights, which are recognised and guaranteed [in Community law], could not be admitted in the Community.’

It is not clear from the terms of the judgment in ERT whether the court in this passage is referring to Community measures or Member State measures, but given that ERT concerned measures instituted by Greece, a Member State, in derogation from Community law, the latter conclusion is not unjustifiable.

Further, in ERT the court adopted a more forthright fundamental rights approach to the question of the admissibility of public policy derogations by Member States from Community law than is evidenced by Rutili. ERT concerned a challenge by an independent broadcasting company in Greece to the enforcement of a State monopoly on the provision of television services within Greece. Greek law forbade any party other than the State Television Company to broadcast television programmes within Greek territory. The defendant company defied this ban and when prosecuted, pleased in their defence that the television monopoly was contrary both to Community law (*inter alia*, on the free movement of goods and services) and to art 10 of the European Convention on freedom of expression and information. The Greek government defended the television monopoly as a public policy derogation from the free movement of goods and services under art 66. The court held26 that:

‘When a Member State invokes arts 56 and 66 of the Treaty in order to justify rules which hinder the free movement of services, this justification, which is provided for in Community law, must be interpreted in the light of general principles of law, notably fundamental rights. The national rules in question may only benefit from the art 56 and 66 exceptions insofar as they are compatible with fundamental rights, the observance of which the court ensures.’

And, the court went on:27

‘The limitations imposed on the power of Member States to apply the provisions of arts 66 and 56 of the treaty for reasons of public order, public security and public health must be understood in the light of the

25. *ibid*, para 41 [authors’ translation]. Compare the difference in this formulation to that repeated in Hauer (44/79) [1979] ECR 3727 at 3745, para 15: ‘[T]he court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights which are recognised by the Constitutions of those States are unacceptable in the Community’ [emphasis added].
26. Para 43 [authors’ translation – emphasis added].
27. Para 45 [authors’ translation].
general principle of freedom of expression, enshrined in art 10 of the European Convention.’

In ERT, the European Court is once more seen to be extending its jurisdiction in the matter of fundamental rights. The court is, in effect, applying the text of the European Convention not only to the acts of Community institutions but also to any attempts by Member States to derogate from the market freedoms assured by Community law. It is a development of Rutili precisely in that it uses the European Convention on Human Rights as an additional standard on the basis of which to judge Member State action, rather than, as in Rutili, merely a declaration which happens to echo general principles of existing Community law.

Joseph Weiler, writing before the ERT decision28 suggested that the following statement of principle could be derived from the judgment in Rutili:

‘If the Community law is but a specific manifestation of a general principle it should follow that the general principle forms part of the Community regime which controls the practices of the Member States under the derogation. It further follows, that a national practice which violated this general principle without violating a specific rule of the Community regime, would violate Community law and, by virtue of the principle of supremacy, be inapplicable.’

Weiler arguably went too far in drawing this conclusion from Rutili, but his formulation may well be an accurate statement of Community law following ERT.

Most recently, The Society for the Protection of Unborn Children (Ireland) Ltd v Stephen Grogan29 represents the encroachment by Community Law on a fundamental precept of the Irish Constitution, in raising the possibility that the Irish guarantee of the right to life of the unborn child, and the consequent prohibition on abortion in the Irish Republic might be held to be incompatible with the fundamental objectives of the Community. This case will be discussed in full below. It is sufficient to note at this stage that the jurisdictional expansion in this instance was not achieved through upholding the pre-eminence of individual rights. Rather, the court treated the claim to fundamental rights as concerning a restriction on the Community freedom to provide and receive services. In so doing the court effectively ignored the clear wording of the Irish Constitution which explicitly extends human rights protection to the unborn.

2. Changing formulations of the general jurisdictional rule

The line of cases from Wachauf through to Grogan also evinces an incremental expansion of the area of law and of Member State action which is

subject to fundamental rights validation by the European Court of Justice.

In Cinéthèque v Fédération nationale des cinémas français the court stated:

'Although it is true that it is the duty of this court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.'

Judge Pescatore, commenting on the Cinéthèque decision, wrote:

'This position shows that the court is conscious of the limits of its jurisdiction: called upon to guarantee respect for the law within the Community it has no mission to busy itself with the defence of human rights within the sphere of the legislative sovereignty of Member States.'

Nevertheless, the Cinéthèque formula was reworded in Demirel v Stadt Schwäbisch Gmund:

'[The Court] has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law'.

This change of emphasis from that which is within the jurisdiction of the national legislator to that which is within the jurisdiction of Community law is a subtle one, but one which may nevertheless have revolutionised the impact of fundamental rights considerations on national administrative and legislative action. For one thing it paved the way for the decision in Wachauf which applied fundamental rights standards to a Member State act in implementation of a Community rule. Such an act is one which clearly falls within the jurisdiction of the national legislator and also falls within the scope of Community law. The application of fundamental rights criteria in this case would not have been consistent with the reasoning of Cinéthèque but fell within the Demirel formulation.

In ERT, the court appeared to go further, stating the following:

'According to its jurisprudence . . . [see the decisions in Cinéthèque and Demirel] the court cannot assess, from the point of view of the European Convention on Human Rights national legislation which is not situated within the body of Community law. By contrast, as soon as any such legislation enters the field of application of Community law, the court, as the sole arbiter in this matter, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights.'

30. (60-1/84) [1985] ECR 2605, para 26 [emphasis added].
32. (12/86) [1987] ECR 3719, 3754, para 28 [emphasis added].
33. See note [24], para 42 [authors' translation – emphasis added].
as laid down in particular in the European Convention on Human Rights – the observance of which the court ensures.  

The implication of the court is that it would examine all matters which did fall within the area of Community law. The only Member State actions which the court might decline to vet on human rights grounds are, therefore, those which occur in an area of exclusive Member State jurisdiction. This concept of exclusive Member State jurisdiction may itself be open to future redefinition by the court.

This implication was spelt out by Advocate-General Van Gerven in Grogan when he stated: 

‘In Cinéthèque... it was stated that the court’s power of review did not extend to “an area which falls within the jurisdiction of the national legislator”, a statement which, generally speaking, is true. Yet once a national rule is involved which has effects in an area covered by Community law (in this case art 59 of the EEC Treaty) and which, in order to be permissible, must be able to be justified under Community law with the help of concepts or principles of Community law, then the appraisal of that national rule no longer falls within the exclusive jurisdiction of the national legislature.’

The court in Grogan did not expressly adopt the Advocate-General’s formulation, asserting that it was competent to pronounce on fundamental rights issues ‘where national legislation falls within the field of application of Community law’ but that ‘the court has no such jurisdiction with regard to national legislation lying outside the scope of Community law.’ Nevertheless, the implication as to the requirement of exclusive national jurisdiction remains. This represents, in practice, a major expansion of the Cinéthèque reasoning, and a doctrine of much wider application than the strict terms of the decision in Wachauf.

4. IS THE EUROPEAN COURT TAKING RIGHTS SERIOUSLY?

The adoption of the discourse of fundamental rights seemed to commit the European Court to the principle that certain Community rules of law should be measured by the standard of their respect for fundamental rights. If the rules in question failed to respect particular fundamental rights then this would of itself be a ground for declaring them invalid. A question then arises as to the competence of the European Court to subject even primary articles of the Treaty which created it to scrutiny on fundamental rights grounds.

Manfred Daues has stated, in reference to fundamental rights, that:

34. See note [29], para 31 of the Opinion of the Advocate-General of 11 June 1991.
35. ibid, para 30 of the Judgment of the court.
The European Court of Justice: taking rights seriously? 237

'Strong arguments point to the conclusion that elemental legal principles which are based on the ultimate concept of law itself and which therefore constitute the fundamental pillars of any society take precedence even over the Community treaties; it would appear to be inconsistent with their nature as an ethico-juridical guarantee of a fundamental, prepositive and supra-positive type if positive law of whatever type were to be given priority.'

Dauces would appear to suggest that fundamental rights are at the peak of the normative hierarchy of laws against which all rules of positive Community law, even Treaty provisions, may be measured and if found wanting, declared invalid.37

This is, in essence, the basis of the European Court's claim to national courts that it could be relied upon to protect fundamental rights, implicit in the court's original adoption of fundamental rights discourse. The German and Italian national courts could only accept the supremacy of European law if they were persuaded that the European Court was truly a guardian of the rights of the individual against possible abuse by the institutions of the Community. Legitimate action by Community institutions was to be limited by the higher standard of respect for fundamental rights.

However in the cases in which the court has adopted fundamental rights discourse, it has been the general Community rule or the Community objective which has prevailed against claims as to the violation of fundamental rights. A recent survey of human rights protection in the European Community admitted:38

"[A]lthough the court has increasingly referred to the [European] Convention, the European Social Charter, international treaties and constitutional principles and traditions, the rights contained therein have hardly been developed by the court, and they have rarely been relied on to give concrete protection to an individual.'

It is the contention of this paper that these common outcomes are not coincidental but follow directly from an instrumental manipulation of the nature and importance of the concept of fundamental rights protection. In each case the court has manipulated the usage of fundamental rights principles, endowing these principles with just enough significance in Community terms to allow for the triumph of the Community will.

1. Wachauf — human rights as an interpretative principle

In Wachauf fundamental rights, far from being regarded as a universal and overarching principle of validation, were treated as no more than a principle of interpretation which Member States should adopt when

implementing Community legislation. Firstly, the court firmly placed its regard for fundamental rights in a position effectively subordinate to its regard for the common (Community) good. It stated that:"39

'The fundamental rights recognised by the court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights.'

The court in *Wachauf* went on to state:40

'Since . . . [the requirements of the protection of fundamental rights] . . . are also binding on the Member States when they implement Community rules, the Member States must, *as far as possible*, apply those rules in accordance with those requirements.'

Not only may Community rules discount fundamental rights in the name of common objectives, but the Member States, in implementing those Community rules, need have regard to human rights concepts only as a principle of interpretation, and only to the extent that this is compatible with the wording of the legislation. Where Community actions in pursuit of Community objectives, are concerned, claims to fundamental rights are quite clearly not accorded fundamental status.

2. ERT – human rights used to validate national action

A contrasting approach is apparent as regards Member States’ actions which are not in implementation of Community law. The issue arises clearly when a Member State seeks to invoke its rights under the Treaties to derogate from a provision relating to the Community economic freedoms. In *ERT*, the court held that such derogations must, not only be compatible with the general administrative principles of Community law, but should also conform to the principles of fundamental rights which the court claims to respect and protect.

On this approach, fundamental rights reclaim their position at the peak of the normative hierarchy, and Member State actions, specifically those actions which detract from fundamental Community economic freedoms, must be subject to them. The court’s apparent reassertion of the pre-eminent position of fundamental rights would seem to be in conflict with *Wachauf*, where human rights were treated as subordinate to Community objectives. The court itself does not appear to see any contradiction between the decisions in *Wachauf* and *ERT* since it quotes the former case in support of its argument in the latter.

How then are *Wachauf* and *ERT* to be reconciled? One may note

39. See note [21], 2639, para 18.
40. *Ibid*, 2639, para 19 [emphasis added].
immediately that whereas in *Wachauf* the court was examining the 
validity of a Community provision, in *ERT* the matter at issue was a 
provision of national legislation. There would appear then to be two 
standards in operation – one standard for Community acts, another 
standard for individual Member States’ acts derogating from Com-
munity law. In the former, human rights are subordinated to and have to 
be interpreted in the light of Community objectives. In the latter, human 
rights are presented as an additional hurdle which national States’ acts 
have to negotiate in order to be accepted as valid.41

3. Grogan – fundamental rights avoided

In 1989 the Society for the Protection of the Unborn Child brought a case 
against the office bearers of various Students Unions in Ireland seeking 
an injunction to prevent the students from distributing various publica-
tions which contained, *inter alia*, information about clinics which per-
formed legal abortions in Great Britain.42 The case was referred to the 
European Court of Justice for a preliminary judgment under art 177 of 
the EEC Treaty.

In 1983 an amendment was made to the Irish Constitution in the 
following terms:43

‘[T]he State acknowledges the right to life of the unborn and with due 
regard to the equal right to life of the mother, guarantees in its laws to 
respect and, as far as practicable by its laws to defend and vindicate that 
right.’

It was unclear, at the time of this reference, whether or not the European 
Court would recognise and protect a fundamental right proclaimed in 
the Constitution of only one Member State, or rather would grant this 
protection only where the right was proclaimed in some, a majority, or 
indeed all of the Member States. In *Nold* the court had stipulated that it 
could not ‘uphold measures which [were] incompatible with fundamen-
tal rights recognised and protected by the Constitutions of [Member] 
States’.44 In *IRCA45* Advocate-General Warner stated in his Opinion 
that ‘a fundamental right recognised and protected by the constitution of 
any Member State must be recognised and protected in Community 
law.’

On the basis of this opinion, one commentator, writing in 198846 stated 
that:

41. See in this regard *R v Kirk* (63/83) [1984] ECR 2689 and *Pinna v Caisse D’Allocations 
Familiales de la Savoie (No 1)* (41/84) [1986] ECR 1, and (No 2) (359/87) [1990] 2 CMLR 
561.
42. The earlier stages of the case in Ireland before the European Court reference are 
reported as *SPUC v Grogan* [1990] 1 CMLR 689.
43. Now art 40(3)(iii) of the Irish Constitution.
It is probable that the European Court would accept as a general principle of Community law a principle which is constitutionally protected in only one Member State. In other words, any measure which is contrary to human rights in Germany or any other Member State will be annulled by the European Court.

The Irish Constitution's recognition and protection of the right to life of the unborn is a case of a fundamental right unequivocally expressed in only one Member State of the Community. However, in Grogan neither the Advocate-General nor the court followed the 'maximalist' approach of IRCA on Community protection of human rights. In his Opinion, Advocate-General Van Gerven described the point at issue in the case in the following terms:

'Two rules which stem from fundamental rights come into conflict in this case: the freedom of the defendants in the main proceedings to distribute information, which I have accepted as being the corollary of the Community freedom to provide services vested in the actual providers of the service ... and the prohibition to assist pregnant women, by providing information which, according to the Irish Supreme Court, results from the constitutional protection of unborn life.'

The Irish Constitution's grant of a 'fundamental right' to life was, in effect, placed by the Advocate-General at precisely the same normative level as the right freely to provide services throughout the Community. Protection of the former right demands a restriction on the distribution of information, while the stimulation of free trade appears to require freedom of information.

In its judgment delivered on 4 October 1991 the European Court treated the Irish Constitution's proclamation of 'the right to life of the unborn' as nothing more than a restriction on abortion. The court only used the phrase 'right to life of the unborn' in quoting the relevant provision of the Irish Constitution. Thereafter it glossed over arguments to the effect that abortion could not be granted the status of a service to be protected under Community law on the grounds that abortion constituted an attack on fundamental rights guaranteed in the Irish Constitution.

Walsh J had stated in the Irish Supreme Court at an earlier stage in the case:

'Although the provision of abortion within the law in particular Member States provides profit for those engaged in it, that could scarcely qualify it to be described as a service of economic significance of a type which must be available in all the Member States of the Communities especially when it is manifestly contrary not only to the public morality of the Member State in question and to the ordre public but also destructive of the most fundamental of all human rights, namely the right to life itself.

47. See note [29], Opinion of the Advocate-General of 11 June 1991, para 25.
48. See note [29].
49. SPUC v Grogan [1990] 1 CMLR 689 at 704.
The fact that particular activities, even grossly immoral ones, may be permitted to a greater or lesser extent in some Member States does not mean that they are to be considered within the objectives of the treaties of the European Communities, particularly the Treaty of Rome, which is the Treaty of the European Economic Community. *A fortiori*, it cannot be one of the objectives of the European Communities that a Member State should be obliged to permit activities which are clearly designed to set at naught the constitutional guarantees for the protection within the State of a fundamental human right.'

The European Court characterised these arguments, which surely go to the heart of the question of whether or not abortion should be protected and promoted as a service under Community law, as moral rather than legal, and hence arguments which did not raise justiciable issues. It stated:

'It is not for the court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.'

The European Court’s refusal to look at the morality of Member States legislation sits uneasily with its judgment in *ERT*, in which it was willing to scrutinise national legislation for its compatibility with fundamental rights.

Having translated the Irish fundamental right into what it regarded as communitarian legal terms, namely as a restriction on the availability of abortion, the European Court then defined abortion as ‘a medical activity which is normally provided for remuneration [and] may be carried out as part of a professional activity’. Accordingly, abortion constituted ‘a service within the meaning of art 60 of the treaty.’

Article 59 of the Treaty prohibits any restriction by Member States on the freedom to supply services throughout the Community. However, the European Court held that the injunction which was sought against the students did not constitute a breach of art 59 because the link between the students’ associations and the British abortion clinics was ‘too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of art 59 of the Treaty.’

The terms of the judgment left open the possibility of a formal agency relationship being set up between the British abortion clinics and activists in Ireland. This would have allowed the latter, as associates of an economic operator established in another Member State, to receive the full protection of European law regarding freedom to provide and receive services, as against the provisions of the Irish constitution. The obvious response of the Irish government would have been to claim derogation from Community law on this matter on the grounds of public

50. See note [29], judgment, para 20.
policy, under arts 56 and 66 of the Treaty of Rome. However the ERT judgment restricted the discretion of Member States in this area in that it requires such public policy derogations to be justified in terms of their compatibility with the European Convention on Human Rights.

A Protocol annexed to the Maastricht Treaty on European Political Union provides that nothing in the Treaties of the European Communities shall affect the application in Ireland of art 40.3.3. of the Constitution. This appears to be an attempt to forestall further challenge to the Irish Constitution under Community law. It is arguable that the Protocol may be insufficient to allow this article of the Irish Constitution to be upheld against the principle of freedom of services where an Irish citizen travels outside Ireland in order to have a legal abortion since this involves a clear inter-state element.

The European Court’s interpretation of the Irish provision on unborn life has the effect of extending that court’s jurisdiction into the very heart of the Irish Constitution. As a result the onus now falls on the Irish authorities to justify in Community law their ex facie interference with Community ‘fundamental rights’.

Notwithstanding the Maastricht Protocol, Grogan remains authority for the proposition that the provisions of national constitutions of Member States are, in fact, subordinate law, to be interpreted in the light of and applied only insofar as permitted by the Foundation Treaties of the European Communities.

4. Heylens – the elevation of Community rights to the status of fundamental human rights

Another technique used by the court in relation to fundamental human rights has been a confusion of terminology which has resulted in the elevation of the free market freedoms guaranteed in the Community treaties to a status equivalent to that of fundamental human rights. In ADBHU it was stated that:

54. 'Protocol Annexed to the Treaty on the European Union and to the Treaties Establishing the European Communities' in Europe Documents 1750/1 of 13 December 1991.
55. In a judgment of 17 February 1992 (reported in full in the Irish Times of 18 February 1992) Costello J of the Dublin High Court granted an injunction at the instance of the Irish Attorney-General preventing a 14 year old Irish girl, who had become pregnant as a consequence of a rape, from travelling outwith Ireland to secure an abortion. This decision was overturned by the Irish Supreme Court, which gave its reasons on 5 March 1992 (reported in full in the Irish Times of 6 March 1992). The Supreme Court decided to lift the injunction because of a real and substantial risk of the girl committing suicide. The implications of the ruling in and for European Community law are unclear since the Supreme Court expressly declined to consider submissions made to them under European Community law, thereby avoiding the need for another art 177 reference to the European Court. Finlay CJ stated:

'In this case the court has decided the questions at issue without reference to submissions made under European law. No decision on any question of European law is therefore necessary to enable the court to give judgement.'

56. Procureur de la République v ADBHU (240/83) [1985] ECR 520, 531 [emphasis added].
"[I]t should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the court ensures observance."

The Community economic freedom, the free movement of goods was placed on the same conceptual level as a 'fundamental right'. But the court was to go further.

In *Heylens* the court stipulated that:

'Since free access to employment is a fundamental right which the treaty confers individually on each worker of the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right.'

From the terms of the *Heylens* decision it appears that the four freedoms of workers, services, goods and capital enshrined in the Treaties can be translated into individuals' fundamental rights. It would seem, then, that there is no distinction and hence no hierarchical relationship being posited by the European Court between the basic human rights outlined, for example, in the European Convention on Human Rights and the free market rights arising out of the Treaties of the Community.

If this is indeed the case, it is difficult to see any foundation for the European Court's claim that it will measure the specific enactments of Community law against some pre-eminent standard of respect for and protection of human rights. The invocation of the idea of fundamental rights by the European Court does not set essential limits to lawful executive action, because executive action which has as its object the promotion of the four market freedoms is itself, in the vocabulary of the European Court, instantiating a fundamental right. A claim to violation of certain fundamental human rights hence ceases to be a 'trump card' against executive action.

One can no longer speak of a 'validation' of a lower norm by a higher norm. Instead, two norms of equal qualitative significance are balanced one against the other. Such a procedure can be seen in the opinion of the Advocate-General in *Grogan*. Ultimately, he balances freedom of information (seen as a corollary of the Community freedom to provide services) against the right to life of the unborn child. The result of this equality in practical terms can only be that the court will find it easier to subordinate a fundamental human right to a Community economic freedom, as did Advocate-General Van Gerven in *Grogan*.

Such a slippage from Community economic freedoms to fundamental rights is, at best, contentious. It implies a positive stance on an issue which remains controversial in international law, namely, the relationship between different categories of rights. For example, how are classic civil and political rights set out in the European Convention on Human Rights to be compared to claims to various economic, social and cultural

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58. See note [29], para 19 of the Advocate-General's Opinion.
rights set out in such documents as the European Social Charter and, it would now seem, the Treaty of Rome. The notion that, for example, the free movement of capital is a fundamental right in the international community and not just in the European Community is by no means generally accepted.\(^{59}\)

5. CONCLUSION

These developments in the court’s jurisprudence have considerable practical implications for all the Member States of the Community, not least for the United Kingdom which has not formally incorporated the European Convention on Human Rights into its domestic law.

Given the jurisdictional expansion seen in the reformulation of the Cinéthèque dictum in ERT and Grogan, the court now sees itself as being able to review national legislation wherever this operates in an area touched by Community law. ERT reveals that such assessment of the validity of national law will be made from a point of view of its respect for human rights. Similarly national courts would now seem to be obliged to give effect to the European Convention on Human Rights, as this would be interpreted by the European Court of Justice, if not the European Court of Human Rights in Strasbourg, in all questions before them which fall within the field of Community law.\(^{60}\) Article F(2) of the Common Provisions of the Maastricht Treaty may encourage this trend.

Further, there would seem to be no reason to prevent the Court of Justice also assessing national legislation on the basis of other general principles of Community law, such as the doctrine of proportionality. In this way, it would seem that where human rights have ventured, other general principles will follow and new, Community, doctrines of administrative law will thereby be imposed on the United Kingdom courts and administration.

For example, it is clear that the House of Lords in *R v Secretary of State for the Home Department, ex p Brind*\(^{61}\) could not have denied the applicability of the doctrine of proportionality had the Secretary of State’s decision been taken in implementation of Community legislation. The House of Lords would then have been obliged to apply, *inter alia*, the doctrine of proportionality. This has already occurred in the various cases which have arisen out of challenges to the English Sunday trading laws on the basis of their alleged incompatibility with art 30 of the Treaty of Rome.\(^{62}\)

Further, the jurisdictional rule as formulated in ERT and Grogan would suggest that the general principles of European law should be

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applied by national courts not simply where national authorities act in implementation of a Community rule but in fact when they act in any field touched by Community law. And it is clear that the fields where Community law can be said to have no influence are becoming fewer. It will become increasingly difficult for the British courts to resist the application, within domestic law, of not just proportionality but also the whole range of principles of administrative justice developed in and applied by the European Court of Justice.63

At times the court has seemed willing to apply human rights as if they were superior to (and hence grounds for invalidating) the acts of Member States. However, at the same time, it clearly subordinates human rights to the end of closer economic integration in the Community. In doing so the court has treated human rights, and in particular their place in any normative hierarchy, in a confused and ambiguous way.

Evidently it is economic integration, to be achieved through the acts of Community institutions, which the court sees as its fundamental priority. In adopting and adapting the slogan of protection of human rights the court has seized the moral high ground. However, the high rhetoric of human rights protection can be seen as no more than a vehicle for the court to extend the scope and impact of European law.

By using the term ‘fundamental right’ in such an instrumental way the court refuses to take the discourse of fundamental rights seriously. It thereby both devalues the notion of fundamental right and brings its own standing into disrepute.

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The protection of fundamental rights in Scotland as a general principle of Community law - the case of Booker Aquaculture

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Case: Booker Aquaculture Ltd (t/a Marine Harvest McConnell) v Secretary of State for Scotland (Judicial Review) [2000] U.K.H.R.R. 1 (IH (1 Div))

‘E.H.R.L.R. 18 This article examines the background to the recent reference to the European Court of Justice by the Inner House of the Scottish Court of Session in Booker Aquaculture v. The Scottish Ministers. The case concerns the extent to which general principles of Community law protect the right to property in Article 1 of Protocol 1 to the European Convention on Human Rights. The author explores the constitutional issues raised by the case and their implications for the respective roles of the national courts and the European Court of Justice in the sphere of fundamental rights’ protection. He highlights certain inconsistencies between the approach of the Strasbourg and Luxembourg courts, and suggests that since the deprivation of property at issue in Booker Aquaculture has been affirmed by the Scottish Executive, it may no longer be necessary for the petitioner to assert its Convention rights through Community law. The Scotland Act 1998, he concludes, provides an alternative means to assert Convention rights directly in the national courts.

Introduction

Article 1 of the First Protocol to the European Convention specifies the “protection of property” as being among the rights to be respected by signatory States, stating that:

"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 to secure payment of taxes or other contributions or penalties."

This provision is one of the Convention rights set out in Schedule 1 to the Human Rights Act 1998. With effect from October 2000 (the currently anticipated date for the coming into force of the Human Rights Act) it will be unlawful for a “public authority” to act in any way which is incompatible with this right, among the other incorporated Convention rights. The Scotland Act, however, has already effected a partial implementation of the Human Rights Act, at least as regards the activities of the Scottish *E.H.R.L.R. 19 Parliament and Executive. The Scotland Act received Royal Assent on November 19, 1998 and the first elections to the new Parliament it created took place on May 6, 1999. On May 20, 1999 the Scottish Executive, including the devolved Scottish law officers, the Lord Advocate and the Solicitor General for Scotland, assumed their functions under the Act while July 1, 1999 was appointed as the day on which the principal remaining provisions of the Act came into force. Accordingly, by virtue of section 129(2) of the Scotland Act 1998, even before the coming into effect of the Human Rights Act the incorporated Convention rights are to be given effect for the following purposes:

- setting the limits of the legislative competence of the Scottish Parliament under section 29(2) of the Scotland Act;
- delimiting the competence of members of the Scottish Executive to make subordinate legislation or to do any other “act” under section 57(2) of the Act; and
- determining the “victim status” and hence standing of individuals to complain of a breach of their Convention rights by the Scottish Parliament or Executive under section 100 of the Act.
The effect on court proceedings in Scotland involving the Lord Advocate (notably all criminal prosecutions as well as civil actions in devolved matters brought by or against the State) has been immediate. The Lord Justice General, Lord Rodger of Earlsferry, noted in *Lord Advocate v. Scottish Media Newspapers Ltd* that as a result of the coming into force of the Scotland Act, with effect from May 20, 1999 the Lord Advocate no longer has power to “move the court to grant any remedy which would be incompatible with the European Convention on Human Rights” unless, under reference to section 57(3) of the Scotland Act, he has been specifically required so to do by a provision of a Westminster statute. The section 57(3) exception does not apply to the acts (and, arguably too, the omissions1 of the other members of the Scottish Executive who, by virtue of section 57(2), simply have no power to act in a manner incompatible with any of the Convention rights or with Community law. The Scottish Ministers cannot be authorised by any particular statutory provision to act in a manner incompatible with the Convention, since any such action by them would be, by definition, *ultra vires*. All and any specific powers devolved to the Scottish Ministers have to be interpreted and exercised in the light of the section 57(2) prohibition against acts incompatible with Convention rights.

### The petitioners' claim in Booker Aquaculture

*Booker Aquaculture Limited v. The Scottish Ministers* was a petition for judicial review originally brought against the Secretary of State for Scotland by a fish farming concern. The petitioners sought a declarator that they were entitled to receive payment by way “*E.H.R.L.R. 20* of compensation in respect of the loss of certain farmed fish which had been slaughtered in 1994 on the orders of the Scottish Office Agriculture, Environment and Fisheries Department with a view to preventing the spread to other fish and fish farms of a suspected outbreak of viral haemorrhagic septicemia, a fish disease apparently of no harm to humans. The specific legal authority under which the Scottish Office Department was acting in ordering the destruction of the fish was regulation 7 of the Diseases of Fish (Control) Regulations 1994. These 1994 regulations had been made by the Minister of Agriculture, Fisheries and Food together with the Secretary of State acting jointly under section 2(2) of the European Communities Act 1972 for the purpose of implementing Council Directive 93/53/EEC.4

After the fish had been destroyed in accordance with the Government Order the operator of the fish farm wrote to the Secretary of State on December 13, 1994 seeking a compensation payment in excess of £600,000, being their estimate of the losses which they said they had suffered as a result of complying with the notice. It appears to have taken some 18 months for the Secretary of State to reply to this claim, stating in a letter dated May 13, 1996 as follows:

"After careful consideration it has been concluded that your legal claim for compensation cannot be accepted. In addition, in line with the Government's long-established policy of non payment of compensation for fish diseases, an *ex gratia* payment would not be appropriate."

Over eight months after their compensation claim the original fish farming operation, Marine Harvest McConnell Limited, then assigned to Booker Aquaculture Limited “all claims and rights competent to them to sue or raise any court proceedings in respect of losses incurred by them arising *inter alia* out of the service on them of the notice under Regulation 7 [of the 1994 Regulations]”. Booker Aquaculture shortly thereafter raised the present proceedings for judicial review of the May 1996 decision to refuse Marine Harvest McConnell Limited any compensation or *ex gratia* payment in respect of the slaughter of their fish.

There was no express provision made in either the 1994 national regulations, or the 1993 European directive which they implemented, obliging the authorities to make any form of compensation or payment to persons affected by fish disease control measures. The petitioners did not claim that such an obligation, express or implied, could be found in any national provision or principle of Scots common law. Neither did the petitioners claim that the European legislation was in some way defective in failing to make any such express provision for compensation. Instead the petitioners based their case on an *implied* obligation under the general principles of Community law.

The petitioners claimed that when national authorities such as the Scottish Office Agriculture Environment and Fisheries Department could be said to be acting "within the scope of Community law" they also had an implicit Community law obligation to act in a manner "compatible with fundamental rights the observance of which the Court [of Justice] ensures and which derive, in particular, from the European *E.H.R.L.R. 21* Convention on Human Rights." In effect, the petitioners were arguing that, in an area covered by Community law, there was also backdoor incorporation of the European Convention and that they could accordingly directly rely upon its provisions, in particular, the obligation of national authorities to respect property rights as set out in
Article 1 of Protocol 1 to the Convention, regardless of the status of that Convention in purely domestic law.  

The petitioners were successful at first instance, the court holding that the failure by the Scottish national authorities to provide for compensation to the fish farm whose fish were compulsorily slaughtered as part of Community-based measures to control the outbreak of disease constituted an unlawful interference with the property rights of the affected fish farmer which were protected under and in terms of Community law. Accordingly declarator was pronounced by Lord Cameron of Lochbroom on May 28, 1998 against the Secretary of State to the effect that, notwithstanding the terms of the Diseases of Fish (Control Regulations) 1994, he was bound to make provision for due compensation to the owner of fish slaughtered under and in terms of the regulations. In effect, the Lord Ordinary held that the Secretary of State had acted illegally by failing to provide, whether by legislative or administrative means, for payment of compensation where slaughter orders had been made under regulation 7 of the 1994 Regulations.  

The Secretary of State reclaimed against this decision, to the Inner House, the court of appeal in civil matters in Scotland. In the course of the hearing before the Inner House, which took place in the summer of 1999, the relevant rights and obligations of the Secretary of State were transferred by statutory instrument to the Scottish Executive as part of the devolution settlement. The court was advised however that “the Scottish Ministers were adhering to the position previously adopted by the Secretary of State and were insisting in the reclaiming motion” and that “any procedural formalities resulting from the transfer of the relevant rights and obligations could be dealt with in due course”.  

In its decision on the reclaiming motion, the Inner House noted that it was agreed between the parties that “in implementing the 1993 Directive the United Kingdom had been subject to the general rules of the Treaty and in particular to the general principles of Community law, including the fundamental rights enshrined in Community law”  

There was, however, a dispute between the parties “as to whether, in determining compensation arising out of the application of the national measures implementing Community rules, the Member State is acting within the scope of Community law or within the area of its own competence”.  

The argument presented on behalf of the Scottish Ministers was to the effect that, unless the Community measure on which the national regulation or administrative action was based imposed an express and specific obligation on the Member State to pay compensation, the matter of (non-) payment of compensation was not governed by Community law but instead remained within the competence of the Member State. Accordingly the general principles of Community law, including the right of property, would have no application to the situation and the petition would fail since no other basis in law was argued for the claim to compensation.  

The Inner House considered that there were indeed conflicting lines within the jurisprudence of the European Court of Justice such that it might be argued that the decision of national authorities to order expropriation or otherwise to control property use, even within an area (such as the control and prevention of disease in fish farms) under general Community law regulation, might still be seen as an exercise of purely national (rather than delegated Community) competence to which broader arguments based on general Article 1 of Protocol 1, or Community law principles such as “no expropriation without compensation”, would not necessarily apply. The court tended to the view that the question of the reach in this situation of Community law, and its general principles, was itself a matter of Community law which could usefully be referred to the European Court of Justice and it was accordingly decided to make such a reference, one of the few to have emanated from a court sitting in Scotland since the accession of the United Kingdom to the European Community.  

The European Court of Justice and Fundamental Rights  

The Court of Justice of the European Communities has held that, under Community law as it presently stands, the European Union or European Communities cannot as a body formally accede to the European Convention on Human Rights. The effect of any such accession would be to place the central institutions of the Community within the jurisdiction of the Strasbourg Court of Human Rights and displace the Luxembourg *E.H.R.L.R. 23* Court of Justice from its position as the court of final reference for the European Union.  

The corollary of the non-accession has been that, to date, the Strasbourg institutions have declined to uphold complaints from applicants that a particular Community measure contravenes their
Convention rights, on the basis that there is provision for effective protection of those rights. The latitude accorded by the Strasbourg organs to the institutions of the European Union may be changing in the light of the definitive rejection by the European Court of Justice of the possibility of accession to the Council of Europe by the European Union. Thus in *Cantoni v. France* the Court of Human Rights held that the fact that a national legislative provision is based almost word for word on a Community directive does not remove the provision from the requirements of the Convention, or the responsibility of the Contracting State to ensure that any offences imposed thereby meet the standard of clarity and certainty required by Article 7 of the Convention. And in *Matthews v. United Kingdom* the United Kingdom was held responsible for the denial of voting rights to the European Parliament to British citizens resident in Gibraltar contrary to those individuals' Convention rights under Article 3 of Protocol 1 to participate in free elections "which will ensure the free expression of the opinion of the people in the choice of the legislature", notwithstanding that the extent of voting rights to the European Parliament was a matter for the European Union institutions rather than individual Member States.

Notwithstanding the inability of the European Union as a body to accede to the European Convention, the Court of Justice has repeatedly emphasised the crucial "E.H.R.L.R. 24 importance to Community law of respect for human rights, stating in its 1994 ECHR Accession Opinion (emphasis added):" 

"It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court [of Justice] ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard the Court has stated that the [European] Convention has special significance (see in particular the judgment in Case C-260/89 ERT [1991] ECR I-2925, paragraph 41). Respect for human rights is therefore a condition of the lawfulness of Community acts."

There is no doubt, then, that the central Community institutions are bound to respect fundamental rights in their activities and that the Court of Justice has jurisdiction to ensure such compliance by the Commission and other Community bodies. Recent treaty provision has been made to this effect in Article 46(d) (formerly Article L) of the post-Amsterdam European Union Treaty which gives the Court of Justice specific jurisdiction "with regard to actions of the [central Community] institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Union and under this Treaty" in relation to Article 6(2) (formerly Article F) of the post-Amsterdam Consolidated Treaty on European Union. This article provides that "the [European] Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." This last formulation is lifted verbatim from the fundamental rights case law of the Court of Justice, and so the treaty alterations in question may be thought of as another example of the Member States simply amending the relevant treaty provisions ex post facto so that they are brought into line with the interpretation already given by the Court of Justice.19

"E.H.R.L.R. 25 On application of the principle of construction expressio unius est exclusio alterius, particularly in relation to a court of limited jurisdiction such as the Court of Justice of the European Communities, one might reasonably assume that the intent and effect of Article 46(d) is to exclude by implication any jurisdiction the Court might have or claim for human rights review of Member State action. Given the history of the Court's past jurisprudence on such jurisdictional niceties it seems unlikely that the Luxembourg Court will feel itself constrained to this conclusion, perhaps relying instead on their duty under Article 220 (formerly Article 164) of the Treaty of Rome to "ensure that in the interpretation and application of this Treaty the law is observed". For as the then Advocate-General (subsequently Judge) Mancini stated in his Opinion in *Parti Ecologiste "Les Verts" v. European Parliament":"

"The obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the Court [of Justice] is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission."

The question as to the degree (if any) to which the Court of Justice may properly act as a human rights court in relation to the activities of the Member States remains a vexed one. There is no specific Treaty provision giving the Court of Justice jurisdiction in this regard and indeed Article 6(3) of the Treaty on European Union provides that "the Union shall respect the national identities of its Member..."
States." The Court of Justice has, instead, by a process of "creeping pre-emption" apparently claimed to itself such power of review of Member State action on the basis of "general principles of Community law," including on human rights grounds, a position most recently reiterated in Kremzow v. Austria concerning the compatibility of national measures of criminal procedural law with the European Convention as mediated through Community law.

"E.H.R.L.R. 26 The judges of the German Federal Constitutional Court, the Bundesverfassungsgericht, after a period of rapprochement in the 1980s appear now to have rejected the broader hierarchical claims of the Court of Justice and have reiterated that they, and not the European Court of Justice, are the ultimate arbiters and guarantors of the protection of fundamental rights (as irrevocably conferred within the German Constitution, the Grundgesetz) within Germany.

There are signs, too, that United Kingdom judges are beginning to question the apparent expansionist approach of the Court of Justice in relation to the application to Member States of unwritten principles of Community law and implied obligations and have reaffirmed that the Court of Justice is a court of specific attribution and limited (rather than general) jurisdiction and as such is bound by, and can only bind national courts and other national authorities in accordance with, specific provisions of the Treaty from which it derives its authority. As the then Mr Justice (now Lord Justice) Laws has noted:

"These fundamental principles ... are not provided for on the face of the Treaty of Rome. They have been developed by the European Court of Justice ... out of the administrative law of the Member States. They are part of what may perhaps be called the common law of the Community. That being so, it is to my mind by no means self-evident that their contextual scope must be the same as that of Treaty Provisions relating to discrimination or equal treatment which are statute law taking effect according to their express terms. ... Like any statute law containing orders or prohibitions, the Treaty is dirigiste: it is law in the shape of command. Law of this kind may intrude into areas previously altogether free of any legal controls, because of the sovereign force of the legislation. It may open a new jurisdiction. But it is to be sharply distinguished from law which is made by a court of limited jurisdiction, such as the ECJ. The legitimacy of that law depends upon its being elaborated by the court within the confines of the power with which it is already endowed. Its writ cannot run where it could not run before. The position is, or may be, different in the case of a court whose powers are inherent "E.H.R.L.R. 27 and original, not conferred by legislation. But the ECJ has no inherent jurisdiction. Its authority derives solely from the Treaties. Although (by virtue ultimately of the European Communities Act 1972) its decisions are as a matter of English law supreme, its supremacy runs only within its appointed limits."

There is no doubt that the Court of Justice first used the language of human rights to defend the integrity of Community law and to protect the activities of the Community institutions from threatened fundamental rights review by national courts. As Advocate General (subsequently Judge) Mancini of the European Court of Justice noted in 1989:

"Reading an unwritten bill of rights into Community law is indeed the most striking contribution the Court [of Justice] made to the development of a constitution for Europe. This statement should be qualified in two respects. First ... that contribution was forced on the court from outside, by the German and, later, the Italian Constitutional Courts. Second, the Court [of Justice]'s effort to safeguard the fundamental rights of Community citizens stopped at the threshold of national legislation." It may be that the apparent extension of the case law of the European Court of Justice to review Member State action on human rights grounds, first clearly articulated in the 1989 decision in Wachauf, has been superseded by events, and in particular the development, since 1991, of the principle of Francovich damages, that is to say that a Member State is obliged to make good the damage to individuals caused by a breach of Community law for which that Member State was responsible. The Court has held that where the Community law rule in question conferred individual rights, and the disregard of these rights had directly resulted in loss to those individuals, Member States might incur liability to make good that loss if the action of their national legislatures, which was contrary to Community law, was sufficiently serious as to show a "manifest and grave disregard of the limits of its discretion" in so legislating in a field also covered by Community law. Thus, where a Member State incorrectly transposes the provisions of a directive into national law, a Member State could defend itself "E.H.R.L.R. 28 against a claim for damages suffered by individuals since the implementation into national law of an imprecisely worded directive in such a manner might reasonably be construed or interpreted as having been done in good faith and need not result in State
liability for any damages resulting. By contrast, in the case of decisions made by national authorities in situations where Community law grants, at most, a limited “margin of appreciation” in the application and/or interpretation of the law (for example the granting of licences for the export of live animals for slaughter in another Member State) the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach to support a Francovich damages claim.

If Francovich has indeed superseded Wachau, then it would mean that the claim by the petitioners to compensation in Booker Aquaculture has been brought on the wrong basis. Rather than seek to enforce a free-floating Convention right to respect for property, the petitioners should have founded their case on Francovich damages for improper implementation of a Community law provision. In both cases, however, the petitioners would still have to establish to the satisfaction of the court that the actions and inactions of the national authorities in this area could properly be regarded as falling within the scope of Community law.

This analysis would mean that the human rights jurisprudence of the European Court of Justice may be left in its defensive role, that of reassuring national courts that the actions of Community institutions over which the Court of Justice alone has jurisdiction will indeed be reviewed on human rights grounds and, more importantly, that Community law does not authorise national authorities when acting in a field covered by Community law to act in a manner contrary to fundamental rights as these are understood and protected by the national courts within the territory of the Member States. The advantage of such a solution is that it leaves to national courts (and ultimately the European Court of Human Rights) the question of the precise content “E.H.R.L.R. 29 and standard of enforcement of these rights within their own jurisdiction, and avoids the possibility of a conflict within the Member State arising from two different fundamental rights standards being applied, depending on whether or not the matter in question falls within the scope of Community law.

There have already been instances of divergence between the European Court of Justice and the European Court of Human Rights on the interpretation and application of rights derived from the Convention. In Hoehst the Luxembourg court held that the individual’s right to “privacy, family life, home and correspondence” guaranteed under Article 8(1) of the European Convention did not extend to business premises, and so upheld the legality of “dawn raids” by the European Commission seeking evidence for anti-competitive practices. By contrast, the Strasbourg Court has held in Niemietz that the purpose of Article 8 is to protect the individual against arbitrary interference by public authorities and so its protection extended to the individual's professional or business activities or premises. Similarly in Orkem the Luxembourg Court, although ruling that the Commission could not compel a company to provide it with answers which might involve an admission of a breach of Community law which it was incumbent upon the Commission to prove, opined that Article 6 of the European Convention did not confer a right not to give evidence against oneself. By contrast, the Strasbourg Court in Funke stated that Article 6 of the European Convention did indeed protect the right to remain silent and not to contribute to incriminating oneself. And in AM & S Europe v. Commission, following a comparative survey of the laws of the Member States, the Court concluded that the Commission’s extensive powers of investigation, search and seizure in the context of suspected breaches of Community fair competition law were subject to the principle that communications between lawyer and client were to be respected as confidential. The Commission could not therefore require the production of business records concerning such communications. The Court of Justice held, however, that the principle of confidentiality applied only in relation to communications with independent counsel rather than with in-house lawyers or legal departments. It is not clear whether or not the European “E.H.R.L.R. 30 Court of Human Rights would make a similar finding as to the extent of an individual’s right to privacy. More recently, while the European Court of Human Rights has found that the dismissal of homosexuals from the United Kingdom Armed Forces on grounds purely of their sexual orientation contravenes their human rights and the European Commission on Human Rights has found that the maintenance of different ages of consent as between heterosexuals and homosexuals contravenes the European Convention, the European Court of Justice and the Court of First Instance have both stated that they consider it lawful under Community law for an employer (in one case the European Commission) to discriminate in the employment benefits paid as between its heterosexual and homosexual employees.

It is not clear how divergences between the two European Courts on the proper interpretation of fundamental rights provisions might be resolved as a matter of strict law. There is no machinery for the formal reconciliation of their competing judgments. In Al-Jubail Advocate General Damon stated that, as a matter of prudence to maintain the position taken by the European Commission of Human Rights that complaints made under the European Convention against national decisions
enacted pursuant to a Community Act were inadmissible before the machinery of the Council of Europe, the Court of Justice should seek to avoid "conspicuous discrepancies" between the construction placed by the Luxembourg Court of Justice on the rights to a fair trial and the requirements as laid down by the Strasbourg-based European Court of Human Rights.

It would be unfortunate, indeed, if the national courts of the United Kingdom were discouraged from developing a high level of protection of the Convention rights incorporated under the Human Rights Act 1998 as a result of a differing approach to the protection of fundamental rights to actions and omissions by public authorities in areas said by the European Court of Justice to be within the scope of Community law and subject to its fundamental rights review. The coming into force of the Human Rights Act 1998 may, indeed, serve as a bulwark against the acceptance by the United Kingdom courts of the Court of Justice's expansive claims for the reach of Community law, in the same way that the fundamental rights provisions of the Grundgesetz have served the German courts.

**E.H.R.L.R. 31 Conclusion**

Booker Aquaculture potentially raises a number of fundamental constitutional issues dealing with the proper relationship between Member States authorities and the Community institutions, and the respective roles of the European Court of Justice and national courts in the sphere of fundamental rights protection. In some ways, however, it is rather an unsatisfactory case on its facts. One of the more puzzling aspects of the Booker Aquaculture litigation is that the fish which were destroyed were at no time the property of the pursuers to the action. The pursuers proceeded in their claim for breach of the fundamental right to respect for property on the basis that they had been assigned any such claim by the original operator of the fish farm in question.

It appears somewhat counter-intuitive, however, that fundamental rights such as those set out in the European Convention and its associated protocols should be regarded as being assignable. Can one, for example, assign or transfer one's right to a fair trial, to liberty and security, to respect for privacy and family life, to freedom of thought, conscience or religion, to freedom of expression, to marry? If not, why should the claim to a fundamental right of protection of property in Article 1 of Protocol 1 be treated differently, and (unlike any of the other fundamental rights protected by the Convention) be regarded as transferable? It seems unlikely that the extension of fundamental rights protection to non-natural persons and corporate bodies was intended to have the effect of radically altering the character of those rights. The rights contained in the Convention seem to relate to claims for the State to respect the integrity of each specific legal or natural person; and being fundamental to each person they would not, on the face of it, appear to be the kind of rights which could be transferred or assigned from one party to another. Instead, they appear to carry within themselves an element of delectus personae. It is of interest in this regard to note that the European Court of Justice rarely, if ever, refers to a fundamental right to property per se but normally conjoins it with the right of an individual to pursue the trade or profession of his or her choice or of a corporate body to engage in the business of its choice. The standard formula used by the Court of Justice in such cases is as follows:

"[T]he exercise of the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed."  

**E.H.R.L.R. 32** This formula clearly anchors the claim to respect for property, like the other fundamental rights, in the more general claim for respect of the integrity of the individual person. It may be that the conceptual error which is being made in the Booker Aquaculture litigation is that Article 1 Protocol 1 has been decontextualised and read as embodying an enforceable right to respect for property qua property rather than as simply another aspect of the right of the individual natural or legal person to have his, her or its individuality and integrity respected.

Further, one may ask whether the chosen route of reliance by the petitioners on the backdoor incorporation of the European Convention via Community law is now necessary, given that the decision to refuse any compensation to the fish farmer has been specifically reaffirmed by the relevant Scottish Minister. Such a continuing decision to refuse any compensation arguably falls within the definition of an act of a Member of the Scottish Executive. By virtue of section 57(2) of the Scotland Act 1998 any such act would be unlawful insofar as it was incompatible with any of the Convention rights, regardless of any questions of Community law. There is then no need to rely on
arguments as to the scope of Community law to determine whether or not the petitioners have a claim under Article 1 of Protocol 1 of the European Convention since the relevant decision-maker within the Scottish executive is already directly bound by the Convention to respect property rights. If this is correct then the right course would be for the petitioner to re-argue their claim to compensation as a "devolution issue" rather than a Community law issue.

E.H.R.L.R. 2000, 1, 18-32


2. See the decision of Lord Penrose in H.M. Advocate v. Bryan Robb, 2000 J.C. 127 at 130 D-E: "Section 6(6) of the Human Rights Act 1998 defines 'act' as including a failure to act, subject to certain exceptions. There is no express provision to that effect in the Scotland Act, but it is plain that, while the express qualifications are necessarily different in the context of the two Acts, the expressions must have the same general scope, and the word 'act' in Section 57(3) (of the Scotland Act) must include failure to act."


8. Relying on Wachau v. Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R. 2609, per Jacobs A.G. at 2629 where he states that "when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in every event in relation to the principle of respect for fundamental rights, as the Community legislator" and the decision of the court in the case at 2539 para. 19 to the effect that "the requirements of the protection of fundamental rights in the Community legal order ... are also binding on the Member States when they implement Community rules [and so] the Member States must, as far as possible, apply those rules in accordance with those requirements."


14. See M & Co. v. Germany App. No. 13258/87 (1980) 64 D.R. 138 where the Commission on Human Rights observed that "the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection." And in Waite and Kennedy v. Germany, unreported decision of February 18, 1999, the European Court of Human Rights upheld the lawfulness of immunity granted to the European Space Agency from the general jurisdiction of the German labour courts on the grounds that adequate internal remedies were available to dismissed employees, and noted as follows: "The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities, and where they attribute to those organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial...88. For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."
Compare with the parallel decision of the Court of Justices in Criminal Proceedings v. X (C-129/96) [1998] E.C.R. I-6609 at para. 25 to the effect that "a provision of criminal law may not be applied extensively to the detriment of the defendant [and] ... precludes bringing criminal proceedings not clearly defined as culpable by law."


Thus in Criminal Proceedings against Donatella Calfa (C-346/96) [1999] E.C.R. I-III [1999] All E.R. (E.C.) 850, ECJ, the Court of Justice declared a provision of Greek law which required the imposition of an order of expulsion from Greek territory for life of nationals of other Member States convicted in Greece of drugs offences to be incompatible with Community law as being a disproportionate interference with the Community principles of free movement. By contrast, in Società Italiana Petrol SpA v. Borsa di Roma Srl (C-2/97) [1998] E.C.R. I-3907, the Court of Justice stated that it was not open to the Court to apply the Community standards of proportionality to assess the lawfulness of a national measure and the penalties imposed thereunder relative to the exposure of workers to carcinogens in the workplace. It was noted by the Court that the measures in question did not impede free movement rights and that, in any event, Article 118(3) (now Article 137(5)) of the Treaty of Rome specifically allowed Member States to maintain or introduce more stringent protective measures than the minimum standard required by secondary Community legislation, Council Directives 86/555 and 90/394.


Krenzov v. Austria (C-299/95) [1997] E.C.R. I-2629 where the court seemed to suggest that national measures which are incompatible with observance of the human rights as recognised and guaranteed by the Court of Justice "are not acceptable in the Community". See generally, Bruno de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights" in Phillip Alston and others (eds), The EU and Human Rights (OUP, Oxford, 1999) at 859-897 for a general survey of the past case law of the Court of Justice on human rights.

See the Solelone II decision of the German Constitutional Court, BVerfG, October 22, 1986, reported in English at [1987] 3 C.M.L.R. 259.

See, e.g., the Maastricht Urteil: BVerfGE 89, 155, translated into English as Brunner v. European Union Treaty [1994] 1 C.M.L.R. 57 at 91 paras. 35: "The Federal Republic of Germany, therefore, even after the Union Treaty comes into force, will remain a member of an association of States (Staatsbund), the common authority of which is derived from the Member States and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law be applied."

See, e.g., the article by Paul Kirchhoff, Justice of the German Constitutional Court, "The Balance of Powers between National and European Institutions" (1990) 5 E.L.J. 225 at 227: "If ... Community law were to seek to abridge the fundamental rights protection required irremovable by [the German Constitution] the Grundgesetz, [German] constitutional law would then have the mandate and the power to heed this imposition as not being legally binding."


See, too, Decision No. 97-394 of the French Conseil Constitutionnel of December 31, 1997 (Recueil 1997, 344) on the constitutionality of the Amsterdam Treaty and the Danish Supreme Court decision No. 1-361/1997 Carlsen and others v. Rasmussen, April 6, 1998 UFR 1949, 800 (available in English at www.um.dk/udregnspolitik/europa/domeng/) also on the Maastricht Treaty. Both of these decisions stress that in so far as a Community legal act which had been upheld as valid by the ECJ exceeded the limitations laid down in the accession provisions of these individual Communities to the European Community, that act would not be regarded as valid within the territory of the individual Member States by their national courts.
48. The doctrine of Francovich damages has been accepted and applied by the House of Lords in the most recent of the Factoras cases, R. v. Secretary of State for Transport, ex p. Factoras Ltd (No. 5) (C-45/93) [1999] 4 All E.R. 906, HL.

49. D v. Council (T-294/97), January 28, 1999, [1999] Rec. F.P.II-1. This decision is currently under appeal to the Court of Justice at the
50. See C. Turner, "Human Rights Protection in the European Community: resolving the conflict and overlap between the European Court of Justice and the European Court of Human Rights" (1999) 5 E.P.L. 453 for a proposal for such reconciliation machinery in the establishment of a human rights chamber to the ECJ.


53. See, however, Irish Farmers Association v. Minister for Agriculture, Food and Forestry, Ireland and Another. (C-22/94) [1997] E.C.R. 1-1809 at 1839 para. 27.


57. Compare with the decision of the Appeal Court in the Temporary Sheriff’s case Starrs and another v. Procurator Fiscal, Linlithgow, 2000, S.L.T. 42, HCJ. The facts were that the Procurator Fiscal had commenced a criminal trial on May 5, 1999 but, since the trial was not completed within that day, the case was then adjourned to July 8, 1999 for the completion of the evidence. It was held by Lord Cullen, the Lord Justice-Clerk, that the act of continuing with the prosecution after the Scotland Act had come fully into force, and the Procurator Fiscal (Crown Prosecution) Service accordingly become bound by the Convention, was sufficient to raise a devolution issue subject to human rights review by the courts.

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The European Convention and the Independence of the Judiciary – The Scottish Experience

Aidan O’Neill QC*

[It would be wrong ... to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply.]

Introduction

While the Human Rights Act 1998 is not expected to be brought into general force throughout the United Kingdom until at least October 2000, in Scotland the Human Rights Act has already come into force at least as regards the acts (and arguably, too, the omissions2) of the Scottish Executive and of the Scottish Parliament brought into being by the Scotland Act 1998.3

It may be thought that, as with the poll tax, and whether by accident or by design, Scotland has become the trial ground for a radically new government policy. The staggered implementation of the Human Rights Act in the United Kingdom effectively allows the effects and implications of direct reliance on human rights considerations to be assessed within a small jurisdiction so that proper preparation may be made before the policy becomes law within the territorial jurisdiction of the English courts.

In this article, I draw attention to some recent cases in Scotland in which human rights considerations have been used to challenge the manner in which the Lord Advocate has traditionally exercised his functions in Scotland, most notably as regards his involvement in part-time judicial appointments. I then draw out the possible implications that these Scottish decisions may have on the English constitutional settlement, in particular the role of the Lord Chancellor in judicial appointments and the administration of tribunals, once the Human Rights Act is implemented south of the Border.

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1 Her Majesty’s Advocate v David Shields Montgomery and another 2000 JC 111, HCJ per the Lord Justice General, Lord Rodger, at 117.

2 See Her Majesty’s Advocate v Bryan Robb, 2000 JC 127, HCJ per Lord Penrose at 130:

Section 6(6) of the Human Rights Act 1998 defines ‘act’ as including a failure to act, subject to certain exceptions. There is no express provision to that effect in the Scotland Act, but it is plain that, while the express qualifications are necessarily different in the context of the two Acts, the expressions must have the same general scope, and the word ‘act’ in Section 57(2) [of the Scotland Act] must include failure to act.

3 See Scotland Act 1998, s 129(2). The Scottish Executive law officers took up office with effect from 20 May 1999 and from that date became subject to the Convention rights. The rest of the provisions of the Scotland Act came into force on 1 July 1999.
Human rights and the role of the Lord Advocate

The office of Lord Advocate is an ancient one, long predating the 1707 Union of Parliaments. Latterly, under the unreformed Union settlement, the Lord Advocate combined a variety of functions which in England and Wales would have been shared among the offices of Lord Chancellor, the Attorney General and the Director of Public Prosecutions. He had effective responsibility for judicial appointments in Scotland at all levels; he was responsible for advising the Westminster Cabinet on matters of Scots law and sat on a number of Cabinet Committees; and he headed the Crown Office in Edinburgh and, as such, had ultimate responsibility for the prosecution of offences and the investigation of deaths in Scotland.

The office of Lord Advocate was devolved back to Scotland under the provisions of the new constitutional settlement, and he has become a law officer to, and member of, the Scottish Executive, advising the Scottish Ministers rather than the Westminster administration on matters of law. His function of advising the Westminster government on matters of Scots law has been taken over by a newly created office, that of the Advocate General for Scotland. It appears likely, also, that the primary responsibility for judicial appointments in Scotland will now rest with the new Scottish Minster for Justice rather than, as before, with the Lord Advocate. The Lord Advocate has, however, retained his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. Section 48(5) of the Scotland Act makes specific provision that any decision by the Lord Advocate in his capacity as head of the criminal prosecution service and the system for the investigation of deaths in Scotland ‘shall continue to be taken by him independently of any other person’, notwithstanding his ex officio membership of the Scottish Executive by virtue of section 44(1)(c) of the Act.

Once the Human Rights Act 1998 comes wholly into force throughout the United Kingdom, it will be unlawful for the courts in Scotland and England (as ‘public authorities’ under that Act) to act in a way which is incompatible with a Convention right. In this interim period between the coming into force of the Scotland Act and the Human Rights Act, the courts are themselves not yet directly subject to the Convention. However, the Lord Advocate, as a member of the Scottish Executive, is so bound. The devolved Lord Advocate’s actions accordingly become subject to human rights scrutiny with effect from 20 May 1999 when his office was devolved and he became a member, ex officio, of the Scottish Executive. Since that date decisions made by the Lord Advocate as head of the Crown Office, and as such responsible for criminal prosecutions and the investigation of fatal accidents in Scotland, became subject to review by the courts under the provisions of Schedule 6 to the Scotland Act 1998 insofar as they raise ‘devolution issues’.

Traditionally, the courts in Scotland have accorded great deference to the views of the Lord Advocate as head of the Crown Office and have rarely, if ever, permitted those decisions, including decisions not to prosecute, to be challenged before them. This situation has begun to change, however, as the courts in

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4 The Scottish Executive consists of: the First Minister; Scottish Ministers who have been appointed by the First Minister from among the members of the Scottish Parliament; and the Scottish Law Officers, that is to say the Lord Advocate and the Solicitor General for Scotland, neither of whom need to be appointed from among the elected Members of the Scottish Parliament.

Scotland have begun to take on board the general obligations now laid upon the Lord Advocate to respect Convention rights in prosecuting criminal offences in Scotland. As Lord Rodger, the Lord Justice General, noted in Lord Advocate v Scottish Media Newspapers Ltd the Lord Advocate now no longer has the power to ‘move the court to grant any remedy which would be incompatible with the European Convention on Human Rights’ unless, under reference to section 57(3) of the Scotland Act, he had been specifically required so to do by a provision of primary Westminster legislation which cannot be read or given effect to in a way which is compatible with the Convention. And in Her Majesty’s Advocate v David Shields Montgomery and another Lord Rodger noted as follows:

[Plowing the matter generally, he [the Lord Advocate] and his representatives have no power to act in a manner which would prevent an accused person from having a fair trial. ... While the authority now given to Convention rights in our law means that, when considering what constitutes a fair trial, the court must take account of Convention law and jurisprudence, the issue will still fall to be dealt with under our existing procedures.]

Thus in H M Advocate v William Maxwell Little, Lord Kingarth held, on the basis of a concession that the bringing of the indictment could be an ‘act’ of the Lord Advocate for the purposes of Section 57(2) of the Scotland Act and thus subject to human rights review, that a delay of 11 years and 1 month from the time between an accused had been advised by the police of charges of sexual abuse and his being served with an indictment was incompatible with the accused’s Article 6(1) Convention right to a hearing within a reasonable time and accordingly outwith the powers of the Lord Advocate.

More radically yet, in Hugh Starrs and another v Procurator Fiscal, Linlithgow the complainers, Hugh Starrs and James Chalmers, claimed that their prosecution on summary complaint before a Temporary Sheriff sitting in Linlithgow Sheriff Court contravened their rights under Article 6(1) of the European Convention to a trial before ‘an independent and impartial tribunal established by law’. In the appeal in Starrs and Chalmers the Appeal Court of the High Court of Justiciary, consisting in a three judge bench composed of the Lord Justice Clerk Lord Cullen, Lord Prosser and Lord Reed, was advised by the Solicitor-General for Scotland that ‘the Lord Advocate expected the Procurator Fiscal to be bound by the Convention as he is, and that he would not take any point that something which was done by the procurator fiscal was not his act as Lord Advocate and as a member of the Scottish Executive.’ Thus it was conceded that the Convention rights could be claimed in relation to all criminal prosecutions in Scotland, whether brought under summary or solemn procedure...

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6 Lord Advocate v Scottish Media Newspapers Ltd 1999 SCCR 599.
7 Her Majesty’s Advocate v David Shields Montgomery and another 2000 JC 111, HCJ at 117.
8 H M Advocate v William Maxwell Little 1999 SCCR 625, per Lord Kingarth.
9 Compare with the decision in Caroline McNab v Her Majesty’s Advocate 2000 JC 80, HCJ.
10 Hugh Starrs and another v Procurator Fiscal, Linlithgow, 2000 SLT 42.
11 Article 6(1) of the European Convention on Human Rights is in the following terms:

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 reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
On the facts of that case, then, the decision of the fiscal to continue, on 8 July 1999, a prosecution which was originally begun before the Lord Advocate had become subject to the Convention constituted a reviewable act for the purposes of the human rights provisions of the Scotland Act. The court was accordingly willing to consider the substance of the challenge, namely whether or not it was compatible with the accused’s Article 6(1) rights for that prosecution to be brought before a sheriff appointed on a temporary basis. The Advocate-General for Scotland, as the relevant UK law officer to whom intimation of this ‘devolution issue’ was given under and in terms of paragraph 5 of Schedule 6 to the Scotland Act 1998, appears to have decided not to take any part in the proceedings before the appeal court, notwithstanding the potential UK-wide implications of the claim.

The decision in Starrs and Chalmers

The appellate court judges in Starrs and Chalmers were at pains to underline the fact that they were considering the question of the impartiality and independence of temporary sheriffs in the abstract and as a matter of principle. Accordingly no actual evidence of any form of partiality or bias in favour of the prosecution was needed for the question of the possible breach of the accused’s Article 6(1) rights to be raised. What was important, then, was appearances: justice had to be seen to be done, and to ensure impartiality as viewed objectively there must exist ‘sufficient guarantees to exclude any legitimate doubt in this respect.’

Section 11 of the Sheriff Courts (Scotland) Act 1971, which serves as the statutory basis for the appointment of temporary sheriffs, was examined in detail. Section 11(2) allowed the Secretary of State to appoint temporary sheriffs to act as sheriff where a (permanent full-time) sheriff was unable to perform his shrieval duties because of illness, or where there was a vacancy for a sheriff, or where it appeared to the Secretary of State that for any other reason it was ‘expedient so to do in order to avoid delay in the administration of justice in that sheriffdom’. Section 11(4) provides, baldly, that ‘the appointment of a temporary sheriff principal or of a temporary sheriff shall subsist until recalled by the Secretary of State’. There was accordingly said to be no security of tenure for anyone appointed temporary sheriff.

The court was then advised as to current practice in the appointment and continued engagement of persons as temporary sheriffs. Although nominally a matter for the Secretary of State (and now the Scottish Ministers), in practice the Lord Advocate was said to play a ‘crucial role’ in these appointments. Appointments were made, normally in December, and always for one year only.

12 Findlay v United Kingdom (1997) 24 EHRR 221 at paragraph 73.
13 s 11 of the Sheriff Courts (Scotland) Act 1971, so far as relevant provides as follows:

(2) Where as regards any sheriffdom
(a) a sheriff is by reason of illness or otherwise unable to perform his duties, or
(b) a vacancy occurs in the office of sheriff, or
(c) for any other reason it appears to the Secretary of State to do so in order to avoid delay in the administration of justice in that sheriffdom,
the Secretary of State may appoint a person (to be known as a temporary sheriff) to act as a sheriff for that sheriffdom.

(4) The appointment of a temporary sheriff principal or of a temporary sheriff shall subsist until recalled by the Secretary of State.
A temporary sheriff would, in the normal run of things, expect to be re-appointed at the end of each year if he or she were still willing to serve in this capacity, but there was no guarantee or right of re-appointment, and indeed no guarantee that his or her services would be used during any period of appointment. It was accepted by the Solicitor-General that 'service as a temporary sheriff could be regarded as providing suitability for a permanent appointment' and that 'temporary sheriffs formed in effect a pool from which permanent appointment might be made, although not all permanent appointments came from that pool'. Lord Cullen noted the following, perhaps crucial description of the post (at 50):

The Solicitor General was unable to explain why a period of one year had been chosen. He accepted that, in practice, the system was not one of 'temporary' appointment (other than in the sense that the appointment were formally for a period of one year, and lacked security of tenure) but was one of part-time appointments which were intended to be long-term.

Both Lord Cullen and Lord Reed expressed doubts as the *vires* of the practice which had grown up of using temporary sheriffs as a permanent supplement to the shrieval bench appointed in order to deal with a substantial part of the routine work of the shrieval courts throughout Scotland rather than as *ad hoc* engagement to meet a particular emergency need, as appeared to them to be envisaged by the terms of Section 11 of the 1971 Act Lord Cullen also expressed his doubts as to the *vires* of the imposition of a one year term of appointment for temporary sheriffs as there seemed to be no statutory basis for the imposition of any such term or condition to the appointment. He noted (at 57):

Rather than a control over numbers, the use of the one year term suggests a reservation of control over the tenure of office by the individual, enabling it to be brought to an end within a comparatively short period. This reinforces the impression that the tenure of office by the individual temporary sheriff is at the discretion of the Lord Advocate. It does not, at least *prima facie*, square with the appearance of independence.

The Appeal Court in *Starrs and Chalmers* then applied their minds, on the basis of criteria culled from a variety of decisions of the European Court of Human Rights and Commonwealth jurisdictions, to determine whether temporary sheriffs could be said to constitute impartial and independent tribunals for the purposes of Article 6(1) ECHR. Having regard to the manner of appointment of temporary sheriffs by a member of the Scottish executive who was, in addition, the head of the prosecution service in Scotland, the temporary sheriffs' one year renewable term of office, their lack of security of tenure, their lack of financial security once appointed (in that they could be sidelined and offered no work), the lack of any statutory safeguards in relation to the recall of their appointment, and the possibility of susceptibility to pressure insofar as they ultimately sought from the Lord Advocate a permanent appointment with security of tenure, the Appeal Court judges concluded that temporary sheriffs under the current regime did not present the 'appearance of independence' necessary to maintain individual and public confidence in the administration of justice. As such, temporary sheriffs as an institution, and without any suggestion of any actual subjective bias on the part of individual acting as temporary sheriffs, could not be said to constitute an independent and impartial tribunal for the purposes of Article 6(1) of the Convention. The suggestion that the fact that temporary sheriffs were able to continue to practice law constituted further grounds for questioning their impartiality or independence was, however, rejected by the court.

The Appeal Court judges were unanimous in their finding that the terms and conditions under which temporary sheriffs held their appointment from the Lord...
Advocate were incompatible with the requirements that judges be seen to be independent of the Executive and, in particular, of the prosecution service. Accordingly, in continuing to bring prosecutions before such temporary sheriffs following the coming into force in Scotland of the relevant provisions of the European Convention, the Lord Advocate and the procurators fiscal carrying out prosecutions on his behalf before temporary sheriffs constituted action incompatible with the accuseds' Article 6(1) ECHR fair trial rights. Since the Lord Advocate has no power to act in a manner incompatible with the Convention, it would seem that the decisions to continue with such prosecutions were ultra vires.

As a result of certain obiter remarks of the Lord Justice Clerk, Lord Cullen and of Lord Reed, in which they raised the question, regardless of human rights considerations, as to whether or not Section 11(2)(c) of the Sheriff Courts (Scotland) Act 1971 ever provided sufficient statutory backing for the creation of the 'constitutional innovation' of 'a permanent supplement to the shrieval bench', namely a pool of temporary sheriffs who might be called upon to fulfil the role of sheriff as and when required, a further challenge was swiftly brought before the criminal Appeal Court. In Gibbs v Procurator Fiscal, Linlithgow14 a differently constituted High Court of Justiciary chaired by the Lord Justice General, Lord Rodger of Earlsferry sitting with Lord Sutherland and Lord Weir rejected the contention that section 11(2)(c) permitted the Secretary of State to make a temporary shrieval appointment only for the particular purposes of dealing with a specific identified emergency. Such an interpretation, it was said, would run counter to the purpose of the Act which was to ensure the efficient organisation and administration of business within the sheriff courts and, in any event, any such case by case appointment of temporary sheriffs was considered to be even less compatible with the requirements of the Convention than the one year renewable terms currently granted them.

Assessment of the decision in Starrs and Chalmers

One of the more surprising, and unsatisfactory, aspects of the decision in Starrs and Chalmers is that it would appear that it was not argued on behalf of the Lord Advocate that, however one decided on the independence and/or impartiality of the temporary sheriffs, Article 6(1) of the Convention would not have been breached on the grounds that the decision of the temporary sheriffs, in both criminal and civil matters could be appealed and reviewed on their whole merits to a properly constituted independent and impartial tribunal within the court system, in the form of the Sheriff Principal or the Inner House in civil matters, and the Appeal Court of the High Court of Justiciary in criminal issues. In this way the appearance of justice being seen to be done was being preserved because any allegation of actual subjective (and indeed unconscious) bias could properly be raised on appeal. Instead, the Appeal Court judges in Starrs and Chalmers appear to have proceeded on the assumption that the jurisprudence of the Strasbourg court requires in every criminal trial the tribunal at first instance had to possess all the characteristics of independence and impartiality required by Article 6(1) ECHR. Interestingly, in Gibbs v Procurator Fiscal, Linlithgow,

the Lord Advocate did advance the argument, based in part on Roman law, that even if the appointment of temporary sheriffs had been *ultra vires*, the temporary sheriffs had still been acting *de facto* as judges, and as such the law should treat their acts to date as having been legally valid ones, notwithstanding any invalidity in their initial appointments. The court specifically reserved its opinion on the soundness of that proposition, leaving it open to be argued on some other occasion.

It is at least arguable that the Strasbourg jurisprudence allows for the possibility that Article 6(1) of the European Convention will not be breached if hearings before any body which fails its requirements of independence and impartiality can be fully appealed and reviewed on their whole merits to a properly constituted independent and impartial tribunal. In *Findlay v UK*, a case concerning the procedures followed in Courts Martial, the European Court of Human Rights stated that:

The defects referred to [could not] be corrected by any subsequent review proceedings. Since the applicant’s hearing was concerned with serious charges classified as ‘criminal’ under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of Article 6(1).

In *Findlay* the applicant’s sentence had been confirmed by the confirming officer (who was also the convening officer of the Court Martial) and his requests for further internal review to the Deputy Director General of Personal Services and the Defence Council had been rejected. His application for leave to move for judicial review of these was also unsuccessful before the Divisional Court on the basis that the court martial had been conducted fully in accordance with the provisions of the Army Act 1955 and there was no evidence of improper conduct or hostility on the part of the judge advocate. The observations of the Strasbourg courts may be thought, then, to be limited to the particular facts of this case in which there was no access to the independent and impartial general court system for a full appeal rather than being of general and universal application to all individuals subject to criminal charges. Thus, in its 1984 judgment in *De Cubber v Belgium*, the European Court of Human Rights found that an individual who had been tried and found guilty of a forgery offence had not received a fair trial under Article 6(1) because one of the judges of the court which convicted him had previously acted as investigating magistrate in the same case. Even in this case, the question of the possibility of remedying these defects being remedied on appeal was considered. The Court dealt with the matter thus:

At the hearing the Commission’s delegate and the applicant’s lawyer raised a further question, concerning not the applicability of Article 6(1) but rather its application to the particular facts: had not the subsequent intervention of the Ghent Court of Appeal ‘made good the wrong’ or ‘purged’ the first-instance proceedings of the ‘defect’ that vitiated them?

The Court considers it appropriate to answer this point although the Government themselves did not raise the issue in such terms. The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of the Convention’s provisions: that is precisely the reason for the existence of the rule of exhaustion of domestic remedies contained in Article 26. Thus the Adoff judgment of 26 March 1982 noted that the Austrian Supreme Court had ‘cleared the

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16 *Findlay v United Kingdom* (1997) 24 EHRR 221 at para 73.
applicant of any finding of guilt’, an applicant in respect of whom a District Court had not respected the principle of presumption of innocence laid down by Article 6(2).17

Further, the appeal court judges in *Starrs and Chalmers* do not appear to have been referred to the jurisprudence of the European Court of Human Rights in relation to minor criminal offences and the requirements of Article 6(1). In *Lauko v Slovakia*18 a case concerning the lawfulness of a State entrusting the prosecution and punishment of minor offences to administrative authorities the heads of which were appointed by the executive and whose officers had the status of salaried employees, the European Court of Human Rights held that the lack of any guarantees against outside pressures, the absence of any appearance of independence, and the impossibility of appealing against the decision to the general court system constituted a breach of the Article 6(1) fair trial guarantee. The Strasbourg Court reviewed its relevant case law in the following terms:

63. The Court [of Human Rights] recalls at the outset that the right to a fair trial, of which the right to a hearing before an independent tribunal is an essential component, holds a prominent place in a democratic society.19 In order to determine whether a body can be considered to be ‘independent’ of the executive it is necessary to have regard to [i] the manner of appointment of its members and the duration of their term of office, [ii] the existence of guarantees against outside pressures and [iii] the question whether the body presents an appearance of independence.20

...While entrusting the prosecution and punishment of minor offences to administrative authorities is not inconsistent with the Convention, it is to be stressed that the person concerned must have an opportunity to challenge any decision made against him before a tribunal that does offer the guarantees of Article 6.21

From the decision in *Lauko* and associated cases it is clear that the Strasbourg court makes a clear distinction between the seriousness of offences brought before a particular criminal tribunal and the implications that this has as regards Article 6(1) ECHR. As regards the prosecution and punishment of minor criminal offences there will be no breach of Article 6(1) ECHR even if such prosecution or punishment is carried out by a tribunal such as an administrative body which is not properly independent of the executive provided that there is provision for proper review of any such decision on appeal by a properly constituted independent and impartial tribunal. As the Court of Human Rights noted in its 1984 decision in *Öztürk v Germany*:

Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offence on administrative authorities is not inconsistent with the Convention provided that the

17 *Adolf v Austria* [1982] 4 EHRR 313 at paras 38-41.
19 See, mutatis mutandis, the *De Cuyper v Belgium* judgment of 26 October 1984, Series A no. 86, p 16, § 30 in fine, (1991) 13 EHRR 922.
person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.  

Thus, it seems that the judgment of the Appeal Court in *Starrs and Chalmers* could properly have been subject to appeal on at least two distinct grounds: firstly, that question of the possibility of the existing appeal process case being sufficient to purge any defects in the independence of temporary sheriffs at first instance; and secondly, on the grounds that the Appeal Court did not consider the distinction between minor and serious criminal matters which might have allowed the retention of temporary sheriffs for the hearing of the former category of cases.

The Lord Advocate has announced that he has decided not to seek leave to appeal against the decision of the Appeal Court to the Judicial Committee of the Privy Council as provided for in paragraph 13(a) of Schedule 6 to the Scotland Act. This decision, together with the decision of the Advocate General for Scotland not to participate in the proceedings before the criminal appeal court, is to be regretted. The judgment of the appeal court in *Starrs and Chalmers* has raised a number of important constitutional issues with implications throughout the UK. It would have been a useful exercise for the whole matter to have been reconsidered from a United Kingdom wide perspective by a court of five judges. In the meantime, a challenge has been raised as to the compatibility with the Article 6(1) ECHR of temporary judges appointed by the Scottish First Minster to the Court of Session deciding civil cases between wholly private parties.  

This matter has been referred to the Inner House of the Court of Session for decision.

The immediate reaction of the Lord Advocate to the adverse decision in *Starrs and Chalmers* was to order the suspension of the commissions of all temporary sheriffs. This, predictably, gave rise to a high degree of procedural confusion before the sheriff courts and the creation of log-jams of cases in both criminal and civil matters. The matter also exposed a lacuna in the provisions under the Scotland Act 1998. Under Section 102 of the Act the courts have power to suspend or to limit the retrospective effect of their rulings in relation to successful challenges to the *vires* of the legislative activity of either the Scottish Parliament or Scottish Executive. In making any decision to limit the retrospective effect of their decision the courts are enjoined to have regard to, among other matters, the extent to which persons who are not parties to the proceedings would be otherwise adversely affected. The courts are, however, given no such power to limit the retrospective effect of their decisions in relation to the non-legislative activity of members of the Scottish Executive, such as the bringing of criminal prosecutions by, or under the authority of, the Lord Advocate. Thus, the decision in *Starrs and Chalmers* could not be made wholly or partly prospective or otherwise suspended by the court to allow the Scottish Executive time to remedy the situation.

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22 Öztürk v Germany, judgment of 21 February 1984, Series A no. 73, p. 19, § 52, pp 21–22, § 56.

> It is for consideration whether, as has been suggested, the decision in *Starrs and Chalmers* carries with it the implication that in order to be an independent tribunal an adjudicator must hold a permanent office with guaranteed employment. Such a rule might well seem impracticable given the exigencies necessarily encountered in the operation of a Court. The utilisation of person acting part-time or when required in the fulfilment of an office has been seen as a practical solution to staffing problems. This has been particularly so in matters of civil dispute, resolution of which does not necessarily require the intervention of a court, in marked contrast with matters of criminal prosecution.

It is a matter for the Westminster legislature to decide whether or not for the sake of consistency of approach the Scotland Act 1998 should be amended to give the court the power to pronounce prospective judgments where devolution issues are raised against decision or omissions of the Scottish Ministers, including the law officers, acting in an administrative capacity. If such a power had already existed and been exercised, then the administrative chaos resulting from the *Starrs and Chalmers* decision might have been avoided. It is no longer the case that, as Lord Goff noted in another context, ‘[a] system [of] prospective over-ruling ... has no place in our legal system.’

Alternatively, if a power of prospective over-ruling is seen as a good thing for judges to have in the new constitutional dispensation, it is not clear why it should be limited to cases which raise devolution issues under the Scotland Act. Where a ‘pure’ human rights challenge is made once the Human Rights Act 1998 is fully implemented, there is no statutory basis to allow the courts to limit or suspend the retrospective effect of their decisions. Any such power awarded for the sake of the preservation of good administration would require specific amendment to the Human Rights Act 1998 in a manner which might be justified as simply a more general extension to the UK courts of the powers already granted to (though not yet exercised by) the courts considering devolution issues under the Scotland Act 1998.

**Conclusion**

It is to be expected that similar arguments to those successfully advanced before the Scottish Criminal Appeal Court will be advanced in England and Wales by way of challenge to the decisions of, among others, assistant recorders and others exercising judicial office on a part-time basis once the Human Rights Act is brought into full force and effect. On a practical level, it should not be thought that the ruling in *Starrs and Chalmers* will require the automatic end of all part-time judicial appointments. The Scottish criminal appeal court has held that lawyers continuing in practice while occasionally taking on cases does not of itself compromise their objective appearance of independence and impartiality. What it will require in any judicial appointments, whether it be the members of employment tribunal, immigration adjudicators, magistrates and justices of the peace, or is at least the following:

- an element of security of tenure involving procedural safeguards against dismissal;
- an appointment for any specific limited term would have to be for a reasonable period and certainly greater than one year;
- guaranteed levels of work and payment;
- no suggestion that their performance in any part-time appointment is being used as a probationary period for any possible full-time permanent appointment; and
- a fair and open method of appointment.

In *Smith v Department of Trade and Industry* the Employment Appeal Tribunal in England considered the question of independence and impartiality as required by

24 Kleinwort Benson v Leicester City Council [1998] 4 All ER 513 at 536.
25 Smith v Secretary of State for Trade and Industry [2000] IRLR 6, EAT.
Article 6(1) ECHR. The President of the EAT, Morison J, expressed the view that, in cases involving the Secretary of State for Trade and Industry, Employment Tribunals as currently constituted might not conform to the requirements of this Article. He noted that lay members of the Tribunals were appointed by the Secretary of State for Trade and Industry and the tribunals system was administered by the employment tribunal service, an agency of the Department of Trade and Industry. Given that the Secretary of State for Trade and Industry was ultimately responsible for the appointment, pay and termination of these lay Tribunal members, Morison J expressed his doubts as whether they could be said to be sufficiently independent from the Secretary of State for Trade and Industry to constitute objectively independent and impartial tribunals for the purpose of Article 6(1). Leave was granted for the matter to be appealed to the Court of Appeal to allow the issue to be clarified prior to October 2000.

It is arguable that the current appointments procedure to other statutory tribunals by Westminster departments may not survive the requirement of Article 6(1) ECHR as currently understood in the light of the Starrs and Chalmers judgment. For example, the appointments policy of the Lord Chancellor Department as set out on the departmental web-site provides that the Lord Chancellor will normally consider for appointment to full-time office to those tribunals administered by his department only those individuals ‘who have gained sufficient experience through service in a part-time capacity’. Further, part-time office-holders are appointed initially only for one year; continued appointment thereafter for further periods of up to three years thereafter being subject both to the availability of work and to an assessment of their performance in the job.

Thus, one may well anticipate challenges being brought against, for example, the decisions of part-time Special Adjudicators in asylum cases. It might be argued that these adjudicators hold office (and so exercise their judicial functions) solely at the pleasure of the Lord Chancellor, a Cabinet Minister whose job description itself confounds the separation of powers in its confusion of legislative, executive and judicial responsibilities and powers.26 Such dependence on the continued favour of the Lord Chancellor might be thought to contravene the Article 6(1) ECHR rights of applicants appearing before these adjudicators to a hearing before an independent and impartial tribunal in that:

- the adjudicators’ one year period of initial appointment is too short to be independent of the executive;
- their re-appointment for a further period of up to three years (i.e. it may be for a lesser period) is conditional on the assessment of their ‘performance’ in the role as assessed by the executive;
- the adjudicators have no security of tenure, and may presumably be ‘side-lined’ if their performance during the period of appointment is considered by the Lord Chancellor’s Department to be ‘unsatisfactory’;
- there may be thought to be an incentive for adjudicators to comply with the anticipated requirements of the executive since ‘successful’ performance on a part-time basis is effectively seen as a prerequisite to being considered for appointment to a full-time post;

26 For some support for the view that a confusion of legislative, executive and judicial functions in one person may be incompatible with the requisite appearance of independence and impartiality on the part of the judiciary see the decision of the European Court on Human Rights in McConnell v United Kingdom, unreported decision of 8 February 2000 accessible at <www.dhcour.coe.fr/hudoc>.

Such individuals would accordingly, during the period of their part-time appointment, appear to be beholden to the Executive and there are no legal (as opposed to conventional) guarantees to ensure their independence from influence (whether direct or indirect) of government. The courts would then have to consider whether or not their own judicial review jurisdiction, limited as it is to questions of law and requiring a very high degree of deference on any question of the assessment of the reasonableness of the reviewed decisions on their merits, would be sufficient to ensure respect for the individuals' Article 6(1) ECHR rights. There is apparently competing case law on this point. In Vilvarajah and Others v United Kingdom27 the Court of Human Rights held that proceedings by way of judicial review afforded an effective remedy (for the purposes of Article 13 ECHR) to asylum applicants who were arguing that their return to their country of origin would expose them to the risk of torture or to inhuman or degrading punishment or treatment contrary to Article 3 ECHR. By contrast, in Smith and Grady v United Kingdom,28 the Strasbourg Court held that the threshold of irrationality or unreasonableness in judicial review proceedings of the lawfulness of the ban on homosexuals in the Armed Forces was 'placed so high that it effectively excluded any consideration by the domestic courts of the question [i] of whether the interference with the applicants' rights answered a pressing social need or [ii] was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention'.

However matters are decided, it seems clear that the ability to rely directly on the provisions of Article 6(1) ECHR will have profound effects on the judicial structure within the United Kingdom. As well as potentially requiring changes in the structure of the appointments to and the administration of statutory tribunals, it may well also require the final abandonment of the judicial deference to administrative decisions embodied in the Wednesbury test and require the explicit adoption by the courts of a form of the doctrine of proportionality in which the judge, in applying a 'most anxious scrutiny' to decisions challenged before them on Convention rights grounds, should be ready and willing not only to strike down executive decisions found wanting by them, but to substitute their own decisions in their place.

The passing of the Scotland Act and the incorporation of provisions of the European Convention on Human Rights have resulted in a constitutional revolution, or at least reformation, within the United Kingdom. The implications of this change for the political and legal culture of this country are only now beginning to be realised. There has been an effective shift in power in favour of the judiciary, and a shift in focus in the act of judging. The decision of the Appeal Court in StArrs and Chalmers may then be characterised as the first blast of the trumpet of a new, and as what some might characterise a monstrous, règime, namely the government of judges. It is not, however a role which they have unconstitutionally seized, but one which has been required of them as part of our on-going constitutional reforms. It is also not a role which all judges are happy with. Some judges in Scotland have already informally observed that the current devolution settlement, which effectively subordinates both the Scottish Executive and, more controversially, the Scottish Parliament,29 to the judiciary on human rights questions is unsatisfactory as it effectively requires the judges to decide

29 See Whaley and Others v Lord Watson of Invergowrie, 1H, unreported decision of Lord President Rodger, Lord Prosser and Lord Morison, 16 February 2000, accessible at www.scotcourts.gov.uk, for the first assertion by the judges of their jurisdiction to control the Scottish Parliament.
complex social and political questions, which they are ill-equipped by training and inclination to deal with, on strictly formal legal grounds, regardless of the consequences. Where their decisions, as in the Starrs and Chalmers case, result in apparent administrative chaos then it is the judges who are left exposed to public criticism and scrutiny, rather than the politicians.

It may be that the apparent shift of power in favour of the judiciary will be regarded, in time, as a mixed blessing. It would certainly be somewhat ironic if, in upholding individuals' rights to a hearing from an independent and impartial tribunal, the political independence and impartiality of the judges themselves was itself called into question. It would be unfortunate indeed if a result giving the Convention rights 'direct effect' was the effective juridicalisation of what has previously been treated as purely political conflicts. Such a result could conceivably lead, in its turn, to demands for, or complaints of, the explicit politicisation of the national judiciary. Judge not, lest ye be judged.30

30 Thus in Hoekstra and others v HM Advocate, HCl, unreported decision of Lord Justice General Rodger, Lord Sutherland and Lady Coserove, March 2000, accessible at <www.scotcourts.gov.uk>, the Criminal Appeal Court held that certain extra judicial comments made in a newspaper column by Lord McCluskey, in which he expressed strong misgivings as to the wisdom of the policy decision to make the ECHR directly effective and suggested that this decision was of benefit only to 'lawyers and a fair number of people who have been aped the necessity of appearing in court to answer criminal charges', were such as to cast doubt on the appearance of impartiality both of the individual judge and of any court of which he was a member, when called upon to decide on convention based arguments. Since Section 6 of the Human Rights Act 1998 imposes a general duty on judges, as public authorities, to act compatibly with convention rights, it is difficult to see what judicial function the judge in question could carry out after October 2000 without compromising the appearance of impartiality.
Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council

Aidan O’Neill QC*

Devolution issues

The three ‘Devolution Statutes’ of 1998, namely the Scotland Act, the Government of Wales Act and the Northern Ireland Act, all make reference to and define a new category of legal questions, ‘devolution issues’, which arise out of the creation of devolved governments for the non-English parts of the United Kingdom.1

Devolution issues are boundary markers. They are concerned with questions as to whether or not the devolved assemblies and administrations have transgressed the limits of the powers granted them under their founding acts – for example, by entering into areas reserved to the Westminster Parliament, or by being in breach of Community law, or by being incompatible with any Convention rights, or by otherwise being outwith the legislative or administrative competence of the devolved institutions.

Since the limits of the devolved legislative bodies and administrations are set out in statute, the task of ensuring that the devolved institutions stay within the limits of the powers granted to them is one for the courts. Quite separately from the provisions of the Human Rights Act 1998, the three Devolution Statutes put it within the power of all UK courts to review and strike down on grounds of incompatibility with Convention rights, both legislative and executive acts emanating from the devolved institutions of Scotland,2 Wales3 and Northern Ireland.4 What has been created by the Devolution Statutes then are democratic institutions whose acts are, however, subject to control by the judiciary.

Questions as to the ‘constitutionality’ of the acts or omissions of the devolved institutions and administrations (in the sense of whether or not these are in conformity with the limits set out in their founding statutes) may, if relevant to the matter at hand, competently be raised in any proceedings before any courts in the United Kingdom. Such matters are not reserved for decision by the higher courts. In principle, devolution issues may arise within any of the legal jurisdictions of the United Kingdom; thus, questions as to the vires of a Welsh measure might be raised before a Scottish court; while Scottish legislation may be challenged in Northern Ireland or in England. Schedules 6, 8 and 10 of the Scotland Act, Government of Wales Act and Northern Ireland Act respectively set out the procedures to be followed when devolution issues are raised before courts in the United Kingdom. All provide that frivolous or vexatious challenges to the

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1 For the various definitions of ‘devolution issues’ see para 1 of each of: Sched 6 to the Scotland Act 1998; Sched 8 to the Government of Wales Act 1998; and Sched 10 to the Northern Ireland Act 1998.
2 Scotland Act 1998 ss 29(2)(d) and 57(2).
4 See Northern Ireland Act 1998 ss 6(2)(c) and 24(1)(a).

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603
competency of devolved legislation or administrative action or omissions need not, however, be taken up by the courts.\(^5\)

The three Devolution Statutes have also created a new role for the Judicial Committee of the Privy Council in that they have given it, rather than the House of Lords, jurisdiction on the question of the final domestic resolution of any devolution issues.\(^6\) But it is only those Privy Councillors who hold or have held the office of a Lord of Appeal in Ordinary, or high judicial office as defined in Section 25 of the Appellate Jurisdiction Act 1876 (that is to say English and Northern Ireland High Court and Court of Appeal Judges and, in Scotland, Senators of the College of Justice) who may sit and act as members of the Judicial Committee in proceedings brought under the Devolution Statutes. In effect, what this means is that: firstly, Privy Councillors who are Commonwealth judges (for example Lord Cooke of Thorndon) are excluded from sitting in devolution issue proceedings, and secondly, unless Privy Councillors who do not sit in Parliament are specifically called to sit on a particular Judicial Committee hearing, there will be high degree of overlap between those who are active House of Lords judges and the Privy Council judges.\(^7\)

The devolution jurisprudence of the Privy Council

Between October 2000 and February 2001 four decisions of the Judicial Committee of the Privy Council, acting for the first time under its devolution jurisdiction, were pronounced. All of these cases came from Scotland on appeal from decisions of the High Court of Justiciary sitting in Edinburgh as a court of criminal appeal. The Scottish criminal appeal court has, throughout its history, been a court of final instance with no possibility of further appeal against any of its decisions to the House of Lords. Paragraph 13(a) of Schedule 6 to the Scotland Act 1998, however, introduced for the first time the possibility of an appeal against decisions of the Scottish criminal appeal court to the Privy Council, either with leave of the Scottish court or, failing such leave, with special leave of the Judicial Committee. The four cases which have now gone to the Judicial Committee from Scotland are, chronologically:

(i) Montgomery and Coulter \textit{v} Her Majesty's Advocate and the Advocate General for Scotland,\(^8\) an appeal by the two accused in the second Surjit Singh Chhokar murder trial against a decision by the High Court of Justiciary, acting as the Scottish criminal appeal court, to refuse their claim that the extent of their pre-trial publicity (resulting in part from a public dispute between Lord McCluskey the trial judge in the first Chhokar trial and the then

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Lord Advocate, Lord Hardie of Blackford, over the propriety of the Crown deciding against putting all three suspects for the murder on trial together) was such as to deprive them of the possibility of a fair trial;

(ii) Hoekstra and others v Her Majesty's Advocate (No. 4) an application by the accused for special leave to appeal to the Privy Council against the decision of the High Court10 chaired by the Lord Justice General, Lord Rodger of Earlsferry, to refuse their application to set aside as ultra vires that court's earlier decision11 to order the quashing of the interlocutors of a differently constituted High Court, chaired by Lord McCluskey.12 The second High Court had quashed the orders of the first High Court on the grounds that these had been pronounced by a court which, by reason of Lord McCluskey's trenchantly expressed public views on the wisdom of the incorporation of the European Convention, could not be said to have been properly constituted by three impartial judges;

(iii) Brown v Stott,13 an appeal by the Crown against the decision of the High Court of Justiciary, again acting under the chairmanship of the Lord Justice General in its appellate jurisdiction,14 to uphold the accused's claim that the proposal by the Crown to lead and rely in court upon evidence of the admission which she was compelled to make to the police under Section 172(2)(a) of the Road Traffic Act 1988 contravened her Convention right against self-incrimination; and

(iv) HM Advocate v McIntosh,15 again a Crown appeal against a decision of the Scottish criminal appeal court consisting of Lord Prosser, Lord Kirkwood and Lord Allanbridge in which a majority of the court (Lord Kirkwood dissenting) found that the assumptions set out in Section 3(2) of the Proceeds of Crime (Scotland) Act 1995 relating to the recovery of the proceeds of drug trafficking were incompatible with the presumption of innocence set out in Article 6(2) ECHR.16

All of these appeals concerned aspects of the fair trial provision of the Convention, Article 6. In all of them, the Privy Council found against the arguments of the individuals accused, and in favour of the Crown. Thus, the accused's appeal in Montgomery v. Coulter was unsuccessful, it being held by the Judicial Committee that the High Court of Justiciary was correct in its assessment of the effect of the pre-trial publicity in this case as not being such as to prejudice the possibility of the two accused's receiving a fair trial. The applicants for special leave in Hoekstra (No. 4) were also unsuccessful, with the Judicial Committee again agreeing with the High Court that the accuseds' applications raised no devolution issues properly so called, and that therefore there was no avenue of appeal to the Judicial

9 Hoekstra and others v Her Majesty's Advocate (No. 4), [2000] 3 WLR 1817, 2001 SLT 28 JCPC also accessible at <www.privy-council.org.uk/ >.
10 Hoekstra and others v Her Majesty's Advocate (No. 3), HCJ, 2000 SCCR 676.
11 Hoekstra and others v Her Majesty's Advocate (No. 2), 2000 SLT 603, HCJ, the criminal appeal court consisting in Lord Rodger of Earlsferry, Lord Sutherland and Lady Cosgrove.
12 Hoekstra and others v Her Majesty's Advocate (No. 1), 2000 SLT 602, HCJ, the criminal appeal court consisting of Lord McCluskey, Lord Kirkwood and Lord Hamilton.
14 Brown v Stott (Procurator Fiscal, Dunfermline), 2000 SLT 379, HCJ.
16 McIntosh v. HM Advocate, 2000 SLT 1280, HCJ, also accessible at <www.scotcourts.gov.uk/>. 

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605
Committee available under the Scotland Act. By contrast, in Brown v Stott the Crown appeal against the decision of the High Court of Justiciary was successful, being held that any right against self-incrimination in the Convention was not an absolute one, but was instead a right which could lawfully be limited provided that such limitation were proportionate and not such as to compromise an accused's right to a fair trial overall: in the context of road traffic prosecutions, the Judicial Committee held that considerations of the public interest could justify the Crown leading in evidence the accused's self-incriminating statement, notwithstanding that it was required of her by the police under threat of prosecution. And in H/H Advocate v McIntosh the Crown appeal was again successful, with the Judicial Committee overruling the majority decision of the Scottish criminal appeal court and holding that the property confiscation proceedings did not constitute a separate criminal charge. Accordingly the Judicial Committee held that the presumption of innocence set out in Article 6(2) was neither applicable or relevant to the prosecutor's application for a confiscation order (overruling on this point also the decision of the Court of Appeal Criminal Division of England and Wales in R v Benjafield17), albeit that the accused might still rely in such proceedings, on the general fairness protections set out at common law and under Article 6(1). In any event, the Judicial Committee reiterated their view as set out in Brown v Stott and by the House of Lords in R v Director of Public Prosecutions, ex parte Kebilene18 to the effect that the presumption of innocence contained in Article 6(2) was not an absolute right but one which might properly be subject to a balancing test against the general interest of the community in suppressing crime.

The specific decisions of the Judicial Committee on the merits of each of these cases were unanimous: all are of interest and all raise important issues of law and legal interpretation which deserve full consideration. More generally, however, the four decisions, and the manner in which they appear to have been reached, highlight some fundamental aspects of the new constitution of the United Kingdom which the Human Rights Act and the Devolution Statutes, in particular the Scotland Act, have created. It is on these general constitutional aspects that this present article will concentrate.

The definition of a ‘devolution issue’

The first thing that should be noted is that the one constant factor in all of the decisions of the Privy Council to date acting under its devolution jurisdiction has been the presence of the two Scots judges in the House of Lords, Lord Hope of Craighead and Lord Clyde on the panel of judges considering these matters.19 This is perhaps unsurprising, given that all of these cases to date have emanated from Scotland, but it is suggested that this continuity of personnel is a factor of particular significance when coming to consider the impact of these decisions on the constitutional development of the United Kingdom, post-devolution.

17 See R v Karl Benjafield and others, CA unreported decision of Woolf LCJ, Judge LJ and Collins LJ December 2000 at para 69. This decision is also digested in [2000] Times Law Reports 902.
18 R v Director of Public Prosecutions, ex parte Kebilene [2000] 2 AC 326, HL.
20 See, most recently, Follen v HM Advocate 8 March 2001, JCPC, accessible at <www.privycouncil.org.uk>, a decision of the screening committee composed by Lords Bingham, Hope and Clyde to refuse special leave to appeal.

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In Montgomery and Coulter v Her Majesty’s Advocate and the Advocate General for Scotland the Judicial Committee was composed in the traditional manner one now expects of Scottish appeals to the House of Lords, namely by two Scottish judges (Lord Hope and Lord Clyde) together with three non-Scotts (Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Hoffmann). However, a clear division of opinion arose among these judges as to whether or not a decision of the Lord Advocate to initiate criminal proceedings on indictment against the accused could properly be said to raise a devolution issue at all. The non-Scotts judges, led by Lord Hoffmann, clearly tended to the view that the matter of respect for and enforcement of an individual’s Article 6 rights to a fair trial was not a matter for a prosecutor, but lay wholly with the court before which the trial was to be conducted. Accordingly, they tended to the view that one could not take Article 6 fair-trial point against the prosecutor, particularly before the trial has actually started.

The Scottish judges, by contrast, emphasised the peculiar role and history of the Lord Advocate, noting his status as ‘master of the instance’ in criminal trials and insisting that the approach which the Scotland Act had taken was to make the right of the accused to receive a fair trial a responsibility of the Lord Advocate as well as of the court. In what appears to be an implicit rebuke to Lord Hoffmann, Lord Hope noted that this case was the first time in which an appeal on a matter of Scots criminal law and procedure had ever come before a court situated outside Scotland; he therefore stressed the need for all the judges of that court to think themselves into the history and modes of understanding of Scots criminal lawyers, rather than simply for the judges to assume that the Scottish criminal system mirrored English criminal and the English derived criminal legal systems.

The matter at stake was clearly one of the highest general constitutional importance. If Lord Hoffmann’s view were to prevail and questions regarding the proper protection of Article 6 did not raise devolution issues (since they concerned only the acts of the courts rather than the devolved Lord Advocate) then two consequences followed: firstly, it would appear that all of the Scottish jurisprudence on the Lord Advocate’s duties under Article 6 which had developed since the coming into force of the Scotland Act and prior to the implementation of the Human Rights Act had been decided on the wrong statutory basis; secondly, and perhaps more importantly, there would effectively be no role for the Judicial

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21 Lord Hope relied in part on the following passage from Hume’s Commentaries on the Law of Scotland Respecting Crimes (1844) vol. II 134:

The Lord Advocate is master of his instance in this other sense, that even after he has brought his libel into court, it is a matter of his discretion, to what extent he will insist against the pannel; and he may freely, at any period of the process, before return of the verdict, say after it has been returned, restrict his libel to an arbitrary punishment, in the clearest case, even of a capital crime.

22 Notably: HM Advocate v Little 1999 SLT 1145 on the Lord Advocate’s delays in bringing a case to trial; Stars and another v Ruxton (Procurator Fiscal, Linlithgow), 2000 JC 208 on temporary sheriff; Hoekstra and others v Her Majesty’s Advocate (No. 2), 2000 SLT 605 on the requirements of an impartial judiciary; Buchanan (Procurator Fiscal, Fort William) v McLean 2000 SLT 928, HJC (decision of Lord Prosser, Lord Milligan and Lord Morison) on fixed fees criminal legal aid and the equality of arms; Procurator Fiscal, Kirkcaldy v. Kelly, HJC, unreported decision of Lord Milligan, Lord Cameron of Lochbroom and Lord Allanbridge, 18 August 2000, accessible at <www.scotcourts.gov.uk> on District Courts and the appearance of independence; and McIntosh v. HM Advocate, 2000 SLT 1280, HJC, on the incompatibility the presumption of innocence set out in Article 6(2) ECHR of the procedures for the confiscation of the assets of convicted drug traffickers

23 See Angus Stewart QC, ‘Devolution Issues and Human Rights’ (2000) Scots Law Times (News) 239 for a detailed argument to the effect that the legislation has indeed been misunderstood and misapplied by the judges and that the Scotland Act was never intended to be used to raise human rights points in the context of ordinary criminal procedure.
Committee in deciding on the proper interpretation and application of Convention fair-trial rights within the context of Scottish criminal procedure. There would be no space for the Judicial Committee to carry out its envisaged constitutional function of ensuring a uniform UK-wide interpretation for Convention rights in matters of both criminal and civil law. The result of this could well be the development of a peculiarly Scottish Convention rights jurisprudence in criminal matters, since there remains no appeal from the High Court of Justiciary to the House of Lords on 'pure' human rights challenges which might be brought in the Scottish criminal courts under the Human Rights Act.²⁴

In the event, since all the judges in Montgomery and Coulter were agreed that the appeal should be dismissed on the basis that the facts did not show any potential breach of the accuseds' fair trial rights, the non-Scots judges did not find it was not necessary for them to reach any final decision to be reached on the point as to whether a devolution issue had properly been raised as regards the applicability of Article 6 to the acts and omissions of the Lord Advocate, leaving the point to be argued and resolved on another occasion.

In Hoekstra (No. 4) the three judge screening committee of the Privy Council, composed of Lord Slynn, Lord Hope and Lord Clyde, had little difficulty in rejecting the accuseds' application for special leave to appeal, with Lord Hope, delivering the Judgment of the Board, noting that the Judicial Committee was not a constitutional court of general jurisdiction and re-affirming that it could only hear appeals from Scotland which raised a devolution issue as defined under the Scotland Act and which had been determined by the court appealed against.²⁵ In all other issues, every interlocutor of the High Court of Justiciary is final and conclusive and is not subject to review by any court whatsoever. Thus, where it was alleged that the judges of the High Court of Justiciary had acted unlawfully, this did not give rise to an issue which the Judicial Committee could adjudicate on, since such an allegation, although raising a constitutional point, did not raise a Scotland Act point. The limits within which the powers of the High Court of Justiciary may be exercised were said by Lord Hope to be for determination by that court and had nothing to do with the functions of the Scottish Ministers, the First Minister or the Lord Advocate.

The composition of the Judicial Committee in Brown v Stott is of particular interest in the context of the split in approach between the Scots and non-Scots judges which was revealed in Montgomery and Coulter. Again the two Scottish Law Lords, Lord Hope and Lord Clyde were included on the Committee, but they were joined by a third Scottish judge, Lord Kirkwood, who was eligible to sit on the Judicial Committee by virtue of the recent appointment of Inner House judges to the rank of Privy Councillor. Thus, for the first time, Scottish judges made up a majority of the Judicial Committee, being joined in Brown v Stott by Lord Bingham and Lord Steyn. This time, the Committee were unanimous in deciding that the proposed acts of the Lord Advocate properly raised a devolution issue under reference to Article 6 fair-trial rights.

Thus, in Brown v Stott, the disputed analysis of this issue by Lords Hope and Clyde in Montgomery and Coulter would seem to have prevailed over the approach of Lord Hoffmann, and over the doubts expressed by Lord Slynn and Lord Nicholls in the earlier case. Had the Scots judges' analysis of what constitutes a devolution

²⁴ The non-availability of appeals from the Scottish Criminal Courts to the House of Lords was confirmed by the House of Lords in Mackintosh v Lord Advocate (1876) 2 App Cas 41 and was recently statutorily re-affirmed by s 124(2) of the Criminal Procedure (Scotland) Act 1995.

²⁵ See Follen, n 20 above, per Lord Hope at para 9.
issue not been followed, and the Hoffmann approach preferred, the likely result would have been that Lord Justice-General Rodger’s finding – backed as it was by an impressive citation and detailed critique of many Commonwealth and US authorities – as to the central and (almost) absolute nature of the right against enforced self-incrimination implicit in Article 6 of the Convention would have prevailed in the context of the Scots criminal law and procedure. By contrast, it seems likely that the House of Lords in any criminal appeal in England would have followed the approach favoured by the pressure group JUSTICE (who were permitted to intervene in the Judicial Committee proceedings in Brown v Stott) and allowed the right to be limited in a proportionate manner for legitimate reasons. One suspects that it was precisely the possibility of such a major disparity of approach between the two jurisdictions which drove Lord Hope’s insistence (in the face of Lord Hoffmann’s scepticism) as to the fair trial responsibilities of the Lord Advocate.

In HM Advocate v McIntosh the Judicial Committee again included Lord Hope and Lord Clyde, but had a non-Scottish majority made up of Lord Bingham, Lord Hoffmann, and Lord Hutton. By this time, there was no dispute among any members of the Committee that the matter before it was properly to be characterised as a devolution issue. The leading speech was given by Lord Bingham and concurred in by the rest of the bench, with only Lord Hope adding some brief additional observations on their decision (remarks which were also specifically concurred in by Lord Hoffmann). Again the decision of the Judicial Committee to over-rule the majority decision of the Scottish criminal appeal court brought Scottish criminal jurisprudence on the extent and effect of Article 6(2) into line with England and Wales (as now seen in the judgment of the Court of Appeal Criminal Division in R v Benjafield26) and ensured a uniformity of approach throughout the United Kingdom on the question of the confiscation of the alleged proceeds of drug trafficking.

The relevance of the Strasbourg jurisprudence to the Privy Council decisions

In coming to their decisions on the compatibility of acts or omissions of public authorities with any of the defined ‘Convention rights’, the courts are enjoined by section 2 of the Human Rights Act to ‘take into account’ all and any relevant decisions of the institutions established under the Council of Europe, namely the Court of Human Rights, the Commission on Human Rights and the Committee of Ministers.

The Human Rights Act 1998 does not, then, incorporate into UK law and bind the UK courts to the jurisprudence of the Strasbourg institutions. The apparently non-binding nature of the decisions of the Strasbourg Court on national courts is to be contrasted with the position of the European Court of Justice in matters concerning European Community law. National courts are obliged to decide cases involving matters of substantive Community law under the Treaty of Rome and associated treaties, or involving jurisdictional or conflict of laws question arising between the Member States under the Brussels and/or Rome Conventions, ‘in accordance with the principles laid down by and any relevant decision of the

26 See R v Karl Benjafield and others, CA unreported decision of Woolf LCJ, Judge LJ and Collins J, 21 December 2000 at para 69. This decision is also digested in [2000] Times Law Reports 902.
European Court of Justice’. It may be that the non-binding nature of the general Strasbourg jurisprudence is intended simply to reflect the position under public international law under which a contracting state to the European Convention is bound only by judgments addressed to that state. Alternatively, it may be thought that since the European Court of Human Rights itself treats the Convention as a ‘living instrument’ meaning that its interpretation of its provisions may change over time, it would not be appropriate to bind national courts to Strasbourg judgments which are not binding on the Council of Europe institutions themselves. The fact that domestic courts would appear not to be formally bound to apply the decisions of the European Court of Human Rights to the facts of the case before them, arguably leaves the way open for a national human rights jurisprudence to be pursued and for a native human rights culture to be developed.

In Montgomery and Coulter Lord Hope’s judgment on the substantive issue (as to whether or not the pre-trial publicity precluded the possibility of a fair trial) contains, in addition to references to numerous Scottish and English domestic authority, an impressive citation and analysis of New Zealand legal research and Strasbourg, Canadian, Australian and Irish case-law, leading him ultimately to uphold the compatibility of the existing common law approach on the matter of possible prejudice with the fair trial requirements of the Convention.

And in HM Advocate v McIntosh Lord Bingham’s judgment considers in some detail Strasbourg authority both on the question as to whether or not a person subject to property confiscation proceedings following upon a conviction for drug trafficking could be said to be being charged with a criminal offence and, secondly, as to whether the statutory presumptions and reversal of onus of proof set out in such proceedings could be said to violate the presumption of innocence.

In Brown v Stott, however, it would appear that the Judicial Committee took a decision not to follow a developing Strasbourg jurisprudence as to the absolute nature of the privilege against enforced self-incrimination implicit in Article 6 seen, most notably, in the following decisions of the European Court of Human Rights: Funke v France, where the Strasbourg Court found that the imposition of fines by the French customs authorities against an individual in respect of his failure to disclose documents concerning financial transactions violated Article 6(1) ECHR; and Saunders v United Kingdom in which the use at a subsequent fraud trial of transcripts of even non-self-incriminating evidence taken from the accused by DTI inspectors acting in relation to the investigation of company takeovers under compulsory powers was found to contravene Article 6(1) ECHR. These Strasbourg cases, together with recent decisions of the supreme or constitutional courts of Canada, South Africa, and the United States of America.
had been relied upon in the judgment of the High Court of Justiciary acting as a court of criminal appeal against which the appeal to the Judicial Committee of the Privy Council was taken by the Crown. In the leading judgment in the appeal court, the Lord Justice General, Lord Rodger, observed that it was not easy to discover the scope of the right to silence protected under the European Convention simply from the judgments of the European Court of Human Rights since there were at that time only two or three cases in which the matter had been raised. He stated, too, that he could derive little guidance from the admissibility decisions of the European Commission of Human Rights cited to him by the Crown in which the Commission had Human rejected as ‘manifestly ill-founded’ claims by applicants that their Article 6(1) ECHR rights had been breached, holding that ‘not all of the[ir] reasoning is easy to follow’ and that, in any event, ‘none of the decisions concerned the use of any reply as evidence at a trial’. Having regard to authorities in a variety of jurisdictions he concluded that Article 6(1) ECHR conferred ‘testimonial immunity’ on any verbal statements which an accused was required to make under compulsion by the authorities but that the right to silence and the privilege against self-incrimination ‘does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing’. The Lord Justice General observed:

[According to recognised international standards, to be effective, the right of silence and the right not to incriminate oneself at trial really imply the recognition of similar rights at the stage when the potential accused is a suspect being questioned in the course of a criminal investigation. In particular the accused’s right to silence and not to incriminate himself under the Convention would be infringed if the Crown could lead evidence of an answer which the accused was obliged to give in response to police questioning in those circumstances. To hold otherwise would be to undermine the central right of an accused under the Convention not to incriminate himself at trial.

The Solicitor General argued in terrorem that, if we were to allow the appellant’s appeal, then any use of information obtained under Section 172 at trial would infringe an accused’s right not to incriminate himself under Article 6(1). He pointed out that this could have momentous effects on the use of roadside cameras in the detection and prosecution of road traffic offences, since such prosecutions rely on the use of Section 172 for proof of the identity of the driver. That may or may not be so, but, in accordance with the guidance of the [Strasbourg] Court, I have reached my decision on the facts of this particular case. I have not considered the facts of other possible cases. But not all the features of the present case would be found, say, in cases where the police send out a written request to the keeper of a vehicle caught speeding by a roadside camera. I therefore reserve my opinion on such a case until it arises for decision.

33 Brown v Stott (Procurator Fiscal, Dunfermline), 2000 SLT 379, HCJ.
34 These included the following situations specifically involving road traffic regulation: where an individual was required under UK law to produce blood samples under threat of prosecution in a drink driving case (Application 30551/96 Carridge v United Kingdom, Commission decision of 9 April 1997, accessible at <www.dhcour.coe.fr/hudoc>); where a car owner was found liable in the Netherlands for parking fines in respect of his car when he was not able or willing to name the driver or to establish that the car had been used against his will (Application 6170/73 D v Netherlands, unpubished decision of the Commission of 26 May 1975); where an Austrian national regulation obliged the registered keeper of a car to accept responsibility for the unlawful use of his car, or to name the actual driver if known to him (Application 15135/89 JP, KR and GH v Austria Commission decision of 5 September 1989, accessible at <www.dhcour.coe.fr/hudoc>); and where the registered keeper of a vehicle was fined by the Spanish authorities for failing to disclose the identity of the driver of his vehicle after it had been caught in a radar speed trap (Application 23816/94 Tora Tolmos v. Spain Commission decision of 17 May 1995, accessible at <www.dhcour.coe.fr/hudoc>).
By contrast, the Judicial Committee in its unanimous decision overturning the decision of the High Court, appeared to accept the consequentialist in terrors arguments put forward by the Lord Advocate, the Advocate-General for Scotland and by the only intervening party JUSTICE, and held that the right not to be compelled to incriminate oneself which is implicit within the Convention should not be regarded as an absolute right, but instead was one which the State authorities could lawfully limit in accordance with the requirements of proportionality. It is perhaps to be regretted that the apparent inequality of arms as between appellants and respondent was not redressed by the participation on the side of the accused of LIBERTY or some other NGO willing to argue the case for a more absolute right against compelled self-incrimination.

Such an approach by the Judicial Committee limiting the privilege against self-incrimination appears to run counter to the Strasbourg, US and Commonwealth court decisions which had been reviewed and applied in the judgment of the High Court of Justiciary. The view taken by the Judicial Committee, however, appears to have been that, as a matter of policy, the public interest in the regulation and effective control of road traffic justified a more restrictive interpretation of the right against self-incrimination in the context of road traffic prosecutions. The Privy Council judges appear to have accepted (as a matter of submission and without evidence) the contentions of the appellant and intervening parties to the effect that such limitation on the privilege against self-incrimination in road traffic matters was effective in preventing misuse of motor vehicles and thereby to reduce the number of fatal and serious accidents and so save lives and property. It would appear that it was in the light of this policy decision that the judges in the Judicial Committee then expressed some reservations about too ready a reliance on Commonwealth and US precedents to inform the domestic courts' understanding of the requirements of the Convention, and also gave voice to doubts as to the correctness of the decision of the European Court of Human Rights in Saunders;65 notwithstanding the fact that in subsequent proceedings before the European Court of Human Rights, the United Kingdom Government has conceded the correctness of the Saunders decision.36

The Privy Council decision in Brown v Stott makes one thing clear, at least: past case law, whether from the Strasbourg institutions, from other constitutional or human rights courts or from their domestic courts, should not be applied mechanistically or with an undue emphasis on the rules of precedent. Past cases should not be seen as establishing the extent of a Convention right – they simply provide examples of its application in particular circumstances. When faced with a Convention argument it may be argued that the courts have always to seek to ensure ‘a fair balance between the general interests of the community and the requirements of the protection of individuals’ fundamental rights’,37 having regard to the particular circumstances before them and the consequences which might flow from their particular decision. In the early days of wrestling with human rights arguments there will clearly be a temptation for practitioners and the courts to elevate dicta of the European Court of Human Rights into binding pronouncements on the law, in a manner which may perhaps be criticised in the light of Brown v Stott as overly deferential to that court. At the same time, however,

35 See, in particular: Lord Bingham at 25; Lord Steyn at 38 and 43–45; Lord Hope at 56-58 and 63-65; Lord Clyde at 67; Lord Kirkwood at 75.
36 See IJL, GNR and AKP v United Kingdom, ECtHR unreported decision of 19 September 2001, accessible at <www.dhcour.coe.fr/hudoc>.
37 See A v The Scottish Ministers 2000 SLT 873, IH per L-P Rodger at para 48.
would appear that the Judicial Committee also wish proper account should be taken of the effect and import of, for example, admissibility decisions of the Commission (and post-Protocol 11 Court) of Human Rights and they should not be summarily dismissed as of little or no account because considered to be ‘obscurely reasoned’.

The question that remains is whether an approach to the case law of the Strasbourg court which, on apparently the basis of the considerations derived from the ‘margin of appreciation’ of the national institutions, seems to allow for a lower standard of protection for the Convention right against self-incrimination than that set out by the European Court of Human Rights in Funke and Saunders, is itself compatible with the requirements of the Convention. This question can ultimately only be answered by a decision of the Strasbourg court.

Proportionality and the intensity of review in Convention rights cases

Prior to the ‘bringing home’ of the Convention rights there was a growing awareness among practitioners and judges that the stark choice between either high ‘Wednesbury unreasonableness’ as traditionally defined, and the standards of ordinary reasonableness (with judges substituting their views for those of the administrators) was insufficient if judicial review was to be properly responsive to the requirements of the changing constitution. In fundamental rights cases, the phrase a ‘most anxious scrutiny’ came to be used in relation to the courts reviewing the administration’s actions and a recognition that ‘the more substantial the interference with human rights the more the court will require by way of justification before it is satisfied that the decision is reasonable’\(^{38}\) in the sense of it actually falling within the range of responses open to a reasonable decision maker.\(^{39}\)

With the coming into force of the Human Rights Act, however, things have changed. By virtue of Section 6(1) of the Act the actions and omissions of a public body in breach of a Convention right are no longer to be characterised in judicial review terms as a species of ‘irrationality’ and thus subject to the high hurdle of Wednesbury unreasonableness,\(^{40}\) but rather have to be regarded as a form of illegality and should, in theory, thereby made subject to a stricter scrutiny by the courts examining whether or not the decision maker has, in fact, acted in a manner which is compatible with Convention rights. This means that the Strasbourg doctrine of proportionality rather than ‘irrationality’ is directly imported into domestic consideration of challenges to public authorities on Convention grounds.

It is, however, implicit within the doctrines of proportionality and the ‘margin of appreciation’ that a weighing of individual rights against considerations of the

\(^{38}\) R v Admiralty Board of the Defence Council, ex parte Lustig-Prean and Beckett [1996] IRLR 100, CA per Thorpe LJ at 106–7

\(^{39}\) See, for example, R v Secretary of State for the Home Department ex parte Launder [1997] 1 WLR 839 per Lord Hope of Craighead at 867 in which he observed that:

If the applicant is to have an effective remedy against a decision which is flawed because the decision maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decision, and not to some independent remedy, that [counsel for Launder] directed his argument.


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common good is followed. In coming to his decision in Montgomery, however, Lord Hope noted (at pages 40–41):

Article 6, unlike Articles 8 to 11 of the Convention, is not subject to any words of limitation. It does not require nor indeed does it permit a balance to be struck between the rights which it sets out and other considerations such as the public interest.

In Brown v. Stott, a different emphasis in relation to Article 6 is evident. Lord Bingham states (at page 31) that:

The jurisprudence of the European Court of Human Rights very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for.

Lord Steyn states (at page 37):

[A] single minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights.

And Lord Hope notes (at page 55):

[T]he European Court of Human Rights and the European Commission of Human Rights have interpreted ... Article [6] broadly by reading into it a variety of other rights to which the accused is entitled in the criminal context. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. They include the right to silence and the right against self-incrimination with which this case is concerned. As these other rights are not set out in absolute terms in ... Article [6] they are open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial.

The approach of the Judicial Committee in Brown was therefore directed at the question as to whether the provision in question represented a ‘disproportionate response to a serious social problem’ given that (per Lord Bingham at page 34) ‘the possession and use of cars (like for example, shotguns, the possession of which is very closely regulated) are recognised to have the potential to cause grave injury’. None of the five judges had any difficulty in finding, in the light of the statistics presented to them for death and injury on the roads, that requiring the registered keeper of a vehicle to advise as to the identity of the driver of his or her car was not disproportionate measure, even if it meant the keeper being compelled to incriminate herself.

Similarly in HM Advocate v McIntosh, both Lord Bingham and Lord Hope took the view that the rebuttable presumption that any property held or transferred to or by a convicted drug trafficker up to six years before his being indicted for drug trafficking should be regarded as the proceeds of drug trafficking carried on by him was a proportionate response to the ‘scourge of drug trafficking’. In support of that view, Lord Bingham cited the terms of the 1988 Vienna UN Convention against

41 Thus the (Luxembourg-based) Court of Justice of the European Communities commonly uses a variation on the following formula (in this instance found in Case 5/88 Wachauf v Germany [1989] ECR 2609 at paragraph 18) when discussing fundamental rights:

The fundamental rights recognised by the Court are not absolute however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.
Illegal Traffic in Narcotic Drugs and Psychotropic Substances (ratified by the United Kingdom in June 1991), quoted with approval certain passages from the Irish Law Reform Commission 1991 report (LRC 35-1991), *The Confiscation of the Proceeds of Crime* and concluded that:

The statutory scheme contained in the 1995 Act is one approved by a democratically elected Parliament and should not be at all readily rejected.

While Lord Hope assessed the proportionality of the statutory scheme (at paragraph 12 of his judgment) in the following terms:

The essence of drug trafficking is dealing or trading in drugs. People engage in this activity to make money, and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for making these assumptions. They serve the legitimate aim in the public interest of combating that activity. They do so in a way which is proportionate. They relate to matters that ought to be within the accused’s knowledge, and that are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion fair balance is struck between the legitimate aim and the rights of the accused.

The apparent readiness of the Privy Council in both Brown v Stott and in *HM Advocate v. McIntosh* to find in favour of the Crown’s claims as to the proportionate nature of the legislative measure under challenge, and to hold that the individual’s privilege against self-incrimination and/or the presumption of innocence could properly be limited by the State highlights the fact that the importation of the European test of proportionality, long advocated by civil libertarian lawyers, may be something of a double-edged sword. The traditional black-letter law approach to judicial review was concerned not with the merits of the particular decision as such, but with the decision making process; accordingly a strict and formal approach in favour of those affected by the decision, which emphasised the legal limits on the jurisdiction of the decision maker and the need for procedural fairness could properly be taken by the courts, concerned as they were to police decisions rather than to make them. With the new doctrine of proportionality, however, the courts are concerned with the merits of the decision in question and, in particular, with whether or not: (i) the decision or measure in question is in fact aimed at a legitimate end; (ii) the decision or measure is effective in achieving that end; and (iii) the decision or measure shows a proper regard for, and balance, of the rights of the individual against the interests of society. Given the balancing exercise required in this last aspect of the proportionality, the procedural and substantive rights of the individual can no longer be regarded as the trump cards they were under the older model of judicial review. Accordingly, the doctrine of proportionality may, in fact, lead to greater rather than less deference by the courts to administrative and legislative decisions, than might have been expected under the older constitutional model, under which individual’s substantive and procedural rights are in effect ring-fenced against the whims of the decision maker.

**Conclusion**

Section 103 of the Scotland Act, Section 82 of the Northern Ireland Act and paragraph 32 of Schedule 8 to the Government of Wales Act all assert the binding nature of decisions of the Judicial Committee of the Privy Council in proceedings under the Act in all other courts and legal proceedings, apart from later cases.
brought before the Committee. These provisions would appear to be intended to alter the general rule that the House of Lords in its judicial capacity is not bound by decisions of the Judicial Committee of the Privy Council. It would seem that the purpose of this provision was to ensure uniformity of approach across the United Kingdom on matters of Convention rights, among others. It is a provision the significance of which has apparently been little understood, because in effect it means that on questions of the effect and scope of Convention rights (which have been duly raised under the Devolution Statutes) the House of Lords has been superseded as the final court of appeal in the United Kingdom. This will come as a great shock to many English lawyers, who are currently engaged in litigation over Convention rights issues since the coming into force of the Human Rights Act in England at the beginning of October 2000. The final court of appeal in civil and criminal matters for England, Wales and Northern Ireland, the House of Lords, has itself been placed at level lower in the judicial hierarchy by another court, the Judicial Committee, which a developing constitutional convention seems to indicate will be a court composed substantially, (and at times by a majority) of Scots lawyers deciding cases brought primarily from Scotland.

The somewhat surprising (and surely unintended) result of this is an effective Scottish take-over of English law when matters of Convention rights are raised, and the exclusion of the vast majority of English lawyers and English judges from the constitutional process put in place to reach final and binding decisions on Convention points in the United Kingdom. Thus, while in December 2000, the Court of Appeal of England and Wales was, in the case of R v Benjafield considering the compatibility of property confiscation orders in drug trafficking cases with individuals’ Convention rights, the final decision on this question of Convention compatibility was effectively taken, not on any appeal by the parties to that case the House of Lords, but by the decision of the Judicial Committee in the Scottish case of HM Advocate v McIntosh, which as we have seen reversed the majority finding of the High Court of Justiciary (sitting in Edinburgh as a court of criminal appeal) to the effect that the legal regime governing such confiscation was incompatible with the fair trial requirements of Article 6. Similarly, in a series of conjoined judicial review applications (collectively known as ‘Alconbury’) which were heard before the High Court of England and Wales in December 2000 the question before Tuckey LJ and Harrison J was whether or not the processes by which the Secretary of State for Environment, Transport and the Regions makes decisions under the Town and Country Planning Act and Orders, under the Transport and Works Act 1992, the Highways Act 1980 and the Acquisition of Land Act 1981 were compatible with Article 6(1). Effectively the same issue arising under parallel Scottish planing legislation had already been raised and decided upon in October 2000 by Lord Macfadyen sitting

44 McIntosh v HM Advocate, JCPC, unreported decision of Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Clyde and Lord Hutton, 5 February 2001 (accessible at <www.privy-council.org.uk>).
45 McIntosh v HM Advocate, 2000 SLT 1280, HCl, also accessible at <www.scotcourts.gov.uk>.
at first instance in the Scottish judicial review application County Properties v Scottish Ministers47 and the Divisional Court hearing the conjoined English and Welsh cases arrived at a similar conclusion to that which had already been reached in the Outer House in the Scottish case, namely that the existing planning procedures in relation to call-ins by the Secretary of State were incompatible with the Convention rights guaranteeing individuals access to an independent and impartial tribunal with full jurisdiction in the determination of their civil rights. The decision of Lord Macfadyen in County Properties was appealed against by the Scottish Ministers to three judges of the Inner House of the Court of Session. Meanwhile, however, the decision of the Division Court in the Alconbury application was allowed to leapfrog the Court of Appeal of England and Wales and be appealed directly to the House of Lords.48 But again, as a result of the new hierarchy of courts created by the Devolution Statutes, the final decision on this point cannot be made by the House of Lords judges in Alconbury: instead the House of Lords will have to defer on the Convention point issue to a decision of the Judicial Committee should an appeal against the decision of the Inner House in County Properties v Scottish Ministers be taken to the Privy Council. The Scottish Ministers hedged their bets, however, in that they applied for and were given leave to intervene to argue their case before the House of Lords in Alconbury and thereby have afforded themselves two bites of the cherry, once before the House of Lords and once before the Privy Council, a privilege not taken advantage of by County Properties Ltd. who brought the original judicial review application which sparked off the whole argument as to the reach of Article 6 in planning matters.

One cannot but feel that this kind of ad hoc constitutional structure will not prove to be an inherently stable one, particularly given that there are at least stateable arguments (which might be raised should, for example, the Privy Council decision in Brown v Stott be taken by the accused to the European Court of Human Rights in Strasbourg, or if County Properties Ltd. are themselves ultimately unsuccessful before the Privy Council and decide to take the matter further) to the effect that the Judicial Committee of the Privy Council does not itself conform to the requirements of the Convention, in particular Article 6(1), as regards having the appearance of being ‘an independent and impartial tribunal established by law’.49 The question must arise as to whether the Judicial Committee of the Privy Council, whose members qua Privy Councillors are appointed solely at the pleasure of the Crown without formal grant or letters patents and who may be removed or dismissed from the Privy Council at the pleasure of the monarch (albeit on advice from the Prime Minister) simply by striking their names from the Privy Council book, themselves satisfy the Article 6(1) requirements as understood by the European Court of Human Rights of the appearance of an independent and impartial tribunal established by law: see, among others, the decisions of the European Court of Human Rights in McGonnell v United Kingdom50 and Wille v Liechtenstein.51

47 County Properties Limited v. Scottish Ministers, 2000 SLT 965, OH.
51 Wille v Liechtenstein, unreported decision of 28 October 1999 of the European Court of Human Rights, accessible at <www.dhcour.coe.fr/hudoc>.

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Constitutional Reform and the UK Supreme Court — A View from Scotland*

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Summary

1. This paper looks at some of the more recent case law emanating from the House of Lords, and from the Judicial Committee of the Privy Council acting under its devolution jurisdiction. It points to certain tensions in the manner in which these two courts have been operating to date as courts for the whole of the United Kingdom. It suggests that while the proposed amalgamation within the new UK Supreme Court of the devolution jurisdiction of the Privy Council with the existing appellate jurisdiction of the House of Lords is a necessary step, it is not a sufficient step to ensure constitutional coherence and stability for the Union. The paper proposes that within the context of current constitutional reforms, a new office within the UK Supreme Court be created, occupying a similar position to that of Advocates-General to the European Court of Justice. The primary function of this new office would be, prior to the Supreme Court judgment, to draw to the attention of the parties, the court and the public at large the general implications of the court’s decision in the individual case before it, both for the separate jurisdictions making up the Union, as well as for the United Kingdom as a whole. The paper also suggests that it may be appropriate for this proposed new office of Advocate-General to the Supreme Court to be involved prior to the hearing of individual cases in publicly advising the court as to whether or not the case before it needs a larger bench than the usual five-judge panel (as envisaged in cl. 32(2) of the Constitutional Reform Bill), and whether that bench should be required to include a particular or additional representation from the individual jurisdictions from within the Union (as cl. 29 envisages its provision for “acting judges”). At the moment the reasons why the House of Lords or the Privy Council occasionally sits in panels larger than the normal five judges, or why, in the case of the devolution jurisdiction of Privy Council, judges other than the current Lords of Appeal in Ordinary have been co-opted onto its bench, are not made public. In the interests of transparency and the maintenance of public confidence in an open and fair procedure, it would seem appropriate to the issues determining these decisions to be made more open and explicit.

Proposed amalgamation of the devolution jurisdiction of the Privy Council with the House of Lords

2. In its July 2003 consultation paper on proposals for a new UK Supreme Court, the UK Government suggested that the new court should combine the existing jurisdiction of the Appellate Committee of the House of Lords with the devolution jurisdiction of the Judicial Committee of the Privy Council. This proposal is now reflected in cl. 31(4) and Part 2 of Sched. 8 to, the Constitutional Reform Bill.

3. The suggestion that there be amalgamation of the devolution jurisdiction of the Privy Council with the existing appellate jurisdiction of the House of Lords was, however, rejected by the Law Lords in their published collective response to the Government.

* This article was written evidence presented to the Lords Committee set up to examine and report on Constitutional Reform Bill.
consultation paper. Although their Lordships accepted that it would be "consistent" with the role of the proposed new UK Supreme Court that "it should be the final arbiter of devolution issues", they noted that under the devolution statutes the Privy Council may, in effect, call in other judges to their bench "drawn from the devolved jurisdictions", who would not otherwise be eligible to sit as House of Lords judges. They suggested that this was a feature of the devolution settlement which the devolved administrations would not wish to see abrogated, and accordingly "with a measure of reluctance" concluded that the two jurisdictions should not be combined into the one UK Supreme Court.1

How the devolution jurisdiction of the Privy Council has been used in practice

4. Almost as soon as its new devolution jurisdiction was conferred on the Privy Council, the judges in Scotland, in their enthusiasm to establish Convention right review, gave a very broad definition to "devolution issues" so as to encompass anything done by the prosecution in the course of any (summary or solemn) criminal trial in Scotland.2 The Scottish judges also insisted that the fair trial rights set out in Art. 6 of the European Convention on Human Rights (ECHR) imposed in Scotland duties directly upon the Lord Advocate and all those acting on his behalf in prosecuting offences.3 There was some initial opposition to this analysis – notably from Lord Hoffmann4 – in the first devolution cases to come before the Privy Council, but the more expansive approach to the Privy Council's devolution jurisdiction advocated primarily by Lord Hope soon prevailed.5

5. The overall result was, in the words of Lord Bingham, "anomalous" and "surprising and unexpected" in that the Privy Council, when exercising its devolution jurisdiction, became a court – in which Scottish judges became a significant and at times dominant bloc6 – dealing exclusively with cases coming from Scotland. The Privy Council in its devolution guise became, in effect, a second Scottish court of appeal,


2 See, e.g., the decisions of the High Court of Justiciary in Brown v Stott 2000 JC 328; and Stærns and another v Ruxton (Procurator Fiscal, Linlithgow) 2000 JC 208.

3 See, e.g., Montgomery v HM Advocate 2001 SC (PC) 1 at 19G, per Lord Hope: "But the approach which which Act has taken is that the right of the accused to receive a fair trial is a responsibility of the Lord Advocate as well as of the court.

4 See, e.g., Montgomery v HM Advocate 2001 PC 1 at 7B-C, per Lord Hoffmann:

"[A devolution issue] arises only if the prospective infringement of their rights is an act of the Lord Advocate. It is therefore necessary to identify the persons upon whom Article 6.1 imposes a correlative obligation. Whom does it oblige to act in such a way as to ensure a fair and public hearing? If, as a matter of construction of the Article, no obligation is imposed upon the Lord Advocate, then no complaint of an infringement of this particular Convention right can give rise to a devolution issue."


6 Lord Bingham of Cornhill, evidence to the Joint Committee on Human Rights, 26 March 2001:

"When Scotland was united with England and Wales in 1707 it was clearly implicit in the Act of Union that there was no criminal appeal from Scotland to London ... There was originally a doubt as to whether there was even a civil appeal from Edinburgh to London, but it was very quickly established that there was and indeed extensive use of it was made to such an extent that there was very little time to hear English appeals! But what is important is that the Scots criminal system has always been self-contained and has had no English input at all. One of the anomalous, and to me surprising and unexpected, results of devolution is that for the first time one does have judges, Scots prominently among them but nonetheless judges, sitting in London ruling on questions relating to Scots criminal trials."

rather than a UK constitutional court, and dealt primarily with questions concerning the proper interpretation of Convention rights in ordinary criminal trials, rather than with broader constitutional issues.

6. In the five years of its existence there have been a total of 13 cases which have been actively considered by the Privy Council under its devolution jurisdiction. All of these cases have come from Scotland. Two have been preliminary hearings before a five-judge panel considering applications for special leave to appeal to the Justiciary Committee cases after such leave had been refused by the court in Scotland; remaining 11 cases have been substantive appeals before five judges. Of the substantive cases, only one has been a civil appeal from a decision of the Inner House of the Court of Session; the remaining 10 were criminal appeals from decisions of the High Court of Justiciary.10

7. There were two Scottish judges in all of these cases, and in two of the substantive appeals Scottish judges formed a majority of the Board. Lord Hope has sat in all 13 of the Privy Council’s devolution cases to date. In only one of the 13 cases has a Privy Council judge who was not also a Lord of Appeal in Ordinary been called to sit on the Board of the Judicial Committee – Lord Kirkwood, a judge of the Inner House of the Court of Session, who sat in the second ever devolution case before the Privy Council. 

8 Hookstra and others v Her Majesty’s Advocate (No. 5) 2001 SC (PC) 37, decision of the screening committee comprising Lord Slyn, Lord Hope and Lord Clyde (26 October 2000); and Follen v HM Advocate 2001 SC (PC) 43, decision of the screening committee comprising Lord Bingham, Lord Hope and Lord Clyde 5 March 2001.


10 The 10 substantive criminal appeal decisions are, in chronological order:

(1) Montgomery v HM Advocate 2001 SC (PC) 1, Lord Slyn, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Clyde, Lord Hope of Craighead (19 October 2000) (ECHR, Art. 6 and pre-trial publicity).


(3) McIntosh v HM Advocate 2001 SC (PC) 89, Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Clyde, Lord Hutton (5 February 2001) (ECHR, Art. 6, and the presumption of innocence).

(4) McClintack and another v Buchanan (Procurator Fiscal, Fort William) and another 2002 SC (PC) 1, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Clyde, Lord Hobsbawm of Woodborough, Lord Steyn (5 May 2001) (ECHR, Art. 6, and the equality of arms between prosecutors and criminal defence lawyers).


(7) Mills and another v HM Advocate (No. 2) 2003 SC (PC) 1, Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead, Lord Scott of Foscote, Lord Mackay of Clashfern (22 July 2002) (ECHR, Art. 6, unreasonable delay between conviction and hearing of appeal and the remedy of a reduction in sentence).


8. Thus, the only devolved administration which has been before the Privy Council in the five years of its devolution jurisdiction has, in fact, been the Scottish Ministers.

9. In their own response to the Westminster consultation paper, however, the Scottish Ministers do not appear to share the concerns voiced by the Law Lords in their opposition to the amalgamation of the Privy Council devolution jurisdiction with that of the House of Lords. In fact, the Scottish Ministers state that precisely in order to avoid the possibility of “conflicting judgments on important constitutional issues”, they consider it “essential” that there be a single UK-wide court before which “all matters of a constitutional nature”, such as devolution issues and all cases involving breaches of the ECHR, whether arising under the Human Rights Act 1998 (HRA) or by operation of s. 57(2) of the Scotland Act 1998, might be decided upon.11

Conflict within the House of Lords

10. It should, of course, be noted that the possibility of “conflicting judgments on important constitutional issues” coming even from one amalgamated UK Supreme Court remains if that new court follows the practice of the present House of Lords (as appears to be envisaged by cl. 32 of the Bill) and, from its full complement of 12 judges, normally sits in committees of five, rather than en banc as a full or plenary court. However, this practice has not, to date, made for a consistent line of judgments from the Appellate Committee in areas of some constitutional importance.

11. Thus, in R v Lambert [2001] UKHL 37 [2002] 2 AC 545 a House of Lords’ bench made up of Lord Slynn of Hadley, Lord Steyn, Lord Hope of Craighead, Lord Clyde and Lord Hutton pronounced judgment on 5 July 2001 in a 4:1 decision (Lord Steyn strongly dissenting) finding to the effect that the relevant provisions of the HRA were not intended to apply to events which happened before October 2000 when the Act came into force and that, accordingly, decisions of courts or tribunals made before that date could not be impugned under s. 6 on the ground that the court or tribunal had acted in a way incompatible with Convention rights. This decision was, as Lord Lloyd was to point out,12 itself inconsistent with a previous 4:1 majority decision of the House of Lords in R v Director of Public Prosecutions ex p. Kebilene [2000] 2 AC 326 in which the majority had been made up of three of the same judges as in Lambert (Lord Slynn of Hadley, Lord Steyn and Lord Hope) together with Lord Cooke of Thorndon (with Lord Hobhouse of Woodborough dissenting).

12. Just under five months after the decision in Lambert, on 29 November 2001 in R v Kansal (No. 2) [2001] UKHL 62 [2002] AC 69 almost precisely the same House of Lords’ bench as in Lambert (the only change of personnel being that Lord Lloyd of Berwick replaced Lord Clyde) held by a 3:2 majority (Lord Lloyd of Berwick, Lord Steyn and Lord Hope of Craighead) that Lambert had, in fact, been wrongly decided. They considered that a defendant whose trial took place before the coming into force of s. 7(1)(b) of the HRA should be entitled, after the Act had come into force, to rely in an appeal on an alleged breach of his Convention rights under s. 22(4) of that Act. Notwithstanding that they considered that in Lambert the wrong decision had been reached on the question of the retrospection of the HRA, however, both Lord Lloyd and Lord Steyn took the view that there was no compelling reason which would require the House to depart from that earlier-considered majority opinion. They therefore applied the rationale of Lambert, which they considered not only erroneous but plainly erroneous, to the facts

12 In R v Kansal (No. 2) [2001] UKHL 62 [2002] AC 69 at 92, per Lord Lloyd of Berwick.
of the case then before them. Only Lord Hope maintained that the Lambert majority, which he had been part of, had been wrong and that the decision should be departed from on the ground that their Lordships were in a developing field of jurisprudence and therefore the sooner any mistakes were corrected the better.

13. An even more striking example, post-Lambert and Kansal, of continuing inconsistency between two benches of the Appellate Committee may be seen in comparing, on one hand, the decisions in R (Middleton) v West Somerset Coroner and another [UKHL 10 [2004] 2 WLR 800] and R (Sacker) v West Yorkshire Coroner [2004] UKHL 51 [2004] 1 WLR 796 with, on the other hand, the decision in In re McKerr [2004] UKHL 37 [2004] 1 WLR 807.

14. The cases of Middleton and Sacker were heard by a five-bench Appellate Committee consisting of Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell between 2 and 3 February 2004. The decision in these two cases was pronounced on 11 March 2004. The Appellate Committee took the unusual step of giving its decisions in each of these cases in the form of a joint single judgment which was said to represent “the considered opinion of the Committee”.

15. The Appellate Committee in In re McKerr also sat on 2 and 3 February 2004, and announced its decision on 11 March 2004. The Committee in that case was, however, constituted by Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffmann, Lord Brown of Earlsferry and Lord Brown of Eaton-under-Heywood. The unanimous decision that case took the usual form of five individual speeches; unusually, however, all judges made substantive speeches.

16. Middleton concerned a death in prison on 14 January 1999; Sacker concerned a prisoner who had been shot by members of the Royal Ulster Constabulary. All of these deaths pre-dated the coming into force of the HRA in October 2000.

17. In both Middleton and Sacker – following a line of case law established in its unanimous October 2003 decision in R (Amin) v Secretary of State for the Home Department [2004] 1 AC 65313 (which concerned the murder in March 2000 of a prisoner by his cell mate) – the Appellate Committee held that in carrying out inquiries into these deaths, the state was obliged under Art. 2 of the ECHR to ensure that there was a full inquiry into and findings upon: the general circumstances of the death; the cause of the death; any steps which could have been, but were not, taken to prevent it; and any precautions which ought to have been taken to avoid or reduce the risk of death to individuals in similar positions. In McKerr, by contrast, the Appellate Committee held that the state had no such obligations in respect of any deaths which had occurred before 2 October 2000. Lord Nicholls’ speech was the only one to mention – and pass over – the inconsistency between this approach and that taken by Lordships in Amin, Middleton and Sacker, noting:

“There have been several cases where everyone concerned appears to have assumed section 6 of the Human Rights Act could apply to a failure to investigate a death which took place before the Act came into force. These include two decisions of your Lordships in R (Amin) v Secretary of State for the Home Department [2003] 3 WLR 1169 and R (Middleton) v West Somerset Coroner [2004] 2 WLR 800. In none of these cases, so it seems, was the subject of argument. So they do not assist.”

13 The Appellate Committee was made up of Lord Bingham of Cornhill, Lord Slynn of Hadley, Lord Steyn, Lord Hope of Craighead and Lord Hutton.
18. Given that the decision in McKerr was an appeal from the Northern Ireland Court of Appeal, whereas Middleton and Sacker were each appeals from the Court of Appeal of England and Wales, it might be said that, strictly, the McKerr decision is binding only in Northern Ireland, whereas the approach taken by the House of Lords in Middleton and Sacker binds the courts of England and Wales. But it seems no way for a Supreme Court to operate as an institution presumably intended to strengthen the Union within the United Kingdom as a whole.

19. It might be noted, too, that the five-judge bench of the Appellate Committee in McKerr which overruled the unanimous decision of the Northern Ireland Court of Appeal (consisting of the then Lord Chief Justice Sir Robert – now Lord – Carswell, McCollum LJ and Coghlin J) contained no judge from the Northern Irish legal system, notwithstanding Lord Hutton’s continued eligibility under the present rules to sit, post-resignation, as a Lord of Appeal until June 2007 (assuming, always, that Lord Hutton had had no prior involvement in this matter whether as judge or counsel). The decision of their Lordships in McKerr can only add to calls already being made for wholly separate provision to be made for a new Northern Ireland Supreme or Constitutional Court, possibly even a cross-border institution with the Irish Republic’s legal system, leaving the proposed new UK Supreme Court to be a Supreme Court at best only for Great Britain.14

20. The question as to whether and when the provisions of the HRA can be relied upon in relation to events which occurred prior to its coming into force is one of major constitutional significance. But, as a result of a continuing series of inconsistent and irreconcilable judgments from differently constituted five-judge benches of the House of Lords, this whole question remains utterly confused, contrary to basic requirements of legal certainty. Such a situation cannot add to the reputation of the House of Lords as a judicial body. And if no effective national judicial remedy is permitted by the courts – even in the case of admitted or uncontested breaches of Convention rights by the state prior to the coming into force of the HRA – some harm may conceivably be done to the international legal standing of the United Kingdom as a whole as a state founded upon and governed by the principles of the rule of law.

Conflict between the House of Lords and the Privy Council

21. The possibility of “conflicting judgments on important constitutional issues” – which, as we have seen, had been anticipated by the Scottish Ministers in their response to the UK Government’s consultation on constitutional reform – has also been realised as between devolution decisions of the Privy Council in Scotland and the appellate decisions of the House of Lords in England and Wales. This is plain from the incompatible decisions of, respectively, the Privy Council in November 2002 in HM Advocate v “R” 2003 SC (PC) 2115 and of the House of Lords in December 2003 in Attorney General’s Reference No. 2 of 2001 [2003] UKHL 68 [2004] 2 AC 72.

22. In HM Advocate v “R” the Privy Council in its devolution jurisdiction considered the question of what remedy could be pronounced by the court where it was found that there had been a breach of a person’s ECHR, Art. 6 right to be brought to trial within a “reasonable time”. The Board split 3:2, with the three Scots judges – Lord Hope, Lord Rodger and Lord Clyde – forming a majority bloc on the Board in the face of robust dissent from Lord Steyn and Lord Walker to decide the following matters of law:

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14 See, e.g. the views expressed in a personal capacity by Professor Brice Dickson, Chief Commissioner of the Northern Ireland Human Rights Commission, in “A Constitutional Court for Northern Ireland?”, in Andrew LeSueur (ed.), Building the UK’s new Supreme Court: national and comparative perspectives (OUP, 2004), Chapter 3.

15 Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Clyde – Lord Steyn and Lord Walker dissenting.
(1) **Scope of the Convention right:** that the true interpretation of the Convention right (contained in ECHR, Art. 6) to a trial within a reasonable time means that it is incompatible with Art. 6 for a trial to be held after a reasonable time has passed.

(2) **Remedy available under Scots law for breach of the Convention right:** that the remedy under s. 57(2) of the Scotland Act 1998 which – in contrast to the “lawfulness” remedy set out in s. 6 of the HRA – imposes a vires control on Convention incompatible action by the Scottish Ministers, including the Lord Advocate, means that the judges have no option but to quash/interdict any attempted prosecution by the Lord Advocate after a reasonable time has passed. It is, they say, not open to the judges acting under the Scotland Act 1998 to remedy any breach of the procedural trial requirements of Art. 6 by some lesser alternative remedy, such as a reduction in sentence or a payment of damages.

(3) **The procedure to be followed in seeking vindication of the Convention right:** that procedural provisions of the Scotland Act 1998 take precedence as lex specialis over the HRA such that Convention rights complaints against the Lord Advocate and other members of the Scottish Executive have to be taken as devolution issues rather than simply as human rights issues raised under the HRA. More controversially, Lord Hope and Lord Rodger suggest that the procedural provisions of the Scotland Act 1998 can only be prayed in aid in relation to positive acts of the Scottish Ministers in contravention of Convention rights and cannot be used to impugn their “omissions” contrary to the requirements of the Convention right.

23. The two non-Scots making up the Board of the Judicial Committee in *HM Advocate R* (the South African educated Lord Steyn and the Englishman, Lord Walker)...

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16 In *Al Fayed v Lord Advocate* (unreported) 12 March 2004, Lord Drummond Young noted (at para 39):

‘[A]n argument presented on behalf of the Advocate General that section 57(2) of the Scotland Act 1998 extended only to acts of members of the Scottish Executive, and not to the failure of a member of the Scottish Executive to act. Section 57(2) is in the following terms:

‘A member of the Scottish Executive has no power to make any subordinate legislation either for or in relation to any other act, so far as the legislation or act is incompatible with any of the Convention rights.’

In the present case, it was argued, the petitioner in his pleadings founded on section 57(2) on the failure of the Lord Advocate’s duty to initiate an inquiry into the death of the petitioner’s relative and the complaint made about the conduct of the Lord Advocate, however, was that he had failed to initiate an inquiry into the death. That amounted to a failure to act, which, it was said, did not fall within the prohibition in section 57(2). In support of that argument, counsel for the Advocate General referred to *Lord Advocate v R*, 2003 SLT 4, where it was held that if the term ‘act’ in section 57(2) did not include a failure to act. A contrast was drawn with the provisions of the Scotland Act, notably sections 52(4) and 100(4)(b) and paragraphs 1(e) of Schedule 5, which provided that provisions made express reference to be a failure to act. Consequently, the expression ‘act’ only with positive acts of the Lord Advocate. In response, counsel for the petitioner cited the cases of Lords Sutherland, Coulsfield and Penrose in the Inner House in *Clancy v Caird*, 200 SC, in which it was held that the term ‘act’ in section 57(2) covered a failure to act. In the latter case, it was said that once the Human Rights Act 1998 came into force in its own right an act was deemed to be a failure to act, which would avoid the problem in so far as breaches of Convention rights were concerned. Nevertheless, the court considered that there were serious practical difficulties in distinguishing an act from a failure to act, and it was pointed out that the reference to Community law was no parallel in the Human Rights Act; consequently, a failure by the Scottish Executive to act with Community law would fall outside the scope of the legal framework of the Scotland Act raised as a failure to act and constructed as including a failure to act. Clancy v Caird was not cited in *HM Advocate v R* and it was necessary for me to express any view on this controversy. I have come to a decision in favour of the position adopted by the Advocate General on a number of other grounds, and thus any view on this aspect is plainly obiter. Moreover, the construction of section 57(2) raises difficult questions which are fundamental to the structure of the Scotland Act and where differing views have been expressed by a number of courts. Any further opinion on these issues should be confined to a case where the proper construction of section 36 is essential to the decision.’

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clearly unhappy with this result fearing, perhaps, that the decision in the Scottish case would mean that a similar result would have to be reached in English proceedings: a result which the non-Scots appeared unwilling to countenance, given that the Strasbourg jurisprudence appeared to allow, rather than the quashing of all charges, a lesser remedy for breach of the reasonable time requirement, such as civil damages or a reduction in sentence. Lord Steyn was also unhappy that a decision which might, in effect, let the guilty walk free would be subject to adverse public reaction, and bring the idea of the necessity for judicial protection of human rights into disrepute. He noted (at para. [18]):

“A characteristically elegant observation of L’Heureux-Dubé J in R v O’Connor [1995] 4 SCR 411 is relevant. She said p 461, (para 69):

‘It is important to recognize that the Charter has now put into judges’ hands a scalpel instead of an axe – a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.’

The moral authority of human rights in the eyes of the public must not be undermined by allowing them to run riot in our justice systems. In working out solutions under the Scotland Act 1998 and the Human Rights Act 1998 courts in Scotland and England should at all times seek to adopt proportionate remedies. In my view there is nothing in the open-textured language of section 57(2), read in context, which rules out the application of such an approach in this case."

24. Lord Rodger, speaking as part of the Scottish majority in the case, was equally robust in his response to Lord Steyn (at paras [128]–[129] and [155]):

"Parliament has quite deliberately treated the acts of members of the Scottish Executive differently from the acts of Ministers of the Crown. [I]n all such cases of positive acts by a member of the Scottish Executive the legal consequence of incompatibility with Convention rights is that the purported act is invalid so far as it is incompatible. That is the legal consequence which Parliament has chosen to attach to this situation – whether or not it is the consequence that would most suit the party who challenges the act.

In enacting a constitutional settlement of immense social and political significance for the whole of the United Kingdom, Parliament has itself balanced the competing interests of the Government of the United Kingdom, of the Scottish Executive, of society and of the individuals affected. Having done so, Parliament has decided that members of the Scottish Executive should have no power to do acts that are incompatible with any of the Convention rights. In this case that means that the Lord Advocate has no power to continue the prosecution on charges 1 and 3. If this is to use an axe rather than a scalpel, then Parliament has selected the tool. Your Lordships’ Board cannot re-open the exercise that Parliament undertook and re-balance the competing interests for itself. Rather, it must loyally give effect to the decision of Parliament on this sensitive matter, even if – or perhaps especially if – there are attractions in a different solution."

25. The decision of the Privy Council in HM Advocate v “R” would appear to have caused some general consternation within the higher judicial circles because it was then decided (under what precise circumstances is not known) – in an exercise that, from the outside at least, rather looks like “court packing” – to field a bench of nine judges to form the Appellate Committee of the House of Lords to hear argument in Attorney General’s Reference No. 2 of 2001,17 an English case on appeal from the Court of Appeal

The House of Lords’ appeal was first heard on 9 and 10 April 2003 and further heard on 28, 29 and 30 July 2003 with a decision being pronounced on 11 December 2003. Only three of the 12 then serving Lords of Appeal in Ordinary were not on this case, presumably because otherwise engaged: namely, Lord Saville (engaged in the Bloody Sunday Inquiry), Lord Hutton (engaged in the inquiry into the death of David Kelly) and the then most junior Law Lord, Lord Walker of Gestingthorpe, presumably excluded to keep the bench an odd number.
(Criminal Division). This appeal concerned the same substantive Convention law/human rights questions as were considered in “R”: whether criminal proceedings may – or indeed must – be stayed on the grounds that there has been a violation of the reasonable time requirement in Art. 6 of the ECHR in circumstances where the accused cannot demonstrate any prejudice arising from a delay.

26. As we have seen, the Privy Council majority in “R” was of the view that any prosecution after an unreasonable delay would necessarily be Convention incompatible. Accordingly, they held that, in the context of the Scotland Act 1998, it would be ultra vires the Lord Advocate to continue with any such prosecution. In so deciding they effectively established that the incorporation of the ECHR into Scots law by the Scotland Act 1998 means that an individual has a positive right not to be prosecuted after an unreasonable time has passed, regardless of any question of (un)fairness or prejudice.

27. In the decision of the Appellate Committee in Attorney General’s Reference No. 2 of 2001 [2003] UKHL 68 [2004] 2 AC 7219 seven of this unprecedented nine-judge bench stated, quite unequivocally, that the previous year’s majority decision of the Privy Council in HM Advocate v “R” had been wrongly decided. The two dissenting judges from this House of Lords’ decision were the Scots, Lord Hope and Lord Rodger, who together with Lord Clyde had formed the Scottish majority in the earlier Privy Council case. Departing from the reasoning of the majority in HM Advocate v “R”, the House of Lords’ majority in Attorney General’s Reference stated that it was not, in and of itself, contrary to the Convention for a criminal prosecution to be proceeded with against an individual, even after an unreasonable time has passed. Their Lordships’ majority therefore held that the power to stay criminal proceedings on the ground of unreasonable delay could be exercised only if either a fair hearing was no longer possible, or if it was for any compelling reason unfair to try the defendant.

28. Lord Hope and Lord Rodger – now forming the dissenting minority in Attorney General’s Reference – were unsparing in their criticisms of the majority, accusing them of “emptying the reasonable time guarantee almost entirely of content” and of confusing the issue of whether the right has been breached with the wholly distinct question as to what remedy might properly be made available under domestic law in respect of any such breach. In this the majority were perhaps exemplifying what has been described as the “typical” English law approach of “fastening not upon principles but upon remedies”20 in contrast to the approach characteristic of Scots law (and other Roman–Canonical-law-based legal systems) of first establishing the content of the right and then determining the remedy which vindication of that right requires, as captured in the maxim ubi jus ibi remedium.

29. The House of Lords majority in Attorney General’s Reference did accept that, notwithstanding their greater numbers, they had no jurisdiction formally to overrule the majority decision of the Privy Council in HM Advocate v “R”. They did, however, make clear their “preference” for the dissenting minority opinions therein expressed by Lord Steyn and Lord Walker.

30. What the House of Lords majority did not consider, however, was the extent to which the House is required by statute to regard itself as bound by the decisions of the Privy Council exercising its devolution jurisdiction, even when it disagrees with them.

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18 Reported as Attorney General’s Reference (No. 2 of 2001) [2001] 1 WLR 1869, CA.
Section 103 of the Scotland Act 1998, s. 82 of the Northern Ireland Act 1998 and para. 32 of Sched. 8 to the Government of Wales Act 1998 all assert the binding nature of decisions of the Judicial Committee of the Privy Council in proceedings under these Acts in all other courts and legal proceedings, (apart from later cases brought before the Committee). And the status of the House of Lords as a court subordinate to the Privy Council would appear to be confirmed by the provision in the Devolution Statutes for preliminary references on devolution issues being made from the lower courts to higher courts; a procedure modelled, in part, on Art. 234 (formerly Art. 177) of the EC Treaty. Provision is made specifically for the House of Lords to refer any devolution issues arising in judicial proceedings before it to the Privy Council “unless the House considers it more appropriate, having regard to all the circumstances, that it should determine the issue.”21 The House of Lords majority in Attorney General’s Reference make no reference to these provisions, however.

31. What can be taken from this magisterial silence on the part of their Lordships’ majority to statutory provisions apparently binding them to follow the Privy Council exercising its devolution jurisdiction? Is it that that the non-Scottish judges on the Appellate Committee have come to regard the Privy Council in its devolution guise as nothing more than a further Scottish appeal court rather than – as was arguably the original intent of the devolution settlement – a new court for the whole of the United Kingdom binding the new constitutional settlement together in the Union? It might perhaps be argued that this is because the Privy Council, in its interpretation and application of Convention rights in its devolution jurisprudence to date, has decided matters simply under reference to Scotland, the only legal system from which its cases have come thus far, and has not taken full and due account of the impact of their rulings on all of the legal systems of the United Kingdom.

32. The silence of their Lordships on these fundamental constitutional matters is to be regretted particularly in the light of the unequivocal statements made by government ministers to Parliament to the effect that the Government fully intended that the decisions of the Privy Council exercising its devolution jurisdiction should be binding upon the Appellate Committee of the House of Lords. As Lord Sewell advised the House of Lords:

“The Government believe that it is important that the decisions of the Judicial Committee of the Privy Council are binding in all legal proceedings other than proceedings before the JCPC itself. Amendment No. 292EA would mean that they were not binding upon this House, and we do not accept that position.

Devolution issues will seldom be decided by this House. In normal circumstances, under Schedule 6 of the Bill any devolution issue which arises in judicial proceedings in this House will be referred to the Judicial Committee unless this House considers it more appropriate that it should determine the issue itself. We think it is appropriate that this House should not be able to depart from the earlier decisions made by the JCPC. We believe that the JCPC is ideally placed to resolve disputes about vires. It has a vast experience of dealing with constitutional issues from the Commonwealth, making the provision that the JCPC’s decisions of the highest status will ensure that clear decisions with a clear status are produced and that devolution issues are treated consistently. That is the advantage behind the line that we are advocating.”22

Conflict in the top courts and a disunited Kingdom?

33. The failure on the part of the House of Lords majority in Attorney General’s Reference No. 2 of 2001 to address the issue of the proper hierarchy of courts under the existing constitutional arrangements in fact highlights the very question - which of necessity has to be addressed in the context of the plans for a UK Supreme Court to replace the Appellate Committee - as to whether there can indeed be a UK court which overarches and unites the various distinct legal systems within the Union.

34. The judges of the Court of Session - in their response to the UK Government's consultation paper on the proposed new Supreme Court - went so far as to deny that one may meaningfully talk of there being any "United Kingdom law" (any more, perhaps, than there can properly be said to be "Franco-German law"[23]). This is, perhaps, to go too far, standing the harmonising influence of EU law across the United Kingdom and the fact that in many areas of law reserved to the Westminster Parliament under the Scotland Act 1998 (for example, social security, employment protection and discrimination law) a uniform approach is taken across the United Kingdom by UK tribunals acting on the basis of UK statutes.[24]

35. In any event, the Court of Session judges express their “strong opposition” - on the grounds that it would “be retrograde and damaging to the separate identity of Scots law” - to the suggestion in the consultation paper that the decisions of this new court should be considered as binding throughout the United Kingdom, as opposed to simply within that particular legal jurisdiction from which the appeal has come. Perhaps, indeed, the refusal by the majority of the House of Lords in Attorney’s General’s Reference to recognise the Privy Council when acting under its devolution jurisdiction as the supreme UK court whose decisions bind even the appellate committee in English appeals makes this very point.

Implications for Scotland

36. Where does this split between and within the UK’s current top courts leave matters in Scotland? What is clear is that under the current constitutional structure a decision of the House of Lords in an English appeal on a criminal issue such as the Attorney's General’s Reference is a danger to Scotland.

23 This analogy is also expressly made in RG Anderson, “Appeals to London and Human Rights”, 2003 32 (News) 297 at 298, as follows:

“It would be unacceptable if German jurists, even distinguished members of the Bundesgerichtshof in judgment in cases before the Cour de Cassation in Paris. Why is the House of Lords any different? While Scotland and England are politically united, Scots law and English law are legally separate as most recently R v. Manchester Stipendiary Magistrates, ex parte Granada Television [2001] 1 AC 302 by Lord Hope of Craighead.”

24 It is to be noted that Lord Hope, in his remarks to the House of Common Constitutional Affairs Committee considering Judicial Appointments and a Supreme Court on Tuesday, 2 December 2003 (available at www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmcnscl/uc48-ii/uc4802.htm) carefully emphasised that the dissimilarities between the two systems are to be found primarily in private law, such as property law or contract, noting:

“Scots private law is markedly different from English private law, and indeed it is a devolved issue of the Scotland Act and it has its own definition as to what private law contains. The problem is if you describe the court as a supreme court of the United Kingdom, it tends to suggest that there is a body of United Kingdom law. In a court which inevitably is filled with a majority of English judges, there may be a temptation to say, 'Well, we see differences between Scots law and English law on relating to property or other matters, what is the point of having a difference when we're sitting in a United Kingdom court?' The Scots may well feel that would introduce a drift away from their way of law into an English system, and there are signs in case law, even now, that there is a temptation that line. I think Scots are anxious that anything that will tend to dilute the present system, which maintains distinctive Scottish appellate structure, will give rise to risks of losing the separate identity of Scots law.”
General’s Reference does not apply to, nor will it be regarding as binding upon, the Scottish courts, whether in criminal or in civil cases. In relation to delays in prosecution attributable to the Lord Advocate, then, the strict analysis given to the reasonable time provisions of ECHR, Art. 6 by the Privy Council Scottish majority in HM Advocate v “R” remains binding upon the courts in Scotland.

37. Questions may arise as to whether or not the analysis of ECHR, Art. 6 by the Privy Council in HM Advocate v “R” formally binds the Scottish courts in relation to cases involving unreasonable court delays which cannot be attributed to the Lord Advocate or the Scottish Ministers generally, for example where the delays are caused by the court itself or by the court administration. If not, this would leave open, at least in theory, the possibility of the courts situated in Scotland developing a “third way” analysis of the reasonable time requirements of Art. 6 distinct from either the House of Lords or the Privy Council, leading to further fragmentation of any notion of a uniform standard of human rights protection throughout the Union.

38. But it can be anticipated that the situation in which Art. 6 is taken to mean one, or more, things in Scotland, but yet a third thing in England, will not be allowed to continue for any extended period. One would expect the Lord Advocate (or, conceivably, the Advocate-General, the Scottish Law Officer for the United Kingdom) to seek at the earliest opportunity to bring this issue back before the Privy Council. Mandatory references directly to the Privy Council may be made of devolution issues in proceedings in which any of the law officers are parties, on their application. Alternatively, the matter may come to the Privy Council by way of appeal from or reference by the High Court of Justiciary acting as Scotland’s Court of Criminal Appeal. The Privy Council would not, of course, be bound to follow the House of Lords’ decision in Attorney General’s Reference, but it would seem that whether or not it does may well be determined by the composition and size of the Board of the Judicial Committee deciding the issue – and who decides that is not known. The spectre of more “court packing” inevitably raises its head.

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25 See, e.g., the repeated refusal by the Inner House in McDonald v Secretary of State for Scotland 1994 SC 234, and again in Davidson v Scottish Ministers (No. 1) 2002 SC 205, IH to follow the decision of the House of Lords in M v Home Office [1994] 1 AC 377 and of the (non-devolution jurisdiction) Privy Council in Galv Arizona (2001) UKPC 30 (2001) 1 AC 167, JCPC on whether ministers of the Crown may be subject to interim and coercive orders pronounced by the courts.

26 See, e.g., Mills v HM Advocate (No. 2) [2002] UKPC D2 [2004] 1 AC 441, 2002 SLT 939, JCPC where there was an unreasonable delay between conviction and the hearing of a criminal appeal caused not by the Lord Advocate but by the court administration.


28 The composition of the Board in any particular case would appear to be a matter for the senior Law Lord. See the following written Parliamentary answer in Hansard, HL 2885 (30 July 1998):

“Lord Lester of Herne Hill asked Her Majesty’s Government:

Who will determine the composition of the Judicial Committee of the Privy Council for hearing each particular appeal under the provisions of the Scotland Bill and the Government of Wales Bill?”

cont./
provision for the President of the Court to direct in any specific proceedings that the Bench of the new Supreme Court should consist in a higher than normal quorum.

Implications for England

39. Where does this unresolved dispute between the two top courts leave matters in England? It would seem at least to open arguments (whether in applications to the European Court of Human Rights or before other courts) to the effect that a failure to give persons charged in England at least as good a remedy for breach of the reasonable time requirement in criminal prosecutions as is available to those charged in Scotland may itself be a breach of ECHR, Art. 14, which provides that "the enjoyment of ... rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... race ... national or social origin, birth or other status." The English do, after all, constitute a distinct racial group from the Scots for the purposes of the Race Relations Act 1976.30

Implications for the United Kingdom

40. And what of the situation for the United Kingdom as a whole? As a result of the Attorney General Reference (HL) versus HM Advocate v "R" (PC) split there is now no court in the United Kingdom with the jurisdiction to ensure uniformity as regards interpretation and application of Convention rights across the United Kingdom. If the Privy Council decides matters on devolution issues for Scotland (and potentially as well Wales and Northern Ireland), the House of Lords for England. But what rationale is there, then, for the Privy Council (or its successor, the new UK Supreme Court) to continue in the newly assumed role of a court of final appeal in Scottish criminal matters (at least when the accused's Convention rights have been breached by the "acts" of the prosecution)?

41. The review conducted by Lord Bonomy into the practice and procedure of the High Court of Justiciary recommended that because of the delays and disruption caused by criminal trials in Scotland by the devolution issue procedure, the right of appeal from decisions of the Scottish Court of Criminal Appeal to the Privy Council should now be withdrawn. He stated:31

"The only practical reason for ever categorising such issues as devolution issues was to ensure that recognition was given to the Convention rights during the period between the implementation of the Scotland Act and the implementation of the Human Rights Act. By even then it was a rather artificial way of introducing Convention rights to Scottish criminal procedure. That interim period is now over. Schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord Advocate as prosecutor, and anyone acting on his authority or on his behalf as prosecutor, are excluded from the definition of a devolution issue. The Scottish Executive should urge the United Kingdom Parliament to make that amendment."

42. If this suggestion were taken up, it would "let Scotland be Scotland". The Scottish judges on the top courts seem to be happy enough to see a split between England

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30 See BBC Scotland v Souther 2001 SC 458, [2001] IRLR 150, IH.
and Scotland on fundamental rights issues. This need not be a bad thing. The two countries have two distinct legal systems, and the system of criminal law in Scotland has been almost entirely uninfluenced by English law considerations for centuries. Different rights regimes within the same overall political conceivably set up the conditions for an inter-jurisdictional dialogue which can only be to the benefit of rights protection in a race to the better protection for individuals.

Appeal from Scotland to the new UK Supreme Court and the 1707 Acts of Union

43. The suggestion that Scotland and England might be allowed to go their own ways on fundamental rights matters (at least in relation to criminal law) is not one which apparently finds favour with the Scottish Ministers, however. They have not sought the change proposed by Lord Bonomy and, instead, as we have seen, in principle support the UK Government’s proposals for a new UK Supreme Court absorbing the Privy Council’s existing devolution jurisdiction.

44. On the question of Scottish representation on the new Supreme Court, the Scottish Ministers state that:

"in relation to devolution issues under the Scotland Act, the new UK Supreme Court is the appropriate forum for final determination of all such matters... provided that appropriate arrangements are made to ensure that Scottish Judges sit in cases raising devolution issues"

while accepting that "that does not in itself mean a majority of Judges must be Scottish".

45. It is clear, however, that the talk of further reform of the constitution and the creation in the proposed new Supreme Court of a new institution of the Union has stirred up anxieties in certain quarters in Scotland. In its response to the Government’s proposals, the Faculty of Advocates has stated that:

"A Supreme Court which is created must be consistent with the Claim of Right of 1689 and the Act of Union of 1707. These instruments are fundamental parts of the constitution of the United Kingdom of Great Britain and Northern Ireland, and in view of the Faculty any proposal for a Supreme Court which contravened any provision of these instruments would be unlawful."

46. The Claim of Right of 1689 is a Declaration of the pre-Union Scottish Parliament - styled the Estates of the Kingdom of Scotland - asserting that James VII of Scotland (and II of England) had, by his conduct and religion, forfeited the right to the Crown in Scotland and that the throne had become vacant, thereby allowing the pre-Union Scottish Parliament to offer the Scottish Crown to the then King and Queen of England, William and Mary. The Claim declares that:

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23 For example, in HM Advocate v “R” 2003 SC (PC) 21, Lord Clyde noted (at para. [103]):

“If there is a difference between the position in Scotland and that which may exist in England under the Human Rights Act 1998 that is a difference which has been prescribed by Parliament in the express enactment of section 57(2) in the Scotland Act 1998.”


25 See, e.g. the response of the Faculty of Advocates to the proposals on a new Supreme Court; available at www.advocates.org.uk.

Ibid.
“it is the right and privilege of the subjects to protest for remeud of law to the King and Parliament against Sentences pronounced by the Lords of Session providing the same do not stop Execution of these sentences.”

47. Otherwise, it reads as a profoundly sectarian document, excoriating Catholics and Catholicism and, indeed, requiring the abolition of the episcopacy even over the reformed Scottish Church. As the Lord Advocate, Colin Boyd QC, has noted:

“Leaving entirely aside the provisions of the Human Rights Convention and of the legislation as to discrimination made under the European Union treaties, no-one has complained that the Education (Scotland) Act 1918, which extended the right to public education to members of the Catholic faith, was in breach of the Claim of Right. If we are to accept the Claim of Rights is a golden statement of immutable principles, then we should be able to see why it is that its strictures on the practice and dissemination of the Roman Catholic faith which looks very odd to our modern eyes, are not to be followed today, while its vague provision about political appeals are set in stone for all time coming.”

48. It is indeed somewhat surprising that any contemporary reliance should be placed upon this document as the basis for a claim for fundamental constitutional freedoms in our now properly pluralist and Convention rights-sensitive polity. But the implicit suggestion from those relying upon this document seems to be that the right to appeal from the Court of Session to the pre-Union Scottish Parliament which was asserted in the 1689 Claim of Right was transformed with the 1707 Union into an unqualified right of appeal to the UK Parliament (without need for leave, whether from the Court of Session or from the House of Lords). Although not fully stated, the idea would appear to be that any alteration in this now settled right of appeal from the Court of Session to the House of Lords would be contrary to the Claim of Right of the pre-Union UK Supreme Court.

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56 See Kay Goodall, “Ideas of ‘representation’ in UK Court structures”, in Andrew LeSuer (ed.), Building a UK’s new Supreme Court: national and comparative perspectives (OUP, 2004), pp. 70-80 for a lively and interesting account of the historical development of the House of Lords’ appellate jurisdiction from Scotland in the year following the 1707 Union.

37 The 1689 declaration notes, inter alia:

“That Erecting Schools and Colleges for Jesuits, the Inverting Protestant Chapels and Chancels, public Mass houses and the allowing Mass to be said are Contrary to Law

That the allowing Popish booke to be printed and Dispersed is Contrary to law

That the taking the children of Noblemen Gentlemen and others sending and Keeping them alive to be bred papists The making funds and donations to popish schools and Colleges The Bestowing of pensions on priests and the perverting protestants from their religion by offers of places preferments and pensions are Contrary to law

That the discharging of Protestants and employing papists in the places of greatest trust both civil and military the thrusting out Protestants to make room for papists and the entrusting papists with their places and magazines of the Kingdom are Contrary to law”

38 The 1689 Claim of Right also states:

“That Prelacy and the superiority of any office in the Church above presbyters is and hath beene an insupportable grievance and trouble to this Nation and contrary to the Inclinations of the majority of the people ever since the reformation (they having reformed from popery by presbytery) therefore ought to be abolished.”


40 See, however, the comments of Lord Brown of Eaton-under-Heywood in the House of Lords’ appeal for the Court of Session in Buchanan v Alba Diagnostics Ltd [2004] UKHL 5 at [41]:

“For the reasons given by my noble and learned friend Lord Hoffmann I too would dismiss this appeal. I add only that it seems to me a great misfortune for Mr Buchanan that he was able to bring this appeal to your Lordships House without leave. Had leave been required assuredly it would have been refused and Buchanan thereby saved a very great deal of expense.”

44 This is perhaps best illustrated by a learned friend of May’s: “The Claim of Right was a profound and radical document, and one which extended to the Scottish nation a form of self-governance and power not possessed by any other comparable body in modern history.” Lord Hoffmann, as a learned friend of Lord Bingham and Lord Brown of Eaton-Under-Heywood, with whom they concurred (see [41]).

45 In MacKintosh v Westminster City Council, 2004 SLT 91, Lord Brown of Eaton-under-Heywood observed: “The Claim of Right is the product of an age, and in its time and place was an undeniably valid and comprehensive statement of the political and legal principles that the Scots felt entitled to insist on. It remains a profound and profound and profound and profound and profound document, and one which extended to the Scottish nation a form of self-governance and power not possessed by any other comparable body in modern history. In a sense it is the first constitutional document of post 1707 Scotland.” See also Lord Brown of Eaton-under-Heywood, in Grey v Grey (2004) 245 CLR 511, para. 51.
Scottish Parliament\(^4\) and thus *ultra vires* the post-Union UK Parliament\(^2\) – and, therefore, challengeable before the courts as unconstitutional. In the words of the Faculty of Advocates' response:

"Any attempt to create a Supreme Court which did not comply with these requirements would be contrary to the constitution of the United Kingdom, and any purported act in or affecting Scotland by such a Court would be unlawful and of no effect in Scotland."

49. The irony is, that any such claim would have to be tested before the Court of Session, and the parties involved would then have a right of appeal to the House of Lords which would then become *index in causa suâ* in that it would have to determine whether the Westminster Parliament could lawfully abolish appeals from Scotland to itself as a Committee of the Westminster Parliament.

50. This studied legal antiquarianism all rather smacks of desperation, given that the pre-Union Scottish constitution was not one noted for its protection of what would now be regarded as the fundamental rights and freedoms of the individuals.\(^4\)

51. But what it would seem that these references – to what are presented as the foundational documents of the constitution of Scotland – are intended to do is to make the

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\(^{4}\) This is perhaps difficult to square with the plain words of Art. XIX of the Act of Union, which provides:

"That the Court of Session or College of Justice do after the Union, and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the Union; and that the Court of Justiciary do also, after the Union, and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the Union, subject, nevertheless, to such regulations as shall be made by the Parliament of Great Britain, and without prejudice of other rights of justice."

\(^{4}\) In *MacCormick v Lord Advocate* 1953 SC 39, IH, Lord President Cooper observed (at p. 411):

"The principle of the unlimited sovereignty of Parliament is a distinctly English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Baghot and Dicey, the latter having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions."

\(^{4}\) In *Macintosh v Lord Advocate* (1876) 2 App Cas 41, HL(SC), Hemming QC (at pp. 59–60) cites a paper by JF Macquere QC, read at the Manchester Congress of Social Science on 8 October 1866 (Lord Brougham presiding) to the following effect:

"The blessings of the English Constitution, however, were not extended to Scotland [at the Union in 1707]. The Scotch consequently have no Magna Charta, no Bill of Rights, no Habeas Corpus . . . Personal freedom depends on the temper of the existing government, or rather on the discretion – peradventure the caprice – of the Lord Advocate. When that high functionary incarcerated a gentleman supposed to entertain dangerous political opinions, the Lord Advocate justified himself in the House of Commons by the proud boast that he represented the Scottish Privy Council, and that his powers were unlimited. Under the sway of a benignant sovereign Caledonian grievances have practically disappeared. But the grave question remains whether it is consistent with the dignity of an intellectual people that their political rights should depend on the clemency of the government."
non-Scottish parts of the Union stop and listen. The altering of settled constitutional arrangements resurrects many issues, and may exhumate half-buried resentments unarticulated unease. This is not something peculiar to Scotland. It applies equally to the debate over the terms of a new European Union Constitution and the plain facts of the United Kingdom, as to the reform of the institutions of the United Kingdom and the place of its constituent nations therein. If you are altering the institutions of the Union then you have to have some view as to what sort of Union we have or want.

52. From the Scottish point of view, the United Kingdom is considered to be a union of nations, based primarily on an eighteenth century compact between two equal contracting parties - the Scottish and English Parliaments - resulting in the dissolution of both institutions and the creation of new Union institutions; in particular Westminster Parliament which does not have unbridled sovereignty but is instead understood as being bound by the original eighteenth century instruments which created it.44

53. The impression one sometimes gets is that, in so far as the English think about these matters, the 1707 union was an incorporating union, under which Scotland was annexed to England. There is and was no equality. There is and was no binding contract. There is no limitation on the sovereignty or power of Parliament. As was submitted on behalf of the appellant to the House of Lords in 1876 in Mackintosh v Lord Advocate (1876) 2 App Cas 41 at 58, per Hemming QC:

"[T]he meaning of that Treaty [of 1707] was that the whole political and judicial constitution of Scotland was swept away, and that the political and judicial constitution of England was substituted for it in every particular not mentioned in the Treaty itself."

54. Such a constitutional analysis is not one which would be likely to go down well in present day Scotland, however.

Two UK Supreme Courts, one or none?

55. However one interprets the impact and continued relevance of the Treaty of Union and Claim of Right, for the sake of constitutional and democratic stability in the devolution United Kingdom it is clear that the present structure of two top courts (the House of Lords and the Privy Council) cannot continue. The Constitutional Reform Bill is premised on that finding.

56. It would appear, then, that we have two options. Either there is one Supreme Court in the United Kingdom which, at the very least, combines the current jurisdictions of the House of Lords with the devolution jurisdiction of the Privy Council in a manner which properly has regard to the differing constitutional traditions existing within the United Kingdom; within this one court, the dialogue (and dialectic) between the approach of the Aristotelian judge (who insists that right decisions are and be reached by only following the rules) and the Platonists (who intuit the right result and then try to find a way to use the rules to get to that result) can be contained, and may continue in a manner while maintains constitutional stability within the multi-national state that is the United Kingdom. The alternative would be to consider the abolition of appeals (whether criminal, civil or devolution issues) from Scotland and let England speak for Scotland.

44 See, e.g. Lord Gray's Motion 2000 SC (HL) 46, [2002] I AC 124, where such arguments have been pressed.
57. This latter option is one which seems to find some favour in the Scottish legal academic community on the basis that it will ensure that Scots law can develop in a manner uncontaminated by English law. There is indeed an argument that with the re-establishment of a Scottish Parliament – which has established a public petitions committee to consider requests from individuals for the Parliament to express a view or introduce or amend legislation on a matter of public concern – the mischief complained of in the 1689 Claim of Right reference to the need for recourse to Parliament has now been remedied, and there is no longer any need to provide for further appeals to London from decisions of the Court of Session.

58. But the abolition of appeals from Scotland would, in my view, be a retrograde step and not one to be recommended if the intention is that the Union is to be maintained. Scotland is a small country, and its legal system, lawyers and judges all benefit from appeals to London. It is psychologically very important for all judges to think that they may judged in another forum – the classic “quis custodiet ipsos custodes?” problem – so that even if they are not appealed against, they know that they might be, and their reasoning there analysed and held up to rigorous scrutiny.

59. It is arguable that the possibility of appeals to the House of Lords in civil cases from Scotland does precisely that, and keeps the judges of the Inner House sharp, less likely to fall into unreasoned prejudice, more careful in how and what they decide. The European Court of Human Rights performs a similar (but not as pervasive) function for the House of Lords. So the rationale for even the unexercised possibility of second or third tier appeals is precisely to keep the judges focussed. From this practitioner’s point of view coming from a small jurisdiction, it is also not unwelcome to be able to argue a difficult or controversial point before judges who are not known to one personally and are therefore unlikely to confuse the point being argued with the person arguing it. The possibility of getting into a broader UK legal forum can therefore be something of a breath of fresh air for practitioners and judges, and indeed the law of Scotland. And indeed it is potentially very useful to argue before (and hear argument from) Platonist judges as well as from Aristotelians. The English legal system, too, benefits from having a comparativist outsider perspective on matters which can be brought by the non-English judges on the House of Lords’ bench.

Conclusion: A proposal to minimise judicial conflict and stabilise the Union

60. How then to preserve the benefits of comparativism, while allaying the fears expressed by some Scots lawyers and judges that the integrity of the Scottish legal system would

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References:


“If differences of laws with an inevitable majority of non-Scottish members makes the House of Lords inherently unsuitable for Scottish criminal appeals, then the case is, if anything, stronger for private law appeals. One does not need to be a legal nationalist to see this.”

46 As Colin Boyd QC, Speech to the Conference of the Law Society of Scotland on the UK Supreme Court Proposals, 21 January 2004, observes (at para. 52):

“As a legal system in a small country on the edge of Europe, we must be conscious of the risk of becoming self-centred and inward looking. It would be very easy for us to fall into the trap of defining our unique legal qualities and character in a negative sense, of simply not being the same as others. Certainly we must protect and cherish and develop the many valuable features of our legal heritage. But the presence of Scottish judges in the supreme court, whether it is the current House of Lords or the proposed new institution, opens a two-way window for us into the world-wide family of common-law systems. In the same way the United Kingdom’s membership of the European Union opens up for Scots lawyers opportunities of contributing to and learning from the differing systems of Continental Europe. This is not the time for Scots law to retreat into some kind of protectionist shell.”

HeinOnline -- 9 Jud. Rev. 233 2004
be undermined by a new UK Supreme Court? One possible solution might be to consider the appointment of comparativist amici curiae in cases coming to the Court of Justice. Their task might be to set out before the Court the relevant law as it applies in the jurisdictions other than that from which the appeal is being taken, and then draw the possible implication of any decision of the Court from an overall perspective. Thus, appeals from England might profitably have an amicus to present position in Scotland, while Scottish cases could be advised as to the position in England. It is noteworthy that already in purely English cases it would appear to be custom of Lord Hope also to advise (albeit without the benefit, it would seem, of specific submissions from counsel on the matter) what the position is in Scots law.47 In this way the whole Union perspective of the decisions emanating from a UK Supreme Court may be assisted.

61. The role played by these proposed comparativist amici curiae might be similar to that taken by the Advocate-General before the European Court of Justice, who seeks to mediate between the submissions of the parties against the broader European perspective:

62. It should, of course, be borne in mind that the European Court of Human Rights stated that “the right to adversarial proceedings means in principle the opportunity for the parties to court proceedings falling within the scope of Article 6 to have a lawyer and a right of access to the Court...”50 This would, then, require that the actual parties file the information as to the last word and a proper opportunity to comment on the submissions of the comparativist amicus,51 if so advised, since “in this context the importance is attached to appearances as well as to the increased sensitivity to the administration of justice”52.

47 See, for a recent example, Lord Hope’s judgment in Secretary of State for Trade and Industry v Frankland [2004] 2 WLR 1279 where in the context of a purely English appeal the law of Scotland off and reimbursement of debts is expounded.


51 See, in particular: Vermeulen v Belgium (20 February 1996), RJD 1996-I 225, para. [23] (re the Belgien Attorney-General); Loko Machado v Portugal (20 February 1996), RJD 1996-I 195, para. [28], [51] (re the Portuguese Attorney-General); Van Horssen v Belgium (25 June 1997), RJD 1997-II, 1040, paras [38]-[41] (re the Advocate General); J v Netherlands (27 March 1998), RJD 1998-II 604, para. [42]-[43] (re the Dutch Advocate-General); and KDB v Netherlands (27 March 1998), RJD 1998-II 621, para. [43]-[44] (re the Dutch Advocate-General). In Application No. 36590/97 Gök v Turkey (11 July 2002) and Application Nos 32911/96 and 34959/97 Mejfah and others v France (26 July 2002) the European Court of Human Rights, sitting in the latter capacity as a Grand Chamber in both cases, confirmed this line of case law and held that the lack of opportunity to respond to the submissions of the Principal Public Prosecutor in Turkey (in the former case) and to the Advocate-General’s submissions to the Court of Cassation in the latter (i.e., the Netherlands) constituted a violation of their rights to a fair hearing guaranteed under Art. 6 of the Convention. See also Passolin v France, Application No. 45019/98 (26 June 2003) where Art. 6(1) was held to have been breached where an applicant was not provided with a copy of the reporting judge’s report to the Court of Cassation; and Fontaine and Berdin v France, Application Nos 36410/97 and 40373/98 (8 July 2008) where application of Art. 6(1) was found both in the failure to provide the applicant with a copy of the reporting judge’s report to, and in the presence of the Advocate-General at the deliberations of the Court of Cassation.

52 See Bulat v Austria (22 February 1996), RJD 1996-II, 3, para. [47]. See also Borgers v Belgium (1995) ECHR at [24].
63. There is arguably, already, at least the beginnings of provision for the appointment of suitable comparativist amici curiae in cl. 34 of the Constitutional Reform Bill, which provides as follows:

“(1) If the Supreme Court thinks it expedient in any proceedings, it may hear and dispose of the proceedings wholly or partly with the assistance of one or more specially qualified advisers appointed by it.

(2) Any remuneration payable to such an adviser is to be determined by the Court unless agreed between the adviser and the parties to the proceedings.

(3) Any remuneration forms part of the costs of the proceedings.” (emphasis added)

64. This provision of the Bill would require some amendment. However, given that the role of the comparativist amicus would be to represent the general public interest in outlining the effects of a decision on (the constituent parts of) the Union, it would seem more appropriate that the costs of his participation should be borne not by the parties to the action but subsumed within the costs of running the court itself. But in any event, the proposed new position of Advocate-General to the UK Supreme Court would encompass but go beyond the comparativist amicus role outlined above.

65. As a matter of fundamental principle, the public at large and the parties before the court are entitled to expect consistency from the court, particularly given that this is a court of final instance against which there is no appeal. Without consistency in court decisions, lawyers cannot properly advise their clients, and individuals cannot properly regulate their affairs. As should be clear from the review of the recent case law set out above, the current structures under which the House of Lords and the Privy Council do not seem to be ensuring this necessary consistency in approach, particularly on questions as to how and when Convention rights may be relied upon before the courts by individuals against the state. Some more structural reform seems to be called for.

66. Further, provision is also made in cl. 29 and 30 of the Constitutional Reform Bill for the appointment of “acting judges” to the UK Supreme Court from persons who hold high judicial office or who are Privy Councillors who are also members of a specified “supplementary panel”. This provision is presumably primarily intended to allow for additional judges to be appointed to specific cases from individual jurisdictions of the Union to ensure adequate representation of that jurisdiction on the case in question. But the fact that additional acting judges may, on occasion, be called to sit on any particular case would itself tend to militate against an overall consistency in approach by the Supreme Court, since it is plain that the changing of the identity of even one member of the court can change the internal dynamic-making within the court and may potentially make the difference between a close minority decision becoming a majority decision.

67. So, it would appear that there is an overall general public interest in the interests of transparency and maintaining public confidence in the integrity of the court’s decision in knowing how and why a particular bench of the court has been composed in the way that it has—why a larger bench than five is thought necessary in one particular case; why particular acting judges from Scotland and/or Northern Ireland or Wales or, indeed, England, have been co-opted in another case.

68. It is suggested that the proposed new Advocate-General to the UK Supreme Court could properly play a role on this issue. For example, once it is clear that a case is proceeding before the Supreme Court (whether because leave to appeal has been granted or a petition for appeal without leave has been duly lodged) it might be useful for the Advocate-General to the Supreme Court to advise as to whether or not this case raises
Constitutional Reform and the UK Supreme Court

such issues as would be appropriate for a larger bench than normal to be assigned to any case, or that the bench in question should contain at least two members from Scotland – whether full-time members of the court or acting judges co-opted from the same jurisdiction. It is not suggested that the parties to the case should have any input into the composition of the bench (to avoid fears of court picking), but it would at least make it clear to the parties (and the public at large) why their bench is comprised of seven or nine judges, and why some of these are acting judges, and/or why a majority of the judges in question are Scots.

69. In sum, one thing seems clear: the conflict within the House of Lords and between the House of Lords and the Privy Council has made further reform of our top court structure inevitable. The status quo cannot be maintained on this matter. But if a stable and lasting constitutional structure is to be achieved, it must be one which is consistent with the historic constitutions of the Union and of its constituent parts, if it is to maintain the confidence of the people. This has, at the very least, to involve formal recognition in the structure of the new court of the distinctive intellectual, constitutional history, judicial philosophy and continuing national identity of Scotland, and a conscious and explicit acknowledgment that the Union of which the new UK Supreme Court will be a lynchpin is based on partnership among nations rather than presumed incorporation into the one nation that is “greater England”.

53 In this regard, see, in particular, the provision of the (Scottish) Act of Union of 1707, which states that:

 “[N]o Causes in Scotland be cognisuble by the Courts of Chancery Queens-Bench Common-Bench, or any other Court in Westminster-hall; And that the said Courts or any other of the like nature of the Union shall have no power to Cognose Review or Alter the Acts or Sentences of the Justices of Scotland or stop the Execution of the same.”

In its response to the UK Supreme Court proposals, the Faculty of Advocates (see n. 33 above) has given the provision as meaning that “any Court exercising jurisdiction in Scotland, and in particular a Court with power to review or alter the interlocutors of the Courts in Scotland, cannot be a part of the Courts of England and Wales. This means that in order to comply with the Act of Union, a Supreme Court would require to be set up as a Court independent of the Courts of England and Wales”.

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be assigned from Scotland, from any person, he would at least be composed, or why a man...

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Judging Democracy: the Devolutionary Settlement and the Scottish Constitution

Aidan O’Neill*

This article considers three distinct but inter-related issues concerning human rights and the Scottish constitution. First of all, it discusses the alleged anti-democratic nature of human rights which, of course, depends on what is meant by “democracy”. The paper suggests that “democracy” after the Human Rights Act 1998 has to be given a substantive “value-rich” meaning founded on the principle of respect for the individual, rather than simply a claim that the majority is always right. Second, it looks at the fact that Scotland’s new constitution under the Scotland Act 1998 mandates a new form of “democratic constitution”, one in which the judges are supreme in the sense that they have the power to strike down as invalid – because Convention-incompatible – both legislation which has been duly passed by the Scottish Parliament and acts of the Scottish Ministers which would otherwise be warranted under primary Westminster legislation. It is suggested that the reasons why this constitutional revolution has not yet made the impact that might have been expected relate to the institutional conservatism inherent in the current Scottish legal culture. Third, it examines the issue of the role and structure of the Judicial Committee of the Privy Council in the devolutionary settlement. It is submitted that the case-law to date shows certain tensions in the way that the current arrangements are working in the United Kingdom as a whole, and a unitary state with two Supreme Courts deciding on Convention rights is inherently unstable. For the sake of constitutional and democratic stability in the post-devolution UK, we need one Supreme Court – at the very least one which combines the current jurisdiction of the House of Lords with the devolution jurisdiction of the Privy Council.

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A. WHAT DO WE MEAN BY DEMOCRACY?

The tendency in general political and philosophical discourse in the UK has been to think of democracy as simply a "numbers game" – that is, the majority rules, and whatever it says goes. Talk of values, of basic rights, was all rather embarrassing to an intellectual culture brought up on the polite scepticism and empiricism that has characterised post-Enlightenment Scottish and English intellectual life – the "doubting Thomas" school of philosophy, which wished to "reserve its position" as to whether any objective values could be said to "exist" in any sense, given that they could not be seen or touched and there was no procedure for proper resolution of their content.

This apparently "values-free" approach to discussion of governance in the UK has its parallel in constitutional law in the claims of the absolute and unqualified sovereignty of the Westminster Parliament, developed most notably by Dicey and his followers. Lord Hailsham, a former Lord Chancellor, famously characterised this approach – under reference to a Labour administration – as "elective dictatorship". Lord Reid spoke of the idea that judges only find the law and do not make it as "a fairy tale" and, apparently, we do not believe in fairy tales any more. Similarly, it is a fantasy to suggest the untramelled sovereignty of the Westminster Parliament means that, no matter its content, whatever Parliament ordains – the killing of red haired children, say, or the deprivation of civil rights from Jews or from asylum seekers – is legitimate and has moral or legal binding force: it is untrue.2

The only reason, perhaps, that this Diceyan fairy tale has endured for so long is that peculiar, non-revolutionary nature of the UK constitution. Since the formation of the United Kingdom constitution, the foundation of the unitary state in 1707, there has been no revolutionary breakdown or challenge to the established constitutional order. Instead the 1707 constitution has been flexible enough to adapt to change, to adapt to democracy, so that the values underlying democracy have never had to be enumerated, to be uncovered, or to be made explicit. The nineteenth-century growth in the democratic franchise to the UK Parliament coincided with the rise of the political and moral philosophy of utilitarianism, the maxim that the guiding moral and legislative principle should be do whatever makes as many people as happy as possible. Even this involved no ascription of what really was, or ought to be, of value. This utilitarianism could therefore coexist with a healthy scepticism about values and rights talk as being nothing more than, in Jeremy Bentham's phrase, "nonsense on stilts".

1 Lord Reid, "The judge as law maker" (1972-73) 12 JSLT 22.
In the course of the late 1980s and early 1990s the case against untrammelled parliamentary sovereignty was being made increasingly by serving judges on the English bench, who spoke in favour of the recognition, whether at common law or by way of statutory adoption of a Bill of Rights, of fundamental values which set enforceable limits on the absolute powers of the state as against the individual. In the UK the necessary political revolution for the adoption of a human rights charter into domestic law was the election of a new Labour administration in 1997 after that party had been out of power for eighteen years. The Human Rights Act 1998 (HRA) adopted as enforceable “Convention rights” before national courts many of the substantive provisions of the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR). Lawyers in practice could, therefore, no longer dismiss “rights talk” as “nonsense on stilts” – because such “rights talk” could win or lose their cases. And judges too have been required by the 1998 Act to address their minds to the needs of a “democratic society”, in the name of which certain rights may be limited.

In contrast to the human rights instruments which have emanated from the UN Charter, the ECHR is replete with explicit references to “democracy” both in its preamble and in its substantive provisions. In its 1998 judgment in United Communist Party of Turkey v Turkey the European Court of Human Rights underlined the proposition that a democratic system was the bed-rock on which the Convention rights were based, stating:

Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is “necessary in a

3 Sir John Laws, “Illegalities: the problem of jurisdiction”, in M Supperstone and J Goudie (eds), Judicial Review, 2nd edn (1997) 4.1 at 4.17: “[The principle of Parliamentary sovereignty] remains one of the plainest constitutional fundamentals at the present time; a departure from it will only happen, in the tranquil development of the common law, with a gradual re-ordering of our constitutional priorities to bring alive the nascent idea that a democratic legislature cannot be above the law.”

4 Sir John Laws, “The Constitution, morals and rights” [1996] PL 622 at 628: “The case which I and some others have ventured to suggest may be made against the doctrine of Parliament’s absolute sovereignty ultimately rests on the proposition that the legislature holds its power for the benefit of the people as surely as does the executive; that is, it is, or ought to be, subject to the rule of law.”

5 Lord Woolf, “Droit Public – English style” [1995] PL 56 at 59: “Ultimately there are even limits on the sovereignty of Parliament which it is the courts’ inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved.”

6 Sir John Laws, “Law and democracy” [1995] PL 72: “[The survival and flourishing of a democracy in which basic rights...are not only respected but enshrined requires that those who exercise democratic political power must have limits set to what they may do: limits which they are not allowed to overstep. If this is right, it is a function of democratic power itself that it be not absolute.”

7 The fourth preamble to the Convention refers to the Contracting States’ “profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend”.
democratic society”. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from “democratic society”. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.8

And the Strasbourg Court noted in its decision in Selim Sadak and others v Turkey concerning the obligations of Contracting States under Protocol 1, Article 3 “to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” that this provision implicitly meant that individuals had Convention rights both to vote and to stand for election. It observed: “Article 3 of Protocol No 1 enshrines a characteristic principle of an effective political democracy, and it is accordingly of prime importance in the Convention system.” 9

The European Court of Human Rights has identified certain provisions of the Convention as being particularly “characteristic of democratic society”, notably: that proceedings before the judiciary should be conducted in the presence of the parties and in public; that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment; and, of course, the right to free elections enshrined in Protocol 1, Article 3. In its important decision in the case of The Welfare Party v Turkey the Grand Chamber of the European Court of Human Rights unanimously upheld the Convention-compatibility of the decision of the Turkish Constitutional Court to order the dissolution of a Turkish political party and the suspension of certain political rights of certain of its leading figures. The order was made on the grounds that the party’s programme advocated the reintroduction of Islamic law at least among Muslims, and contravened the principle of Mosque-State separation on which the modern Turkish state was founded after the collapse of the theocratic Ottoman Empire. In its decision, the Strasbourg Court emphasised that under the Convention, the acceptance of “pluralism” and

8 Emphasis added. Application no 19392/92, United Communist Party of Turkey v Turkey (1998) 26 EHRR 121, para 45. The preceding text in para 45 is as follows: “Democracy is without doubt a fundamental feature of the European public order…That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights…The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention…; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society.” See also Applications nos 22723/93, 22724/93 and 22725/93, Yasar and others v Turkey (2003) 36 EHRR 6.

freedom of speech was a prerequisite to any democracy. They noted that the Convention guarantee under Article 9 to freedom of "thought, conscience and religion" applied not only to religious believers but also to "atheists, agnostics, sceptics and the unconcerned" and it does not protect every act motivated or influenced by a religion or belief. The Court asserted that:

The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it... Moreover, in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected...[T]he principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention...[A] political party whose leaders incite violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds...No-one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole...In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history.10

It is clear that the Strasbourg Court's view of democracy is one which is freighted with meaning, inseparable from the experience of the breakdown of the democratic and moral order which characterised so much of continent of Europe in the course of the twentieth century. The European Court of Human Rights' vision of a liberal political democracy is a secular one, in which Church/Mosque/Synagogue/ Temple and State are separated; a polity which tolerates only the tolerant, and is intolerant of the intolerant. As Koçak and Örticü put it:

It seems that now there is a European consensus that an Islamic party advocating the introduction of Shari'a law is incompatible with the European Convention on Human Rights and hence with the conception of European democracy.11

11 M Koçak and E Örticü, "Dissolution of political parties in the name of democracy: cases from Turkey and the European Court of Human Rights" (2003) 9 European Public Law 399 at 423. See too their remarks at 401-402: "To prevent democracy from becoming a tool for oppression of minorities and for it to protect itself there are certain sine qua non such as the rule of law, the Rechtsstaat, fundamental freedoms
“Democracy” is on this analysis, then, already heavily value-laden: it is a substantive moral concept, rather than simply an arithmetical procedural one determining how a Government is put into or is removed from power. A political regime – even one supported or elected by a majority of the population – which sought to deny basic rights to those falling within its care would be in danger of forfeiting the right to call itself “democratic”. The example of Germany after the 1933 elections bringing the Nazi party to power comes readily to mind. As the Pope noted in his 1991 encyclical Centesimus Annus, “a democracy without values easily turns into open or thinly-disguised totalitarianism”.12 The state authorities, however constituted, have an obligation to protect and proclaim the value of human life, and to provide the conditions for each individual's flourishing, even in the case where a majority of the people may favour the deprivation or attenuation of rights for unpopular minorities – whether that be present day asylum seekers in the United Kingdom, or Jews in the Germany of the early 1930s. It is the duty of the state authorities, especially in democratic systems, to stand up for and protect fundamental rights, often against majority opinion. It might be said that the whole point about human rights is that, in some ways, they are anti-democratic, or at least anti-majoritarian, because they seek to protect – even in the face of opposition from a comfortable majority – the weak, the powerless, the destitute, the undeserving, and even those deemed socially useless. The State has to foster respect for all those within its care. Democracy can only be anchored in that respect by the State and by each and every individual of the fundamental rights of other individuals. Democracy is, on this analysis, a substantive moral enterprise and not simply a matter of head-counting or the taking and following of opinion polls.

It is submitted that just such a re-ordering of our constitutional priorities is already under way. In responding to a court reversal13 overturning his policy of “destitution for asylum seekers” who had failed to claim asylum immediately upon arriving in the UK the Home Secretary has attacked “unelected judges” for carrying out their duty of ensuring that the government of which he is a member keeps within the boundaries of the law and that, in the case in point, due respect for the

and human rights, and secularism, in addition to the minimum requirements of the right to vote, to elect and be elected. It is generally accepted that the protection of freedoms may necessitate limitation of freedoms, and that the protection of a system can only be achieved by limitation of the system. There is no freedom to destroy freedom. In a democratic society it is a duty to preserve democracy. Democracy cannot grant people the right to reduce it to a formality or destroy its sine qua non. This means that the concept of democracy itself is also limited. Limitations are acceptable if it can be guaranteed that democracy will protect and defend itself only through means allowed by democracy. This position is valid even if the majority does not support it, since use of freedom is an abuse of freedom and freedom cannot by abused by any, including the majority. This is true whether a democratic system calls itself direct, representative, western, liberal, socialist, organic, bourgeois or popular.”

health and welfare of asylum seekers is maintained. In doing so the Home Secretary is himself in danger of subverting the very democratic constitution which he, as a holder of one of the four great offices of State, is bound to uphold. The obligations of his office include one of guardianship of the constitution. The Home Secretary should be seen to be confronting the mob, not seeking to lead or incite it. There is no justification for launching, from that office, an intemperate political attack on the judges for doing what the law requires them to do: namely to uphold human rights claims against the unlawful actions of the Executive. Constitutional convention, after all, dictates that serving judges cannot engage in public debate to answer back their critics. But the words of Sir John Laws may be borne in mind:

We are I hope on our way to the construction of a renewed constitutional jurisprudence in which the megalithic doctrine of the sovereignty of Parliament will be refined to allow fundamental rights to flourish, while the legislature’s ultimate legislative supremacy is preserved. The [Human Rights] Act of 1998 gives democratic backbone to this important ideal.

The ideal has many prizes. It means high standards of decision-making within government, which must now respect the demands of proportionality as well as those of reason and fairness. It begins to shift us away from a coarse majoritarian view of democracy, which lacked any substantial theoretical underpinning for the imperative of the protection of minorities, especially unpopular minorities. In so doing, it promotes the virtue of tolerance. It is capable also of making democratic process more vigorous, by a heightened insistence on freedom of speech and associated political freedoms.¹

B. SCOTLAND’S CONSTITUTION

How does this relate to Scotland’s constitution and the new post-Scotland Act democratic structures? Under the principle of the rule of law which informs the UK constitution it is for the Westminster Parliament to make new laws and to amend existing laws; for the Ministers (including the Home Secretary) to govern within the limits of the law; and it is for the judges to interpret and enforce the law. This is the classic doctrine of the separation of powers. This doctrine requires, on democratic grounds, a certain sensitivity, indeed savvy, on the part of the judiciary. As Lord Hoffmann stated in an extra-judicial lecture:

The separation of powers...raises questions of great subtlety and complexity far more difficult and interesting than the question whether the Lord Chancellor should sit as a judge. It requires a degree of political awareness from judges, the ability to identify cases in which behind the formal structure of legal reasoning with which judges are so familiar, there lie questions of policy which are more appropriately decided by the


democratically elected organs of the State. And it requires a degree of restraint on the part of the judges; a willingness to stand back from the thickets of the law and accept that judges are not appointed to set the world to rights. However slow, obtuse and maddening the democratic process may be, there is a legitimacy about the decisions of elected institutions to which judges, however enlightened, can never lay claim.  

The constitutional twist which has been introduced by the Scotland Act to this still classically Diceyan analysis is that an unmodified form of judicial review of the democratic legislature has been introduced, with the result that the constitutional fundamentals in Scotland post-devolution may be stated as follows:

(i) It is for the Scottish Parliament to make new laws, but such laws will be valid only if and insofar as they fall within the legal competences of the legislature.\(^\text{16}\) The susceptibility of even the internal procedures of the Scottish Parliament to judicial review has also been robustly affirmed by the court.\(^\text{17}\)

(ii) It is for the Scottish Ministers to govern within the limits of the law. There are absolute limits on their power, however.\(^\text{18}\) In particular, save for the Lord Advocate,\(^\text{19}\) the Scottish Ministers cannot in any circumstances be authorised either by Holyrood or Westminster, to act in a manner which is incompatible with Convention rights.\(^\text{20}\) Thus, even a Human Rights Act

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16 The Scotland Act 1998, s 29(d) provides that the Scottish Parliament has no power to pass any legislative provision which is incompatible with Community law or any of the Convention rights incorporated by the HRA.
17 Whaley and others v Lord Watson of Invergowrie and The Scottish Parliament 2000 SC 125, OJ; 2000 SC 360, IH per Lord Rodger at 345H, 349D-E, 350B-C.
18 Under the Scotland Act, s 57(2) members of the Scottish Executive have “no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law”. The Scottish Ministers are also bound under s 58 to respect and, if necessary, implement, all and any other international obligations of the UK.
19 The Scotland Act, s 57(2) makes specific provisions for the Lord Advocate, when prosecuting any offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, to rely upon HRA s 6(2) to permit his lawful breach of Convention rights. Without such specific Westminster-derived authorisation, however, the Lord Advocate no longer has power to “move the court to grant any remedy which would be incompatible with the European Convention on Human Rights”: see Lord Advocate v Scottish Media Newspapers Ltd 2000 SLT 331, IH per Lord Justice General (Rodger) at 333C.
20 The Government of Wales Act, s 107(4)(a) and the Northern Ireland Act, ss 71(3)(a) and 71(4)(a) effectively place the Welsh Assembly and the Northern Ireland Assembly and Northern Ireland Ministers and Department in the same position as any other public authority under HRA s 6(2), that is to say, these sections make provision for the possibility of a lawful breach of Convention rights if, as a result of one or more provisions of primary Westminster legislation, the devolved Welsh or Northern Ireland institutions could not have acted differently or if the devolved Welsh or Northern Ireland authority was acting so as to give effect to or enforce Convention-incompatible Westminster provisions. There is no such tie-in with HRA, s 6(2) in the Scotland Act. This means that a declaration by a court made under HRA, s 4 to the effect that a provision of Westminster legislation is incompatible with the requirements of the Convention will have the effect of rendering ultra vires any act or omission of the Scottish Ministers or Parliament which relies upon the provision in question.
section 4 declaration of incompatibility will have the effect of rendering actions of the Scottish Ministers ultra vires.

(iii) It is for the courts to ensure that both the Scottish Parliament and the Scottish Ministers respect the limits on their powers and to strike down measures which go beyond the limits of these powers. Any purported act of the Scottish Parliament or the Scottish Ministers is invalid in so far as it is incompatible with Convention rights, and therefore of no legal effect. The courts have no discretion to withhold or re-fashion any other remedy.

What has been created by the devolution statutes, then, are democratic institutions whose acts are, however, subject to control by the judiciary. Under the Scotland Act the rights guaranteed under the Convention have, in effect, the status of a higher law as against all and any legislation passed by the Scottish Parliament or any act (but not omissions) of a member of the Scottish Executive. The different constitutional status given by the Scotland Act to the Convention rights has been unequivocally affirmed by the three Scottish judges, Lord Hope, Lord Clyde, and Lord Rodger, who produced the majority judgment (Lord Steyn and Lord Walker dissenting) of the Privy Council in R v H M Advocate, in which Lord Rodger noted as follows:

In enacting a constitutional settlement of immense social and political significance for the whole of the United Kingdom, Parliament has itself balanced the competing interests of the Government of the United Kingdom, of the Scottish Executive, of society and of the individuals affected. Having done so, Parliament has decided that members of the Scottish Executive should have no power to do acts that are incompatible with any of the Convention rights. In this case that means that the Lord Advocate has no power to continue the prosecution on charges 1 and 3. If this is to use an axe rather than a scalpel, then Parliament has selected the tool. Your Lordships' Board cannot re-open the exercise that Parliament undertook and re-balance the competing interests for itself. Rather, it must loyally give effect to the decision of Parliament on this sensitive matter, even if – or perhaps especially if – there are attractions in a different solution.

Thus, under the Scotland Act, it is the courts which are supreme, not Parliament. On the Blunkett analysis this would appear to mean that the constitutional settlement in Scotland is an undemocratic one, and therefore one lacking any proper legitimacy. Can this be right? I think not. If we see legitimacy as flowing not from simple majoritarianism but from respect for individuals' basic inalienable rights then it could be argued that the Scottish settlement with its unelected

21 See Miller v Dickson, note 62(v) below.
22 See Dyer v Watson, note 62(vii) below, per Lord Millett at 126 para 131.
24 Note 62(a) below, at 34-35, para 155, in clear riposte to Lord Steyn's observations at 27D-E, para 18.
judges at the apex of the pyramid is more legitimate than the human rights settlement for England which leaves open the possibility that the Westminster Parliament may legislate in a manner which is incompatible with human rights and may indeed authorise the Executive to breach human rights.

(1) The institutional conservatism of the Scottish judiciary: the judges who will not cry “Woolf”

The Scottish devolutionary settlement does place an enormous responsibility on the judges. Judges in Scotland have, however, tended to be more conservative than their brethren in England. As the late Professor W A Wilson once observed:

It cannot be said that the Scottish judiciary has been a major agency of change in the last hundred years. The House of Lords has made abrupt turns from time to time and perhaps that is the appropriate place for changes to be made. The Court of Session has been, on the whole, conservative; it has refused to break new ground, not only because there was precedent against it, but also because there was no precedent for it... The best that can be said for the judges is that they have kept the system going; that is, perhaps, their function.25

In stark contrast to the position in England, there was no pressure from the judiciary in Scotland for the incorporation of any bill of rights. In fact, cases such as the 1980 decision of Lord Ross in Kaur v Lord Advocate, 26 which was specifically approved in the 1985 decision of the Second Division in Moore v Secretary of State27 and only departed from by the 1997 decision of the First Division in T, Petitioner,28 point, if anything, to a degree of judicial hostility to any attempt to rely upon the ECHR prior to the constitutional changes initiated by the 1997 new Labour administration. In so far as one can speak of general trends, Scots judges have tended towards a strict dualist (international law has nothing to do with domestic law) and black-letter interpretative approach to the law. It is not entirely clear that this culture of what may be termed “institutional conservatism” has totally disappeared, even under the new dispensation of the Scotland Act which mandates a radical constitutional gouvernement des juges in Scotland akin to the role played by the courts in the constitution of the United States. Despite this new constitutional position, the decided cases seem to indicate that judges remain loath to exercise their constitutional muscles.

This is not necessarily a bad thing of course. If the judges have been handed an axe under the new constitution, then it might be wiser for them not to use it, in case

26 Kaur v Lord Advocate 1980 SC 319, 1981 SLT 322, OH.
27 Moore v Secretary of State 1985 SLT 38, IH.
28 T, Petitioner 1997 SLT 724, IH.
it brings down the whole constitutional structure. And when their powers of Convention-compatibility review have to be used, it may be that the safest way of using them is in a manner which emphasises the wholly rule-driven nature of the exercise, rather than a more result-driven approach which focuses more on achieving what the judge anticipates might be legally workable and politically acceptable.

Where there has been Convention-right-driven change in Scots law to date has been in criminal matters, rather than in civil: this may be due to a necessary re-balancing or re-configuring of the degree of deference which had traditionally been accorded the Lord Advocate by the courts in Scotland when the Lord Advocate’s constitutional position was much more powerful, combining many of the functions that in England were divided between the Lord Chancellor and the Attorney General. The most notable of these successful challenges in the criminal sphere was *Starrs v Ruxton* where the structural independence and impartiality of temporary sheriffs in relation to the Lord Advocate was found to be wanting. The consequence of this finding was, as the Privy Council ruled in *Millar v Dickson*, all criminal proceedings before temporary sheriffs from 20 May 1999 were unsustainable because afflicted by fundamental nullity. Repeated Convention-based challenges have also been made in relation to delays in criminal prosecutions.

In the civil sphere much less has been happening in constitutional terms. No provision of an Act of the Scottish Parliament has been struck down as Convention-incompatible in the few challenges that have been brought to date before the courts, whether it be the retrospective change in the law to allow for the continued detention of medically untreatable psychopaths in the State hospital.

29 2000 JC 208; 2000 SLT 42, HCJ.
31 Note 62(v) below.
32 See, however, *Lochridge v Miller* 2002 SLT 906, HCJ, finding that even Convention-based competency challenges to criminal proceedings have to be brought promptly.
33 See, for example: *Dyer v Watson*, note 62(vii) below; *Mills v HM Advocate* (No 9) 2001 SLT 1359, HCJ (Lord Justice General Rodger, Lord Coulsfield and Lord Caplan) upheld on appeal to the Privy Council, note 62(viii) below. See too the 3-2 decision of the Privy Council (Lord Steyn (dissenting), Lord Hope, Lord Clyde, Lord Rodger, Lord Walker (dissenting)) in *R v H M Advocate*, note 62(ix) below, in which the Scottish majority over-ruled both the judgment of Lord Reed at first instance (*H M Advocate v R* 2001 SLT 1366) and the judgment of the Criminal Appeal Court (*H M Advocate v R* 2002 SLT 834, Lord Coulsfield, Lord Cameron of Lochbroom and Lord Caplan).
34 Anderson v The Scottish Ministers, note 62(vi) below, in which the Privy Council held that the Scottish Parliament’s legislation was justified from considerations of continued safety of the general public as well as the staff and inmates of ordinary prisons, all of which could properly be used to justify the continued detention of restricted patients in hospital, whether or not their mental disorder was treatable. See Lord Clyde at para 74: “The balance between the rights and interests of a person of unsound mind to enjoy freedom from restraint and the opposing rights and interests of member of the public to live free from
or the lawfulness of the Scottish Parliament ban on hunting with dogs.35 And on the question of the courts reviewing the acts of the Scottish Ministers the judges in Scotland most recently in Davidson v Scottish Ministers36 have continued so to interpret the Crown Proceedings Act 1947, section 21 as to mean that, notwithstanding arguments as to Convention incompatibility, they have no power to pronounce any form of interim coercive or declaratory order against the Scottish Ministers or Ministers of the Crown and that no final coercive orders by way of interdict or specific implement may be pronounced against the Crown.37

(2) Restrictive rules on standing in judicial review

Part of the problem in civil matters which is holding back Convention law-based development may be the restrictive rules on standing in judicial review in Scotland. Chapter 58 of the Rules of the Court of Session, which governs judicial review, does not contain any explicit reference to the requirements of standing, but the Scottish courts have traditionally required there to be both title and interest to sue as a prerequisite to an individual or body being permitted to raise a petition.38 Title to sue has been attributed to a "party ... to some legal relation which gives ... some right which the party against whom he raises the action either infringes or

35 See Trevor Adams and others, Petitioners 2003 SC 171, OH (Lord Nimmo Smith). This case was, at the time of writing on appeal to the Inner House.

36 Davidson v Scottish Ministers (No 1) 2002 SC 205, 1H. In Davidson v Scottish Ministers (No 2) 2003 SC 103 this decision was itself overturned by the Second Division on the grounds of a breach of the principle of judicial impartiality when it was discovered that one of the judges in the case, Lord Hardie, had, as Lord Advocate in the Westminster government, been responsible for proposing the extension of the 1947 Act to the Scottish Ministers and advising Parliament as to its intended effect. This decision in Davidson (No 2) was at the time of writing itself the subject of an appeal by the Scottish Ministers to the House of Lords (see Seventieth Report from the Appeal Committee, 31 July 2003).

37 In the 2002 Robin Cooke Lecture, "Democracy through law" [2002] EHR LR 723 at 734, Lord Styn made the following observations to a New Zealand audience: "The idea that injunctive relief would not be granted against Ministers of the Crown, or only exceptionally, lingered in our system (M v Home Office, 1994 AC 377, HL). It was a relic of an age of deference toward the Crown. In a recent case from Grenada the Privy Council has held that Ministers have no immunity or quasi-immunity (Cairty v Attorney General of Grenada [2002] 1 AC 167). The rule of law applies to even the most powerful holders of office. This is a development of constitutional and symbolic significance. England can fairly claim to be inching towards being a constitutional state. And New Zealand is already thereabouts." (Emphasis added).

denies”. The interest which the party seeks to protect must also be considered by the court to be “a material or sufficient interest” which will be prejudiced by the decision complained of. The emphasis on title to sue and the consequent need for there to be a breach of identifiable individual rights as a pre-requisite before the supervisory jurisdiction of the court can be summoned does not fit well with a broader constitutional analysis of judicial review as a procedure to allow the courts to police and prevent wrong-doing by the state and its emanations.

The contrast with English law on this point could not be greater. There is no requirement to show title to sue in English judicial review. Since the 1977 reforms to judicial review procedure in England and Wales, all that has been required of the courts is to determine whether or not the applicant for judicial review has shown a “sufficient interest” in the matter to which the application relates. In recommending a broad inclusionary approach to this test of “sufficient interest” Lord Diplock observed:

[There would be a] grave lacuna in...public law if a pressure group...or even a single public-spirited tax-payer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful action stopped.

But precisely such a grave lacuna exists in Scotland, in contrast to the position in England where, in general, the English courts have acted in accordance with the observations of Lord Diplock and have applied a liberal interpretation to the test on standing. As well as permitting concerned individuals the opportunity to seek to right public wrongs in judicial review, the courts in England and Wales have increasingly allowed representative organisations to pursue applications for judicial review whether on behalf of their own particular membership or even on behalf of the wider public interest. Despite the fact that at Scots common law the

40 Air 2000 v Secretary of State for Transport (No 2) 1990 SLT 335. See also Air 2000 v Secretary of State for Transport (No 1) 1989 SLT 688.
41 See Simpson v Edinburgh Corporation 1960 SC 312 for a relatively narrow definition of what constitutes sufficient “prejudice” to ground an action for judicial review.
43 Supreme Court Act 1981, s 31(3) provides that “the court shall not grant leave [for judicial review]... unless it considers that the applicant has a sufficient interest in the matter to which the application relates” (emphasis added).
44 In Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited [1982] AC 617 at 645.
45 For a review of some of the English cases see K Gledhill, "Standing, capacity and unincorporated associations" [1996] Judicial Review 67; C HIlson and I Cram, "Judicial review and environmental laws— is there a coherent view of standing?" (1996) 18 Legal Studies 1.
possibility of an *actio popularis* is at least recognised in theory,\(^\text{47}\) the continued Scottish emphasis on the formal requirements of both title and interest to sue means that access to judicial review is more restricted than in England. Further, in contrast to England, where it has been held that the question of standing is one which can only properly be resolved after consideration of the full legal and factual context of the case,\(^\text{48}\) it has been stated that in Scotland questions as to the title of the petitioners to pursue the application for judicial review and the nature of their interest which they are thereby seeking to protect, are logically prior to any others in the litigation and should normally be dealt with as a preliminary matter before any consideration of the merits of the petition.\(^\text{49}\) Thus in *The Rape Crisis Centre v Home Office*\(^\text{50}\) Lord Clarke dismissed on the basis of the respondent's preliminary plea a challenge made by way of judicial review of a decision of the Secretary of State for the Home Department to allow Mike Tyson to enter the United Kingdom, on the grounds that petitioners could not show that they had title and interest to pursue the application.

As is plain, one consequence of these restrictive rules on standing in judicial review applied by the courts in Scotland is that pressure groups and other parties interested in challenging the general law, or Executive decision-making, have taken their judicial review actions south of the Border rather than risk being prevented on the basis of the technicalities of showing title and interest from airing the merits of the matter before the courts in Scotland. Thus the decision to allow radioactive material to be dumped in Scottish waters was judicially reviewed by the English courts,\(^\text{51}\) and an Edinburgh resident nurse dismissed from the armed

\(^\text{47}\) See *MacCormick v Lord Advocate* 1953 SC 396; *Wilson v Independent Broadcasting Authority* 1979 SC 351.

\(^\text{48}\) See *R v Inland Revenue Commissioners, ex parte the National Federation of Self-Employed and Small Businesses Ltd* [1988] AC 617, H.L. per Lord Wilberforce at 630-I.

\(^\text{49}\) Scottish Old People's Welfare Council, *Petitioners* 1987 SLT 179, OH per Lord Clyde at 184; *Paisley Taxi Owners Association Ltd v Renfrew District Council* 1997 SLT 1112, OH.

\(^\text{50}\) 2000 SC 527, OH per Lord Clarke at 534: "Where questions of title to sue arise in a situation where a Minister is exercising a function, the search is, in my opinion, to be focused on the scope and the purpose of the statute or other measure under which he is purporting to act to discover who, in law, has the right to challenge an act or decision taken by the Minister in the exercise of that function if that act or decision is not to his liking. The fact that the act or decision is not to his liking does not per se qualify a person with title to challenge. Some legislation and its related measures, having regard to their purpose and function, will, no doubt, confer a right of challenge on individual members of the public as a whole, but it is a fallacy to suppose that because of the public interest in ministers acting lawfully and fairly that public interest by itself confers on every member of the public a right to challenge a minister's act or decision. Matters must go further, in my judgement, and the individual or body seeking to challenge the minister's act or decision must show that, having regard to the scope and purpose of the legislation, or measures, under which the act is performed, or the decision is made, he or they have had such a right conferred upon them by law, either expressly or impliedly."

\(^\text{51}\) See *R v Secretary of State for Scotland, ex parte Greenpeace* (unreported, CO/185/95), decision of Popplewell J, QBD, 24 May 1995.
forces by reason of her homosexuality brought the matter by way of judicial review application before the English High Court. The restrictive approach to standing in judicial review taken to date in Scotland has been criticised by Lord Hope in a public lecture given to the (English) Administrative Law Bar Association. The main problem with the development of the law in this area seems to be the innate conservatism which characterises so much of Scottish legal culture, and the fact that there have been very few judicial review cases which have in fact gone before the Inner House to allow them to establish a coherent approach to standing/title and interest in Scotland. It may be that all that is needed for the restrictive approach to standing to be changed in Scotland is for a suitably funded interest group to challenge the issue before three judges on appeal from the Outer House. If this is done and a broader more representative approach is allowed then we can hope perhaps for a proper Convention-rights-informed development of Scots civil law.

(3) Summary

In sum, despite Scotland's radical constitution on paper and the active role it gives to the judges in ensuring that individual Convention rights are fully respected by both the legislature and the executive, much remains theoretical, untried and unenforced. Perhaps the new constitutional settlement needs a new kind of judge - individuals who have been more obviously independent of the executive and the Crown Office in their pre-judicial careers. Since the decision in Staraks v Ruxton, of course, the Lord Advocate's former responsibility for Judicial Appointments has been taken from him and is exercised by the Scottish Minister of Justice who has set up, on a non-statutory basis, a lay-dominated ten-member Judicial Appointments Advisory Board whose function is to interview candidates for judicial office and make non-binding recommendations to the Minister. Radical Scottish judges for the radical Scottish constitution? But perhaps such a mixture is seen as too potent and explosive and it is thought that a properly balanced approach needs conservative judges exercising a high degree of judicial self-restraint and according a high degree of judicial deference to the "democratic powers", willing to hold their constitutional fire until it is truly needed. Perhaps, indeed...

54 For critical comment on the new juridical appointments procedure see J Gilmour, "The Judicial Appointments Board - a misnomer" (2002) 47 JLSS 25.
55 See the opinion of Lord Woolf MR in R v Parliamentary Commissioner for Standards ex parte Al Fayed [1999] 1 WLR 669 at 670.
C. TROUBLE AT THE TOP?

The new constitutional structure created by the devolution statutes, provided in effect that there were to be two top courts in the United Kingdom, the House of Lords and, separately, the Judicial Committee of the Privy Council exercising its devolution jurisdiction. Why it was thought necessary to provide for a new UK Supreme Court in the Privy Council is unclear. It might be that it was considered politically unacceptable to have the House of Lords hearing, for the first time in its history, criminal appeals from Scotland. Alternatively, given that one of the envisaged roles of the courts in the devolution settlement was of adjudicating between the rights and responsibilities of the devolved legislatures and administrations as against the claims of Whitehall, it might have been thought inappropriate to have the final appeal on these issues being heard and decided upon by a committee of the Upper House of the Westminster Parliament.

For whatever reason, we have, then, a new Supreme Court for the UK. I say a court for the UK because the devolution statutes restrict the possible members of the Judicial Committee considering devolution issues to Privy Councillors who also hold high judicial office in the UK. Thus, Commonwealth judges who were also Privy Councillors, such as the New Zealander Lord Cooke of Thorndon, were ineligible to sit in devolution issues, although the three South African-educated Law Lords who have held high judicial office in England, Lord Steyn, Lord Hoffmann and Lord Scott of Foscote, can and do regularly sit in devolution cases before the Privy Council. It is a new court, too, in its method in that, in contrast with the traditional approach of the Judicial Committee advising with one voice the Sovereign in Empire and Commonwealth cases, the devolution issue Judicial Committee has multiple and sometimes sharply dissenting judgments.

Although it is a court of last instance, it has been stressed that the Judicial Committee is not a UK constitutional court of general jurisdiction. It is confined, in

56 See Scotland Act 1998, s 103(2).
57 The tradition of unanimity has been abandoned even in Commonwealht cases before the Privy Council: see for example the dissenting judgment of Lord Scott in R v Attorney General of England and Wales, [2003] UKPC 22, [2003] EMLR 24 (Lord Bingham, Lord Steyn, Lord Hoffmann, Lord Millett and Lord Scott), a decision on appeal from the Court of Appeal of New Zealand concerning the enforceability of MOD contracts requiring SAS members to maintain post-service confidentiality, and the dissenting judgments of Lord Steyn and Lord Cooke (Lord Hoffmann, Lord Hobhouse and Henry J in the majority) in Higgs v Minister for National Security and others [2000] 2 AC 225, a death sentence appeal from the Court of Appeal of the Commonwealth of The Bahamas.
58 See B Manley, "Judicial configuration, permutations of the court and properties of judgment" (2002) 61 CLJ 512 for discussion of this constitutional innovation of multiple and dissenting judgments in the Privy Council. Balkissoon v Trinidad and Tobago [2003] UKPC 78 is a recent example of a significant 3-2 split within the Privy Council in a Commonwealth death penalty case.
59 See Hoekstra and others v H M Advocate (No 5), note 62(xii) below, per Lord Hope at 41C-F.
the ordinary course, to determining appeals on "devolution issues" which have been
the subject of a specific determination by the court appealed against, together
with matters reasonably incidental to or following consequentially upon the
determination of the devolution issue question – such as the appropriate remedy.
On the other hand, although the Judicial Committee is limited to adjudication
on devolution issues, what constitutes a "devolution issue" has been interpreted broadly.

There has been a total of twelve cases which have come to the Privy Council
since it acquired its devolution issue jurisdiction. All of these have come from
Scotland, all but one of them on appeal from the High Court of Justiciary. Two of
these cases have been preliminary hearings before a three-judge panel considering
applications for special leave to appeal to the Judicial Committee after such leave

60 See Follen v H M Advocate, note 62(xii) below, per Lord Hope at 108D, para 9.
61 See Mills v H M Advocate (No 2), note 62(viii) below, per Lord Hope at 121H-13C, para 34.
62 The substantive decisions are, respectively:

(i) Montgomery v H M Advocate, 2001 SC (PC) 1; [2001] 2 WLR 779; 2001 SLT 37 (Lord Stott, Lord Nicholls, Lord Hoffmann, Lord Clyde, and Lord Hope) 19 Oct 2000 (Art 6 and pre-trial publicity);
(ii) Brown v Stott 2001 SC (PC) 43; [2001] 2 WLR 817; 2001 SLT 59 (Lord Bingham, Lord Clyde, Lord Hope, Lord Kirkwood and Lord Styn) 5 Dec 2000 (Art 6 and the privilege against self-incrimination);
(iii) McIntosh v H M Advocate 2001 SC (PC) 89; [2001] 3 WLR 107; 2001 SLT 304 (Lord Bingham, Lord Hoffmann, Lord Hope, Lord Clyde and Lord Hutton) 5 Feb 2001 (Art 6, drug confiscation orders and the presumption of innocence);
(iv) McLean and another v Buchanan and another 2002 SC (PC) 1; [2001] 1 WLR 2425; 2001 SLT 780 (Lord Nicholls, Lord Hope, Lord Clyde, Lord Hobhouse and Lord Millett) 24 May 2001 (Art 6, legal aid and the equality of arms between prosecutors and criminal defence lawyers);
(v) Miller v Dickson 2002 SC (PC) 30, [2002] 1 WLR 1615; (Lord Bingham, Lord Nicholls, Lord Hope, Lord Clyde, and Lord Scott) 24 July 2001 (Art 6 and possible waiver of the right to an independent and impartial tribunal);
(vi) Anderson v The Scottish Ministers 2002 SC (PC) 63, [2002] 3 WLR 1469; 2001 SLT 1331 (Lord Slynn, Lord Hope, Lord Clyde, Lord Hutton, and Lord Scott, 24 July 2001 (Art 5(1)(c) and the detention of persons of unsound mind);
(vii) Dyer v Watson and Another and H M Advocate v K 2002 SC (PC) 89, [2002] 1 WLR 1488; 2002 SLT 229 (Lord Bingham, Lord Hope, Lord Hutton, Lord Millett and Lord Rodger) 29 Jan 2002 (Art 6 and the factors indicating unreasonable delay);
(viii) Mills v H M Advocate (No 2) 2003 SC (PC) 1; 2002 SLT 939; [2003] 3 WLR 1597; (Lord Nicholls, Lord Stott, Lord Hoffmann, Lord Hope, Lord Scott, and Lord Mackay) 27 July 2002 (Art 6 unreasonable delay between conviction and hearing of appeal and the remedy of a reduction in sentence);
(ix) H v H M Advocate 2003 SC (PC) 21; [2003] 2 WLR 517; 2003 SLT 4 (Lord Stott, Lord Hoffmann, Lord Clyde, Lord Rodger, and Lord Walker) 28 Nov 2002 (Art 6 unreasonable delay in bringing charges and remedies under the Scotland Act);
(x) Clark v Kelly 2003 SC (PC) 77; 2003 SLT 208 (Lord Bingham, Lord Hoffmann, Lord Hope, Lord Hutton, and Lord Rodger) 11 Feb 2003 (Art 6 and the independence and impartiality of the District Court).

There have also been two decisions of the screening committee refusing special leave to appeal, namely:
had been refused by the court in Scotland. The remaining ten cases have been substantive appeals before five judges. In all of the devolution hearings before the Judicial Committee there has been a substantial Scottish presence on the bench hearing the application – Lord Hope has, indeed, sat in all the Privy Council's devolution cases to date. In both the preliminary applications for special leave and in two substantive cases, Brown v Stott and R v H M Advocate, Scots judges formed a majority.

All of the devolution issue cases before the Privy Council have concerned disputes over Convention rights rather than any other disputes over the legal competencies of the devolved institutions. One of the cases before the Judicial Committee has been by way of direct reference to it on the application of the Lord Advocate using his powers under the Scotland Act, Schedule 6, paragraph 33 after the special leave which had been granted by the Privy Council from the decision of the High Court lapsed because the instance in the original case had fallen. The Crown has appealed to the Judicial Committee from the High Court of Justiciary in three of the cases and in two of these appeals the Crown has been successful. Of the six other substantive cases brought on appeal to the Judicial Committee by individuals, only two have been successful. Both the reported preliminary applications brought by individuals for special leave to appeal to the Judicial Committee have been unsuccessful. The Judicial Committee of Privy Council has, then, overturned the decision of the High Court of Justiciary in four of the nine substantive cases which have been brought before it from that court.

At almost one-half this is a very significant rate of reversal of the decisions of the High Court of Justiciary, a court from which there was no appeal prior to the devolutionary settlement.

This new UK Supreme Court, which was also supposed to have primacy over the House of Lords, has to date been a substantially Scottish enterprise. This must present the non-Scottish members of the Judicial Committee with certain difficulties, given that there will doubtless be a sensitivity on the part of the non-Scottish participants on the Committee to try not to offend the sensibilities of the

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63 Clark v Kelly, note 62(x) above.
64 Clark v Kelly, 2001 JC 16; 2000 SLT 1038, HCJ.
65 Brown v Stott, note 62(ii) above, and McIntosh v HM Advocate, note 62(iii) above, were the successful Crown Appeals. Dyer v Watson and Another and H M Advocate v K, note 62(vii) above, was the unsuccessful Crown appeal.
66 Millar v Dickson, note 62(v) above, and R v H M Advocate, note 62(x) above.
67 Rockstr and others v H M Advocate (No 5), note 62(xi) above; Follen v H M Advocate, note 62(xii) above.
68 These four cases in which the Privy Council has reversed the High Court of Justiciary are: Brown v Stott, note 62(ii) above; McIntosh v H M Advocate, note 62(iii) above; Millar v Dickson, note 62(v) above, and R v H M Advocate, note 62(x) above.
Scots – or to tread on Scottish toes – in coming to their decisions (although Lord Hoffmann and Lord Steyn seem to have been more robust in this regard). But it gives the Scottish members of the Committee undoubted power (an unfair advantage?) in that the Scottish card can be used, as it were as a trump card, in the course of the Committee’s deliberations. To date, the Scottish card would appear to have been used in at least two ways.

First, in order to give a broad interpretation to the term “devolution issues” – in the face of initial scepticism and indeed hostility in the analysis of the non-Scottish judges in the Committee – to include within the ambit of the Convention right to a fair trial the acts of the Lord Advocate and the Procurator Fiscal Service in bringing and pursuing criminal prosecutions in Scotland. After a degree of internal dissent, the Judicial Committee has held unanimously that the manner in which both summary and solemn procedure prosecutions are conducted by the prosecuting authorities in Scotland may be said to raise devolution issues. This view is reached on the basis that all criminal prosecutions in Scotland concern the exercise of the functions of the Lord Advocate and that the Lord Advocate, and all those prosecuting on his behalf, are said to owe a general duty to ensure that individuals receive a fair trial within a reasonable time before the courts. This is a duty which runs concurrently with, and is not displaced by, the court’s own duty to ensure the fairness of trials. The Lord Advocate’s duty to ensure that any appeal against conviction is heard speedily is not so clear-cut, however.

This expansive approach has resulted in the Privy Council “capturing” a wide jurisdiction in Scottish criminal law matters so as to broaden the Judicial Committee’s jurisdiction to the extent that, in the first few years of the devolutionary settlement, it appears to have become a third instance Scottish court of criminal appeal, rather than a UK constitutional court. This is a jurisdiction which Lord Bingham has described in his evidence to the Joint Parliamentary Committee on Human Rights as “anomalous” and “surprising and unexpected”.

69 See Montgomery v H M Advocate, note 62(i) above, per Lord Hope at 12D-E, 13A-C.
70 See, e.g., Montgomery v H M Advocate, note 62(i) above, per Lord Hoffmann at 7B-C.
71 See Brown v Stott 2001 SC (PC) 43 per Lord Hope at 71G-H.
72 See Montgomery v H M Advocate, note 62(i) above, per Lord Hope at 17H-18E. See, too, Brown v Stott, note 62(iii) above, per Lord Hope at 71D-E.
73 See Brown v Stott 2000 JC 338, in which it was conceded on behalf of the Lord Advocate before the Criminal Appeal Court that procurators fiscal were bound by the Convention in the same way as the Lord Advocate. See too Stairs v Ruxton 2000 JC 208; 2000 SLT 42, HCJ at 47D-E.
74 See Montgomery v H M Advocate, note 62(i) above, per Lord Hope at 18H-I, 19G.
75 See Mills v H M Advocate (No 2), note 62(viii) above, per Lord Hope at 14B-D, para 38.
76 Lord Bingham of Cornhill, evidence to the Joint Committee on Human Rights, 26 Mar 2001: “When Scotland was united with England and Wales in 1707 it was clearly implicit in the Act of Union that there was no criminal appeal from Scotland to London...There was originally a doubt as to whether there was
It might be suggested that the broad interpretation of "devolution issue" to include all Convention claims raised against the prosecution authorities in the course of criminal proceedings in Scotland was necessary in order to ensure that the Judicial Committee played its proper role of ensuring a uniformity of interpretation and application of Convention rights across the United Kingdom. If the Judicial Committee had not interpreted its jurisdiction on devolution issues broadly then there would arguably be a completely different approach as between Scotland and England as regards, say, the right against self-incrimination in road traffic cases, or the presumption of innocence in applications for confiscation orders against persons convicted of drug-trafficking, both cases in which the Judicial Committee reversed, on Crown appeals, the previously unappealable decisions of the High Court of Justiciary.

But the Scottish card has also been played in the Judicial Committee to ensure not uniformity of approach but difference, most clearly in relation to remedies available when a breach of a Convention right is established. On the question of remedies, particular emphasis has been placed on the peculiar and specific constitutional settlement which Scotland has been afforded under the Scotland Act, which is said to be distinct from the constitutional settlement applying in England as a result simply of the application of the Human Rights Act. The procedural provisions of the Scotland Act take precedence as lex specialis over the Human Rights Act so that Convention rights complaints against the Lord Advocate and other members of the Scottish Executive have to be taken as devolution issues rather than simply as human rights issues under the Human Rights Act. Such an interpretation of the statutory provisions also maintains, of course, a live and broad jurisdiction for the Judicial Committee of the Privy Council. The problem with this use of the Scottish trump card in decisions of the Judicial Committee is that it may be thought to pre-empt or upstage consideration of similar issues by the House of Lords in non-Scottish cases (particularly in purely English law matters). It may also be thought to be contrary to the intent of the

77 See Brown v Stott 2000 JC 328, HCJ.
78 McIntosh v Lord Advocate 2000 SCCR 1017, HCJ.
79 See Brown v Stott, note 62(ii) above; McIntosh v H M Advocate, note 62(iii) above.
80 See R v H M Advocate, note 62(iii) above.
devolution settlement for the Judicial Committee to operate primarily as a further Scottish appeal court instead of as a court for the whole of the United Kingdom, giving guidance and binding rulings on, inter alia, the interpretation and application of Convention rights after taking full and due account of the impact of their rulings on all the legal systems of the UK, and not simply the Scottish legal system.

House of Lords v Privy Council

Once the English courts had gained their own jurisdiction to determine Convention rights matters with the coming into force of the Human Rights Act, the potential for conflict became clear. Tensions with regard to the Privy Council's devolution jurisprudence have now indisputably arisen from the broader UK perspective, as may be seen in the conflicting decisions of the Privy Council in R v H M Advocate and the House of Lords in Attorney General's Reference No 1 of 2001.81

In R v H M Advocate the Privy Council considered the question as to what remedy could be pronounced by the court where it was found that there had been a breach of the accused's Article 6 Convention right to be brought to trial within a "reasonable time". The Committee split 3-2, with the Scottish judges holding that the only remedy which could be pronounced was to order that the proceedings in Scotland brought by or in the name of the Lord Advocate be discontinued, since the act of continuing to prosecute charges after a reasonable time was incompatible with Article 6, and the Lord Advocate had, by virtue of section 57(2) of the Scotland Act, no power to act in a Convention-incompatible manner. And on the question of the proper interpretation of the Convention, the Scots judges in R effectively decided that the right under Article 6 to be tried within a reasonable time included within it a right not to be tried after an unreasonable time.

The two non-Scots making up the Board of the Judicial Committee in R v H M Advocate (Lord Steyn and Lord Walker) were clearly unhappy with this result, fearing perhaps that the decision in the Scottish case would mean that a similar result would have to reached in English proceedings. They were unwilling to countenance this, given that the Strasbourg jurisprudence appeared to allow, rather than the quashing of all charges, a lesser remedy for breach of the reasonable time requirement, such as civil damages or a reduction in sentence.

The decision of the Privy Council in R v H M Advocate also caused some general consternation because the House of Lords decided there should be a bench of nine

81 Note 62(1x) above.
judges to hear argument in Attorney General’s Reference No 2 of 2001,\textsuperscript{83} the English case on appeal from the Court of Appeal (Criminal Division)\textsuperscript{84} which concerned the same substantive Convention questions as were considered in \textit{R}, namely: whether criminal proceedings may – or indeed must – be stayed on the grounds that there has been a violation of the reasonable time requirement in Article 6 ECHR in circumstances where the accused cannot demonstrate any prejudice arising from a delay.

Seven of the unprecedented nine-judge bench convened to hear this English criminal appeal stated, quite unequivocally, that the previous year’s majority decision of the Privy Council in \textit{R v H M Advocate} was wrong. The two dissenting judges in the House of Lords decision were the Scots, Lord Hope and Lord Rodger, who together with Lord Clyde had formed the Scottish majority in the earlier Privy Council case, in the face of strong dissenting judgments from Lord Steyn and Lord Walker.

The primary point which divided the two courts was one of the proper interpretation of the reasonable time requirements contained in Article 6(1) ECHR. The House of Lords majority in \textit{Attorney General’s Reference} stated that it is not, in and of itself, contrary to the Convention for a criminal prosecution to be proceeded with against an individual, even after an unreasonable time has passed. Their Lordships therefore held that the power to stay criminal proceedings on the ground of unreasonable delay may be exercised only if either a fair hearing is no longer possible, or it is for any compelling reason unfair to try the defendant.

By contrast, the Privy Council majority in \textit{R} was of the view that any prosecution after an unreasonable delay would necessarily be Convention- incompatible; and held that, in the context of the Scotland Act, it would be ultra vires the Lord Advocate to continue with any such prosecution – effectively establishing that the incorporation of the Convention into Scots law by the Scotland Act means that an individual has a positive right not to be prosecuted after an unreasonable time has passed, regardless of questions of fairness or prejudice.

The House of Lords majority in \textit{Attorney General’s Reference} accepted that, notwithstanding their greater numbers, they could not overrule the majority decision of the Privy Council in \textit{R v H M Advocate}, but they made clear their preference for the opinion therein expressed by the dissenting minority of Lords

\textsuperscript{83} The House of Lords appeal was part heard on 9 and 10 April 2003 and further heard on 28, 29 and 30 July 2003 with a decision being pronounced on 11 Dec 2003. Only three of the twelve serving Lords of Appeal in Ordinary were not on this case, presumably because otherwise engaged: namely, Lord Saville (engaged in the Bloody Sunday inquiry), Lord Hutton (engaged in the David Kelly inquiry) and the then most junior Law Lord, Lord Walker.

\textsuperscript{84} Reported as \textit{Attorney General’s Reference (No 2 of 2001)} [2001] 1 WLR 1869, CA.
Steyn and Walker. What the House of Lords majority did not consider, however, was the extent to which it is required to regard itself as bound by the decisions of the Privy Council exercising its devolution jurisdiction, even when it disagrees with them.

The Scotland Act, section 103, the Northern Ireland Act, section 82 and the Government of Wales Act, Schedule 8, paragraph 32 all assert the binding nature of decisions of the Judicial Committee of the Privy Council in proceedings under these Acts in all other courts and legal proceedings, (apart from later cases brought before the Committee). And the status of the House of Lords as a court subordinate to the Privy Council is confirmed by the provision in the devolution statutes for preliminary references on devolution issues being made from the lower courts to higher courts; a procedure modelled, in part, on Article 234 EC (formerly Article 177 of the EC Treaty). Provision is made specifically for the House of Lords to refer any devolution issues arising in judicial proceedings before it to the Privy Council “unless the House considers it more appropriate, having regard to all the circumstances, that it should determine the issue.” 85 The House of Lords majority in Attorney General’s Reference made no reference to these provisions, however.

It would appear that the non-Scottish judges on the Appellate Committee regard the Privy Council in its devolution guise as nothing more than a further Scottish appeal court rather than – as was arguably the original intent of the devolution settlement – a new court for the whole of the United Kingdom binding the new constitutional settlement together in the Union. It might be said that this is because the Privy Council, in its interpretation and application of Convention rights in its devolution jurisprudence to date, has decided matters simply under reference to Scotland, the only legal system from which its cases have come thus far, and has not taken full and due account of the impact of its rulings on all of the legal systems of the UK.

Where does that leave matters in Scotland? In relation to delays in prosecution attributable to the Lord Advocate, the strict analysis given to the reasonable time provisions of Article 6 by the Privy Council majority in R v H M Advocate remains binding upon the courts in Scotland. Questions may arise as to whether or not the analysis of Article 6 by the Privy Council in R formally binds the Scottish courts in relation to cases involving unreasonable court delays which cannot be attributed to the Lord Advocate or the Scottish Ministers generally, for example where the delays are caused by the court itself or by the court administration. 86 What is clear, however, is that a decision of the House of Lords in an English appeal on a criminal


86 See for example Mills v H M Advocate (No 2), note 69(vii) above.
issue such as the Attorney General's Reference does not apply to, nor should it be regarding as binding upon, the Scottish courts, whether in criminal or civil cases. This then leaves open, at least in theory, the possibility of the courts situated in Scotland developing a "third way" analysis of the reasonable time requirements of Article 6 distinct from either the House of Lords or the Privy Council, leading to further fragmentation of any notion of a uniform standard of human rights protection throughout the Union.

But the situation in which Article 6 ECHR is taken to mean one or more things in Scotland and yet another thing in England cannot continue for any extended period. It can be assumed that the Lord Advocate will seek at the earliest opportunity to bring this issue back before the Privy Council. Mandatory references directly to the Privy Council may be made, on their application, in relation to devolution issues in proceedings in which any of the Law Officers are parties. Alternatively, the matter may come to the Privy Council by way of appeal from or reference by the criminal appeal court. The Privy Council would not, of course, be bound to follow the House of Lords decision in Attorney General's Reference but it would seem that whether it does or not may well be determined by the composition and size of the Board of the Judicial Committee deciding the issue – and who decides that is not known.

Where does this unresolved dispute between the two highest courts leave matters in England? It would seem to open arguments (whether in applications to the European Court of Human Rights or before other courts) to the effect that a failure to give persons charged in England at least as good a remedy for breach of the reasonable time requirement in criminal prosecutions as is available to those charged in Scotland may itself be a breach of Article 14 ECHR which provides that

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87 Compare with the statement of the High Court of Justiciary in Lord Advocate's Reference (No 1 of 2000) re Nuclear Weapons 2001 JC 143 (a case concerning possible reliance on norms derived from customary international law by way of defence to a prosecution for criminal damage to government property associated with the Trident missile defence system) at para 60: "In our view it is not at all clear that if this issue had been fully debated before us the incorporation of Trident II in the UK's defence strategy, in pursuance of a strategic policy of global deterrence, would have been regarded as giving rise to issues which were properly justiciable. Chandler v DPP [1964] AC 763, HL remains binding authority in this court. Such developments as have taken place seem to have left untouched the status of the prerogative in matters relating to the defence of the realm. However, we have not been asked to dispose of the case on this basis, and we see no alternative but to reserve the issue for another occasion." (Emphasis added.)

88 See, for example, the repeated refusal by the Inner House in McDonald v Secretary of State for Scotland 1994 SC 234 and again in Davidson v Scottish Ministers (No 1) 2002 SC 205 to follow the decisions of the House of Lords in M v Home Office [1996] 1 AC 777 and of the (non-devolution jurisdiction) Privy Council in Cairy v Attorney General of Grenada [2002] 1 AC 167 on whether Ministers of the Crown may be subject to interim and coercive orders pronounced by the courts.

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"the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... race ... national or social origin, birth or other status". The English do, after all, constitute a racial group distinct from the Scots for the purposes of the Race Relations Act 1976.90

And what of the situation for the United Kingdom as a whole? As a result of the Attorney General v R split there is now no one court with the jurisdiction to ensure uniformity as regards the interpretation and application of Convention rights across the United Kingdom. The Privy Council decides matters on devolution issues for Scotland (and potentially also Wales and Northern Ireland), the House of Lords for England. But what rationale is there, then, for the Privy Council to continue in its role as a court of final appeal in Scottish criminal matters? The review conducted by Lord Bonomy into the practice and procedure of the High Court of Justiciary recommended that, because of the delays and disruption caused to criminal trials in Scotland by the devolution issue procedure, the right of appeal from decisions of the Scottish criminal appeal court to the Privy Council should now be withdrawn. He stated:

The only practical reason for ever categorising such issues as devolution issues was to ensure that recognition was given to the Convention rights during the period between the implementation of the Scotland Act and the implementation of the Human Rights Act, but even then it was a rather artificial way of introducing Convention rights to Scottish criminal procedure. That interim period is now over. Schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord Advocate as prosecutor, and anyone acting on his authority or on his behalf as prosecutor, are excluded from the definition of a devolution issue. The Scottish Executive should urge the United Kingdom Parliament to make that amendment.91

If this suggestion were taken up, however, the result would indeed be no one court with the jurisdiction to ensure uniformity with regard to Convention rights.

It seems clear that we now need some form of legislative intervention to resolve these issues. In its July 2003 consultation paper on proposals for a new UK Supreme Court, the government suggested that this body should combine the existing jurisdictions of the Appellate Committee of the House of Lords with the devolution jurisdiction of the Judicial Committee of the Privy Council. This suggestion was, however, rejected by the Law Lords in their published collective response to the Westminster Government's consultation paper. Although their Lordships accepted that it would be "consistent" with the role of the proposed new UK Supreme Court that "it should be the final arbiter of devolution issues", they noted that under the

90 See BBC Scotland v Souster 2001 SC 458; [2001] IRLR 150, 1H.
devolution statutes the Privy Council may, in effect, call in other judges to their bench “drawn from the devolved jurisdictions”, who would not otherwise be eligible to sit as House of Lords judges. They suggested that this was a feature of the devolution settlement which the devolved administrations would not wish to see abrogated, and accordingly, “with a measure of reluctance”, concluded that the two jurisdictions should not be combined in the one Supreme Court. 92

In their own response to the Westminster consultation paper, however, the Scottish Ministers stated that, precisely in order to avoid the possibility of “conflicting judgments on important constitutional issues”, they considered it “essential” that there be a single UK-wide court by which “all matters of a constitutional nature”, such as devolution issues and all cases involving breaches of ECHR, whether arising under the Human Rights Act or by operation of section 57(2) of the Scotland Act, might be decided. The Scottish Ministers stated that “in relation to devolution issues under the Scotland Act, the new UK Supreme Court is the appropriate forum for final determination of all such matters...provided that appropriate arrangements are made to ensure that Scottish Judges sit in cases raising devolution issues”, while accepting “that does not in itself mean a majority of judges must be Scottish”. 93 The concerns which led the Law Lords to oppose the amalgamation of the devolution jurisprudence of the Privy Council with the existing appellate jurisdiction of the House of Lords do not, then, seem to be shared by the devolved administration in Scotland.

One thing is clear: the status quo cannot be maintained on this matter. The conflict between the House of Lords and the Privy Council exposed by the decision in Attorney General’s Reference No 2 of 2001 has made further reform of our highest courts structure inevitable. One can only hope that this will proceed in a manner which is not inconsistent with the historic constitutions of the Union, and of its constituent nations 94 and with the overall requirements of human rights. For aside from the suggestion of the constitutional “tail wagging the dog syndrome” –

94 See for example the response of the Faculty of Advocates to the proposals on a new Supreme Court (available at <http://www.advocates.org.uk/blueprints.htm>); “For the purposes of Scotland, however, it is necessary to emphasise that a Supreme Court which is created must be consistent with the Claim of Right of 1689 and the Act of Union of 1707. These instruments are fundamental parts of the constitution of the United Kingdom of Great Britain and Northern Ireland, and in the view of the Faculty any proposal for a Supreme Court which contravened any provision of these instruments would be unlawful. In particular, article XIX of the Act of Union states inter alia that “… no Causes in Scotland be cognisable by the Courts of Chancery Queens-Bench Common-Pleas or any other Court in Westminster-hall;
which may be how some English lawyers would see a Scottish-dominated Privy Council having precedence over an English-dominated House of Lords – there are at least stateable legal arguments questioning the very Convention-compatibility of the Judicial Committee as it is currently constituted by judges who also happen to be Privy Councillors. If the decision of the High Court of Justiciary in Starrs v Ruxton is correct then questions must arise as to whether the Judicial Committee of the Privy Council, whose members qua Privy Councillors are appointed solely at the pleasure of the Crown without formal grant or letters patents and who may be removed or dismissed from the Privy Council at the pleasure of the monarch (albeit on advice from the Prime Minister) simply by striking their names from the Privy Council book, itself satisfies the Article 6(1) requirements as understood by the European Court of Human Rights of the appearance of an independent and impartial tribunal established by law.\(^{95}\) This would mean, at the very least, that by virtue of the operation of the Scotland Act section 57(2) the appeals by the Lord Advocate to the Judicial Committee could not competently have been heard by that court.

It might of course be said, following the spirit of the decision of the Privy Council in Clark v Kelly\(^^{96}\) upholding the Convention-compatibility of the District Courts, that this is just another example of lawyers’ ingenuity going too far and the reality of the situation is that we can trust our judges who are Privy Councillors to be independent and impartial. But just such appeals to reality and past experience were rejected in the successful challenge to the Convention-compatibility of temporary sheriffs in both Starrs v Ruxton and Miller v Dickson, where it was held

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And that the said Courts or any other of the like nature after the Union shall have no power to Cognose Review or Alter the Acts or Sentences of the Judicateurs within Scotland or stop the Execution of the same…” The effect of this provision is that any Court exercising jurisdiction in Scotland, and in particular a Court with the power to review or alter the interlocutors of the Courts in Scotland, cannot be a part of the Courts of England and Wales. This means that in order to comply with the Act of Union, a Supreme Court would require to be set up as a Court independent of the Courts of England and Wales. In terms of how it was constituted, where it would sit, and how it was provided with administrative and support services, the Court could have no association with the Courts of England and Wales. Reference is made on this matter to the comments for the Faculty in relation to Administration, funding and support which are provided after the answer to question 23 below.

The Faculty respectfully submits that the constitutional significance of this cannot be overstated. Any attempt to create a Supreme Court which did not comply with these requirements would be contrary to the constitution of the United Kingdom, and any purported act in or affecting Scotland by such a Court would be unlawful and of no effect in Scotland. All of what is said below should be taken as subject to the over-riding constitutional considerations which must apply to such a Court.”


\(^{96}\) Clark v Kelly, note 62(c) above.
that the lack of sufficient formal procedural safeguards guaranteeing structural independence and impartiality was such as to vitiate the decisions of the temporary sheriffs.97

D. CONCLUSION

What all these arguments point inexorably to is the need for a re-configuration of the current arrangements for our highest courts or court post-devolution.98 The government appears now to have accepted that the logic of the on-going constitutional change will require the setting up a properly established Supreme Court for the United Kingdom, with a more transparent appointments procedure and properly tenured and explicitly independent judges.99

Given their pivotal role under the new post-human rights constitutions of the United Kingdom, argument has now begun as to whether potential Supreme Court judges may be selected, perhaps, from a broader pool than simply senior practitioners at the Bar.100 Suggestions have been made, too, in the light of the significant powers with which the judges of the court are invested and their role, under the ECHR of defining and protecting democracy, that any such appointment should be after a degree of democratic scrutiny provided by parliamentary

97 In Clark v Kelly, note 62(x) above, per Lord Hoffmann at 314G-H para 34: “[I]n Starrs and another v Buxton (Procurator Fiscal, Linlithgow), 2000 JC 208 at 241; 2000 SLT 42 at 64 Lord Reed said that if, as was held by the High Court (and as to which I make no comment) a temporary sheriff is not an independent tribunal, it does not help that an appeal lies to the High Court of Justiciary which is undoubtedly independent” (emphasis added).


99 Provision is made for this in the Constitutional Reform Bill introduced before the House of Lords (acting as a Chamber of the Legislation) in March 2004.

100 For arguments in favour of the broader pool approach see Sir Thomas Legg, “Judges for the new century” [2001] PL 62; Dame Brenda Hale, “Equality and the judiciary: Why should we want more women judges?” [2001] PL 494. See too, the comments of Lord Hoffmann in R (Pro-Life Alliance) v BBC [2003] 2 WLR 1403 at 1423 para 80: “Public opinion in these matters [the availability of legal abortion] is often diverse, sometimes unexpected and in constant flux. Generally accepted standards on these questions are not a matter of intuition on the part of elderly male judges. The researches into public opinion by the BSC and the broadcasters would be superfluous if this were the case. And I attach some importance to the fact that Mrs Sloman, who was the principal decision-maker for the BBC, and Mrs Richards, the Controller of BBC Wales, are women. In deciding which members of the public would be likely to find the images offensive, I would imagine that one constituency the broadcasters would have had in mind was the 200,000 women who, for one reason or another, according to the Alliance evidence, have abortions every year.” (Emphasis added.)
hearings, perhaps along the lines of the US Senate's role in appointments to the Supreme Court of the United States.\textsuperscript{101}

The djinn of constitutional reform, then, is out of the bottle and has acquired its own dynamic. It is clear that we have not completed the task of writing the constitution in Scotland, or in the United Kingdom as a whole.

\[\text{101 See, for example, B Cornes, "The UK Supreme Court" (2003) 153 New Law Journal 1018 at 1019; Sir Sydney Kentridge, "The highest court: selecting the judges" (2003) 69 CLJ 55 puts the argument against any such Parliamentary involvement.}\]
"STANDS SCOTLAND WHERE IT DID?": DEVOLUTION, HUMAN RIGHTS AND THE SCOTTISH CONSTITUTION SEVEN YEARS ON

Aidan O’Neill QC

"Macduff: Stands Scotland where it did?
Ross: Alas, poor country! Almost afraid to know itself."

Macbeth Act IV Scene iii

Introduction

The Caledonian antisyzygy

Scotland is, according to an on-going publicity campaign promoted by the Scottish Ministers “the best (small) country in the world”. According to the World Health Organisation, however, Scotland has the second highest homicide rate in Western Europe (only Finland’s is higher). 1 The Scottish Executive’s own statistics record an average and consistent homicide rate over the past twenty years or so of 22 violent deaths per million of population, 2 and press reports point out that an individual is two to three times more likely to be murdered in Scotland than in England and Wales. 3 A study from the University of California is expected to claim that Scotland’s homicide rate is higher than that in the United States, in Israel, in Uzbekistan, in Chile and in Uruguay. Another recent United Nations Report has described Scotland as the most violent country in the developed world on the basis of the report’s estimate of some 2,000 people each week being the subject of violent attack. 4 And research from the London School of Hygiene and Tropical Medicine indicates that Scotland now has one of the highest mortality rates in Western Europe for cirrhosis of the liver attributable to alcohol abuse. 5 Meanwhile the Scottish Ministers make plans to give Scotland a prison capacity of 8,000 which, if filled, would give Scotland the highest prison population rate in Western Europe. This mismatch between aspiration and experience—“it is the best of countries; it is the worst of countries”—exemplifies the Caledonian antisyzygy.

Antisyzygy means the yoking together of contradictory impulses or drives existing simultaneously, be it: love and hate; arrogance and abjection; radicalism and reaction; realism and fantasy. This idea of an internal (and eternal) conflict within the one entity has long been said to capture

1 See www.who.int/whosis.
3 See, for example, The Guardian 26 September 2005 “Scotland has the second highest murder rate in Europe” archived at http://www.guardian.co.uk/crime/article/0,2763,1578388,00.html.
4 See http://www.timesonline.co.uk/article/02-1786945,00.html.
5 See, for example, The Independent 6 January 2006 “Binge drinking blamed for increase in liver cirrhosis across Britain” archived at http://news.independent.co.uk/uk/health_medical/article336782.ece.
something of the peculiarly Scottish character and situation and is, perhaps, archetypically to be seen in the novel The Strange Case of Dr. Jekyll and Mr. Hyde, a work of the Edinburgh lawyer, Robert Louis Stevenson. But it is, I suggest, a useful (if somewhat literary) trope with which to begin to appreciate the impact and development of a human rights culture in Scotland and Scotland’s relationship within the United Kingdom in recent years.

In so far as one can capture these things, it might be said that what has been most characteristic of Scotland’s constitutional and legal history to date is that of being in a state of constant unresolved and irresoluble tension, of attachment and separateness, of rejection and belonging. The dynamic is one of seeking to accommodate the political and geographical reality of union with England — a country with ten times as many people — while striving to maintain a sense of Scotland as still being a distinct nation within a unitary State. Scotland, it must always be borne in mind, is a small country of some 5 million people — and dropping. There remains, then, a tension in the Scottish legal system between the assertion and preservation of its independent history within the civilian European Roman law tradition, and the sometimes resented pull toward the English common law. This tension makes for the odd mixture of judicial attitudes of conservatism and radicalism, of parochialism and crabbed insularity counterbalanced, at times, by a generous internationalism in approach.

The Devolutionary Settlement in Scotland

The gradual dismantling of the British Empire in the course of the 20th century and the pooling of the sovereignty of the United Kingdom with other member States of the European Union led to increasing political pressure within Scotland for an effective re-negotiation of the terms of the 1707 Parliamentary Union with England. The end result of that re-negotiation was the Scotland Act 1998 which established a new Scottish Parliament and an executive drawn from its ranks — the Scottish Ministers — who would, in effect, govern Scotland’s internal affairs. The Scottish Ministers were also bound (under Section 58 SA) to respect and, if necessary, implement, all and any other international obligations of the United Kingdom. But legislative and administrative power under this scheme was (provisionally) devolved and never (permanently) ceded to the new Parliament and Executive.

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7 See, too, para.7 of Sch.5 to the Scotland Act which provides as follows:

International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations, regulation of international trade and international development assistance and co-operation are reserved matters.

Sub-paragraph (1) does not reserve - observing and implementing international obligations, obligations under the Human Rights Convention and obligations under European Community law, assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.
The 1998 devolutionary settlement may be seen as an attempt to resolve historic Anglo-Celtic tensions within the United Kingdom, by giving formal recognition to the separateness of Scotland (as well as to the distinctiveness of Wales and Northern Ireland). But no provision is made for the constitutional recognition of England as a distinct entity within the Union. England is left to be governed by the institutions of the United Kingdom. This results in a new tension — the “West Lothian question” — because while the English are deprived of a say in the internal affairs of Scotland, Scots MPs (i) continue to vote in Westminster on purely English matters and (ii) to act as Secretaries of State over Whitehall departments dealing with purely English affairs. In theory of course, the UK Parliament’s sovereignty remained untouched in the new constitutional framework. Westminster retains the right to legislate in all matters affecting Scotland, not simply in those areas it specifically reserved to itself in Schedule 5 to the Scotland Act. As has been observed, and as repeated re-imposition of direct rule in Northern Ireland even after the enactment of the Northern Ireland Act 1998 shows, power devolved is power retained.

The devolution statutes have created non-sovereign democratic institutions. These institution have strict legal limits on the extent of their powers, and provision is made for those limits to be enforced by the courts. This itself is the cause of new tension within the devolved polity. The Scottish Parliament may look and act like a Parliament, but in law it has no more status than any other statutory body exercising powers within its limited jurisdiction. This point was forcefully made by Lord Rodger of Earlsferry, when Lord President of the Court of Session, when he stated

“[T]he [Scottish] Parliament [i]s a body which — however important its role — has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law . . . .

While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a Parliament which is sovereign: on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a ‘self-denying ordinance’ which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law.”

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8 Whaley and others v Lord Watson of Invergowrie and The Scottish Parliament 2000 SC 125, OH; 2000 SC 340, IH per Lord Rodger at 348H, 350B-C.
“Stands Scotland Where it Did?” Devolution, Human Rights . . . 105

And while Section 38(1) of the Crown Proceedings Act 1947 now defines “officer” in relation to the Crown as including “a Minister of the Crown or a member of the Scottish Executive”, the courts have rejected the Scottish Ministers’ claims to be entitled to the respect and immunities traditionally afforded “the Crown”. As the First Division has noted:

“[I]t is clear that the powers of the respondents [the Scottish Ministers], who were created by the statute, are circumscribed both by the limits of devolved competence and by reference to compatibility with Convention rights and community law. The validity of the acts of the respondents may be determined by a court of law as a devolution issue. In this respect the respondents may be compared with the Scottish Parliament, which is not sovereign but is subject to the laws and hence to the courts (Whaley v Watson 2000 S.C. 340, Lord President Rodger at page 350). In the present case we are concerned with the exercise by the respondents of their statutory functions under the Prisons (Scotland) Act 1989. While the exercise of such statutory functions on behalf of Her Majesty is devolved to the Scottish Ministers, it is erroneous, in our view, to regard proceedings against them in respect of any of those functions as proceedings against the Crown itself.”

Models for fundamental rights protection under the constitution

In Matadeen v Pointu Lord Hoffmann drew a contrast between the traditional UK constitutional approach, under which Parliament was regarded as sovereign in all matters, and countries in which fundamental rights were entrenched within a written constitution, noting:

“A self-confident democracy may feel that it can give the last word, even in respect of the most fundamental rights, to the popularly elected organs of its constitution. The United Kingdom has traditionally done so; perhaps not always to universal satisfaction, but certainly without forfeiting its title to be a democracy. A generous power of judicial review of legislative action is not therefore of the essence of a democracy. Different societies may reach different solutions.

The United Kingdom theory of the sovereignty of Parliament is however an extreme case. The difficulty about it, as experience in many countries has shown, is that certain fundamental rights need to be protected against being overridden by the majority. No one has yet thought of a better form of protection than by entrenching them in a written constitution enforced by independent judges. Even the United Kingdom is to adopt a modified form of judicial review of statutes by its incorporation of the European Convention.”

The problem which the devolutionary settlement in Scotland has introduced – compounding the Caledonian antisyzygy – is that within the one unitary

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State of the United Kingdom we now have two wholly divergent constitutional models in relation to the protection of fundamental rights. One model under the Human Rights Act 1998 - which received Royal Assent on 9 November 1998 - is based on the idea of delicate constitutional dialogue and a dance of deference between judiciary and legislature but one where ultimately Parliament has the last word. The other model, under the Scotland Act - which received Royal Assent on 19 November 1998 - is one in which the courts are supreme and are required to strike down all and any "unconstitutional" acts of the devolved legislature and administration. The fact that these two UK statutes are working on the basis of quite distinct democratic models becomes clearer from an examination of the structures of the two acts and how they have been applied in practice.

The Human Rights Act and constitutional dialogue

The scheme of the Human Rights Act is one which may be said to be based along the lines of the model proposed by Sir Stephen (now Lord Justice) Sedley in which he speaks of:

"a new and still emerging constitutional paradigm, no longer Dicey's supreme Parliament . . . but a bi-polar sovereignty of the Crown in Parliament and the Crown in the courts, to each of which the Crown Ministers are answerable - politically to Parliament and legally to the courts."\(^1\)

Section 3(1) HRA obliges public authorities, so far as it is possible to do so, to read legislation in a way which is compatible with Convention rights and to give effect to that legislation in a way which is compatible with those rights.\(^2\) Where it is not possible to read or apply an Act of the Westminster Parliament in a manner which is compatible with Convention rights, Section 3(2)(b) HRA provides that the legislative provisions in question remain fully valid, operative and enforceable: in contrast to the situation where there is an incompatibility with Community law, national courts are not empowered even after incorporation of the Convention to "dis-apply" or suspend primary statutory provisions which contravene human rights.

Section 4 HRA sets up a mechanism for dialogue between the courts and the legislature in the event of an unavoidable conflict between the Convention rights and an Act of Parliament by giving the courts the power to make a declaration as to the incompatibility of this provision with the requirements of the European Convention. This conversation may at times be a spirited one.\(^3\) But any such declaration of incompatibility by the courts has, by


\(^3\) See, for example, A v Secretary of State for the Home Department [2005] AC 68, per Lord Bingham of Cornhill at 110-1 para.42:

"I do not . . . accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course
virtue of Section 4(6)(a) HRA, no effect on the validity, continuing operation or enforceability of the offending legislative provision. Further, Section 4(6)(b) HRA provides that any declaration of incompatibility is not binding on the parties to the proceedings in which it is made. The obtaining of a declaration of incompatibility will therefore be a Pyrrhic victory for the party in whose favour it is granted unless Parliament decides to change the relevant legal provisions with retrospective effect so as to apply in his case. A final declaration of incompatibility — that is one against which no right of appeal exists or is being exercised — gives Ministers of the Crown the power to order under Section 10(1) HRA such amendment to, or repeal of, the primary or secondary legislation in question as they think is appropriate to remove the incompatibility. Any such remedial order will require the approval of Parliament under the affirmative resolution procedure, all as set out in Schedule 2 to the Act. The principle of ultimate Westminster Parliamentary sovereignty is said thereby to be maintained. As Lord Irvine of Lairg has stated:

“This innovative technique will provide the right balance between the judiciary and [the Westminster] Parliament. [The Westminster] Parliament is the democratically elected representative of the people and must remain sovereign. The judiciary will be able to exercise to the full the power to scrutinise legislation rigorously against the fundamental freedoms guaranteed by the Convention but without becoming politicised. The ultimate decision to amend [primary Westminster] legislation to bring it into line with the Convention, however, will rest with [the Westminster] Parliament. The ultimate responsibility for compliance with the Convention must be [the Westminster] Parliament’s alone.”

true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. . . . The Human Rights Act 1998 gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it ‘The courts are charged by Parliament with delineating the boundaries of a rights-based democracy’ (‘Judicial Defence: servility, civility or institutional capacity?’ [2003] PL 592, 597).”

And per Lord Hoffmann at 132 para.97:

“[The power of detention [under s.23 of the Anti-terrorism, Crime and Security Act 2001] is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.”

But Section 21 HRA specifically includes Acts of the Scottish Parliament ("ASPs") within the definition of "subordinate legislation" which means that any ASP which is incompatible with any of the Convention rights is impliedly repealed under the HRA to the extent of its incompatibility. And no provision of primary Westminster legislation can be prayed in aid to prevent such implied repeal of Scottish legislation since the governing Westminster Statute is the Scotland Act 1998.

**Convention rights and the limits on devolved power**

The Scotland Act has been described as "a major constitutional measure which altered the government of the United Kingdom". It contains quite different constitutional checks and balances from those which form the basis of the Human Rights Act. The system under the Scotland Act is predicated on a wholly different constitutional model; one in which judges – rather than the legislature – have the last word.

Section 29(1) SA states that "an Act of the Scottish Parliament [ASP] is not law so far as any provision of the Act is outside the legislative competence of the [Scottish] Parliament". Not only is it put beyond the legislative competence of the Edinburgh Parliament or Executive to pass laws in areas reserved to the Westminster Parliament, but the Scotland Act also provides (in Section 29(2)(d) SA) that the Scottish Parliament has no power to pass any Act which contains a provision which is incompatible with any of the Convention rights specified in Schedule 1 to the Human Rights Acts 1998.

Statutory functions and functions derived from the royal prerogative may be conferred upon and exercised by the Scottish Ministers insofar as the exercise of these functions are compatible with the limits imposed on the legislative competence of the Scottish Parliament: see Section 53 SA. It follows from this that it falls outside the Scottish Ministers' devolved competence to confirm, approve or make any provision by subordinate legislation which would be incompatible with Convention rights: see Section 54 SA. Although Section 63 SA on its face allows for the transfer (by Order in Council) to the Scottish Ministers of further powers or functions which may exceed the legislative competence of the Scottish Parliament, this transfer cannot be used as a means to allow the Scottish Ministers to act incompatibly with Convention rights. This is confirmed by the provisions of Section 57(2) SA which states that "a member of the Scottish Executive has no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights."

The protection of Convention rights under the constitutional settlement set out in the Scotland Act is, then, embedded within the concept of limits on the

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15 *R v HM Advocate 2003 SC (PC) 21* per Lord Rodger of Earlsferry at 60 para.16.

16 See *Somer ville and others v Scottish Ministers* [2005] CSOH 23 per Lady Smith at para.51: "[T]here is a clear constitutional framework within the Scotland Act to deal with the situation where a member of the public claims that a Scottish Minister has failed in his constitutional obligation to act in accordance with the Convention and it contains a self contained system of checks and balances which do not apply to claims under the Human Rights Act. It is impossible to resist the conclusion that Parliament intended the two types of claim to be treated differently."
"Stands Scotland Where it Did?" Devolution, Human Rights . . . 109

powers or competence of the devolved authorities. Thus, the Convention compatible interpretative obligation for UK legislation in Section 3 HRA is paralleled by an interpretative obligation for Scottish legislation in Section 101 SA, relative to competence: Section 101(2) SA enjoins the courts when faced with devolved Scottish primary and subordinate legislation which could be read in such a way as to be outside competence to read the provision "as narrowly as possible as is required for it to be within competence, if such a reading is possible" and to give effect to it accordingly.

And the "implicit dialogue" provisions between court and legislature set out in Section 4 HRA in relation to Westminster legislation has its parallel in Section 102 SA as regards Scottish legislation: Section 102(2)(a) SA permits the court to remove or limit the retrospective effect of any finding that legislation - whether passed by the Scottish Parliament or the Scottish Ministers - is beyond their legislative competence and hence ultra vires; and Section 102(2)(b) SA allows the court to suspend the effect of its decision on lack of legislative vires for such period and on such conditions as might allow the defect identified by it to be corrected by the legislature.

Significantly there is no such power or discretion vested in the courts in relation to administrative (non-legislative) acts of the Scottish devolved institutions, just as there is no discretion given to the courts under Section 6 HRA to permit public authorities to act in a manner which is Convention incompatible - Section 6(2) HRA requires any such authorization to be found in the provisions of primary Westminster legislation. By contrast, the Scotland Act provisions have unequivocally placed the ultimate responsibility for ensuring compliance with the Convention in Scotland with the judges, rather than with the democratically elected Scottish Parliament or the publicly accountable Scottish Ministers.

In its decision in R v HM Advocate the Privy Council - acting under its devolution jurisdiction - made it clear that the Scotland Act has to be read as a constitutional document which provides, within its four corners, a complete system of rights, obligations and remedies as regards the devolved governance of Scotland. Thus, the Judicial Committee held that Section 100(1) SA rather than Section 7 HRA is the proper statutory basis for any claim against the Scottish devolved authorities in respect of a claimed breach of Convention rights; and Section 100(3) SA rather than Section 8 HRA is the basis for claims seeking "just satisfaction" damages for breach by the Scottish authorities of Convention rights.17 If the coherence of the Scottish devolved constitutional settlement as set out in the Scotland Act is to be preserved, the provisions of the Scotland Act regarding the protection of Convention rights must take precedence over the parallel provisions of the Human Rights Act when considering questions of the Convention compatibility of Scottish legislation and Scottish Ministerial action.18 Any

17 R v HM Advocate 2003 SC (PC) 21 per Lord Hope of Craighead at 39-40, 42 paras.29, 38; per Lord Rodger of Earlsferry at 61-62 paras.17-19.

18 One may note in this regard Lord Hardie when, as Lord Advocate, promoting the Scotland Bill through the House of Lords (HL Hansard 2 November 1998, Column 79): "[H] is intended to bring the Scotland Bill more into line with the Human Rights Bill in certain limited respects. It is not intended that the Scotland
resulting difference between the position in Scotland and that which may exist in England under the Human Rights Act 1998 may be said to be a difference which has been prescribed by the UK Parliament in the express enactment of these provisions of the Scotland Act relating to Convention rights protection in the context of limits on competency of the devolved authorities.

No discretion as to remedy under the Scotland Act

Thus whereas under Section 8(1) HRA the courts are given a discretion as to what remedy, if any, to afford an individual whose Convention rights have been violated by a public authority, there is no such discretion where the courts have found that the Scottish Ministers have acted in a manner which is incompatible with Convention rights. This is because the courts have held that the effect of Section 57(2) SA is to deprive the Scottish Ministers of all power to act incompatibly with Convention rights and therefore any purported act in contravention of a Convention right is ultra vires. Accordingly under the scheme of the Scotland Act, it is simply not open to either the Scottish Parliament or the Scottish Ministers to decide to maintain Convention incompatible legislation in force, and they have no right to amend the legislation in such manner as they think fit. Instead any Convention incompatible legislation is to be struck down by the courts, whatever the wishes of the legislature or administration. The Westminster legislature has given the courts no choice as to what the consequences of any particular violation by the Scottish devolved administration or parliament of an individual’s Convention rights by them should be. Such Convention incompatible action is void and, in principle, of no effect, not only in relation to the particular individual establishing violation of his or her rights, but contra mundum.

As has been observed, within the context of the devolved Scottish constitution the judiciary have therefore been handed rather different...
"Stands Scotland Where it Did?" Devolution, Human Rights . . . 111

costitutional tools from those provided to the judges under the Human Rights Act. The Scotland Act’s insistence on vires control of the Convention incompatible acts of the devolved authorities might be criticized insofar as it prevents the judges from “fashion[ing], more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.”21 But, as Lord Rodger of Earlsferry has noted:

“In enacting a constitutional settlement of immense social and political significance for the whole of the United Kingdom, Parliament has itself balanced the competing interests of the Government of the United Kingdom, of the Scottish Executive, of society and of the individuals affected. Having done so, Parliament has decided that members of the Scottish Executive should have no power to do acts that are incompatible with any of the Convention rights . . . . If this is to use an axe rather than a scalpel, then Parliament has selected the tool. Your Lordships’ Board cannot re-open the exercise that Parliament undertook and re-balance the competing interests for itself. Rather, it must loyally give effect to the decision of Parliament on this sensitive matter, even if – or perhaps especially if – there are attractions in a different solution . . . .”22

Scotland Act as lex specialis

As we have noted, the Convention rights’ limits on the powers of the Scottish Parliament and Scottish Ministers exist independently from the provisions of the Human Rights Act.23 Indeed, any person seeking to rely on his Convention rights against the Scottish Ministers or Scottish Parliament is not entitled to pick and choose between the remedies and procedures provided specifically in relation to the Scottish devolved authorities under Scotland Act and those applicable to public authorities in general under the Human Rights Act. Any Convention rights based challenges to the acts of the Scottish devolved administration or legislature have to be raised as

21 This is the description of the judge’s role under the Canadian Charter of Rights and Freedoms by L’Heureux-Dubé J in R v O’Connor [1995] 4 SCR 411 at p.461 para.69 which is quoted with approval by Lord Steyn in H.M. Advocate v R 2003 SC (PC) 21 at 30 para.18 who then continues: “The moral authority of human rights in the eyes of the public must not be undermined by allowing them to run riot in our justice systems. In working out solutions under the Scotland Act 1998 and the Human Rights Act 1998 courts in Scotland and England should at all times seek to adopt proportionate remedies. In my view there is nothing in the open-textured language of s.57(2) SA, read in context, which rules out the application of such an approach in this case.”

22 H.M. Advocate v R 2003 SC (PC) 21 per Lord Rodger of Earlsferry at 73 para.50.

23 See Clancy v Caird, 2000 SC 441, IH per Lord Penrose at 473, para.9 of his judgment: “Section 57(2) SA is concerned with a further specific limitation on the powers of the [Scottish] Executive expressed by reference to the Convention and Community law. It is not a temporary or transitional provision. It will continue to apply after the Human Rights Act comes fully into force.”
“devolution issues” and brought under and in terms of the Scotland Act.\(^2\)

This has the following important procedural consequences among others:

(i) the Convention rights challenge to devolved action has to be intimated to the relevant law officer or officers for the jurisdiction of the UK in which the proceedings in question take place.\(^2\)

(ii) the courts are enjoined to consider whether and to what extent any decision on Convention incompatibility of devolved legislation (but not administrative action) should be made retrospective;\(^2\)

(iii) the court may also suspend its judgment to allow the identified Convention incompatibility in devolved legislation to be corrected;\(^2\)

(iv) procedure is made for lower courts to make Article 234 EC style “preliminary references” on such Convention rights challenges to the superior courts;\(^2\) and

(v) the final decision on these questions lies with the Judicial Committee of the Privy Council exercising its devolution jurisdiction whether on preliminary reference from a superior court (including the House of Lords),\(^19\) on appeal from a superior court (including from the High Court of Justiciary in Edinburgh)\(^19\) or on a direct reference to the Privy Council made by order of a law officer in proceedings in which he or she is a party.\(^31\)

No time limits for Convention rights challenges under the Scotland Act

Section 7(5)(a) HRA imposes a long-stop one year time limit from the date of the act or omission complained of within which court proceedings under that Act alleging breach of Convention rights must be brought. This is, however, subject to any rule imposing a stricter time in relation to the procedure in question, which means that a claim under section 7(1)(a) HRA pursued by way of judicial review in England and Wales will be subject to the three month time limit normally applicable to judicial review applications in that jurisdiction.\(^32\) By contrast the question of the time within which an action raising a Convention rights challenge as a devolution issue is left unspecified in the Scotland Act. But there are no time limits applicable to judicial review procedure in Scotland – this matter being left to the discretion

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24 H.M. Advocate v R 2003 SC (PC) 21 per Lord Hope at 39D-40A, and per Lord Rodger of Earlsferry at 59D-5, 73C.
26 Scotland Act 1998 s.102(2)(a).
27 Scotland Act 1998 s.102(2)(b).
28 See paras 7-9, 18-21 and 28-29 of Sch.6 to the Scotland Act 1998.
29 See paras 10-11, 22, 30, and 32 of Sch.6 to the Scotland Act 1998.
30 See paras 12-13, 23, and 31 of Sch.6 to the Scotland Act 1998.
32 Lester & Pannick, Human Rights Law and Practice, para.2.7.5, n.4. The rule is CPR 54.5(1).
of the court under the existing common law principles of *mora*\(^3\) - and there is no Scottish authority in which a petition for judicial review has been refused on the ground of delay alone, in the absence of evidence of acquiescence by the pursuer or prejudicial reliance on this delay on the part of the defender.\(^4\) This therefore leaves the acts of the Scottish administration and legislature potentially open to challenge for an indefinite period.\(^5\)

**Vires and the Scottish Administration**

As we have noted, the effect of Sections 53 SA and 54 SA (as read in the light of Section 29(2)(d) SA) and of Section 57(2) SA is that "members of the Scottish Executive" (defined, in Section 44(1) SA, as the First Minister, the Law Officers and those other Scottish Ministers who are within the Cabinet) have no power to act in a manner incompatible with any of the Convention rights or with Community law. Consistently with this, paragraphs 1(c), 1(d) and 1(e) of Schedule 6 to the Scotland defines a "devolution issue" as including:

"(c) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, within devolved competence,

(d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law,

\(^3\) See, e.g. *King v East Ayrshire Council*, 1998 SC 182, IH per Lord President (Rodger) at 196: "It is recognised that the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision for any longer than is necessary in fairness to the person affected by it." See, too, *Swan v Secretary of State for Scotland*, 1998 SC 479, 111.

\(^4\) See, for example: *Singh v Secretary of State for Scotland* 2000 SLT 533, OH per Lord Nimmo Smith at 536 para.(8) and *Uprichard v Fife Council* 2000 SCLR 949 per Lord Bonomy at para.(16). In *R (Burkett) v Hammersmith LBC* [2002] 1 WLR 1593, Lord Hope of Craighead summarised the Scottish position thus at paras.63-64: "The principal protection against undue delay in applying for judicial review in Scotland is not to be found ... in any statutory provision but in the common law concepts of delay, acquiescence and personal bar: see Clyde & Edwards, *Judicial Review*, para.13.20. The important point to note for present purposes is that there is no Scottish authority which supports the proposition that mere delay ... will do. It has never been held that mere delay is sufficient to bar proceedings for judicial review in the absence of circumstances pointing to acquiescence or prejudice ... none of the cases in Scotland provide support for a plea of unreasonable delay, separate and distinct from a plea of *mora*, taciturnity and acquiescence, in answer to an application for judicial review."

\(^5\) See Lord Hope of Craighead House of Lords Hansard 17 Jun 1998; Column 1638: "One has only to look at the devolution issues listed in paragraph 1 of Schedule 6 to see the scope which will exist for challenges to be made. No time limit is set for the making of those challenges. As has been pointed out by several noble Lords, there is to be no revising chamber. So in theory at least - I stress the word theory - subject to the exercise of the powers given to the court in Section 93 to vary retrospective decisions, legislation by the Scottish parliament could be set aside as not being within that parliament’s competence long after it had been put into effect."
(e) a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law.

The question which then arises is whether or not the Scotland Act’s definition of “devolution issue” (and consequently the Sections 53-54 SA and 57(2) SA vires limitation on Convention incompatible action) applies equally to Junior Scottish Ministers appointed by the First Ministers under Section 49 SA but who are not in the Scottish Cabinet, or to the Scottish Ministers’ civil servants appointed under Section 51 SA, or to those defined under Section 126(7) SA as the holders of non-ministerial offices within the “Scottish Administration” (such as the Registrar of Births, Deaths and Marriages for Scotland\(^{36}\) and Procurators Fiscal\(^{37}\) who prosecute crimes under the direction of the Lord Advocate).

The answer to this question must be “yes” since any other conclusion would result in the constitutional anomaly that the powers of those employed or holding junior or non ministerial office within the Scottish administration would, in principle, exceed those of the Scottish Ministers who appointed them and to whom they are answerable. For example, if the actions of Scottish officials and junior ministers were not subject to the vires limitations imposed by Section 57(2) SA, then any Convention incompatible action by them would only be prima\(^{8}\) facie unlawful under Section 6(1) HRA (subject to the Section 6(2) HRA defence), and the courts would have a discretion under Section 8 HRA whether or not to grant a remedy for breach of Convention rights by the Scottish civil servant or junior minister, but would have no such discretion as regards the act of Scottish Ministers holding Cabinet rank. In any event, the general constitutional principle applicable to civil servants is the “Carltona\(^{38}\) doctrine”, which is that acts done by officials in the exercise of Ministerial functions are to be treated as the Minister’s own acts regardless of whether these acts are done personally by the Minister himself or by a junior minister or by departmental officials. The Carltona doctrine does not involve any question of agency or delegation but rather the idea of the official as alter ego of the Minister; the official’s decision is constitutionally seen to be the Minister’s decision.\(^{39}\)

Further, if the acts of non-ministerial office holders and members of staff of the Scottish Administration are to be regarded as distinct from the acts of the

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36 S.126(8)(a) SA.
37 See Reg.2 of the Scottish Administration (Offices) Order 1999 (SI 1999 No. 1127) which provides: “As from the [20 May 1999] date when section 44(1)(c) of the [Scotland] Act comes into force, the following offices are specified for the purposes of section 126(8)(b) of the Act (offices in the Scottish Administration which are not ministerial offices), namely the offices of procurator fiscal and procurator fiscal depute to which appointments may be made under sections (2) and 2 respectively of the Sheriff Courts and Legal Officers (Scotland) Act 1927.”
38 See Carltona Ltd v Commissioners of Works [1943] 2 All ER 560.
Scottish Ministers for the purposes of Section 57(2) SA and paragraph 1(d) of Schedule 6 SA, then the Judicial Committee of the Privy Council has wholly misunderstood the nature and extent of its devolution jurisdiction. Every case – bar one – which has come before the Privy Council to 2006 under the devolution statutes has concerned the actions of procurators fiscal and advocates deputies acting as public prosecutors in criminal trials in Scotland, rather than any personal acts of the Scottish Ministers. In the exercise of its devolution jurisdiction, the Privy Council has become less a

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general UK constitutional court and more a third tier court of criminal appeal from Scotland. All of the eighteen cases before the Privy Council’s devolution jurisdiction to the beginning of 2006 have come from Scotland, and only one of these cases has been a civil appeal; and even that one concerned a challenge to the validity of continued detention – under and in terms of the first Act of the Scottish Parliament the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 – of persons detained in the State Hospital for reasons of public safety.

Section 6(2) HRA and the Scottish administration

More radically yet, whereas under Section 6(2) HRA a public authority might claim that its Convention incompatible acts were not unlawful because they were constrained so to act by one or more provisions of Westminster primary legislation, or were simply giving effect to or enforcing provisions of some Convention incompatible Westminster derived legislation, no such defence has been given to the Scottish Ministers. This means that no provision is made for the possibility of any “lawful” breach of Convention rights by the Scottish devolved authorities. Curiously, however, the Section 6(2) HRA defence is given to the devolved administrations and assemblies in both Wales and Northern Ireland. But because the Scottish Ministers and Parliament have no Section 6(2) HRA defence open to them, a declaration by a court made under Section 4 HRA to the effect that a provision of Westminster legislation is incompatible with the requirements of the Convention will have the effect of rendering ultra vires any act or omission of the Scottish Ministers or Parliament which relies upon the Westminster provision in question.

It is noteworthy that Section 57(2) SA refers to limitations on the powers of the Scottish Ministers under reference to both European Community law and Convention rights. One matter that remains to be resolved is what are the Scottish Ministers to do where Community law and Convention right

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41 In addition to the twelve substantive criminal appeals, there have been three preliminary hearings before a three judge panel considering applications for special leave to appeal to the Judicial Committee cases after such leave had been refused by the High Court in Scotland: Hoekstra and others v Her Majesty’s Advocate (No. 5) 2001 SC (PC) 37 – decision of the screening committee comprising Lord Slynn, Lord Hope and Lord Clyde, 26 October 2000; Fellen v H.M. Advocate, 2001 SC (PC) 105 – decision of the screening committee comprising Lord Bingham, Lord Hope and Lord Clyde, 8 March 2001; and Meir v H.M. Advocate, 2005 SC (PC) 1 – decision of the screening committee comprising Lord Bingham, Lord Hope and Rodger, 17 November 2004.


43 In R v Kansal (No. 2) [2002] 2 AC 69, HL Lord Hope observed (at para.68) that, in his view, the s.6(2)(b) HRA exception was not limited to non-discretionary acts and instead could be prayed in aid by a public authority which could point to a provision of, or made under, a primary Westminster statute which authorised the action in question.


45 See ss.71(3)(a) and 71(4)(a) of the Northern Ireland Act 1998.
conflict. But the decision not to afford the Scottish Ministers the possibility of a Section 6(2) HRA defence to any challenges made to the Convention compatibility of their actions is one with radical constitutional implications that have perhaps not yet been fully realised. For the decision means that—in relation to the assessment of the lawfulness of acts of the Scottish Ministers—Westminster statutes are placed in a position which is normatively subordinate to the requirements of the Convention. Because the Scottish Ministers have no Section 6(2) HRA defence, Convention rights have the same effect against the Scottish Ministers as do directly effective provisions of Community law—both render their acts ultra vires. Thus any Convention incompatible provision of a Westminster statute effectively falls to be “disapplied” as regards the Scottish Ministers, just as any Community law incompatible provision of a Westminster statute is to be disapplied as regards acts of emanations of the UK State.

And it would appear that this failure to allow for any Convention incompatible activity on the part of the Scottish Parliament and Ministers was not a matter of simple oversight. When the Scotland Bill was before the House of Lords a provision was specifically amended in (and now forms Section 57(3) SA) to ensure that the Lord Advocate, when acting in his capacity as head of the system of criminal prosecution and investigation of deaths in Scotland, might be able to claim a Section 6(2) HRA defence. In

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47 See R v Secretary of State for Transport, ex parte Factortame (No. 2) [1991] 1 AC 603.

48 See House of Lords Hansard 28 October 1998 at Columns 2041-2042 per the then Lord Advocate, Lord Hardie: “Amendment No. 145F ensures that the Lord Advocate is able to rely on the protection afforded by Clause 6(2) of the Human Rights Bill when he is prosecuting an offence or acting in his capacity as head of the systems of criminal prosecution and investigation of deaths. Clause 6 of the Human Rights Bill provides that it is unlawful for a public authority which would include the Lord Advocate to act in a way that is incompatible with a convention right. Clause 6(2) provides that it is not unlawful if the act of the public authority was because it could not have acted differently as a result of primary legislation or the public authority was acting to give effect to provisions made under primary legislation. This is intended to protect a public authority where a Westminster Act required it to breach a convention right. The amendment ensures that this protection is also afforded to the Lord Advocate where it is alleged that he has breached Clause 53(2) of the Scotland Bill [now Section 57(2) SA] which requires him to act compatibly with the convention rights. This ensures that the Lord Advocate could prosecute an offence contained in a UK Act even if it were in contravention of a convention right. Without the amendment the offence could be prosecuted by the Crown Prosecution Service in England but not by the Lord Advocate. The amendment also allows him to act in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland if he is acting as required by a provision of the UK Act. Without the amendment disapplying Clause 53(2) he could not act in this way... What is being contemplated — I am not sure that I can think of a specific example — is United Kingdom legislation which creates an offence but which itself was contrary to the convention... If an offence were created across the United Kingdom under a UK
the absence of specific Westminster derived authorisation the Lord Advocate would have, like the rest of the Scottish Ministers, no power to “move the court to grant any remedy which would be incompatible with the European Convention on Human Rights”. 49 The fact that no similar amendment was made in respect of the other Scottish Ministers – or for the Lord Advocate when acting other than as head of Scotland’s criminal prosecution service – suggests it was intended that the Convention based limits imposed on the powers of the Scottish devolved government would be subject to no exception. But since all those who hold office by virtue of their effective appointment by the Scottish Ministers within areas of devolved competence are governed by the vires controls of Section 57(2) SA – rather than by the lawfulness controls of Section 6 HRA – this means that a declaration of incompatibility made under Section 4 HRA has the effect of actually setting specific and particular limits on the power of those Scottish officials. A practical example may illustrate the issues that this constitutional arrangement may give rise to. In Bellinger v Bellinger the House of Lords made a Section 4 HRA declaration to the effect that Section 11(c) of the Matrimonial Causes Act 1973, which provided that in England and Wales “A marriage . . . shall be void on the following grounds only, that is to say . . . that the parties are not respectively male and female . . .” was incompatible with the Convention rights articles 8 and 12 because it prevented the law’s recognising the marriage entered into between a man and a transsexual female who on birth in 1946 had been correctly classified and registered at birth as male but had subsequently undergone gender reassignment surgery and treatment. For the purposes of domestic law, however, both parties to the marriage were regarded as being men and hence their marriage was not recognised. As Lord Hope noted:

“When Parliament used the words ‘male’ and ‘female’ in section 11(c) of the 1973 Act it must be taken to have used those words in the sense which they normally have when they are used to describe a person’s sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of child bearing. I think that section 5(4)(c) of the Marriage (Scotland) Act 1977, which provides there is a legal impediment to a marriage in Scots law where the parties “are of the same sex”, has to be read and understood in the same way. I do not see how, on the ordinary methods of interpretation, the words “male” and “female” in section 11(c) of the 1973 Act can be interpreted as including female to male and male to female transsexuals. [...]”

69. Her problem would be solved if it were possible for a transsexual to marry a person of the same sex, which is indeed

statute it would be appropriate that one of the considerations for the Lord Advocate would be whether he or she wished to prosecute in Scotland for that offence. Just as the Crown Prosecution Service in England could prosecute, it would be invidious if the Lord Advocate were precluded from prosecuting for the statutory offence under the United Kingdom Act simply because it contravened the convention right. At this stage, I am unable to think of specific examples.”

49 See Lord Advocate v Scottish Media Newspapers Ltd 2000 SLT 331 per the Lord President (Rodger) at 333B.
what the European Court of Human Rights has now held should be the position in Goodwin. The court noted in para 100 of its judgment that article 9 of the Charter of Fundamental Rights of the European Union had departed ‘no doubt deliberately’ from the wording of article 12 of the Convention in removing the reference to ‘men and women of marriageable age’. Article 9 of the Charter states simply that ‘the right to marry’ shall be guaranteed. The note to article 9 says that it neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. It appears that the European Court saw that article as opening up the possibility of transsexuals marrying persons of the opposite sex to their post-operative acquired gender, as it rendered arguments about whether they were in fact of the opposite sex irrelevant. By this route, which bypasses the physical problems which are inherent in the notion of a complete sex change, legal recognition can be given to the acquired gender of post-operative transsexuals. But it is quite impossible to hold that section 11(c) of the 1973 Act treats the sex of the parties to a marriage ceremony as irrelevant, as it makes express provision to the contrary. In any event, problems of great complexity would be involved if recognition were to be given to same sex marriages. They must be left to Parliament. I do not think that your Lordships can solve the problem judicially by means of the interpretative obligation in section 3(1) of the 1998 Act.

70. So I too would dismiss the appeal. But I too would make a declaration that section 11(c) of the Matrimonial Causes Act 1973 is incompatible with Mrs Bellinger’s right to respect for her private life under article 8 and with her right to marry under article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

As Lord Hope notes, if Section 11(c) of the Matrimonial Causes Act 1973 is incompatible with the requirements of the Convention, so too is Section 5(4)(e) of the Marriage (Scotland) Act 1977 which, on its face, prevents same sex couples from marrying. But marriage is, of course, a devolved matter and the Registrar General of Birth, Deaths and Marriages in Scotland is defined, by Section 126(8) SA as holding a non-ministerial office within the Scottish Administration. It would therefore appear to be ultra vires the Registrar in Scotland to refuse to issue a marriage licence to a couple on the basis solely that they are of the same sex, since to do so would be to breach their Article 8 and 12 Convention rights. On this analysis, same-sex couples in Scotland need not have waited for the coming into force of the Civil Partnership Act 2004 before they could have legitimised their unions. They had the right to do so since July 1999 when power to regulate marriages was devolved to Scottish Ministers under the Scotland Act, and they retain the right even subsequent to the coming into force of the Civil Partnership Act to seek to a marriage licence. The fact that no such challenge has been made in

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50 Bellinger v Bellinger [2003] 2 AC 467.
Scotland to date is if anything symptomatic of the lack of a properly developed public law culture in Scotland and the inability of pressure groups to take cases directly before the Scottish courts.\(^{51}\)

Another example of the unexpectedly radical implications of the absolute duty placed on the Scottish Executive and Administration to act always in accordance with Convention rights arises from the decision of the Grand Chamber of the European Court of Human Rights in \textit{Hirst v United Kingdom}\(^ {52}\) where it was held, by a majority of twelve votes to five held that the legislation in the UK which disenfranchises all individuals sentenced to a prison term after conviction for the duration of the period of their detention contravenes the requirements of the Article 3 Protocol 1 of the European Convention because it is disproportionate in its impact and effect and is not tailored to the circumstances of the conviction of individual prisoners. The opinion of Judge Caflisch, concurring with the majority, has stated that, in order to comply with the requirements of proportionality, any national law purporting to disenfranchise prisoners on conviction must have the following characteristics.

"[I]t cannot be a blanket law: it may not, simply, disenfranchise the author of every violation sanctioned by a prison term. It must, in other words, be restricted to major crimes, as rightly pointed out by the Venice Commission in its \textit{Code of Good Practice in Electoral Matters} (judgment, section 32). It cannot simply be assumed that whoever serves a sentence has breached the social contract.

The legislation in question must provide that disenfranchisement, as a complementary sanction, is a matter to be decided by the judge, not the executive. This element, too, will be found in the \textit{Code of Good Practice} adopted by the Venice Commission.

Finally – and this may be the essential point for the present case – in those Contracting States where the sentence may comprise a punitive part (retribution and deterrence) and a period of detention based on the risk inherent in the prisoner’s release – the disenfranchisement must remain confined to the punitive part and may not be extended to the remainder of the sentence. In the instant case this would indeed seem to be confirmed by the fact that retribution is one of the reasons adduced by the United Kingdom legislator for enacting the legislation discussed here, and certainly a central one. This reason is no longer relevant, therefore, as soon as a person ceases to be detained for punitive purposes."

\(^{51}\) Compare with \textit{Minister for Home Affairs v Fourie}, 1 December [2005] SACC and \textit{Goodridge and Others v Department of Public Health} 18 November [2003] MSC where the south African constitutional court and the Massachusetts supreme court, respectively, held the exclusion of same sex couples from the legal regime of marriage unconstitutional because in violation of their fundamental right to equal treatment.

\(^{52}\) App. No.74025/01 \textit{Hirst v United Kingdom} (No. 2), ECtHR (GC), 6 October 2005.
It is clear from the Hirst decision that Section 3 of the Representation of the People Act 1983 which provides that “a convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election” is incompatible with the Convention right to “free elections” protected under both the Human Rights Act and the Scotland Act. It follows from this that the holding of general elections and any by-elections to the Scottish Parliament under that voting system would be incompatible with respect for the Convention rights of those who have been found to be improperly disenfranchised. Accordingly it is would appear that by virtue of Section 57(2) SA the Scottish Ministers and Administration have no power to participate in or do any official act – for example the provision or allocation of funds – in connection with any such elections to the Scottish Parliament until the franchise thereto has been altered so as to be Convention compatible.

Any such alteration in the franchise to the Scottish Parliament would appear to be the responsibility of the Westminster Parliament, however, by virtue of the provisions of Paragraph B3(b) in Part II of Schedule 5 to the Scotland Act which provides that “elections for membership of the House of Commons, the European Parliament, the [Scottish] Parliament, including the subject matter of... the Representation of the People Act 1983 and the Representation of the People Act 1985... so far as those enactments apply, or may be applied in respect of such membership” are matters reserved to the Westminster Parliament and fall outwith the legislative competence of the Scottish Parliament and Executive. But in the meantime, the limitations on the powers of the Scottish Ministers as set out in the Scotland Act mean that the Scottish Ministers have no power to participate in or administer any legislative scheme – even one duly passed by the Westminster Parliament and approved by the Scottish Parliament by “Sewel motion” which is incompatible with the requirements of the Convention.

53 The constitutional convention in the UK post-devolution is that the Westminster Parliament will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. A “Sewel motion” is a motion passed by the Scottish Parliament, in which it consents to the Parliament of the United Kingdom passing legislation on a topic which falls within the devolved legislative competence of the Scottish Parliament.

54 Thus, for example, a challenge may be taken as to the lawfulness of any legislative provision which purports to allow the Scottish Ministers to act in any agency capacity in Convention incompatible elections. See the Scotland Act 1998 (Agency Arrangements) (Specification) Order 1999 (SI 1999 No. 1512) which by art.2(1) purports to specify the functions of a Minister of the Crown which may be exercised by the Scottish Ministers on his behalf under and in terms of s.93(1) SA. These functions include:
- s.18(5), 29(4A), 29(5), 29(6) and 29(7) of the Representation of the People Act 1983 (functions relating to funding arrangements for, and the conduct of, parliamentary elections).
- s.29(4A), 29(5), 29(6) and 29(7) of the Representation of the People Act 1983 as applied by regulation 3(1) of, and Sch.1 to, the European Parliamentary Elections Regulations 1999 (functions relating to funding arrangements for elections to the European Parliament).
Conclusion on the Scottish devolutionary settlement

Although the same substantive Convention rights (those set out in Schedule I to the Human Rights Act 1998) have been incorporated throughout the legal jurisdictions of the United Kingdom, those Convention rights have been given a completely different constitutional status in Scotland from the rest of the United Kingdom. Under the Scotland Act 1998, the rights guaranteed under the Convention have, in effect, the status of a higher law as against all and any legislation whether passed by the Westminster Parliament or passed by the Scottish Parliament as well as over any act or omission of a member of the Scottish Executive. Scotland's new constitution under the Scotland Act mandates this new form of "democratic constitution" previously unknown within the context of the United Kingdom, one in which the judges are supreme in the sense that they have the power to strike down as invalid both:

(i) legislation which has been duly passed by the Scottish Parliament and

(ii) acts of the Scottish Ministers, even where these which might otherwise be warranted or authorized under primary Westminster legislation.

- Ss.29(4A), 29(5), 29(6) and 29(7) of the Representation of the People Act 1983 as applied by art.18 of the Scottish Parliament (Elections etc.) Order 1999 (functions relating to funding arrangements for elections to the Scottish Parliament).
- S.47(1) of the Representation of the People Act 1983 (function relating to determining terms and conditions for loans of equipment for local government elections).
- Regs.43(2) and 55(2) of the Representation of the People (Scotland) Regulations 1986 (functions of directing an adaptation of the electors lists and electoral register in force in consequence of an alteration of parliamentary polling districts).
- Reg.51(2) of the Representation of the People (Scotland) Regulations 1986 (function of receiving copies of electoral register).
- Art.20(1) of the Scottish Parliament (Elections etc.) Order 1999 (function relating to determining terms and conditions for loans of equipment for Scottish parliamentary elections).
- Art.23(1) of the Scottish Parliament (Elections etc.) Order 1999 (function relating to the giving of directions to the discharge of registration duties).
- Arts.39(4), 40(3)(a), 40(5), 47(1), 47(6), 49(2) and 49(3)(b) of the Scottish Parliament (Elections etc.) Order 1999 (functions relating to the receipt of various returns and declarations in relation to election expenses).
- Art.55(2) and (3) of the Scottish Parliament (Elections etc.) Order 1999 (functions relating to the publication of notice of time and place of inspection of returns and declarations in relation to election expenses).
- Art.57(1) and (4) of the Scottish Parliament (Elections etc.) Order 1999 (functions relating to the making available for inspection various returns and declarations in relation to election expenses). Para.20(4) of Sch.4 to the Scottish Parliament (Elections etc.) Order 1999 (function in relation to the receipt of returns relating to postal ballot papers). Para.1(2) of Sch.7 to the Scottish Parliament (Elections etc.) Order 1999 (function in relation to the determination of questions about the use of rooms in school premises for election meetings).

In French constitutional writing, the idea of the judiciary having such absolute power to review and strike down provisions of laws which have been duly passed by the legislature has been termed "un gouvernement des juges". This is how the French would characterise the American constitutional position under which, since the seminal judgment in 1803 of the Supreme Court of the United States in Marbury v Madison, the courts of that country have claimed the power to declare "a legislative act contrary to the constitution" as "not law". The US model involving the "Government of Judges" is one which has been imported into the devolved Scottish constitution. As the following survey of human rights decisions made by the courts in Scotland under the devolved constitution shows this is a development which has not been universally welcomed within the Scottish judiciary.

Human Rights Litigation in Post-Devolutionary Scotland

Given the statistics quoted at the outset of this article regarding the relevance of violent crime in Scotland and the high prisoner population, it should perhaps have come as no surprise that the bulk of human rights litigation to date following upon the devolution of power to the Scottish executive has been in the area of criminal justice, nor that the other main area in which courts have wrestled with Convention rights has been in civil claims brought by prisoners.

One explanation of this is a simple access to justice point. The vast bulk of individuals cannot afford to go to court and litigate against the government. Given the potential liability for the costs and expenses of the other side should one lose, one has either to be very rich – or so poor as to be eligible for legal aid – before one could even contemplate litigation. And litigation against government defenders is all the more fraught because, unlike ordinary litigants, the government recognises no general economic imperative to settle cases taken against it. The government’s untrammeled access to tax-payers’ pockets is such that it considers that it can afford to insist on litigating to the bitter end – regardless of cost – so that every avenue of appeal must be exhausted before it accepts defeat. This is a daunting prospect for all but the most determined litigants. And the most determined litigants are to be found amongst those who are seeking to avoid the loss of their liberty consequent upon their conviction and sentencing for a criminal offence and among those who, having lost their liberty on conviction, now have time enough on their hands to test the lawfulness of the actions of those by whom they are detained.

Further, the restrictive rules on standing (or “title and interest to sue”) in Scotland as compared to the rules in England mean that there is no real scope for public interest litigation by pressure groups or non-government organizations. And the Scottish courts have been traditionally unwilling to allow themselves to be used as debating fora for the resolution of purely

56 Marbury v Madison (5 US 368, 389, (1803) 1 Cranch 103 at 177.
academic disputes and have been hostile to the idea that they might be asked to pronounce "bare declarators" of law. Instead cases can only be brought in Scotland by individuals who can say that their rights are being breached and that they have a true on-going and live interest to have that matter resolved by the court.59

All of these factors have, by a process of elimination, left human rights issues against the Scottish Ministers to be litigated within the context of criminal prosecutions and, in the civil sphere, by convicted prisoners complaining of aspects of their detention. This has given a rather lop-sided feel to human rights in Scotland. From the decided cases, at least, human rights appears to be concerned only with asserting the rights of prisoners and criminals and the duty of courts to vindicate those rights and provide compensation for their violation. This has not been a development which has been universally welcomed, whether in the populace at large, the popular press, the politicians in charge of our affairs, or indeed among a number of the judges faced with these new claims before them. A feeling of injustice may also have been engendered by the fact that Convention rights challenge to the criminalisation of previously lawful activity (for example fox-hunting60) have failed whereas Convention rights cases brought by convicted prisoners have been successful. Prisoners are seen as undeserving and so their grievances should not be allowed to clutter up the courts and impede the speedy hearing and resolution of the legal claims of decent ordinary citizens. As Lord Hardie observed in Davidson v Scottish Ministers (No. 1):

"[T]he complainer and his legal advisers were seeking, as part of a campaign involving other prisoners, to obtain what was, in effect, an advisory opinion of the court. Had the reclamer pursued his remedies under the Prison Rules, the present application might have proved quite unnecessary... [C]ounsel for the reclamer acknowledged that the reclaiming motion was intended to deal with abstract questions of principle. I strongly disapprove of the procedure adopted by the reclamer and his legal advisers in this case. It is a matter for future consideration whether the court should dismiss at the earliest opportunity any similar such petitions unless the petitioner has had recourse to and exhausted his remedies under the Prison Rules. If the court does not adopt such a stance there is a real risk that, by reason of the priority given to petitions for judicial review, judicial time and public funds will be utilised unfairly at the expense of other litigants."61

The underlying complaint appears to be that the litigation that was before the court - under which the prisoner challenged the compatibility of the conditions in which he was detained on remand in HMP Barlinnie with the

59 See Adams v Advocate General, 2003 SC 171, OH for a discussion of the requirements of title and interest in the context of a challenge to the Convention compatibility of the restrictions on fox hunting contained in the Protection of Wild Mammals (Scotland) Act 2002.


61 Davidson v Scottish Ministers (No. 1), 2002 SC 205 per Lord Hardie at 216-217.
Article 3 ECHR prohibition on inhuman and degrading treatment and sought an order from the court removing him from these condition — was the continuation of politics by other means and was therefore illicit, as an improper use of court time and resources. The prisoner’s application was accordingly summarily rejected. Ironically, however, the refusal on the part of this court to consider making such an order was itself subsequently overturned on the grounds that Lord Hardie as one of the bench hearing the application had failed to disclose his own prior political involvement as Lord Advocate on the very question of law — the competency of pronouncing coercive orders against the Scottish Ministers — then at issue before them.62

In Napier v The Scottish Ministers,63 the prisoner litigant similarly complained that the cell in which he was detained on remand was Article 3 ECHR incompatible because: it was grossly inadequate in terms of living space, lighting and ventilation; the sanitary arrangements involved using a chamber pot in the presence of his cell-mate and subsequently “slopping out” the contents; and the extent to which he was confined in his cell was excessive with the periods of exercise and recreation outside the cell wholly inadequate. Unlike Mr. Davidson, he was successful in persuading the judge at first instance that he had made out a prima facie case which was strong enough for the judge to order his immediate transfer from his conditions of detention within HMP Barlinnie Prison to a conditions which complied with Article 3 ECHR. The case subsequently went to a six week period and — after consideration of expert evidence and Reports from the European Committee for the Prevention of Torture (CPT) — the Lord Ordinary, Lord Bonomy held that the combination of the “triple vices” of cellular and prison hall overcrowding, slopping out and impoverished regime in C Hall of Barlinnie Prison, Glasgow were such as to be capable of constituting in Scotland in 2001 a breach of Article 3. As he noted:

“[T]o detain a person along with another prisoner in a cramped, stuffy and gloomy cell which is inadequate for the occupation of two people, to confine them there for at least 20 hours on average per day, to deny him overnight access to a toilet throughout the week and for extended periods at the weekend and thus to expose him to both elements of the slopping out process, to provide no structured activity other

62 Davidson v Scottish Ministers (No.2), 2005 SC (HL) 7. This decision to find that Lord Hardie’s participation in the case breached the necessary appearance of judicial imparternal was criticised by Louis Blom Cooper in “Bias on appeal” (2005) Public Law 225 at 228 in the following terms: “Whether or not the present law of bias is sustainable to test the impartiality of the trial judge, the executive and legislative roles performed by Lord Hardie when he was Lord Advocate cannot properly constitute a frame of mind (even assuming that Lord Hardie fully recalled his role in advising as a member of the Government on s.21 of the Crown Proceedings Act 1947 which apparently he did not) that would exercise in the courtroom bystander a proper feeling of bias. If one assumes (as one must) that an ‘open mind’ is not an empty mind and that Lord Hardie’s politico-legal past included, even demonstrably, a relevance to the point of law raised by Mr. Davidson, an acknowledgement of the judicial role would preclude anything that called for disqualification or dismissal, at least not automatic.”

than daily walking exercise for one hour and one period of
recreation lasting an hour and a half in a week, and to confine
him to a 'dog box' for two hours or so each time he entered of
left the prison was, in Scotland in 2001, capable of attaining
the minimum level of severity necessary to constitute
degrading treatment and thus to infringe Article 3.\textsuperscript{64}

The impact of these conditions, when taken together, were found by the
judge to have diminished the petitioner's human dignity and to aroused in
him feelings of anxiety, anguish, inferiority and humiliation. The Lord
Ordinary also found that Article 8 ECHR was breached in the circumstances
of the case. The detention of the petitioner in the conditions displaying the
"triple vices" was held not to be "necessary in a democratic society". Interestingly, in reaching his decision on that point, Lord Bonomy took into
account various statements made before the Scottish Parliament by members
of the Executive, notably the then Minister of Justice, Jim Wallace MSP. From these statements, Lord Bonomy was able to judge that positive choices
had been made by the Scottish Executive in the knowledge that there was an
urgent need to address prison conditions. He noted in his judgment that in
1994 the conditions in HMP Barlinnie were criticised by the Committee for
the Prevention of Torture. He also heard evidence that slopping out had
generally been abolished in prisons in England and Wales by April 1996.
The judge found from the Scottish Parliamentary material put before him by
the petitioner's representatives that the Scottish Ministers could easily have
installed integral sanitation in the cells in C Hall before 2001. Funds were
available to them for this purpose but these had been allocated elsewhere.
The Scottish Ministers were also found to have breached their common law
duty to take reasonable care for the petitioner's health and safety in that the
stress on the petitioner consequent upon the conditions of his detention was
found to have contributed to the resurgence and exacerbation of his pre-
existing eczema. In the circumstances an award of £2,000 plus interest was
made to the petitioner to reflect the loss, injury and damages sustained by
him in the course of the 42 days in which he was detained in the conditions
in question.

The decision of Lord Bonomy was unsuccessfully appealed against by the
Scottish Ministers to the Inner House, ultimately only on the question of the
appropriate standard of proof to be applied by domestic courts in Article 3
ECHR cases. The First Division held that:

"in civil proceedings in Scotland in which a finding is sought
from the court that there has been an act or a failure to act by a
public authority which is incompatible with the requirements
of Article 3 of the European Convention on Human Rights, the
appropriate standard of proof is the ordinary standard of proof
applicable to civil cases in Scotland, namely, proof on a
balance of probabilities."\textsuperscript{65}

The Scottish Ministers declined to exercise their further right of appeal to the
House of Lords.

\textsuperscript{64} Napier v Scottish Ministers, 2005 SC 229, OH at para.75.

\textsuperscript{65} Napier v Scottish Ministers, 2005 SC 307, IH.
Lord Bonomy’s judgment has since been publicly criticised by a retired Scottish judge (and former Solicitor General for Scotland) for its political nature and impact. Lord McCluskey wrote in a newspaper article as follows:

"[T]he most remarkable feature of the Napier case was that the court accepted evidence that the Executive had deliberately decided to spend its limited financial resources on other things, in the light of their judgment as to what the public interest required. . . .

The decision as how limited public (i.e. taxpayers’) funds are to be spent within the criminal system is a matter for elected politicians not for judges. How can it be for judges to decide that spending money on improving toilet facilities for convicted criminals is more important than spending that money on tackling domestic violence or on trying to fight the menace of dangerous drugs?"

Lord McCluskey had while still serving as a judge in Scotland previously expressed – in fairly robust terms – a certain scepticism as to the use to which the human rights legislation might be put; describing the incorporation of the Convention rights into domestic law as “a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers”.

The tone and content of these remarks were subsequently found by the High Court of Justiciary to give rise to a legitimate apprehension that Lord McCluskey could not then be seen to apply questions arising out of that particular branch of the law with the necessary appearance of judicial impartiality. It may be that the decision in Napier provided for him the confirmation of his earlier trenchantly expressed views on the unwisdom of incorporating the Convention.

This publicly expressed judicial hostility to human rights litigation for prisoners’ rights appears to rest on the unspoken idea that justice is a limited commodity, or a zero-sum game such that for justice to be done to one means that an injustice is perpetrated against another. While there is no doubt that the claims of the victim to a form of restorative (and indeed individually retributive) justice are under-acknowledged within our present criminal and civil justice system it is not clear why that should constitute a basis for the demand that prisoners be excluded from any further participation in the justice system, or be denied the opportunity to air their grievances and seek vindication of their rights before the courts. It is clear that the individuals most directly aware of the activities of the particular prison administration are the imprisoned.

Another possible response to criticism of this kind of litigation might be to note that in improving the position of prisoners vis à vis the State one may improve the position of everyone, so that it is not just the undeserving who benefit from prisoners’ rights litigation. Thus the abstract matter of principle that was before the Extra Division in Davidson (and to which Lord Hardie took exception) was the question as to whether or not it was ever open to the

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68 See *Hoekstra v H.M. Advocate* (No. 2) 2000 JC 391.
court to pronounce interdict or an order for specific performance against officers of the Crown (such as the Scottish Ministers) to compel them to comply with the law. Surely the establishing of such a principle can be seen to be potentially of use to all litigants faced with an abuse or excess of State power? In the event, when the decision of the Extra Division in Davidson was eventually appealed by the (former) prisoner petitioner to the House of Lords, the appeal was allowed unanimously, with Lord Hope observing as follows:

"36. In McDonald v Secretary of State for Scotland 1994 SC 234, 238–239, Lord Justice Clerk Ross said:

'It is thus clear that certain restrictions are imposed by section 21 [of the Crown Proceedings Act 1947] upon the granting of interdict in any civil proceedings against the Crown. The Act of 1947 in this respect changed the law of Scotland. Prior to the passing of the Act of 1947, the court in Scotland did on occasion pronounce interdict and interim interdict against the Crown (Russell v Magistrates of Hamilton (1897) 25 R 350; Bell v Secretary of State for Scotland 1933 SLT 519). . . . I accordingly agree with counsel [for the Secretary of State, the Lord Advocate, Lord Rodger of Earlsferry] that one effect of the Crown Proceedings Act 1947 has been to deprive litigants in Scotland of a right which they previously had, namely, a right to obtain interdict and interim interdict against the Crown."

37. Support for this view was undoubtedly to be found in the fine print of the Act. No one can pretend that it is easy to follow. It is obvious at a glance that the draftsman failed to examine the implications for the Scottish system to the same level of detail as is to be found in the provisions that are applicable in England. But those who cared for the structure and orderly development of the law found it hard to believe that this was indeed what Parliament had intended. Why should litigants in Scotland have been deprived in 1947 of a remedy which they had previously enjoyed and was, for the first time, being made available to their counterparts in England? Surely there would have been a protest about this result, if anyone had thought to explain that this was the intention while the Bill was being discussed in Parliament.

38. That having been said, the decision in McDonald has been regarded as having settled the issue in Scotland for over a decade. The appellant's attempt to open it up in the present proceedings, predictably, met with no success when the Extra Division heard the reclaiming motion against the Lord Ordinary's interlocutor. We on the other hand have had the benefit of examining the issue in a tribunal which draws its membership from all parts of the United Kingdom. There are occasions when those of your Lordships who come from Scotland feel justified in defending Scots law and the Scottish legal system against what are perceived to be alien influences. But this is not one of them. There is everything to be gained by the sharing of views among your Lordships which it has been
possible to enjoy in this case. This has helped greatly, as we step back and try to take a broader view of section 21 of the 1947 Act.

[...]

54. I would summarise the conclusions which I have reached about the meaning of section 21 in its application to Scotland in this way. There are excluded from the expression 'any civil proceedings' in section 21(1) and section 21(2) proceedings by way of judicial review where relief is sought in respect of acts or omissions of the Crown or of an officer of the Crown acting as such. Proviso (a) to section 21(a) extends to any proceedings in which a remedy is sought against the Crown in private law proceedings, but not otherwise. 669

And in Beggs v Scottish Ministers67 the issue that was before the Inner House was whether or not individual civil servants can be called before the court to account for their contempt in failing to ensure that undertakings which had been given to the court on behalf of the Government were respected. Again, surely, the establishment of the principle that civil servants exercising State power may be held directly accountable to the court for their actions or omissions may be thought to be a matter of interest and significance not only to prisoners, but to everyone.

It is readily apparent, however, that there remains among at least a certain sector of the higher judiciary based in Scotland disquiet and unease about the constitutional position in which the Scottish devolutionary settlement has placed them. The fear appears to be that they are being required to enter into and make decisions on matters - such as the proper allocation of budgetary funds - in which they have little expertise and no democratic legitimacy. The problem is that what the law requires them to do. A radical constitution is foisted on a conservative judiciary - the antisyzygy continues.

The Scottish Human Rights Commissioner

In March 2000, the Lord Advocate and the then Minister for Justice stated that the Scottish Ministers were considering the establishment of a human rights commission. Following a period of public consultation in 2003 the Scottish Executive announced their intention to put forward a Bill before the Scottish Parliament to establish the office of the Scottish Human Rights Commissioner (SCHR). Subsequent to the Scottish Executive announcing its proposals to create a human rights commission in Scotland, the UK Government announced its intention to create a Commission for Equality and Human Rights (CEHR) for England and Wales and Scotland. This UK proposal was set out in the Equality Bill which was introduced into the Westminster Parliament as a House of Lords Bill on 18 May 2005 and given royal assent as the Equality Act 2006. Some five months after the Equality Bill had been introduced into the Westminster Parliament, on 7 October

669 Davidson v Scottish Ministers (No. 1), [2005] UKHL 74, 2006 SLT 110 (Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell, Lord Mance) per Lord Hope at paras.36-38, 54.

67 Beggs v Scottish Ministers, 2005 SC 342, 1H.
2005, the Scottish Commissioner for Human Rights Bill was introduced as an Executive Bill before the Scottish Parliament. The UK and Scottish Executives have apparently independently decided to create their own distinct Human Rights Commissions and Commissioners operating under distinct legislative frameworks.

But the whole question of the possible inter-relationship between the CEHR set up by Westminster and the SCHR to be established by the Scottish Ministers and Parliament seems to have been barely thought through. One of the complexities of the current Scottish constitutional arrangements is the fact that the Human Rights Act and the Scotland Act were drafted by wholly distinct Whitehall departments and little effort was made to co-ordinate the two Bills in their passage through the Westminster Parliament. This problem of complexity in constitutional structures for the protection of human rights in Scotland has now been compounded by the fact that there is little or no evidence of thought out co-ordination between the Westminster proposal for a British Commission for Equality and Human Rights and the Holyrood proposal for a Scottish Commissioner for Human Rights.

The very least it might be expected that each Commission(ers) should have similar remits and investigative and coercive powers as well as similar powers to pursue and intervene in court actions. But that is not to be. The proposed Scottish Commissioner for Human Rights will have far less powers than the British Commission for Equality and Human Rights. Thus, while the CEHR is to be given statutory “title and interest” to raise actions and applications for judicial review before the courts in Scotland in any proceedings relevant to its functions (including human rights issues in reserved matters), the SCHR will be given no power either to raise actions in its own name before the courts in the public interest or to assist others who claim to be the victims of the violation of their rights in bringing human rights cases. The SCHR is given a limited power of intervention in civil cases before the Scottish courts but it will have no power to intervene in criminal cases. And the SCHR will have no power to investigate individual complaints of human rights abuses and any recommendations made in inquiries into the policies and practices of public authorities in Scotland will not be legally binding on any party. The CEHR’s powers to conduct inquiries are broader than the Scottish Commissioner’s in that the CEHR will be able to conduct enquiries into any matter relating to its human rights duties and its inquiries are not restricted to particular types of organisations. Further, in contrast to the CEHR which may give financial assistance to human rights NGOs, the SCHR will not have any grant-giving powers. As has been noted:

“Given the fact that the [Scottish] Commissioner will not have the power to support individual cases, limited access to justice generally for individuals, and an NGO sector without the resources to fund cases, there is no guarantee that the strategically important cases in which the Commission might helpfully intervene will be litigated. This will severely restrict the ability of the Commissioner to operate at a proactive strategic level, and will sit in stark contrast to the position of the CEHR in England and Wales, and in Scotland on reserved issues. . . . The Northern Ireland model with an Equality Commission and a HRC with powers to give assistance to
individuals, and to bring proceedings in its own name, as well as monitoring the law and conducting investigations, serves as a model to which the EOC considers that all nations of the United Kingdom, including Scotland, should aspire. While the creation of the post of Scottish Commissioner for Human Rights is a welcome move, the EOC considers that the role and remit do not go nearly far enough to ensure the creation of a human rights culture in Scotland.\footnote{71}

There is clearly an overlap both in terms of function, responsibilities and jurisdiction between the CEHR and the SCHR which is apparently to be addressed and alleviated by the conclusion of a Memorandum of Understanding between the two bodies on how they will co-operate on matters of mutual interest. It is apparently envisaged that whereas the CEHR will have a general overall remit for human rights matters in England and Wales, the CEHR’s human rights role \textit{in Scotland} will be restricted to reserved human rights issues and be a matter for Westminster: thus, such issues as data protection, elections, immigration and asylum, national security, competition, consumer protection, transport, social security, employment, discrimination and equal opportunities and broadcasting being all reserved issues might properly fall within the British Commission’s Scottish remit. The SCHR’s focus will, by contrast, be on \textit{devolved} human rights issues which fall within the jurisdiction of Holyrood and will have regard not simply to the European Convention on Human Rights but \textbf{all} other international human rights instruments which the UK has ratified, although not specifically incorporated into domestic law.\footnote{72} It is envisaged in the Equality Act 2006 that the CEHR might take action in respect of devolved issues if the Scottish Commissioner gives consent to the CEHR to do so, but this apparent power of veto over the power of the CEHR in Scotland is not reflected in the terms of the Scottish draft legislation which sets up the SCHR.

The potential for confusion, duplication and for boundary disputes between the two bodies is clear. In addition the two new bodies will have to work with and co-ordinate their activities with the existing Scotland’s Commissioner for Children and Young People, established by the Commissioner for Children and Young People (Scotland) Act 2003 and tasked with promoting and safeguarding the rights of children and young people.” In the event, it is to be hoped that the creation of a multiplicity of

\footnote{71} See Muriel Robison \textit{Written Submission to the Justice Committee of the Scottish Parliament on behalf of the Equal Opportunities Commission on the Scottish Commissioner for Human Rights Bill} 18 November 2005 (available online at http://www.scottish.parliament.uk/business/committees/justice1/inquiries/hrb/j105/hrb-evid-00.htm).

\footnote{72} Given that it is clear that under and in terms of s.58 SA and para.7(2)(a) in Part I of Sch.5 SA all of the UK’s international obligations bind the Scottish Ministers as a matter of domestic law, then it may be argued that the Scottish constitution created under the Scotland Act is now a monist one for the purposes of international law, rather than the dualism which still characterises the UK constitution. Whether the international obligations which bind the Scottish Ministers as a matter of domestic law can be prayed in aid before the court by private litigants is more problematic however: see \textit{Friend v Lord Advocate} [2005] CSHI 69.
distinct (and potentially competing) human rights Commissions and Commissioners holding a remit over human rights matters in Scotland will not be to the detriment of overall human rights protection within Scotland.

Conclusion

The devolutionary settlement in Scotland is an on-going constitutional experiment. The six years of its operation to date have revealed certain tensions, focusing most particularly around the question of the proper role of judges within a democratic polity. The United States has had two hundred years of experience with a constitution interpreted as mandating judicial supremacy, and there clearly remain tensions in its operation. The consequent juridicalisation of politics in that country has resulted in a perception of the politicisation of the judiciary, particularly in the members of the US Supreme Court. But the idea of judges as open political players runs wholly counter to the basic constitutional traditions of the United Kingdom where the preservation of the appearance of judicial impartiality is seen as being of fundamental importance.

If the appearance of judicial impartiality is in danger of being compromised by the current constitutional position in which judges are placed under the devolutionary settlement, it may be that change is required in the Scottish constitution. Two options for change occur. First, that the Westminster legislature determine that “Convention rights” challenges against the Scottish Ministers should no longer be considered to raise devolution issues, and the Scottish Ministers then be treated on this matter as every other public authority in the United Kingdom, subject to the procedures of the Human Rights Act only. The result of such a change would be that the Privy Council would no longer have jurisdiction to hear criminal appeals from Scotland with the consequence that — in criminal matters at least — Scotland would be able to go its own way in Convention rights matters, untrammeled by UK wide considerations. This was the option recommended by Lord Bonomy in the context of his review into the practice and procedure of the High Court of Justiciary. He stated:

“The only practical reason for ever categorising such issues as devolution issues was to ensure that recognition was given to the Convention rights during the period between the implementation of the Scotland Act and the implementation of the Human Rights Act, but even there it was a rather artificial way of introducing Convention rights to Scottish criminal procedure. That interim period is now over. Schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord Advocate as prosecutor, and anyone acting on his authority or on his behalf as prosecutor, are excluded from the definition of a devolution issue. The Scottish

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73 See, e.g. the decision in Bush v Gore 513 US 98 (2000) (00-949) where the US Supreme Court in a five-four split decision ruled on the validity of the Florida count in the 2000 US Presidential election thereby giving the election to George W. Bush notwithstanding his failure to achieve a majority of votes in his favour nationwide.

74 See, for example, In re Pinochet (No. 2) [2000] AC 119.
"Stands Scotland Where it Did?" Devolution, Human Rights... 133

Executive should urge the United Kingdom Parliament to make that amendment.\textsuperscript{75}

But such a constitutional change might itself set up new tensions within the Union however, since the High Court of Justiciary has, post-devolution, taken at times a fairly radical approach to the application of Convention rights considerations to criminal procedures. Thus in Brown v Stott\textsuperscript{76} the Scottish criminal appeal court found that the prosecuting authorities could not lead and rely in court on evidence of an admission (regarding the identity of the driver of a car) which the accused was compelled to make to the police under Section 172(2)(a) of the Road Traffic Act 1988 as this was said to contravene her Convention right against self-incrimination. And in HM Advocate v McIntosh, the Scottish criminal appeal court found that the assumptions set out in Section 3(2) of the Proceeds of Crime (Scotland) Act 1995 relating to the recovery of the proceeds of drug trafficking were incompatible with the presumption of innocence set out in Article 6(2) ECHR.\textsuperscript{77} Both of these decisions were overturned when the cases were taken to the Privy Council on Crown appeals. In coming to the decision in Brown v Stott Lord Steyn sitting as one of the Board of the Privy Council made the following general observations, implicitly critical of the approach taken by the Scottish court:

"[A] single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights."\textsuperscript{78}

Similarly, in reversing the decision of the Scottish criminal appeal court in McIntosh v HM Advocate, Lord Bingham stated his preference for the approach which had been taken by the Court of Appeal in England and Wales, as he observed:

"The statutory scheme contained in the 1995 Act is one approved by a democratically elected Parliament and should not be at all readily rejected. I would for my part endorse the conclusion of the Court of Appeal (Criminal Division) in R v Benjafield [2001] 3 WLR 75, 103, para 87:

'It is very much a matter of personal judgment as to whether a proper balance has been struck between the conflicting interests. Into the balance there must be placed the interests of the defendant as against the interests of the public, that those who have offended should not profit from their offending and should not use their criminal conduct to fund further offending. However, in our judgment, if the discretions which are given

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\textsuperscript{76} Brown v Stott, 2000 JC 328.
\textsuperscript{77} McIntosh v HM Advocate, 2001 JC 78.
\textsuperscript{78} Brown v Stott, 2001 SC (PC) 43 per Lord Steyn at 63.
to the prosecution and the court are properly exercised, the solution which Parliament has adopted is a reasonable and proportionate response to a substantial public interest, and therefore justifiable."\footnote{McIntosh \textit{v} HM Advocate, 2001 SC (PC) 89 per Lord Bingham at 102 para.36.}

If the Scottish criminal courts were to maintain a different line on the protection, interpretation or remedies available for breach of Convention rights than the courts in the rest of the United Kingdom, then this might then open arguments (whether in applications to the European Court of Human Rights or before the domestic courts) that such difference in treatment may itself be a breach of Article 14 ECHR which provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . race . . . national or social origin, birth or other status."\footnote{See, for example, Dudgeon \textit{v} United Kingdom (1981) 4 EHRR 149 where a claim for breach of Article 14 ECHR in conjunction with Article 8 ECHR was based on the fact that while homosexual conduct had been decriminalised in Great Britain, it remained illegal in Northern Ireland. In the event, the Court did not find it necessary to deal with the Article 14 discrimination point, having found in favour of the substantive art.8 case – that the continued existence of the Northern Ireland legislation contravened individuals’ right to respect for their private life.} The English have been found, after all, to constitute a distinct racial group from the Scots for the purposes of the Race Relations Act 1976,\footnote{See \textit{BBC Scotland v Souster}, 2001 SC 458; [2001] IRLR 150, IH.} and the distinctive ethnicity of the Welsh and Irish is not in dispute.

It should be noted that the possibility of such an Article 14 ECHR based discrimination claim already exists even under the existing constitutional arrangements. Currently a failure to bring a criminal prosecution against a person charged with a criminal offence within a reasonable time attracts quite different remedies in Scotland compared to the rest of the United Kingdom as a result of a divergence in approach between the Privy Council and the House of Lords. The Privy Council (in a divided 3:2 devolution jurisdiction decision) has held that such a failure in Scotland constitutes a breach of Article 6(1) ECHR and that the Lord Advocate therefore has no power to institute or maintain a criminal prosecution after a reasonable time has passed; the accused benefits from the delay by being able to avoid any trial.\footnote{\textit{H.M. Advocate v R} 2003 SC (PC) 21, decision of 28 November 2002, Lord Hope of Craighead, Lord Rodger of Earlsferry, and Lord Clyde forming the majority with Lord Steyn and Lord Walker dissenting.} But a nine judge House of Lords (in a divided 7:2) decision has sought to reject this approach for England and Wales\footnote{S.103 of the Scotland Act 1998, s.82 of the Northern Ireland Act 1998 and para.32 of Sch.8 to the Government of Wales Act 1999 all assert the binding nature of decisions of the Judicial Committee of the Privy Council in proceedings under these Acts in all other courts and legal proceedings, (apart from later cases brought before the Privy Council). The Government fully intended that this meant that decisions of the Privy Council exercising its devolution jurisdiction should be binding upon the Appellate Committee of the House of Lords. As Lord Sewell advised Parliament (House of Lords Hansard 8 October 1998 \textit{per} Lord Sewell at Column 619):}
Article 6(1) ECHR gives a right to be tried within a reasonable time but not a right not to be tried after an unreasonable time. Accordingly, it remains lawful for the Crown Prosecution Service in England and Wales to initiate criminal prosecutions after a reasonable time has passed, any unreasonable delay in the proceedings being recognized by the courts only in terms of possible compensation or reduction in sentence rather than as a bar to prosecution. The consolidation of the devolution jurisdiction of the Privy Council with the appellate jurisdiction of the House of Lords into the new UK Supreme Court – as provided for by Section 40 of (and Schedule 9 to) the Constitutional Reform Act 2005 – may provide a forum in which this divergence in approach may be resolved and in future avoided. But unless and until that court is established, however, there remains something of a constitutional impasse which can only invite further litigation on these issues.

The second option for constitutional change might be to bring an end to the judicial supremacy on which the new Scottish constitution is based and to place the Scottish Parliament and Executive in the same legal position as the UK Parliament and Executive. On this model the judges could no longer simply strike down Scottish legislation but would have the power only to declare it to be Convention incompatible, leaving it to the Scottish legislature to decide whether, how and when to amend the legislation in question in the manner suggested by the judges. But the political implications of any such move might be regarded as too serious. If the Scottish Parliament and Executive were accorded the legal status of properly sovereign bodies, this might be seen as an unequivocal move away from the unionist agenda of retaining overall power under devolution, to a more unstable model of federalism and co-sovereignty within the Union. And this option might be seen to go too far down the slope to nationalism and raise the possibility of formal secession of Scotland from the Union.

The third option is simply to do nothing. The long-term implications of that may be just as radical on the United Kingdom constitution as a whole,

"The Government believe that it is important that the decisions of the Judicial Committee of the Privy Council are binding in all legal proceedings other than proceedings before the JCPC itself. Amendment No. 292EA would mean that they were not binding upon this House, and we do not accept that position. Devolution issues will seldom be decided by this House. In normal circumstances, under Sch.6 of the Bill any devolution issue which arises in judicial proceedings in this House will be referred to the Judicial Committee unless this House considers it more appropriate that it should determine the issue itself. We think it is appropriate that this House should not be able to depart from the earlier decisions made by the JCPC. We believe that the JCPC is ideally placed to resolve disputes about vires. It has a vast experience of dealing with constitutional issues from the Commonwealth, making the provision that the JCPC's decisions of the highest status will ensure that clear decisions with a clear status are produced and that devolution issues are treated consistently. That is the advantage behind the line that we are advocating."

however. Although, in theory, the Judicial Committee of the Privy Council may draw on a larger pool of potential judges than the House of Lords,69 in practice the devolution cases of the Privy Council have largely been decided upon by the House of Lords judges.66 When exercising this devolution jurisdiction, those judges have been acting under and in terms of the Scottish devolved constitution which, as we have seen, mandates a position of judicial supremacy over the legislature and, at least as regards the assessment of the lawfulness of the acts of the Scottish Ministers, places Westminster statutes at a normatively lower status than Convention rights. It is conceivable that this experience of acting under this Scottish constitutional model of gouvernement des juges may lead those judges to begin to question or push against the heretofore accepted tenets of the United Kingdom constitution which ascribe to judges – even in fundamental rights matters – a role subordinate to the UK Parliament. We may note in this regard, the following observations on the UK constitution made by Lord Hope (who has participated as a judge in every devolution case brought to date before the Privy Council):

“Our [UK] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in McCawley v The King [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified ... ."

[It is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. ... ]

There is a strong case for saying that the rule of recognition, which gives way to what people are prepared to recognise as law, is itself worth calling

65 The Judicial Committee of the Privy Council exercising its devolution jurisdiction under s.103(2) of the Scotland Act may consist of Privy Councillors holding high judicial office in the United Kingdom (this means in effect all the current Inner House judges of the Court of Session) as well as the Lords of Appeal in Ordinary. By contrast the Appellate Committee of the House of Lords can only be constituted by Lords of Appeal in Ordinary or holders of high judicial office who also hold peerages (in Scotland among serving Court of Session judges, Lord Cullen of Whitekirk, Lord Mackay of Drumadoon and Lord Hardie of Blackford only).

66 Brown v Stott. 2001 SC (PC) 43 is the only case to date in which one member of the Board – Lord Kirkwood – was a Privy Councillor who was not also a Lord of Appeal in Ordinary.
The experience of the Caledonian antisyzygy may, perhaps, be seen to act as a catalyst for future radical judicial change of the uncodified constitution of the United Kingdom as a whole. The constitutional dance continues, but it may be becoming less deferential: "the rules of the game are changing", to quote the Prime Minister,\(^\text{18}\) but perhaps not in the way he had envisaged or hoped.

\footnote{\textit{Jackson v Attorney General} [2005] 3 WLR 733 per Lord Hope at pp.768, 769, 775 paras.104, 107, 126. See too similar effect the remarks by Lord Steyn at pp.767-768 para.102: "We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second \textit{Factor Tang} decision made that clear: [1991] 1 AC 603. The \textit{settlement contained in the Scotland Act 1998 also points to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the \textit{ECHR} with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the \textit{general} principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a compliant House of Commons cannot abolish."}

\footnote{See the Prime Minister's Press Conference for 5 August 2005, accessible on line at http://www.number-10.gov.uk/output/Page8041.asp: ["W]e are today signalling a new approach to deportation orders. Let no-one be in any doubt, the rules of the game are changing. These issues will of course be tested in the courts, up to now the concern has been that orders for deportation will be struck down as contrary to Article 3 of the European Convention on Human Rights as interpreted by the European Court in the \textit{Chahal} case in 1996, and indeed we have had such cases struck down. However, the circumstances of our national security have self evidently changed...[s]o it is important to test this anew now in view of the changed conditions in Britain. Should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights."}
Scottish Criminal Law

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The Europeanisation of Scots criminal law

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Council Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States

*S.C.L. 1122 I. The influence of the European Convention on Human Rights

1.1 The provisions of the Scotland Act came into force vis-à-vis the Scottish Law Officers (the Lord Advocate and the Solicitor General for Scotland) in late May 1999. The judges in Scotland, in their first flush of enthusiasm for Convention rights review of government action, immediately gave a very broad definition to “devolution issues” so as to encompass anything done by the prosecution in the course of any (summary or solemn) criminal trial in Scotland. The Scottish judges also insisted that the fair trial rights set out in art 6 ECHR imposed in Scotland duties directly upon the Lord Advocate and all those acting on his behalf in prosecuting offences. There was some initial opposition to this analysis – notably from Lord Hoffmann – in the first devolution cases to come before the Privy Council, but the more expansive approach to the Privy Council’s devolution jurisdiction advocated primarily by Lord Hope soon prevailed. The overall result was, in the words of Lord Bingham, “anomalous” and “surprising and unexpected” in that the Privy Council, when exercising its devolution jurisdiction, became a court – in which Scottish judges became a significant and at times dominant bloc – dealing exclusively with cases coming from Scotland.

1.2 The Privy Council in its devolution guise became, in effect, a second Scottish court of appeal rather than a UK constitutional court and dealt primarily with questions concerning the proper interpretation of Convention rights in ordinary criminal trials, rather than with broader constitutional issues. The only devolved *S.C.L. 1123 administration ever brought before the Privy Council in the first nine years of its devolution jurisdiction was that of the Scottish Ministers (included among their number being the Lord Advocate). And in this period every case – bar one* – which came before the Privy Council exercising its jurisdiction under the devolution statutes was a criminal case concerned with aspects of art 6 and its impact upon Scottish criminal procedure, whether in relation to the actions of advocates depute in solemn procedure or as concerned with the actions of procurators fiscal in summary trials. In the 17 substantive decisions Scottish criminal cases decided upon by the Privy Council in these *S.C.L. 1124 first nine years as the final court of appeal on devolution issues, the Board has effectively reversed the decision of the Scottish criminal appeals court on six occasions, and has overruled itself on one occasion. Appeals to the Privy Council have therefore played an important role in guiding the overall approach to be taken in Scottish criminal law and procedure to ensure its Convention compatibility. And with the participation of non Scottish judges in these appeals, the Privy Council jurisprudence has brought to an end the heretofore complete isolation of the system of Scottish criminal legal system from the rest of the United Kingdom and opened it up in part to external scrutiny and judgment.

1.3 But in exercising its devolution jurisdiction the Privy Council is not a court of general appeal against decisions of the (civil or criminal) courts in Scotland. The court of general appeal from decisions of the Inner House in Scotland remains the House of Lords while there is no right of general appeal to London against decisions of the High Court of Justiciary whether exercising its original or appellate criminal jurisdiction. It is instead a prerequisite for the Privy Council to be able to exercise its devolution jurisdiction, whether in a civil or in a criminal case, that there be a determination not simply of a civil right or criminal charge, but of a “devolution issue”. Paragraph I of Sch 6 SA defines “devolutions issues” as questions relating either to the legislative competence of the Scottish Parliament or to the exercise of functions by or among the “members of the Scottish Executive”. And
§ 44(1) SA defines as being "members of the Scottish Executive" the First Minister, other (Cabinet) Ministers appointed by him and the two Scottish Law Officers.

1.4 Now while it is at least arguable that advocates depute acted in persona Domini Advocati when prosecuting in the High Court, the fact that the Convention rights vires limits laid upon the "members of the Scottish Executive" by the Scotland Act were considered to also apply to fiscals carrying on summary criminal prosecutions was perhaps more surprising.

Procurators fiscal are expressly defined by Order in "S.C.L. 1125 Council to be "holders of offices in the Scottish Administration which are not ministerial offices" under § 126(7)(a)(ii) SA. And the criminal appeals court has held that the Crown Agent was not a member of staff of the Scottish administration within the meaning of § 51 (1)(b) of the Scotland Act 1998 and that in extradition matters at least, he did not act on behalf of the Lord Advocate. Accordingly the Crown Agent's allegedly Convention incompatible acts in extradition matters were not covered by the vires controls of the Scotland Act and so did not raise devolution issues and did not engage the appellate devolution jurisdiction of the Privy Council.

Further in Somerville v Scottish Ministers the House of Lords held that prison governors exercising their powers under the Prisons and Young Offenders Institutions (Scotland) Rules 1994 to order the segregation of prisoners were similarly not covered by the vires controls of the Scotland Act, on the basis that in so acting prison governors were exercising a distinct statutory function which could not be carried out by the Scottish Ministers.

1.5 In the light of these decisions it may be wondered whether the devolution jurisdiction of the Privy Council was ever properly exercised over (summary) criminal trials or was, instead, an example of late imperial over reach by what was, in its nineteenth century heyday, the court of final appeal for the British Empire. Latterly, indeed, the High Court of Justiciary has begun to re-energise the limited and narrow statutory appellate jurisdiction which the Privy Council may exercise in matters of Scots criminal law -- effectively reminding itself and the Judicial Committee that the Board is limited to giving to all other UK courts (including the House of Lords) an authoritative interpretation of the meaning of Convention rights within the United Kingdom -- leaving "S.C.L. 1126 the effect of this interpretation to be worked out by the courts with full jurisdiction to consider and decided upon these matters. In particular, the judges of the High Court of Justiciary have re-emphasised that the members of the Board of the Judicial Committee has no jurisdiction and is therefore not competent to decide upon general matters of criminal law or procedure in Scotland, for example, on such issues as the Crown duty of disclosure in criminal trials.

1.6 It may be that the fact that in Spiers v Ruddy the Privy Council (in a decision which contained less than convincing reasoning and which smacked more of judicial politics and pressure from the English Law Lords) overturned its unequivocal majority decision in R v HM Advocate (on the issue whether a proper construction of the Scotland Act and the reasonable time requirements of art 6 ECHR mandated an abandonment of a prosecution where it was no longer possible to conduct trial within a reasonable time) has weakened the prestige and reputation of the Privy Council as an independent supreme court in devolution issues, and has correspondingly emboldened the High Court of Justiciary to reassert its own position as the supreme court with general inherent jurisdiction in Scots criminal law. But whether or not rightly invested with jurisdiction when deciding on issues raised in summary trials, the effect of the devolution jurisprudence of the Privy Council has been to underline the basic fact that any competent criminal practitioner practicing in Scotland requires to have a proper expertise in the law of the European Convention on Human Rights, and also some comparative knowledge too of English criminal law practice and procedure.

2. The influence of European Union law

2.1 It is now also becoming increasingly clear that the competent criminal law practitioner in Scotland will have to have a knowledge and familiarity not only with the law of the European Convention on Human Rights but with European Union law too.

"S.C.L. 1127 The Lisbon Treaty proposals

2.2 One of the least commented upon provisions of the Lisbon Treaty is its creation of an EU wide "area of freedom, security and justice". The Treaty provisions forming the basis for this are set out in Title IV art 61 through to 69L of the Treaty on the Functioning of the Union ("TFU") which seeks to replace the provisions of Title VI, arts 29 to 42 of the EU Treaty ("EU"), and arts 61 to 69 of the EC Treaty ("EC").

2.3 This EU wide area of freedom, security and justice will be based on the following:
(i) the adoption of common policies on (external) border checks, asylum and immigration (arts 69-69CTFU);

(ii) co-operation among the judicial authorities of the Member States in both civil and criminal matters -- where appropriate through the European Judicial Co-operation Unit (EUROJUST) -- based on the principles of the mutual recognition of judgments, judicial decisions and decisions in extra-judicial cases, and including the possibility of creation of the European Public Prosecutor's Office "in order to combat crimes affecting the financial interest of the Union" (art 691 TFU);

(iii) inter-agency co-operation between the police in criminal matters, such police co-operation may be made directly between the police forces, customs authorities of the Member States and/or through the European Police Office (EUROPOL) (art 69J-K TFU);

(iv) the establishing of "minimum rules concerning the definition of criminal offences and sanctions" in specific areas of "particularly serious crime with a cross-border dimension: ...terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime (art 69F TFU).

2.4 The clear strong intention of the governments of the EU Member States (if not their peoples) in the battle against crime in the era of globalisation is, then, the creation of common definitions and sanctions across the EU for "particularly serious crimes". Member States government also accept the need for there to be a far greater readiness within their legal systems to accept and apply judicial and prosecutorial decisions made in one EU country in all the other Member States of the Union. The ambition of the promoters of the Lisbon Treaty is ultimately to seek the harmonisation at an EU level of both the substance of the criminal law, and the sentencing in response to its breaches, thereby preventing the creation of safer havens within the EU for say possible terrorist offences (for example, say, among those who would seek to "glorify" terrorism). Although this project for the Europeanisation of criminal law and sanctions is presented at a formal treaty level as aimed at "particularly serious crime with a cross-border dimension" these are not precise or watertight definitions and so cannot be said to form any specific limitation on the powers to be given to the EU legislature in criminal matters. What crimes are not "particularly serious"? And, in an era of globalisation and an area of (often, passportless) free movement, what crimes can be said to have no cross-border dimension?

*S.C.L. 1128 2.5 Provision is made for the European Court of Justice ("ECJ") in Luxembourg to have jurisdiction authoritatively to interpret, on preliminary references from national courts, the provisions of this treaty which are to be Euopeanised criminal law. Article 240A TFU specifies that the ECJ will have jurisdiction in matters concerning the Common Foreign and Security Policy of the EU to review the legality of "restrictive measures" adopted by the Council in the context of the Union's common foreign and security policy against legal or natural persons (see art 188 K TFU). By virtue of 240B TFU, the ECJ is granted jurisdiction to rule on the interpretation or validity of measures or decision taken (or conventions adopted) under the Treaties' provisions on Police and Judicial Co-operation in Criminal matters in disputes on these matters between Member States or between Member States and the Commission. The ECJ is, however, denied jurisdiction to review the validity or proportionality of decision carried out by the police or other law enforcement agencies of a Member State. The ECJ is also denied jurisdiction to review matters concerning the exercise of Member States responsibilities in relation to the maintenance of law and order or the safeguarding of their internal security. But, of course, given that this delimitation of the ECJ's jurisdiction is contained in a Treaty provision it is for the ECJ alone authoritatively to determine the scope and extent of this delimitation. In particular it may be said to be for the ECJ to determine whether any particular national measure has been taken by a Member State "in the exercise of its responsibilities with regard to the maintenance of law and order and the safeguarding of internal security" One has always to bear in mind in this regard the ECJ's line of case law emanating with and from the Greek Television decision to the effect that as soon as any national administrative decision -- or indeed primary legislation of the Member State -- sought to invoke a specific permitted derogation from EU law, the Member State's action was then "within the scope of EU law" and, inter alia, fundamental rights considerations could be used by the Court of Justice to consider and test the validity of the legislative and administrative actions of the Member State.

2.6 It should always be borne in mind by the practitioner that whereas decisions of the European Court of Human Rights require to be "taken into account" by any domestic court on Convention rights issues (see s 2(1)(a) HRA), under the scheme of the Human Rights Act, the decisions of the Strasbourg court are of persuasive value only and are not formally binding on the national courts. By
contrast decisions of the European Court of Justice as to the validity meaning and effect of any EU law instrument or Treaty do bind national courts as a matter of law (see s 3 of the European Communities Act 1972).

The European arrest warrant

2.7 One area in which the jurisdiction of the ECJ has already asserted itself is in relation to the interpretation of the provisions of the “European arrest warrant” brought into force by the European Council Framework Decision 2002/584 and implemented in the United Kingdom in part by the Extradition Act 2003. Even before the reforms proposed under the Lisbon Treaty, the European Court of Justice already had *S.C.L. 1129* jurisdiction under art 35 EU to consider preliminary references from national courts as to the proper interpretation and effect to be given to both arts 54 to 56 of the Convention implementing the Schengen Agreement and to the provisions of the Council Framework Decision 2002/584 concerning the European arrest warrant.

2.8 In general, where national legislation seeks to implement EU law -- and/or where a national measure seeks to derogate from EU law -- national courts have a duty under EU law to ensure that these national measures (which, by definition, fall *S.C.L. 1130* within the field of operation of EU law) are applied in accordance with the fundamental rights jurisprudence of the ECJ, including, in the case of the European arrest warrant in particular, the right to a fair trial. Further, since the relevant provisions of the United Kingdom's Extradition Act 2003 are measures derived from EU law the national court is obliged as a matter of EU law when applying these national law implementing provisions to interpret them so as far as possible in the light of the wording and purpose of the EU framework decision in order to attain the result which it pursues and thus comply with art 34(2)(b) EU.

And although the principle of “conforming interpretation” cannot serve as the basis for an interpretation of national law contra legem, that principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the EU framework decision.*

*S.C.L. 1131* 2.9 Recital 5 in the preamble to the European Council Framework Decision 2002/584 narrates that “the objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities ... covering both pre-sentence and final decisions.” But as the Grand Chamber of the Luxembourg court has observed in one such preliminary reference from a Belgian court, the European arrest warrant does not, at this stage, require any presumption in favour of the EU wide harmonization of the substantive or procedural criminal law of the Member States:

*59.... *It is not the objective of the Framework Decision to harmonise the substantive criminal law of the Member States and nothing in Title VI of the EU Treaty, Articles 34 and 31 of which were indicated as forming the basis of the Framework Decision, makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question (see by way of analogy, inter alia, Joined Cases C-187/01 and C-385/01 Göztütok and Brügge [2003] ECR 1-1345, paragraph 32, and Case C-467/04 Gosprini and Others [2006] ECR 1-9199, paragraph 29).*

2.10 And in art 1 (3) of the European Council Framework Decision 2002/584 it is expressly provided that, while the definition of the offences covered by the provision and of the penalties applicable are matters which fall to be determined by the law of the Member State issuing the extradition request, all Member States authorities require to *S.C.L. 1132* respect fundamental rights and fundamental legal principles as enshrined in art 6 EU. The national court is in any event also bound as a matter of EU law to read and to give effect to both the European provisions and those national provisions falling within their scope in a manner which is consistent with the requirements of fundamental rights as incorporated into EU law from the national constitutions of the Member States and as set out in the EU Charter of Fundamental Rights and Freedoms, in other International human rights instruments in which they have participated (such as, for example, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child) as well as in the provisions of the European Convention on Human Rights. There is thus some overlap between what EU law might require *S.C.L. 1133* and what the ECHR might expect, but the fact that a case falls within the ambit of EU law means that the range of potentially relevant human rights instruments and case law is much greater than in the case of a simple Convention rights challenge brought purely under the Scotland Act or the Human Rights Act.
The EU implications for the practice of criminal law

2.11 Member States have a duty under EU law to repeal national laws which are contrary to EU law. Where this has not been done, the Court of Justice has repeatedly stressed that it is the duty of national courts to give precedence to EU law in situations of conflict with national law, including fundamental national constitutional norms. Since a national law or constitutional rule which has the effect of denying or restricting an individual's EU law rights cannot be enforced before the national courts it is a good defence to a criminal charge (or a civil action) that the domestic legal instrument which forms the basis of the action is itself in breach of EU law.

2.12 In England and Wales this "Euro-fact" of the "primacy" of EU law over national law was creatively (and notoriously) relied in the course of the early 1990s by large retailers in a concerted campaign seeking to render the then existing restrictions on Sunday trading unenforceable. The retailers opened in defiance of the Sunday trading restrictions imposed on them by the Shops Act 1950. They then put forward defences against any attempt to enforce the national law by the criminal law by relying in court upon considerations of EU law which, they said, gave them a right to stay open and trade on a Sunday regardless of what the Shops Act provided. It was initially argued by was of defence on behalf of the retailers that these national restrictions on Sunday opening constituted a quantitative restriction on imports from other Member States in the EU and so contravened art 30 of the EC Treaty (now art 28 TFU). When this argument was ultimately rejected by the European Court of Justice, a new "Euro-defence" was found. The retailers then claimed that since the majority of people employed by them on a Sunday in retail outlets were women, restrictions on Sunday opening disproportionately and adversely affected women's employment, contrary to the EU law prohibition on indirect sex discrimination. The restrictions on Sunday trading in England and Wales were liberalised by the UK Parliament before this new defence had run its course. The retailers' extra-Parliamentary campaign for reform was successful.

S.C.L. 2008, Oct, 1122-1134

1. See, for example the decisions of the High Court of Justiciary in Starrs v Ruxton, 2000 JC 208; 2000 SLT 42 and Brown v Stott, 2000 JC 328; 2000 SLT 379.
2. See, for example, Montgomery v HM Advocate, 2001 SC (PC) 1; 2001 SLT 37 per Lord Hope at 2001 SC (PC) p 19G; 2001 SLT, p 48: "But the approach which that Act has taken is that the right of the accused to receive a fair trial is a responsibility of the Lord Advocate as well as of the court."
3. See, for example, Montgomery v HM Advocate, per Lord Hoffmann at p 7 B-C (41): "[A devolution issue] arises only if the prospective infringement of their rights is an act of the Lord Advocate. It is therefore necessary to identify the persons upon whom Article 6.1 imposes a correlative obligation. Whom does it oblige to act in such a way as to ensure a fair and public hearing? If, as a matter of construction of the Article, no obligation is imposed upon the Lord Advocate, then no complaint of an infringement of this particular Convention right can give rise to a devolution issue."
5. Lord Bingham of Cornhill, evidence to the Parliamentary Joint Committee on Human Rights, 26 March 2001: "When Scotland was united with England and Wales in 1707 it was clearly implicit in the Act of Union that there was no criminal appeal from Scotland to London ... There was originally a doubt as to whether there was even a civil appeal from Edinburgh to London, but it was very quickly established that there was and indeed extensive use of it was made to such an extent that there was very little time to hear English appeals! But what is important is that the Scots criminal system has always been self-contained and has had no English input at all. One of the anomalies and to me surprising and unexpected, results of devolution is that for the first time one does have judges, Scots prominently among them but nonetheless judges, sitting in London ruling on questions relating to Scots criminal trials."
See further Aidan O'Neill "Judging Democracy: Scotland's Constitution and Human Rights" in (2004) Edinburgh Law Review 177-205. It may be noted, for example, that Lord Hope of Craighead has appeared in and given a lengthy judgment in every case to date in which the Privy Council has been called upon to exercise its devolution jurisdiction.


The sole non-criminal case was A v The Scottish Ministers, 2002 SC (PC) 63; 2001 SLT 1331 (art 5(1)(e) ECHR and the detention of persons of unsound mind).

The JCPC cases dealing with solemn procedure are:(i) Montgomery v HM Advocate (art 6 ECHR fairness and pre-trial publicity – affirming the decision of the criminal appeals court);(ii) McIntosh v HM Advocate , 2001 SC (PC) 89; 2001 SLT 304 (art 6 ECHR presumption of innocence and drug confiscation orders – reversing the decision of the Criminal appeals court);(iii) HM Advocate v K (sub nom Dyer v Watson ) 2002 SC (PC) 89 2002 SLT 229 (art 6 ECHR reasonable time requirements and the factors indicating unreasonable delay – affirming the decision of the criminal appeals court);(iv) Mills v HM Advocate (No 2) 2003 SC (PC) I; 2002 SLT 939 (art 6 ECHR reasonable time requirements and unreasonable delay between conviction and hearing of appeal with the remedy of a reduction in sentence – affirming the decision of the Criminal appeals court);(v) R v HM Advocate , 2003 SC (PC) 21; 2003 SLT 4 (art 6 ECHR reasonable time requirements and unreasonable delay in bringing charges with the remedy of abandonment of the trial mandated under the Scotland Act – reversing decision of the criminal appeals court);(vi) Flynn v HM Advocate, 2004 SC (PC) I; 2004 SLT 663 (arts 5 and 6 ECHR tariffs for mandatory lifers – effectively correcting the interpretation of the legislation by the criminal appeals court);(vii) Holland v HM Advocate, 2005 SC (PC) 3; 2005 SLT 563 (art 6 ECHR fairness and procedure identification of accused by in the dock of the court – reversing the decision of the Criminal appeals court);(viii) Sinclair v HM Advocate , 2005 SC (PC) 28, 2005 SLT 553 (art 6 ECHR fairness and disclosure to the defence of relevant information in the hands of the Crown – reversing the decision of the criminal appeals court);(ix) Kearney v HM Advocate, 2006 SC (PC) I; 2006 SLT 498 (art 6 ECHR independence and impartiality requirements and whether temporary judges had the requisite independence from the Executive – affirming the decision of the criminal appeals court);(x) DS v HM Advocate, 2007 SC (PC) I; 2007 SLT 1026 (whether s 10 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 ("the 2002 Act") which inserted s 27A into the Criminal Procedure (Scotland) Act 1995 is compatible with the appellant's right to a fair trial under art 6 of the European Convention on Human Rights – affirming the decision of the criminal appeals court.

The JCPC decisions concerning trials conducted by and in the name of procurators fiscal are:(i) Brown v Stott, 2001 SC (PC) 43; 2001 SLT 59 (art 6 ECHR privilege age against self-incrimination – reversing the decision of the criminal appeals court);(ii) McLean v Buchanan, 2002 SC (PC) I; 2001 SLT 780 (art 6 ECHR fairness and legal aid and the equality of arms between prosecutors and criminal defence lawyers – affirming the decision of the criminal appeals court);(iii) Millar v Dickson, 2002 SC (PC) 30, 2001 SLT 868 (art 6 ECHR and the possibility of waiver of the right to an independent and impartial tribunal – reversing the decision of the criminal appeals court);(iv) Dyer v Watson, 2002 SC (PC) 89; 2002 SLT 229 (art 6 ECHR and the factors indicating unreasonable delay – affirming the decision of the criminal appeals court);(v) Clark v Kelly, 2003 SC (PC) 77; 2003 SLT 308 (art 6 ECHR and the independence and impartiality of the District Court – affirming the decision of the criminal appeals court);(vi) Robertson v Higson (sub nom Robertson v Frame) 2006 SC (PC) 22, 2006 SLT 476 (art 6 ECHR and whether the concept of acquiescence could be prayed in aid to prevent challenges to the validity of convictions and sentences pronounced by temporary sheriff who had insufficient structural independence from the Executive to be art 8(1) compliant – affirming the decision of the criminal appeals court);(vii) Spiers v Ruddy, 2008 SCL 424; 2008 SLT 39 (art 6 ECHR reasonable time requirements and unreasonable delay in bringing to trial and remedy under the Scotland Act – a mandatory reference on the application of the Lord Advocate direct from the sheriff court in which the JCPC reversed its own earlier decision in R v HM Advocate, 2003 SC (PC) 21; 2003 SLT 4 by now holding that the right to a trial within a reasonable time did not entitle under the Scotland Act a right not to be tried after an unreasonable time).
These articles of the Schengen Convention have been accepted/implemented by the UK notwithstanding that the UK remains outside the full Schengen agreement and accords. See art 1 of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ 2000 L 131, p 43) and Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland.
In C-467/04 Criminal Proceedings against Gasparini [2006] ECR 1-9199, the European Court of Justice observed at para 41: "[T]he system under Article 234 EC is capable of being applied to references for a preliminary ruling pursuant to Article 35 EU, subject to the conditions laid down in the latter article (see Case C-105/03 Pupino [2005] ECR 1-5295, para 29). Under the procedure envisaged in Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. The Court of Justice is thus empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court puts before it (see Case C-235/95 Dumon and Froment [1996] ECR 1-4531, para 25, and Case C-421/01 Traunfellner [2003] ECR 1-11941, para 21)."
LIMITED GOVERNMENT, FUNDAMENTAL RIGHTS AND THE SCOTTISH CONSTITUTIONAL TRADITION

AIDAN O’NEILL*

INTRODUCTION

In his work of 1324 CE, Defensor Pacis (“Defender of the Peace”), Marsilius of Padua relied on Aristotle’s Politics to reclaim a view which saw political power and authority as being conferred from the bottom up, by and from the people. Among the conclusions reached by Marsilius were that:

- “the whole body of citizens or its majority alone is the human ‘legislator’”;
- “the ‘legislator’ alone or the one who rules by its authority has the power to dispense with human laws”;
- “the elective principality or other office derives its authority from the election of the body having the right to elect, and not from the confirmation or approval of any other power”;
- “there can be only one supreme ruling power in a State or kingdom”; and that
- “no prince, still more, no partial council or single person of any position, has full authority and control over other persons, laymen or clergy, without the authorization of the ‘legislator’”.

In reaching these conclusions, among others, Marsilius ran wholly counter to the prevailing theologically driven “top-down” debates which focused instead on the supposed details of the authority and power which had been granted by God to ecclesiastical and secular rulers. In so re-positioning the debate away from God and on to the people, Marsilius anticipated and became, in a sense, the father of modern democratic political thought. The focus which Marsilius put on the sovereignty of the people would prove in time to be just as potentially revolutionary for kings as it was for Popes. Since if the political claims of the Popes could be questioned in the name of the people, so too, in time, might the claims of their secular rulers come to be challenged on the

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1 See generally Walter Ullmann, Principles of government and politics in the Middle Ages, 3rd edn (London: Methuen; New York: Barnes & Noble, 1974).

same basis. Indeed the claim that the people were the source of legitimation of temporal rule was at times used by those writing in support of Papal claims to power to undermine the authority of and encourage resistance to the Holy Roman Emperor.3

The Declaration of Arbroath

The implications for secular rulers of this founding of legitimacy in the consent of the people is clear from, taking simply as one example in medieval Europe, a seminal text in Scottish political and legal history which was composed almost contemporaneously with the writings of Marsilius of Padua. The Declaration of Arbroath of 1320 was, in form, a letter to the reigning Pope, John XXII, in his capacity as an international arbiter, requesting him to, “admonish and exhort the King of the English”, to end his grumbling ongoing military campaign in Scotland and, “to leave us Scots in peace”. The complaint was made that in invading Scotland—which earlier Popes had recognised as constituting a distinct kingdom and people with its own church hierarchy independent from that of England4—and seeking to subdue and/or annex Scotland to his kingdom, the English king Edward I (“Hammer of the Scots”) had carried out wanton acts of, “cruelty, massacre, violence, pillage, arson, imprisoning prelates, burning down monasteries, robbing and killing monks and nuns, and yet other outrages without number which he committed against our people, sparing neither age nor sex, religion nor rank”. The letter was composed by a Scottish Churchman, Bernard de Linton, the Abbot of Arbroath, and was signed by leading nobles and gentry bearing to represent, “the whole community of the realm of Scotland”. Two other letters in similar terms—from the Scottish clergy and from the King of Scots—were composed at the same time but no copies of these have survived. The surviving letter suggested that any failure on the part of the Pope to condemn the English action in Scotland would tarnish such reputation he might hope to garner for himself as a defender of the Church, of Christendom and of the Christian Holy places. The letter claimed that Papal interests were directly concerned in this issue on the basis that the continued war of the English against the Scots was preventing the Scots from participating in a Crusade in the Holy Land. It stated, too, that the English campaign against the Scots was being used by the

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3 See for example the Alsatian monk, Manegold of Lautenbach writing around 1080 CE on the Papal side against the Emperor put forward the idea that the secular prince ruled by virtue of a contract with the people which if broken by the ruler would call into question his authority. For a fuller discussion of the ideas of Manegold see G.H. Sabine, A history of political theory, 4th edn, revised by Thomas Landon Thorson (Hinsdale, Illinois: Dryden Press, 1973).
4 See Pope Celestine III Bull of 1192 CE, Cum universi, which collectively recognised the dioceses of the Scottish Church as a “special daughter” of the Roman see with a direct unmediated relationship to the Papacy.
English simply as an excuse not to join in the Crusade, suggesting that, "the real reason that prevents them is that in making war on their smaller neighbours they find quicker profit and weaker resistance". The letter advised the Pope that he would be to blame for, "the slaughter of bodies, the perdition of souls, and all the other misfortunes that will follow, inflicted by them on us and by us on them", if he should favour the English claims in this dispute.

Crucially the document makes two important constitutional claims about kingship. First that, "it was the due consent and assent of us all have made Robert Bruce our Prince and King". Secondly that the continued kingship of Robert Bruce was conditional on his maintaining the integrity and independence of the Scottish nation, for:

"[I]f he should give up what he has begun, and agree to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own rights and ours, and make some other man who was well able to defend us our King. For, as long as but a hundred of us remain alive, never will we on any conditions be brought under English rule. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom—for that alone, which no honest man gives up but with life itself."  

Pope John XXII's initial response to the Scottish document was to support the Scottish claims and a peace treaty was concluded between Scotland and England in 1323. It may be that this was simply the Papacy doing nothing more than recognising the political and military realities on the ground, rather than acting in any sense as an independent supranational arbitrator and peace broker. For as has been noted:

"[A]nother aspect of the new political reality which [Pope] John XXII fostered [was] the emergence of centralizing monarchies jealous of their independence [which] led to a decline in the acceptability of arbitration by the pope, or by anyone else from outside the borders of the national kingdom. Declarations calling for obedience to papal justice were only token gestures made to old norms which had become meaningless in the political reality of the late Middle Ages. Moreover, the political process caused individuals to reassess their personal priorities as citizens of an

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emerging national entity. The author of the *Disputatio inter clericum et miliem* in the late thirteenth century already had asserted that the clergy too were expected to become involved in the [national] political process, for "the king’s arm is your buttress; the king’s peace is your peace; the king’s safety is your safety."  

Judged overall, the Papacy of John XXII (1316–1334 CE) and those of his Avignon successors marked a decline in the power and prestige of the Papacy which was accelerated by the Great Schism in the Western Church from 1378 when initially two distinct lines of Popes (maintaining distinct courts in Avignon and Rome respectively) co-existed, each anathematising and excommunicating the other as an illegitimate usurper of the office. A church council held at Pisa in 1409 simply compounded the confusion by electing a third Pope, Alexander V, without first securing the resignation of the reigning rival Avignon and Roman Popes. Alexander V reigned for less than year but was himself succeeded by John XXIII as a Pisan Pope. The schism was only resolved by the convening by the Holy Roman Emperor Sigismund of a general Council of the Western Church at Constance in 1414 in the name of the Roman Pope Gregory XII who, after formally empowering the council to elect the new Pope, abdicated so leaving the council free to declare both John XXIII and the Avignon Pope Benedict XIII deposed, and to elect a wholly new candidate, who took the name Pope Martin V, thereby ending the schism and ensuring the existence once more of only one line of Popes. The fact of the Great Schism brought questions of legitimacy, authority and sovereignty to the fore of intellectual consideration. One positive legacy of the Great Schism might be said to be the revival of secular political thought and the revival of democratic thinking in the West. The German Cardinal and polymath Nicholas of Cusa was able to write in the wake of the ending of the Schism as follows:

"All legitimate authority arises from elective concordance and free submission. There is in the people a divine seed by virtue of their

7 The Council of Constance in its canon *Sacrosancta* of 1415 CE declared as follows: "[T]his same council, legitimately assembled in the Holy Ghost, forming a general council and representing the Catholic Church militant, has its power immediately from Christ, and every one, whatever his state or position, even if it be the Papal dignity itself, is bound to obey it in all those things which pertain to the faith and the healing of the said schism, and to the general Reformation of the Church of God, its head and members. It further declares that any one, whatever his condition, station or rank, even if it be the Papal, who shall contumaciously refuse to obey the mandates, decrees, ordinances or instructions which have been, or shall be issued by this holy council, or by any other general council, legitimately summoned, which concern, or in any way relate to the above mentioned objects, shall, unless he repudiate his conduct, be subject to censure, and be suitably punished, having recourse, if necessary, to the other resources of the law."
common birth and the equal natural right of all so that all authority—which comes from God as does mankind itself—is recognized as divine when it arises from the common consent of the subjects.8

The main consequence of the Western Schism was, however, that the prestige of the Papal office was irretrievably damaged and it was, in part, the memory of the Great Schism which led ultimately to the complete rejection of Papal authority, both political and ecclesiastical, which marked the Protestant Reformation movement in the Europe of the sixteenth century.

THE CONSTITUTIONAL IMPACT OF THE PROTESTANT REFORMATION IN THE BRITISH ISLES

In 313 CE Emperor Constantine I (280–337 CE) brought to an end the era of official persecution of the Christian cult with the Edict of Milan and confirmed that Christianity would now be legally permitted within the Roman Empire. Constantine thereafter used the imperial powers of the Roman State to create, define and defend Christian orthodoxy. Subsequently—in recognition of his contribution to the development of the Church (and despite having had his wife, the Empress Fausta, and his son Crispus both executed)—he was, after his death, celebrated by the Eastern church as a saint—harking back, perhaps, to the traditional Imperial cult and pagan Roman practice of proclaiming dead emperors to be divinities—and was accorded by the Church the title isapostolos, that is co-equal to the apostles.

In the official English Reformation, this triumph of the Emperor Constantine was seen as a useful template on which to remodel Church-State relations in England. In the Scottish Reformation, which took place a generation later in 1560, a more radical approach to the history of the early Church was taken with the Constantinian moment now being understood as a mistake and therefore to be decisively rejected, rather than emulated as a model for post-Papal Church-State relations.

Rex in regno suo imperator est

In the England of Henry VIII, the civil and intellectual turmoil associated with the ideas of the Protestant Reformation was ultimately seen by the king as providing a political opportunity for the secular ruler effectively to nationalise the Church within his territories. The supranational claims of the Bishop of Rome could be repudiated, he thought, but the existing ecclesiastical hierarchical structures and established doctrine still maintained. Instead of the

Pope having any supervisory authority, the king could now arrogate to himself a position of supreme governor over the Church within his realm. This was seen by Henry VIII at least to be simply a political rather than some profound theological change. And instead of a usurpation or innovation, such a transfer of power over the Church to the State authorities in England could be presented instead as a restoration of the same constitutional order which had prevailed in the Roman Empire in the reign of Constantine I from the time of his formal recognition of Christianity. The English king would simply be regaining and using the full imperial power proper to his office. The Church in England would therefore be subject to the same constitutional dispensation, caesaropapalism, as was thought to have prevailed in the Orthodox Churches of the East throughout the history of the Byzantine, and later the Russian, empires.

It was this imperial theory which was taken up by Henry VIII of England to force through the annulment of his marriage to Catherine of Aragon in the face of Papal opposition from Pope Clement VII. The Restraint of Appeal Act 1533, which sought to end the right of appeal guaranteed in Canon law of the Roman Church from the Church courts in England to the Roman Rota, stated that:

"... here by divers sundry old authentic histories and chronicles it is manifestly declared and expressed that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same."

In the following year the first Supremacy Act 1534 explicitly tied the office of head of the English Church to the English imperial crown, stating that, "the only supreme head in earth of the Church of England called Anglicana Ecclesia, and shall have and enjoy annexed and united to the imperial crown of this realm."

The, perhaps surprising, thing about the English church’s enforced break from Rome is how little institutional dissent or objection appeared to it within either the ruling elites of either the English Church or the State. Only one bishop, John Fisher of Rochester, openly objected to the move and only one leading politician, the Lord Chancellor Thomas More, let his private dissent become publicly assumed. Both of these individuals were eventually tried and executed for treason to the English monarch for their respective failures to accede to the Oath of Supremacy, though with Thomas More insisting to the end that he died the King’s, “good servant and God’s first”.9 While

Henry VIII could rely upon the notion of his imperial rights and the example of the Emperor Constantine and his relations with the Christian Church to justify and validate his repudiation of Papal sovereignty as lawful and in accord with precedent, the intransigence of Fisher and More in the face of the king's imperial claims could be understood and re-told within a different narrative and period of early Christian history, that of the martyrs of the Christian Church in the era before Constantine refusing to abandon their faith in the face of the unlawful demands of the pagan Roman Emperors. Certainly, the idea of the pre-Constantinian suffering Church undergoing imperial persecution was clearly also a powerful icon in Ireland where the attempt to impose the Henrician reforms on the Church proved markedly less successful, among the common faithful at least, than in England.

The king as "God's silly vassal"

While the English king in the 1530s was engineering a breach with the Roman Church, his nephew James V, the King of Scots, was by contrast apparently consolidating his country's connections with the Roman See. Thus in 1532 Scotland's principal civil court, the Court of Session, was re-founded as a "College of Justice" modeled on an institution of the same name in the ancient Lombard capital of Pavia. In its re-founding the new college was largely funded by a grant from the Papacy and contained a significant number of senior Catholic clerics among its judges (now styled Senators) to administer the Scottish civil law, which was then an admixture of classical Roman law governing contracts and commerce, Canon law for inheritance and family law, and feudal law in relation to rights over land.

The Protestant Reformation and the official break from Rome took place in Scotland in 1560 almost 30 years after that of England and took a far more radical and revolutionary turn than the earlier English Reformation. Whereas the English Reformation and creation of Anglicanism can be characterised as primarily a top-down reform initiated by the King, Henry VIII, in the 1530s as a way of increasing royal power by annexing the Church and its existing Episcopal structures to the State, in Scotland the Reformation which occurred a full generation later from that in England involved a wholesale dismantling of the Catholic Church's existing structures and institutions—bishops, canons, abbeys, monasteries and collegiate churches—and that done in the face of royal opposition albeit at a time when the Queen, Mary, was still in France (briefly indeed reigning as its Queen until the death in 1561 of her then 17 year old husband, the French King, Francis II). The Scottish religious Reformation of 1560 ultimately precipitated a civil war in Scotland led by powerful faction of the Scottish nobility committed to Protestantism against the forces of the still Catholic, Mary, Queen of Scots (1542-1567 CE). The Queen was captured and imprisoned by the victorious Protestant Lords and in 1567 CE forced to abdicate in favour of her infant son (James VI) who was taken from her, to be brought up by guardians and tutors steeped in the radical Calvinism of the successful Scottish Reformers.
As we noted, this Calvinism took an entirely different approach to the Constantinian moment in the history of the Church from that which had been followed by the Royal Reformation party in England. Rather than seeing this as a period in which Christianity conquered the Roman Empire, it came to be regarded instead as the capture and annexation of Christianity by the Roman Emperors. The Constantinian moment represented, for the radical Reformation thinkers of the latter half of the sixteenth century and first half of the seventeenth century, a wrong turning. Instead of having history repeat itself by allowing the Church once again to come under the dominion of an imperial Caesar, their vision was one in which Christianity would transform the polity, turning it from imperial autocracy back to the republican values of a commonwealth. The pretensions of Caesar over the Church would be exorcised from the State, just as Jesus had driven out the demon, Legion, from the Gerasene demoniac.\footnote{See Mark 5: 6-13: “Catching sight of Jesus from a distance, he ran up and prostrated himself before him, crying out in a loud voice, ‘What have you to do with me, Jesus, Son of the Most High God? I adjure you by God, do not torment me!’ (Jesus had been saying to him, ‘Unclean spirit, come out of the man!’) Jesus asked him, ‘What is your name?’ He replied, ‘My name is Legion, for we are many.’ And the man pleaded earnestly with Jesus not to drive them away from that territory. Now a large herd of pigs was feeding there on the hillside. And they pleaded with him, ‘Send us into the pigs. Let us enter them.’ And he let them, and the unclean spirits came out and entered the pigs. The herd of about two thousand rushed down a steep bank into the sea, where they were drowned.”}

Accordingly, in the course of the sixteenth and seventeenth centuries the Scottish Reformers sought a constitutional settlement within the State—in line with Calvin’s Geneva—which carefully separated and distinguished between the co-existent powers and functions of the civil magistrate and those of the Church. Thus the Scottish Reformation differed radically from the English in its understanding of the relationship of Church and State. In the England of the Tudors, the king became Supreme Governor of the Church; in Scotland the Reformation, instead, wholly deposed the king in the sphere of the ecclesiastical and rendered the king as no more than, at best, an ordinary member of the Church, wielding no authority \textit{ex officio} within it. Its orthodox Calvinist ecclesiology allowed that:

“... the civil magistrate hath authority, and it is his duty to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof, he hath power to call synods, and to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God.”\footnote{Westminster Confession of Faith 1647 Ch.xxiii 3.}
But this was understood to mean that the civil power had legal authority and a duty to concern itself about the interests of religion and the welfare of the Church and to provide for the advancement of the Church's interests and welfare in the temporal sphere and not that the civil power had any right or power to interfere within the internal workings of the Church itself. The political theology of the reformed Scottish Church was one which emphasised the limitations of the secular power before the Church. In the words of the leading second generation reformer, Andrew Melville, in 1596, the King:

"... was God's silly vassal and that there are two kings and two kingdoms in Scotland. There is Christ Jesus the King, and His kingdom the Kirk, whose subject King James VI is—and of whose kingdom, not a king, nor a lord, nor a head, but a member he was."

Andrew Melville was able to articulate such radical republican sentiment before the King himself because he could draw on the work of George Buchanan (1506—1582 CE), the noted European humanist scholar, historian of Scotland, tutor to the young James VI, and ideologue of—and apologist for—the post-1560 CE Scottish Reformation’s constitutional settlement. In his dialogue written in 1567 CE and published in 1579 CE, *De iure regni apud Scotos* (which might be translated as *On Constitutional Government in Scotland*) Buchanan insisted on the existence of an immemorial Scottish tradition to the effect that the power received by the kings of Scotland had from the outset been limited and restricted by the laws and customs of the people. The existence of such boundaries or limitation on power meant that the king could be required as a matter of law to act only in an intra vites manner. The law and customs of the Scots in relation to Kings was therefore said to be one of a limited constitutional monarchy involving subordination of the Crown to the law, the Crown’s answerability before the courts, and the people’s right of revolt against a monarch in fundamental breach of his or her duties. By these arguments Buchanan sought to provide a reasoned political justification for the specific deposing of Mary by the Protestant Lords. More
generally he articulated and defended the idea of monarchy being limited by
laws enforceable before the courts, and echoing the sentiments set out in the
declaration of Arbroath of 1320 (the terms of which he was unaware)\textsuperscript{15}
asserted the right of the people to replace a monarch who willfully over-
stepped the limits of his office. As he states:

"[T]he law should be yoked to the king to show him the way when he
does not know it or lead him back to it when he wanders from it... I
want the people who have granted the king authority over themselves to
be allowed to dictate to him the extent of his authority, and I require him
to exercise as a king only such right as the people have granted him over
them... [T]he power received by our kings from our ancestors was not
unbounded but was limited and restricted within fixed boundaries... It
makes no difference to me whether the king himself appears in court or
his procurator. In either event, the king will be at risk in litigation: any
profit or loss arising from the result of the trial will fall to him, not to his
procurator. In short the king himself is the defender, that is the person
whose case is in dispute. There is no justification either for the complaint
and protest of those who argue that it is neither proper or just that a
verdict on a king should be delivered by a man of lower rank... For no
one who comes before a judge comes before an inferior, especially since
God himself pays so much honour to the judicial order that He calls them
not only judges but gods and, so far as this is possible, imparts to them
His own dignity... The verdicts of judges are valid when pronounced in
accordance with law, otherwise they are rescinded... The judge has his
authority from the law, not the law from the judge... and the lowly rank
of the person pronouncing the verdict does not diminish the dignity of the
law, but the dignity of the laws is always the same, whether it is a king, or
a judge or a herald who pronounces the verdict."\textsuperscript{16}

New constitutional models formed from the Reformation in Europe

Classically, Aristotle had described the different varieties of constitutional
government under reference to the number and quality of the persons invested

\textsuperscript{15} William Ferguson The identity of the Scottish Nation: an historic quest, 1998, p.42: "[T]he
Declaration [of Arbroath]... has had a chequered history. Known only in some manuscript
versions of the Scottichronicon it became lost to sight. It was for example, unknown to George
Buchanan, whose political theory it would have confirmed. It did not surface again until the late
seventeenth century, when it was first printed by Sir George Mackenzie of Rosehaugh, the
eminent lawyer and antiquarian. Not surprisingly an English translation of the declaration was
published at the Revolution of 1688 to support those who opposed the divine right theory of
kingship."

\textsuperscript{16} Roger Mason and Martin Smith, A Dialogue on the law of kingship among the Scots—a critical
edition and translation of George Buchanan's De iure regni apud Scotos dialogus (Ashgate:
Aldershot, 2004), pp.33, 55, 133, 143.
with ruling authority: a State ruled by one man was a monarchy or tyranny, depending on whether the rule was ordered to the good; a State ruled by the few was be termed either an aristocracy or an oligarchy on the same principle; and a State ruled by many might be either a constitutional polity or a democracy, with the latter term for Aristotle being a pejorative one denoting, in effect, “mob rule” where the poor and needy reign supreme.17

The classification of the constitution of States following the sixteenth century Protestant Reformation in Europe follows a different model. Rather than being determined or described by the number and quality of people ruling, the determining or classifying factor for the countries of a now splintered Christendom became the role of the Church within the polity. It may be said that one of the results of the Reformation was the crystallisation or precipitation of new and different forms of political structure within the continent’s emerging nation States. The various political settlements which emerged from the Reformation could be attributed to the fact of different answers being given to the long contested question as to what was properly due to Caesar and what to God. We can now say, post-Reformation, that in the West the constitutional relationship between religion and the State fell into distinct “ideal types” which may be labelled, respectively: theocratic, Erastian, dualist and, latterly in the wake of the Enlightenment and the French Revolution, secularist.

On the theocratic model the claims of religion take precedence over the claims of the State; religious law trumps civil law in the event of conflict; and the civil magistrate is required to defer to the religious authorities who exercise temporal and spiritual authority within the civil sphere. The immediate response of the Popes to the denial of the political and religious revolutions that marked the Protestant Reformation was to assert some form of theocratic prerogative (and elements of the theocratic model may be seen in the present day constitution of Iran and of the Vatican State).

17 See Aristotle, Politics, Book 3, Ch.VII (translated by Benjamin Jowett): “The words constitution and government have the same meaning, and the government, which is the supreme authority in states, must be in the hands of one, or of a few, or of the many. The true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one or of the few, or of the many, are perversions. For the members of a state, if they are truly citizens, ought to participate in its advantages. Of forms of government in which one rules, we call that which regards the common interests, kingship or royalty; that in which more than one, but not many, rule, aristocracy; and it is so called, either because the rulers are the best men, or because they have at heart the best interests of the state and of the citizens. But when the citizens at large administer the state for the common interest, the government is called by the generic name—a constitution. And there is a reason for this use of language. One man or a few may excel in virtue; but as the number increases it becomes more difficult for them to attain perfection in every kind of virtue, though they may in military virtue, for this is found in the masses. Hence in a constitutional government the fighting-men have the supreme power, and those who possess arms are the citizens. Of the above-mentioned forms, the perversions are as follows: of royalty, tyranny; of aristocracy, oligarchy; of constitutional government, democracy. For tyranny is a kind of monarchy which has in view the interest of the monarch only; oligarchy has in view the interest of the wealthy; democracy, of the needy: none of them the common good of all.”
On the Erastian model, ecclesiastical authority became subordinate to the civil power; the Church was “established” as a department of State; and the State authorities might legislate and adjudicate in matters concerning the doctrine, worship and discipline of the Church. The Erastian approach classically influenced the reformed religious settlements to be found in the Nordic countries of Europe—with their various State Lutheran Churches—as well as the established Church of England and was characteristic of the first wave of the Reformation where princes took up the cause of the Reformation seeing it as an opportunity of nationalising and gaining control over the Church within their realms.

We have also noted that the Scottish Reformation of 1560—part of Europe’s second wave of more radical religious reform based on a coherent ideology of evangelical Protestantism—aimed at the realisation of a quite different model which was developed within the context of a radically democratic Presbyterian Church polity and which harked back to the constitutional dualism articulated by Pope Gelasius at the end of the fifth century CE. Under this model each individual member of the Church was also a full member of civil society. He or she owed allegiance simultaneously both to Church and to the State. Church and State, then, co-existed in creative dialogue, each with their particular spheres of influence and authority but always with the possibility of overlap between the two. The independent voice of religion could and would, on this model, be heard in the public square. But the corollary of this was that the civil magistrate was given a role in ensuring that the claims of religion did not overstep the fundamental limits on which civil society is based. Unlike the other models of Church State relations which adopted top-down approaches, delineating the relationship between God and Caesar from the viewpoint of God and Caesar, the Scottish Calvinist model sought to work out the relationship between the two from the viewpoint of the individual who was simultaneously a citizen of the State and also a member of the Church. The approach taken was fundamentally a democratic one—the Church was made up and governed by the assemblies of its members, just as the powers of those entrusted with the governance of the State was understood as limited by the assembly of its people. On this model Church and State authority co-existed equally in the one territory in co-operative dialogue and creative tension. This Scottish constitutional

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18 In 494 CE Pope Gelasius I (the Bishop of Rome from 492–496 CE) sent the letter (now known from its opening words Duo sunt) to the Eastern Roman (Byzantine) Emperor Anastasius on the subject of their respective distinct spheres of authority, in which he stated (as translated by Brian Tierney, Religion, Law and the Growth of Constitutional Thought, 1150–1650 (Cambridge: Cambridge University Press, 1982), pp.13–14): “Two there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power. Of these the responsibility of the priests is more weighty, in so far as they will answer for the kings of men themselves at the divine judgment . . . [I]n the order of religion . . . you ought to submit yourselves [to priests] rather than rule . . . [T]he bishops themselves . . . obey your law so far as the sphere of public order is concerned.”
LIMITED GOVERNMENT, FUNDAMENTAL RIGHTS

model—developed within the context of a radically democratic Presbyterian Church polity—sought to resolve the implicit tension within that dualism first spelled out by Pope Gelasius in Duo sunt.19

All of these pre-secularist constitutional models sought to preserve some notion of the rule of law and avoid conflict between the claims of religion and an individual's civil obligations, whether by subordinating one to the other or by treating the two as existing in distinct worlds, but they all are subject to different tensions. Yet all of them had ultimately to take account of—and make accommodation for—the sheer fact of religious minorities within the communities over which they ruled. It was the existence of such religious minorities within the polity which required States in the end to develop policies allowing for religious tolerance. Religious tolerance became necessary because, with the Reformation, it finally proved impossible to eliminate individual dissent and protest from majority or State sanctioned views on matters religious. But once religious dissent was allowed for, then what should properly be rendered to Caesar and what properly to God became, in principle a matter for freely taken individual decision and informed conscience rather than a matter of (potentially competing) imperial or ecclesiastical diktats, backed by threats or coercion—a result which would have dismayed Thomas More and Andrew Melville equally.

RELIGIOUS INTOLERANCE AND REVOLUTIONARY SENTIMENT: A SCOTTISH COMBINATION

We have noted that the Scottish Reformation differed radically from the English in that it was carried out against the wishes of and in the face of opposition by the reigning sovereign. The Scottish Reformation was fundamentally an act of revolution. Its apologists, notably the humanist poet and scholar, George Buchanan, sought to justify the revolutionary aspect of the Scottish Reformation by invoking a supposed radical Scottish constitutional tradition. This line of thought which deemed revolutions against the monarch to be justified was taken up with particular gusto by the Presbyterian elements in the Scottish reformed church in the course of the seventeenth century constitutional convulsions which gripped the British Isles. It was indeed this tradition which was called upon to justify the position taken in the National Covenant of 1638 which claimed it legitimate to rebel and take up arms against an unpopular king on the basis that he had no lawful authority to impose his own religious practices upon the people.

In March 1689 a “Convention of Estates”—a convocation of the Scottish Parliament—met in Edinburgh to address the constitutional problems resulting from the flight in December 1688 of King James II of England and VII of

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Scotland to France following upon the landing in November 1688 of the Dutch invasion force in the south-west of England headed by William, Stadthoulder of Holland and Prince of Orange. In February 1689, the Crown of England had been formally offered by the English Parliament jointly to William of Orange (a nephew, through his mother, of James Stuart) and to his wife Mary (the king’s elder daughter) to rule together as dual sovereigns. The two incomers readily accepted the English Crown, though Mary ceded executive power to William to exercise alone.

The 1689 Convention of Estates declared itself to be, “assembled in a full and free representative of this Nation [of Scotland]”. It convened itself a matter of weeks after the English had offered the throne to William of Orange—by now styled William III of England—and contained a significant and well-organised Presbyterian grouping. This faction strongly supported the idea of the Scottish Crown being offered to William of Orange (for him to become William II, King of Scots) on condition that he supported their demands for the suppression of Episcopacy as forming any part of the government of the Reformed Church in Scotland. In order to be able to make any such offer, the Estates had to deal with the position of their heretofore lawful monarch, James VII, King of Scots. They did so by issuing a document, styled the “Claim of Right” of 1689. The Scottish Claim of Right 1689 reads now as a profoundly sectarian document and its continued contemporary relevance for understanding the Scottish constitution has been questioned.

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20 The provision against toleration of Catholics and Catholicism in the Claim of Right include the following declarations:

“That by the law of this Kingdom no papist can be King or Queen of this realm nor bear any office whatsoever therein nor can any protestant successor exercise the regal power until he or she swear the Coronation Oath

That all Proclamations asserting an absolute power to Cass annul and Disable laws The Erecting Schools and Colleges for Jesuits The Inverting protestant Chapels and Churches to public Mass houses and the allowing Mass to be said are Contrary to Law

That the allowing Popish books to be printed and Dispersed is Contrary to law

That the taking the children of Noblemen Gentlemen and others sending and Keeping them abroad to be bred papists The making funds and Donations to popish schools and Colleges The Bestowing pensions on priests and the perverting protestants from their religion by offers of places preferments and pensions are Contrary to law

That the Disarming of protestants and Employing papists in the places of greatest trust both Civil and military the thrusting out protestants to make room for papists and the intrusting papists with the forts and magazines of the Kingdom are Contrary to Law”.

21 Colin Boyd, O.C., then Lord Advocate now Lord Boyd of Duncansby, Speech to the Conference of the Law Society of Scotland on the UK Supreme Court Proposals, January 21, 2004, para.26: “Leaving entirely aside the provisions of the Human Rights Convention and of the legislation as to discrimination made under the European Union treaties, no-one has complained that the Education (Scotland) Act 1918, which extended the right to public education to members of the Catholic faith was in breach of the Claim of Right. If we are to accept that the Claim of Rights is a golden statement of immutable principles, then we should be told why it is that its strictures on the practice and dissemination of the Roman Catholic faith, which looks very odd to our modern eyes, are not to be followed today, while its rather vague provision about political appeals are set in stone for all time coming.”
From the tenor of the document, James VII’s greatest offence appears to have been the fact that he was publicly Catholic (“being a professed papist”)—though the case was certainly made against him that the political theology and constitutional theory then (and still?) underpinning the Roman Catholic church were arguably committed to an absolutist theocratic model wholly inimical to the idea of civil society which was founded upon open and public dissent from the doctrines and practices of the Roman Church.  

From the point of view of constitutional law and theory, the Scottish Claim of Right 1689 made the radical claim that James VII had “forfeited” his right to the Scottish Crown by reason of his “illegal actions” while king. The use of the word “forfeited” was of particular significance because it necessarily implied, consistently with the terms of the 1320 Declaration of Arbroath and with the justifications offered by George Buchanan for the earlier deposition of Mary Queen of Scots in 1567, a notion of kingship as legally limited and determined by the people. Such an idea, of course, ran directly counter to the Stuart monarchs’ absolutist claims in the course of the seventeenth century to be kings by “divine right” (reviving in effect the imperialist claims for kingship made by Henry VIII in his takeover of the English church). On the Scottish consensual model, if the king misused his powers, he could, wholly lawfully, be deposed by the people. It may be said that this radical revolutionary tradition within the Scottish constitution reached its apotheosis with this decision by the Scottish Parliament to declare James VII deposed on the basis of their claims that he had over-reached the lawful limits placed on his executive power.

But such radical revolutionary views were never permitted to form part of the accepted pre-1707 Union constitution of England, which had characterised the regidical republican regime of 1649–1660 latterly governed under the personal

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22 See for example John Locke, “A Letter concerning toleration” (1689) (as translated by William Popham): “That Church can have no right to be tolerated by the magistrate which is constituted upon such a bottom that all those who enter into it do thereby ipso facto deliver themselves up to the protection and service of another prince. For by this means the magistrate would give way to the settling of a foreign jurisdiction in his own country and suffer his own people to be listed, as it were, for soldiers against his own Government. Nor does the frivolous and fallacious distinction between the Court and the Church afford any remedy to this inconvenience; especially when both the one and the other are equally subject to the absolute authority of the same person, who has not only power to persuade the members of his Church to whatsoever he lists, either as purely religious, or in order thereunto, but can also enjoin it them on pain of eternal fire.”

23 See however J.R. Philip, “The Crown as Litigant in Scotland” (1928) 40 Juridical Review 228, 239–240: “Stair and other institutional writers following his example refused to deal with constitutional law; and because the Crown as litigant is on the border lines of constitutional and private law, they avoid treating it, except incidentally under other topics . . . Again, in examining the early position of the Crown as litigant in Scotland, it seems dangerous to expect too strict an application of legal theory . . . Further, even if one hopes for a strict application of legal theory, it is a mistake to expect that the theory applied is always consistent. There are many illustrations of the truth that the history of Scots law is a mirror of the vicissitudes of Scottish history; that when the Scots Crown was weak, its immunity at law was weak, and that the habitual weakness of the Scots Crown account for the narrower limits of immunity.”
rule of the self-styled Lord Protector of the Commonwealth, Oliver Cromwell, as simply an “inter-regnum”. This desire to avoid incorporating the notion of lawful revolution within the constitution of England becomes clearer yet when a comparison is made between the different ways in which the “Glorious Revolution” of 1688–1689 was officially represented in Scotland and England respectively by contrasting the constitutional concepts underpinning the Scottish Claim of Right with those contained in the English Parliament’s Declaration and Bill of Rights of 1688. The English document—rather than straightforwardly admitting the fact that the king had been deposed—employed, instead, the legal fiction that the king in fleeing to France had chosen to “abdicate” his throne, thereby preserving the fiction that the existing constitutional order in England continued and that there had been no usurpation of power. The English Declaration and Bill of Rights 1688 is again to be contrasted with the Scottish Claim of Right 1689 in that the English document makes no reference to the King’s oath on entering Government that he will, “rule the people according to the laudable laws”. Nor does the English document claim that the King has expressly breached any of the terms of his (English Coronation) oath. And the English document, while asserting that James, “did endeavour to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom”, makes no reference—unlike the Scottish text—to the King invading the, “fundamental Constitution of the Kingdom” and of that constitution properly being understood as a, “legally limited monarchy”. Nor do the English, in terms, accuse James Stuart of attempting to subvert the constitution that he was in office to uphold, complaining instead only of specific acts of “arbitrary

24 The statute of 1689, “declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown” which was passed by the English Parliament narrates: “[T]he said late King James the Second having Abdicated the Government and the Throne being thereby Vacant His Highness the Prince of Orange . . . did (by the Advice of the Lords Spiritual and Temporal and diverse principal Persons of the Commons) cause Letters to be written to the Lords Spiritual and Temporal being Protestants and other Letters to the several Counties, Cities, Universities, Boroughs and Cinque Ports for the Choosing of such Persons to represent them as were of right to be sent to Parliament to meet and sit at Westminster upon the two and twentieth day of January in this Year 1688 in order to such an Establishment as that their Religion Laws and Liberties might not again be in danger of being Subverted, Upon which Letters Elections having been accordingly made.”

25 Stephen Tierney “Scotland and the Union State”, in Mullen and McHarg (eds), Scottish Public Law (Edinburgh: Avizandum Press, 2006), Ch.2 notes as follows: “[T]he Bill of Rights [was] passed by the English Convention Parliament in 1688 and formally ratified in 1689. In England, former members of the English Parliament summoned a Convention Parliament which was by definition an irregular meeting of the legislature since by this time the king had deserted the throne (by constitutional law the English Parliament could not convene without the king). The Convention declared that the throne was vacant and offered it to William and Mary. In turn William and Mary, in assuming the throne subject to conditions, had to accede to a Declaration of Right which accepted both that the monarchy’s powers were limited, and in particular that the monarch could only govern and make law with the consent of the Parliament. The Convention Parliament then passed the Crown and Parliament Recognition Act 1689 and the new English Parliament, convened with its new monarchy, duly enacted the Bill of Rights which incorporated the Declaration of Right.”
power” (namely, “prosecutions in the Court of King’s Bench for Matters and
Causes cognizable only in Parliament and by diverse other Arbitrary and Illegal
Courses”) rather than the root and branch corruption of power which the
Scottish document identified.

The Scots, by contrast, complain expressly that James VII had acted in
violation of the basic constitutional principles including, crucially, the funda-
mental principle of the separation of powers as understood in terms of due
respect owed by the Executive for the workings and constitution of the
legislature (“subverting the right of the Royal Burghs, the third Estate of
Parliament”) and of the judiciary (“sending letters to the courts of Justice
Ordaining the Judges to stop or desist from determining Causes or ordaining
them how to proceed in Causes depending before them the changing the
nature of the Judges’ gifts ad vitam aut culpam Into Commissions durante
beneplacito”). In failing to respect the limits upon his powers and to give due
defere to the workings of the other branches of Government, the erstwhile
king is said to have exercised the royal powers with which he was entrusted in
an arbitrary despotic manner, “to the violation of the laws and liberties of the
Kingdom inverting all the Ends of Government”. Avowedly just, “as their
ancestors in the like cases have usually done for the vindicating and asser-
ting their ancient rights and liberties”, the document then goes on to declare as
unlawful a number of specific acts or practices of the Crown. Importantly,
however, the Claim of Right does not seek to list or enumerate (and thereby
to define and limit) precisely what its authors considered to constitute, “their
undoubted right and liberties” which they seek to defend. By referring only to
the King’s abuses of rights, the document then leaves open the possibility of
there existing further unenumerated rights which have not been mentioned
simply because they have not (yet) been the subject of abuse by the executive
powers.26

Because the document complains that they had been violated by the
Crown’s actions, it can be established that among those fundamental rights
and liberties which the authors of the Claim of Right considered to exist in late
seventeenth century Scotland were:

(i) the right to a trial before properly appointed judges27 and, in capital
cases, before a jury28;

26 Compare with the Ninth Amendment to the United States 1776 Constitution: “Theenumeration in the Constitution, of certain rights, shall not be construed to deny or displace
others retained by the people.”
27 “The Employing the officers of the army as Judges through the Kingdom or imposing them
where there were heritorial offices and Jurisdictions . . . are Contrary to Law”,
28 “. . . [The putting the lieges to death summarily and without legal trial jury or record . . . is
Contrary to Law”. Compare with the Fifth Amendment to the United States Constitution: “No
person shall be held to answer for any capital, or otherwise infamous crime, unless on a
presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or
in the Militia, when in actual service in time of War or public danger.”
(ii) the privilege against self-incrimination, at least in capital cases\textsuperscript{29} and in treason trials\textsuperscript{30};

(iii) the right not to be arbitrarily imprisoned without trial\textsuperscript{31};

(iv) the presumption against the ordinary use of torture\textsuperscript{32};

(v) the right not to be subjected to excessive fines or other monetary penalties\textsuperscript{33};

(vi) a right, for Protestants at least, to bear arms\textsuperscript{34};

(vii) the right, at least in peacetime and then only with proper parliamentary authorisation, not to have soldiers compulsorily garrisoned upon one's home\textsuperscript{35} or otherwise quartered or provisioned from one's property\textsuperscript{36};

(viii) the independence of spouses \textit{inter se} in matters of religious observance\textsuperscript{37};

(ix) the right to appeal to Parliament from decisions of the courts\textsuperscript{38};

\textsuperscript{29} "That the forcing the lieges to Depone against themselves in capital Crimes however the punishment be restricted is Contrary to law". Compare with the Fifth Amendment to the United States Constitution: "No person ... shall be compelled in any criminal case to be a witness against himself."

\textsuperscript{30} "That the opinions of the Lords of Session ... following were Contrary to Law videlicet ... that persons refusing to discover what are their private thoughts and judgments in relation to points of treason or others men's actions are guilty of treason".

\textsuperscript{31} "That the Imprisoning persons without expressing the reason thereof and delaying to put them to trial is contrary to law". Compare with the Sixth Amendment to the United States 1776 Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

\textsuperscript{32} "That the using torture without evidence or in ordinary Crimes is Contrary to law". Compare with the English Bill of Rights 1688: "That excessive Bail ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted", which is exactly mirrored in the wording of the Eighth Amendment to the 1776 United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

\textsuperscript{33} "That the Imposing of extraordinary fines, the exacting of exorbitant Bail and the disposing of fines and forfeitures before sentence are Contrary to law". Compare with the English Bill of Rights 1688: "That all Grants and Promises of Fines and Forfeitures of particular persons before Conviction are illegal and void."

\textsuperscript{34} "That the Disarming of protestants [is] ... Contrary to Law". Compare with the English Bill of Rights 1688: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law"; and with the Second Amendment to the United States 1776 Constitution: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

\textsuperscript{35} "That the putting of Garrisons on private men's houses in time of peace without their Consent or the authority of Parliament is Contrary to law". Compare with the Third Amendment to the United States Constitution: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

\textsuperscript{36} "That the Sending of an army in a hostile manner upon any part of the Kingdom in a peaceable time and Exacting of Locality and any manner of free quarters is Contrary-to-law". Compare with the English Bill of Rights 1688: "That the raising or keeping a standing Army within the Kingdom in time of Peace unless it be with Consent of Parliament is against Law".

\textsuperscript{37} "That the lining husbands for their wives withdrawing from the church was Contrary to law".

\textsuperscript{38} "That it is the right and privilege of the subjects to protest for remeed of law to the King and Parliament against Sentences pronounced by the Lords of Session Providing the same Do not stop Execution of these sentences".
(x) the right of the people to petition the king;  
(xii) the right to freedom of speech and debate for those within Parliament.

Certain additional fundamental rights were also specifically written into the Scottish constitution around this period. For example, the presence of the parties and their lawyers before the court was expressly guaranteed as a constitutional right in Scotland in both civil and criminal cases. The twentieth century Scottish jurist and Lord of Appeal in Ordinary, Lord Shaw...
of Dunfermline, described these two statutes as, “a part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and to secure against judges, as well as against the Sovereign, the liberties of the realm”.

Significantly, however, the settlement of the Crown of Scotland upon William of Orange was not accompanied by a requirement for increased religious liberty for the individual in Scotland—as it was in England with the enactment of the Toleration Act 1689 requiring official toleration of the varieties of Trinitarian Protestant dissent from the Anglican settlement. Instead, in Scotland the “Glorious Revolution” marked the triumph of the hardline Presbyterian party in the reformed Scottish Church and resulted in the expulsion of Scottish Episcopalian clergy from their benefices and a general proscription of any church or religious activity in Scotland other than in accord with the requirements of the now fully State-sanctioned Presbyterianism.

The full extent of the triumph of the hardline Presbyterian party in Scotland both in political revolution and in religious intolerance can perhaps be seen in the case of Thomas Aitkenhead, an Edinburgh university medical student in his early twenties, who in 1697 was charged before the High Court in Edinburgh with having:

“... repeatedly maintained, in conversation, that theology was a rhapsody of ill-invented nonsense, patched up partly of the moral doctrines of philosophers, and partly of poetical fictions and extravagant chimeras: That he ridiculed the holy scriptures, calling the Old Testament Ezra’s fables, in profane allusion to Aesop’s Fables; That he railed on Christ, saying, he had learned magic in Egypt, which enabled him to perform those pranks which were called miracles: That he called the New Testament the history of the imposter Christ; That he said Moses was the better artist and the better politician; and he preferred Mahomet to Christ: That the Holy Scriptures were stuffed with such madness, nonsense, and contradictions, that he admired the stupidity of the world in being so long deluded by them: That he rejected the mystery of the Trinity as unworthy of refutation; and scoffed at the incarnation of Christ”.

After a two day trial in December 1696 the student was found guilty of:

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45 The 1689 Claim of Right also states: “That Prelacy and the superiority of any office in the Church above presbyters is and hath been a great and insupportable grievance and trouble to this Nation and contrary to the Inclinations of the generality of the people ever since the Reformations (they having reformed from popery by presbyters) and therefor ought to be abolished.”
LIMITED GOVERNMENT, FUNDAMENTAL RIGHTS

“... having railed against the First Person, and also cursed and railed our blessed Lord and Second Person of the Holy Trinity, and further finds the other crimes libelled proven, viz. the denying of the incarnation of our Saviour, the Holy Trinity, and scoffing at the Holy Scriptures.”

In accordance with the provisions of the Blasphemy Act 1661— which made the, “railing against or cursing of God or any person of the Trinity” a capital offence— he was executed by hanging in early January 1697.

BRITISHNESS AND ANTI-CATHOLICISM

The United Kingdom of Great Britain was created by the 1707 Parliamentary Union between the two independent States of England and Scotland, till then united only symbolically since 1603 in the person of a shared (Stuart) monarch, James VI and I and his descendants. The historian Linda Colley illustrates the thesis in her book, Britons: Forging the Nation— that the creation of the United Kingdom of Great Britain, following the 1707 Parliamentary Union between England and Scotland, was brought together by the conscious use of religious ideology based on a common anti-Catholicism. The Union and its Empire was consciously cemented by a new patriotism built on maritime prowess, the Protestantism of its peoples and a Parliamentary heritage, which betokened such fundamental principles as popular sovereignty, limited monarchy, separation of powers and respect for the fundamental rights and liberties of the individual subject. In all these things, Great Britain (and its colonies in North America) was contrasted with the regimes of other rival powers of Continental Europe, notably the French and Spanish, whose constitutions were seen as embodying everything that was unBritish, namely: Popery, arbitrary and despotic government and servility.

46 The Blasphemy (Scotland) Act 1661 provides, as far as relevant as follows: “Our sovereign lord and estates of parliament, considering that hitherto there has been no law in this kingdom against the horrible crime of blasphemy; therefore, his majesty, with advice of his said estates, does hereby statute and ordain that whatsoever hereafter, not being distracted in his wits, shall rail upon or curse God or any of the persons of the Blessed Trinity, shall be processed before the chief justice and, being found guilty, shall be punished with death. Likewise his majesty, with adviceforesaid, finds, statutes and ordains that whatsoever hereafter shall deny God or any of the persons of the Blessed Trinity, and obstinately continue therein, shall be processed, and being found guilty, that they be punished with death.”


The same policy of excluding Catholics from public life which applied in England was also followed in Scotland. If anything, the oath required by the Scottish Parliament was even more extensive in its rejection of the political doctrines and theology associated with the Catholic Church. And art.2 of the Acts of Union of 1707—which ratified the Parliamentary Union of England and Scotland and created from this the new unitary State of Great Britain—provided (and still provides):

"... that all Papists and persons marrying Papists, shall be excluded from and forever incapable to inherit possess or enjoy the Imperial Crown of Great Britain and the Dominions thereunto belonging or any part thereof."

Although Linda Colley is correct to note that there was an ideology of a shared Protestantism united against the Papist common enemy which cemented the new British Union, it should also be borne in mind that from a

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50 By the Test Act 1672 the English Parliament—in order to preserve itself and its ancient constitution and liberties—sought to exclude Catholics from public life by imposing the requirement of a religious test or oath on all those holding any public office, civil or military in England. The Test Act of 1678 extended the Test requirements to all those sitting in—or voting for—Parliament, and all peers in the realms of England, Scotland and Ireland to take an oath by which they publicly and expressly repudiated as, "superstitious and idolatrous" what were then understood to be the specifically Catholic doctrines of transubstantiation, the sacrifice of the Mass, and the invocation of Mary and the (other) saints. The first statute passed by the English Parliament in the reign of William and Mary, the Crown and Parliament Recognition Act 1689 (the long title of which was "An Act for removing and Preventing all Questions and Disputes concerning the Assembling and Sitting of this present Parliament") as follows:

"I A B Do sincerely Promise and Swear that I will be Faithfull and bear true Allegiance to Their Majesties King William and Queen Mary So help me God.

I A B Do Swear that I do from my Heart Abhor Detest and Abjure as Impious and Heretical that damnable Doctrine and Position That Princes Excommunicated or Deprived by the Pope or any Authority of the Sea of Rome may be Deposed or Murdered by their Subjects or any other whatsoever And I do Declare that no Foreign Prince, Person, Prelate State or Potentate hath or ought to have any Power Jurisdiction Superiority Freeminece or Authority Ecclesiastical or Spiritual within this Realm So help me God."

51 See the Anti-Popery (Scotland) Act 1700 which prescribed the following oath: "I do sincerely from my heart profess and declare before God, who searches the heart, that I do deny, disown and abhor these tenets and doctrines of the papal Romish church namely: the supremacy of the pope and bishop of Rome over all pastors of the Catholic church; his power and authority over kings, princes and states and the infallibility that he pretends to either without or with a general council; his power of dispensing and pardoning; the doctrine of transubstantiation and the corporal presence with the communion without the cup in the sacrament of the Lord's supper; the adoration and sacrifice professed and practised by the popish church in the mass; the invocation of angels and saints; the worshipping of images, crosses and relics; the doctrine of supererogation, indulgences and purgatory and the service and worship in an unknown tongue; all which tenets and doctrines of the said church I believe to be contrary to and inconsistent with the written word of God. And I do from my heart deny, disown and disclaim the said doctrines and tenets of the church of Rome as in the presence of God, without any equivocation or mental reservation, but according to the known and plain meaning of the words as to me offered and proposed, so help me God."
constitutional perspective these were, as we have seen, quite different (ideal) types of Protestantism as between Scotland and England. Scotland’s ecclesiastical settlement immediately prior to the 1707 Union was Presbyterian, Calvinist and republican. England’s was Episcopal, monarchical and Erastian. And yet the negotiations leading up to the conclusion of the 1707 Union between England and Scotland also, somewhat unusually, sought the entrenched preservation of the two countries’ distinct ecclesiastical (and implicitly also the two countries’ differing underlying constitutional) settlements. The, “securing of the Protestant Religion and Presbyterian Church Government within the Kingdom of Scotland” was expressly declared to be, “a fundamental and essential Condition of the said Treaty or Union in all times coming” and it was similarly declared by the English Parliament that the preservation of the Anglican settlement in England also be made, “a Fundamental and Essential part of any Treaty of Union” with Scotland.

The English Test Act of 1678 and the Scottish Act for Preventing the Growth of Popery 1700 had imposed specific religious tests which were designed to identify and exclude Catholics from all and any public office within the two States. But in the negotiations leading up to the eventual union

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52 The relevant terms of the Scottish Act of Security 1707 which secured the continued Presbyterian establishment in Scotland were duly incorporated into the English Union with Scotland Act 1706 and the Union with England (Scotland) Act 1707 and they are as follows: “Her Majesty with Advice and Consent of the said Estates of Parliament doth hereby establish and confirm the said true Protestant Religion and the Worship Discipline and Government of this Church to continue without any Alteration to the People of this Land in all succeeding Generations And more especially Her Majesty with Advice and Consent aforesaid ratifies approves and for ever confirms the Fifth Act of the first Parliament of King William and Queen Mary entitled Act ratifying the Confession of Faith and settling Presbyterian Church Government with all other Acts of Parliament relating thereto in Prosecution of the Declaration of the Estates of this Kingdom, containing the Claim of Right bearing date 11 April 1699 And Her Majesty with Advice and Consent aforesaid expressly provides and declares that the foresaid true Protestant Religion contained in the above mentioned Confession of Faith with the Form and Purity of Worship presently in use within this Church and its Presbyterian Church Government and Discipline (that is to say) the Government of the Church by Kirk Sessions Presbyteries Provincial Synods and General Assemblies all established by the foresaid Acts of Parliament pursuant to the Claim of Right shall remain and continue unalterable And that the said Presbyterian Government shall be the only Government of the Church within the Kingdom of Scotland.”

53 The relevant terms of the English Securing the Church of England Act 1706 are: “[W]hereas it is reasonable and necessary that the true Protestant Religion Professed and established by Law in the Church of England and the Doctrine Worship Discipline and Government thereof should be effectually and unalterably secured Be it enacted by the Queen’s most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal and the Commons in this present Parliament assembled and by Authority of the same That an ... Act made in the thirteenth year of the reign of the late King Charles the Second entitled an Act for the Uniformity of the publick Prayers and Administration of Sacraments and other rites and ceremonies and for establishing the form of making ordaining and consecrating Bishops Priests and Deacons in the Church of England (other than such Clauses in the said Acts or either of them as have been repealed or altered by any subsequent Act or Acts of Parliament) and all and singular other Acts of Parliament now in force for the Establishment and Preservation of the Church of England and the Doctrine Worship Discipline and Government thereof shall remain and be in full force for ever.”
between England and Scotland, concerns arose in Scotland about the possibility of new religious tests being made a qualification for office within the new State of Great Britain. To forestall this possibility, the Protestant Religion and Presbyterian Church Act 1707 (also known as the “Act of Security”) was passed by the Scottish Parliament (and its terms subsequently incorporated into both the Union with England Act of 1707 and the English Parliament’s Union with Scotland Act 1706) providing as follows:

“Her Majesty with advice foresaid expressly Declares and Statutes that none of the Subjects of this Kingdom [of Scotland] shall be liable to, but all and every one of them forever free of, any Oath, Test or Subscription within this Kingdom contrary to or inconsistent with the foresaid True Protestant Religion and Presbyterian Church Government Worship and Discipline as above established And that the same within the bounds of this Church and Kingdom shall never be imposed upon or required of them in any sort. ... And it is hereby statute and ordained that this Act of Parliament, with the establishment therein-contained, shall be held and observed, in all time coming, as a fundamental and essential condition of any treaty or union to be concluded between the two kingdoms, without any alteration thereof or derogation thereeto in any sort forever. As also, that this act of parliament and settlement therein-contained shall be inserted and repeated in any act of parliament that shall pass for agreeing and concluding the foresaid treaty or union between the two kingdoms, and that the same shall be therein expressly declared to be a fundamental and essential condition of the said treaty union in all time coming.”

There is no parallel provision within the relevant English statute. The Acts of Union of Great Britain accordingly sought to then entrench within the new British constitution and impose a perpetual prohibition upon the institutions of government within the new State from ever imposing any further oath, test or subscription for public office in the British State which was inconsistent with any that applied prior to the Union in Scotland.

THE SCOTTISH CONSTITUTIONAL TRADITION IN THE UNITED KINGDOM POST THE 1707 UNION

This question as to the continued existence of a peculiarly Scottish constitutional tradition surviving within (or underneath) the unitary State of the United Kingdom is not purely of antiquarian or of (British) insular interest. For example, the North American colonies’ policy on religious toleration was decisively influenced by developments in seventeenth century England. It can be argued that the very Declaration of Independence of 1776 took up the rhetoric, precedent and tradition which was to be found in Scottish constitutional history prior to the 1707 Union. And as the 2008 judgment of the US
Supreme Court in *Boumediene v Bush* shows, a proper understanding of the eighteenth century constitution of Great Britain (and of the post-Union relationship between Scotland and England) may still have a decisive influence on the determination of questions relating to the correct interpretation of the United States Constitution, particularly among those justices who would favour an originalist interpretation of the constitution.

The legal question at issue in *Boumediene v Bush* was whether persons described by the United States Government as "alien enemy combatants" who had been detained by the United States military in Guantanamo Bay in Cuba could claim the procedural protections guaranteed under the United States Constitution of habeas corpus given that they were non-US citizens detained outside United States territory. Article 1 s.9(2) of the United State Constitution provides that: "[[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it". The United States Government noted that at the time of the founding of the United States the courts in England had no power to issue the writ in respect of persons detained in Scotland, notwithstanding the fact that from 1603 onward England and Scotland had shared the same monarch in whose name the writ was issued and that, from 1707, the two countries were united under one Parliament. In rejecting this argument for the US Government, Kennedy J. for the 5:4 majority suggested that an English court could

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56 The fact that the English courts had no jurisdiction in Scotland was exploited by the Crown in seventeenth century Scotland as is explained by Lord Hope in *A v Secretary of State for the Home Department (No.2)* [2006] 2 A.C. 221 at 284–285:

> “104. . . . [W]hen the Act of 16 Charles I, c 10, abolished the Star Chamber [the jurisdiction of the Privy Council in all matters affecting the liberty of the subject was transferred to the ordinary courts, which until then in matters of state the executive could by-pass. Torture continued to be used in Scotland on the authority of the Privy Council until the end of the 17th century, but the practice was brought to an end there after the Union by section 5 of the Treason Act 1708. . . ."

107 When the jurisdiction of the Star Chamber was abolished in England prisoners were transferred to Scotland so that they could be forced by the Scots Privy Council which still used torture to provide information to the authorities. This is illustrated by the case of Robert Baillie of Jerviswood whose trial took place in Edinburgh in December 1684. A detailed description of the events of that trial can be found in *Fountainhall’s Decisions of the Lords of Council and Session*, vol 1, pp 324-326: for a summary, see ‘Torture’ 53 ICLQ 807, 818-820. Robert Baillie had been named by William Spence, who was suspected of being involved in plotting a rebellion against the government of Charles II, as one of his co-conspirators. Spence gave this information having been arrested in London and taken to Edinburgh, where he was tortured. Baillie in his turn was arrested in England and taken to Scotland, where he was put on trial before a jury in the High Court of Justiciary in Edinburgh. All objections having been repelled by the trial judge, the statement which Spence had given under torture was read to the jury. Baillie was convicted the next day, and the sentence of death that was passed on him was executed that afternoon. There is a warning here for us. ‘Extraordinary rendition’, as it is known today, is not new. It was being practised in England in the 17th century."
but would not issue a writ of habeas corpus in respect of an individual detained in Scotland by reason of, "prudential concerns" related to, "the English Crown's (sic) delicate and complicated relationships with Scotland". In a dissenting judgment (which was concurred in by the rest of the minority) Scalia J. riposted that the English court had no power to issue the writ of habeas corpus because, "even after the [1707] Union 'Scotland remained a foreign dominion of the prince who succeeded to the English throne'". But neither of the justices seems to have been aware that the reason why the English writ of habeas corpus did not run in eighteenth century Scotland was because of the express prohibition against English courts purporting to exercise their jurisdiction in Scotland contained in art.XIX of the Acts of Union which provides that:

"... no Causes in Scotland be cognoscible by the Courts of Chancery, Queens-Bench, Common-Pleas, or any other Court in Westminster-hall; and that the said Courts, or any other of the like Nature, after the Union, shall have no Power to cognosce, review, or alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same."

Accordingly, for any English court to purport to exercise jurisdiction within the realm of Scotland would be contrary to fundamental provisions of the Acts of Union between the two countries. When stating that, "to foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland";57 Lord Mansfield was, of course, speaking against the background of the terms of the Acts of Union of which he would have been well aware and to which he would have been particularly sensitive, being himself a Scot. In the event it would seem that the majority of the justices in Boumediene v Bush were correct to reject the contention of the United States' Government that for the purposes of habeas corpus jurisdiction Guantanamo is more closely analogous to Scotland, but perhaps not for the correct reasons. The prohibition on extending habeas corpus to Scotland arose not from any inherent extraterritorial limitation on the writ, but because of a specific constitutional prohibition on English courts exercising any form of jurisdiction in Scotland. Thus, a better grasp of the constitutional history of the United Kingdom might have given them a surer legal basis on which to found their interpretation of provisions of the United States Constitution.

It seems clear that the eventual formation, at the end of the eighteenth century, of a new national entity, the United States of America (from the original 13 British North American colonies which had established their independence from the colonial power) was, itself, profoundly influenced by

the experience of the earlier constitutional model of new state formation which was seen in the mother country at the beginning of the eighteenth century, in the creation of the United Kingdom of Great Britain. But, importantly, the perspective on the formation of the United Kingdom that was significant for the North American colonies (and subsequently states) was that of Scotland. This is because the Scottish approach to the negotiations on Union with England was one which emphasised the need to be able to protect and preserve certain continuing rights, attributes and institutions of the Scottish nation within the new unitary state. From an English perspective there was no real problem in preserving Englishness within the Union because England was by far the larger, more populous, wealthier and powerful partner in the Union. The Scots’ very powerlessness, by contrast, brought with it an edgier more distrustful attitude—one which emphasised the importance of putting the important things down in writing and of the necessity of fettering the new Union institutions as a matter of law so that they should not overstep the limits of the original bargain struck between two independent nations. The Scots wished to see the new United Kingdom Government as one born in chains.

But it must be acknowledged that within the British Isles (or to use more neutral and purely geographic terminology, the Anglo-Celtic Archipelago) this older revolutionary populist constitutional tradition in Scotland was rather lost and submerged with the Union of the Parliaments of Scotland and England in 1707 and the creation of a new unitary state, Great Britain. The institutional interests of the former primary guardians of this republican tradition in Scotland—the Church and the jurists—were perhaps answered and assuaged by the fact that the Union was formed under an express guarantee of the new British State’s continued support for the established Presbyterian ecclesiastical settlement in Scotland and for the preservation of a distinct and separate Scottish legal system. These guarantees were certainly sufficient to ensure the Scottish Lowland establishment’s support for the suppression of the Jacobite uprisings of 1715 and 1745 against the post-Stuart Hanoverian monarchy.

The passing of the first Catholic Relief Act by the British Parliament in 1778 provoked an outbreak of popular unrest (the infamous “Gordon riots”) in both England and Scotland on the basis that Parliament’s move to lessen restrictions on Catholics was unrepresentative. The Catholic Relief Act 1778 sought to restore some limited civil rights to Catholics in communion with Rome including the ability to maintain a school and to inherit and purchase land, provided that they swore a declaration of loyalty to the reigning sovereign, denied the rights of the Stuart claimants and expressly disavowed any beliefs to the effect that excommunicated princes might lawfully be murdered or that the Pope had any temporal jurisdiction in Britain.

But this link between Britishness and Protestantism was in large part dismantled in 1829 with the passing of the Catholic Emancipation Act, some 29 years after the Union between Britain and Ireland had brought a large
Catholic Irish population directly under the rule of the United Kingdom Parliament. Linda Colley summarises the effect of the 1829 Act thus:

“All, English, Welsh, Scottish and Irish Catholic males were now citizens in the sense that they could vote, enter Parliament and fill the majority of civil offices if they possessed the necessary economic and social qualifications. But Catholics remained excluded from the throne (as they still are). The ancient universities were still closed to them and so were the highest legal offices. If appointed to state employment, they still had to swear that they would not ‘disturb or weaken the Protestant religion or Protestant Government in this kingdom’."^58

The supposed lack of any Scottish constitutional basis for the protection of fundamental rights against governmental abuse of power was adversely commented upon by one J.F. Macqueen, Q.C. in 1866 in the following terms (apparently unaware of any continuing legacy of the 1689 Glorious Revolution in Scotland):

“The blessings of the English Constitution, however, were not extended to Scotland [at the Union in 1707]. The Scotch consequently have no Magna Charta, no Bill of Rights, no Habeas Corpus. . . . Personal freedom depends on the temper of the existing government, or rather on the discretion—peradventure the caprice—of the Lord Advocate. When that high functionary incarcerated a gentleman supposed to entertain dangerous political opinions, the Lord Advocate justified himself in the House of Commons by the proud boast that he represented the Scottish Privy Council, and that his powers were unlimited. Under the sway of a benignant sovereign Caledonian grievances have practically disappeared. But the grave question remains whether it is consistent with the dignity of an intellectual people that their political rights should depend on the clemency of the government.”^59

It seems that a popular commitment to the success of the unitary British State and the expansion of its Empire in the course of the nineteenth and early twentieth century had led to a certain downplaying in the courts of the continued existence of any distinctive Scottish constitutional tradition surviving the Acts of Unions. As was submitted on behalf of the appellant to the House of Lords in 1876 in Mackintosh v Lord Advocate:

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^59 J.F. Macqueen, Q.C., paper read at the Manchester Congress of Social Science on October 8, 1866 (Lord Brougham presiding) cited by Hemming, Q.C., at 59–60 in Mackintosh v Lord Advocate (1876) 2 App. Cas. 41 HL(Sc).
"[T]he meaning of that Treaty [of 1707] was that the whole political and judicial constitution of Scotland was swept away, and that the political and judicial constitution of England was substituted for it in every particular not mentioned in the Treaty itself."^{60}

But this claim that the 1707 Parliamentary Union between Scotland and England resulted in fact in the extinction of the distinctive Scottish constitutional tradition with the normative structure of the English constitution subsuming that of Scotland—as if the British Union was in its constitutional effect the conquest of Scotland by the English constitutional system—was rejected by the House of Lords in its actual decision in Mackintosh v Lord Advocate. In finding that the House of Lords had no appellate jurisdiction over decisions of the High Court of Justiciary, their Lordships made reference to and relied upon the pre-1707 history of the, “right and privilege of the subjects to protest for remeind of law to the King and Parliament against Sentences pronounced by the Lords of Session”, referred to in the 1689 Claim of Right. It is this pre-1707 provision and practice which was said to provide the constitutional foundation for appeals post-1707 to the House of Lords. Accordingly since appeals to the Scottish Parliament from decisions of the High Court of Justiciary were apparently not competent prior to the 1707 Union, it was held that there was no right of appeal post-1707 to the House of Lords in criminal matters. These provisions of the pre-Union Scottish constitution were therefore asserted to survive and continue to create binding and enforceable legal norms even subsequent to the Parliamentary Union between England and Scotland and the creation of the new State of Great Britain.

And yet, perhaps encouraged by the terms of art.XVIII of the Treaty of Union^{61}, the tendency remained for the Scottish courts to seek to align Scots law with English law in constitutional and public law issues generally such that by the early twentieth century a Court of Session judge could say that:

"... the constitution of Scotland has been the same as that of England since 1707 [and] there is a presumption that the same constitutional principles apply in both countries."^{62}

Thus, in Scotland as in England the Crown was found not to be liable in delict (tort).^{63} Significantly this was accepted as being the law of Scotland notwithstanding that the basis for it was the—essentially English—constitutional

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^{60} Mackintosh v Lord Advocate (1876) 2 App. Cas. 41 HL(Sc), per Mr Hemming, Q.C. at 58.
^{61} Article 18(2) of the Treaty of Union provides that, "the laws concerning public right, policy and civil government may be made the same throughout the whole United Kingdom."
^{62} Macgregor v Lord Advocate, 1921 S.C. 847, per the Lord Ordinary (Lord Anderson) at 848.
^{63} See: Smith v Lord Advocate (1897) 25 R. 112; Wilson v First Edinburgh City RGA Volunteers (1904) 7 F. 168; MacGregor v Lord Advocate, 1921 S.C. 847, per the Lord Justice-Clerk at 89.
doctrine that, “the King can do no wrong”, not (for example) the Scots statute which provided that the King could not be prejudiced by the neglect of his officers: Crown Proceedings Act 1600 (c.14) APS IV, 231. The question of whether this doctrine was really part of Scots law prior to 1921 is perhaps controversial, but what is clear is that Scots law did thereafter—and expressly for purposes of constitutional consistency—accept the rule that the Crown was not liable in delict, and with it the English constitutional principle which gave rise to that rule. However, the application of the rule in England carried with it further consequences, in particular the concept of a Crown servant ceasing to be “the Crown” when sued in his personal capacity for tortious acts for which he was responsible. Unfortunately these complex and technical distinctions in English law between private law and Crown’s side proceedings and the subtle (not to say Jesuitical) parsings which required to be made between the Crown and its “officers” appeared to be just too much for Scottish judges to take on board.64 Indeed at times the belated (and perhaps mistaken and unnecessary) reception into Scots private law of the doctrine that, “the Crown can do no wrong” appears to have been misunderstood to mean not (as the English jurisprudence has it) any wrong done in the name of the Crown cannot have been done by the Crown, but rather that nothing the Crown does is wrong—and even if it is, the courts could give no effective remedy against such wrongdoing.

This tendency continues to the present day: the Scottish courts have followed English authority on such issues as the nature and extent of the Crown prerogative65; the question of the application to the Crown of general statutory provisions66; the susceptibility of government departments to coercive orders from the courts67; and the possibility of, and the conditions for, finding the Executive to be in contempt of court.68 While there may well be a

per Lord Salvesen at 852. In Davidson v Scottish Ministers, 2006 S.C. (HL) 42 Lord Rodger observed at 58 [66]: “[B]elatedly and—in retrospect—unfortunately, in Macgregor v Lord Advocate 1921 S.C. 847 the Second Division had held that in Scotland too the Crown could not be held liable in delict.”

64 See McDonald v Secretary of State for Scotland, 1994 S.C. 234 IH, per Lord Justice-Clerk (Lord Ross) at 242, 244; per Lord Morison at 245; and per Lord Sutherland at 246, 247-248.
65 Burmah Oil v Lord Advocate, 1964 S.C. (HL) 117, per Lord Hodson at 153.
67 Davidson v Scottish Ministers (No.1), 2006 S.C. (HL) 42. See, however, Edwards v Cruikshank (1840) 3 D. 282, per Lord President Hope at 306-307: “With regard to our jurisdiction [in Scotland], and the jurisdiction of the supreme courts in every civilized country with which I am acquainted, I have no doubt. They have power to compel every person to perform their duty—persons whether single or corporate: and, in our noble constitution, I maintain—though at first sight it may appear to be a startling proposition—the law can compel the Sovereign himself to do his duty, ay, or restrain him from exceeding his duty. Your Lordships know that the Sovereign never acts by himself, but only through the medium of his ministers or executive servants; and if any duty is refused to be done by any minister in the department over which he presides, or if he exceed his duty to the injury of the subjects, the law gives redress. . . . In this country a person would proceed by action or by petition; and, if he was right, a decree would be passed and would be enforced by ordinary process of law.”
tendency towards seeking harmonisation throughout the United Kingdom, rather than a desire to preserve constitutional differences between Scotland and England, there is no legal rule or indeed presumption that the constitutional law of both countries should be the same, and certainly no principle that in the event of divergence between the Scottish and English constitutional traditions, the English approach should be given precedence. As Lord Hope has noted:

“Our [UK] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in McCawley v The King [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified... [E]ven Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: Thoughts on the Scottish Union, pp 252-253, quoted by Lord President Cooper in MacCormick’s case 1953 SC 396, 412.69 So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality.”

The doctrinal traffic, then, was and is not always one way. Thus, on the issue of whether the courts could overrule the Executive’s claim to be able to withhold documentation relevant to court proceedings on the grounds of public interest immunity the House of Lords relied upon Scottish authority.

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69 In MacCormick v Lord Advocate, 1953 S.C. 39 IH, Lord President Cooper observed: “The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.”

70 Jackson v Att Gen [2006] 1 A.C. 262, per Lord Hope at 303, 304 [104], [106].

to overrule the earlier English rule\textsuperscript{72} that it was not open to the courts to look behind any such claim by the Executive.\textsuperscript{73} And in the early twentieth century House of Lords, the Scottish Law Lord, Lord Shaw of Dunfermline, played at times a prophetic role in a number of English cases emphasising the vigilance needed to ensure the protection of fundamental rights of individuals against encroachments, as much as by a complaisant judiciary as a power hungry Executive.\textsuperscript{74} Thus in the 1913 decision in Scott v Scott he relied upon Scottish constitutional history (and in particular the two Acts of the Scottish Parliament of 1693 requiring both civil and criminal cases to be heard openly in the presence of the parties and their lawyers and any other interested parties) to emphasise the fundamental importance of justice always being done in public, noting:

"The right of the citizen and the working of the Constitution ... have ... received from the judiciary—and they appear to me still to demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law."\textsuperscript{75}

And in R. v Halliday Ex p. Zadig, in which a majority of the House of Lords upheld the legality of wartime Government regulations which were used to

\textsuperscript{72} Set out in Duncan v Cammell Laird & Co Ltd [1942] A.C. 624.
\textsuperscript{73} Conway v Rimmer [1968] A.C. 910, per Lord Reid at 938, 950.
\textsuperscript{74} David Foxton in "R v. Halliday, ex parte Zadig in retrospect" (2003) 119 L.Q.R. 455 gives the following biographical note on Lord Shaw at pp.459–460:

"Thomas Shaw was born in Dunfermline in 1850, the son of a baker. After studying at Dunfermline High School, he served an apprenticeship as a solicitor, before 'ambition spurred him' to Edinburgh University and practice at the Scottish Bar. He was Liberal M.P. for Hawick Burghs from 1892 to 1909 (holding the post of Solicitor-General for Scotland from 1894 to 1905, and that of Lord Advocate from 1905 to 1909). The defining event of his political career was almost certainly his opposition to the Boer War, which he believed to be unjust, and did not hesitate to say so. In a letter to his wife of July 26, 1900, he wrote that he had followed his conscience and 'voted against the war', concluding: 'Let the consequences be what they may'. (Footnote omitted) Those consequences were later described by his son as follows: 'His practice at the Bar began to decline seriously. He was the object of bitter invective ... During his absence his house was broken into. Every drawer of his private desk was forced with a jemmy and all his papers were ransacked ... Various unwanted and ridiculous articles began to arrive at his house from tradesmen who had been given fictitious orders in his name ... An attempt was made by a gang of roughs to attack his house in Abercromby Place, and missiles were thrown.' (Footnote omitted)

In 1905, Asquith appointed him as the Scottish Lord of Appeal in Ordinary required by the Appellate Jurisdiction Act 1876, taking his place as Baron Shaw of Dunfermline. The circumstances of his appointment remain controversial. (Footnote omitted) Certainly it was not a universally popular appointment."

\textsuperscript{75} Scott v Scott [1913] A.C. 417, per Lord Shaw of Dunfermline at 477–478.
order the internment without trial of a naturalised British subject of German birth, the sole dissenting judgment was that of Lord Shaw of Dunfermline who noted presciently:

“Once let the overmastering generality of the principle of regulation be affirmed, as has been done, all is lost; the law itself is overmastered. The only law remaining is that which the Bench must accept from the mouth of the Government: ‘Hoc volo, sic jubeo; sit pro ratione voluntas.’ [I will it; I order it; let my will stand for a reason: Juvenal, Satire, VI, 223.]

No rights, be they as ancient as Magna Carta, no laws, be they as deep as the foundations of the Constitution: all are swept aside by the generality of the power vested in the Executive to issue ‘regulations’: ‘Silent enim, leges inter arma’ [In time of war, laws fall silent: Cicero, Pro Milone, IV, 11]. . .

Once a discretion over all things and persons and rights and liberties, so as to secure public safety and defence, what regulations may issue? This one is founded on ‘hostile origin or associations.’ It enters the sphere of suspicion, founded not on conduct but on presumed opinions, beliefs, motives, or prepossessions arising from the land from which a person sprang. This is dangerous country; it has its dark reminders. It is the proscription, the arrest of suspects, at the will of men in power vested with a plenary discretion. If the power to issue regulations meant this to warrant a passage from proof to suspicion and from the sphere of action to the sphere of motive or the mind, let us think how much this involves.

No far-fetched illustrations are needed; for, my Lords, there is something which may and does move the actions of men often far more than origin or association, and that is religion. Under its influence men may cherish beliefs which are very disconcerting to the Government of the day, and hold opinions which the Government may consider dangerous to the safety of the realm. And so, if the principle of this construction of the statute be sound, to what a strange pass have we come! A regulation may issue against Roman Catholics—all, or, say, in the South of Ireland, or against Jews—all, or, say in the East of London,—they may lose their liberty without a trial. During the war that entire chapter of the removal of Catholic and Jewish disabilities which has made the toleration of Britain famous through the world may be removed—not because her Parliament has expressly said so, but by a stroke of the pen of a Secretary of State.

Vested with this power of proscription, and permitted to enter the sphere of opinion and belief, they, who alone can judge as to public safety and defence, may reckon a political creed their special care, and if that creed be socialism, pacifism, republicanism, the persons holding such creeds may be regulated out of the way, although never deed was done or word uttered by them that could be charged as a crime. The inmost citadel of our liberties
would be thus attacked. For, as Sir Erskine May observes, this is ‘the greatest of all our liberties—liberty of opinion.’

R. v Secretary of State for Home Affairs Ex p. O’Brien concerned an application for habeas corpus by one Art O’Brien, a British subject and English resident who was said to be, “the representative in London of the Irish Republican Government”. The Irish Republican Government, from which the modern IRA claimed descent, was then an illegal organisation which had refused to accept the terms of the peace treaty which had been concluded between Britain and the Irish. Under the terms of this treaty, Ireland was to be partitioned, with 26 of its counties forming the Irish Free State (as an independent dominion within a British Empire) and its six north-eastern counties becoming the devolved self-governing province of Northern Ireland while remaining within the United Kingdom. In March 1923 O’Brien was arrested at his home in London by order of the Home Secretary, taken to Chelsea police station and from there transported by train to Liverpool where he was placed on board a British warship which sailed to Dublin into the territory of the Irish Free State. On his arrival there he was surrendered to the authorities of the Irish Free State who then interned him without trial in Mountjoy Prison. The applicant, however, successfully petitioned for habeas corpus before the English Court of Appeal which held that though the Home Secretary had lost the legal control of O’Brien on (illegally) transporting him out of British territory\(^7\) and then surrendering him to the Irish Free State authorities, he had not necessarily lost the de facto control, and accordingly the order should be made absolute in order to compel the Home Secretary to make a return to the writ. In rejecting as incompetent the Home Secretary’s attempt to appeal against this order to the House of Lords, a 4:1 majority of their Lordships reaffirmed the rule that although an unsuccessful applicant can appeal against a refusal of habeas corpus, once a court has pronounced the order in favour of an applicant, its judgment cannot be overruled either by any other court or by any court of review or appeal. Lord Shaw of Dunfermline formed part of the majority on this occasion, and in his judgment quoted and relied upon his dissenting judgment in Ex p. Zadig when observing that:


\(^{77}\) See Blackstone (Commentaries on the Laws of England, 15th edn (1809), Vol.1, pp.136, 137): “A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ ne exeat regno, and prohibit any of his subjects from going into foreign parts without licence. But no power on earth, except the authority of parliament, can send any subject out of the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law.”
“An appeal against an unwarranted destruction of liberty is not to be refused or delayed. Promptitude is guaranteed, because without promptitude the illegal loss of liberty would be continued and enlarged. The occasions are frequent in which the temptations are severe to abridge these fundamental rights. Parliament may make such abridgment in plain language of its own and, so to speak, with its eyes open, or it may do so in a form more concealed, looser, less open to scrutiny, and much more convenient and not unfamiliar to administrators, by giving power for the issue of orders or regulations by a Committee of the Privy Council; but, of course, this has to be determined in its legality by the exact ambit of the delegated power. . . . There is hardly any great historical occasion on which a Government might not plead its view of the public good and the public convenience as an excuse for a violent deprivation from the subject of those rights in which he is secured by law. In declining jurisdiction in this case, your Lordships are not doing more than affirming a settled principle and declining to permit an invasion of constitutional right.”

In these judgments, Lord Shaw seems to be reflecting and reviving that older Scottish common law constitutional tradition of distrust for unlimited executive power and a strong presumption in favour of liberty. He emphasises

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79 See, for example, Sokha v Secretary of State for the Home Department, 1992 S.L.T. 1049; [1992] Imm. A.R. 14 OH in which an illegal entrant detained in England sought judicial review of his detention before the Court of Session and where the Secretary of State conceded that on the basis of current policy and practice the petitioner would have a better chance of obtaining an order for interim liberation from the Scottish courts than the English courts. Lord Proctor observed as follows: “Both the reported cases, and my general impression, suggest that in England a person may be subjected to continued detention, and that continued detention may be upheld by the courts, in circumstances which in Scotland would result in conditional release, either at the hand of the respondent or by decision of the courts. If that is the position, I think that it indicates that normal practice and policy, or at least the way in which they have been described to the courts, are not the same in the two jurisdictions. While I find that odd, it is not necessarily incomprehensible or unjustifiable. Policy and practice in Scotland as I understand them to be, and as they have been described to the court, may reflect an unease felt by the Scottish courts at the idea that deprivation of liberty, for periods which would not here be regarded as acceptable pending a criminal trial, could be regarded as reasonable in order to exclude a perhaps slight risk of an illegal entrant absconding.”
80 See Ati Gen’s Reference (No.2 of 2001) [2004] A.C. 72, per Lord Hope at 100 [62], [63]: “62 Under the Scottish system statutory time limits ensure that an accused does not remain longer than is strictly necessary in custody and that once an accused has been fully committed for trial, even if he is not in custody, his trial should take place within one year. On the one hand there is the 110 day rule, which requires that the trial in solemn proceedings of a person remanded in custody must start within 110 days of his full commitment in custody, failing which he shall be liberated forthwith and shall thereafter be for ever free from all question or process for the offence: section 65(4)(b) of the Criminal Procedure (Scotland) Act 1995. This rule, which was first enacted by the Criminal Procedure Act 1701 (c 6), has existed in more or less the same
the role of the courts as the guardians against the easy temptations for government to abuse its power, particularly in wartime or times of national emergency. He warns judges, too, against their guilty acquiescence in any attempts by the governing powers, even on such grounds of national security or public interest, to invade upon the “ancient rights and liberties” of the people. Lord Shaw’s observations on the need for constant vigilance against the threats to liberty posed by a government seeking to extend its powers in the name of national security and a complaisant legislature (and judiciary) who would acquiesce in such encroachments on fundamental rights might be thought to have a certain continuing and contemporary relevance.81

**Conclusion: Human Rights Litigation in Post-devolutionary Scotland**

In *Somerville v Scottish Ministers*82 the decision of the House of Lords in favour of the prisoner litigants determined that the courts should adopt a more searching and independent approach in the face of claims by the Executive to public interest immunity as well as establishing that in principle the Scottish Ministers cannot claim HRA time bar protections in respect of its breaches of Convention rights. The 3:2 majority decision of their Lordships in this case (Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe forming the majority; Lord Scott of Foscote and Lord Mance dissenting) clarified the constitutional relationship between the Scotland Act 1998 and the Human Rights Act 1998 by making it plain that the two statutes provide distinct statutory routes for the vindication of Convention rights against the Scottish Ministers with each statute providing access to the full range of remedies in respect of breach of Convention rights, including a claim to public law damages by way of “just satisfaction”. Although both statutes give the same definition of Convention rights, the two acts differ as follows:

(a) the range of persons who may bring Convention rights challenges is broader under the Scotland Act (in including law officers as well as “victims”);

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63 The invariable sanction, until now, for a breach of one or other of the statutory time limits has been that the proceedings are brought to an end. Power is given to extend the time limits in certain carefully defined circumstances, but that power is jealously exercised by the judiciary in the public interest against the executive. Due to the vigilance of the judges, the statutory time limits are carefully observed by the prosecutor. Complaints of delay are unusual in cases which are not covered by the statutory time limits.”

81 See *Singh v Secretary of State for the Home Department*, 1993 S.L.T. 950 OH, per Lord Penrose: “There is a deep seated abhorrence of indefinite detention of the individual in Scots law. In the criminal field, as was submitted, it is reflected in the statutory requirement that an accused person who is committed in custody must in general be brought to trial not later than the 110th day after being placed on petition. It is reflected also in the decisions of the court on applications in the immigration field, and, in my opinion, rightly so.”

(b) the range of acts and omissions which might be challenged as Convention incompatible is broader under the Scotland Act (in including the making of legislation by the Scottish Parliament or Scottish Ministers, and/or a failure on the part of the Scottish Ministers to make legislation or to introduce or lay before the Scottish Parliament a proposal for legislation);

(c) the s.6(2) Human Rights Act defence does not apply to Convention claims brought under the Scotland Act and so the Scottish Ministers cannot rely on the defence of, "only following or acting under Westminster statutory authority";

(d) the s.7(5) Human Rights Act one year stop gap time limit does not apply to Convention claims brought under the Scotland Act which, in fact, sets down no time limits for Convention-based claims against the Scottish devolved institutions.

The decision in Somerville confirms the radical constitution embodying the principle of judicial supremacy which now governs the Scottish devolved institutions. This has a particular significance in the area of judicial review of legislation. Thus in A v Scottish Ministers83 a judicial review was brought challenging the Convention compatibility of the provisions of the substantive provisions of United Kingdom sex offenders registration legislation. Although the regulation of sex offenders is within the devolved capacity of the Scottish Parliament, the Parliament decided that in the interests of uniform treatment of sex offenders they would pass a Sewel motion requesting the United Kingdom Parliament to legislate for Scotland at the same time as it was legislating for England and Wales. However the legislation applies in Scotland only as a result of a commencement order made by the Scottish Ministers exercising their devolved powers. Accordingly the challenge to the Convention compatibility of this legislation was brought under the Scotland Act by attacking the vires of the Scottish commencement order. Although the petition was unsuccessful at first instance, if the Convention-based argument had been accepted (as they have subsequently been in England)84 the result of the judicial review would be that the Scottish commencement order of the

84 See R. (on the application of F) v Secretary of State for the Home Department [2008] EWHC 3170 QB at [33]: "The material we have suggests that it may well be very difficult for an offender to establish that he no longer presents any risk of re-offending. But I find it difficult to see how it could be justifiable in Article 8 terms to deny a person who believes himself to be in that position an opportunity to seek to establish it. There will necessarily have to be a debate about what an offender should have to prove in order to enable him or her to be discharged from the notification requirements and when he should be entitled to make any necessary application. Unlike Kerr J, I think, however, that as a matter of principle, an offender is entitled to have the question of whether or not the notification requirement continues to serve a legitimate purpose, determined. As the statutory scheme does not make such provision, I conclude that he also is entitled to a declaration of incompatibility."
United Kingdom measures would be struck down as ultra vires, thereby disapplying the substantive provisions of the primary legislation. By virtue of s.102(2)(a) of the Scotland Act 1998 the courts have been invested with the power (a) to remove or limit any retrospective effect of such a decision, or (b) to suspend the effect of the decision for any period and on any conditions to allow the defect to be corrected. Section 102(3) of the Scotland Act enjoins the court when considering the exercise of these powers to, “have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected”.

In *Smith v Scott*, the Registration Appeal Court in Scotland exercising its statutory appellate jurisdiction under the Representation of the People Act pronounced a declaration of incompatibility under s.4 of the Human Rights Act in relation to the maintenance of the blanket ban on voting by convicted prisoners (the franchise is a matter reserved to Westminster under the scheme of the Scotland Act). Notwithstanding the fact that this final declaration of incompatibility was made in January 2007 (there being no right of appeal from the Registration Appeal Court to the House of Lords) the United Kingdom Government has not yet put forward any proposals for changing the law to ensure its Convention compatibility. The result has been that one Scottish General Election to the Scottish Parliament—that in May 2007—and the 2009 European Parliamentary Election have each proceeded on the basis of a Convention incompatible franchise. Following the s.4 declaration of incompatibility of this blanket prisoner disenfranchisement—and relying on the fact that the Scotland Act excludes any possible s.6(2) defence in relation to the actions of the Scottish Ministers—in *XY v Scottish Ministers* the argument was essayed that it was now beyond the powers of the Scottish Ministers to exercise their statutory powers of recall of prisoners released into the community on licence on the basis that such recall into custody would

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85 Smith v Scott, 2007 S.C. 345 RAC/TH.
86 Section 3(1) of the Representation of the People Act 1983 provides: “3.—(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election”.
88 Under reference to s.17(1)(ii) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 which provides:

“17.—(1) Where— (a) a long-term prisoner has been released on licence under this Part of this Act ... (b) ... the Scottish Ministers— (i) shall, if recommended to do so by the Parole Board; or (ii) may, if revocation and recall are, in their opinion, expedient in the public interest and it is not practicable to await such a recommendation, revoke the licence and recall the prisoner to prison.”

Such recall has the consequence that the petitioner became liable to be detained in pursuance of his remaining original sentence: see s.17(5) of the 1993 Act which provides: “(5) On the revocation of the licence of any person under the foregoing provisions of this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large.”
inevitably result in the individual's Convention incompatible disenfranchise-
ment by virtue of the operation of the United Kingdom legislation. This
dilemma was rejected by the First Division which held that although the
actions of the Scottish Ministers would foreseeably result in the individu-
al's automatic disenfranchisement there could not be said to be a proper
connection between the fact of recall by the Scottish Ministers and the
legislative disenfranchisement of the recalled individuals which was not the
Scottish Ministers' responsibility nor within their competence to alter.89

In these challenges to Convention compatibility of legislation the judges in
Scotland are having to dealing with new constitutional problems which expose
their own lack of democratic accountability. But the idea of judges as open
political players runs wholly counter to the basic constitutional traditions of
the United Kingdom where the preservation of the appearance of judicial
impartiality is seen as being of fundamental importance.90 The constitutional
novelty which has been introduced by the Scotland Act into the United
Kingdom constitution is that an unmodified form of judicial review of the
democratic legislature has been introduced, with the result that the constitu-
tional fundamentals in Scotland post-devolution may be stated as follows:

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89 Compare however with the subsequent five judge decision of the High Court of Justiciary in
Dickson v HM Advocate, 2008 J.C. 181, per Lord Justice General (Hamilton) at 194–195 [40]:
"In my view, the prosecutor here may properly be regarded as giving effect to sec 11(6) of the
Sheriff Courts (Scotland) Act 1971 by invoking the jurisdiction and powers conferred by it on the temporary sheriff. That construction is not as strained as that urged by the reclamer in XY v Scottish Ministers 2007 S.C. 631."

And per Lord Macfadyen (at 199–200, 203 [53], [54], [63]):
"The Advocate-depute... referred also to XY v Scottish Ministers 2007 SC 631 in which,
while not reaching a concluded view on the point, the court commented unfavourably on the
proposition that in moving for sentence a prosecutor was 'giving effect' to sec 3 of the
Representation of the People Act 1983 (cap 2) (as amended), which disqualifies a convicted
person while serving a custodial sentence from voting in a parliamentary or local government
election... The Advocate-depute's submission was that in calling a criminal case before a
temporary sheriff the Lord Advocate, through the procurator fiscal, was 'giving effect' to the
provisions of sec 11(6) of the 1971 Act which conferred on the temporary sheriff the
jurisdiction and powers of a sheriff. Section 6(2)(b) of the Human Rights Act therefore
applied to the effect that in doing so the Lord Advocate neither committed an unlawful act
under sec 6(1) of the Human Rights Act nor (by virtue of sec 57(3)(a)) acted in a way that
was beyond his powers by virtue of sec 57(2) of the Scotland Act... I am of opinion that
the Advocate-depute's fourth submission is not precluded by binding or persuasive authority,
and is well founded. The procurator fiscal, in calling the cases against the appellant and the
complainant respectively before temporary sheriffs, were giving effect to the provisions of sec
11(6) of the 1971 Act. It follows that the prosecutions of the appellant and the complainant
were neither unlawful nor ultra vires of the Lord Advocate."
(i) It is for the Scottish Parliament to make new laws, but such laws will be valid only if and insofar as they fall within the legal competencies of the legislature. The susceptibility of even the internal procedures of the Scottish Parliament to judicial review has also been robustly affirmed by the court;

(ii) It is for the Scottish Ministers to govern within the limits of the law. There are absolute limits on their power, however. In particular, save for the Lord Advocate, the Scottish Ministers cannot in any circumstances be authorised either by Holyrood or Westminster, to act in a manner which is incompatible with Convention rights. Thus,

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91 The Scotland Act 1998 provides in s.29(3) that the Scottish Parliament has no power to pass any legislative provision which is incompatible with Community law or any of the Convention rights incorporated by the Human Rights Acts. See, too the discussion in the striking down of Scottish legislation by the courts in *Anderson v Scottish Ministers*, 2002 S.C. (PC) 63, per Lord Hope.

92 *Whaley v Lord Watson of Invergowrie*, 2000 S.C. 340 IH, per Lord Rodger at 348H, 349D–E, 350B–C:

"[T]he [Scottish] Parliament [i]s a body which—however important its role—has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law.

In many democracies throughout the Commonwealth, for example, even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which uphold the law. The Scottish Parliament has simply joined that wider family of parliaments. Indeed, I find it almost paradoxical that counsel for a member of a body which exists to create laws and to impose them on others should contend that a legally enforceable framework is somehow less than appropriate for that body itself. . . .

While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a Parliament which is sovereign: on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a 'self-denying ordinance' which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law."

93 Under s.57(2) of the Scotland Act 1998 members of the Scottish Executive have, "no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law". The Scottish Ministers are also bound under s.58 to respect and, if necessary, implement, all and any other international obligations of the United Kingdom.

94 Section 57(3) of the Scotland Act 1998 makes specific provisions for the Lord Advocate, when prosecuting any offence or in his/her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland to rely upon s.6(2) of the Human Rights Act 1998 to permit his/her “lawful” breach of Convention rights. Without such specific Westminster derived authorisation, however, the Lord Advocate no longer has power to, “move the court to grant any remedy which would be incompatible with the European Convention on Human Rights”—see *Lord Advocate v Scottish Media Newspapers Ltd*, 1999 S.C.C.R. 599 IH, per the Lord President, Lord Rodger of Earlsferry at 561.

95 Section 81(4)(a) of the Government of Wales Act 2006 (replacing s.107(4)(a) of the
even a s.4 declaration of incompatibility will have the effect of rendering actions of the Scottish Ministers ultra vires.96

(iii) It is for the courts to ensure that both the Scottish Parliament and the Scottish Ministers respect the limits on their powers and to strike down measures which go beyond the limits of these powers. Any purported act of the Scottish Parliament or the Scottish Ministers is invalid so far as it is incompatible with Convention rights and therefore of no legal effect.97 The courts have no discretion to withhold or re-fashion any other remedy.98

What have been created by the Scotland Act are democratic institutions whose acts are, however, subject to control by the (non-democratically accountable) judiciary. When exercising this devolution jurisdiction, those judges have been acting under and in terms of the Scottish devolved constitution which mandates a position of judicial supremacy over the legislature and, at least as regards the assessment of the lawfulness of the acts of the Scottish Ministers, places Westminster statutes at a normatively lower status than Convention rights. In effect, under the Scotland Act 1998, the rights guaranteed under the Convention have the status of a higher law as against all and any legislation

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96 See Somerville v Scottish Ministers, 2008 S.C. (HL) 45, per Lord Hope at [15]: “Section 57(2) SA reinforces, in the context of provisions about the devolved competence of the Scottish Ministers generally, the restriction that sec 29(2)(d) imposes on the legislative competence of the Scottish Parliament. It provides that a member of the Scottish Executive ‘has no power’ to make any subordinate legislation, or to do any other act, so far as the legislation or other act is incompatible with any of the Convention rights or with Community law. Section 57(3) qualifies that restriction in the case of an act of the Lord Advocate in prosecuting an offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, so as to align his position with that of the equivalent authorities in England and Wales. It does so by providing that sec 57(2) does not apply to an act of the Lord Advocate in that capacity if, because of sec 6(2) HRA, it would not be unlawful under sec 6(1) HRA. That qualification on the limits of devolved competence does not apply to any other member of the Scottish Executive or to the Lord Advocate acting in any other capacity. It is not open to them to claim that the act or the failure to act was within devolved competence because, as a result of primary legislation, they could not have acted differently or they were acting so as to give effect to primary legislation which cannot be read in a way that is compatible with the Convention rights.”


98 See Dyer v Watson, 2002 S.C. (PC) 89, per Lord Millett at 126 [131].
passed by the Scottish Parliament or any act or failure to act of a member of the Scottish Executive.99

The devolutionary settlement in Scotland is an ongoing constitutional experiment. In this the first decade of its operation certain tensions have been revealed, focusing most particularly around the question of the proper role of judges within a democratic polity. The judiciary in Scotland is already being led into controversial political waters, notably in the various prisoners’ rights cases which have come before the courts in recent years.100 The power which the courts now have to examine critically and strike down executive policy which is judged to be unlawful by its nature opens up a democratic deficit within the constitution. Paradoxically this democratic outrage may perhaps be most clearly seen in the immediate almost universally negative reaction to the decision of the three judges of the Court of Session making up the Registration Appeal Court who in Smith v Scott101 pronounced a declaration of incompatibility in relation to the maintenance of a blanket ban on voting by convicted prisoners.

This ending of judicial subordination to the Crown which the new post-devolution constitutional model seems to entail may not be welcomed unequivocally as an unalloyed blessing. The new constitutional scenario perhaps raises as many questions as it answers, focussing now on the quality of the individuals selected to sit on the bench in judgment upon the Executive. It is readily apparent, however, that there remains a certain disquiet and unease about the constitutional position in which the Scottish devolutionary settlement has placed the judges, not least among certain sectors of the higher judiciary based in Scotland. Their fear appears to be that they are being required to enter into and make decisions on matters—such as the proper allocation of budgetary funds—in which they have little expertise and no

100 See for example: Somerville v Scottish Ministers, 2008 S.C. (HL) 45 (successful appeal on time bar, just satisfaction damages and the constitutional relationship between the Scotland Act 1998 and the Human Rights Act 1998); Beggs v Scottish Ministers [2007] 1 W.L.R. 455; 2007 S.L.T. 225 HL (House of Lords confirming the competency of, and mens rea for, a finding of contempt of court against Scottish government departments); X v Scottish Ministers, 2007 S.C. 631 (First Division considering the interrelationship of reserved and devolved competence in the context of prisoner disenfranchise); Smith v Scott, 2007 S.C. 345 RAC/IH (Registration Appeal Court pronouncing a declaration of incompatibility in relation to the maintenance of a blanket ban on voting by convicted prisoners); Davidson v Scottish Ministers, 2006 S.C. (HL) 42 (successful constitutional challenge to the denial of availability of interim and final coercive court orders against the acts and omissions of the Government); Davidson v Scottish Ministers (No.2), 2005 S.C. (HL) 7 (successful challenge to the Inner House decision in Davidson v Scottish Ministers (No.1), 2002 S.C. 205 IH on the grounds of apparent judicial bias given previous legislative and executive involvement of one of that bench when Lord Advocate in the very legal issue raised in that case); Napier v Scottish Ministers, 2005 S.C. 307 IH; 2005 S.C. 229 (successful judicial review challenge to the slopping out regime imposed on remand prisoners in Scotland on the basis of breach of arts 3 and 8 ECHR, as well as common law duty of care).
democratic legitimacy. The problem is that is what the law requires them to do. A radical constitution has been foisted on to a traditionally conservative judiciary. As the late Professor Bill Wilson once observed:

“It cannot be said that the Scottish judiciary has been a major agency of change in the last hundred years. The House of Lords has made abrupt turns from time to time and perhaps that is the appropriate place for changes to be made. The Court of Session has been, on the whole, conservative; it has refused to break new ground, not only because there was precedent against it, but also because there was no precedent for it. The best that can be said for the judges is that they have kept the system going; that is, perhaps, their function.”

What might it be like if the Scottish judiciary were to become radicalised too? Perhaps—given the ongoing constitutional conversation which is currently being encouraged in Scotland—it might be better to consider that question in the context of returning to an examination of the first principles of constitutional democracy and consider seriously just what sort of a democracy modern Scotland should aspire to be, whether within or outwith the current Union. Should it be one such as at present which incorporates a model of a government des juges over the Executive and Parliament or instead one which emphasises instead the primacy and dignity of the legislature as the proper guardian of fundamental rights. Any choice should be properly informed by

102 See for example Lord McCluskey, “Opinion” in the Scotsman, August 3, 2005 in which the retired judge and former Solicitor General publicly criticised some of the reasoning and basis for Lord Bonomy’s judgment in Napier v Scottish Ministers, 2005 S.C. 229 OH on finding that the regime for remand prisoners in Scotland involving prolonged cellular incarceration in doubled up cells with no integral sanitation (requiring slopping out) constituted Convention incompatibele treatment thus:

“[T]he most remarkable feature of the Napier case was that the court accepted evidence that the Executive had deliberately decided to spend its limited financial resources on other things, in the light of their judgment as to what the public interest required... The decision as how limited public (i.e. taxpayers’) funds are to be spent within the criminal system is a matter for elected politicians not for judges. How can it be for judges to decide that spending money on improving toilet facilities for convicted criminals is more important than spending that money on tackling domestic violence or on trying to fight the menace of dangerous drugs?”


“3.09 Scottish legislation concerning the transfer of competence and achievement of independence would need to re-establish the Scottish Parliament on a foundation other than an Act of the United Kingdom Parliament, that is the Scotland Act. Initially, however, it would not be necessary to change the essentials of the framework laid out in the Scotland Act, and legitimised by broad consensus in the country following on the work of the Scottish
the complex constitutional traditions to which we are heirs. To determine the future, look to the past.

Constitutional Convention and the referendum of 1997. Membership, elections, chamber and committee structures and proceedings, standing orders and legislative procedures could all continue in their current form. In other aspects, for example, concerning the judicial review of legislation for conformity with human rights obligations, provisions would have to be made to reflect the new circumstances of independence. . . .

3.11 The Scottish courts and judiciary would remain constituted as at present, but with cessation of appeals beyond the Scottish courts either to the House of Lords and Privy Council, or (in due course) to the United Kingdom Supreme Court. As noted, provision would need to be made concerning the scope of judicial review both in respect of legislative powers of the Scottish Parliament and in respect of executive powers of Ministers. Arrangements would be needed to secure the continuing independence of the judiciary."
Constitutional Judicial Review in Scotland – Some Recent Developments

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Introduction

1. This article looks at a number of recent developments in the general area of judicial review in Scotland that again highlight the different constitutional structure the devolutionary settlement has created for Scotland, one in which a model based on judicial supremacy rather than (Scottish) Parliamentary sovereignty has been created, and some of the tensions that have been raised thereby.

2. It should be noted that, notwithstanding the new constitutional framework, and certain judicial criticism of the older rules that apply private concepts of, or “title and interest to sue”1 to, public law cases,2 Scotland retains restrictive rules on standing compared to the practice in England which means that there is no real scope for public interest litigation by pressure groups or (quasi-) non-governmental organisations. Indeed, the Scottish Human Rights Commission – set up by the Scottish Parliament under the Scottish Commission for Human Rights Act 2006 – while permitted to intervene in legal proceedings “for the purpose of making a submission to the court on an issue arising in the proceedings” is expressly forbidden by its constituting statute to “provide assistance to or in respect of any person in connection with any claim or legal proceedings to which that person is or may become a party”. Section 7 of the Equality Act 2006 also prohibits the Equality and Human Rights Commission from taking “human rights action” in Scotland, or even from considering the question whether a person’s human rights have been contravened “if the Scottish Parliament has legislative competence to enable a person” to take such action or consider this question.

3. Additionally, the Scottish courts have been traditionally unwilling to allow themselves to be used as debating fora for the resolution of what they would term “purely academic disputes” unrelated to the particular facts of the individual case before them and have been hostile to the idea that they might be asked to pronounce “bare declarators” of law.3 Instead, it is not uncommon for Court of Session judges to assert that cases can only properly be brought before the courts in Scotland by individuals who can say that their rights are being breached and that they have a true, ongoing and live interest to...

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1 See Rape Crisis Centre v Secretary of State for the Home Department 2000 SC 527 and Adams v Advocate General 2003 SC 171, OH, for a discussion of the requirements of title and interest in public law cases.
3 But see now Napier v Scottish Ministers 2005 SC 307 at [7], OH:

"[W]e considered that there might be instances, as was envisaged by Lord Slynn in R v Secretary of State for the Home Department ex p. Salem [1991] 1 AC 450 at 457, in which it would be in the public interest that an issue of general importance arising out of an academic appeal should, if possible, be resolved. We were satisfied that in the unusual circumstances of the present case we should hear argument in regard to grounds 1 and 5, in so far as they were concerned with matters of general legal principle, with a view to making, if possible, a declaratory order." (emphasis added)
have that matter resolved by the court. Scottish judges in the House of Lords seem to have taken a different approach. But the prevalent attitude in the Court of Session results in the paradox, for example, that protective costs or expenses orders in Scotland can only be sought by persons who have an identifiable and specific legally recognised private interest in the outcome of a judicial review, a factor which might otherwise count against them in obtaining such an order in proceedings brought in England and Wales.

4 See, e.g. Davidson v Scottish Ministers 2002 SC 205 at 216, IH, per Lord Hardie:

"[J]unior counsel for the claimant acknowledged that the reclaiming motion was intended to deal with 'abstract questions of principle'. I strongly disapprove of the procedure adopted by the claimant and his legal advisers in this case. It is a matter for future consideration whether the court should dismiss at the earliest opportunity any similar such petitions unless the petitioner has had recourse to and exhausted his remedies under the Prison Rules. If the court does not adopt such a stance there is a real risk that, by reason of the priority given to petitions for judicial review, judicial time and public funds will be utilised unfairly at the expense of other litigants."

5 See Davidson v Scottish Ministers [2005] UKHL 74 2006 SC (HL) 41 at [58], per Lord Rodger:

"[T]he issue of public importance in the appeal is whether the Scottish courts can ever grant interim interdict and interim interdict, or an order for specific performance and an interim order for specific performance, against the Crown. As I have explained, the issue arose at the very outset of the present proceedings when Mr. Davidson sought an interim order ordaining the Scottish Ministers to secure his transfer to conditions of detention compliant with Art 3 of the Convention, whether within Barlinnie or in another prison. Happily, Mr. Davidson completed his sentence in 2002 and so now has no reason to seek any such order. For him, the question is academic. But for other litigants in the Scottish courts, for the Scottish Ministers and indeed for the UK government, it is of perennial interest. The appeal presents the first opportunity that the House has had to consider the question in a Scottish appeal." (emphasis added)

See also Beggs v Scottish Ministers [2007] UKHL 3 [2007] 1 WLR 455 at [30], per Lord Rodger:

"By the time of the hearing before this House, an appeal [taken by the Scottish Ministers] which had been widely expected to raise a range of issues and which had been set down for a three-day hearing had shrunk to an appeal against the order, now spent, requiring Mr. Cameron and Mr. Gunn to appear before the First Division, and a request for clarification of a point of law discussed by the First Division in relation to a decision against which the [Scottish] ministers were no longer appealing." (emphasis added)

6 See McArthur v Lord Advocate 2006 SLT 170 at [13], [15], per Lord Glennie:

"[C]ounsel emphasized that the petitioners in the present cases were relatives and therefore victims. Non-governmental organizations or public interest groups did not qualify for victim status in terms of the Convention. These actions could not be raised by anyone other than victims; and there were questions in Scots law as to the status required to raise an action by way of judicial review. The petitioners were not seeking money or compensation and had indicated that they had no present intention to raise an action for damages. These petitioners were not about pecuniary gain. They were seeking to air a matter which should be aired in public, namely the whole manner in which blood transfusion was administered in Scotland since the mid 1980s. . . . I am satisfied that although the petitioners are relatives of the deceased, they have no financial interest in pursuing the action. As I understood counsel for the petitioner's submissions, the individual relatives were put forward as petitioners because it is they, rather than any pressure group, who have the appropriate status for judicial review proceedings in Scotland. I therefore consider that the 'no private interest' test is satisfied." (emphasis added)

7 See R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192 [2005] 1 WLR 2600 at [74]:

"(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above." (emphasis added)
The Scotland Act 1998 and the Human Rights Act – alternative statutory routes for the vindication of Convention rights

4. The 3:2 majority decision of the House of Lords in *Somerville v Scottish Ministers* [2007] UKHL 44 2008 SC (HL) 45 [2007] 1 WLR 2734, HL (Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe forming the majority; Lord Scott of Foscote and Lord Mance dissenting) overruled the decision of the First Division of the Inner House of the Court of Session and re-stated the principles governing the constitutional relationship between the Scotland Act 1998 and the Human Rights Act 1998 (HRA). Their Lordships forming the majority confirmed that the two statutes provide distinct alternative statutory routes for the vindication of Convention rights against the Scottish Ministers, with each statute providing access to the full range of remedies in respect of breach of Convention rights, including a claim to public law damages by way of “just satisfaction”. Although both statutes give the same definition of Convention rights, the two Acts differ in the following respects on the matter of the actionability of Convention rights violations:

(i) The range of persons who may bring Convention rights challenges is broader under the Scotland Act 1998 (in including law officers as well as “victims”).

(ii) The range of acts and omissions which might be challenged as Convention incompatible is broader under the Scotland Act 1998 (in including the making of legislation by the Scottish Parliament or Scottish Ministers, and/or a failure on the part of the Scottish Ministers to make legislation or to introduce or lay before the Scottish Parliament a proposal for legislation).

(iii) Except in the case of challenges to acts of the Lord Advocate in her capacity as head of the systems of criminal prosecution and of the investigation of deaths in Scotland, the s. 6(2) HRA defence does not apply to Convention claims brought under the Scotland Act 1998 and so the Scottish Ministers cannot rely on the defence of “only following orders” or acting in a manner required of or permitted to them under Westminster statutory authority.

(iv) The s. 7(5) HRA one-year stop-gap time limit does not apply to Convention claims brought under the Scotland Act 1998 which, in fact, sets down no specific time limits for Convention-based claims against the Scottish devolved institutions.8

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8 The “no time-bar for public law damages” aspect of the *Somerville* decision has been adversely commented upon by the SNP administration in Edinburgh. See, e.g Kenny MacAskill MSP, the [Scottish] Cabinet Secretary for Justice in his Scottish Parliamentary Question SW3-6286 response on 14 November 2007:

“The effect of the House of Lords ruling [in *Somerville*] is to leave the Scottish Government as the only public authority exposed to claims of this kind without a one year time bar. I have made it clear to the UK Government that I regard that position as untenable and unacceptable and that action is required to restore the position to what we believe was intended in 1998 and was understood to be case before now. If that requires amendment of the Scotland Act, I believe the UK Government should be prepared to consider bringing forward legislation to that effect. I continue to discuss these points with the UK Government and will give further details to Parliament in due course.”

See also the Scottish Parliament Justice Committee Official Report, 7 October 2008, per the Scottish Minister for Community Safety, Fergus Ewing MSP, at col. 1181:

“[T]he fundamental legal issue raised by the *Somerville* case . . . is that the Scottish ministers are the only public authority exposed to claims for damages arising from breaches of human rights without a one-year time bar. We asked the UK Government to assist us in tackling that. . . . On 25 June [2008], the [Scottish] Cabinet Secretary for Justice . . . stated: ‘It is . . . frustrating that despite our strenuous efforts we still await a commitment by the UK Government to take action to remedy the situation, although our discussions with them continue. . . . In the meantime, we have no option but to deal with existing cases as the law now stands.’ . . . Because we have not obtained a satisfactory response from Westminster, we are left facing these stopping out claims without the time bar that applies to every other authority. That seems to me to be a shocking neglect.”
5. In their dissenting judgments in Somerville, Lord Scott and Lord Mance also gave a new reading to s. 7(1) HRA. They considered that s. 7(1)(a) (and consequently the s. 7(5) time bar) applied to all claims brought for breach of Convention rights, by whatever procedure they might pursue and whether or not they are pursued alone or in conjunction with other claims. Section 7(1)(b), on their analysis, was said to allow for reliance on Convention rights in situations which were not within s. 7(1)(a) – for example, where a Convention right was relied upon by way of defence in civil or criminal proceedings brought by a public authority or in the development or application of common law principles. Where Convention rights were used in this way the s. 7(5) one-year time limit does not apply. Although strictly obiter, this analysis of s. 7(1) was subsequently followed and approved by Collins J in A v B [2008] EWHC 1512 (Admin) [2008] 4 All ER 511 at [21]–[23], but his decision was reversed by the Court of Appeal: [2009] EWCA Civ 24 [2009] 3 All ER 416.


6. The Scottish Government quickly and repeatedly made plain from October 2007 its unhappiness with the majority decision of the House of Lords in Somerville. In a March 2009 briefing note for journalists on the implications of the decision, the Scottish Ministers made the following claims:

“The House of Lords ruled that no one-year time-bar applies to Scottish Ministers because of the wording of the Scotland Act. The practical effect is that the Scottish Government is exposed to tens of thousands of potential claims from prisoners for compensation for being held in slopping-out conditions. By contrast, every other public authority in Scotland, and virtually every public authority in the UK, including the UK Government, can rely on the one-year time bar when faced with human rights based claims.”

7. In his statement to the Scottish Parliament on 11 March 2009, the Scottish Cabinet Secretary of Justice, Kenney MacAskill MSP, said this:

“The UK Government had suggested that we might address the Somerville issue by changing the law on time bar in Scotland more generally. However, that would reduce the rights of many deserving claimants, such as those who suffer from pleural plaques or [have] been injured through the negligence of an employer.”

8. Three points can be made in relation to the second sentence of this extract from the Justice Minister’s statement. First, the application to Convention rights (“just satisfaction”) damages claim of the same (currently three-year) period which applies to private law damages claims for personal injuries would not result in the reduction of any right of any existing claimants, since all this would do would be to establish parity of treatment between these two categories of case. Secondly, an apparent insinuation is being made by the Justice Minister to the effect that all and any who seek damages in respect of the violation of their Convention rights are ipso facto less deserving than those seeking damages for personal injuries. Finally, and in any event, different rules, principles and procedures already apply in relation to public law damages claims, since these are usually brought in the context of judicial review petitions. The introduction of changes in relation to the time limits applicable to such public law damages claims need not have any impact upon private law delictual damages brought by way of ordinary action.

10 See Cabinet Secretary of Justice Statement to the Scottish Parliament, 11 March 2009.
11 See s. 17 of the Prescription and Limitation (Scotland) Act 1973.
9. Be that as it may, on 1 April 2009 the Scottish Government had managed to exert sufficient political pressure on the UK Government – based mainly on repeated but unsubstantiated claims that a failure to change the law as they requested by the summer of 2009 would result in a further £50 million having to be paid out by the Scottish Ministers to convicted prisoners such that the Cabinet Secretary of Justice was able to advise the Scottish Parliament that “the UK Government and the Scottish Government had reached agreement in principle on a solution to the anomaly [sic] exposed by the House of Lords judgment on Somerville, in terms of which the two Governments committed themselves to working together to deliver a one-year time bar in Scotland by the summer [2009]”. The solution agreed upon between the Scottish and the UK Governments was for a draft order under s. 30(2) of the Scotland Act 1998 to be laid before both the Scottish and Westminster Parliaments for their approval, prior to its being made by the Privy Council. This draft order was intended to invest the Scottish Parliament with power itself to amend the Scotland Act by introducing a time bar of one year or less in relation “to any proceedings against the Scottish Ministers or a member of the Scottish Executive that may, by virtue of the Scotland Act, be brought in any court or tribunal by any person” (other than the Law Officers) “on the ground that an act of the Scottish Ministers or of a member of the Scottish Executive is incompatible with the Convention rights”. This draft s. 30 order was laid before the Scottish and Westminster Parliaments on 2 April 2009 and was subsequently approved by them. The Scotland Act 1998 (Modification of Schedule 4) Order 2009 (SI 2009/1380) was made at the Privy Council meeting on 10 June 2009.

10. In its Policy Memorandum accompanying the Executive’s Convention Rights Proceedings (Amendment) (Scotland) Bill (both documents being produced by the Scottish Government together on 16 June 2009), the Scottish Government stated that it had discussed with the Westminster Government the possibility of the change in the Scotland Act 1998 which it sought being brought about by primary legislation by the Westminster Parliament, but that that option had been discounted as, in their discussions, the parties could identify no “suitable legislative vehicle at Westminster” and that “there would thus have been the risk of a lengthy delay, possibly running to a number of years, before legislation would have been enacted at Westminster; during which time the Scottish Government would have been exposed to continuing uncertainty and potentially a substantially increased financial liability”. Instead, the agreed solution was for the Scottish Government to present a Bill to the Scottish Parliament to amend the Scotland Act 1998 in the manner in which it has been empowered by the Privy Council and thereby to impose a new one-year time bar on all Convention rights-based claims taken against the Scottish Ministers.

11. The Scottish Government’s Policy Memorandum promised that further UK-wide constitutional tidying up will be addressed in time by the Westminster Parliament, noting that:

12 See Cabinet Secretary of Justice Statement to the Scottish Parliament, 11 March 2009:

“The situation created in Scotland by the judgment is untenable and unacceptable. Introducing a 1-year time bar would enable us to draw a line under our liability in relation to claims of the kind made in Somerville, and so could release up to some £50m for spending on more worthwhile purposes. It would also reduce our liability in relation to other human rights claims that might arise in the future. £50m is a large amount of money. For instance, it could pay for 8 new primary schools or 500 new affordable housing units, or employ 1250 teachers or 1600 nurses for a year. So this is a very real and important issue.” (emphasis added)
"The intention is that the UK Government will subsequently seek the agreement of the UK Parliament to a comprehensive solution for all three devolved administrations via primary legislation, so putting all the devolved administrations on a consistent footing. That solution would be on the same basis as the present Bill and so any such legislation at Westminster will not change the substantive position in relation to Scotland."

12. In their Policy Memorandum accompanying this Bill the Scottish Ministers also claimed that the effect of passing the Bill into law would be that "any claims brought against the Scottish Ministers or a member of the Scottish Executive, grounded wholly or partly on an alleged breach of Convention rights" would be subject to the new one-year time limit. But if this is correct then it would appear that, for example, personal injuries actions brought against the Scottish Government which rely in part on breach of Convention rights will now be subject to a one-year time limit rather than the existing three-year prescription period. "Act" of the Scottish Ministers is said for the purposes of this Bill not to include the making of any legislation, but it does include "any other act or failure to act (including a failure to make legislation)". When the new one-year time limit might begin to run in relation to "failure to act" is left unclear in the text of the Bill. The new one-year maximum time bar applies in both civil and criminal proceedings.

13. The Policy Memorandum to the Bill also noted that the original intent of the Scottish Government was to have the new one-year time limit apply to all and any proceedings brought on or after 31 July 2009. In their eagerness to change the law, the Scottish Ministers appeared initially to have failed to take into account Convention and EU rights case law to the effect that in the absence of adequate transitional provisions, the manner and introduction of new statutory time limits such as this which have retrospective effect may itself contravene claimants' Convention rights and their legitimate expectations in being able to raise proceedings on the basis of the earlier legal rule (which had been to the effect that any undue delay in raising proceedings which had been relied upon by the Scottish Ministers might bar the claimant from proceedings with a claim).13 Accordingly, the Bill as finally introduced before the Scottish Parliament gave a further three-month period of grace until 2 November 2009 for Convention rights cases to be raised in respect of action or inaction by the Scottish Ministers pre-dating 2 July 2008. Whether this is sufficient to avoid a successful challenge to the Convention compatibility of the manner and form in which the new time limits are being introduced remains to be seen.

14. The fact remains, however, that this new one-year time limit has been imposed in Scotland without public consultation and using emergency legislation procedures. This means that there was no real scrutiny of, or evidence received on, the Bill and its implications for Scottish society by any Scottish Parliamentary Committee. Instead, the Bill was introduced before and discussed and passed unamended by a unanimous Scottish Parliament all in one day on Thursday, 18 June (only two days after publication of the Bill).

15. No proper reason was ever given by the Scottish Government as to what emergency existed which required this legislation to be pushed through in one day without public consultation or debate almost two years after the House of Lords decision complained of.

13 See, e.g. Fleming (t/a Bodcrafter) v Customs and Excise Commissioners [2008] UKHL 2 [2008] 1 WLR 195, HL.
16. It is clear, however, that this change in the law allows for far more than setting a cap on the bringing of aged claims by prisoners for just satisfaction damages in respect of their slopping out, as was its avowed rationale. Instead, it provides for the imposition of a time bar of at most one year in relation to all and any Convention rights claims against the administrative action or inaction of the Scottish Ministers, regardless of whether just satisfaction damages was sought by the Convention rights victims in these actions, and regardless of whether these actions are brought by or on behalf of the apparently deserving (for example the pensioners whose situation was repeatedly mentioned in the Scottish Parliament) as contrasted with allegedly undeserving (i.e. convicted prisoners).

17. This change in the law involves, under the guise of limiting prisoners' rights, a significant reduction in the level of judicial protection afforded to the (Convention) rights of each and every private individual in Scotland vis à vis the Scottish Government. All this was done without any public consultation in what looked like a helter-skelter rush to change the constitution to the Scottish Government’s advantage before anyone apparently noticed the implications of what was being done. It may be said to be an example of playing politics with the (Scottish) constitution.

Recent judicial review of legislation in Scotland on Convention grounds

Fox hunting

18. In Friend v Lord Advocate [2007] UKHL 53 2008 SC (HL) 107 the House of Lords (Lord Bingham, Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood) unanimously rejected the challenge argued by a litigant in person to the Convention compatibility of the Scottish fox hunting ban. Unfortunately, given that this was a case argued by a litigant in person and where no amicus curiae had been appointed, their Lordships also saw fit to pronounce on the issue as to whether ss 35 and 58 of the Scotland Act 1998 – which would appear to bind the Scottish Parliament and the Scottish Government to act in a manner which is compatible with all and any international obligations of the United Kingdom – might have modified the heretofore accepted dualist approach to international law (which requires specific incorporation of international treaty obligations into domestic law before they become enforceable before the court).

14 See Scottish Government Briefing Note, “Somerville: time bar on human rights actions against Scottish Ministers” (11 March 2009), para. 19:

“The Scottish Government believes that the basic point is simple and compelling, and should command widespread support. The Scottish and UK Governments and Parliaments should work together to reduce the amount being paid out to convicted criminals and release up to £50m which can be put to better uses, particularly in the present economic circumstances. Legislation to achieve that should be progressed urgently in both Parliaments.” (emphasis added)

15 The Scottish Government’s Executive Note on the Scotland Act 1998 (Modification of Schedule 4) Order 2009 (SI 2009/1380) notes as follows:

“There has not been any public consultation by the Scottish Government on the instrument; but the Scottish and UK Governments have made known publicly their intention to make the instrument and this was the subject of a statement to the Scottish Parliament by the Cabinet Secretary for Justice on 11 March 2009, which was accompanied by publication of drafts of the instrument and of the Bill proposed to be introduced before the Scottish Parliament once the instrument has been made.”

This statement is repeated verbatim at para. 22 of the Policy Memorandum to the Bill.
19. There was at least an interesting argument to the effect that by statutorily binding the Scottish Government under the Scotland Act 1998 to respect all of the UK’s international obligations (albeit an obligation which s. 58 of the Scotland Act envisages to be enforced by action on the part of the Secretary of State), this was sufficient to incorporate these international obligations into domestic law – at least as against the Scottish Government – such as to make them enforceable also by private parties who could show themselves prejudice citizens by the Scottish Government (in)action which was not compatible with the UK’s international treaty obligations.16

20. There may yet be some mileage in the statutory provisions as providing a statutory basis for a legitimate expectation of Scottish devolved institutions action being compatible with the UK’s international obligations.

**Sex offenders’ registration legislation**

21. *A v Scottish Ministers* 2008 SLT 412 is an ongoing judicial review of the Convention compatibility of the substantive provisions of the UK sex offenders’ registration legislation. Although the regulation of sex offenders is within the devolved capacity of the Scottish Parliament, the Scottish Parliament decided that in the interests of uniform treatment of sex offenders across the United Kingdom, it would pass a Sewel motion requesting the UK Parliament to legislate for Scotland at the same time as it was legislating for England and Wales. However, the legislation applies in Scotland only as a result of a commencement order made by the Scottish Ministers exercising their devolved powers. Accordingly, the challenge to the Convention compatibility of this legislation has been brought under the Scotland Act 1998 by attacking the *vires* of the Scottish commencement order. The action was unsuccessful at first instance, and the matter has gone to appeal. If the Convention rights argument were to be accepted by the court (as they have subsequently been by the Court of Appeal in England and Wales17) the result of

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16 On the direct enforceability of norms of customary international law in Scots law, see Lord Advocate’s Reference (No. 1 of 2000) v nuclear weapons 2001 JC 183, HCJ, which concerned an attempt to rely on norms derived from customary international law as a defence against a prosecution for criminal damage to government property associated with the Trident missile defence system.

17 See R (F) v Secretary of State for the Home Department [2009] EWCA Civ 792 at [29]-[30]:

"The only case to which our attention has been drawn in which the question of whether notification requirements are compatible with the article 8 rights of a child is the Scottish decision (Outer House) of Lord Turnbull in A v Scottish Ministers [2007] CSOH 189. The petitioner was 14 years of age when he was convicted in 1993 of two charges of assault with intent to rape (as well as other charges) and was sentenced to 4 years’ detention. When the 1997 Act was enacted, he became subject to the indefinite notification requirements and this continued to be the case under the 2003 Act. In 2007, he sought declarator that sections 51 and 82 of the 2003 Act were incompatible with article 8. Lord Turnbull rejected the claim and in a detailed and careful judgment concluded that section 82 was proportionate to the legitimate aim that was sought to be achieved and was not, therefore, incompatible with article 8. He said:

'[52] In light of the importance of the aims being pursued I am satisfied that the rigid and indeterminate nature of the scheme under discussion does not result in this petitioner having to bear an individual and excessive burden. That is not to say that if the facts of the case were different the same view would necessarily be arrived at. For example, the proportionality of an indefinite interference with the art 8 rights of an elderly man who had been in no trouble for very many years might cause the issue to be focused in quite a different way …’

30. This decision is, of course, not binding on us. We confess to having difficulty in seeing how [52] is consistent with the remaining part of Lord Turnbull’s reasoning which is directed to the question whether the scheme as a whole is disproportionate. Once it is acknowledged that there might be cases (for example, the elderly man who has been in no trouble for many years) where indefinite notification requirements without the possibility of review would be disproportionate, it is difficult see how a scheme which does not permit a review in any circumstances can be proportionate."
the judicial review would be that the Scottish commencement order of the UK measures could be struck down as *ultra vires*, thereby disapplying the substantive provisions of the Westminster primary legislation in Scotland. By virtue of s. 102(2)(a) of the Scotland Act 1998 the courts have been invested with the power (a) to remove or limit any retrospective effect of such a decision or (b) to suspend the effect of the decision for any period and on any conditions to allow the defect to be corrected. Section 102(3) enjoins the court when considering the exercise of these powers to "have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected". Rather than deal with these legal and constitutional issues, however, in July 2009 the First Division of the Inner House *ex proprio motu* decided to set the appeal "to await the outcome of proceedings in England". Whether this refusal by the appeal court to allow the Scottish proceedings to progress is compatible with the court's obligations under s. 6 HRA to ensure that the petitioner receives a trial within a reasonable time is an open question which may yet have to be resolved in Strasbourg.

**Voting rights for prisoners**

22. In *Smith v Scott* 2007 SC 345, RAC/IH the Registration Appeal Court in Scotland, exercising its statutory appellate jurisdiction under the Representation of the People Act 1983, pronounced a declaration of incompatibility under s. 4 HRA in relation to the maintenance of a blanket ban on voting by convicted prisoners18 (the franchise is a matter reserved to Westminster under the scheme of the Scotland Act 1998). Notwithstanding the fact that this final declaration of incompatibility was made in January 2007 (there being no right of appeal from the Registration Appeal Court to the House of Lords) the UK Government has not yet put forward any proposals for changing the law to ensure its Convention compatibility. The result has been that one Scottish General Election to the Scottish Parliament — that in May 2007 — has proceeded on the basis of a Convention-incompatible franchise.

23. Following the s. 4 HRA declaration of incompatibility of this blanket prisoner disenfranchisement — and relying on the fact that the Scotland Act 1998 excludes any possible s. 6(2) HRA defence in relation to the actions of the Scottish Ministers — in *X v Scottish Ministers and others* 2007 SC 631 the argument was essayed that it was now beyond the powers of the Scottish Ministers to exercise their statutory powers of recall of prisoners released into the community on licence19 on the basis that such recall into

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18 Section 3(1) of the Representation of the People Act 1983 provides, "A convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election".

19 Under reference to s. 17(1)(ii) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 which provides:

> "(1) Where —
>  
> (a) a long-term prisoner has been released on licence under this Part of this Act...  
>  
> (b) ...
> 
> the Scottish Ministers —
> 
> (i) shall, if recommended to do so by the Parole Board; or
> (ii) may, if revocation and recall are, in their opinion, expedient in the public interest and it is not practicable to await such a recommendation,  
> 
> revoke the licence and recall the prisoner to prison." (emphasis added)

Such recall has the consequence that the petitioner became liable to be detained in pursuance of his remaining original sentence: see s. 17(5) of the 1993 Act which provides that "On the revocation of the licence of any
custody would inevitably result in the individual's Convention-incompatible disenfranchisement by virtue of the operation of the UK legislation. This challenge was rejected by the First Division which held that although the actions of the Scottish Ministers would foreseeably result in the individual's automatic disenfranchisement, this could not be said to be a proper connection between the fact of recall by the Scottish Ministers and the legislative disenfranchisement of the recalled individuals which was not the Scottish Ministers' responsibility nor within their competence to alter. 20

24. It is anticipated that the disenfranchisement of prisoners from elections to the Scottish Parliament may be the subject of a further challenge based on EU law. Article 19 EC provides that "Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State". Those eligible to vote in the Scottish Parliamentary elections are persons who are registered as a local government elector in the register to be used at the elections. This provision effectively enfranchises in a Scottish Parliamentary election resident EU citizens. Any EU right has to be interpreted and applied in a manner which is compatible with respect for the fundamental rights recognised as general principles of EU law. The current Convention-incompatible refusal to allow convicted prisoners who are EU citizens to exercise their rights to vote in the Scottish Parliamentary elections would seem to be incompatible with these fundamental rights provisions of EU law. This therefore open up the possibility of action being taken by an EU citizen detained in a Scottish prison to have the current disenfranchisement provisions disapplied in his or her case and for Francovich damages to be awarded in respect of this disenfranchisement to date. 21

person under the foregoing provisions of this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large".

20 This reading is somewhat difficult to reconcile with the subsequent five-judge decision of the High Court of Justiciary in Dickson v HM Advocate 2008 JC 181 at [40], per Lord Justice General (Hamilton):

"[In my view, the prosecutor here may properly be regarded as 'giving effect' for the purpose of s. 6(2)(b) HRA to sec 11(6) of the Sheriff Courts (Scotland) Act 1971] by invoking the jurisdiction and powers conferred by it on the temporary sheriff. That construction is not as strained as that urged by the reclaimer in XY v Scottish Ministers 2007 SC 631."

Lord Macfadyen stated (at paras 53-54, 63):

"The Advocate-depute... referred also to XY v Scottish Ministers 2007 SC 631 in which, while not reaching a concluded view on the point, the court commented unfavourably on the proposition that in moving for sentence a prosecutor was 'giving effect' to sec 3 of the Representation of the People Act 1983 (cap 2) (as amended), which disqualifies a convicted person while serving a custodial sentence from voting in a parliamentary or local government election... The Advocate-Depute's submission was that in calling a criminal case before a temporary sheriff the Lord Advocate, through the procurator fiscal, was 'giving effect' to the provisions of sec 11(6) of the 1971 Act which conferred on the temporary sheriff the jurisdiction and powers of a sheriff. Section 6(2)(c) of the Human Rights Act therefore applied to the effect that in doing so the Lord Advocate neither committed an unlawful act under sec 6(1) of the Human Rights Act nor by virtue of sec 57(3)(a) acted in a way that was beyond his powers by virtue of sec 57(2) of the Scotland Act... I am of opinion that the Advocate-depute's fourth submission is not precluded by binding or persuasive authority, and is well founded. The procurators fiscal, in calling the cases against the appellant and the complainer respectively before temporary sheriffs, were giving effect to the provisions of sec 11(6) of the 1971 Act. It follows that the prosecutions of the appellant and the complainer were neither unlawful nor ultra vires of the Lord Advocate."

25. In Rothwell v Chemical & Insulating Co. Ltd [2007] UKHL 39 [2008] 1 AC 281 (also known as Johnston v NEI International Combustion Ltd) the House of Lords ruled that asymptomatic pleural plaques which were attributable to asbestos exposure did not give rise to any award of damages under English law. The Scots law of delict and the English law of tort have developed the law of negligence in common on the basis of the same principles to establish what constitutes actionable wrongdoing (iniuria) and what constitutes recoverable heads of loss (damnum) as a matter of private law. However, in a legislative effort to avoid a similar finding in Scots law that the presence of asymptomatic pleural plaques properly attributable to negligent asbestos exposure should not result in any award of damages, the Scottish Government introduced a Bill before the Scottish Parliament in the summer of 2008 which the Scottish Parliament enacted as the Damages (Asbestos-related Conditions) (Scotland) Act 2009, the provisions of which came into force on 15 June 2009. This Act has two main aims:

(i) first, definitively to restate the heretofore established law of Scotland to the effect that certain specified asbestos-related conditions (namely pleural plaques, asbestos-related pleural thickening and asymptomatic asbestosis) are to be regarded as non-negligible personal injury sounding in damages, with a view to restoring legal certainty to this area after the uncertainty introduced by the decision of the House of Lords in Rothwell/Johnston to reverse the established English position at common law;

(ii) secondly, to safeguard the rights and legitimate expectations of, among others, workers who have been negligently exposed by their employers to asbestos in the workplace to obtain compensation in respect of their development of the full range of asbestos-related medical conditions.

26. It should be noted that the 2009 Act does not formally purport to overrule the decision of the House of Lords in Rothwell/Johnston since that determines issues of English law rather than Scots law and the Scottish Parliament has no power to alter English law. The House of Lords judgment then remains wholly unaffected by the 2009 Act. The validity of the decision as a matter of English law is not being called into question by the Scottish Bill but, if it is passed by the Scottish Parliament, there will then be two different legal regimes in the United Kingdom in terms of recoverability of damages in cases involving asbestos exposure as the UK Government has refused to consider the legislative overruling of the House of Lords decision in Rothwell. The validity of the 2009 Act is, at the time of writing, subject to a judicial review challenge brought by a group of six professional indemnity insurance companies which claim that their rights and interests (both at common law and under and in terms of the ECHR) are disproportionately and unlawfully affected by this Scottish legislation.²² Although disavowing the suggestion that this legal challenge is in effect an actio popularis, these insurance companies are nonetheless seeking an order from the court quashing the legislation as null and void erga omnes.

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Recent judicial review of administrative action in Scotland

27. Davidson v Scottish Ministers [2005] UKHL 74 2006 SC (HL) 42 was, in effect, the Scottish M v Home Office [1994] 1 AC 377 in which a unanimous House of Lords (Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell, Lord Mance) confirmed that the prohibition contained in s. 21 of the Crown Proceedings Act 1947 against the court pronouncing coercive orders against Ministers of the Crown (including Scottish Ministers) applied only in private law actions and had no effect in relation to the remedies (coercive and declaratory) which the court in Scotland might pronounce in the exercise of its public law supervisory jurisdiction accessed by way of petitions for judicial review to the Court of Session.

28. Kennedy v Lord Advocate 2008 SLT 195 is an example of this (newly rediscovered) jurisdiction of the Scottish courts being exercised against the Lord Advocate who, in the face of repeated requests, had refused to order any public inquiry into the deaths of individuals who, it was admitted, had eventually succumbed to the Hepatitis C infection which they had received from blood transfusions and blood products administered to them in the late 1980s and early 1990s when in the care of the NHS in Scotland. The Lord Ordinary pronounced an order reducing or quashing the Lord Advocate's refusal and his judgment was accepted by the incoming Scottish Nationalist administration, which has announced that it is setting up an Art. 2 ECHR-compliant inquiry into the circumstances under which individuals in the care of the NHS in Scotland were given infected blood transfusions and blood products, whether infected by the Hepatitis C virus or HIV.

Judicial impartiality and the appearance of bias

29. In Helow v Advocate General for Scotland [2008] UKHL 62 2009 SC (HL) 1 [2008] 1 WLR 2416 a unanimous House of Lords bench (with, unusually, a majority of Scottish Judges in Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Cullen of Whitekirk; Lord Walker of Gestingthorpe and Lord Mance being the non-Scots) rejected a claim that the decision of the Lord Ordinary had been vitiated by apparent bias. The judicial decision in question – which had been made on consideration of the papers only without an oral hearing – had been to refuse permission to a woman of Palestinian ethnicity to allow her to appeal against a notice of removal, following the rejection of her asylum claim. The woman's asylum claim was based, in part, on her claims that, as a former resident of the Sabra/Chatila refugee camp in the Lebanon, she had been involved in collating evidence in support of the attempted war crimes prosecution in Belgium of the then Israeli Prime Minister, Ariel Sharon.

30. Following this refusal by the Lord Ordinary of permission to appeal it was determined by an internet search undertaken by the petitioner's solicitors that the judge in question was a member of the International Association of Jewish Lawyers and Jurists (which has Lord Woolf as one of its three Honorary Deputy Presidents) and was a founder member of the Scottish branch of the association. Membership of the association is open to lawyers and jurists of all creeds who share its aims, which are “to advance human rights everywhere, including the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions” with the association describing itself as
“especially committed to issues that are on the agenda of the Jewish people, and works to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel”. The Association also has category II status as a non-governmental organisation (NGO) at the United Nations, enabling it to participate in the deliberations of various UN bodies. However, from a reading of various of the statements made in the name of the association before the UN, as well as of a selection of articles published under its imprint in its quarterly magazine Justice (one of which was highly critical of the attempted prosecution in Belgium of Ariel Sharon for war crimes in respect of his alleged complicity in the Sabra/Chatila massacres), the petitioner reached the conclusion that the association could fairly be described as anti-Palestinian and had a strong commitment to causes and beliefs at odds with the petitioner’s own causes and beliefs sufficient to give rise to an objective appearance of bias (or to an apprehension of the possibility of subconscious bias) on the part of the judge considering her original application.

31. The issue for determination was whether and to what extent the picture presented by the petitioner’s research would, in fact, indicate to the objective fair-minded observer that there was a real possibility that the Lord Ordinary had been biased. In dismissing the claim their Lordships held that there was no evidence that the Lord Ordinary had ever expressed support for the more extreme views expressed by the association of which she was a member, and that the Lord Ordinary’s mere membership of the association could not give rise in the eyes of a fair-minded observer to a real possibility of unconscious influence or the appearance of possible bias, since such membership was said not to connote any form of approval or endorsement of that which was said or done by the association’s officers avowedly on its behalf and in its name. The failure of the Lord Ordinary to disclose membership of the association did not carry great weight with their Lordships in the balancing of factors, since they considered that a fair-minded observer was more likely to conclude that it had never crossed her mind that her membership was relevant.

**Scottish judges (critically) reviewing the (Scottish) Constitution**

32. In a document dated 10 October 2008, the judges of the Court of Session made a collective submission to the Calman Commission which was established by the Scottish Parliament to consider the future of devolution in Scotland. As an initiative of the Scottish Parliament in the face of opposition from the (minority nationalist) Scottish Government, the Calman Commission had the support of the leading unionist parties in Scotland (Labour, the Conservative and the Liberal Democrats) which when aggregated to form the majority (and the opposition) in the Scottish Parliament. It also attracted the backing of the UK Government. The Commission’s formal remit was to:

> “review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.”

(emphasis added)

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24 According to the Commission’s website at [http://www.commissiononscottishdevolution.org.uk/about/](http://www.commissiononscottishdevolution.org.uk/about/): “The United Kingdom Government signalled its support for the Commission in January 2008. In a written Ministerial Statement on 25 March, the Secretary of State for Scotland said the UK Government would work with the Scottish Parliament to provide support for the Commission”.
33. The terms of this remit would seem to have been intended to exclude consideration of the issue of possible independence of Scotland outside the United Kingdom. The Scottish National Party, which is the largest party within the Scottish Parliament, therefore refused to participate in the deliberations and proceedings of the Calman Commission. The SNP minority administration in Scotland is, instead, holding its own consultation into the country’s constitutional future, entitled National Conversation. With the coming UK Supreme Court, the SNP Government also announced its own review in December 2007 into possible further reform of the current system of civil appeals going to London from Scotland, notwithstanding that this issue might be thought to concern the constitutional arrangements within the United Kingdom and therefore to fall outwith the devolved competence of the Scottish administration. This review, headed by Professor Neil Walker of Edinburgh University, is tasked to produce its report by November 2009.

34. Against that background, it is perhaps surprising that the judges of the Court of Session should be willing to enter into an area of some political and constitutional sensitivity by recognising and responding to a Commission which, albeit set up by the Scottish Parliament and backed by the UK Government, is not recognised or supported by the Scottish Government.

35. The submission states that the Court of Session judges are agreed that there are “certain problems” in relation to “the operation of section 57(2) and Schedule 6 of the Scotland Act 1998 and related matters” and that these problems “ought to be addressed”. There was, they say, no general agreement among the judges as to how the problems they identified might be addressed, so in their submission the judges limit themselves to giving an “indication . . . of several possible ways of dealing with the problems, without commending any particular one”.

Problems in the Scottish devolutionary settlement, as identified by the Court of Session judges

36. The first problem identified by the Court of Session judges (at para. 5) is that devolution issues arise and are considered in court proceedings only where a party to the action or trial “takes appropriate and timeous steps” to raise the issue. They say, however, that the parties to the litigation may fail to raise the issue through “neglect, 

25 The full membership of the Calman Commission is: Sir Kenneth Calman, Chancellor of the University of Glasgow (Chair); Lord Boyd of Duncansby (Colin Boyd), former Lord Advocate, now Labour member of the House of Lords (Labour); Rani Dhir, Director Drumchapel Housing Co-operative; Lord Selkirk (James Douglas Hamilton), former Scottish Office Minister, Conservative member of the House of Lords; Professor Sir David Edward, retired judge of the European Court and temporary judge of the Inner House of the Court of Session; Lord Elder (Murray Elder), Labour member of the House of Lords; Audrey Findlay, former Leader of Aberdeenshire Council, now Convenor of the Scottish Liberal Democrats; Lord (Jamie) Lindsay, former Scottish Office Minister, Conservative member of the House of Lords, and Chairman of Scottish Agricultural College; John Loughton, President of the Scottish Youth Parliament (serving in a personal capacity); Murdoch MacLennan, Chief Executive, Telegraph Media Group; Shona McPherson, Chair of the National Trust for Scotland and of the Scottish Council Development and Industry; Iain McMillan, Director, CBI Scotland; Mona Siddiqui, Professor of Islamic Studies, University of Glasgow; Matt Smith, Scottish Secretary, UNISON; Lord Wallace (Jim Wallace), former Deputy First Minister and former leader of the Scottish Liberal Democrats, Liberal Democrat member of the House of Lords.


inadvertence, misjudgement or lateness in acting" and they consider that "having regard to the important consequences that may attach to the proper raising of a devolution issue, that situation may not be regarded as satisfactory". The main constitutional consequence of something being defined as a devolution issue is that it opens up a whole new mechanism for what might be called statutory judicial review of the decisions of lower courts (defined as including, for these purposes, even the Appellate Committee of the House of Lords). At the apex of this system of statutory judicial review sits the Judicial Committee of the Privy Council exercising its devolution jurisdiction. It is not immediately clear why this matter should be raised before the Calman Commission, however, since it concerns the details of court procedure which is a matter for the Court of Session judges to regulate (by Act of Sederunt in civil matters or Act of Adjourn in criminal cases) rather than an issue which might require Parliamentary amendment of any primary legislation. One would have thought that the solution to this first problem as it is identified in their submission would be for the judges simply to amend the relevant rules so as to permit the court itself to raise a devolution issue, ex proprio motu.

37. What is now mentioned in the Scottish judges' submission is the fact that in some appeals in Scotland – whether in civil cases in the Inner House of the Court of Session or in the High Court of Justiciary acting as criminal appeals court – the court has refused to receive, consider or make any formal determination or finding on devolution issues which have in fact duly been raised before it. The avowed intent behind such a refusal to rule has apparently been to avoid the possibility of an appeal to the Privy Council against the Scottish appellate court's decision. But such an approach by judges in Scotland to the interpretation of the relevant rules and primary statutory provisions has now been said by the Privy Council to be based on a "misconception".

28 C v Miller 2004 SC 318 at [9]–[11]:

"9. . . . We are of the opinion that the word 'determination' in that context implies the making of a decision upon the merits of a devolution issue by the court. As will be apparent from the terms of our opinion, dated 26 June 2003, no such decision has been made. Indeed, for the reasons which we have explained in that opinion, the court was at pains to make no such decision. In these circumstances we conclude that the present application for leave to appeal is incompetent. It will be refused on that basis.

10. Even if our view regarding that matter were to be wrong, we would have refused to grant leave to appeal. It appears to us to be quite inappropriate for an appeal to the Judicial Committee to be authorised in a situation in which this court, for the reasons which it has given, has in fact not made a decision on the merits of the issue raised.

11. It was represented to us that a decision by this court to decline to entertain a devolution issue was itself unwise and that the Judicial Committee ought to be given the opportunity so to decide. In our opinion that contention is unarguable. . . . No attempt was made to persuade us, during the course of the hearing of the appeal, to exercise the discretion, which we consider we have under those provisions, in favour of the second-named appellant. In this situation we consider that no suitable argument to the effect indicated could be presented to the Judicial Committee." (emphasis added)

29 McDonald (John) v HM Advocate [2008] UKPC 46 2008 SLT 993 at [16]. JCPC, Lord Hope noted as follows:

"The word 'determination' is capable of being given a wider meaning than the Extra Division gave to it [in C v Miller 2004 SC 318]. It can, of course, mean the making of a decision on the merits. But it can also include
38. In paras 6-12 of their submission the Court of Session judges go on to identify as their second problem what they describe as a “serious difference in approach as between the court and the Judicial Committee [of the Privy Council]” in determining devolution issues and associated matters. On the Court of Session judges’ account (para. 7):

“The perception is that the explanation for this state of affairs lies in the different responsibilities of the courts in Scotland and the Judicial Committee. The courts in Scotland must apply the common and statutory law of Scotland, as well as respecting the requirements of section 6 of the Human Rights Act 1998. The Judicial Committee, on the other hand, in the context under discussion, is concerned only with the narrower issue of the compliance or otherwise of an act, or contemplated act, of the Lord Advocate with Convention rights.”31 (emphasis added)

39. As an example of the “serious difference in approach” between themselves and the Judicial Committee of the Privy Council, the Court of Session judges cite what they consider to be divergent approaches taken on the issue of when and whether a convic-

any decision which disposes of the issue in the lower court, including a refusal to consider the issue. The importance of preserving the avenue of seeking special leave to appeal from the Judicial Committee in such a case is indicated by the judges’ comment in para 67 of their opinion that they were not persuaded that the circumstances justified a jurisdiction being invoked which might render competent an appeal to the Privy Council. The Extra Division in C v Miller, para 11, made a similar comment when they rejected the appellant’s submission that the Judicial Committee ought to be given the opportunity to decide whether to entertain the devolution issue which that court had refused to entertain. I am not to be taken as indicating that these decisions were taken simply to present the issue being determined by the Judicial Committee. If they had been, they would have amounted to an abuse of the system which the Judicial Committee must be able to correct. But the decisions were undoubtedly based upon a misconception. It is for the Judicial Committee, not for the lower court, to decide whether special leave to appeal should be given. It is also for the Judicial Committee to decide whether it has jurisdiction to entertain an application for special leave.” (emphasis added)

See also Lord Rodger (at paras 48-49):

“[I]n substance, the appeal court determined that the Lord Advocate was not under any duty in terms of article 6(1) ECHR, or otherwise, to reinvestigate the case at the appeal stage to see whether there were any statements which ought to have been disclosed, and so she had not acted incompatibly with the appellants’ article 6(1) Convention rights in declining to do so. That amounted to the determination of a devolution issue in terms of para 1(4) or (6) of Schedule 6 to the 1998 Act.

49. Rather surprisingly, the appeal court simultaneously determined, not that no devolution issue arose in the proceedings . . . but that it would not allow the devolution minutes to be received. The court was not satisfied that ‘the circumstances justify a jurisdiction being invoked which might render competent an appeal to the Privy Council’: McDonald (John) v HM Advocate, 2008 SLT 144, 158, para 67. All that needs to be said about that observation is that receiving or not receiving a devolution minute is a procedural step which cannot affect the jurisdiction of the Board to hear an appeal, with special leave, in a case where the appeal court has in substance determined the devolution issue in question. That jurisdiction, which is conferred by Parliament, not the appeal court, cannot be removed by any procedural decision of the appeal court. For these reasons, I am satisfied that the Board has jurisdiction to entertain the appeal.” (emphasis added)

See, e.g. Fraser (Nat Gordon) v HM Advocate [2008] HJCAC 26 [2008] SCCR 407 at [219]-[220], HJCAC, per Lord Osborne:

219. . . . [T]he relationship between the concepts of a miscarriage of justice, recognised in section 106(3) of the Criminal Procedure (Scotland) Act 1995 and an unfair trial in terms of Article 6(1) of the Convention is not straightforward. Plainly they are not co-extensive. An unfair trial may not result in a miscarriage of justice. That would be so where, for example, that trial concluded with an acquittal, since the concept of miscarriage of justice comes into play only following a conviction on indictment, as provided in section 106(1) of the 1995 Act. Furthermore, a trial may be completely fair yet result in a conviction which must be regarded as a miscarriage of justice, as for example where the provisions of section 106(3)(a) operate.

220. What importance, if any, may be attached to these considerations in the present context. The answer, in my view, is that it is potentially confusing and therefore unhelpful, in criminal appeals under section 106(3)(a) of the Criminal Procedure (Scotland) Act 1995 to seek to rely on dicta pronounced in appeals under paragraph 13 of Schedule 6 to the Scotland Act 1998, since the issues which this court must consider in the former type of appeal, which I have described in some detail, are inevitably quite different from those issues which the Judicial Committee require to determine in the latter.”
tion can be disturbed on appeal upon the basis of fresh evidence. They highlight, in particular, the developing case law of the Privy Council on the duties of the Crown to disclose material evidence in a manner compatible with the accused’s fair trial rights set out Art. 6 ECHR. They also note that where the “ Judicial Committee conclude that there has been a denial of a fair trial under Article 6(1) of the Convention, they consider that they are empowered to quash the associated conviction themselves”. The Privy Council will, therefore, they say, quash convictions without having proper regard: either to the established case law of the High Court of Justiciary when sitting as a final court of appeal in non-devolution issue cases in relation to when fresh evidence might be admitted or relied on, or to the statutory test as to what constitutes a “miscarriage of justice”. The Court of Session judges conclude as follows:

"[W]e would argue that there are therefore two jurisdictions, the exercise of either of which may result in the quashing of a conviction, in which different criteria may be applied, in particular, in relation to evidence not heard at a trial, yet one of those jurisdictions, that of the Judicial Committee, can be invoked only if certain procedural steps have been timeously taken, which they may not have been, for wholly arbitrary reasons. If the question is asked whether this is a satisfactory situation, one is driven to conclude that it is not. Accordingly, in summary, the present statutory arrangements, described above are not operating in a satisfactory manner.” (emphasis added)

40. The third problem identified by the judges of the Court of Session is that human rights claims which can be made at any stage in criminal proceedings against an accused slow criminal justice down, noting (para. 13):

"[T]he facility provided by section 57(2) of the Scotland Act, to challenge by way of deviation minute virtually any act of a prosecutor has led to a plethora of disputed issues, with consequential delays to the holding of trials and to the hearing and completion of appeals against conviction. The jurisdiction of the Judicial Committee, while by no means the only factor, has arguably created, or at least has substantially contributed to, delay in the handling of criminal business.” (emphasis added)

41. This last criticism, insofar as directed to the exercise of the devolution jurisdiction of the Privy Council, is again somewhat surprising. It is a criticism not of the legislation itself, but rather of the way in which the Scottish judges themselves have interpreted and applied s. 57(2) of the Scotland Act 1998 since 31 May 1999 when the Scottish Law Officers became devolved officers and subject to Convention rights controls under the


33 Compare, however, McDonald (John) v HM Advocate [2008] UKPC 46 2008 SLT 993 at [77], JCPC, per Lord Rodger:

"I must re-emphasise the point, which was emphasised in Holland v HM Advocate 2005 SC (PC) 1, 25, para. 77, and 27, para, 65, that, while a failure by the Crown to disclose material may be incompatible with article 6 ECHR, it by no means necessarily follows that the accused has not had a fair trial in terms of article 6 ECHR, or that there has been some other miscarriage of justice. For instance, as already pointed out, the issue (such as identification) to which the material would have been relevant may not actually be in dispute at the trial, or the statement may not contain any fresh information. Alternately, as was pointed out in Sinclair v HM Advocate 2005 SC (PC) 28, para 42, even if a significant point emerges for the first time in the course of the trial, the Crown’s previous failure to disclose may well be remedied by the Crown making disclosure at that stage and the defence being given an opportunity to deploy the new material. In short, the effect of any failure to disclose depends on a consideration of the circumstances as a whole. Therefore, if the failure comes to light at an appeal stage, it will only assist the appellant if he can deploy the new material in support of an existing ground of appeal or use it as the basis for obtaining leave to lodge a fresh ground of appeal. In either event, it will be for the appeal court then to determine the appeal in the usual way. In that way, the appellant’s article 6 Convention rights can be fully respected."
Scotland Act. The judges in Scotland, in their first flush of enthusiasm for Convention rights review of government action, immediately gave a very broad definition to “devolution issues” so as to encompass anything done by the prosecution in the course of any (summary or solemn) criminal trial in Scotland. The Scottish judges also insisted that the fair trial rights set out in Art. 6 ECHR imposed in Scotland duties directly upon the Lord Advocate and all those acting on his behalf in prosecuting offences.

42. There was some initial opposition to this analysis in the Privy Council – notably from Lord Hoffmann – in the first devolution cases to come before the Judicial Committee; but the more expansive approach to the Privy Council’s devolution jurisdiction soon prevailed, albeit that the overall result of investing the Privy Council with a new appellate jurisdiction in Scottish criminal matters was, in the words of Lord Bingham, “anomalous” and “surprising and unexpected”. Scotland’s second most senior judge, the Lord Justice-Clerk Lord Gill, is apparently now openly critical of this development. His observations are noted in one account as follows:

“[S]ection 57 of the Scotland Act 1998... prevents a Scottish minister from taking any steps that are contrary to Convention rights. This Section has been seized upon by the Scottish Bar to obtain a route of appeal in criminal cases to the Privy Council. This is a result that was never expected and never intended. The origin lies in the fact that in Scotland there is only one ground of appeal in criminal cases: miscarriage of justice. The argument runs like this: since Article 6 ECHR requires that everyone should have a fair trial, then if there has been a miscarriage of justice, it stands to reason that there has not been a fair trial, and there can be an appeal to the Privy Council. Exactly where the boundaries lie has not yet been fully clarified in the case law. At ground level, this is causing endless trouble by prolonging criminal trials in Scotland. In a period of six years, the average length of a contested criminal trial has increased by one complete day. It is also causing huge delays in the criminal appeals system. The problem must sooner or later be resolved, the judge said. There has been considerable academic criticism of the jurisdiction. There is a question as to whether it was intended to be a transitional arrangement because in 1998 (when devolution started) the Human Rights Act had..."

34 See, e.g. the decisions of the High Court of Justiciary in Stairs and another v Raxton 2000 SLT 42 and Brown v Stott [2003] 1 AC 681.

35 See, e.g. Montgomery v HM Advocate 2001 SC (PC) 1 ([2003] 1 AC 641) at 19G, per Lord Hope: “But the approach which the Act has taken is that the right of the accused to receive a fair trial is a responsibility of the Lord Advocate as well as of the court”.

36 See, e.g. Montgomery, ibid. at p. 7B–C, per Lord Hoffmann:

“[A devolution issue arises only if the prospective infringement of their rights is an act of the Lord Advocate. It is therefore necessary to identify the persons upon whom Article 6.1 imposes a correlative obligation. Whom does it oblige to act in such a way as to ensure a fair and public hearing? If, as a matter of construction of the Article, no obligation is imposed upon the Lord Advocate, then no complaint of an infringement of this particular Convention right can give rise to a devolution issue.” (emphasis added)


38 Lord Bingham of Cornhill, evidence to the Parliamentary Joint Committee on Human Rights, 26 March 2001:

“When Scotland was united with England and Wales in 1707 it was clearly implicit in the Act of Union that there was no criminal appeal from Scotland to London... There was originally a doubt as to whether there was even a civil appeal from Edinburgh to London, but it was very quickly established that there was and indeed extensive use of it was made to such an extent that there was very little time to hear English appeals! But what is important is that the Scots criminal system has always been self-contained and has had no English input at all. One of the monstrosities, and to me surprising and unexpected, results of devolution is that for the first time one does have judges, Scotsly prominent among them but nonetheless judges, sitting in London ruling on questions relating to Scots criminal trials.” (emphasis added)
not been brought into force. There is a question whether it really is necessary now that human rights are better understood and all the main human rights issues in relation to criminal trials have at least been canvassed if not fully resolved. The judge concluded by saying that there is every likelihood that this question will be opened up by the Calman Commission, which has been appointed to review the workings of the devolution settlement.\(^{39}\) (emphasis added)

43. But Lord Gill’s apparent suggestion that the possibility of appeal from the decisions of the High Court of Justiciary to the Judicial Committee of the Privy Council have been “seized upon” by the Scottish criminal defence bar does seem rather to ignore or down-play the fact that some significant Scottish criminal cases before the Privy Council have been taken by the Crown against decisions of the Scottish criminal courts with which the prosecution authorities were in disagreement.\(^{40}\) It is also difficult to see how it can be said that it is the simple possibility of appeal to the Judicial Committee of the Privy Council (or in the future to the UK Supreme Court) which is responsible for the noted claimed one-day increase in the length of contested criminal trials or the complained of “huge delays in the criminal appeals system”. It seems more likely that any such delays are caused by the increasing use of human rights arguments in the criminal courts which will assuredly not disappear even if the possibility of any further UK appeal in criminal cases from Scotland is abolished.

\(^{39}\) See Andrew Le Sueur, A report on six seminars about the UK Supreme Court (School of Law Queen Mary, University of London, November 2008) See also the following remarks attributed to Lord Gill on civil appeals from Scotland as noted at p. 43:

> “It is a re-badging exercise, where you simply transfer jurisdiction to the new UK Supreme Court, is there pressure that there should be no appeal in Scottish civil matters? There is a distinct likelihood of this. It is naive to imagine that there will be no change... if the UK Supreme Court is simply going to be seen as an additional, third-level of appeal court, then it becomes less and less obvious why that court, sitting out with Scotland, with a minority of Scottish judges, is worth the disproportionate costs to the public and the litigant. This is obviously a big question. One option, the judge explained, would be simply to cut off the right of appeal to the UK Supreme Court so that the decision of the Inner House of the Court of Session would be final. There would be no great novelty in that, because a great many of the Inner House’s decisions are already final—in valuation for rating matters, appeals from the Scottish Land Court, certain planning matters, and certain other tribunal appeals. A second option would be to allow an appeal from the Inner House of the Court of Session to a larger division of the Inner House (constituted as a panel of five, seven, nine or eleven judges). There are regularly five judge constitutions and they do work very well. A third option would be the creation of a Scottish Supreme Court. At the time of the debate on the Scotland Bill the Scottish National Party adopted a surprisingly supine attitude on the question of House of Lords appeals and there was no agitation on the subject. Then in 2003 there was a Member’s Bill proposed in the Scottish Parliament to abolish the right of appeal to the House of Lords. With every passing day it increases in topicality. The argument, when it comes, is if New Zealand and Ireland can have Supreme Courts, why can’t Scotland? Reform is not imminent, but that it is significantly closer than it was a year ago.” (emphasis added)

\(^{40}\) See, e.g. Brown v Stott [2003] 1 AC 681 (Art. 6 ECHR privilege against self-incrimination – reversing the decision of the criminal appeals court); McIntosh v HM Advocate [2001] UKPC D1 [2003] 1 AC 1078 (Art. 6 ECHR presumption of innocence and drug confiscation orders – reversing the decision of the criminal appeals court); Clark v Kelly [2003] UKPC D1 [2004] 1 AC 681 (Art. 6 ECHR and the independence and impartiality of the District Court – affirming the decision of the criminal appeals court); and Spiers v Ruddy [2007] UKPC D8 [2008] 1 AC 873 (Art. 6 ECHR reasonable time requirements and unreasonable delay in bringing to trial and remedy under the Scotland Act – a mandatory reference on the application of the Lord Advocate direct from the sheriff court in which the JCPC reversed its own earlier decision in R v HM Advocate [2002] UKPC D3 [2004] 1 AC 462 by holding that the right to a trial within a reasonable time did not entail under the Scotland Act a right not to be tried after an unreasonable time).
Solutions suggested by the Court of Session judges to the problems identified by them

44. At paras 14–15 of their submission, the judges of the Court of Session propose three possible solutions to the problems which they identify, while, in the absence of any general agreement among them, endorsing no one of these. These possible solutions are:

(i) to have the UK Parliament amend s. 57(2) of the Scotland Act 1998 so as to exclude the Lord Advocate’s acts in her capacity as head of the system of criminal prosecution in Scotland from the operation of the vires/competency controls of the Act (and implicitly removing such issues from the devolution jurisdiction of the Judicial Committee of the Privy Council);

(ii) to leave the Lord Advocate with her function as general legal adviser to and member of the Scottish Executive but hive off her prosecution functions to a new post of “Director of Public Prosecutions in Scotland” who would be responsible for the prosecution system, but who would not be a member of the Scottish Executive (and whose acts or omissions would again be thereby removed from the devolution jurisdiction of the Judicial Committee of the Privy Council);

(iii) to introduce a general right of appeal with leave in criminal matters from the criminal appeals court in Scotland to the Judicial Committee/UK Supreme Court. The Court of Session judges say of this possible solution that:

“a change of such a radical nature would be likely to generate considerable controversy. However, it would put the criminal appeal court in Scotland on the same footing as the court of appeal in England and Wales in relation to criminal matters.”

45. The first two proposed solutions will, it is said, bring the system for the prosecution of offences into line with the system in England and Wales by having a Director of Public Prosecutions in each jurisdiction who would be subject only to the lawfulness controls of the HRA. The Judicial Committee would no longer have any jurisdiction to ensure uniformity in approach across the United Kingdom in relation to the proper interpretation of Convention rights, at least in criminal law and procedure. The third proposed solution would for the first time since the 1707 union between Scotland and England place the whole of Scottish criminal law and procedure under the supervisory jurisdiction of the new UK court.41 But, of course, solutions are only required if one accepts the premise that the present system is indeed problematic, and the answer to that question might well depend on who is posing it and who is being asked it.

Conclusion – giving the judges the last word on fundamental rights in Scotland?

46. The devolutionary settlement in Scotland is an ongoing constitutional experiment. In this, the first decade of its operation, certain tensions have been revealed, focusing most particularly around the question of the proper role of judges within a democratic polity. The judiciary in Scotland has already been led into controversial political waters, notably in the various prisoners’ rights cases which have come before the

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41 See Mackintosh v Lord Advocate (1876) 2 App Cas 41, HL (Sc).
courts in recent years. The power which the courts now have to examine critically and strike down executive policy which is judged to be unlawful by its nature opens up a democratic deficit within the Scottish constitution. Paradoxically, this popular democratic outrage may be most clearly seen in the immediate, almost universally, negative reaction to the decision of the three judges of the Court of Session making up the Registration Appeal Court who, in Smith v Scott 2007 SC 345 pronounced a declaration of incompatibility in relation to the maintenance of a blanket ban on voting by convicted prisoners.

47. The submission from the judges of the Court of Session to the Calman Commission also points to the existence of certain internal tensions in the manner in which the devolutionary settlement in Scotland is currently working in the courts – and more particularly in the system of criminal justice. This is of particular importance within the Scottish devolved system because the constitutional settlement is one that is ultimately based on judicial primacy rather than legislative sovereignty or executive supremacy.

48. In the challenges to Convention compatibility of legislation we have noted above that the judges in Scotland are having to deal with a new constitutional position which exposes their own lack of democratic accountability. The idea of judges acting as open political players runs wholly counter to the basic constitutional traditions of the United Kingdom where the preservation of the appearance of judicial impartiality is seen as being of fundamental importance. However, what have been created by the Scotland Act 1998 are devolved democratic institutions whose acts are subject to control by the (non-democratically accountable) judiciary. The Scottish devolved constitution mandates a position of judicial supremacy over the legislature. As regards the assessment of the lawfulness of the acts of the Scottish Ministers, the Scotland Act places Westminster statutes at a normatively lower status than Convention rights. In effect, under the Scotland Act, the rights guaranteed under the Convention have the status of a higher law as against all and any legislation passed by the Scottish Parliament or any act or failure to act of a member of the Scottish Executive. The Scotland Act, therefore, unequivocally provides for an unmodified form of judicial review of the devolved democratic legislature and its executive, with the result

42. See, e.g. Somervelle v Scottish Ministers [2007] UKHL 44 [2007] 1 WLR 2734 (successful appeal on time bar, just satisfaction damages and the constitutional relationship between the Scotland Act 1998 and the HRA); Beggs v Scottish Ministers [2007] UKHL 3 [2007] 1 WLR 455, HL (House of Lords confirming the competency of, and mens rea for, a finding of contempt of court against Scottish government departments); X v Scottish Ministers and others 2007 SC 631 (First Division considering the interrelationship of reserved and devolved competence in the context of prisoner disenfranchisement); Smith v Scott 2007 SC 345, RAC/1H (Registration Appeal Court pronouncing a declaration of incompatibility in relation to the maintenance of a blanket ban on voting by convicted prisoners); Davidson v Scottish Ministers [2005] UKHL 74 2006 SC (HL) 42 (successful constitutional challenge to the denial of availability of interim and final coercive court orders against the acts and omissions of the Government); Davidson v Scottish Ministers (No. 2) [2004] UKHL 34 2005 SC (HL) 7 (successful challenge to the Inner House decision in Davidson (No. 1) 2002 SC 205, IH on the grounds of apparent judicial bias given previous legislative and executive involvement of one of that bench when Lord Advocate in the very legal issue raised in that case); Npier v Scottish Ministers 2008 SC 307 2009 SC 229 (successful judicial review challenge to the stopping-out regime imposed on remand prisoners in Scotland on the basis of breach of Arts 3 and 8 ECHR, as well as common law duty of care).


that the constitutional fundamentals in Scotland post-devolution may be stated as follows:

(i) It is for the Scottish Parliament to make new laws, but such laws will be valid only if and insofar as they fall within the legal competencies of the legislature.46 The susceptibility of even the internal procedures of the Scottish Parliament to judicial review has also been robustly affirmed by the court.47

(ii) It is for the Scottish Ministers to govern within the limits of the law. There are absolute limits on their power, however.48 In particular, save for the Lord Advocate,49 the Scottish Ministers cannot in any circumstances be authorised either by Holyrood or Westminster to act in a manner which is incompatible with Convention rights.50 Thus, even a s. 4 HRA declaration of incompatibility will have the effect of rendering actions of the Scottish Ministers ultra vires.51

46 The Scotland Act 1998 provides in s. 29(d) that the Scottish Parliament has no power to pass any legislative provision which is incompatible with Community law or any of the Convention rights incorporated by the HRA. See also the discussion in the striking down of Scottish legislation by the courts in Anderson v The Scottish Ministers [2001] UKPC D5 [2003] 2 AC 602, per Lord Hope.

47 Whalley and others v Lord Watson of Invergowrie and The Scottish Parliament 2000 SC 340 at 348H, 349D-E, 350B-C, IH, per Lord Rodger:

"[T]he [Scottish] Parliament [i]s a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law.

In many democracies throughout the Commonwealth, for example, even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which uphold the law. The Scottish Parliament has simply joined that wider family of parliaments. Indeed, I find it almost paradoxical that counsel for a member of a body which exists to create laws and to impose them on others should contend that a legally enforceable framework is somehow less than appropriate for that body itself. . . .

While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a Parliament which is sovereign; on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a 'self-denying ordinance' which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law.’” (emphasis added)

48 Under s. 57(2) of the Scotland Act 1998 members of the Scottish Executive have “no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law”. The Scottish Ministers are also bound under s. 58 to respect and, if necessary, implement, all and any other international obligations of the United Kingdom.

49 Section 57(3) of the Scotland Act 1998 makes specific provisions for the Lord Advocate, when prosecuting any offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, to rely upon s. 6(2) HRA to permit his lawful breach of Convention rights. Without such specific Westminster-derived authorisation, however, the Lord Advocate no longer has power to “move the court to grant any remedy which would be incompatible with the European Convention on Human Rights” – see Lord Advocate v Scottish Media Newspapers Ltd 1999 SCCR 599 at 561, IH, per the Lord President, Lord Rodger of Earlsferry.

50 Section 81(4)(a) of the Government of Wales Act 2006 (replacing s. 107(4)(a) of the Government of Wales Act 1998) and s. 719(9a) and (9c) of the Northern Ireland Act effectively place the Welsh Ministers and the Northern Ireland Assembly and Northern Ireland Ministers and Department in the same position as any other public authority under s. 6(2) HRA, that is to say these sections make provision for the possibility of a lawful breach of Convention rights if, as a result of one or more provisions of primary Westminster legislation, the devolved Welsh or Northern Ireland institutions could not have acted differently or if the devolved Welsh or Northern Ireland authority was acting so as to give effect to or enforce Convention-incompatible Westminster provisions. There is no such tie-in to s. 6(2) HRA in the Scotland Act. This means that a declaration by a court made under s. 4 HRA to the effect that a provision of Westminster legislation is incompatible with the requirements of the Convention will have the effect of rendering ultra vires any act or omission of the Scottish Ministers or Parliament which relies upon the provision in question.

51 See Somerville v Scottish Ministers [2007] UKHL 44 [2007] 1 WLR 2734 at [15], per Lord Hope:
(iii) It is for the courts to ensure that both the Scottish Parliament and the Scottish Ministers respect the limits on their powers and to strike down measures which go beyond the limits of these powers. Any purported act of the Scottish Parliament or the Scottish Ministers is invalid so far as it is incompatible with Convention rights and therefore of no legal effect. The courts have no discretion to withhold or re-fashion any other remedy.

49. The ending of judicial subordination to the Crown and Parliament in Scotland which the new post-devolution constitutional model seems to entitle may not be welcomed unequivocally as an unalloyed blessing. The new constitutional scenario perhaps raises as many questions as it answers, leading to a greater focus on the identity, quality and “representativeness” of the individuals selected to sit on the bench in judgment upon the executive and the people.

50. As we have seen, it is readily apparent, however, that there remains a certain disquiet and unease about the constitutional position in which the Scottish devolutionary settlement has placed the judges, not least among certain sectors of the higher judiciary based in Scotland. The fear of some appears to be that they are being required to enter into and make decisions on matters – such as the proper allocation of budgetary funds – in which they have little expertise and no democratic legitimacy. The problem is that that is just what the law requires them to do.

51. The tenor of the Court of Session judges’ submission to the Calman Commission seems to be, however, that if judges are having to make decisions on Convention rights and other constitutional issues that directly affect the lieges – and the (criminal) justice

"Section 57(2) SA reinforces, in the context of provisions about the devolved competence of the Scottish Ministers generally, the restriction that sec 29(2)(d) imposes on the legislative competence of the Scottish Parliament. It provides that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or other act is incompatible with any of the Convention rights or with Community law. Section 57(3) qualifies that restriction in the case of an act of the Lord Advocate in prosecuting an offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, so as to align his position with that of the equivalent authorities in England and Wales. It does so by providing that sec 57(2) does not apply to an act of the Lord Advocate in that capacity if, because of sec 6(2) HRA, it would not be unlawful under sec 6(1) HRA. That qualification on the limits of devolved competence does not apply to any other member of the Scottish Executive or to the Lord Advocate acting in any other capacity. It is not open to them to claim that the act or the failure to act was within devolved competence because, as a result of primary legislation, they could not have acted differently or they were acting so as to give effect to primary legislation which cannot be read in a way that is compatible with the Convention rights." (emphasis added)

52 See Miller v Dickson 2002 SC (PC) 30 [2002] 1 WLR 1615, JCPC.
53 See Dyer v Watson 2002 SC (PC) 89 at [131], per Lord Millett.
54 See, e.g. Lord McCluskey, “Opinion”, in The Scotsman, 3 August 2005, in which the now retired judge and former Solicitor General publicly criticised some of the reasoning and basis for Lord Bonomy’s judgment in Napier v Scottish Ministers 2005 SC 229, OJ, in which the Lord Ordinary held that the regime for remand prisoners in Scotland which involved prolonged cellular incarceration in doubled-up cells with no integral sanitation (requiring slopping out) constituted Convention-incompatible treatment. Lord McCluskey remarked thus: “The most remarkable feature of the Napier case was that the court accepted evidence that the Executive had deliberately decided to spend its limited financial resources on other things, in the light of their judgment as to what the public interest required. . . . The decision as to how limited public (i.e. taxpayers’) funds are to be spent within the criminal system is a matter for elected politicians not for judges. How can it be for judges to decide that spending money on improving toilet facilities for convicted criminals is more important than spending that money on tackling domestic violence or on trying to fight the menace of dangerous drugs?”
system – in Scotland, then in their view it would better be done by judges based in Scotland. But, as the late Professor Bill Wilson once observed:

"It cannot be said that the Scottish judiciary has been a major agency of change in the last hundred years. The House of Lords has made abrupt turns from time to time and perhaps that is the appropriate place for changes to be made. The Court of Session has been, on the whole, conservative; it has refused to break new ground, not only because there was precedent against it, but also because there was no precedent for it…. The best that can be said for the judges is that they have kept the system going; that is, perhaps, their function."55

52. Yet a radical constitution has been foisted onto an apparently conservative judiciary. What might it be like if the Scottish judiciary were also to become radicalised? Perhaps – given the ongoing constitutional conversation that is currently being encouraged in Scotland – it might be better to consider that question in the context of returning to an examination of the first principles of constitutional democracy and consider seriously just what sort of a democracy modern Scotland should aspire to be, whether within or outwith the current Union. In particular, should it be one such as at present which incorporates a model of a government des juges over the executive and Parliament or, instead, one which emphasises the primacy and dignity of the legislature as the proper guardian of fundamental rights.56

• This article is a revised version of a paper presented at the Second Annual Hart Judicial Review Conference (December 2008).


"3.09 Scottish legislation concerning the transfer of competence and achievement of independence would need to re-establish the Scottish Parliament on a foundation other than an Act of the United Kingdom Parliament, that is the Scotland Act. Initially, however, it would not be necessary to change the essentials of the framework laid out in the Scotland Act, and legitimised by broad consensus in the country following on the work of the Scottish Constitutional Convention and the referendum of 1997. Membership, elections, chamber and committee structures and proceedings, standing orders and legislative procedures could all continue in their current form. In other aspects, for example, concerning the judicial review of legislation for conformity with human rights obligations, provisions would have to be made to reflect the new circumstances of independence….

3.11 The Scottish courts and judiciary would remain constituted as at present, but with cessation of appeals beyond the Scottish courts either to the House of Lords or Privy Council, or (in due course) to the United Kingdom Supreme Court. As noted, provision would need to be made concerning the scope of judicial review both in respect of legislative powers of the Scottish Parliament and in respect of executive powers of Ministers. Arrangements would be needed to secure the continuing independence of the judiciary." (emphasis added)
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Perhaps, even if I have misread his contributions to the present and immediately preceding issues of *Common Knowledge*, Alick Isaacs will not take it amiss if I say they have stimulated the appearance of this essay of mine in the same venue and context. Our efforts have in common, first, that we both are Scots whose religion is not that of the state-recognized national Church of Scotland: Dr. Isaacs, as I understand it, is a modern Orthodox Jew, and I am a Roman Catholic. We share also, and more significantly, a discontent, as citizens of the post-Nuremberg world order, with elements of our respective orthodoxies—and I believe we share also a sense that the authorities of our religions, in reaction against modernity, have gone astray from their own longer-term traditional principles. Dr. Isaacs writes, in this milieu, on behalf of peace. It is my intention to write here, in a complementary fashion, on behalf of democracy, its institutions, and the exercise of individual conscience. For his part, Dr. Isaacs builds a case on foundational texts of the talmudic age—and in turning first to the Christian Gospels, so, in a sense, do I.

Matters of Jurisdiction

In Luke 12:13 the following exchange is observed: “A man in the crowd said to Jesus, ‘Master, tell my brother to give me a share of our inheritance’. ‘My friend’, Jesus replied, ‘who appointed me your judge, or the arbiter of your claims?’” Thus, Jesus declines jurisdiction. He refuses to become involved in a dispute between brothers. He does not step in and seek to reconcile, or negotiate between, the parties to a family breakdown. He expresses no view on the merits of the complaint, on the justice of the claim of one brother over another. And Jesus avoids the task of adjudicating the matter, it would seem, because there are already existing mechanisms for the resolution of such disputes. There are extant regulations, lawyers to argue over them, and civil judges to apply them. This Gospel text might therefore be seen as an assertion or confirmation that the Christian tradition is one that is mindful of the distinction between the political and the religious spheres, and recognizes the autonomy of the state and the independence of civil law from religious law and the religious establishment. The text in Luke might also be interpreted as a warning to the church to avoid what may be called the temptation of shari’a—the temptation to make civil law mirror religious law.

My concern here is that the terms of pronouncements emanating from the Vatican and from individual bishops in recent years seem to indicate that the Catholic Church has given into this temptation. The particular documents that give rise to this concern include especially these: Pope John Paul II’s address to the Roman Rota, “Divorce and the Duties of Canon Lawyers and of Catholic Civil Lawyers and Judges” (2002); the Congregation for the Doctrine of the Faith’s doctrinal notes, “Some Questions regarding the Participation of Catholics in Political Life” (2002) and “Considerations regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons” (2003); Archbishop Raymond Burke’s essays “On Our Civic Responsibility for the Common Good” (2004) and “On the Discipline regarding the Denial of Holy Communion to Those Obstinately Persevering in Manifest Grave Sin” (2007). The second and third of these documents were prepared by the Congregation for the Doctrine of the Faith at the time when its head was Joseph Cardinal Ratzinger, now Pope Benedict XVI. It is understood that the present pope is these days engaged in writing an encyclical concerning the church’s teaching on “natural law” and its impact on matters of positive law and politics. Some indication of the direction of his thinking may, perhaps, be gleaned from the first encyclicals of his pontificate, Deus Caritas Est: On Christian Love and Spe Salvi: On Christian Hope, as well as from a number of his recent speeches to university, political, and general audiences: for example, his address of 2007 to the conference of the executive committee of the Centrist Democratic International, which is the international union of (primarily European and Latin American) Christian democratic par-
ties; his message for the celebration of the World Day of Peace in 2008; and his address of 2008 written for — but, in the event, not delivered to — the faculty and students at La Sapienza University in Rome.

It would be premature to anticipate the terms of any encyclical, so the discussion in this article of the thought of Joseph Ratzinger as pope is necessarily at this stage provisional. Going by his writings to date, however, he may be said to harbor a significant degree of pessimism in relation to the powers of human reason. He takes the view—citing Kant’s judgment on the French Revolution—that reason is corrupted and that reason alone will tend to prefer evil (a “perverted end”) rather than the good. In order to see the good, reason needs to be “purified” and shielded from the “dazzling effect of power and special interests.” What shields and purifies reason (from such temptations as utilitarianism and pragmatism) is faith: faith in God, faith in Christ, and, ultimately, a faith in the church, which “liberates reason from its blind spots.” The reasoning of the Roman Catholic Church on moral matters is said by Benedict XVI to form a particular, internally consistent discourse; still, he argues that the reasoning and conclusions of the church on matters of morality are, nonetheless, owed some deference within the wider society, because they embody the wisdom of the ages and a tradition of sustained ethical reflection over the course of two millennia.


3. For the full text of this speech, see www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xvi-world-day-peace_en.html (accessed September 21, 2008).


For Benedict XVI, a society that fails to follow or rejects the church’s ethical strictures, preferring the lights of its own reasoning unaided by faith and tradition, is plainly doomed. It will not achieve the goal of a well-ordered and just polity but, instead, will revert to the condition of a robber band, a Mafia society in which there is no honor or justice.

It is not yet clear whether these various remarks of Benedict XVI portend an innovation of some kind, or a rejection of the Thomist tradition of natural law, or a reformulation of the natural law tradition along what would be for him more congenially Platonist (rather than Aristotelian) lines. Little express reference appears to be made in Joseph Ratzinger’s writings to the Thomist tradition and, at times, he seems to regard the idea of natural law as a post-Reformation Protestant development rather than as part of the pre-Reformation Catholic appropriation of Aristotelian thought. Thus, Cardinal Ratzinger stated in remarks made just prior to his elevation to the papacy:

[Consequent upon the Reformation], it was necessary to elaborate a law, or at least a legal minimum, antecedent to dogma: the sources of this law then had to lie, no longer in faith, but in nature and in human reason. Hugo Grotius, Samuel von Pufendorf and others developed the idea of natural law, which transcends the confessional boundaries of faith by establishing reason as the instrument whereby law can be posited in common. Natural law has remained (especially in the Catholic Church) the key issue in dialogues with secular society and with other communities of faith in order to appeal to the reason we share in common and to seek the basis for a consensus about the ethical principles of law in a secular, pluralistic society. Unfortunately, this instrument has become blunt. Accordingly I do not intend to appeal to it for support in this conversation. The idea of natural law presupposed a concept of “nature” in which nature and reason overlap, since nature itself is rational. With the victory of the theory of evolution this view of nature has capsized: nowadays we think that nature as such is not rational. . . One final element of the natural law that claimed (at least in the modern period) that it was ultimately a rational law has remained, namely human rights. These are incomprehensible without the presupposition that man qua man, thanks simply to his membership in the species man, is the subject of rights and that his being bears within itself values and norms that must be discovered—but not invented. Today, we ought perhaps to amplify the doctrine of human rights with a doctrine of human obligations and human limitations. This could help us to grasp anew the relevance of the question as to whether there might exist a rationality of nature and hence a rational law for man and for his existence in the world.”


Doubtless, more will be revealed in the anticipated encyclical; but if, as some commentators are already suggesting, the already published views of Benedict XVI on law, nature, and the state involve effectively an abandonment of the Aristotelian-Thomist synthesis that has formed the basis of Catholic social teaching since the late nineteenth century, then a fundamental shift will have occurred in the self-understanding of the church in its relation to modern society and political order. A position of positive dialogue with, and full participation within, society was heralded, after all, by the Second Vatican Council. My fear is that the alternative model to active engagement with modern society might be that of a “fortress church” that rallies to itself a “faithful remnant” while railing against the unredeemable forces of secularism, relativism, and corrupted reason outside. The implication for Catholics engaged in public life is that we all would become—as nineteenth-century popes saw themselves, in the face of Italian unification—prisoners of the Vatican.

Voting as Sinning

The role of Catholics in public life came to special prominence in the United States in 2004 as the result of pronouncements made by a number of American bishops. In January of that year, Raymond Burke—then bishop of La Crosse, Wisconsin—published a formal “canonical notification” in the diocesan newspaper, in which he stated that Catholic politicians, who in their work as legislators were deemed by the bishop to have shown “support” for abortion or the legalization of euthanasia, would not be admitted to communion within his diocese. Bishop Burke was subsequently installed as archbishop of St. Louis, Missouri, and in June 2008 he was appointed prefect of the Apostolic Signatura, the Vatican’s supreme court of canon law. Archbishop Burke specified that the Democratic Party’s nominee for president of the United States, Senator John Kerry, a practicing Catholic, would be refused communion and, moreover, that Catholics who voted for him should also be excluded until such time as they had confessed and repented their “sin” in voting for “a pro-choice politician.” Thus, a Catholic in public life. We bishops have the primary responsibility to hand on the Church’s moral and social teaching. . . . we are to teach fundamental moral principles that help Catholics form their consciences correctly, to provide guidance on the moral dimensions of public decisions, and to encourage the faithful to carry out their responsibilities in political life. In fulfilling these responsibilities, the Church’s leaders are to avoid endorsing or opposing candidates or telling people how to vote ([www.usccb.org/faithfulcitizenship/ FCStatement.pdf](http://www.usccb.org/faithfulcitizenship/FCStatement.pdf) [accessed September 21, 2008]).

14. But compare, more recently, the United States Conference of Catholic Bishops’ document Forming Consciences for Faithful Citizenship: A Call to Political Responsibility from the Catholic Bishops of the United States (November 19, 2007), para. 15: “Clergy and lay people have complementary roles.
prelate effectively campaigned against a Catholic candidate for high public office, favoring instead a born-again Methodist-Evangelical, George W. Bush. In a pastoral letter of May 2004, Bishop Michael Sheridan of Colorado Springs likewise stated without reserve or nuance:

There must be no confusion on these matters. Any Catholic politicians who advocate for abortion, for illicit stem cell research or for any form of euthanasia ipso facto place themselves outside full communion with the Church and so jeopardize their salvation. Any Catholics who vote for candidates who stand for abortion, illicit stem cell research or euthanasia suffer the same fateful consequences. . . . As in the matter of abortion any Catholic politician who would promote so-called “same-sex marriage” and any Catholic who would vote for that political candidate place themselves outside the full communion of the Church and may not receive Holy Communion until they have recanted their positions and been reconciled by the Sacrament of Penance.15

It is worthy of at least passing notice that these same bishops appeared willing to allow communion to Catholic politicians and judges who supported the continued use of the death penalty in the United States, who were in favor of the preemptive military strike on Iraq, and who supported the stockpiling of weapons of mass destruction by Western interests, despite opposition to all these by the Catholic hierarchy.16 In response to these individual bishops’ pronouncements, the U.S. Catholic Episcopal Conference issued in June 2004 a public statement, “Catholics in Political Life,” in which they appeared to uphold an individual bishops’ right to proclaim such diocese-specific “excommunications,”17 though allowing also that “bishops can legitimate make different judgments on the most prudent course of pastoral action.”18 The approach of then-Cardinal Ratzinger to the issue was more nuanced than that of bishops such as Burke and Sheridan. In a memorandum to the president of the U.S. Catholic Episcopal Conference, Cardinal Ratzinger stated that a Catholic politician who consistently campaigned and voted for permissive abortion and euthanasia laws—and any individual Catholic


16. But compare the words of Pope John Paul II, Centesimus Annus (1991), para. 52, www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_encycl_19910521_centesimus-annus_en.html (accessed September 21, 2008): “On the occasion of the recent tragic war in the Persian Gulf, I repeated the cry: ‘Never again war!’ No, never again war, which destroys the lives of innocent people, teaches how to kill, throws into upheaval even the lives of those who do the killing and leaves behind a trail of resentment and hatred, thus making it all the more difficult to find a just solution of the very problems which provoked the war.”

17. Those bishops announcing their intention to deny communion to individuals of whose voting record they disapprove claim to rely on canon 949 of the Code of Canon Law (1983), which refers to communion being refused to persons displaying an obstinate persistence in “manifest grave sin.”

who deliberately voted for a politician "precisely because of the candidate's permissive stand on abortion and/or euthanasia"—would be guilty of "formal cooperation in evil" and therefore would be deemed "unworthy" to present him- or herself for communion. Cardinal Ratzinger did leave open the possibility that an individual voter might have "proportionate reasons" for voting for such a candidate despite his or her stand on abortion and/or euthanasia. The cardinal was careful to add that "not all moral issues have the same moral weight as abortion and euthanasia": while the church has always and everywhere taught that abortion and euthanasia are "intrinsically evil," 19 he said, it had not shown such consistency as regards the death penalty or "just wars." 20 Accordingly, Cardinal Ratzinger allowed that "there may be legitimate diversity of opinion, even among Catholics, about waging war and applying the death penalty but not however with regard to abortion and euthanasia." 21

Archbishop Burke returned to the fray with the publication, in October 2004, of a new pastoral letter, "On Our Civic Responsibility for the Common Good," in which he added that individuals had a moral duty both to vote and to use that vote against any candidate supporting, inter alia, same-sex marriage, no matter that candidate's position on any other issues. 22 Archbishop Burke also unequivocally indicated his dissent from the position taken by his fellow bishops that they might "legitimately make different judgments on the most prudent course of pastoral action." 23 The archbishop insisted that

19. See Pope John Paul II, Veritatis Splendor (1993), para. 81, www.vatican.va/holy_father/john_paul_ii/enencyclicals/documents/hf_jp_ii_enc_06081993_veritatis-splendor_en.html (accessed September 22, 2008): "If acts are intrinsically evil, a good intention or particular circumstances can diminish their evil, but they cannot remove it. They remain 'irremediably' evil acts, per se and in themselves they are not capable of being ordered to God and to the good of the person."

20. See Aidan O'Neill, "The Supreme Court Judge and the Death Penalty," Tablet, February 23, 2002, www.thetablet.co.uk/articles/4534/ (accessed September 20, 2008) for reflections on the position taken by Justice Antonin Scalia on the development in recent papal teaching, notably in Evangelium Vitae, of a claim that the death penalty is, other than in the most exceptional circumstances, incompatible with the social doctrine of the church.


22. Relying on Catechism of the Catholic Church, para. 2260, www.vatican.va/archive/catechism/p322e2a4.html#V (accessed November 6, 2008): "Submission to authority and co-responsibility for the common good make it essentially obligatory to pay taxes, to exercise the right to vote, and to defend one's country."

23. In the 2008 presidential race Archbishop Raymond Burke broadened his opposition to include the Democratic Party as a whole in an interview with Avvenire, October 2, 2008, Rome:

At this point, the Democratic Party risks transforming itself definitively into a "party of death" due to its choices on bioethical issues, as Ramesh Ponnuru wrote in his book The Party of Death: The Democrats, the Media, the Courts and the Disregard for Human Life. And I say this with a heavy heart, because we all know that the Democrats were the party that helped our Catholic immigrant parents and grandparents to better integrate into and prosper in American society. But it's not the same anymore. Mine was not an isolated position. It was shared by Archbishop Charles J. Chaput of Denver, by Bishop Peter J. Jugis of Charlotte, and by others. But it is true that the bishops' conference has not taken this position, leaving each bishop free to act as he believes is best. For my part, I always
The statement of the United States' Bishops, *Catholics in Political Life*... failed to take account of the clear requirement to exclude from Holy Communion those who, after appropriate admonition, obstinately persist in supporting public legislation which is contrary to natural moral law... No matter how often a bishop or priest repeats the teaching of the Church regarding procured abortion, if he stands by and does nothing to discipline a Catholic who publicly supports legislation permitting the gravest of injustices and, at the same time, presents himself to receive holy communion, then his teaching rings hollow. To remain silent is to permit serious confusion regarding a fundamental truth of moral law. Confusion is, of course, one of the most insidious fruits of scandalous behavior.24

Amid this welter of threats, it is worth recalling that the church need not regard itself in these terms and, indeed, has not always done so. No less a foundational authority than St. Augustine of Hippo urged his fellow bishops to refrain from exercising or threatening to exercise their formal powers. A Roman *comes* complained to Augustine that his local bishop had placed him with his whole household under formal condemnation, to which Augustine replied: "I would say clearly without being rash that, if anyone of the faithful has been anathematized unjustly, it would be more harmful to the one who did this injustice than the one who suffered it."25 While to the anathematizing bishop, his colleague, Augustine wrote: "Do not suppose that an unjust impulse cannot creep up on us because we are bishops, but let us rather think that we live with great peril amid the snares of temptation because we are human beings."26 Whether the American rigorist bishops' approach—which appears at times to restrict Catholic social doctrine to matters regarding abortion and euthanasia—reflects the teaching of a church that exalts its faithful "to reject as unacceptable *all forms of violence*, to promote attitudes of dialogue and peace and to commit themselves to establish a just international and social order"27—is a matter for a further paper.


27. See, for example, Pope John Paul II, *Christifides Laici* (1988), para. 41, www.vatican.va/holy_father/john_paul_ii/documents/hf_jp_ii_exh_19881201_christifides-laici_en.html (accessed November 3, 2008): In order to achieve their task directed to the Christian animation of the temporal order, in the sense of serving persons and society, the *lay faithful* are never to relinquish their participation in "public life"... the lay
In the present context, quoting from John Paul II’s encyclical *Ecclesia de Eucharistia* should suffice to make the point: 

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Many problems darken the horizon of our time. We need but think of the urgent need to work for peace, to base relationships between peoples on solid premises of justice and solidarity, and to defend human life from conception to its natural end. And what should we say of the thousand inconsistencies of a globalized world where the weakest, the most powerless and the poorest appear to have so little hope! It is in this world that Christian hope must shine forth.
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The logic of the bishops’ position—at least within the U.S. constitutional context—should perhaps lead them to direct their threats of ecclesiastical sanctions against those who obstruct any facet of Catholic social teaching, including its preferential option for the poor, along with its criticism of the free market and its effects on family, community, and spiritual (as opposed to material) values. Moreover, there appears to be an inconsistency evident in how and whom Catholic bishops threaten with sanctions. Should not the church sanction Catholic judges who fail to favor the “pro-life/pro-family” position in cases before their courts? Should not Archbishop Burke and like-minded American bishops insist on withholding communion from the five Catholic justices who now comprise

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*The direct and intentional destruction of innocent human life from the moment of conception until natural death is always wrong and is not just one issue among many. It must always be opposed.... Racism and other unjust discrimination, the use of the death penalty, resorting to unjust war, the use of torture, war crimes, the failure to respond to those who are suffering from hunger or a lack of health care, or an unjust immigration policy are all serious moral issues that challenge our consciences and require us to act. These are not optional concerns which can be dismissed. Catholics are urged to seriously consider Church teaching on these issues. Although choices about how best to respond to these and other compelling threats to human life and dignity are matters for principled debate and decision this does not make them optional concerns....*
a majority of the U.S. Supreme Court if they reason and vote in particular cases before them contrary to ecclesiastical instruction? In particular, the justices' failure to overturn, or delay in overturning, the 1973 decision in Roe v. Wade directly affects the availability of abortion in the United States far more than, say, John Kerry's or Joseph Biden's voting record in the Senate. Just five individuals' votes, in the case of the Supreme Court, could result in the restoration to the legislatures of the individual states the regulation of abortion.

Article VI of the U.S. Constitution states that "all executive and judicial officers, both of the United States and of the several States shall be bound by oath or affirmation to support the Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States." And the terms of the judicial oath are provided for in 28 U.S.C. § 453 (2000) as follows:

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

But following the analyses of recent popes as to the requirements of justice and "equal right," a judge who reached decisions that protected or promoted, for example, abortion rights or same-sex marriage would not be administering justice or equal rights. The Vatican Congregation for the Doctrine of the Faith under the chairmanship of then-Cardinal Ratzinger stated unequivocally that "the principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions." If one takes these claims seriously, the very judicial oath in the United States would seem, on its face, to be permeable to considerations derived from the social teaching of the Catholic Church. And if the Constitution of the United States and laws "properly so called" are understood as instruments intended to achieve justice rather than injustice, then the way would


The insoluble contrasts between the concept of man and law according to Christian principles...and that of juridical positivism can be a source of deep anxiety in professional life. We well know...how not infrequently in the soul of the Catholic jurist who wishes to remain faithful to his Christian concepts of law, there arise conflicts of conscience especially when he must apply a law which conscience itself condemns as unjust...[A] judge cannot simply throw responsibility for his decision from his own shoulders, causing it to fall on the law and its authors. Undoubtedly the authors are principally responsible for the effects of such a law. But the judge who applies it in a particular case by his sentence is a joint cause and thus jointly responsible for these effects.
appear to be open to a specifically Catholic interpretation by those who hold themselves to be both faithful (conforming) Catholics and faithful judges.

Thus, Cardinal Levada, formerly archbishop of San Francisco and now Joseph Ratzinger’s successor as head of the Congregation for the Doctrine of the Faith, has asserted:

Over the years since the 1973 Roe v. Wade Supreme Court decision, the frustration of many Catholics, bishops among them, about Catholic politicians who not only ignore church teaching on abortion but actively espouse a contrary position has continued to grow. . . . Supreme Court decisions are not infrequently changed or reversed over time. The Dred Scott decision on slavery is perhaps the most cited case in point. The Supreme Court’s judgment about the application of the Constitution should also be guided by principles of the moral law.31

For an American, Cardinal Levada displays a worrying lack of understanding of the constitutional history of the United States in supposing that the Dred Scott decision was overturned by judicial fiat. He suffers as well from a form of historical amnesia in his failure to acknowledge that slaves were held and owned by Catholic institutions based in the South right up to the Civil War (on the basis that slavery was not at that time considered by the church to be intrinsically evil). 32 Instead, of course, Dred Scott was overturned not by the court but by the terms of the thirteenth and fourteenth amendments to the constitution, passed in 1868 in the wake of the Civil War. But if, on Cardinal Levada’s understanding, the votes of Supreme Court justices are to be determined not (only) by the terms of law or the intention of the framers of the constitution but (also) by external considerations such as the requirements of the religion of the particular judge (as explained by their bishops), is there not a problem about separation of powers and about the separation of church and state?

One suspects that the church is not unaware that any explicit public attempt by Catholic bishops to dictate to Catholic judges would result in a backlash against religious interference in the affairs of the state. But it should be borne in mind that canonical penalties, such as the refusal of communion, can only be imposed against those “who obstinately persevere in their sin” or whose actions are “gravely imputable by reason of malice or negligence.”33 The public rebuke of

32. See John T. Noonan, A Church that Can and Cannot Change: The Development of Catholic Moral Teaching (Notre Dame, IN: University of Notre Dame Press, 2005). Noonan claims that church teaching changed under the pontificate of John Paul II with respect to slavery and that the church now teaches unequivocally that slavery is intrinsically evil. For criticism of this position, see Avery Cardinal Dulles, SJ, “Development or Reversal?” First Things, no. 156 (October 2005): 53–61.
a public official for failing in his moral duty is, under the church's code of canon law, a remedy of very last resort. The remedy of publicizing the instruction comes into play only after the primary remedy of private warning or admonition to the individual has been tried and has failed. Assuming that private rebukes, warnings, and other attempts at fraternal correction of "erring judges" on the Supreme Court have not been essayed, it is not immediately clear why—for other than prudential reasons—the bishops should not be seeking to assert their authority (first privately and then, if necessary, publicly) over those of their flock who hold judicial office, just as the bishops have sought to assert it over those who hold or seek executive or legislative office, and over those citizens who might vote them into office.

Other bishops have done so, in their own national contexts. In May 2006, the Constitutional Court of Colombia found that the Colombian constitution gave women the right to obtain an abortion where pregnancy was a result of rape or incest or where the unborn child was so malformed as to be incapable of independent life if born. The immediate response to this decision by Pedro Cardinal Rubiano Saenz, the archbishop of Bogotá, was to invoke canon 1398 of the Code of Canon Law against the judges who formed the 5–3 majority of the Constitutional Court in this decision. Canon 1398 provides that a person who procures a completed abortion incurs a latae sententiae (automatic) excommunication. In September 2006, the Colombian Catholic Bishops’ Conference issued a statement calling "the attention of baptized Catholics to the gravity of abortion," calling on them to "prevent the crime from being committed," and deploring the "abortionist mentality" manifest in the decision of the Constitutional Court. The civil law, the Colombian bishops held, "can never replace conscience or dictate norms which overstep the duty to guarantee the common good by means of recognition and protection of the basic rights of the people." The bishops confirmed that the penalty of automatic excommunication applied to all whose actions knowingly facilitated carrying out an abortion. Their comments appear to have been directed at members of their national judiciary.

Thus, it would seem that Chief Justice Roberts and Associate Justices Scalia, Kennedy, Alito, and Thomas would, at least in the judgment of the Catholic bishops of Colombia, incur excommunication automatically, were any of them to

34. Code of Canon Law, canon 1341.
35. Code of Canon Law, canons 1339, 1347.
37. Re Monica Roa Case D6122, Constitutional Court of Colombia, May 10, 2006.
vote against limiting the effect of, or overturning, *Roe v. Wade.* An alternative might be for justices who are conforming Catholics to recuse themselves from abortion cases—but, since more than half its members are Catholics, that action, or inaction, would render the Supreme Court always nonquorate to reconsider *Roe v. Wade.* Given the growing readiness in sections of the hierarchy to threaten the use of ecclesiastical sanctions against Catholic politicians and voters, it is not too early to ask whether Catholics should continue to participate at all in public life—as legislators, judges, administrators, or even voters—within liberal pluralist democracies.

A "Necessary Conformity of Civil Law with the Moral Law"

But really, what is the problem? Is there a problem? The bishops protest that they are simply reiterating the church's constant social teaching on respect for life and on matters of sexual ethics. They are just doing their job. But of course they are not just teaching; they are giving instructions and issuing threats. Theirs is a model of society in which people can be told how to vote and be punished, eternally, if they fail to do so in the required manner.

If the bishops' threatened use of church disciplinary measures were successful, a Catholic bloc would emerge whose votes could be delivered on call. The bishops would become political players, of similar influence and importance to the trade-union barons of old Labour (in a British context) or to the lords of Tammany Hall (in New York). In this way, the institutional church might increase its power within civil society—even where Catholics form a minority of the electorate—and politicians would once again fear the wrath and condemnation of turbulent priests. The legislature (and courts) could be expected to push through a quite radical social program. Given the tone of some of the recent pronounce-

39. But see Justice Antonin Scalia, “God’s Justice and Ours,” *First Things* (May 2003): 17–21: “[A] judge, I think, bears no moral guilt for the laws society has failed to enact. Thus, my difficulty with *Roe v. Wade* is a legal rather than a moral one: I do not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.”

40. As it is put by the Congregation for the Doctrine of the Faith in a doctrinal note of 2002, "Regarding the Participation of Catholics in Public Life," para. 6, www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_participation_en.html (accessed November 3, 2008): “The Church’s Magisterium does not wish to exercise political power or eliminate the freedom of opinion of Catholics regarding contingent questions. Instead, it intends as is its proper function to instruct and illuminate the consciences of the faithful, particularly those involved in political life, so that their actions may always serve the integral promotion of the human person and the common good.”

ments emanating from the Vatican, the "Catholic agenda" might include policies such as these:

- accepting, within domestic jurisdictions, the binding and enforceable nature of international (humanitarian) law and, more specifically, affirming the jurisdiction of the international criminal court over the state's nationals;
- recriminalizing abortion, as well as banning the manufacture and sale of IUDs and the "morning-after pill";
- outlawing human embryonic stem cell research and the therapeutic or reproductive cloning of human embryos.


The family of peoples experiences many cases of arbitrary conduct, both within individual States and in the relations of States among themselves. ... power must always be disciplined by law, and this applies also to relations between sovereign States. Values grounded in the natural law are indeed present, albeit in a fragmentary and not always consistent way, in international accords, in universally recognized forms of authority, in the principles of humanitarian law incorporated in the legislation of individual States or the statutes of international bodies. Mankind is not lawless. All the same, there is an urgent need to persevere in dialogue about these issues and to encourage the legislation of individual States to converge towards a recognition of fundamental human rights.

43. Pontifical Council for Justice and Peace, A Compendium of the Social Doctrine of the Church (2004), para. 506, www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xvi-world-day-peace_en.html (accessed November 3, 2008) states: "There is also present within the international community an International Criminal Court to punish those responsible for particularly serious acts such as genocide, crimes against humanity, war crimes and crimes of aggression. The Magisterium has not failed to encourage this initiative time and again."

44. See "Charter of the Rights of the Family, presented by the Holy See to all persons, institutions and authorities concerned with the mission of the family in today's world" (October 21, 1983), article 4(b), www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831021_family-rights_en.html (accessed November 3, 2008). "Human life must be respected and protected absolutely from the moment of conception. Abortion is a direct violation of the fundamental right to life of the human being." See also Congregation for the Doctrine of the Faith, "Declaration on Procured Abortion" (November 18, 1974), para. 22, www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html (accessed November 3, 2008). "It must in any case be clearly understood that whatever may be laid down by civil law in this matter, man can never obey a law which is in itself immoral, and such is the case of a law which would admit in principle the licitness of abortion."

45. Pope John Paul II, Evangelium Vitae (1995), para. 11, www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp_ii_enc_25031995_evangelium-vitae_en.html (accessed November 3, 2008). "The close connection which exists, in mentality, between the practice of contraception and that of abortion is becoming increasingly obvious. It is being demonstrated in an alarming way by the development of chemical products, intrathecine devices and vaccines which, distributed with the same case as contraceptives, really act as abortifacients in the very early stages of the development of the life of the new human being."

46. Evangelium Vitae, para. 63:

the use of human embryos or foetuses as an object of experimentation constitutes a crime against their dignity as human beings who have a right to the same respect owed to a child once born, just as to every person. This moral condemnation also regards procedures that exploit living human embryos and foetuses—sometimes specifically "produced" for this purpose by in vitro fertilization—either to be used as "biological material" or as providers of organs or tissue for transplants in the treatment of certain diseases. The killing of innocent human creatures, even if carried out to help others, constitutes an absolutely unacceptable act.

See also "Charter of the Rights of the Family," article 4(b): "Respect of the dignity of the human being excludes all experimental manipulation or exploitation of the human embryo."

47. Compendium of the Social Doctrine of the Church, para. 236, states:
creating animal/human-hybrid or admixed embryos by cloning, or using human biological material obtained from aborted embryos in scientific research or for the production of vaccines or other products;\textsuperscript{48} 
halting the in vitro production of human embryos even for the purposes of overcoming a (married) couple’s infertility,\textsuperscript{49} as well as prohibiting surrogacy and donor arrangements in relation to assisted pregnancy;\textsuperscript{50} 
- strengthening the laws against euthanasia and physician-assisted suicide;\textsuperscript{51} 
- improving prison conditions\textsuperscript{52} and abolishing (except, perhaps, in the most extreme circumstances) the death penalty;\textsuperscript{53}

From an ethical point of view, the simple replication of normal cells or of a portion of DNA presents no particular ethical problem. Very different, however, is the Magisterium’s judgment on cloning understood in the proper sense. Such cloning is contrary to the dignity of human procreation because it takes part in the total absence of an act of personal love between spouses, being agamic and asexual reproduction. In the second place, this type of reproduction represents a form of total domination over the reproduced individual on the part of the one reproducing it. The fact that cloning is used to create embryos from which cells can be removed for therapeutic use does not attenuate its moral gravity, because in order that such cells may be removed the embryo must first be created and then destroyed.


\textsuperscript{49} Congregation for the Doctrine of the Faith Instruction, “Dignitatis Personae,” para. 18.

\textsuperscript{50} Compendium of the Social Doctrine of the Church, para. 403; states: “Unfortunately the conditions under which prisoners serve their time do not always foster respect for their dignity; and often prisons become places where new crimes are committed.”

\textsuperscript{51} See Sacred Congregation for the Doctrine of the Faith, “Declaration on Euthanasia” (1980), www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800305_euthanasia_en.html (accessed November 3, 2008): “nothing and no one can in any way permit the killing of an innocent human being, whether a fetus or an embryo, an infant or an adult, an old person, or one suffering from an incurable disease, or a person who is dying. . . . It may happen that, by reason of prolonged and barely tolerable pain, for deeply personal or other reasons, people may be led to believe that they can legitimately ask for death or obtain it for others. Although in these cases the guilt of the individual may be reduced or completely absent, nevertheless the error of judgment into which the conscience falls, perhaps in good faith, does not change the nature of this act of killing, which will always be in itself something to be rejected.”

\textsuperscript{52} Compendium of the Social Doctrine of the Church, para. 403, states: “the nature and extent of the punishment [meted out to offenders] must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity; in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.”
limiting the availability of contraceptives\textsuperscript{54} and promoting a sex-education curriculum\textsuperscript{55} directed against the present day’s “contraceptive mentality”;\textsuperscript{56}
withdrawing legal recognition from unmarried de facto family relationships;\textsuperscript{57}
making divorce more difficult\textsuperscript{58} and also, conceivably, prohibiting remarriage after divorce;\textsuperscript{59}
supporting measures enabling women to participate equally and without suffering discrimination in the workplace;\textsuperscript{60}
promoting the integration of people with disabilities into society and, in particular, ensuring that they are not discriminated against in the workplace;\textsuperscript{61}
withdrawing the protection of antidiscrimination laws that cover sexual orientation\textsuperscript{62} and vetoing every legal recognition of same-sex unions;\textsuperscript{63}

\textsuperscript{54} See “Charter of the Rights of the Family,” article 3: “The spouses have the inalienable right to found a family and to decide on the spacing of births and the number of children to be born, taking into full consideration their duties towards themselves, their children already born, the family and society, in a just hierarchy of values and in accordance with the objective moral order which excludes recourse to contraception, sterilization and abortion.” See also Archbishop Raymond L. Burke, “On the Dignity of Human Life and Civic Responsibility” (2003), www.wf-f.org/Burke-Life-CivicRespons.html (accessed November 3, 2008).

\textsuperscript{55} “Charter of the Rights of the Family,” article 5(c): “Parents have the right to ensure that their children are not compelled to attend classes which are not in agreement with their own moral and religious convictions. In particular, sex education is a basic right of the parents and must always be carried out under their close supervision, whether at home or in educational centers chosen and controlled by them.”

\textsuperscript{56} For “contraceptive mentality,” see Evangelium Vitae, para. 13.

\textsuperscript{57} Pope John Paul II, “Address to the Tribunal of the Roman Rota” (2002): “[There must be] resolute opposition to any legal or administrative measures that... equate de facto unions—including those between homosexuals—with marriage.” See also “Charter of the Rights of the Family,” article 1(c): “The institutional value of marriage should be upheld by the public authorities; the situation of non-married couples must not be placed on the same level as marriage duly contracted.”

\textsuperscript{58} “Charter of the Rights of the Family,” article 6(b): “The family has the right to exist and to progress as a family... Divorce attacks the very institution of marriage and of the family.”

\textsuperscript{59} See, for instance, John Paul II, “Address to the Tribunal of the Roman Rota.”

\textsuperscript{60} Compendium of the Social Doctrine of the Church, para. 295, states: “The feminine genius is needed in all expressions in the life of society, therefore the presence of women in the workplace must also be guaranteed.”

\textsuperscript{61} Compendium of the Social Doctrine of the Church, para. 148, states:
The rights of persons with disabilities need to be protected with effective and appropriate measures. “It would be radically unworthy of man, and a denial of our common humanity, to admit to the life of the community, and thus admit to work, only those who are fully functional. To do so would be to practise a serious form of discrimination, that of the strong and healthy against the weak and sick.” Great attention must be paid not only to the physical and psychological work conditions, to a just wage, to the possibility of promotion and the elimination of obstacles but also to the affective and sexual dimensions of people with disabilities.

\textsuperscript{62} See Congregation for the Doctrine of the Faith, “Some Considerations concerning the Response to Legislative Proposals on the Non-discrimination of Homosexual Persons” (1992), paras. 14, 17, www.ewtn.com/library/curia/cdfhomol.htm (accessed November 5, 2008); where it is warned that “there is a danger that legislation which would make homosexuality a basis for entitlements could actually encourage a person with a homosexual orientation to declare his homosexuality or even to seek a partner in order to exploit the provisions of the [anti-discrimination] law... where a matter of the common good is concerned, it is inappropriate for church authorities to endorse or remain neutral toward adverse legislation.”

It should be emphasized that the church does not regard this radical social program as a “Catholic agenda.” Legislation of this nature, according to the Vatican, would be intended to instantiate the natural law, which sets out objective standards of justice and morality applicable to all. As Pope John Paul II wrote:

The value of democracy stands or falls with the values which it embodies and promotes. . . . The basis of these values cannot be provisional and changeable “majority” opinions, but only the acknowledgment of an objective moral law which, as the “natural law” written in the human heart, is the obligatory point of reference for civil law itself. . . . Even in participatory systems of government, the regulation of interests often occurs to the advantage of the most powerful, since they are the ones most capable of maneuvering not only the levers of power but also of shaping the formation of consensus. In such a situation, democracy easily becomes an empty word. It is therefore urgently necessary, for the future of society and the development of a sound democracy, to rediscover those essential and innate human and moral values which flow from the very truth of the human being and express and safeguard the dignity of the person: values which no individual, no majority and no State can ever create, modify or destroy, but must only acknowledge, respect and promote.65

Laws in favour of homosexual unions are contrary to right reason because they confer legal guarantees, analogous to those granted to marriage, to unions between persons of the same sex. . . . The principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions. Differentiating between persons or refusing social recognition or benefits is unacceptable only when it is contrary to justice. The denial of the social and legal status of marriage to forms of cohabitation that are not and cannot be marital is not opposed to justice; on the contrary, justice requires it.

64. Compendium of the Social Doctrine of the Church, para. 471, states: “The Christian vision of creation makes a positive judgment on the acceptability of human intervention in nature, which also includes other living beings, and at the same time makes a strong appeal for responsibility. . . . the human person does not commit an illicit act when, out of respect for the order, beauty and usefulness of living beings, and their function in the ecosystem, he intervenes by modifying some of their characteristics or properties. Human interventions that damage living beings or the natural environment deserve condemnation, while those that improve them are praiseworthy.”


Juridical positivism . . . has taken on the form of the theory of consensus if reason is no longer able to find the way to metaphysics as the source of law, the State can only refer to the common convictions of its citizens’ values, convictions that are reflected in the democratic consensus. Truth does not create consensus, and consensus does not create truth as much as it does a common ordering. The majority determines what must be regarded as true and just. In other words, law is exposed to the whim of the majority, and depends on the awareness of the values of the society at any given moment, which in turn is determined by a multiplicity of factors. This is manifested concretely by the progressive disappearance of the fundamentals of law inspired in the Christian tradition. . . . Because in modern States metaphysics, and with it, Natural Law, seem to be definitely depreciated, there is an ongoing transformation of law, the ulterior steps of which cannot yet be foreseen; the very concept of law is losing its precise definition.

These laws encouraged by the Vatican are held to derive their binding force and legitimacy not from consent of the people but from their harmony with the world as God intended it. The model assumes that God created humanity—and each other component of the universe—with a fundamentally fixed nature or essence. It further assumes that, by careful observation, it is possible to discern various natural laws that govern the appropriate exercise of that nature. These laws are in principle immutable since human nature is (said to be) an unchanging given. All and any acts undertaken contrary to these natural laws will be, in all circumstances, objectively immoral because they are contrary to nature and to God's purpose. Further, the model assumes that civil law should reflect and enforce the moral norms of natural law. As the Congregation for the Doctrine of the Faith has put it:

Civil law cannot contradict right reason without losing its binding force on conscience. Every humanly-created law is legitimate insofar as it is consistent with the natural moral law, recognized by right reason, and insofar as it respects the inalienable rights of every person.

Moreover, in *Evangelium Vitae*, John Paul II states that "the doctrine on the necessary conformity of civil law with the moral law is in continuity with the whole tradition of the Church." By contrast, however, St. Thomas Aquinas held that it is not the business of human law either to restrain all moral vices or to require the execution of all virtuous acts. Immorality does not map directly onto illegality. The apparent collapse, in recent Vatican pronouncements, of the careful distinctions made by Aquinas does make it seem that the temptation of *shari'a* has been irresistible to the church. A profound lack of sympathy on the part of the Vatican with specific legal developments in the Western democracies—particularly in the areas of sexuality, family, and the right to life—has perhaps led the church away from the Thomist recognition of the dignity and integrity of the system of positive civil law. Be that as it may, the church is clearly not, or no longer, persuaded that the system of civil law creates a normative order of binding obligations independent of their consistency or congruence with the moral order of nature. What, then, is the difference between this agenda of the church and the determination of

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70. *Summa Theologiae* Ia–IIae, q. 95, aa. 4, 5.
radical Islamists to make shari'a the civil law in all Muslim countries?  
Why, for example, should Catholic prelates not call for the recriminalization of adultery, as has been proposed in Turkey? Adultery, after all, is forbidden in the Ten Commandments and considered by the church to be an objectively immoral act that undermines the very basis of civil society—the family.

The legal agenda of the church could well be more radical in scope than even the Islamists’ program, because the church contends that the moral standards it seeks to guarantee through legislation are products of rational reflection on the human condition. They are therefore standards that everyone, regardless of religious belief or culture, can properly be expected to recognize and affirm.

As Veritatis Splendor formulates this proposition:

Only by obedience to universal moral norms does man find full confirmation of his personal uniqueness and the possibility of authentic moral growth. For this very reason, this service is also directed to all mankind: it is not only for individuals but also for the community, for society as such. These norms in fact represent the unshakable foundation and solid guarantee of a just and peaceful human coexistence, and hence of genuine democracy... In the end, only a morality which acknowledges certain norms as valid always and for everyone, with no exception, can guarantee the ethical foundation of social coexistence, both on the national and international levels.

Contrary to its own emphatic claim, this high theocratic vision is very difficult to square with the democratic ideals to which Western societies now adhere and that our politicians seek so zealously to spread among the nations of the developing world and the Islamic world. In the bishops’ vision of its realization on earth, the City of God has little room for the variety of interests and viewpoints upon which actual democracies are founded and survive.

71. In Refah Partisi (‘the Welfare Party’) v. Turkey (2003) 37 EHRR 47 (ECtHR [Grand Chamber], February 13, 2003) the European Court of Human Rights held that a political program seeking the introduction of shari’a as the basis of civil law in Turkey was incompatible with the European Convention on Human Rights and hence with the conception of European democracy, which was said to be based on pluralism, freedom of speech, the separation of church (or mosque) from state, and due respect for human rights. See Mustafa Köpük and Esin Öräci, “Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights,” European Public Law 9:3 (2003): 399–424.

72. Thus, Compendium of the Social Doctrine of the Church, para. 84, states: every conscience and mind is in a position to grasp the human depths of meaning and values expressed in [the Roman Catholic social doctrine] and the potential of humanity and humanization contained in its norms of action. It is to all people—in the name of mankind, of human dignity which is one and unique, and of humanity’s care and promotion of society—to everyone in the name of the one God, Creator and ultimate end of mankind, that the Church’s social doctrine is addressed. This social doctrine is a teaching explicitly addressed to all people of good will, and in fact is heard by members of other Churches and Ecclesial Communities, by followers of other religious traditions and by people who belong to no religious group.

73. Pope John Paul II, Veritatis Splendor, paras. 96–97.
Conscientious Objection to Unjust Laws

However, while awaiting the establishment of the godly state, church authorities in the post-Nuremberg context have relied less on the assertion of theocratic power than on the right, guaranteed to them in democratic societies, to freedom of religion and freedom of expression. These democratic rights have become the basis for the bishops' claim of entitlement to intervene in issues of public policy that touch upon questions of morality. Moreover, the bishops' criticism of laws to which they object has tended to be framed in the language of fundamental human rights. In the Vatican's Compendium of the Social Doctrine of the Church, for example, we find it affirmed that "the movement towards the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity".

The ultimate source of human rights is not found in the mere will of human beings, in the reality of the State, in public powers, but in man himself and in God his Creator. These rights are "universal, inviolable, inalienable." Universal because they are present in all human beings without exception of time, place or subject. Inviolable insofar as they are inherent in the human person and in human dignity" and because "it would be vain to proclaim rights, if at the same time everything were not done to ensure the duty of respecting them by all people, everywhere, and for all people." Inalienable insofar as "no one can legitimately deprive another person, whoever they may be, of these rights, since this would do violence to their nature.”

The problem with many recent documents emanating from the Vatican, and from some of the more politically activist bishops, is the lack of adequate awareness of what use of the language of human rights, in the context of democratic society, commits them to as a matter of process. Likewise, there seems to be inadequate awareness of the complexities involved in the processes by which the rule of law is carried out. And perhaps of most far-reaching significance, the bishops show inadequate awareness that fidelity to the values of legality and constitutionality is itself a moral requirement for participation in democratic public

74. The summary passage following is taken from an address to the sixtieth session of the UN Human Rights Commission, April 2004, by Archbishop Silvano Tomasi, the Holy See's permanent observer at the UN offices in Geneva, para. 4, www.vatican.va/roman_curia/secretariat_state/2004/documents/rc_seg-st_20040401.tomasi-religious-freedom_en.html (accessed November 5, 2008); "An emerging subtle form of religious intolerance is opposing the right of religion to speak publicly on issues concerning forms of behavior that are measured against principles of a moral and religious nature. While respecting a healthy sense of the state's secular nature, the positive role of believers in public life should be recognized. This corresponds, among other things, to the demands of a healthy pluralism and contributes to the building up of authentic democracy. Religion cannot be relegated to a corner of the private sphere of life and in this way risk losing its social dimension and its charitable action toward vulnerable people it serves without any distinction."

75. Compendium of the Social Doctrine of the Church, paras. 152-53.
life. On the bishops' political model, the individual's obedience to the laws of the state (no matter what position the individual holds within the state) is always contingent on those laws' conforming to the demands of God, as mediated through his church. In the words of the catechism:

The citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel. Refusing obedience to civil authorities, when their demands are contrary to those of an upright conscience, finds its justification in the distinction between serving God and serving the political community.76

Applying this principle, John Paul II set down:

Laws which authorize and promote abortion and euthanasia are . . . radically opposed not only to the good of the individual but also to the common good; as such they are completely lacking in authentic juridical validity. . . . [A] civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law. Abortion and euthanasia are thus crimes which no human law can claim to legitimate. There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection. . . . It is precisely from obedience to God—to whom alone is due that fear which is acknowledgment of his absolute sovereignty—that the strength and the courage to resist unjust human laws are born. It is the strength and the courage of those prepared even to be imprisoned or put to the sword, in the certainty that this is what makes for "the endurance and faith of the saints." (Rev. 13:10)77

This last passage relies paradoxically on the primacy of individual conscience—otherwise denied (at least by rigorist bishops) to legislators, judges, and voters—in combination with the language of John's Apocalypse. Comparisons are drawn with the Christian martyrs of ancient Rome. At the same time, John Paul II sought the protection of the civil law for those who would disobey those civil laws from which the church dissented. "Morally upright people," he stated, "have a right to demand not to be forced to take part in morally evil actions. . . . To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right. . . . Those who have recourse to conscientious objection must be protected not only from legal penalties but also from any negative effects on the legal, disciplinary, financial and professional plane."78 What the late pope seems to have been calling for is a legally guaranteed right for individuals—in

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76. Catechism of the Catholic Church, para. 2242.
77. Evangelium Vitae, paras. 72–73.
78. Evangelium Vitae, para. 74.
the name of individual conscience—to dissent from and oppose laws with which they are in moral disagreement. It is difficult to see how the legal system of any democracy could permit its citizens this pick-and-choose approach to legality. The attitude to the civil law taken by church authorities indeed parallels the "à la carte Catholicism" that the hierarchy accuses Catholics who (for example) use birth control of practicing. The church appears to indulge in "à la carte constitutionalism" when its Compendium of Social Doctrine states:

Recognizing that natural law is the basis for and places limits on positive law means admitting that it is legitimate to resist authority should it violate in a serious and repeated manner the essential principles of natural law. Saint Thomas Aquinas writes (in Summa Theologiae IIa–IIae, q. 104, a. 6, ad 3um) that "one is obliged to obey ... insofar as it is required by the order of justice." Natural law is therefore the basis of the right to resistance. There can be many different concrete ways this right may be exercised; there are also many different ends that may be pursued. Resistance to authority is meant to attest to the validity of a different way of looking at things, whether the intent is to achieve partial change, for example, modifying certain laws, or to fight for radical change in the situation. ... The gravity of the danger that recourse to violence entails today makes it preferable in any case that passive resistance be practiced, which is "a way more conformable to moral principles and having no less prospects of success."

If the church is going to promote conscientious objection to the laws of civil society, it needs to do better than that. First, the statement appears to contravene traditional Catholic moral teaching by suggesting that good ends can justify disorderly means. Truly conscientious objection must be rooted in fidelity to the legal values of civil society and to the democratic process that produced the whole corpus of law. Otherwise, far from being conscientious—an act of

79. Thus, in Pickford and Sajens v. France (nonadmissibility decision of October 2, 2001), the European Court of Human Rights rejected as "manifestly ill-founded" a complaint by two licensed pharmacists that their criminal conviction—resulting from their refusal, on religious grounds, to supply women with contraceptives prescribed by their doctors—contravened their right to freedom of thought, conscience, and religion guaranteed under article 9 ECHR. The court held that "as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere" (www.reproductiverights.org/pdf/pub_bp_RREuropeanCourt.pdf).

80. Compendium of the Social Doctrine of the Church, paras. 399–401.

81. As is noted in Veritatis Splendor, para. 71: "human activity cannot be judged as morally good merely because it is a means for attaining one or another of its goals, or simply because the subject's intention is good." Cf. Aquinas, Summa Theologiae IIa–IIae, q. 148, a. 3.

82. The EU Charter of Fundamental Rights provides in article 10(2), www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed November 5, 2008) as follows: "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."
loyal opposition—"objection" or self-exemption becomes contempt for the law and the political system sustaining it.

**Respect for Human Rights as a Specifically Democratic Principle**

Though church documents sharply critical of civil society have increasingly been framed in the language of human rights, the Vatican itself—as a sovereign European state—has not subscribed to the European Convention on Human Rights.83 But if the church is willing to use human rights language to criticize civil society, then it has also to be open to the possibility that the church itself may be criticized and judged with reference to these same standards.84 The Vatican's *Compendium of Social Doctrine* acknowledges that "the Church profoundly experiences the need to respect justice and human rights within her own ranks."85 The difficulty is that the church uses the language of human rights as if it were simply another way of talking about natural law. The popes, the curia, and the bishops appear to assume that, when participating in human rights discourse, they do no more than translate the church's constant teaching into intelligible contemporary terms.

This assumption on the part of church authorities is mistaken: it is a basic category or framework error. In Catholic teaching, "natural law" is a specifically Christian theological account of what makes actions by human beings into moral actions and of what gives human (positive) laws their prescriptive or binding force. But talk about fundamental rights, post-Nuremberg, is not talk about theology, nor is it talk about virtue (which surely is the proper focus of any Christian morality). "Fundamental rights talk" is best understood as the articulation of a specifically political attitude toward the power of the state; namely, that its power is not unlimited. A concrete expression of the limitation on power is that the state and its agents can be held to account, as a matter of law, for conduct held to be incompatible with respect for a set of basic values. Talk of fundamental rights in

83. The Holy See does have observer status before the Council of Europe. Among the institutions set up under the auspices of the Council of Europe is the European Court of Human Rights which adjudicates on the proper interpretation of the European Convention of Human Rights.

84. In *Pellegrini v. Italy* (2002) 35 EHRR 2, the European Court of Human Rights found in 2001 that the procedures of the Roman Rota, the ecclesiastical appeals court responsible for marriage-annulment applications, failed to reach the standards required for a fair trial under article 6(t) of the European Convention and that, therefore, its judgments could not properly be recognized and enforced under Italian law. ECHR noted that, in Rota proceedings, witness statements were not provided to parties and that thus there was no opportunity for the parties to comment on them. Parties were not advised that they could appoint lawyers to appear for them, nor advised of the terms of the legal submissions made by the canon lawyer appointed by the court to argue against annulment. Finally, the parties were refused sight of a full copy of the Rota's judgment, in which the ecclesiastical court set out its reasoning. Given these circumstances, the Strasbourg court took the view that justice was not done in annulment proceedings before church courts.

85. *Compendium of the Social Doctrine of the Church*, para. 159.
this mode arose from the historical experience (particularly in Nazi Germany) of how very far state power, when constitutionally unlimited, can go in abusing individuals. Our contemporary talk of human rights seeks to protect individuals from the state and its agents. The focus of human rights legislation is individualistic, its methods are thus by definition legalistic; and its end is the preservation of self-interests. Given its source and historical context, human rights talk does not directly address the duties owed by individuals to others. Nor does it address the interests of the community over and against those of the individual. In other words, the church has so far failed to take account adequately of the political (and specifically, the democratic) context in which the idea of human rights is now embedded. In decontextualizing, de-democratizing, and dehistoricizing human rights, the church is bound to continue misrepresenting them. As for the specific processes by which democracies embody the rule of law, the Roman Catholic Church—in stark contrast, say, to the Church of Scotland—is not a democracy (the laity have no vote in its governance), nor has the sovereign State of the Vatican City participated in constructing the sets of legally enforceable rights affirmed since World War II.86

The context within which governments have bound themselves to honor these sets of rights is best understood in terms of legal structures. The nations of the world reacted, by means of human rights legislation, against the perversion of the form of the law under the Nazi state and against the consequent corruption of those who participated as lawyers and judges in that system.87 The unique horror of the Nazi system is that it purported to maintain the forms of law and legality while routinely using torture against individuals, reversing the presumption of innocence and the principle that criminal legislation should not be applied retrospectively, and legislatively for people to be held under conditions of slavery. Under its “Nuremberg laws,” the Nazi state grossly invaded the privacy of those under its rule, denying them free expression, free assembly, and the freedom of thought, conscience, and religion. In the name of “eugenics,” the Nazi authorities withdrew from certain individuals the right to marry and found a family.

86. The text of the Fundamental Law of the State of the Vatican City, which was promulgated in November 2000, may be found at www.vatican.va/vatican_city_state/legislation/documents/scv_doc_20001126_legge-fondamentale-scv_it.html (accessed November 5, 2008). Article 11(1) confirms the essentially monarchical nature of the Vatican’s constitution: “The Supreme Pontiff, as sovereign power of the Vatican State, holds full executive, legislative and judicial power.”

87. Nuremberg “Case 3” (or United States v. Altstötter and Others) concerned the prosecution of a selection of sixteen jurists who had participated in the German legal system during the Nazi era. The prosecution described them as representative of “what passed for justice in the Third Reich,” and they were put on trial for “judicial murder and other atrocities which they committed by destroying law and justice in Germany and by utilizing the empty forms of legal process for persecution, enslavement and extermination on a vast scale.” See Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg October 1946—April 1949, 10 vols. (Washington, DC: United States Government Printing Office, 1951), 352–33.
Notoriously, they discriminated among the populations under their control on the grounds of “race,” religion, and national and social origin. In the words of the Nuremberg War Crimes Tribunal, the Nazi legal system was a nation-wide government-organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.88

The Nazi state did not simply discriminate against certain populations, it “legitimized” that discrimination as well as, in time, the expropriation and wholesale extermination of the Jews of Europe.

Thus it was jurists who assembled after the war to set out, both in international charters and in national constitutional documents, the substance of the moral underpinnings to the domestic law of states. The United Nations issued the Universal Declaration of Human Rights in 1948. Regional agreements expounding further the principles of international humanitarian law were entered into as well, notably the 1950 European Convention on Human Rights. The postwar German national constitution, the Grundgesetz, set out a list of basic rights that the state was henceforth bound to accept and that could not be changed or abrogated even by constitutional amendment. In the postwar process of decolonization, states newly independent of the British empire wrote constitutions containing bills of fundamental rights modeled on the European Convention.89 Meanwhile, Canada, New Zealand, and South Africa formulated and adopted their own bills of fundamental rights and freedoms. These human rights documents (and related developments in the common law) were responses to the insight that, in the absence of legally enforceable limits, state power can do great evil; but a second primary insight emerged as well from the Nuremberg trial process. The judges at Nuremberg rejected the “only following orders” defense—the plea that a defendant had been acting in accordance with the laws of his place and time. Instead the judges mandated the punishment of individuals for acts or omissions deemed criminal “according to the general principles of law recognized by civilised nations.”90 “Crimes against international law,” the judges wrote, “are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be

88. See Trials of War Criminals before the Nuremberg Military Tribunals, 3:984–85.


enforced.91 This decision was far-reaching and by no means limited to combatants and government officials or employees.92

Almost every nation (with the possible exception of the United States) experienced significant constitutional change or development since World War II, whether through the creation of the European Union, the dismantling of the communist system, the process of decolonization, the transformation of the British empire into the Commonwealth, or the ending of South African apartheid. Human rights charters have come to embody the essence of what we mean by "rule of law." Making human rights into legally enforceable standards is by now seen as fundamental to what it is to be a democracy.93 The legal systems of most of the world are now "post-Nuremberg" systems in that they have accepted that morality and law are not wholly distinct and separate spheres, and that those who hold office within national legal systems have a duty to administer justice in accordance with humanitarian principles and not simply and mechanistically apply laws of their own states. The Lisbon Reform Treaty—which was agreed to by the governments of the EU member states in 2007 and is now in the process of ratification by the national parliaments—made explicit this "value laden" aspect of the laws and constitutions of European states by inserting the following text into the preamble to the Treaty on European Union:

Drawing inspiration from the cultural, religious, and humanist inheritance of Europe, from which have developed the universal values of inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law, . . . the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member


92. See *Harvard Law Review* 64 (1951): 1005–7 on the ease of a woman who, with a view to effecting a swift end to her marriage, denounced her husband to the authorities for slandering Hitler. Her husband was imprisoned and sentenced to death (a sentence later commuted to military service on the Russian front). The woman was convicted in the postwar German courts for her reliance, in bad faith, on the patently unjust laws of the Nazi system. See also commentary on this and similar cases in H. O. Puppe, "On the Validity of Judicial Decisions in the Nazi Era," *Modern Law Review* 23 (1960): 260–74. Compare the Zyklon B case decision of the British Military Court of March 1946—a prosecution of the industrialists who produced and delivered the poison gas used for the mass extermination in German death camps—which has the following commentary at page 1498: "The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authority, but to anybody who is in a position to assist in their violation. The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal."
States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.94

There is no doubt that many of the values that Western democratic states now proclaim have their roots in Christian moral traditions. But other values—such as freedom of speech, pluralism, and tolerance—have their roots in the Enlightenment rejection of institutional Christianity. And while, in its 1965 declaration Dignitatis Humanae,95 the Roman Catholic Church finally affirmed the importance of legal recognition for the free exercise of religion, the manner in which the fundamental right to freedom of thought, conscience, and religion has been understood in the modern European context is not one by which those currently influential within the Holy See appear to set store.96 The case law of the European Court of Human Rights is to the effect that ECHR article 9 neither protects religious doctrine as such, nor upholds the legal status historically given to any particular religious establishment, but rather that article 9 protects the individual’s freedom to hold and practice a religion in a manner consistent with a tolerant and pluralist democracy and with due respect for others’ rights. Hence, not every strong religiously-based feeling, opinion, or judgment is protected under article 9. A value judgment is, to some degree, made by civil authorities as to which convictions—even religiously-based ones—may properly claim the protection of the Convention in the European states to which it pertains. The religious and philosophical convictions thus protected are to be distinguished from prejudices (for example, that of anti-Semitism) which, however deeply held and “religiously” based, are regarded as incompatible with respect for human dignity and therefore as unworthy of respect in a democratic society. In her mono-

94. This text, taken from the first preamble and article 10 of the Treaty on European Union, is given here as amended by the 2007 Lisbon Reform Treaty.

95. The Vatican II Declaration on Religious Freedom, promulgated by Pope Paul VI in 1965, www.vatican.va/archive/ii_vatican_council/documents/vat_ii_decl_19651207_dignitatis-humanae_en.html (accessed November 9, 2008), states: “In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious... Injury therefore is done to the human person and to the very order established by God for human life, if the free exercise of religion is denied in society, provided just public order is observed.”


The right to freedom of conscience and, in a special way, to religious freedom, taught in the Declaration Dignitatis Humanae of the Second Vatican Council, is based on the ontological dignity of the human person and not on a non-existent equality among religions or cultural systems of human creation. Reflecting on this question, Paul VI taught that “in no way does the Council base this right to religious freedom on the fact that all religions and all teachings, including those that are erroneous, would have more or less equal value, it is based rather on the dignity of the human person, which demands that he not be subjected to external limitations which tend to constrain the conscience in its search for the true religion or in adhering to it.”
While freedom of religion or belief is an important right, the free practice of religion or belief should sometimes be limited. Even if the believer claims an absolute and divinely mandated obligation to behave in a particular manner, it does not follow that the State or human rights bodies should support those claims. Religions or groups of believers may be involved in stirring up hatred against people who do not share their beliefs and they may actively oppose the notion of religious freedom. Religions have also tended historically to discriminate against women and some religions have been involved in promotion of notions of racial inequality and inciting persecution against homosexuals.\footnote{Evans, Freedom of Religion under the European Convention of Human Rights, 206.}

This kind of interpretation of the right to religious freedom is viewed by some in the Vatican as a disguised attack on religion, and they rush to claim victim status for Catholic Christianity, battered, as they see it, by intolerant secularism. Thus, curial documents have claimed that
even in democratic societies, there still remain expressions of secular intolerance that are hostile to granting any kind of political or cultural relevance to religious faiths. Such intolerance seeks to exclude the activity of Christians from the social and political spheres because Christians strive to uphold the truths taught by the Church and are obedient to the moral duty to act in accord with their consciences.\footnote{Compendium of the Social Doctrine of the Church, para. 572.}

Moreover, the Vatican wants to claim, “the marginalisation of Christianity . . . would threaten the very spiritual and cultural foundations of civilisation.”\footnote{“On Some Questions regarding the Participation of Catholics in Political Life,” para. 6.} But what the values of European democratic states would appear to demand is tolerance of the tolerant and, by corollary, intolerance of the intolerant. This position is not an instance of “Christianophobia,” anticlericalism, or “militant secularism.”\footnote{Officially, the church is otherwise very much in favor of “the European project.” See Aidan O’Neill, “Archbishop Conti Hoists the EU Flag,” Tablet 23 (March 23, 2002): www.thetablet.co.uk/article/4465, for critical reflections on that stance.} Rather, the problem is that the church has introduced a fundamental tension into any democratic polity in which conforming Catholics participate. The church has asserted its right to deny the validity of democratically enacted laws and has instructed Catholics, where possible, to block or impede their implementation.
This teaching of the church raises for democratic societies the question of which moral vision a Catholic in public life can be expected to implement in carrying out public duties—those of the institution in which he or she holds office, or those of the church of which he or she is a member. The distinction between the Rule of God and the Rule of Man was repeatedly emphasized by Pope John Paul II and subsequently has been stressed as well by Benedict XVI. As the former wrote in *Veritatis Splendor*:

Today, when many countries have seen the fall of ideologies which bound politics to a totalitarian conception of the world—Marxism being the foremost of these—there is no less grave a danger that the fundamental rights of the human person will be denied and that the religious yearnings which arise in the heart of every human being will be absorbed, once again into politics. This is the risk of an alliance between democracy and ethical relativism, which would remove any sure moral reference point from political and social life, and on a deeper level make the acknowledgement of truth impossible. Indeed, “if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism” (Encyclical Letter *Centesimus Annus* [May 1, 1991], 46; *AAS* 83 [1991], 850).

The existence of positively democratic values is clearly a blind spot of the Catholic hierarchy’s. The Western democracies proclaim and seek to embody the values of liberty, equality, tolerance, pluralism, and respect both for human rights and for the structures of the rule of law.

**The Specifically Moral Vision of Democracy**

Western democratic states are not, as some in the church hierarchy would claim, morally neutral or morally bankrupt. The post-Nuremberg democracies share a moral vision that is implicit in the following propositions:

1. that all individuals have inestimable and intrinsic worth;
2. that respect for this intrinsic worth can be translated into statements of fundamental rights;
3. that respect for these rights entails each individual’s correlative obligation to respect the rights of others as equal to his or her own, and entails as well each individual’s respect for the interests of the community as a whole;
4. that the interests of the community as a whole are to be determined by an electoral process under which the majority’s will prevails—subject always

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to the duty of the majority to give due respect to the fundamental rights of minorities and of each individual;

5. that the creation and maintenance of a balance of respect for the rights of individuals and the interests of the community require that institutions for open discussion flourish (hence the importance accorded to freedom of speech, open and honest debate within legislatures, and the flow of information and commentary through the press, broadcasting, and the Internet);

6. that the prevention of tyranny and abuse of power by (or in the name of) the majority, as well as the protection of the fundamental rights of minorities and individuals, entail that there should be independent and impartial courts, whose judgments are to be respected and accepted by all parties before them and especially by those entrusted with political power;

7. that an attitude of humility, including the acceptance that one's own views are contingent on passing circumstances—an acceptance that one might be wrong and a consequent openness to persuasion of the rightness of other views—is essential in maintaining social order and civic peace;

8. that all those who participate in civil society—and particularly those holding public office—must do so in good faith and must share those values of respect for the individual, toleration of difference, equality of treatment, and willingness to listen, upon which all the civil institutions of the society must also be based;

9. that laws duly enacted under the democratic deliberative process, unless found—under the same process—to be unconstitutional and to violate fundamental rights of individuals, must be respected and obeyed by all parties within society, subject always to the right to continue pressing, under the same deliberative process, for change in such laws;

10. that, given the experience of World War II and relevant findings of the Nuremberg trial judges, an individual, in rare and extreme cases, may break a duly enacted law, but only where

(a) the individual is seeking to prevent an action that is itself illegal under either domestic or applicable international (humanitarian) law;

(b) the individual's action is necessary in the sense that there is no reasonable legal alternative available to the actor (for example, because the authorities have refrained from enforcing relevant laws);

(c) that the individual actor can reasonably and properly expect that the actions he or she takes will be effective in impeding the illegal act; and

(d) that the individual's actions are marked by a fidelity to legal values, which is to say that they are proportionate, that they involve no possibility of harm or violence to individuals, and that no attempt is made to avoid detection in performing the act.
It should be said immediately that most of these propositions have their parallels in official Roman Catholic documents, including the Catechism. Civil democratic society does not differ radically from the church regarding the importance of individual rights, though the emphases of course differ.102 Both the church and civil society recognize the urgency of protecting minorities against the potential tyranny of the majority.103 The difference between civil democratic society and the church can be formulated in either negative or positive terms. Defined negatively, civil democratic society, in comparison with the church, shows a lack of certainty or finality in the judgments made on how its substantive values are to be realized and on the requirements of the common good. Defined positively, civil democratic society differs from the church in its openness to the possibility of views alternative to those that currently hold sway and in the openness of decision making. The assumption of fallibility does not mean, as is sometimes charged, that a democratic society is therefore committed to "ethical relativism."104 Relativism is an assertion that there exists no right answer, while the structures of a democratic civil society exist precisely to allow for the continued search for right answers.105 The difference here is not between fallible and infallible leadership. While the tendency of the church is to maintain that its moral

102. Thus, in Centesimus Annus, John Paul II stated (at para. 47):
   it is necessary for peoples in the process of reforming their systems to give democracy an authentic and solid foundation through the explicit recognition of [human]
   rights. Among the most important of these rights, mention must be made of the right to life, an integral part of which is the right of the child to develop in the mother's
   womb from the moment of conception; the right to live in a united family and in a moral environment conducive to the growth of the child's personality; the right to
   develop one's intelligence and freedom in seeking and knowing the truth; the right to share in the work which makes wise use of the earth's material resources, and to
derive from that work the means to support oneself and one's dependents; and the right freely to establish a family, to have and to rear children through the responsible
   exercise of one's sexuality. In a certain sense, the sources and synthesis of these rights is religious freedom, understood as the right to live in the truth of one's faith and in conformity with one's transcendent dignity as a person.

103. Thus, the Compendium of the Social Doctrine of the Church, para. 169, states: "in the democratic State, where decisions are usually made by the majority of representa-
tives elected by the people, those responsible for government are required to interpret the common good of their country not only according to the guidelines of the majority
but also according to the effective good of all the members of the community, including the minority."

104. See "A 'Dictatorship of Relativism'? Symposium in Response to Cardinal Ratzinger's Last Homily," Common

   Rapids, MI: Eerdmans, 2001), 177–79: The dismal truth is that generations of moderns were
   miseducated to think that religion, and Christianity in particular, claims to be "objectively" true in a man-
   ner that eliminates the subjectivity of experience and perspective. Regrettably that miseducation was and is
   abetted by Christians who confuse orthodoxy with the exclusion of intellectual inquiry. In this habit of mind
   the truth is an object, a thing possessed, which must be assiduously protected from any thought that is not
certified by Christian copyright. The alternative is to understand that truth is personal, less a matter of our
   possessing than of our being possessed in service to the one who is the way the truth and the life. . . . If
   Christians exhibited more intellectual patience, modesty, curiosity and sense of adventure, there would be
fewer atheists in the world, both of the modern rationalist and post-modern irrationalist varieties. I have
never met an atheist who rejects the God in whom I believe. I have met many who decline to commit intel-
lectual suicide, and maybe spiritual suicide as well, by accepting a God proposed by Christians who claim to
know more than they can possibly know.
teachings have been constant and immutable since its foundation, historians have amply shown that church authorities have effectively made doctrinal changes down the centuries—reflecting perhaps developments in wider society—on the morality of wars of conquest and the processes of colonialism, on slavery, on sex discrimination, on the rights of women, on freedom of individual conscience, on freedom of religion, on capital punishment, on usury, and on other important ethical questions. The rock of Peter, exposed to the elements, changes perceptibly over time.

The post-Nuremberg democratic state, based as it is on the principle that the individual is an end and never a means, is, as a matter of positive law, heir to both the Christian tradition and to the Enlightenment and Kant. The claim of legal positivism that the law is simply what the powerful command, no matter what the content, has been routed. We are all natural lawyers now. What the democratic state brings to the realization of values associated with natural law (values that the church does not embrace) is the requirement of due process, the rule of law, the procedural rights of the defense in legal proceedings, and so forth. The procedures that have been incorporated into post-Nuremberg democracies have been selected to embody the ideals of natural law. These procedures are majoritarian, pluralist, and liberal. Decisions are made on the basis of majority votes of the people or their representatives. Yet, on the assumption that individuals are genuinely individual and thus differ from one another in their interests and views, all are guaranteed the right and opportunity to express, publicize, and proselytize on behalf of those views and interests—whether the regulation of abortion or the freedom to hunt foxes is at issue. Finally, the post-Nuremberg procedures have been made consistent with the right to proselytize on behalf of minority views. A public official charged with carrying out these procedures needs to possess the quality or disposition of “open-mindedness.” That term has been an object of scorn from various quarters and is badly misunderstood. Open-mindedness is not a quality of the philosophical relativist, for relativism is disbelief in objective truths or in our capacity to establish what they are. To be open-minded, in the relevant sense, is to be open to persuasion that the truths one currently affirms may not be the definitive or last word. This quality is obviously essential in civil judges. Judicial impartiality depends on the capacity to suspend one’s immediate judgment—one’s prejudgment or prejudice—and be willing to consider with an “open mind” both argument and counterargument. But even among members of the legislature and executive, the ideal (though sometimes obscured by systems of party discipline) is that they too should be independently minded, willing to hear oppositional voices and, having heard them, to deliberate and make decisions with their colleagues about present requirements of the common good. Judge Learned Hand called this the “spirit of liberty” and expressed it thus:

What then is the spirit of liberty? I cannot define it; I can only tell you
my own faith. The spirit of liberty is the spirit which is not too sure that
it is right; the spirit of liberty is the spirit which seeks to understand the
minds of other men and women; the spirit of liberty is the spirit which
weighs their interests alongside its own without bias; the spirit of liberty
remembers that not even a sparrow falls to earth unheeded; the spirit
of liberty is the spirit of Him who, near two thousand years ago, taught
mankind that lesson it has never learned, but has never quite forgotten;
that there may be a kingdom where the least shall be heard and consid-
ered side by side with the greatest.107

From the viewpoint of the post-Nuremberg democratic state, it makes no sense to
seek to disentangle ideas about human rights from other rights that are essential
to the procedures that ensure that fundamental rights are safeguarded effectively.
It is only the rules of due process and the requirements of pluralism and liberal-
ism that render guarantees of human rights enforceable—render them more
than an empty promise. In its use of the language of human rights, the church
has not yet committed itself to this very particular moral and political vision.
Any church teaching on the proper relationship between the civil law and the
moral law needs to take into account that, from the perspective of the former,
the legitimacy of any law comes not from the end it achieves but from its having
passed through the democratic process and having been found, by the institu-
tions of the state charged with this task, in accord with all fundamental rights
that the state guarantees. Moreover, laws in the democratic state are not fixed and
final, and its governments are not eternal. It is a democratic ideal that the law be
responsive to and reflective of the community; thus there is provision for lawful
change. Lawful change is brought about by using mechanisms provided: cam-
paigns may be mounted, petitions gathered, discussions initiated in the press and
the broadcasting media, legislative hearings called, members of the executive and
the legislature lobbied. All of these are activities in which the church may pro-
perly and legitimately participate. Given the existence and vigor of the democratic
deliberative process, it is improper and illegitimate for the church to claim that
it can mandate immediate disobedience of laws that it considers in contravention
of natural law. To do so threatens the integrity of a legal system that emerged in
response to post-Nuremberg needs for liberalism, pluralism, majoritarianism,
and procedural transparency.108

(speech, “I Am an American Day” ceremony, Central
Park, New York City, May 31, 1944).

archive/hist_councils/ii_vatican_council/documents/vat-
tii_cons_19651127_gaudium-et-spes_en.html (accessed
November 5, 2008):

The people who come together in the political com-
unity are many and diverse, and they have every
right to prefer divergent solutions. If the political com-
unity is not to be torn apart while everyone follows
his own opinion, there must be an authority to direct
the energies of all citizens toward the common good,
not in a mechanical or despotic fashion, but by acting
Church authorities sometimes respond to this logic by implicitly comparing the institutions and principles of the post-Nuremberg democracies with those that permitted the Nazi Party to take power and then exercise it through the German legal system. But, as we have seen, the German legal system from 1933 to 1945 was systematically corrupted and subordinated to tyranny, such that all who participated in it (or in public life at any level) were tainted. It was a system of, and only of, state oppression; and the only moral response was for the just to withdraw from any participation in it and, indeed, to seek to overthrow the regime—by “unlawful” or “revolutionary” means if need be—that sustained it. Nothing at all resembling this situation can reasonably be said to hold currently in the legal systems of Western democracies. But if that is indeed the church’s assessment of systems that permit abortion and euthanasia, then the only option is for the church to instruct its members to withdraw wholly from participation in the public life of these societies. John Paul II, however, in most of his remarks, seemed to take the more balanced view that, while most laws in Western democracies were aimed at the common good, others (notably those respecting human life) failed to achieve that standard. If the church in this way accepts the overall legitimacy of Western democracies, then it cannot call for revolt against the system as a whole. Its one reasonable and consistent option is, then, to promote change in specific laws by engaging in public debate. As one Jesuit commentator has put it:

above all as a moral force which appeals to each one’s freedom and sense of responsibility. It is clear, therefore, that the political community and public authority are founded on human nature and hence belong to the order designed by God, even though the choice of a political regime and the appointment of rulers are left to the free will of citizens. It follows also that political authority, both in the community as such and in the representative bodies of the state, must always be exercised within the limits of the moral order and directed toward the common good—with a dynamic concept of that good—according to the juridical order legitimately established or due to be established. When authority is so exercised, citizens are bound in conscience to obey. Accordingly, the responsibility, dignity and importance of leaders are indeed clear. But where citizens are oppressed by a public authority overstepping its competence, they should not protest against those things which are objectively required for the common good; but it is legitimate for them to defend their own rights and the rights of their fellow citizens against the abuse of this authority, while keeping within those limits drawn by the natural law and the Gospels.

109. See Archbishop Raymond L. Burke, “On Our Civic Responsibility for the Common Good” (2004), paras. 2–3, www.stlreview.com/abpcolumn.php?abpid=7051 (accessed November 5, 2008); some months ago . . . another native of Germany, who grew up during the Third Reich commented to me on the accusation made against a number of Catholic bishops of Germany of the time of not having done enough to teach against the evils of Nazism . . . I think how much weightier the individual responsibility for the common good is in a democratic republic like our own nation, in which we elect the officials of our Government. As a Bishop I think of the tremendous responsibility which is mine to teach clearly the moral law to all the faithful so that, in turn, we all have a clear understanding of our civic responsibility for the common good.

110. The Catechism of the Catholic Church makes the following assertions at paras. 2241–43: When citizens are under the oppression of a public authority which oversteps its competence, they should still not refuse to give or to do what is objectively demanded of them by the common good, but it is legitimate for them to defend their own rights and those of their fellow citizens against the abuse of this authority within the limits of the natural law and the Law of the Gospel. Armed resistance to oppression by political authority is not legitimate, unless all the following conditions are met: 1) there is certain, grave,
The willingness to subject the civil law and public policy to moral critique within ecumenical political dialogue must constitute the heart of the doctrine of the necessary conformity of the moral law and the civil law in a pluralistic society. That doctrine can be most fruitfully understood as a call for critical moral reflection on contemporary standards of civil law, rather than as a dogmatic insistence on the imposition of Christian morality on a religiously pluralistic society.\textsuperscript{111}

City of God v. City of Man?

The main problem with the political ideas of rigorists like Archbishop Burke is that, while they would accept that individuals have an extensive list of fundamental rights that must be respected,\textsuperscript{112} the rigorists' basic orientation is theocratic or, in their terminology, theonomic.\textsuperscript{113} Despite arguments made by John Paul II in favor of an "authentically free political order," we are often reminded by the hierarchy that, since the church is not a democracy, it is not essential that civil society should be so.\textsuperscript{114} Because the truth is known to, and will be taught by, the church — and because the spreading of erroneous views is likely to cause harm — there is no reason, on this theocratic vision, for structural importance to be ascribed to the freedom of speech. Free speech can serve, indeed, as a medium and prolonged violation of fundamental rights; 2) all other means of redress have been exhausted; 3) such resistance will not provoke worse disorders; 4) there is well-founded hope of success; and 5) it is impossible reasonably to foresee any better solution.


\textsuperscript{112} \textit{Gaudium et Spes}, article 27:

All offences against life itself, such as every kind of murder, genocide, abortion, euthanasia and willful suicide; all violations of the integrity of the human person, such as mutilation, physical and mental torture, undue psychological pressures; all offences against human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children, degrading working conditions where men are treated as mere tools for profit rather than free and responsible persons; all these and the like are certainly criminal; they poison human society; and they do more harm to those who practice them than those who suffer from the injury. Moreover, they are a supreme dishonour to the Creator.

\textsuperscript{113} See John Paul II, \textit{Veritatis Splendor}, para. 41:

Others speak, and rightly so, of "theonomy," or "participated theonomy," since man's free obedience to God's law effectively implies that human reason and human will participate in God's wisdom and providence. By forbidding man to "eat of the tree of the knowledge of good and evil," God makes it clear that man does not originally possess such "knowledge" as something properly his own, but only participates in it by the light of natural reason and of Divine Revelation, which manifest to him the requirements and the promptings of eternal wisdom. Law must therefore be considered an expression of divine wisdom: by submitting to the law, freedom submits to the truth of creation. Consequently one must acknowledge in the freedom of the human person the image and the likeness of God, who is present in all (cf. Eph 4:6). But one must likewise acknowledge the majesty of the God of the universe and revere the holiness of the law of God, who is infinitely transcendent: "Deus semper maior!"

\textsuperscript{114} Compare, however, John Paul II, \textit{Centesimus Annus}, para. 29: "In the totalitarian and authoritarian regimes, the principle that force predominates over reason was carried to the extreme. Man was compelled to submit to a conception of reality imposed on him by coercion, and not reached by virtue of his own reason and the exercise
of temptation: citizens are tempted (in the words of the Catechism) "to prefer their own judgment and reject authoritative teachings." 115 In a theocracy of the kind envisioned, laws draw their legitimacy not from consent of the people but from conformity with natural law. 116 Thus, no respect is due intrinsically to electoral, legislative, and judicial procedures. Thus are Catholic voters told that voting for a particular candidate would be sinful and incompatible with their continued full participation in the life of the church. Thus are Catholic members of democratic legislatures instructed to disregard the views of the people who elected them to office and to use their office instead to promote church-approved legislation. 117 Thus are Catholic members of the judiciary expected to use their offices not to protect and uphold the values of the constitution and laws of the state, but rather to decide cases in accordance with the dictates of natural law, as explained by bishops. And thus are Catholic heads of government told they are not answerable to their people but rather to God and his church. The idea that civic magistrates and leaders hold office contingent on their adherence to the requirements of the godly is a model of church-state relations known outside of Catholic Christendom. It was developed as well in the Reformed tradition by Calvin and his followers in sixteenth-century Geneva and seventeenth-century Scotland. It is also the model of radical Islamists today.

If the rigorist bishops are correct that Catholicism entails theocracy, then it would seem that the post-Reformation British state—in laws that extended to its colonies in North America—got it right in seeking to exclude Catholics from public office. 118 If a Catholic is to be a servant of the church, it was reasoned (perhaps rightly), then he cannot be a servant of the state. Catholic emancipation from the nineteenth century onward in the United Kingdom, and the gradual admission of Catholics to the franchise, to the universities, and to the great offices which is written in every human heart, knowable by reason itself and proclaimed by the Church."

115. The Catechism of the Catholic Church, para. 1783, states: "Conscience must be informed and moral judgment enlightened. A well-informed conscience is upright and truthful. It formulates its judgment according to reason, in conformity with the true good willed by the wisdom of the Creator. The education of conscience is indispensable for human beings who are subjected to negative influences and tempted by sin to prefer their own judgment and reject authoritative teachings."

116. See Evangelium Vitae, n.62d: "No circumstances, no purpose, no law whatsoever can make illicit an act which is intrinsically illicit, since it is contrary to the law of God.

117. Thus Archbishop Raymond L. Burke, "On the Dignity of Human Life and Civic Responsibility" (2003), www.wf-f.org/Burke-Life-CivicRespons.html (accessed November 6, 2008) states: "Catholic politicians have the responsibility to work against an unjust law, even when a majority of the electorate supports it. When Catholic politicians cannot immediately overturn an unjust law, they must never cease to work toward that end. At the very least, they must limit, as much as possible, the evil caused by the unjust law."

118. For an account of the penal laws against Catholics holding public office in the British state (and its colonies), see www.newadvent.org/cathen/11611c.htm (accessed November 6, 2008).
of state in that country (now excepting only the crowned head of state), would appear to have been a major constitutional error. Can the theocratic vision of (or for) the church be reconciled with the democratic vision of the liberal pluralist state? At first glance, it would seem not. For the church, authority and legitimacy come from above, God revealing his laws through his church to the obedient and faithful. The democratic vision is, by contrast, one in which authority and legitimacy come from below: the people decide on the content of their laws, only limited and temporary authority is conferred on those chosen to lead them, and "the voice of the people is the voice of God."

The bishops, unlike post-Nuremberg democrats, implicitly understand laws as commands. A law tells you what to do or not do, and the failure to obey entails punishment. Law is directed by a superior to a subordinate, and backed by threats. We may call this the "big stick theory" of legal obligation. In claiming that their prescriptions as to what we ought to do must outweigh the individual's obligations under civil law, the bishops appear to be offering a "bigger stick theory": obey your bishop's prescriptions or else place yourself "outside full communion with the Church and so jeopardize your Eternal salvation." These last words are those of Bishop Michael Sheridan, whose model for governance is dualist, indeed almost Manichean. On the one hand, you have the command of the state; on the other hand, you have the commands of God (as mediated through his church), which trump human laws. On the one hand, you are a citizen of the state; on the other hand, you are a citizen of the kingdom of God, to which greater loyalty is due ("we must obey God rather than men"). On the one hand, you are a servant of the state; on the other hand, you are a servant of God, but "no-one can serve two Masters: he will either hate the first and love the second, or treat the first with respect and the second with scorn. You cannot serve both God and Mammon." On the one hand, you may be punished by the state, even unto death, for disobeying its laws; on the other hand, far greater—indeed, eternal—punishment will come the way of those who disobey the law of God.

A possible resolution of this "two masters" problem would be for the state to nationalize the church and assert the authority of the secular arm over the spiritual. The state's legislature would legislate also for the church, the government of the state would make episcopal appointments, and the head of state would assume the role of supreme governor of the church. This model, of course, was effectively followed in the case of the Church of England and also of the Lutheran state churches of Scandinavia. It is not a model that works so readily with a supranational body such as the Roman Catholic Church. And there are less disruptive ways out of this impasse. A proper understanding and presentation

of the church's traditional Aristotelian-Thomist teaching on natural law—that moral prescriptions are objectively based and may be discerned by all people of goodwill, reflecting on what it is to be human—may be the best place to start. In Catholic teaching, the requirements of moral action are not necessarily to be based on church dogma or divine revelation. The requirements of moral action can and should be established by reason. To reason is to engage in discourse, to argue, to debate, to consider. The old model of law-as-command need not inflect pronouncements on natural law. If we take seriously the church's reference to (and reliance upon) natural law as an appeal to the rational nature of all human beings, then it may be interpreted as an invitation to everyone, inside and outside the church, to enter into that discussion and to seek in it the right answers.

The church has made fitful moves in this direction. On the fifth anniversary of Evangelium Vitae, John Paul II made remarks that appear to indicate his acceptance that the church should do more than insist on change in civil and criminal laws that fail to conform to Catholic teaching on the right to life. There must, he said, be a general campaign for hearts and minds. "The changing...

121. This position was taken as well by Hugo Grotius, father of international law (and an Arminian Calvinist). See the "Prolegomenon" to his De jure Belli ac Pacis (1625).

122. See James Alison, On Being Liked (London: Darton, Longman, and Todd, 2003), 95: "natural law is the way verifiability challenges metaphysical a prioris, and this saves our Church from becoming a sacred sect, defined by bizarre and anti-rational taboos."

123. See Thomas Shaffer, "Jurisprudence in the Light of Hebraic Faith," Journal of Law, Ethics and Public Policy 1 (1984): 77–115, at 87: "When natural law measures positive law, natural law is likely to take the form of positive law. How else are the two to be compared? This way of thinking leads towards codification of natural law—statements of it in hornbook form. And of course hornbooks have authors: they have institutional authorities who promulgate and enforce them. And the institutional authority which stands behind those codifications of natural law can become a god. There are examples of this in... Roman Catholic moral theology."

124. There are, however, some indications in the later writings of John Paul II of a retreat from this teaching, in favor of the impregnable certainty of revelation. Thus, in Veritatis Splendor, at para. 36, 44, he states:

In response to the encouragement of the Second Vatican Council (cf. Pastoral Constitution on the Church in the Modern World Gaudium et Spes, articles 40 and 43) there has been a desire to foster dialogue with modern culture, emphasizing the rational "and thus universally understandable and communicable" character of moral norms belonging to the sphere of the natural moral law. (cf. Saint Thomas Aquinas, Summa Theologica 1–2, q. 1, a. 6; see also ad sum.) There has also been an attempt to reaffirm the interior character of the ethical requirements deriving from that law, requirements which create an obligation for the will only because such an obligation was previously acknowledged by human reason and, concretely, by personal conscience. Some people, however, disregarding the dependence of human reason on Divine Wisdom and the need, given the present state of fallen nature, for Divine Revelation as an effective means for knowing moral truths, even those of the natural order (cf. Pius XII, Encyclical Letter Humani Generis [August 12, 1950], www.vatican.va/holy_father/pius_xii/encyclicals/documents/hf_p-xii_enc_19500812_humani-generis_en.html: AAS 42 [1950], 561–562), have actually posited a complete sovereignty of reason in the domain of moral norms regarding the right ordering of life in this world... Man is able to recognize good and evil thanks to that discernment of good from evil which he himself carries out by his reason, in particular by his reason enlightened by Divine Revelation and by faith, through the law which God gave to the Chosen People."

125. See Evangelium Vitae, para. 90: "it is not enough to remove unjust laws. The underlying causes of attacks on
of laws must be preceded and accompanied by the changing of mentalities and morals on a vast scale, in an extensive and visible way. In this area the Church will spare no effort, nor can she accept negligence or guilty silence. 126 The late pope, at least, seems to have recognized that reliance, in a democratic context, on canonical authority to issue instructions and threaten sanctions had been turning abortion and euthanasia into sectarian issues peculiar to the church discipline of Catholicism. Whereas Catholic moral tradition has it that these are questions to which all persons of goodwill, guided by the light of reason (rather than revelation), will come to see the objectively right answers. A further, perhaps more difficult step for the church must be to recognize that the democratic process has a moral weight in and of itself, given that it embodies the idea of the individual’s inestimable worth and dignity, and seeks to reconcile individual conscience with the interests of the community. Again, at least the late pope accepted in principle that the democratically mandated processes under which matters in dispute are resolved deserve the respect of the church. As he noted in his 1991 encyclical Centesimus Annus:

The Church values the democratic system inasmuch as it ensures the participation of citizens in making political choices, guarantees to the governed the possibility both of electing and holding accountable those who govern them, and of replacing them through peaceful means when appropriate. Thus she cannot encourage the formation of narrow ruling groups which usurp the power of the State for individual interests or for ideological ends. Authentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person. (para. 46)

The Primacy of Conscience

A key step toward resolving the conflict of claims of the spiritual and secular worlds would be for the church to abandon the figural language of “masters” and “servants.” For even if claims are made on the individual and commands issued, it is the individual who must act and take responsibility for his or her action (or inaction). We are driven inexorably back to the question of individual conscience.

life have to be eliminated, especially by ensuring proper support for families and motherhood. A family policy must be the basis and driving force of all social policies. For this reason there need to be set in place social and political initiatives capable of guaranteeing conditions of true freedom of choice in matters of parenthood. It is also necessary to rethink labor, urban, residential and social service policies so as to harmonize working schedules with time available for the family, so that it becomes effectively possible to take care of children and the elderly.”

Traditional Catholic moral teaching holds that individuals must be accorded the right and freedom to act in accordance with the dictates of their conscience and to be free to make a positive decision to do good and avoid evil. The whole history of salvation is predicated on free will and the individual making choices. The church has also taught that individuals have an obligation to inform their consciences as to what is objectively the right thing to do. But the discussion of the place of individual conscience in determining moral action seems bedeviled by failure to distinguish between the undoubted duty to inform one's conscience and the much more problematic question of whether an individual can properly be required to conform his or her conscience and acts to the demands or expectations of others.

Being a Catholic does not mean the abdication of moral responsibility for one's own acts. One is expected to have regard for authoritative texts of the tradition, including Scripture, official Vatican pronouncements, and works of theologians and exegeses. The duty to inform one's conscience, however, is not confined to looking at formal church sources. Recourse may also properly be had, for example, to insights offered by the sciences, medicine, psychology, philosophy, law, logic, and experience. Once the individual's conscience is responsibly informed, acting contrary to it is—so Catholic tradition advises—acting immorally. To purport to hand over one's moral responsibility to another, and to act in a given way only because told to by a bishop or pope, is to act immorally. One commits, in Kantian terms, the sin of "wilful heteronomy." As stated in Gaudium et Spes, the pastoral constitution (promulgated in 1965 at the Second Vatican Council) on the church in the modern world:

127. See Catechism of the Catholic Church, para. 1781: Conscience enables one to assume responsibility for the acts performed. If man commits evil, the just judgment of conscience can remain within him as the witness to the universal truth of the good, at the same time as the evil of his particular choice. The verdict of the judgment of conscience remains a pledge of hope and mercy. In attesting to the fault committed, it calls to mind the forgiveness that must be asked, the good that must still be practiced, and the virtue that must be constantly cultivated with the grace of God.

128. See Catechism of the Catholic Church, para. 1798: A well-formed conscience is upright and truthful. It formulates its judgments according to reason, in conformity with the true good willed by the wisdom of the Creator. Everyone must avail himself of the means to form his conscience.

129. See, to similar effect, Compendium of the Social Doctrine of the Church, para. 78: A significant contribution to the Church's social doctrine comes also from human sciences and the social sciences. In view of that particular part of the truth that it may reveal, no branch of knowledge is excluded. The Church recognizes and receives everything that contributes to the understanding of man in the ever broader, more fluid and more complex network of his social relationships. It is aware of the fact that a profound understanding of man does not come from theology alone, without the contributions of many branches of knowledge to which theology itself refers.

130. See also Veritatis Splendor, para. 44: Obedience to God is not, as some would believe, a heteronomy, as if the moral life were subject to the will of something all-powerful, absolute, extraneous to man and intolerant of his freedom. If in fact a heteronomy of morality were to mean a denial of man's self-determination or the imposition of norms unrelated to his good, this would be in contradiction to the Revelation of the Covenant and of the redemptive Incarnation. Such a heteronomy would be nothing but a form of alienation, contrary to divine wisdom and to the dignity of the human person.
God willed that men and women should be left free to make their own decisions, so that they might of their own accord seek their creator and freely attain their full and blessed perfection by cleaving to God. Their dignity, therefore, requires them to act out of conscious and free choice, and not by their own blind impulses or by external constraints. (article 17)

One needs, further, in this context, to distinguish between an individual’s deciding how to act morally and an individual’s judging the morality of an action. In Murder in the Cathedral, T. S. Eliot has the character Thomas Becket exclaim that the “greatest treason” would be “to do the right thing for the wrong reason.” If you act contrary to your conscience (“in bad faith”), you act immorally no matter what you do. However, in Catholic tradition—as indeed in any moral philosophy aspiring to be nonrelativistic—acting in accordance with conscience is not sufficient to establish that an action should be judged (objectively) moral: one may well do the wrong thing for the right reason. To be moral, an act that is consonant with individual conscience must also be consonant with objective values. In other words, one can be judged to have acted morally only if one does the right thing for the right reason. The obligation to inform one’s conscience exists to ensure that one does not fall into “moral perplexity,” a situation in which, no matter what one does, one does wrong.

As moral agents, we seek congruence between the subjective demands of conscience and the objective requirements of the good life, referred to in the Thomist tradition as “natural law.” Natural law, however, cannot be defined or confined by the terms of documents emanating from authorities of the church. Instead, as Aquinas put it, natural law is “written in the hearts of mankind.” It is humanity’s seeking—through reason and intellect—to discover the natural grammar of conduct that determines how our individual lives may be rightly ordered. What Aquinas was describing in writing of natural law was an orientation or predisposition in relation to some general and axiomatic (per se nota) and obvious natural human desires. He was not seeking to read off specific principles of right conduct from his views on what was natural to humanity. In theolog-
cal terms, natural law regards action done in conformity with our God-given rational natures and in conformity with divine providence. Thus, natural law is realized not in the formulation of rules or precepts but in prudent and responsible acts.\textsuperscript{134}

As individual moral agents, we each have to make decisions on what to do—and whom to vote for—ourselves. As John Henry Cardinal Newman argued:

Conscience is not a judgment upon any speculative truth, any abstract doctrine, but bears immediately on conduct, on something to be done or not done. "Conscience," says St. Thomas, "is the practical judgment or dictate of reason, by which we judge what 	extit{hic et nunc} is to be done as being good, or to be avoided as evil." . . . Conscience being a practical dictate, a collision is possible between it and the Pope's authority only when the Pope legislates, or gives particular orders, and the like. But a Pope is not infallible in his laws, nor in his commands, nor in his acts of State, nor in his administration, nor in his public policy. Let it be observed that the [First] Vatican Council has left him just as it found him here. . . . Since then infallibility alone could block the exercise of conscience, and the Pope is not infallible in that subject-matter in which conscience is of supreme authority, no deadlock . . . can take place between conscience and the Pope. . . . its dictate, in order to prevail against the voice of the Pope, must follow upon serious thought, prayer, and all available means of arriving at a right judgment on the matter in question. . . . Cardinal Gousset has adduced from the Fourth Lateran [Council]; that "He who acts against his conscience loses his soul." . . . Of course, if a man is culpable in being in error, which he might have escaped, had he been more in earnest, for that error he is answerable to God, but still he must act according to that error, while he is in it, because he in full sincerity thinks the error to be truth. . . . I add one remark. Certainly, if I am obliged to bring religion into after-dinner toasts, (which indeed does not seem quite the thing) I shall drink "the Pope," if you please, still, "to Conscience first, and to the Pope afterwards."\textsuperscript{135}

Each of us, the church emphasizes, will ultimately be answerable in divine judgment for the acts we ourselves do and the inaction for which we are responsible. As John Paul II stated in \textit{Evangelium Vitae} (at para. 74): "Each individual in fact

\textsuperscript{134} See, on this point, Nicholas Lash, "Natural Law" (paper presented to the "D" Society, Cambridge University, January 26, 1979).

has moral responsibility for the acts which he personally performs; no one can be exempted from this responsibility, and on the basis of it everyone will be judged by God himself (cf. Rom. 2:6; 14:12).

Humility and the Hierarchy
The Congregation for the Doctrine of the Faith, in its communication of 2003 against proposals for the legal recognition of same-sex unions, acknowledged the primary importance of individual conscience by suggesting the existence of a right (or indeed, in some circumstances, a duty) of “conscientious objection” to civil laws. Of necessity, that same right of informed conscientious objection must be conceded within the institutional church if the baptized are to remain moral agents. As then-Father Joseph Ratzinger commented on article 16 of Gaudium et Spes:

For Newman, conscience represents the inner complement and limit of Church principle. Over the Pope as the expression of the binding claim of ecclesiastical authority, there still stands one’s own conscience, which must be obeyed before all else, even if necessary against the requirements of ecclesiastical authority. This emphasis on the individual, whose conscience confronts him with a supreme and ultimate tribunal, and one in which the last resort is beyond the claim of external social groups, even of the official Church, also establishes a principle in opposition to increasing totalitarianism. ... Conscience is made the principle of objectivity, in the conviction that careful attention to its claim discloses the fundamental common values of human existence. ... Above all, however, conscience is presented as the meeting point and common ground of Christians and non-Christians and consequently as the real hinge on which dialogue turns. Fidelity to conscience unites Christians and non-Christians and permits them to work together to solve the moral tasks of mankind, just as it compels them both to humble and open inquiry into the truth.

Thus, pronouncements of the Congregation for the Doctrine of the Faith are relevant to, but certainly not determinative on, questions as to how a Catholic

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136. See “Considerations regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons,” para. 5:

Those who would move from tolerance to the legitimation of specific rights for cohabiting homosexual persons need to be reminded that the approval or legalization of evil is something far different from the toleration of evil. In those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty. One must refrain from any kind of formal cooperation in the enactment or application of such gravely unjust laws and, as far as possible, from material cooperation on the level of their application. In this area, everyone can exercise the right to conscientious objection.

may live a life faithful to Christian moral values. One of the great problems with the way in which church authorities talk about natural law is its deductive certainty, its apriorism, its nonverifiability and nonfalsifiability, its antiempiricism. For example, the much-repeated assertion that it is “not possible” for homosexuals to find fulfillment, complementarity, or happiness within a same-sex partnership goes unnuanced despite testimony from individuals who live the life. Such testimony is dismissed as false consciousness. “The experience was only a dream, as that which should not be can not be so,” as Joseph Ratzinger might reason.138

But if the bishops are going to take seriously both the traditional Catholic teaching on the primacy of individual conscience and that on the universal discernibility of natural law, then they are going to have to

1. allow that individuals may, in conscience, differ as to what moral action demands of them in any particular circumstance;
2. allow that questions regarding how best to legislate in or regulate areas of moral dispute or controversy — where people of goodwill reach contrary positions — are questions for the prudential judgment of elected legislators rather than for ex cathedra pronouncements of the church;139
3. be willing to listen and to engage in dialogue, in both the context of civil society and the context of the church, without resorting to ecclesiastical sanctions or the threat of sanctions;
4. seek to persuade by the authority of their reasoning rather than to command obedience by reason of their authority; and
5. be willing to accept that they may themselves get it wrong.140

In sum, the bishops need to be humble enough to listen to and trust the people (of God).141 As the Irish moral theologian Father Seán Fagan has put it:

138. See Die unmögliche Tatsache by Morgenstern (translation by Max Knight):
And he comes to the conclusion:
His mishap was an illusion,
for, he reasons pointedly,
that which must not, can not be.

139. Compare Aquinas, Summa Theologiae 1a-IIae, q. 96, a. 2:
laws should be appointed to men according to their condition; St. Isidore remarks how law should be possible both according to nature and the custom of the country. Law is laid down for a great number of people, of which the majority have no higher standard of morality. Therefore it does not forbid all the vices, from which upright men can keep away. But only those grave ones which the average man can avoid, and chiefly those which do harm to others and which have to be stopped if human society is to be maintained, such as murder and theft and so forth.

140. See Alison, Being Liked, xiv: “We have yet to develop a courteous and rational discourse about the fallibility of the Church. Infallibility makes no sense at all unless it is a very particular sort of exception in a massive sea of fallibility and there is a realistic way of telling the difference between the two.”

141. See Augustine’s discourse, “Against the Pagans,” trans. Edmund Hill, in Complete Works of Saint Augustine, vol. 3, bk. 11 (Sermons Discovered since 1990), 220, para. 52:
Parmenian, who was once a bishop of the Donatists, had the audacity to state in one of his letters that the bishop is the mediator between the people and God.
The Church is not made up of two separate sections, one teaching and the other learning. In fact, the whole Church is a teaching Church (including Pope and bishops), a community of believers in which we must listen to each and learn from each other. At the same time the whole Church is a teaching Church in so far as every mature Christian has, at some time or other, to play the role of teacher, \textit{magister}.\footnote{142}

If adopted, the approach that Fr. Fagan recommends would get us beyond the seemingly radical incompatibility of the principles held by the church and those held by the democratic state. Both church and state would seek to protect individual liberty of conscience, freedom of speech, equality of treatment, tolerance, and pluralism. Both would value the process of dialogue among exponents of differing views and regard that process as necessary if the common good is to be discerned and then pursued. A step toward this stance was taken by \textit{Gaudium et Spes}:

The laity should not imagine that their pastors are always experts, that to every problem which arises, however complicated, they can readily give a concrete solution, or even that such is their mission. Rather, enlightened by Christian wisdom and giving close attention to the teaching authority of the Church, the laity need take on their own distinctive role. Often enough the Christian view of things will itself suggest some specific solution in certain circumstances. Yet it happens rather frequently, and legitimately so, that with equal sincerity some of the faithful will disagree with others on a given matter. Even against the intentions of their proponents, however, solutions proposed on one side or another may be easily confused by many people with the Gospel message. Hence it is necessary for people to remember that no one is allowed in the aforementioned situations to appropriate the Church's

\footnote{142. Fr. Sean Fagan, SM, \textit{Does Morality Change?} (Dublin: Columba Press, 2003), 18. See also Compendium of the \textit{Social Doctrine of the Church}, para. 79:}

\begin{quote}
The social doctrine belongs to the Church because the Church is the subject that formulates it, disseminates it and teaches it. It is not a prerogative of a certain component of the ecclesial body, but of the entire community. It is the expression of the way that the Church understands society and of her position regarding social structures and changes. The whole of the Church community—priests, religious and laity—participates in the formulation of this social doctrine, each according to the different tasks, charisms and ministries found within her.
\end{quote}
authority for his opinion. They should always try to enlighten one another through honest discussion, preserving mutual charity and caring above all for the common good.143

The model for church-state (and cleric-lay) relations that these changes in attitude would entail should require that neither church nor state claim superiority over the other. Members of the church should participate fully in public life, while the institutional church should impose a self-denying ordinance—out of respect for the obligations involved in civil society and the duties of public office—to refrain from instructing the laity as to how specifically they must exercise their responsibilities as voters or carry out their duties as holders of public office. As Gaudium et Spes makes clear:

All citizens, therefore, should be mindful of the right and also the duty to use their free vote to further the common good. The Church praises and esteems the work of those who for the good of men devote themselves to the service of the State and take on the burdens of this office. If the citizens’ responsible co-operation is to produce the good results which may be expected in the normal course of political life, there must be a statute of positive law providing for a suitable division of the functions and bodies of authority and an efficient and independent system for the protection of rights.145

Such an approach, despite the steps already taken (in Gaudium et Spes and other texts) to establish it, would appear to require a change of heart, a conversion experience, a metanoia, on the part of some in the church hierarchy.146 We may note in this regard the paucity of charity and of humility in Archbishop Burke’s characterization of homosexual acts as “intrinsically evil” and as being in a more serious category of wrongdoing than waging war or executing convicts. But more worrisome, perhaps, have been the subtler insinuations coming, for instance, from the Congregation for the Doctrine of the Faith, whose communication on legal recognition of same-sex partnerships was issued on June 3, 2003, the “Memorial of Saint Charles Lwanga and his Companions, Martyrs.” St. Charles Lwanga and his companions were executed on the orders of King Mwanga of Uganda after their conversion to Christianity and, apparently, because of their refusal to submit to the king’s homosexual advances. The very dating of this document, her Lord, should kneel before God and implore forgiveness for the past and present sins of her sons and daughters.” See also Tertio Millennio Adventent, www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_19981124_tertio-millennio-adventente_en.html (accessed November 6, 2008), an apostolic letter in which John Paul II called for the church to repent for sins of the past against individuals and communities.

143. Gaudium et Spes, para. 43.
144. Gaudium et Spes, para. 75.
145. Contrast the position of John Paul II as stated in Incarnationis Mysterium (1998), para. 11, www.vatican.va/jubilee_2000/docs/documents/hf_jp-ii_doc_10111998_bolla-jubilee_en.html (accessed November 6, 2008): “As the successor of Peter, I ask that in this year of mercy the Church, strong in the holiness which she receives from
then, associates homosexual desire with tyranny and martyrdom. Was this dating intended to send a subliminal warning about dangers that the Holy Office sees as inherent in further social acceptance of homosexuality? Still, the document itself notes at the outset:

The present Considerations do not contain new doctrinal elements; they seek rather to reiterate the essential points on this question and provide arguments drawn from reason. ... Since this question relates to the natural moral law, the arguments that follow are addressed not only to those who believe in Christ, but to all persons committed to promoting and defending the common good of society.

This document thus invites assessment of its arguments not in the light of doctrine but in that of reason. As such, it is not and cannot be the last word on its subject. Rome may have spoken, but the particular cause (the legal recognition and regulation of same-sex partnerships) is unresolved, since, after all, the relevant reforms are being proposed in democratic polities. Rather than ending discussion of the matter, this statement of the Holy Office may mark an invitation to debate. Let us hope that this discussion and others of its kind, both within and outside the church, may be allowed to proceed in good faith, and with goodwill, in the spirit of St. Augustine, who wrote: "If I have said something reasonable, let others follow, not me, but reason itself."

146. See sermon 131.X.10 (of the year 417) on John 6:53, in Complete Works of Saint Augustine, vol. 3, bk. 4 (Sermons), 342: "There have already been two councils on this matter [of the North African church—held in 416 at Carthage and Mileve in Numidia], and their decisions sent to the Apostolic See; from there rescripts have been sent back here. The case is finished." This remark is commonly abbreviated and paraphrased as Roma locuta est; causa finita est. Ironically, rather than an assertion of papal primacy, as it is commonly assumed, the phrase remarks on the limits of papal power. Augustine claims that Pope Zosimus had no power to revoke the excommunication of Pelagius and Caelestius, which had been pronounced by the church in North Africa and confirmed by Zosimus's immediate predecessor in office, Pope Innocent I.

147. Sermon 162C (Dolbeau 10, Dolbeau 26, Mainz 27), Complete Works of Saint Augustine, vol. 3, bk. 11 (Sermons), 176, para. 15.
On the 24th September 2010, the Office of the Solicitor to the Advocate General announced the commencement of "an informal consultation concerning the way in which acts of the Lord Advocate in her capacity as head of the system of prosecutions might give rise to devolution issues under the Scotland Act".1

The Advocate General’s announcement referred to the fact that a collective submission had been authored in the name of the judiciary of the Court of Session on this matter, and was submitted by the judges to the Calman Commission. The Calman Commission considered, however, that the matters raised in the Court of Session judiciary’s submission to it went beyond its remit, and did not respond to them. Instead, the Advocate General has set up a new “expert group” (two of whose members were on the Calman Commission) “to consider this issue afresh”.2 This group has been asked to:3

... assess the extent to which it [the Lord Advocate being subject to the devolution issues regime] causes problems in practice for the courts and the operation of the criminal justice system and to make recommendations in relation to any reform which the group considers appropriate.

Now all this may sound like a matter of legal arcana – and, indeed, is largely presented as such in the terms of the Advocate General’s consultation paper. But what is in fact being discussed in this consultation is a proposal, in effect, to free Scottish criminal prosecutions from the Convention rights scrutiny of the Scotland Act, leaving the prosecution authorities in Scotland bound only as public authorities by their duties under the Human Rights Act 1998. And the significance of such a change, if brought into effect, would be the ending of the jurisdiction of the UK Supreme Court to hear criminal appeals from Scotland.

2 Ibid.
3 Ibid.
At heart what seems to be at issue is a question of judicial primacy. What this consultation procedure raises is a question about which should be the top court in Scottish criminal matters: the High Court of Justiciary acting as a criminal appeal court, or the UK Supreme Court? But given that that is the real issue, it is of some concern that the consultation process fails to set this out clearly and unequivocally. Instead it presents its intervention in this area of central constitutional importance and impact as if it were one of not more than minor technical adjusting or fine-tuning of existing Scottish criminal procedure. No doubt, individuals and organizations will have differing views as to whether any such proposed change in the criminal jurisdiction in Scotland is a good or a bad thing, but one thing is clear: it is, from a constitutional perspective, a significant and potentially momentous change.

A. THE DEVOLUTION JURISDICTION OF THE UK SUPREME COURT IN SCOTTISH CRIME

Certainly one of the wholly foreseen, foreseeable and intended results of the devolutionary settlement was the ending of the complete isolation of the Scottish criminal legal system within the Union. The Scotland Act 1998 from the outset envisaged and made express provision in Schedule 6 for the possibility of appeals from Edinburgh to London in criminal cases. The subsequent steps in the evolution of the devolution jurisdiction of the Privy Council (and now of the UK Supreme Court) mean that there are now few, if any, criminal cases in Scotland in respect of which the London based court may claim jurisdiction and pronounce a remedy: whether affirming, modifying or overturning the decision of the Scottish criminal appeal court; and whether on an accused’s appeal or that of the Crown.

The central issue which this consultation’s reference to the “technicalities of devolution issue procedure” masks is a profound and a simple one, which requires no great specialist knowledge or understanding of the *arcsena* of Scottish criminal procedure. The issue is this: should parties (both the prosecution and the defence) in criminal proceedings in Scotland continue to have the possibility of taking an appeal to the UK Supreme Court from decisions of the Scottish criminal appeal court? Once that is recognized as the real issue, then much of the technical undergrowth can be swept away and the plain question posed: why should an existing tier of criminal appeal in Scotland be removed? Are there overwhelming public interest considerations for such a major constitutional alteration of the original Scotland Act schema? If so, what are they? If not, on what basis can any change be justified? But such questions are not raised in either the Court of Session judges’ Calman submissions or in the Advocate-General’s consultation.

And it seems to be only the Court of Session judges in Scotland who, thus far, have expressed any public opposition to the development of the devolution jurisdiction of the UK Supreme Court such as to give it extensive appellate jurisdiction over Scottish criminal cases. It is highly doubtful whether criminal defenders resent or object to the current constitutional framework which allows for the possibility of an appeal to
London and, indeed, the Crown qua prosecutor in Scotland has not been slow to exercise its rights to appeal or reference to London where it disagrees with a decision of the courts in Scotland.

An undertone of apparent resentment to the very idea that the decisions of the criminal appeal court might be subject to appeal to and scrutiny by the UK Supreme Court seemed at times to characterize the tenor of some of the Court of Session judges' Calman submissions. Certainly the fact that the Scottish Government and/or the prosecution authorities in Scotland may find the consequence of certain of the judgments of the UK Supreme Court in criminal matters unwelcome does not support the assertion made that there have been "considerable difficulties for parties and the courts". Which parties, one may ask? And which courts? And, in any event, in what sense might "difficulties for courts" be a relevant consideration in considering the proper extent of the procedural protections to be afforded the individual's fundamental rights from State power?

Such procedural difficulties as the Court of Session judges speak of are found in the intimation requirements for devolution issue. But these, surely, can be resolved by the judges themselves amending the relevant Act of Adjourn to bring its provisions more into line, if so advised, with such procedure as already exists for the intimation of Convention rights issues raised in civil cases? And all this can be done without the need for any amendment to the Scotland Act itself such as is being considered by the Advocate-General's expert group.

B. OPTIONS FOR CONSTITUTIONAL REFORM

At paragraph 15 of the consultation document it is noted that, in their submissions to the Calman Commission, there were three possible solutions put forward by the judges of the Court of Session to the "problems" which they thought that they had identified (albeit that, in the absence of any general agreement among them, the judges failed collectively to endorse any one of them and there was no public breaking of the ranks to identify which judges favoured which solution, and why). Their three possible "solutions" were:

(i) to have the UK Parliament amend section 57(2) of the Scotland Act 1998 so as to exclude the Lord Advocate's acts in her capacity as head of the system of criminal prosecution in Scotland from the operation of the vires / competency controls of the 1998 Act (and implicitly removing such issues from the devolution jurisdiction of the UK Supreme Court);

(ii) to leave the Lord Advocate with her function as general legal adviser to and member of the Scottish Executive, but hive off her prosecution functions to a new post of "Director of Public Prosecutions in Scotland" who would be


responsible for the prosecution system, but who would not be a member of the Scottish Executive (and whose acts or omissions would again be thereby removed from the devolution jurisdiction of the UK Supreme Court);

(iii) to introduce a general right of appeal with leave in criminal matters from the criminal appeal court in Scotland to the UK Supreme Court. The Court of Session judges appear to shy at this possible solution, stating:6

... a change of such a radical nature would be likely to generate considerable controversy. However, it would put the criminal appeal court in Scotland on the same footing as the court of appeal in England and Wales in relation to criminal matters.

The first two proposed solutions would, it is said, bring the system for the prosecution of offences into line with the systems in England and Wales and Northern Ireland by having a Director of Public Prosecutions in each jurisdiction, who would be subject only to the "lawfulness" controls of the Human Rights Act. But then in Scottish criminal law and procedure – as distinct from crime elsewhere in the UK – the UK Supreme Court would no longer have any jurisdiction to ensure uniformity in approach across the United Kingdom in relation to the proper interpretation of Convention rights. The third proposed solution would, for the first time since the 1707 union, explicitly place the whole of Scottish criminal law and procedure under the supervisory jurisdiction of the UK court.

At paragraph 16 of the consultation document it is said that the Expert Group is considered competent only to consider the first of the proposed solutions put forward by the Court of Session judges. But why this should be is not explained, given that that first solution involves just as much significant institutional or constitutional change – in removing an existing tier of appeal to the UK Supreme Court – as do the other two. And it is quite wrong and wholly misleading for the abolition of the possibility of an appeal in criminal matters to the UK Supreme Court to be described, as it is in paragraph 16, as a "technical change... to the scope or operation of devolution issue procedure".

In any event, "solutions" are only required if one accepts the premise that the present system is indeed problematic, and that is not self-evident. The abolition of the possibility of any Scottish criminal appeals to London would certainly be the result of the "option" set out in the consultation document's proposal that "acts of the Lord Advocate... no longer be considered to give rise to devolution issues in procedural terms".7 But it is submitted that, on close examination, nothing said by the Court of Session judges points to the existence of problems such as would necessitate substantive amendment in the current provisions of the Scotland Act. Such problems as these judges have in fact identified seem only to relate to procedural issues which are within their power to remedy without need for any amendment to the Scotland Act.

6 Para 15.
7 Para 17 of the consultation document.
C. CONCLUSION

The question arises as to what precise constitutional role did the Court of Session judges consider themselves to be playing in making collective submissions to the Calman Commission? It could hardly be the interests of the prosecution (for they would be served by submissions from the Lord Advocate or Crown Office) nor indeed the interests of the accused or their legal representatives. And the general interest in the smooth administration of justice would seem properly to be within the constitutional remit of the Minister for Justice, not of the judge—whether individually or collectively—whose proper constitutional rule, surely, is to apply the law and constitution as he or she finds it, rather than to engage in political campaigns to change it?

It may perhaps be said, in response, that in publicly participating in the Calman Commission’s process the Court of Session judges were, at least, being open in their political involvement in pressing for constitutional change. But such judicial participation nonetheless marks a remarkable constitutional development in and of itself.

Aidan O’Neill

The Upper Tribunal in the Higher Courts

A. TWO CASES

There is something dysfunctional at the top of the UK legal systems. In the Tribunals, Courts and Enforcement Act 2007 the UK Parliament created an elaborate new system of tribunals which included, at its peak, an entity known as the Upper Tribunal. The Act defined the composition of the Upper Tribunal. It defined the jurisdiction of the Upper Tribunal—in the main, to hear and determine appeals from first-tier tribunals in the new system, but also a novel “judicial review” jurisdiction. The Act also defined the circumstances under which decisions of the Upper Tribunal might be taken on appeal to the ordinary courts. Because the 2007 Act deals with a tribunal some of whose subject-matter (including, for example, social security and immigration) is “reserved” under the Scotland Act 1998 it extends to Scotland and, therefore, determines relationships between the Upper Tribunal and the Court of Session (as to those issues of appeals and judicial review) as much as it does between the Upper Tribunal and the courts of England and Wales.

The point of the 2007 Act was, in broad terms, to implement the recommendations of the Leggatt Review1 by bringing a better-defined structure, coherence and integrity to the previous, rather chaotic, pattern of tribunals—benefits (if their

1 Tribunals for Users: One System, One Service (2001). See www.tribunals-review.org.uk/)
The EU and Fundamental Rights – Part 1*

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Introduction

1. In this article we consider the EU’s approach to fundamental rights. We look at the case law of the Court of Justice of the European Union (CJEU) on fundamental rights matters as it has developed over time. We set out the (pre-)history to the adoption of the Charter of Fundamental Rights of the European Union (CFR) and we explore why, in the light of the CJEU’s jurisprudence, it was thought that a specifically EU Charter of Fundamental Rights was necessary. We conclude with a consideration of the current legal status of the CFR in EU law, following the ratification of the 2007 Lisbon Treaty and the prospects for the accession of the EU to the European Convention on Human Rights (ECHR). As has been noted:

“With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became legally binding. Furthermore, the Lisbon Treaty provides for EU accession to the European Convention on Human Rights. In this context, increased knowledge of common principles developed by the Court of Justice of the European Union and the European Court of Human Rights is not only desirable but in fact essential…”

Fundamental rights and the CJEU: a response to a legitimacy crisis

2. The story of the manner in which fundamental rights first came to be taken up into EU law is well known2 and now (relatively) uncontested.3 Like the US Constitution as originally drafted, the original European Treaties contained no enumeration of fundamental rights. But unlike the US Constitution,4 there was and is no provision in the European Treaties to the effect that rights and duties under EU law would prevail or had, in any sense, primacy over national laws in the courts of Member States.

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* This article is based on a chapter contained in Aidan O’Neill and Christine Boch, EU Law for UK Lawyers (Hat Publishing, 2011). Part 2 will appear in the next issue.
1 Handbook on European non-discrimination law (Luxembourg: Publications Office of the European Union, 2011) p. 3; a joint production of the EU’s Agency for Fundamental Rights and the European Court of Human Rights. This book is described by the Agency of Fundamental Rights in its press release of 21 March 2011 as “the first publication to present and explain the body of non-discrimination law stemming from the European Convention on Human Rights and European Union law as a single, converging legal system”.
3 See, however, the alternative account contained in I Weiler and N Lockhart in "“Taking Rights Seriously" seriously: the European Court of Justice and its Fundamental Rights Jurisprudence" (1995) 32 CML Rev 51 and 57.
4 Article VI of the US Constitution 1789 has provided from the outset that “this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding”. See the Missouri v Holland 252 US 416 (1920).
The problem of primacy

3. The claim to the primacy of EU law over national law – and, indeed, over all other forms of international law⁵ – is one that rests not in any text of the European Treaties, but rather on the repeated claims of the CJEU.⁶

4. The Court of Justice stated in Costa v ENEL [1964] ECR 585 at 593–594 that membership of the EU entailed a permanent limitation of the sovereign rights of the Member States, to the extent that national laws passed after entry into the EU could not be given effect to if and in so far as they were contrary to EU law. Member States were consequently said to have a duty under EU law to repeal national laws that were found to be contrary to EU law.⁷ Where this has not been done, the Court of Justice has repeatedly stressed that it is the duty of national courts to give precedence to EU law in situations of conflict with national law,⁸ by “disapplying” in the particular case the national rule – even one which post-dates the relevant EU law provision.⁹ This duty of “disapplication” to give primacy to incompatible EU law provisions applies even to fundamental national constitutional norms¹⁰ for, as the Court of Justice stated in Case 11/70 Internationale Handelsgesellschaft GmbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125:

"[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of the national constitutional structure."

5. By contrast, Paul Kirchhoff, former justice of the German Constitutional Court, has written extra-judicially:

"If ... Community law were to seek to abridge the fundamental rights protection deemed immutable by [the German Constitution] the Grundgesetz, [German] constitutional law would then have the mandate and the power to reject this imposition as not being legally binding."¹¹

²² See N Türküller Isiksel, “Fundamental rights in the EU after Kadi and Barakant” (2010) 16 European Law Journal 551 at 560. [There is] an enduring vein of court skepticism according to which the EC resort to the hallowed language of fundamental rights to widen its own authority. Previous critics including Jason Coppel and Aidan O’Neill, and Martti Koskenniemi, have picked up on the Court’s description of free movement rights as ‘fundamental’ rights, charging that the Court draws normative equivalence between these market freedoms and more weighty rights such as those enshrined in Member States’ constitutions and the ECHR. According to critics, the Court’s goal in equating market freedoms with basic rights is to leverage greater jurisdictional turf for Community law. While the controversial question about the hierarchy between economic rights and civil and political rights does not arise in the context of Kadi (since Mr Kadi’s rights of both categories were violated equally), the Börs’logic suggests a similar charge, namely that Mr Kadi’s rights were merely incidental to this titanic struggle between the EC legal order and international law, and further, that the Court is morally suspect as it has deployed human rights instrumentally in order to fortify EU law against subordination in an international legal hierarchy.”

¹² Case 213/89 R v Secretary of State for Transport ex p. Factoriame (No. 2) [1990] ECR 2433.
Competing lines of legitimacy

6. It is clear that the grand claims as to the absolute primacy of EU law over even the fundamental rights provisions of national constitutions has created problems for the national constitutional courts of the Member States. They have seen their primary and ultimate duty as being to preserve the integrity of their written constitution and any enumeration of fundamental rights contained therein. Given that there were no fundamental rights expressly contained in or protected by the European Treaties as then drafted, it seemed clear and inescapable that, from the national constitutional standpoint, EU law would have to give way to national fundamental rights considerations in the event of a conflict between the two. Further, it was the duty of these national constitutional courts as guardians of fundamental rights to hold that any actions or omissions by the EU institutions that were found to be incompatible with national constitutional requirements for respect for fundamental rights would not be recognised as having legal effect within their territories. Certainly, both the German Constitutional Court (the Bundesverfassungsgericht)\textsuperscript{12} and the Italian Constitutional Court\textsuperscript{13} quickly made clear their reservations as to the compatibility of the Court of Justice’s doctrine of the supremacy of EU law over national law, with those national courts’ constitutional duties to preserve and protect the fundamental rights being guaranteed in their respective national constitutions.\textsuperscript{14}

7. The reception of EU law in national legal orders, whether the national constitution is written or unwritten,\textsuperscript{15} unavoidably exposes the fact of differing lines of justification, and uncovers the real possibility of a conflict between the requirements of the national constitution and the (ever-growing) demands of EU law, such as might precipitate a legitimacy crisis.\textsuperscript{16} When the validity or normativity of EU law is examined, one necessarily ends up with radically different lines of legitimacy and of justification. National judges of the Member States seek to place and understand EU law in the context of their own national constitutions, and see it as limited by the bounds of those national constitutions.\textsuperscript{17} By contrast, the judges of the CJEU seek to trace the validity of EU law to the original foundation Treaties, notably the 1957 Treaty of Rome, which the Court of Justice

\textsuperscript{12} See the 1974 Bundesverfassungsgericht decision in Internationale Handelsgesellschaft mbH v Einbeurer und Vorratstelle für Getreide und Futtermittel [1974] 2 CMLR 540. This case was subsequently modified by the Federal Constitutional Court decision in Case 2 EBlR 197/83 Wünsche Handelsgesellschaft [1987] 3 CMLR 225. For commentary on this case, see E. Lanier, Solange, farewell: the Federal German Constitutional Court and the recognition of the Court of Justice of the European Communities as Lawful Judges” (1988) 11 Boston College International and Comparative Law Review 1.


\textsuperscript{14} For an analysis of, inter alia, the Italian and German constitutional case law, see H. Schermers, “The Scales in Balance: National Constitutional Court v Court of Justice” (1990) 27 CMLR Rev 97.

\textsuperscript{15} Thoburn v Sunderland City Council [2002] EWHC 195 (Admin) [2003] QB 151 at [69], per LJJ: “In the event, in which no doubt would never happen in the real world, that a European [Community] measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the European Communities Act 1972 were sufficient to incorporate the measure and give it overriding effect in domestic law.”


\textsuperscript{17} See R v Ministry of Agriculture, Fisheries and Food and another ex p. First City Trading and others [1997] BCLC 185 at 210, per Laws J: “[T]he Court of Justice has no inherent jurisdiction. Its authority derives solely from the Treaties. Although (by virtue ultimately of the European Communities Act 1972) its decisions are in a matrix of English law supreme, its supremacy runs only within its appointed limits.”
progressively redefined in the language of (supra-national) constitutionalism as a Grundnorm which was said to found and ground the whole EU legal system, the validity of which was to be in no sense dependent upon (and hence not bounded by) national constitutional norms. Instead, the logic of the new legal system envisaged by the CJEU judges impelled them to proclaim the primacy of this supra-national legal system over and against the domestic legal systems of the Member States. The claim to primacy was seen by them as being a necessary condition for this autonomous EU legal system to exist and flourish.

8 The issue of competing lines and concepts of justification for the new EU legal system became particularly acute from the point of view of the post-World War II German Constitution (the Grundgesetz) because it contains certain unalterable principles – notably in relation to the duty of the German authorities to show respect for certain enumerated fundamental rights. By the very terms of the Grundgesetz, these fundamental rights provisions can never be amended, modified or departed from. And these unalterable principles also include, in Art. 20 of the Grundgesetz, respect for a democratic form of government and the sovereignty of the German people. In 2004 a case was brought before the Bundesverfassungsgericht, in the wake of the conclusion of the Maastricht Treaty. This case sought to challenge not only the constitutional compatibility of the Maastricht Treaty, but also the validity of the amendments to the German Constitution, that is, Art. 23 of the Grundgesetz, which had been passed in order to ensure compatibility between the Maastricht Treaty and the German Constitution. The Bundesverfassungsgericht rejected the constitutional challenge on its merits (finding the provisions of the Maastricht Treaty to be compatible with the fundamentals of the Grundgesetz), but in the course of its judgment the court reaffirmed (German) national sovereignty in unequivocal terms, stating:

"The Federal Republic of Germany, therefore, even after the Union Treaty comes into force, will remain a member of an association of States (Staatenbund), the common authority of which is derived from the Member States and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law be applied."21

9 Similarly, in its later decision on the constitutionality of the Lisbon Treaty, the Bundesverfassungsgericht observed:

"Article 23.1 of the Grundgesetz, like art. 24.1 of the Grundgesetz, underlines that the Federal Republic of Germany takes part in the development of a European Union designed as an association of sovereign states (Staatenverbund) to which sovereign powers are transferred. The concept of Verbund covers a close long-term association of states which remain sovereign, a

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21 See Case 294/83 Parti Ecologiste "Les Verts" v Parliament [1986] 1339 ECR at 1365: "[The Community] is based on the rule of law, inasmuch as neither the Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty". See also the opinion of the then Advocate-General Mancini in Les Verts (ibid) at 1350: "[T]he obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission".

22 See Case 14/68 Walt Wilhelm v Bundeskartellamt [1969] ECR 1 at 14: "The binding force of the Treaty and of measures taken in application of it must not differ from one State to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril".


treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation.

The empowerment to transfer sovereign powers to the European Union or other intergovernmental institution permits a shift of political rule to international organisations. The empowerment to exercise supranational powers, however, comes from the Member States of such an institution. They therefore permanently remain the masters of the Treaties.

[T]here can be no independent subject of legitimation for the authority of the European Union which would constitute itself, so to speak, on a higher level, without being derived from an external will, and thus of its own right. The Grundgesetz does not authorise the German state bodies to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (Kompetenz-Kompetenz).**

10. The history of the relationship between the Court of Justice’s claims as to the primary of EU law and the constitutional courts of Member States beyond Italy** and Germany** (including Belgium, France, Denmark, Spain, Ireland and – among the newer Member States of Central Europe – Poland, the Czech Republic.

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24 See also Case 2 BVR 2236/04 Re Constituionality of German Law Implementing the Framework Decision on European Arrest Warrant [2006] 1 CMLR 6.

25 See Re Appeal Against Flemish Decree Ratifying the Treaty of Lisbon [2010] 3 CMLR 7 (Belgian Constitutional Court, 19 March 2009).

26 In Re Ratification of the European Union Treaty [1993] 3 CMLR 345 – which is the English translation of the decision of the French Conseil Constitutionnel on the constitutionality of the Maastricht Treaty – the Conseil Constitutionnel stated (at paras 13–14): “[R]espect for national sovereignty does not prevent France … from entering into international undertakings, subject to reciprocity, with a view to participating in the formation or development of a permanent international organisation possessing legal personality and decision making powers by the exercise of transfers of powers consented to by the Member States. However, if the international undertakings given for this purpose contain a provision contrary to the Constitution or affect the essential conditions for the exercise of national sovereignty, authorisation for ratifying them requires amendment of the Constitution”. See subsequently, Case (2004-504 DC) Re EU Constitutional Treaty and French Constitution [2005] 1 CMLR 31 & Constitutional Review of Law on Liberalisation of Online Gaming and Gambling Sector [2010] 3 CMLR 4.

27 See Carlsen v Rasmussen [1999] 3 CMLR 854 (Danish Supreme Court, 6 April 1998) re the constitutionality of the Maastricht Treaty.


Latvia\textsuperscript{39} and Estonia\textsuperscript{34} continues to show this line of tension between the obligation to apply national constitutional norms and the CJEU's grand claims as to the requirements of EU law.\textsuperscript{35} Having been tasked with the ultimate responsibility for the protection of the integrity of their national constitutions, national supreme or constitutional courts have inevitably experienced legal doctrinal difficulties in reconciling their national constitutional duties with the claimed obligations upon them arising directly under EU law to apply and prefer this body of supra-national law in the event of conflict or inconsistency between the national and supra-national legal orders.\textsuperscript{36}

The discovery of fundamental rights by the CJEU

11. The response by the CJEU to these tensions concerning — and explicit and express challenges to — the claimed primacy of EU law over, in particular, the fundamental rights contained in national constitutions, was to “discover” that, notwithstanding the failure by the drafters to include any Bill of Rights within the original European Treaties, EU law itself contained unwritten principles requiring the protection of fundamental rights. And by happy coincidence, the gradual uncovering by the CJEU of those fundamental rights which are said implicitly to be recognised and protected within the EU legal system has revealed that the EU fundamental rights substantially echo the terms of, and in substance reflect, many of those rights already expressly embodied in the various national constitutions, as well as in human rights treaties to which the EU Member States are all signatories, most notably among these the ECHR.\textsuperscript{37} Thus, in its 1974 decision in Case 4/73 Nold v Commission \textsuperscript{[1974]} ECR 491 at [13], the Court of Justice stated:

“International Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of EU law.”

12. The Court of Justice has subsequently developed the following formulation to summarise its approach to fundamental rights review within the EU:

“[I]t is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court [of Justice] ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard the Court has stated that the [European] Convention has special significance. As the Court has also held, it follows that measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognised and guaranteed.”\textsuperscript{38} (emphasis added)

\textsuperscript{39} Re Ratification of the Lisbon Treaty [2010] 1 CMLR 42 (Constitutional Court of Latvia, 7 April 2009).
\textsuperscript{40} See Re Supremacy of EU Law [2010] 1 CMLR 34 (Supreme Court of Estonia, 11 May 2006); and Re Supremacy of EC Law [2010] 2 CMLR 15 (Supreme Court of Estonia, 26 June 2008).
\textsuperscript{41} See N. Eichelmaier, “Supremacy and Direct Effect of European Community Law reconsidered, or the use and abuse of political science as jurisprudence” (2003) 23 OIIS 281.
\textsuperscript{44} Case C-269/95 Krempczynski v Austria [1997] ECR I-2629, a case concerning the compatibility of national measures of criminal procedural law with the ECHR.
13. The following points should be noted from this passage:

(1) The CJEU claims to draw *inspiration* from constitutional traditions common to the Member States, but is implicitly *not* bound by these common traditions in establishing the extent and content of the fundamental rights which it seeks to protect.

(2) The CJEU claims as a possible source for the identification of fundamental rights that it seeks to protect any international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, but again the Court itself is not bound by the terms of any such treaties. This formulation of the CJEU would include conventions concluded by the International Labour Organisation, as well as other UN human rights conventions (such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Elimination of Discrimination Against Women in the social, political and economic spheres and the 1989 Convention on the Rights of the Child) and conventions concluded under the auspices of the Council of Europe, for example the 1961 European Social Charter.

(3) The provisions of the ECHR are regarded by the CJEU as having “special significance” in establishing the content and extent of the fundamental rights protected under EU law.

(4) Respect for human rights is a condition of the lawfulness of EU acts, and accordingly EU acts which fail to respect fundamental rights will be struck down by the CJEU as *ultra vires*.

14. From the perspective of (re-)solving the legitimation crisis with national constitutional courts, it can be seen that the doctrine of primacy of EU law can be maintained if and in so far as the national constitutional courts accept the claims of the CJEU that it can be trusted to review the acts of the EU institutions for their compatibility with, in essence, the same fundamental rights and values to which such acts would otherwise be subject under national constitutional review.

**EU fundamental rights applied to Member State action**

15. The question as to the degree (if any) to which the Court of Justice may properly act as a human rights courts in relation to the activities of the Member States remains a vexed

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39 In Case 4/73 Nold v Commission [1974] ECR 491 at [13] the Court of Justice stated: “International Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories as *supply guidelines* which should be followed within the framework of EU law” (emphasis added).

40 See, e.g., the opinion of Advocate-General Reischl in Case 6/75 Horst v Bundeskampfgesch [1975] ECR 823 at 836 referring to ILO Convention No. 48 on the Maintenance of Migrant’s Pension Rights. And in Case C-158/91 Criminal Proceedings against Jean-Claude Levy [1993] ECR I-4287 there is a discussion by the Court of the inter-relationship between EU law and the ILO Conventions.

41 See Case C-249/96 Grant v South West Trains [1998] ECR I-621 at [43]–[44].


44 Case C-540/03 Parliament v Council [2006] ECR I-5769 at [37].

45 See, e.g. Case T-12/93 Vittet v Commission [1995] ECR II-1247 at [34].

one.\(^6\) There is no specific Treaty provision giving the CJEU jurisdiction in this regard. The Court of Justice has, however, by a process of “creeping pre-emption”, claimed to itself such power of review of Member State action on the basis that it is applying “general principles of EU law”\(^8\) (among which, as we have seen, it includes the protection of unwritten fundamental rights\(^9\)).

16. From the mid-1980s on, the Court of Justice began increasingly to use the language of fundamental rights in cases involving the authorities of the Member States. This was done initially in cases concerning discrimination on grounds of sex\(^3\) and of nationality,\(^5\) in relation to the assessment by the Court of Justice of the compatibility of Member State action with the express provisions of the European Treaties. In its 1989 decision in Case 5/88 **Wachauf v Germany** [1989] ECR 2609, the Court of Justice asserted for the first time that when Member States were seeking to implement or enforce an EU law provision, their actions could be subjected to the same fundamental rights review as the Court of Justice applied to the actions of the EU institutions.\(^9\) The Court of Justice went on to hold that fundamental rights also governed the lawfulness of the actions of Member States when seeking to implement an EU directive.\(^8\) More significantly yet, in the 1991 **Greek Television decision**\(^5\) the Court of Justice claimed that as soon as any national administrative decision – or indeed primary administrative decision – of the Member State – sought to invoke a specific permitted derogation from EU law, the Member State’s action was then “within the scope of EU law”, and fundamental rights considerations could be used by the Court of Justice to consider and test the validity of the legislative and administrative actions of the Member State.\(^3\) Thus, in Case C-299/95 **Konzov v Austria** [1997] ECR I-2629 the Court declared:

“Where national legislation falls within the field of application of EU law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the Convention – whose observance the Court ensures. However the Court has no such jurisdiction with regard to national legislation lying outside the scope of EU law.”

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\(^{6}\) See opinion of 30 September 2010 of Advocate-General Sharpston in Case C-34/09 **Zambrano v Office national de Trésor (ONEM)** [2011] 2 CMLR 46 at [151]-[177] for a comprehensive survey of the case law on this question.

\(^{7}\) Thus in Case C-348/96 **Criminal Proceedings against Donatella Calfa** [1999] ECR I-11, the Court of Justice declared a provision of Greek law (which required the imposition of an order of expulsion from Greek territory for life of nationals of other Member States convicted in Greece of drugs offences) to be incompatible with EU law as being a disproportionate interference with the EU principles of free movement of persons.

\(^{8}\) See, generally, B de Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights” in P Alston et al. (eds), *The EU and Human Rights* (Oxford University Press, 1999), pp. 859-897, for a survey of the developing jurisprudence of the Court of Justice on fundamental rights.

\(^{9}\) See, e.g. Case C-222/86 **UNECTEF v Heylens** [1987] ECR 4097.

\(^{10}\) See, to like effect, Case C-235/99 **R v Secretary of State for the Home Department ex p. Eleonora Ivanova Kondova** [2001] ECR I-16427, where the ECJ ruled on the refusal by the United Kingdom of an establishment request of a Bulgarian national on the basis of a provision in an association agreement between the EC and Bulgaria. Moreover, such measures [of the UK immigration authorities] must be adopted without prejudice to the obligation to respect that national’s fundamental rights, such as the right to respect for his family life and the rights to respect for his property, which follow, for the Member State concerned, from the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or from other international instruments to which State may have acceded”.

\(^{11}\) Joined Cases C-35 and 64/00 **Booker Aquaculture and Hydro Seafoods v Scottish Ministers** [2003] ECR I-7411.

\(^{12}\) Case C-269/93 **ERT v DEF** [1997] ECR I-2925.

\(^{13}\) See also Case C-368/95 **Vereinigte Familienpresse Zeitungsverlags- und Vertriebs GmbH** [1997] ECR I-3689 at [18]-[22].
17. From this line of case law it appears that the CJEU claims to be competent to give authoritative and binding rulings to national courts as to the requirements of fundamental rights – and, more controversially yet, as to the requirements of the ECHR – where national legislation falls within the field of application of EU law. Indeed, the extent of the jurisdiction claimed by the CJEU to conduct fundamental rights review of national law measures would appear to extend both to where national legislation seeks to implement EU law56 and/or to where a national measure seeks to derogate from EU law57.

18. It is only where the national legislation in question is regarded by the CJEU as falling within the exclusive jurisdiction of the Member State and as having no effect in an area covered by EU law58 that the CJEU may decline to offer its opinion on the compatibility of a national measure with the requirements of fundamental rights generally and more specifically with the ECHR.59

19. In accordance with this case law, national courts therefore have a duty under EU law to ensure that national measures falling within the field of operation of EU law accord with respect for fundamental rights, as understood and applied by the CJEU. As the Grand Chamber of the Court of Justice has reiterates:

"Member States must, when transposing the directives... take care to rely on an interpretation of the directives which allows for a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality."60

Fundamental rights in the European Treaties

20. Article 6(3) TEU now provides that:

"fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law."

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56 See Case C-351/92 Graff v Hauptzollamt Köln Rheinu [1994] ECR I-3361 at [17]: "According to well-established case law, the requirements flowing from the protection of fundamental rights and principles in EU law are also binding on the Member States when they implement EU rules and the Member States must therefore, as far as possible, apply these rules in accordance with those requirements". See, to like effect, Case C-292/97 IP Kelk [2000] ECR I-2737 at [37].

57 See Case C-260/89 ERT v DEP [1991] ECR I-2925 at [43]: "Where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court".

58 See Case C-159/90 SPUC v Graven [1991] ECR I-4685 at [31], per Advocate-General van Gerven: "[O]nce a national rule is involved which has effects in an area covered by EU law... and which in order to be permissible must be able to be justified under EU law with the help of concepts or principles of EU law, then the competence of that national law no longer falls within the exclusive jurisdiction of the national legislature" (emphasis added).

59 See, e.g., Case C-144/96 Criminal Proceedings against Jean-Louis Mauzin [1996] ECR I-3209 at [12]: "The offence with which Mr Mauzin is charged involves national legislation falling outside the scope of EU law and the Court therefore does not have jurisdiction to determine whether the procedural rules applicable to such an offence amounts to a breach of the principles concerning observance of the rights of the defence and of the adversarial nature of proceedings (see, in particular, the judgment in Case 12/86 Demirel v State Schuldv Gmnd [1987] ECR 1979, paragraph 28);". See, to like effect, Case C-259/96 Kremzow v Ausztr [1997] ECR I-3058 and Case C-70/95 Sedonné SA and others v Regione Lombardia [1997] ECR I-3395.

60 See Case C-273/06 Productores de Música de España (Promusicae) v Telefónica de España SAU [2008] ECR I-271 at [8].
21. This Treaty provision seems intended to confirm that the central EU institutions are formally legally bound to respect fundamental rights in all their activities, although how that duty might actually be enforced by individual non-state parties remains problematic.

22. Although specific reference in the Treaties to the ECHR and other fundamental rights first made an appearance in the various Treaty revisions in the course of the 1990s, in practice such express amendments to the Treaties have made little, if any, difference to how the Court of Justice has operated. Those amendments to the Treaties to make express reference to fundamental rights might best be understood as an example of the Member States amending the written law of the Treaties ex post facto so as to bring their express terms into line with the existing practice and case law of the CJEU.

23. By Council regulation in 2007, a new Euro-quango was established, the Agency for Fundamental Rights, which has been charged, within the scope of the application of EU law, with providing EU institutions and the Member States with:

> “information, assistance and expertise in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.”

### The content of the fundamental rights protected by the CJEU

#### The indirect influence of the ECHR

24. As we have seen, well before any European Treaty amendment making reference to fundamental rights, the CJEU, in its case law over the years, referred to (and by judicial fiat incorporated) a substantial number of legal principles which the Court nominated “fundamental rights”, recognised and protected as a matter of EU law. It is clear from these past decisions that the Court of Justice, while expressly disavowing any “moral agenda”,

- the right to respect for human dignity;

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* Such that the provision of education and health and the provision of all other social and economic rights which are protected by the EU law principles of free movement on the grounds that “it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally”: see Case C-159/90 SPUC v Grogan [1991] ECR I-4685 at [20] and Case C-268/99 Jany v Staatssecretaris van Justitié [2001] ECR I-8615 at [56], respectively.
* See Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH [2004] ECR I-9609 at [34]-[35]: “[The Court] recognises that the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. However, there can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right. Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services”. See also Art. 1 of the CER, which states that “Human dignity is inviolable. It must be respected and protected”. And see opinion of Advocate-General Bot in Case C-34/10 Oliver Brisset v Groenpence e V (10 March 2011) (not yet reported) at para. 94: “[H]uman dignity is a principle which must be applied not only to an existing human person, to a child who has been born, but also to the human body from the first stage in its development, i.e. from fertilisation”. 
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• the right not to be subjected to torture, or to inhuman or degrading treatment;\(^6^4\)
• the right, based on the principle of legal certainty, not to be subjected to criminal liability or penalties without clearly expressed prior law;\(^6^5\)
• the right not to be deprived arbitrarily of property rights;\(^6^6\)
• the right to exercise one’s chosen trade or profession;\(^6^7\)
• the right to respect for established family life,\(^6^8\) both for EU nationals and for those non-EU nationals who are otherwise lawfully resident in the Member State—whether the family relationship arose before or after the resident’s entry.;\(^7^0\)

\(^{64}\) See Case C-465/07 Elgafaji v Staatssecretaris van Justitie [2009] ECR I-921, where the Grand Chamber went further than the jurisprudence of the European Court of Human Rights (ECtHR) on Art. 3 of the ECHR by holding that the requirement for refugee status, that there be in existence a serious and individual threat to life or person of the applicant, is not subject to the condition that that applicant adduce evidence that he or she is specifically targeted by reason of factors particular to his or her personal circumstances but may, instead, be found to exist where there is shown to be indiscriminate violence implicating civilians characterizing the armed conflict in the territory from which refuge is sought. Contrast with the decision of the ECtHR in FH v States (2010) 51 ECHR 42.

\(^{65}\) See the decision of the Grand Chamber in Case C-308/06 Intertankos and others [2008] ECR I-4057 at [70–71]: "[I]n obliging the Member States to regard certain conduct as an infringement and to punish it, Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, must also observe the principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege), which is one of the general legal principles underlying the constitutional traditions common to the Member States (Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633, paragraph 49) and is a specific expression of the general principle of legal certainty... The principle of the legality of criminal offences and penalties implies that Community rules must define offences and the penalties which they attract. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see, in particular, Advocaten voor de Wereld, paragraph 50, and the judgment of the European Court of Human Rights in Çoène and Others v Belgium, nos 3249/96, 32547/96, 32548/96, 33209/96 and 33210/96, Reports of Judgments and Decisions 2000-VI, [2005] 51 ECHR 42)."

\(^{66}\) See, e.g., Case C-22/94 Irish Farmers Association and others v Minister for Agriculture, Food and Forestry, Ireland (another) [1997] ECR I-1809 at [27]. See now Art. 17(1) of the CFR, which provides: “Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest”. In Tse-Tsoi-06/1 Yussuf and Al Barakat International Foundation v Commission and Council [2005] ECR II-3533 at [292]–[293]. the CFI observed: “[W]here Article 17(1) of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, provides that ‘[e]veryone has the right to own and dispose of property as well as in association with others’. Article 17(2) of that Universal Declaration specifies that ‘[n]o one shall be arbitrarily deprived of his property’. Thus, in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to jus cogens”.

\(^{67}\) Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727. See now Art. 15(1) of the CFR, which provides that “Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation”, and Art. 16 of the CFR, which states that “The freedom to conduct a business in accordance with Community law and national laws and practices is recognised”.

\(^{68}\) See, e.g., Case 249/86 Commission v Germany [1989] ECR 1263 at [10]; Case C-60/00 Carpenter v Secretary of State for the Home Department [2002] ECR I-6279 at [41]; and Case C-413/99 Baumhast and R [2002] ECR I-7071 at [73]. See also Art. 7 of the CFR, which states: “Everyone has the right to respect for his or her private and family life, home and communications”; and Art. 9 of the CFR which provides: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”.

\(^{69}\) In Case 12/86 Demird v Stadt Schöfflisch-Gornel [1987] ECR 3719 at 3754, the Court of Justice—somewhat surprisingly for an institution that prides itself on its standard of human rights protection—found that the Turkish wife of a Turkish Gastarbeiter in Germany could not rely upon EU law principles to prevent her expulsion from Germany and her enforced separation from her family. See also Case C-109/01 Secretary of State for the Home Department v Haenicke Akrich [2003] ECR I-9607 at [58]–[60]. And see more recently Case C-92/07 Commission v the Netherlands (29 April 2010) (not yet reported), where the Court of Justice held that the Netherlands’ decision unilaterally nullifying the basis of the EU principle of equal treatment and non-discrimination against Turkish nationals (who were lawfully resident in the Netherlands under and in terms of the EU-Turkey Association) more than other national Members of State for the issue of residence permits.

\(^{70}\) Case C-578/08 Chakroun v Minister van Buitenlandse Zaken [2010] 3 CMLR 5 at [59]–[64].
the right to the personal and family name (in the spelling) of one's choice;\(^1\)
the right to respect for (commercial) privacy,\(^2\) the right to respect for medical confidentiality,\(^3\) and rights in relation to the retention and use of one's own personal data;\(^4\)
the right to maintain residence in a Member State, both for a child\(^5\) and for his or her primary carer,\(^6\) to allow that child to pursue his or her school education and for the child to be able to exercise his or her EU citizenship rights conferred under Art. 20 TFEU;\(^7\)
the right to join a trade union,\(^8\) and to engage in collective bargaining\(^9\) and in industrial action;\(^10\)
the right to free assembly\(^11\) and to form associations with others,\(^12\) and the right to engage in public demonstration and peaceful protest.\(^13\)

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\(^2\) See e.g. Case 136/79 National Panasonic v Commission [1980] ECR 1979; and Case T-474/04 Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission [2007] ECR II-4225. See also Art. 359 of the TFEU (formerly Art. 287 EC); "The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components".  

\(^3\) Case C-404/92 P X v Commission [1994] ECR I-4347. Compare now Art. 35 of the CFR, which provides that "Everyone has the right of access to preventive health care and the right to benefit from medical treatments under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities".  

\(^4\) See Case C-101/01 Criminal Proceedings against Bodt Lindquist [2003] ECR I-1271; Joined Cases C-645/00 and 158 and 9/01 Rechnungshof v Österreichischer Rundfunk and others [2003] ECR I-4899; and Case C-28/08B Bernier Lager v Commission [2011] 1 CMLR 1. See also Data Protection Directive 95/46/EC (OJ 1995 L281/31) and Art. 16(1) of the TFEU, which states: "Everyone has the right to the protection of personal data concerning him". See also Art. 8 of the CFR, which provides: "Everyone has the right of protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified".  


\(^6\) Case C-488/08 R (Tiecêira) v London Borough of Lambeth [2010] PTSR 1913 (Grand Chamber).  

\(^7\) Case C-94/94 Zambonne v Office national de l'emploi (ONEM) [2001] CMLR 46 [art. 41-42]. "Citizenship of the Union is intended to be the fundamental status of nationals of the Member States. In these circumstances, Article 25 TFEU precludes measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".  

\(^8\) See Joined Cases C-193 and 194/87 Maurissenn and another v Court of Auditors [1990] ECR I-955. See now Art. 12(1) of the CFR, which provides, so far as relevant: "Everyone has the right ... to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests".  

\(^9\) See Case C-271/08 Commission v Germany [15 July 2010] (not yet reported) at para. 37: "[T]he right to bargain collectively ... is recognised both by the provisions of various international instruments which the Member States have cooperated in or signed, such as Article 6 of the European Social Charter, signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, and by the provisions of instruments drawn up by the Member States at Community level or in the context of the European Union, such as Article 12 of the Community Charter of the Fundamental Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 1 December 1989, and Article 28 of the Charter of Fundamental Rights of the European Union (‘the Charter’), an instrument to which Article 6 TFEU accords the same legal value as the Treaties".  

\(^10\) See Case C-438/06 International Transport Workers' Federation v Viking Line A/B [2007] ECR I-10779; and Case C-341/05 Lawun Partneri Ltd v Svenska Byggnadsavsforskningsstaben [2007] ECR I-11767. See also Art. 28 of the CFR, which makes provision for a "Right of collective bargaining and action" as follows: "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".  

\(^11\) Case C-235/92 Menzies v Commission [1995] ECR I-4539 at [137]. See now Art. 12(1) of the CFR, which provides, so far as relevant, that "Everyone has the right to freedom of peaceful assembly".  

\(^12\) Case C-415/93 Union royale belge des sociétés de football and others v Bosman and others [1995] ECR I-921 at [79].  

• the right to freedom of expression in the public sphere;  
• the right to freedom of expression within employment;  
• the right to freedom of expression within employment, against a background of duties relative to the maintenance of mutual trust and confidence within that employment;  
• the right not to be discriminated against in the workplace on grounds of sex;  
• the right not to be discriminated against in the workplace on grounds of religious beliefs, doctrines or practices;  
• the right not to be discriminated against in employment on grounds of transgressed status;  
• the right not to be discriminated against in the workplace on the basis of age;  
• the right to equality of treatment between legally recognised same-sex partnerships and opposite sex marriages;  
• the right to vote.  

Procedural due process, natural justice and the rights of the defence  

25. This is a constantly developing area of EU law and one which, at times, shades into and overlaps with the EU concept of protection of fundamental rights. The Court of Justice has specified a number of rights in the area of administrative justice and judicial review. It should be noted that all the above rights apply without distinction between natural and legal persons, individuals and corporations. These include the following:

See Case C-368/95 Vereinigte Familiapress Zeitungsverlage- und Vertriebs GmbH [1997] ECR I-3699; Case C-7/92 Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH [2004] ECR I-3025; and Case C-421/07 Folk Damgaard [2009] ECR I-2629. See now Art. 11(1) of the CFR, which provides: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.  


See Case 43/75 Deffrenne v Sabena (No. 2) [1976] ECR 455.  


Case C-114/04 Mangold [2005] ECR I-9981; and Case C-271/08 Commission v Germany (15 July 2010) [not yet reported].  

Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008] ECR I-1757 at [59]: “[C]ivil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the principles relating to the principle of non-discrimination.”  

The right to vote is one that in EU law would appear to grant the Member States a broad margin of appreciation: compare Case C-145/04 Spain v United Kingdom [2006] ECR I-7917, on the conferment of active and passive voting rights for British Commonwealth citizens resident in Gibraltar to the European Parliament, with Case C-300/04 Eman and Sevinger [2006] ECR I-8055, on the denial of such voting rights to Netherlands citizen resident in Aruba.  

the right of access to a court;\footnote{in Case T-306/01 Yusuf and Al-Rabiah International Foundation v Commission and Council [2005] ECR II-3533 at [32], the CFI observed: "[T]he right of access to the courts, a principle recognised by both Article 8 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, is not absolute. On the one hand, at a time of public emergency which threatens the life of the nation, measures may be taken derogating from that right, as provided for on certain conditions by Article 4(1) of that Covenant. On the other hand, even where those exceptional circumstances do not obtain, certain restrictions must be held to be inherent in that right, such as the limitations generally recognised by the community of nations to fall within the doctrine of State immunity (see, to that effect, the judgments of the European Court of Human Rights in Prince Henri-Adam II of Liechtenstein v Germany of 12 July 2001, Reports of Judgments and Decisions 2001-VIII, paragraphs 52, 55, 59 and 68, and in McEllhinney v Ireland of 21 November 2000, Reports of Judgments and Decisions 2001-XI, in particular paragraphs 34 to 37) and of the immunity of international organisations (see, to that effect, the judgment of the European Court of Human Rights in Waite and Kennedy v Germany of 18 February 1999, Reports of Judgments and Decisions, 1999-L, paragraphs 63 and 68 to 73)".}

- the right to fair trial before an impartial tribunal;\footnote{Case C-386/97 Atakandareko v Parliament [2000] ECR I-1059 at [41]–[43]: “The right to a fair trial, which derives inter alia from Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU (Case C-305/05 Ordre des barreaux francophones et germanophone and Others [2007] ECR I-5305, paragraph 29, and Joined Cases C-341/06P and C-342/06P Chronopost and La Post v UFEX and Others [2008] ECR I-477, paragraph 44). … Such a right necessarily implies access for every person to an independent and impartial tribunal. Thus, as the Court has had occasion to state, the existence of guarantees concerning the composition of the tribunal are the corner stone of the right to a fair trial, compliance with which must in particular be verified by the Community judiciary if an infringement of that right is complained of and the challenge on that point does not appear from the outset manifestly devoid of merit … However, it is also clear from the case-law of the Court that the fact that the judges who heard and determined a case initially may sit in another formation hearing and determining the same case again is not in itself incompatible with the requirements of a fair trial”.

- the presumption of innocence\footnote{See Case C-317/08 Rosilpin Alinsiti v Telecom Italia SpA [2010] 3 CMLR 17 at [61]: “[T]he principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 37 of the Charter of Fundamental Rights of the European Union”. See also Art. 47(1) of the CFR: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.


- the right not to be subject to retrospective criminal legislation;\footnote{Case 65/3 R v Kirk [1984] ECR 2689. See also Joined Cases C-74 and 129/95 Criminal proceedings against X [2000] ECR I-6689 at [25] and Case T-224/00 Archer Daniels v Commission [2003] ECR II-2597 at [39], [85] and [91]. See now Art. 49(1)(c) of the CFR: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed".

- the principle of ne bis in idem, that is to say the right not to be tried or punished twice for the same offence;\footnote{Joined Cases C-189, 202, 205–208 and 213/02P Danske Rentindstiftel Selvende Danske and others v Commission [2003] ECR I-5425 (Grand Chamber). See now Art. 49(1)(c) of the CFR: "No shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable". See also the decision of the Strasbourg Grand Chamber in Scorpola v Italy [2010] 51 EHRR 12.

- the right to freedom of religion;\footnote{see Case C-289/04 President of the Court of First Instance v Commission [2006] ECR I-8859 at [50], referring to and relying upon Art. 4 of the Seventh Protocol to the ECHR in relation to competition law proceedings. For the application of the...}
The right to legal aid

26. The Court of Justice has held that an individual is entitled to be informed of the case against him and to be heard in his own defence when a decision is proposed which the administrative authority knows will cause substantial detriment to, or will otherwise seriously affect the interests of, that person by, for example, the imposition of substantial penalties or fines. In Case C-7/98 Krombach v Bambergs [2000] ECR I-1935 at [39] the Court of Justice cited and relied upon case law of the European Court of Human Rights on the requirements of a hearing in one's defence in the context of the proper operation of the Brussels Convention by national courts of contracting states.

27. In Case T-85/09 Kadi v Commission [2011] 1 CMLR 24 in sustaining a challenge to the validity of EU measures which implemented a UN Security Council decision aimed at combatting international terrorism by the application of "smart sanctions" against individual legal and natural persons alleged to have financial links with Al-Qaeda, the CJEU stated that in criminal proceedings, see Case C-436/04 Van Esbroek [2006] ECR I-2333 and Case C-158/05 Van Straten [2006] ECR I-9327. See now Art. 50 of the CPR. "No-one shall be liable to be tried or punished again in criminal proceedings for which he or she has been finally acquitted or convicted in the Union in accordance with the law".

The right to know the case against one and to respond thereto

102 Case C-492/08 Commission v France (17 June 2010) (not yet reported) at para. 26: see, however, the CJEU’s observations at para. 77: "[E]ven supposing that the services provided by lawyers under the legal aid scheme are related to social wellbeing and can be classified as 'engagement in welfare or social security work', that fact is not sufficient to conclude in this case that those lawyers may be classified as 'organisations...devoted to social wellbeing...and engaged in welfare or social security work'." Article 47(3) of the CPR now states: "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

103 See Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany [2011] 2 CMLR 21, where in the context of a Franconich damages claim brought by a company against the German state which sought legal aid from the German authorities to pursue the claim, the CJEU observed as follows (at paras 59–60): "[T]he principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. ... In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve... In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take into account the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. ... With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings".

104 See also Council Directive 2003/8/EC (OJ 2003 L62/41) on improving access to justice in cross-border disputes. This Directive establishes minimum common rules relating to legal aid for such disputes, which should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court, and representation in court and assistance with, or enforce ment from, the cost of proceedings.

General Court found that the EU's procedures ran wholly contrary to the rights of the defence to know the case against the accused. The General Court noted that the Commission's response to Mr Kadi's request did not grant him even the most minimal access to the evidence against him, simply refusing him such access without any attempt to strike a balance between his interests, on the one hand, and the need to protect the confidential nature of the information in question, on the other. The General Court was also of the view that the summary of reasons with which he was supplied gave Mr Kadi only limited information, and the allegations made against him were too imprecise to enable Mr Kadi to launch an effective challenge with regard to his alleged participation in terrorist activities. Further, the General Court noted that the Commission made no real effort to refute the exculpatory evidence advanced by Mr Kadi in those few cases in which the allegations against him were sufficiently precise to permit him to know what was being raised against him.

The right to a hearing within a reasonable time

28. Advocate-General Jacobs, in specific reliance upon Art. 41 of the CFR, has stated that there is a general right under EU law to have one's affairs dealt with fairly, impartially and within a reasonable time by the institutions and bodies of the EU.106 In Case C-185/95 Baustahlwerke GmbH v Commission [1998] ECR I-8417, the Court of Justice found that a lapse of five-and-a-half years between the commencement of anti-trust proceedings against the applicant by the Commission and the giving of judgment on the matter by the Court of First Instance contravened the applicant's EU law rights (reflected also in the terms of Art. 6(1) of the ECHR and now Art. 41(2)(ii)107 and Art. 47(2)108 of the CFR) to a fair and public hearing within a reasonable time. In C-385/07 Der Grüne Punkt v Commission [2009] ECR I-6155 at [191] and [196], the Grand Chamber of the Court of Justice observed as follows:

"[F]ailure to adjudicate within a reasonable time constitutes a procedural irregularity...[but the] argument that, where a reasonable period is exceeded, that fact must, in order for that procedural irregularity to be remedied, lead to the judgment under appeal being set aside, is unfounded."

29. In contrast to the Art. 6(1) of the ECHR jurisprudence of the European Court of Human Rights, the right to a fair hearing in EU law is not confined to disputes relating to "civil law" rights and obligations, but extends to disputes which the Strasbourg institutions might otherwise characterise as public law matters falling outwith the civil limb of Art. 6(1).111

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107 Article 41 of the CFR, so far as relevant, provides: "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken... ".
108 Article 6(2) of the CFR provides: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law." See, to similar effect in a non-EU context, Spiers v Ruddy 2009 SC (PC) 1 (Art. 6 of the ECHR reasonable time requirements and unreasonable delay in bringing to trial and remedy under the Scotland Act 1998 – a mandatory reference on the application of the Lord Advocate direct from the sheriff court in which the Judicial Committee of the Privy Council reversed its own earlier decision in R v HM Advocate 2003 SC (PC) 21, by now holding that the right to a trial within a reasonable time did not entail, under the Scotland Act, a right not to be tried after an unreasonable time. See, to like effect, Attorney-General's Reference (No. 2 of 2001) [2003] UKHL 68 [2004] 2 AC 72.
The right to judicial review of administrative decisions

30. The Court of Justice has stated that the conferral of a right under EU law necessarily implies that there also exists a right to a remedy of a judicial nature against any decision of a national authority withholding the benefit of that right.\(^{112}\) Thus, in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651,\(^{113}\) the Court of Justice held that a provision of UK law which treated a certificate issued by the Secretary of State as “conclusive evidence” that an act was done for the purpose of safeguarding national security, was contrary to EU law since it had the effect of preventing individuals from pursuing their claims to EU rights by judicial process.

31. In Case C-120/97 Upjohn Ltd v Medicines Act Licensing Authority [1999] ECR I-223, the Court of Justice held that judicial review of a decision did not require a complete rehearing and decision on the merits by the court, but could remain at the level of ensuring the full legality of the decision taken by the duly empowered administrative authority.

The right to reasons for a decision

32. Following from its decision that there exists a right to judicial review of national administrative decisions that affect an individual’s rights under EU law, the Court of Justice has held that effective judicial review must be able to review the legality of the reasons for the contested decision.\(^{114}\) In Case 222/86 UNECTEF v Heylens [1987] ECR

\(^{112}\) Article 47(1) of the CFR provides: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.

\(^{113}\) See also Case C-185/97 Coote v Granada Hospitality [1998] ECR I-5199 at [22].

\(^{114}\) See Case T-181/08 Pye Phyo Tay Za v Council (19 May 2010) (not yet reported) paras 93-96. “It must be recalled that the obligation to state reasons is an essential procedural requirement which must be distinguished from the question whether the reasons given are correct, a matter going to the substantive legality of the contested measure, and which must satisfy the requirements set out in the case-law... The purpose of the obligation to state the reasons for an act adversely affecting a person, as provided for in Article 36(2) EC & first, to provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested before the courts and, second, to enable the courts to review the lawfulness of the act. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him... A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the courts. If the party concerned is not afforded the opportunity to be heard before the adoption of an initial decision to freeze funds, compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the party concerned, especially after the adoption of that decision, to make effective use of the legal remedies available to it to challenge the lawfulness of the decision (see Case T-228/02 Organisation des Moudjahidines du peuple d'Iran v Council [2006] ECR II-4665, paras 138 to 140 and the case-law cited).... The Court has consistently held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and to the context in which it was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the context of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to the wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a decision are sufficient if it was adopted in circumstances known to the party concerned which enable him to understand the scope of the measure concerning him (see OMPI, paragraph 94 above, paragraph 141 and the case-law cited).... According to that case-law, unless overriding considerations concerning the security of the Community or its Member States or the conduct of their international relations preclude it, the Court...
The EU and Fundamental Rights – Part 1

4097, the Court of Justice found that a national administrative authority owes a duty to the individual under EU law to inform him of the reasons upon which its final decision affecting his EU rights was based. Failure to give such reasons is a contravention of EU law.\(^\text{115}\) Article 41(2)(iii) of the CFR also specifies under the right to good administration "the obligation of the administration to give reasons for its decisions".

3. The duty of national authorities to give reasons for their decisions applies only in relation to particular executive or administrative decisions concerning individuals, to allow those individuals the possibility of seeking some remedy of a judicial nature against the decision.\(^\text{116}\) The EU law duty to give reasons does not yet go as far as to require national legislatures to give reasons when they enact legislative measures of general application within the ambit of EU law.\(^\text{117}\)

Article 296 of the TFEU, however, does require that "legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations or opinions required by the Treaties". This duty to give reasons and to specify the legislative bases for secondary legislation enables the competent CJEU to exercise proper judicial review thereof.\(^\text{118}\)

The right to legal representation

5. In an early staff case,\(^\text{119}\) the Court of Justice stated that the Commission’s refusal to allow either the staff member or his lawyer access to his disciplinary file in order to prepare a defence in disciplinary proceedings constituted a breach of the right to defend oneself through legal assistance.\(^\text{120}\) The right to be advised, represented and defended by a lawyer is now provided for specifically in Art. 47(3) of the CFR,\(^\text{121}\) and has been referred to and relied upon by Advocate-General Léger in an opinion to the Court of Justice.\(^\text{122}\)

The confidentiality of legal advice

6. In Case 155/79 AM & S Europe Ltd v Commission \([1982]\) ECR 1575 at 1610–1613, following a comparative survey of the laws of the Member States, the Court of Justice concluded that:

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\(^{\text{115}}\) In order to determine whether a decision was affected by the requirement to give reasons, it must be asked if it is possible to determine the nature of the decision from the content of the individual act itself, as opposed to the act as a whole. In this latter instance, it is necessary to adduce evidence of such reasons which it was not possible to determine from the content of the individual act itself. For this purpose, the Court has held that the right to good administration, in particular the right to be informed of reasons, is a right of access to the decision.

\(^{\text{116}}\) A decision of a national court or administrative body constitutes a decision of a national authority within the meaning of Article 41(2) of the CFR. It therefore falls within the scope of that Article.

\(^{\text{117}}\) The Court has held in the context of the right to good administration that while the duty to give reasons for a decision extends to the duty to give reasons for the decision as a whole, it does not extend to the reasons for considering or taking a particular measure. Moreover, while the right to good administration may require the national legislature to give reasons for enacting a legislative measure, it does not extend to the implementation of such a measure.

\(^{\text{118}}\) The right to legal representation is a fundamental right that falls within the scope of Article 47(3) of the CFR.

\(^{\text{119}}\) See e.g. Case T-341/07 Sison v Council \([2009]\) ECR II-3625, a decision of the General Court concerning the right to be informed of reasons for a decision to freeze an individual’s assets in connection with counter-terrorism measures.

\(^{\text{120}}\) See 22/86 Union National des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens \([1987]\) EC 4097.

\(^{\text{121}}\) See Case C-70/97 Sedamare S.A and others v Region Lombardia \([1997]\) ECR 1-7183.

\(^{\text{122}}\) See Case C-356/95 Commission v Sytravail and another \([1998]\) ECR I-1718.

\(^{\text{123}}\) See 22/86 Union National des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens \([1987]\) EC 4097.

\(^{\text{124}}\) See Case C-70/97 Sedamare S.A and others v Region Lombardia \([1997]\) ECR 1-7183.

\(^{\text{125}}\) See Case C-356/95 Commission v Sytravail and another \([1998]\) ECR I-1718.

\(^{\text{126}}\) See 22/86 Union National des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens \([1987]\) EC 4097.

\(^{\text{127}}\) See Case C-70/97 Sedamare S.A and others v Region Lombardia \([1997]\) ECR 1-7183.

\(^{\text{128}}\) See Case C-356/95 Commission v Sytravail and another \([1998]\) ECR I-1718.

\(^{\text{129}}\) See 22/86 Union National des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens \([1987]\) EC 4097.

\(^{\text{130}}\) See Case C-70/97 Sedamare S.A and others v Region Lombardia \([1997]\) ECR 1-7183.

\(^{\text{131}}\) See Case C-356/95 Commission v Sytravail and another \([1998]\) ECR I-1718.

\(^{\text{132}}\) See 22/86 Union National des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens \([1987]\) EC 4097.

\(^{\text{133}}\) See Case C-70/97 Sedamare S.A and others v Region Lombardia \([1997]\) ECR 1-7183.

\(^{\text{134}}\) See Case C-356/95 Commission v Sytravail and another \([1998]\) ECR I-1718.

\(^{\text{135}}\) See 22/86 Union National des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens \([1987]\) EC 4097.

\(^{\text{136}}\) See Case C-70/97 Sedamare S.A and others v Region Lombardia \([1997]\) ECR 1-7183.

\(^{\text{137}}\) See Case C-356/95 Commission v Sytravail and another \([1998]\) ECR I-1718.

\(^{\text{138}}\) See 22/86 Union National des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens \([1987]\) EC 4097.

\(^{\text{139}}\) See Case C-70/97 Sedamare S.A and others v Region Lombardia \([1997]\) ECR 1-7183.
that the Commission’s extensive powers of investigation, search and seizure in the context of suspected breaches of EU fair competition law were subject to the principle that communications between lawyer and client were to be respected as confidential. The Commission could not therefore require the production of business records concerning such communications. The Court of Justice held, however, that the principle of confidentiality applied only in relation to communications with independent counsel rather than with in-house lawyers or legal departments.

37. In Case C-305/05 Ordre des barreaux francophones et germanophone v Council of Ministers [2007] ECR I-5305, the Court of Justice held that the obligation imposed on lawyers by Art. 2a(5) of the Money Laundering Directive 91/308/EEC⁴¹ to inform the competent authorities of any fact which could be an indication of money laundering was compatible with the right to a fair trial and with the principle of respect for the professional secrecy and the independence of lawyers.

38. The principle of confidentiality of in-house legal advice is one which may, however, be claimed in principle by the EU institutions.¹²⁴ As the President of the General Court has observed:

"According to settled case-law, it is contrary to public policy, which requires that the institutions should be able to receive the advice of their legal service, given in full independence, to allow such internal documents to be produced by persons other than the services at whose request they have been prepared in proceedings before the Court, unless the production has been authorised by the institution concerned or ordered by the Court (order in Case C-445/00 Austria v Council [2002] ECR I-9151, paragraph 12; Case T-44/97 Geigence and Others v Council [2000] ECR-SC I-A-223 and II-1023, paragraph 48; and order in Case T-357/03 Gollnisch and Others v Parliament [2005] ECR II-1, paragraph 34)."¹²⁵

39. The idea that fundamental rights protections may be prayed in aid by the EU institutions is certainly difficult to reconcile with the principle of ECHR jurisprudence to the effect that fundamental rights cannot be prayed in aid by public authorities or "governmental organizations"¹²⁶ which simply have no standing to make claims under Art. 34 of the ECHR of a violation of Convention rights.¹²⁷ This makes all the


¹²⁵ See now MacKay and BBC Scotland v United Kingdom [2010] ECHR 10734/05 (Fourth Section, 7 December 2010) paras 18-19. "In their initial observations, the Government objected that the BBC was a public broadcasting corporation established by Royal Charter and therefore BBC Scotland could not be a victim for the purposes of Article 34 of the Convention. However, in their final observations the Government informed the Court that, for the sole purpose of the present application, they conceded that BBC Scotland could be considered as a victim and withdrew their initial observations on this point. Relying on the Court's judgment in Quenschlager Kundunk v Austria, no 35841/02, 7 December 2006, the applicants considered that the second applicant was a victim for the purposes of Article 34.... Having noted the parties' positions and having regard to its established case-law (see, for example, Radio France and Others v France (dec), no 53984/00, ECHR 2004-X (Justice氙) the Court will proceed on the basis that BBC Scotland can be considered as a victim within the meaning of Article 34 of the Convention".

¹²⁶ See, e.g. the partial admissibility decision in Radio France v France [2003] ECHR 53984/00 (Second Section, 25 September 2003) at para. 26: "The term ‘governmental organisations’, as opposed to ‘non-governmental organisations’ within the meaning of Article 34, applies not only to the central organs of the State, but also to decentralised authorities that exercise ‘public functions’, regardless of their autonomy vis-a-vis the central organs; likewise it applies to local and regional authorities (see, in particular, Raathenham Commune v
more startling the decision of the Grand Chamber of the CJEU to endorse and reiterate earlier rulings of the Court of Justice to the effect that whereas the in-house legal advice communicated within the EU institutions (which are quintessentially “government organizations” for the purposes of the ECHR) is protected from disclosure by reason of those institutions’ fundamental right to respect for the confidentiality of the legal advice received by them, legal professional privilege cannot be claimed by private enterprises under investigation by the Commission in respect of legal advice from, and internal communications with, their own in-house lawyers. The Grand Chamber notes:

“47. [A]n in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.

48. It must be added that, under the terms of his contract of employment, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer.

49. It follows, both from the in-house lawyer’s economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer.

50. Therefore, the General Court correctly applied the second condition for legal professional privilege laid down in the condition in AM & S Europe v Commission.”

Discovery and the right to access to EU documentation

In Case C-2/88 Zwartveld [1990] ECR I-4405, the Court of Justice held that under EU law there was a presumption in favour of EU institutions producing documentation to national courts and authorising their officials to give evidence to national magistrates engaged in investigations into fraud. Any refusal to co-operate with national judicial
The EU and Fundamental Rights – Part 1

authorities in this way must be justified by imperative reasons, for example the protection of the rights of third parties or where the disclosure of the information would be capable of interfering with the functioning and independence of the EU institutions. In Case C-58/94 Netherlands v Council [1996] ECR I-2169 at [34], the Court of Justice further noted that “the domestic legislation of most Member States now enshrines in a general manner the public’s right of access to documents held by public authorities as a constitutional or legislative principle”.

41. Article 15(3) of the TFEU (formerly Art. 255(1) EC) sets out the general principle that any natural or legal person resident within the Union shall have a right of access to documents of EU institutions, bodies, offices and agencies, whatever their medium, on the conditions laid down by the Council. Any refusal of the EU institutions to produce requested documentation will be subject to judicial review before the General Court with a right of appeal therefrom to the Court of Justice. A new Art. 16(1) of the TFEU also lays down the general principle that “[e]veryone has the right to protection of personal data concerning them”.

42. There may now be said to be a presumptive right of access to EU documentation and in Case C-185/95P Baustahlgewebe GmbH v Commission [1998] ECR I-8417 the Court of Justice also accepted that the right of access to the Commission’s file was recognised as a general principle of EU law. In proclaiming that the pleadings before the CJEU are in principle secret or confidential documents, the Grand Chamber made the following claims, avowedly by way of justification of what, from a UK lawyer’s perspective, seems an extraordinary decision:

“77. ... (It) should be noted that pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission.

... 

79. [...] Judicial activities are as such excluded from the scope, established by those [EU] rules of the right of access to documents

... 

86. [...] If the content of the Commission’s pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the CJEU.

133 See also Case C-174 and 189/98P The Netherlands and another v Commission [2000] ECR I-411.
92. As regards, secondly, the sound administration of justice, the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity.

93. Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.

94. It is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings.” (emphasis added)

Privacy, “dawn raids” and business premises

4. Under Council Regulation No. 17/62, the European Commission was given broad powers to police the observance by undertakings of the Community competition law regime. It could request all necessary information from Member States and individual undertakings, and conduct voluntary or compulsory searches of company premises.

It could impose fines where its demands were not met. In Joined Cases 46/87 and 227/88 Hoechst AG v Commission [1989] ECR 2859, the Court of Justice held that the right to respect for the individual’s “private and family life, his home and his correspondence” guaranteed under Art. 8(1) of the ECHR did not extend to business premises, and so upheld the legality of “dawn raids” by the European Commission seeking evidence for anti-competitive practices.

6. By contrast, the European Court of Human Rights held in Niemitz v Germany (1993) 16 EHRR 97 that the purpose of Art. 8 of the ECHR was to protect the individual against arbitrary interference by public authorities, and so its protection extended to the individual’s professional or business activities or premises. And in Colas Est and others v France (2004) 34 EHRR 17 at [49], the European Court of Human Rights also unequivocally endorsed the idea that companies, as well as private individuals, were accorded rights to private life and respect for their home/domicile.

In Case T-305/94 Limburgse Maatschappij v Commission [1999] II-931, however, the Court of First Instance refused to depart from the decision of the Court of Justice in Hoechst that business undertakings could not pray in aid a right to private life, stating:

“Inssofar as the pleas and arguments put forward by LSM and DVM are identical to or similar to those put forward at that time by Hoechst the Court of First Instance sees no reason to depart from the case law of the Court of Justice. That case law is moreover based on the existence of a general principle of Community law, as referred to above, which applies to legal persons. The fact that the case law of the European Court of Human Rights concerning the applicability of Article 8 of the ECHR has evolved since the judgments [of the
Court of Justice] in *Hoechst, Dow Benelux, and Dow Chemical Ibérica* therefore has no direct impact on the merits of the solutions adopted in those cases.\(^{141}\)

47. Nevertheless, in its decision of October 2002 in Case C-94/00 *Roquette Frères v Director General of Competition* [2002] ECR I-9011, the Court of Justice reversed this position and brought it into line with the European Court of Human Rights jurisprudence, acknowledging that *ECHR*, Art. 8 considerations and the requirements of the doctrine of proportionality could be used by national courts in assessing whether or not to accede to an application to them by the Commission for authority to use coercive measures in dawn raids seeking evidence for breach of EU competition law.\(^{142}\)

48. Interestingly, some UK judges seemed to share some of the doubts of the Court of Justice on the extension of private rights to non-human persons.\(^{143}\) In *P v Broadcasting Standards Commission ex p BBC* [2001] QB 885 it was argued before the Court of Appeal that a right to privacy under Art. 8 of the *ECHR* and that, in any event, it was not an infringement of a right to private life to film secretly in a place to which the public has free access when the event or events filmed are not inherently private in any respect.\(^{144}\) In the event the court declined to be drawn on these broader questions, but Lord Mustill did make the following observations *obiter* (paras 48–49):

> "[I]n general I find the concept of a company’s privacy hard to grasp. To my mind the privacy of a human being denotes at the same time the personal ‘space’ in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate. The concept is hard indeed to define, but if this gives something of its flavour, I do not see how it can apply to an impersonal corporate body, which has no sensitivities to wound, and no selfhood to protect.\(^{145}\)"

There will, it is true, be many occasions where grounds for complaint maintainable by a company will be of the same kind as those which could be presented by an individual as a breach of privacy, for example the clandestine copying of business documents would be actionable by a company as an

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\(^{141}\) The appeal to the Court of Justice (Case C-238/99P *Limburgse Maastrichtse v Commission* [2002] ECR I-887) against this part of the decision was unsuccessful on the grounds that the *ECHR* case law cited had no direct impact on the merits of the case - see para. 251.

\(^{142}\) See, now, Case C-450/06 *Varce SA v Belgium* [2008] ECR I-581 at [48]–[49] and [52]: "It follows from the case-law of the European Court of Human Rights that the notion of ‘private life’ cannot be taken to mean that for professional or commercial activities of either natural or legal persons are excluded (see *Nimetz v Germany*, judgment of 16 December 1992, Series A no 251-B, §29; *Société Colin et autres v France*, no 2791/85, ECHR 2002-II; and also *Peck v The United Kingdom* no 44647/98, §57, ECHR 2003-I). Those activities can include participation in a contract award procedure... The Court of Justice has, moreover, acknowledged that the protection of business secrets is a general principle (see *Case 53/85 AKZO Chemie and AKZO Court UK v Commission* [1986] ECR 1965, paragraph 28, and Case C-36/92P *SEP v Commission* [1994] ECR I-371, paragraph 37).... The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, Case C-438/04 *Mabistor* [2006] ECR I-6075, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial".

\(^{143}\) See now Joined Cases C-92 and 93/09 *Volker und Markus Schecke GbR v Land Hessen* [November 2010] (not yet reported) at para. 87: "[T]he seriousness of the breach of the right to protection of personal data manifests itself in different ways for, on the one hand, legal persons and, on the other, natural persons".

\(^{144}\) Compare with the decision of the Canadian Supreme Court in *Les Editions Vice-Versa v Aubrey* [1989] SCR 437.

\(^{145}\) Compare in this regard with the decision in *Derbyshire County Council v Times Newspapers* [1992] QB 708, finding that a council could not sue for defamation.
The privilege against self-incrimination

It is for the EU authorities to establish a breach of EU law. However, in Case 374/87 Orkem v Commission [1989] ECR 3283 at [30], the Court of Justice ruled that while the Commission could not compel a company to provide it with answers that might involve an admission of a breach of EU law which it was incumbent upon the Commission to prove, Art. 6 of the ECHR did not contain an implicit privilege against self-incrimination, nor any right not to give evidence against oneself. And in the decision of the First Chamber of the CFI (extended composition) in Case T-112/98 Mannesmannröhren-Werke AG v Commission [2001] ECR II-729 at [66], the court observed:

"To acknowledge the existence of an absolute right to silence, as claimed by the applicant, would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty under Article 89 of the EC Treaty [now, after amendment, Art. 105 of the TFEU] to ensure that the rules on competition within the common market are observed."

By contrast, the European Court of Human Rights in Funke v France (1993) 16 EHRR 279 stated that Art. 6 of the ECHR did indeed protect the right to remain silent and not to contribute to incriminating oneself, and in John Murray v United Kingdom (1996) 2 EHRR 29 at 60 the European Court of Human Rights reiterated that "the right to remain silent under police questioning and the privileges against self-incrimination" should be recognised as a standard "which lies at the heart of the notion of fair procedure under Article 6(1) ECHR". A subsequent Grand Chamber decision of the European Court of Human Rights in O'Halloran and Francis v United Kingdom seems rather to roll back from the general and exceptionless right against self-incrimination and, following a decision of the Judicial Committee of the Privy Council
in the Scottish case of Brown v Stott (Procurator Fiscal, Dunfermline) 2001 SC (PC) 4, allowed for an exemption from this general principle in the specific context of the prosecution of road traffic violations.\textsuperscript{151}

**EU competition law enforcement procedures: criminal or administrative?**

51. Article 6(1) of the ECHR has been found by the European Court of Human Rights to include an implicit right of access to a court,\textsuperscript{152} and that the enforcement of a court's judgment has been held to be an integral part of the “trial” for the purposes of Art. 6(1).\textsuperscript{153} In Senator Lines GmbH v 15 Member States of the European Union (2004) 39 ECHR 533, a challenge was brought before the European Court of Human Rights to the compatibility of the right to a fair trial under Art. 6(1) with the right of the European Commission to impose fines under EU law. This challenge was supported by the Council of the Bars and Law Societies of the European Union (CCBE), the European Company Lawyers Association (ECLA), the Fédération Internationale des Ligues des Droits de l’Homme (FIDH) and the International Commission of Jurists (ICJ). In the event, the Grand Chamber of the ECtHR did not have to decide on the merits of the challenge as, by the time it came to consider matters, the applicant could no longer claim victim status, noting:

“The applicant company claimed that, if the fine imposed on it were enforced before the proceedings had been judicially determined, then its access to court would have been denied. In so doing, the applicant company was neither paid nor enforced, and the applicant company’s challenge to the fine (along with the related challenge by other companies) was not merely heard, but ended with the final quashing of the fine. Accordingly, the facts of the present case were never such as to permit the applicant company to claim to be a victim of a violation of its Convention rights. By the time of the ‘final decision’ in the case – the judgment of 30 September 2003 of the Court of First Instances – it was clear that the applicant company could not produce ‘reasonable and convincing’ evidence of the likelihood that a violation affecting it would occur, because on that date it was certain that there was no justification for the applicant company’s fear of the fine being enforced before the Court of First Instance hearing.”

52. The Belgian undertaking Solvay, which was accused, among others, by the Commission of abusing its dominant position on the market for soda ash from 1983 to 1990, has now simultaneously raised parallel proceedings against the Commission before the CJEU\textsuperscript{154} and against all 27 Member States of the European Union before the ECtHR\textsuperscript{155} relying on

\textsuperscript{150} See also the decision of the House of Lord in R v Herefordshire County Council ex p. Green Environmental Agents Ltd [2000] 2 AC 412 at 423, per Lord Hoffmann, on the non-application of this principle to extrajudicial inquiries, contrary to the Strasbourg decision in J v Switzerland [2001] Crim LR 748 (ECHR).

\textsuperscript{151} O’Halloran and Francis v United Kingdom (2006) 46 ECHR 21 at [62] (Grand Chamber): “Having regard to all the circumstances of the case, including the special nature of the regulatory regime at issue and the limited nature of the information sought by a notice under section 172 of the Road Traffic Act 1988, the Court considers that the essence of the applicants’ right to remain silent and their privilege against self-incrimination has not been destroyed”.

\textsuperscript{152} Golden v United Kingdom (1979–80) 1 EHRR 524.

\textsuperscript{153} See Scordino v Italy (No. I) (2007) 45 EHRR 7 at [196] (Grand Chamber), referring to, among other cases, Francis v Greece (1997) 24 EHRR 293.

\textsuperscript{154} Case C-109/10P Solvay SA v Commission (14 April 2011).

\textsuperscript{155} Solvay’s application to the ECtHR was made on 26 February 2010. See the opinion of Advocate-General Kokott of 14 April 2011 in Case C-109/10P Solvay SA v Commission para. 6.
the provisions of Art. 6 of the ECHR in the context of an EU competition law matter to complain that it was not granted due access to the file and that, as a result, its rights of defence have been infringed. Solvay also claims that the administrative and judicial proceedings in this case were excessively long. This, it contends, constitutes an infringement of its fundamental right under of the Art. 6 to have its case adjudicated upon within a reasonable time.

53 It is clear, then, that the issue of the compatibility with fundamental rights of the current investigation and enforcement powers in relation to EU competition law is a matter of concern within the EU institutions. One particular matter that has exercised the CJEU is whether or not procedures before the Commission in respect of its investigation and prosecution of alleged breaches of the requirements of EU competition law are to be classified as “merely administrative”\(^{156}\) or as “essentially criminal”\(^{155}\) in nature.

54 The classification of competition law enforcement proceedings as administrative or (quasi-) criminal certainly has implications for the degree to which the Commission procedures would be subject to judicial challenge. The CJEU has said that such principles as *nullum crimen* or *nulla poena sine lege* should not necessarily have the same scope in “administrative proceedings” as they do in situations covered by criminal law “in the strict sense”\(^{158}\). The CJEU has also asserted that “the effectiveness of Community competition law would be seriously affected if the argument that competition law formed part of criminal law were accepted”\(^{159}\).

55 One commentator has observed in defence of the current EU competition law regime as follows:

> "Many of the claims of incompatibility of EU antitrust procedures with the Convention appear to be based on reasoning along the following lines: Primo, EU antitrust enforcement is 'criminal' within the meaning of the Convention. Secundo, some judgment of the European Court of Human Rights appears to require in some criminal case a procedural right or guarantee which does not appear to be available in EU antitrust proceedings. Ergo, EU antitrust proceedings are incompatible with the Convention. Such reasoning is liable to lead to erroneous conclusions to the extent that it disregards the case-law of the European Court of Human Rights which distinguishes, as to the level of protection required by the Convention, according to the circumstances of the particular case: ‘While the right to a fair trial under Article 6 [ECHR] is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case.’\(^{160}\)"


\(^{157}\) See Case C-197/92 Hills v Commission [1999] ECR I-4267 at [180], holding that the “fundamental rights applicable to criminal law ... apply to proceedings culminating in competition law fines”.


\(^{160}\) Judgment of the European Court of Human Rights (Grand Chamber) of 29 June 2007 in O'Halloran and Francis v United Kingdom (2008) 46 EHRR 21 at [53]. This case concerned a citizen's right to remain silent and the privilege against self-incrimination in criminal trials concerning road traffic offences. These rights are not expressly provided for within Art. 6 of the ECHR but have been implied into the notion of fair trial by the Strasbourg Court on the basis of “generally recognised international standards”.
Particularly relevant in the context of EU antitrust procedures are the distinction between the hard core of criminal laws[163] and other areas of the law which are only criminal within the Convention’s wider meaning of ‘criminal’, and the distinction between natural persons and companies.”[162]

56. The consistent jurisprudence of the European Court of Human Rights since its Grand Chamber decision in Ferrazzini v Italy (2002) 34 EHRR 45 at [29] has been that tax matters form part of the “hard core of public-authority prerogatives”, with the public nature of the relationship between the taxpayer and the community remaining predominant, and that, accordingly, tax disputes fall outside the scope of civil rights and obligations for the purposes of the civil limb of Art. 6(1) of the ECHR, despite the pecuniary effects they necessarily produce for the taxpayer. But there is certainly scope to argue that the decisions of the CJEU to date on this issue have paid insufficient regard for the developing line of jurisprudence from the imposition of tax surcharges,[163] or fiscal penalties or fines associated with late payment of tax,[164] are to be taken as imposing what are to be regarded as, within the “autonomous

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162 See Goldman and Szanidczy v Hungary [2010] ECHR 17604/05 (Second Section, 30 November 2013) para 23-25. "[I]n the case of Fejde v Sweden (29 October 1991, Series A no. 212-C, §5), no violation of the applicant’s defence rights was found — although no oral hearing had taken place before the appellate court because of the minor character of the offence with which the applicant had been charged and the prohibition against increasing his sentence on appeal. 20. The Court is however convinced that the present application does not concern the element of a disproportionate sentence and that the general principle obliging the ordinary instance courts to hold an hearing must be applied. This consideration holds true even for the need to question, since the merits of the case were again embarked on and new evidence was being taken. The Court takes this view notably because the charges against the applicants — aggravated embezzlement — indisputably belong to the hard core of criminal law. Furthermore, what was at stake for the applicants was imprisonment, and they were actually sentenced to a suspended prison term, which obviously carried a significant degree of stigma (see, a contrario, Jussila v Finland [GC], no. 73053/01, §43, ECHR 2010-VIII)."


165 Impar Ltd v Lithuania [2010] ECHR 13102/04 (Second Section, 5 January 2010) para 21-22, 35-37. "The present case concerns tax litigation in which the applicant company was found, following fraudulent bookkeeping, liable to pay a fine in the amount of LTL 880,929 (approximately EUR 231,122). The Court has consistently held that, generally, tax disputes fall outside the scope of ‘civil rights and obligations’ under Article 6 of the Convention, despite the pecuniary effects which they necessarily produce for the taxpayer (see Ferrazzini v Italy [GC], no. 44759/98, §29, ECHR 2001-VII). The facts of the instant case do not give reason to review that conclusion. 22. However, having considered the circumstances of the present case, the Court finds that the general character of the legal provisions imposing fines for persistent tax law violations, the purpose of the penalty, which was both deterrent and punitive, as well as its severity, suffice to show that for the purposes of Article 6 of the Convention, the applicant company was charged with a criminal offence (see Västberga Taxi Aktiebolag and Vulic v Sweden, no. 36985/97, §§76-82, 23 July 2002, and Jussila v Finland [GC], no. 73053/01, §§30-38, ECHR 2006-XIII). It follows, that the Government’s plea that the complaint is inapposAnother matter is the protection of the rights of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see Ferrazzini, cited above, §29). The Court has likewise held that the Contracting States are free to empower tax authorities to impose fines even in small amounts (see mutatis mutandis, Bendenon v France, 24 February 1994, §46, Series A no. 284). Although the fine imposed on the applicant company could be considered heavy, no convincing reasons have been put forward to the Court to explain why it cannot be regarded as compatible with the above-mentioned legitimate State interests. Consequently, this complaint must be dismissed as being manifestly ill-founded, pursuant to Article 35 §§3 and 4 of the Convention". 
meaning of Article 6 ECHR", criminal penalties and as attracting the guarantees of Art 6(1) with its reference to determination of any criminal charge.165

57. Thus, in Jussila v Finland (2007) 45 EHRR 39166 the Grand Chamber of the Strasbourg Court, in effect, overturned earlier decisions of the European Commission on Human Rights167 and unequivocally confirmed that, while a claim to tax itself continues to fall outside the ambit of Art. 6(1) of the ECHR, automatic surcharges of even minimal amounts will constitute for Convention purposes a criminal penalty, and so the proceedings resulting in the imposition of such penalties or surcharges will attract the fairness protections set out in Art. 6(1)168 (although not necessarily the full rigour of the specific protections set out in Art. 6(2) and (3)). As the Strasbourg Court has observed:

"While there is no doubt as to the importance of tax to the effective functioning of the State, it is not convinced that removing procedural safeguards in the imposition of punitive penalties in the sphere of taxation is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention. . . . Furthermore, the tax surcharges in the present case were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. Without more, the Court considers that this alone establishes the criminal nature of the offence . . . Hence, Article 6 applies under its criminal head."169

58. By the same token, and notwithstanding the importance of EU anti-trust law for the functioning of the EU, it is not clear that the removal of—or failure to make express provision for—adequate procedural safeguards for undertakings subject to investigation by the Commission for alleged breaches of the law (and, if found guilty by the Commission, liable to the imposition of substantial financial penalties) can be thought to be consonant with the spirit and purpose of the ECHR.170 Certainly in Société Stenuit

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165 See Paykar Yar Hgghianak Ltd v Armenia [2007] ECHR 21638/03 (Third Section, 20 December 2007) at para. 32: "The Court reiterates at the outset that tax disputes fall outside the scope of civil rights and obligations under Article 6, despite the pecuniary effects which they necessarily produce for the taxpayer (see, among other authorities, Ferrarini v. Italy [GC], no. 44759/98, §29, ECHR 2001-VII). However, when such proceedings involve the imposition of surcharges or fines, then they may, in certain circumstances, attract the guarantees of Article 6(1) under its ‘criminal’ head …”.

166 The Court stated (para. 43): "[T]he autonomous interpretation adopted by the Convention institutions of the notion of a ‘criminal charge’ by applying the Engel criteria have undermined a general broadening of the criminal head to cases not strictly relating to the traditional categories of criminal law, for example administrative penalties (Oeztirko v. Germany (1984) 6 EHRR 409), prison disciplinary proceedings (Campbell and Kelly v. United Kingdom (1985) 7 EHRR 165), customs law (Salabiku v. France (1991) 13 EHRR 379), competition law (Société Stenuit v. France (1992) 14 EHRR 509) and penalties imposed by a court with jurisdiction in financial matters (Gaisser v. France (2002) 32 EHRR 47). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency”.

167 See, e.g. Smith v United Kingdom (1996) 21 EHRR CD 74, holding that the fact that late payment of the local government community charge, or poll tax, attracted an automatic 10 per cent surcharge did not attract the protection of Art. 6 of the ECHR; and ANM & Co. v United Kingdom [1995] ECHR 25602/94 (First Section, 29 November 1995), holding that the use of a summary warrant procedure with no possibility of a court hearing or refuses to issue a warrant, or, in the context of an appeal to the Strasbourg Court, for the enforcement of unpaid local authority business rate claims, did not fall within the ambit of Art. 6.

168 See, to the effect, Jancovic v Sweden (2004) 38 EHRR 22, where the Court noted, in the context of automatic surcharges for arrears in tax payments: “[I]n employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim to be achieved”.

169 See also Bubuska v Hungary [2008] ECHR 8174/05 (Second Section, 17 July 2008) at paras 14–15 (footnotes omitted).

170 See also Dubus SA v France [2009] ECHR 5242/04 (Fifth Section, 11 June 2009) where the Strasbourg Court held unanimously that there had been a violation of Art. 6(1) of the ECHR right to a fair trial in relation to professional disciplinary proceedings that had been brought by the Banking Commission against the applicant, an investment company. The Court based its finding on the fact that there was no clear distinction between the functions of prosecution, investigation and adjudication of the Banking Commission, the supervisory
v France (1992) 14 EHRR 509 the European Human Rights Commission was unequivocal in finding that the provisions of Art. 6(1) in its criminal limb applied to the decision of the French Minister acting under national competition law to impose a fine for breach of national competition law and amounted to the “determination of a criminal charge”. Accordingly, the applicant was entitled to a fair hearing before an impartial tribunal, and the failure to provide such a hearing was a violation of Art. 6(1).

59. More recently, Advocate-General Sharpston has conceded as follows:

“[T]he procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC [now Art. 101(1) of the TFEU] falls under the ‘criminal head’ of Article 6 ECHR as progressively defined by the European Court of Human Rights. The prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application; the offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, with no element of compensation for damage.”

60. The decision of the CJEU in this case was awaited at the time of writing. It remains to be seen whether or not Advocate-General Sharpston’s analysis and concession will be followed by the CJEU.

**Equality of arms and parties’ right to the last word in civil procedure**

61. In Vermeulen v Belgium (2001) 31 EHRR 15,172 the European Court of Human Rights held that it was a systemic violation of individual litigants’ fair trial rights for them to be denied the possibility of replying to submissions made in a case before the Belgian Court of Cassation by the Procureur Général after the submissions of the parties had been concluded. On the reading of the Court, Art. 6(1) ECHR was said to require the parties to a criminal or civil trial to have the opportunity to comment on all evidence adduced173 or observations filed on the case,174 even by an independent member of the national legal service such as the Procureur Général.

62. By contrast, in Case C-17/98 Emesa Sugar (Free Zone) NV v Aruba [2000] ECR I-663, the Court of Justice dismissed the parties’ application for leave to submit written observations in response to the opinion delivered by the Advocate-General,175 declaring that authority chaired by the Governor of the Bank of France which was responsible for credit and investment establishments operating out of France.


172 For recognition of this right in the jurisprudence of the CJEU, see Case C-276/01 Joachim Steffen [2003] ECR I-3735 at [72] and [75]–[77].

173 In Maniounouelli v France (1997) 24 EHRR 370 at [36], and Krčmář and others v Czech Republic (2001) 31 EHRR 41, violations of Art. 6(1) of the ECHR had been found in that the applicants had not had the opportunity to present documentary evidence. Similarly, in Pellegirini v Italy (2002) 35 EHRR 2, the ECHR had held that it was for the parties to a dispute alone to decide whether a document produced by the other party or by witnesses called for their comments.

174 See, to like effect, the subsequent decisions of the Court of Justice in Case C-50/96 Schindler [2000] ECR I-173; Case C-234/96 Vitt [2000] ECR I-799; Case C-270/97 Sleers [2000] ECR I-929; Case C-265/97 VBA v Flinchem [2001] ECR I-2001; Supplementary written submissions were sent by the petitioners in Joined Cases C-250 and 64/01 Booker Aquaculture and Hydro Seafoods v Scottish Ministers [2003] ECR I-7411 following the issuing of the opinion of Advocate-General Mischo on 20 September 2001, but these were summarily refused by the Court’s registry.
the Advocate-General before the CJEU exercised a judicial function which was said not to be analogous to the role of the Belgian Procureur Général. But it seems clear from this line of Strasbourg case law that a denial of the right of the parties to the litigation to comment on the opinion of the Advocate-General in cases before the Court of Justice and be afforded a “genuine opportunity” to submit additional observations, if so advised, on that opinion, could not be said to be Art. 6 compliant.179

63. In Case C-89/08P Commission v Ireland [2009] ECR I-11245, the Grand Chamber of the Court of Justice held that, despite itself being a public authority (and therefore not able, under Strasbourg criteria, to claim the protection of Convention rights), the European Commission could rely upon the (EU “common law”/fundamental rights) principle of equality of arms and the right to be heard before the court comes to a decision.178 In upholding the Commission’s appeal against a decision of the CFI (now the General Court) against it, the Grand Chamber insisted that its earlier decision in Enmesa Sugar could be read in a manner which was compatible with the European Court of Human Rights’ Vermeulen line of case law, on the basis that it was open to the CJEU under its Rules of Procedure to reopen proceedings to consider further submissions from the parties after the Advocate-General had delivered his or her opinion, albeit only in circumstances where the CJEU considered either that it lacked sufficient information or that the case must be dealt with on the basis of an argument which had not been debated between the parties.179 The Grand Chamber observed as follows:


26 See post-Enmesa the decision of the ECHR in Application No. 39594/98 Kress v France, 7 June 2001, in which the Strasbourg Grand Chamber considered the role played by the Commissaire du Gouvernement in the proceedings of the French Conseil d’État, noting at para. 86 that the role of the Advocate-General at the Court of Justice of the European Communities was “closely modelled” on that of the Commissaire du Gouvernement of the French Conseil d’État. Significantly, in Gön v Turkey (2003) 35 ECHR 6 and in Application Nos 32911/96, 32917/96 and 34395/97 Mejri and others v France, 26 July 2002, the ECJ, sitting in an appellate capacity as the Grand Chamber in both cases, confirmed this line of case law and held that the applicants’ lack of opportunity to respond to the submissions of the Principal Public Prosecutor to the Court of Cassation of Turkey (in the former case) and to the Advocate-General’s submissions to the Court of Cassation of France (in the latter case) was a violation of their rights to a fair hearing guaranteed under Art. 6(1) of the ECHR. See also Application No. 45019/98 Pascalini v France, 26 June 2003, where Art. 6(1) was found to be breached where an applicant was not provided with a copy of the reporting judge’s report to the Court of Cassation and Applications Nos 39410/97 and 40327/98 Fontaine and Berin v France, 8 July 2003, where a violation of Art. 6(1) was found both in the failure to provide the applicants with a copy of the reporting judge’s report to, and the presence of the Advocate-General at the deliberations of, the Court of Cassation.

27 See also Joined Cases C-514, 528 and 532/07 Sweden and Association de la presse internationale asbl (API) v Commission [2011] 1 CMLR 23 at [88]–[90]; “[T]he principle of equality of arms – together with, among others, the principle of audi alteram partem – is no more than a corollary of the very concept of a fair hearing (see, by analogy, Case C-315/05 Ordre des barreaux francophones et germanophones and Others [2007] ECHR 1-5365, paragraph 31; Case C-89/08 P Commission v Ireland and Others [2009] ECR I-11245, paragraph 50; and Case C-497/09 IX-II.Réclamations M v EMEA [2009] ECR I-12033, paragraphs 39 and 40). ... As the Court has held, the principle of audi alteram partem must apply to all parties to proceedings before the CJEU, whatever their legal status. It follows that the EU institutions may also rely on that principle when they are parties to such proceedings (see, to that effect, Case C-89/08P Commission v Ireland 2 December 2009 ECR I-941 at paragraph 53). ... Thus, it is therefore incorrect in arguing that, being a public institution, the Commission cannot rely on a right to equality of arms because that right is available only to individuals”.

28 See, now: Coöperatieve Producentsenorganisatie van de Nederlandse Kakkelvleesindustrie UA v Netherlands (2009) 48 ECHR 181; non-admissibility decision of the ECHR, 20 January 2009; “[T]here is a presumption that a Contracting Party has not departed from the requirements of the Convention where it has taken action in compliance with legal obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty as long as the relevant organisation is considered to protect fundamental rights, as regards the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. As a corollary, this presumption applies not only to actions taken by a Contracting Party but also to the procedures followed within such an international organisation itself and, in particular, to the procedures of the European Court of
“57. ... [T]he Community Courts ... cannot base their decisions on a plea raised on its own motion, even one involving a matter of public policy and – as in the present case – based on the absence of a statement of reasons for the decision at issue, without first having invited the parties to submit their observations on that plea.

58. Moreover, in the analogous context of Article 6 of the ECHR, the Court of Justice has held that it is precisely in deference to that article and to the very purpose of every individual’s right to adversarial proceedings and to a fair hearing within the meaning of the provision that the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure be reopened, in accordance with Article 6 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see the order of 4 February 2000 in Case C-17/98 Emesa Sugar [2000] ECR I-665, paragraphs 8, 9 and 18, and Joined Cases C-270/97 and C-271/97 Deutsche Post [2000] ECR I-929, paragraph 30).”

64. It is not clear that in fact the Court of Justice has ever exercised its powers, in response to a request from a party, to reopen the oral procedure after the Advocate-General has delivered an opinion, even where it is stated that the Advocate-General misunderstood or misrepresented the relevant facts. Instead, the standard cut-and-paste response from the Court of Justice to any such request has been minor variations along the following lines:

“23. By letter received at the Court on 7 March 2008, Cassina requested the reopening of the oral procedure pursuant to Article 61 of the Rules of Procedure of the Court following the delivery of the Advocate General’s Opinion. Cassina submits, in particular, that the Advocate General founded her Opinion on a number of incorrect arguments, that she misinterpreted the Court’s case-law and that she failed to take into account all the facts relevant to the proceedings. Cassina accordingly wishes to submit further information to the Court.

24. In this connection, it must be pointed out that neither the Statute of the Court of Justice nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General’s Opinion (see, inter alia, Case C-259/04 Emanuel [2006] ECR I-3089, paragraph 15).

25. Admittedly, the Court may, of its own motion, on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-209/01 Schilling and Fleck-Schilling [2003] ECR I-13389, paragraph 19, and Case C-30/02 Recheio – Cash & Curry [2004] ECR I-1457, paragraph 12).

Justice. In that respect, the Court of Human Rights also reiterates that such protection need not be identical to that provided by Article 6 ECHR; the presumption can be rebutted only if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. Consequently, the Court of Human Rights must examine whether, in the present case, the procedure before the Court of Justice was accompanied by guarantees which ensured equivalent protection of the applicant’s rights. In that respect, it gives weight to the possibility offered by Rule 61 of the Court of Justice’s Rules of Procedure – a possibility which, in the light of the Advocate General’s advisory opinion in case C-212/06 Government of the French Community and Walloon Government v Flemish Government, must be accepted as realistic and not merely theoretical – to order the reopening of the oral proceedings after the Advocate General has read out his or her opinion if it finds it necessary to do so and to the fact, as apparent from the Court of Justice’s decision of 28 April 2004 in the present case, that a request for such reopening submitted by one of the parties to the proceedings is considered on its merits”.

180 See, e.g. Case C-210/06 Cartesio [2008] ECR I-9641 at [41]-[53], where the unsuccessful application to reopen the oral procedure was made by an intervening Member State, Ireland, rather than the direct parties in the preliminary reference from the Hungarian court.
26. However, the Court, after hearing the Opinion of the Advocate General, considers that in the present case it has all the information necessary to answer the questions referred.

27. Consequently, there is no need to order the reopening of the oral procedure.181

A PRACTICAL GUIDE TO
HUMAN RIGHTS LAW IN
SCOTLAND

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The Honourable Lord Reed

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CHAPTER 1

THE HUMAN RIGHTS ACT AND THE SCOTLAND ACT—THE NEW CONSTITUTIONAL MATRIX

The European Convention was formally brought into force in domestic Scots law in the same way as it was incorporated into the laws of England and Wales and of Northern Ireland, namely by the Human Rights Act 1998. Human rights considerations accordingly impact on individual substantive issues of law in Scotland, for example in areas such as family law, prisoners’ rights, privacy claims and delict, protection of property, employment law and criminal law and procedure, in a similar manner to their effect in the rest of the United Kingdom.

With the creation of a Scottish Parliament and the setting up of a Scottish Executive answerable thereto, however, the European Convention on Human Rights was given a different constitutional status in Scotland from the rest of the United Kingdom. Under the Scotland Act 1998, the rights guaranteed under the Convention effectively have the status of a higher law as against any legislation passed by the Scottish Parliament or any act of a member of the Scottish Executive. Given this different constitutional character, the domestication of the European Convention rights has a more immediate and significant impact in Scotland than in the rest of the United Kingdom.

The Scottish Ministers (other than the law officers) took up office with effect from May 6, 1999, but only began to exercise the functions encompassed in section 53 of the Scotland Act on July 1, 1999, being the “principal appointed day”. The Lord Advocate’s actions have, however, been subject to direct Convention rights scrutiny with effect from May 20, 1999, “Law Officer day”, when the offices of Lord Advocate and Solicitor General for Scotland were devolved and they became members, ex officio, of the Scottish Executive. Since that date decisions made by the Lord Advocate as head of the Crown Office, and as such responsible for criminal prosecutions and the investigation of fatal accidents in Scotland,

1 See Art. 2(2) and Sched. 3 to the Scotland Act 1998 (Commencement) Order 1998 (S.I.1998 No.3179)
2 See Art. 2(1) of the Scotland Act 1998 (Commencement) Order 1998 (S.I.1998 No.3179)
3 See Art. 2(2) and Sched. 4 to the Scotland Act 1998 (Commencement) Order 1998 (S.I.1998 No.3179)
became subject to review by the courts under the provisions of Schedule 6 to the Scotland Act 1998 insofar as raising “devolution issues”. Similarly, the devolved assembly and executive committees created under the Government of Wales Act 1998 have been made subject to Convention rights from the outset of their operation. Specific provision has also been made in Northern Ireland for the devolved institutions created by the Northern Ireland Act 1998 to work within the framework of respect for Convention rights.5

Such partial implementation of the Human Rights Act in the Celtic fringes of the United Kingdom has meant that prior to October 2, 2000, when the Human Rights Act was finally brought into force throughout the United Kingdom,6 there had already been a number of important decisions from the courts in Scotland as to the proper interpretation and application of the Convention rights. Courts and practitioners in Scotland were given a head start over those of the rest of the United Kingdom in these matters. Judgments from the Scottish courts on the Convention thus could provide a model for the other jurisdictions of the United Kingdom’s proper understanding and application of Convention rights in domestic law.

It must always be borne in mind in comparing Convention rights decisions across the United Kingdom jurisdictions, however, that in Scotland human rights have to be looked at and understood within the context of the dual framework of the Scotland Act and the Human Rights Act. This chapter will look at some of the issues raised by the inter-relationship between the Scotland Act and the Human Rights Act. It is the inter-relationship between these two constitutional statutes, and the new place that they give to the Scottish Judiciary, the Scottish Parliament and the Scottish Executive which will make the Scottish outlook on incorporation quite different from the rest of the United Kingdom.

THE HUMAN RIGHTS ACT 1998

The enumerated Convention Rights

1.02 The Human Rights Act 1998 incorporates into the domestic law of the United Kingdom a number of the rights set out in the European Convention on Human Rights and its associated protocols. Section 1(1) of the Act specifies that the following

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4 s.107 of the Government of Wales Act 1998
5 See ss. 6(2)(c) and 24(1)(a) of the Northern Ireland Act 1998.
The New Constitutional Matrix

rights, termed “Convention Rights”, have been translated from the Convention into domestic law:

- Article 2 guaranteeing the right to life;
- Article 3 prohibiting torture;
- Article 4 prohibiting slavery or forced labour;
- Article 5 guaranteeing a right to liberty and security of the person;
- Article 6 giving a right to a fair trial both in the determination of civil rights and obligations and in relation to criminal charges;
- Article 7 which incorporates the principle that there should be no punishment without law and in particular no retrospectivity in the definition of criminal offences;
- Article 8 guaranteeing a right to respect for private and family life;
- Article 9 upholding the right to freedom of thought, conscience and religion;
- Article 10 protecting the right to freedom of expression;
- Article 11 setting out the right to freedom of peaceful assembly and freedom of association including the right to form and join trade unions;
- Article 12 giving men and women of marriageable age the right to marry and found a family;
- Article 14 prohibiting discrimination in the enjoyment of the rights set out in the Convention “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”;
- Article 1 Protocol 1 guaranteeing the protection of property and the peaceful enjoyment of possessions;
- Article 2 Protocol 1 guaranteeing the right to education by the State in accordance with the philosophical and religious beliefs of parents, insofar as this is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure;
- Article 3 Protocol 1 setting out the right to free elections in the choice of legislature; and
- Article 1 and 2 of Protocol 6 prohibiting the use of the death penalty except in respect of acts committed in time of war or of imminent threat of war.

Articles 3 (prohibition against torture), 4 (prohibition on slavery and forced labour) and 7 (no retrospective criminal offences) are absolute unqualified rights and by virtue of Article 15(2) they may not be derogated from by the Contracting States. The liberty and due process provisions of Articles 5 and 6 may only be derogated from by the Contracting States in time of war or public emergency by virtue of Article 15(1). Articles 8 (privacy), 9 (freedom of religion), 10 (freedom of expression) and 11 (freedom of assembly), Protocol 1 Article 1 (right to property) and Protocol 1 Article 2
(right to education) are not absolute rights, but rather rights the exercise of which may lawfully be qualified or restricted by the Contracting States provided that these qualification or restrictions are justified in the sense of being proportionate responses which are "necessary in a democratic society". Article 12 (right to marry) may be exercised "according to the national laws governing the exercise of this right".

It should be noted that Article 13 of the Convention, which gives the right to an effective remedy before a national authority to everyone whose rights and freedoms, as set forth in the Convention, have been violated, notwithstanding that the violation has been committed by persons acting in an official capacity, has not been included among the Convention rights which have been incorporated by the Human Rights Act 1998 into domestic law. The explanation given for this omission by the promoters of the Bill which became the Human Rights Act was that the Act itself is intended to give effect to Article 13 and that there is accordingly no need for the courts to look outwith the parameters of the Act in order to provide appropriate remedies against possible violations of Convention rights.

The incorporation of certain rights taken from the European Convention is intended to supplement the existing body of individual rights guaranteed under the law. This is made clear by section 11(a) of the Human Rights Act 1998 which provides that a person's reliance on a Convention right does not restrict either his claim to the protection of any other right or freedom conferred on him by or under any other law in the United Kingdom.

The relevance of the Strasbourg jurisprudence

1.04 In coming to their decisions on the compatibility of acts or omissions of public authorities with any of the defined "Convention rights", the courts are enjoined by section 2 of the Human Rights Act to "take into account" all and any relevant decisions of the institutions established under the Council of Europe, namely the Court of Human Rights, the Commission on Human Rights and the Committee of Ministers. The Human Rights Act 1998 does not then, incorporate into United Kingdom law and bind the United Kingdom courts to the jurisprudence of the Strasbourg institutions. The apparently non-binding nature of the decisions of the Strasbourg Court on national courts is to be contrasted with the position of the European Court of Justice in matters concerning European Community law. National courts are obliged to decide cases involving matters of substantive Community law under the Treaty of Rome and associated treaties, or involving jurisdictional or conflict of laws question arising between the Member States under the Brussels and/or Rome Conventions, "in accordance with the principles laid down by and any relevant decision of the
European Court of Justice”. It may be that the non-binding nature of the general Strasbourg jurisprudence is intended simply to reflect the position under public international law under which a contracting state to the European Convention is bound only by judgments addressed to that State. Alternatively, it may be thought that since the European Court of Human Rights itself treats the Convention as a “living instrument” meaning that its interpretation of its provisions may change over time, it would not be appropriate to bind national courts to Strasbourg judgments which are not binding on the Council of Europe institutions themselves. The fact that domestic courts would appear not to be formally bound to apply the decisions of the European Court of Human Rights to the facts of the case before them, arguably leaves the way open for a national human rights jurisprudence to be pursued and for a native human rights culture to be developed.

In the decision of the Judicial Committee of the Privy Council in Montgomery and Coulter Lord Hope’s judgment on the substantive issue (as to whether or not the pre-trial publicity precluded the possibility of a fair trial) contains, in addition to references to numerous Scottish and English domestic authority, an impressive citation and analysis of New Zealand legal research and Strasbourg, Canadian, Australian and Irish case law, leading him ultimately to uphold the compatibility of the existing law approach on the matter of possible prejudice with the fair trial requirements of the Convention.

In the subsequent Privy Council decision in Brown v. Stott, however, it would appear that the Judicial Committee took a decision not to follow a developing Strasbourg jurisprudence as to the absolute nature of the privilege against enforced self-incrimination implicit in Article 6 seen, most notably, in the following decisions of the European Court of Human Rights, Funke v. France, where the Strasbourg Court found that the imposition of fines by the French customs authorities against an individual in

7 See s.3(1) of the European Communities Act 1972, s.3 of the Civil Jurisdiction and Judgments Act 1982 and s.3 of the Contract (Applicable Law) Act 1990.
8 See, for example, Pellégrin v. France, unreported decision of the EctHR, December 8, 1999, accessible at www.dhcour.coe.fr/hudoc in which the Strasbourg Court explicitly reversed its earlier case law and found that Art. 6(1) fair trial rights might be prayed in aid in certain categories of public sector employment.
10 As laid down in Stuurman v. H.M. Advocate, 1980 J.C. 111 at 122, namely whether or not there was a substantial risk of prejudice so grave that no direction of the trial judge, however careful, could reasonably remove it.
respect of his failure to disclose documents concerning financial transactions violated Article 6(1) ECHR; and "Saunders v. United Kingdom" in which the use at a subsequent fraud trial of transcript of even non-self-incriminating evidence taken from the accused by DTI inspectors acting in relation to the investigation of company take-overs under compulsory powers was found to contravene Article 6(1) ECHR.

The Privy Council decision in "Brown v. Stott" makes one thing clear, at least, past case law, whether from the Strasbourg institutions, from other constitutional or human rights courts or from their domestic courts, should therefore not be applied mechanistically or with an undue emphasis on the rules of precedent. Previous cases should not be seen as establishing the extent of a Convention right—they simply provide examples of its application in particular circumstances. When faced with a Convention argument it may be argued that the courts have always sought to ensure "a fair balance between the general interests of the community and the requirements of the protection of individual fundamental rights", having regard to the particular circumstances before them and the consequences which might flow from their particular decision. In the early days of wrestling with human rights arguments there will clearly be a temptation for practitioners and the courts to elevate dicta of the European Court of Human Rights into binding pronouncements on the law, in a manner which may perhaps be criticised in the light of "Brown v. Stott" as overly deferential to that court. At the same time, however, it would appear that the Judicial Committee also wish proper account should be taken of the effect and import of, for example, the Commission's (and post-Protocol 11 Court) of Human Rights and they should not be summarily dismissed as of little or no account because considered to be "obscurely reasoned". The question that remains is whether an approach to the case law of the Strasbourg Court which, on the apparent basis of the considerations derived from the "margin of appreciation" of the national institutions, seems to allow for a lower standard of protection for the Convention right against self-incrimination than that set out by the European Court of Human Rights in "Funke" and "Saunders", is itself compatible with the requirements of the Convention. This question can ultimately only be answered by a decision of the Strasbourg court.15a

15a In "Alconbury" [2001] U.K.H.L. 23, Lord Slynn of Hadley observed at para. 30 of his judgment that "in the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not so do there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence."
Margin of appreciation in Strasbourg case law

Another reason for treating the case law emanating from the Strasbourg institutions with some degree of care, and in order to guard against the ready assumption that Strasbourg decisions should be followed automatically and applied uncritically by the United Kingdom courts considering Convention points, is the influence of the doctrine of the Contracting States' "margin of appreciation" on some of these decisions.16 This doctrine was explained in one case before the Court of Human Rights as follows:

"By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions."17

It might be thought that the decisions of domestic courts considering human rights points should be less trammelled by the Strasbourg institutions' deference to the contracting states' "margin of appreciation" since they are in contact with the vital forces in their countries.18 David Pannick Q.C. has, however, suggested that it might be appropriate for there to be a local translation of this doctrine as follows:

"Although the doctrine of margin of appreciation will not apply (being concerned with the circumstances in which an international court should substitute its judgment for that of a national court), the courts applying the Human Rights Act should recognise an analogous doctrine which will accord a discretionary area of judgment in relation to policy decisions which the legislature, executive and public bodies are better placed than the judiciary to decide."19

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18 For an example of a more robust approach taken by national courts to the decisions of the national administration where human rights issues are raised see Salah Abbadou v. Secretary of State for the Home Office, 1998 S.C. 504, 1999 S.L.T. 229, (OH) per Lord Eassie in which he displays an apparently more sceptical approach than that in the Strasbourg Court's case law, to the States' "margin of appreciation" in immigration and asylum cases
Prior to the “bringing home” of the Convention rights there was growing awareness among practitioners and judges that the classic choice between either high “Wednesbury unreasonableness” as traditionally defined, and the standards of ordinary reasonableness, with judges substituting their views for those of the administrator was insufficient if judicial review was to be properly responsive to the requirements of the changing constitution. In fundamental rights cases, the phrase a “most anxious scrutiny” came to be used in relation to the courts reviewing the administration’s actions as a recognition that “the more substantial the interference with human rights the more the court will require by way of justification before it is satisfied that the decision is reasonable” 20 in the sense of it actually falling within the range of responses open to a reasonable decision maker. 21 With the coming into force of the Human Rights Act, however, things have changed. By virtue of section 6(1) of the Human Rights Act (discussed below) the acts and omissions of a public body in breach of a Convention right are no longer to be characterised in judicial review terms as a species of “irrationality” and thus subject to the high hurdle of Wednesbury unreasonableness, 22 but rather have to be regarded as a form of illegality and thereby made subject to a stricter scrutiny by the courts examining whether or not the decision maker has, in fact, acted in a manner which is compatible with Convention rights. This means that the Strasbourg doctrine of proportionality rather than “irrationality” is directly imported into domestic consideration of challenges to public authorities on Convention grounds. 22a

It is, however, implicit within the doctrines of proportionality and the “margin of appreciation” that a weighing of individual
rights against considerations of the common good is followed.\textsuperscript{23} But the adoption of the proportionality test should not mean the simple substitution of the court’s views for that of the decision maker, as this would be to replace judicial review by a substantive appeal. Although there is no explicit hierarchy of rights within the Convention, in practice, it may be that the national courts, guided by some of the Strasbourg Court’s own jurisprudence, will develop an informal weighting of the relative importance of these fundamental rights in the event of a possible clash between them—for example as between the fair trial rights of property developers under Article 6(1) and the rights of neighbours to an acceptable environment implicit in Article 8, or between the press’s free expression rights under Article 10 and an individual’s right to privacy under Article 8. In coming to his decision in \textit{Montgomery and Coulter}, however, Lord Hope noted (at pages 40-41):

“Article 6, unlike Articles 8 to 11 of the Convention, is not subject to any words of limitation. It does not require \textbf{nor indeed does it permit} a balance to be struck between the rights which it sets out and other considerations such as the public interest.”

By contrast, in \textit{Brown v. Stott}, a different approach to Article 6 is evident. Lord Bingham states (at page 31) that:

“The jurisprudence of the European Court [of Human Rights] very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for.”

Lord Steyn states (at 37):

“[A] single minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant

\textsuperscript{23} Thus the (Luxembourg based) Court of Justice of the European Communities commonly uses a variation on the following formula (in this instance found in Case 5/88 \textit{Wachauf v. Germany} [1989] E.C.R. 2609 at para. 18) when discussing fundamental rights: “The fundamental rights recognised by the Court are not absolute however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights ... provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.”
European democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited; we live in communities of individuals who also have rights.

And Lord Hope notes (at 55):

"[T]he European Court [of Human Rights] and the European Commission [of Human Rights] have interpreted...Article 6 broadly by reading into it a variety of other rights to which the accused is entitled in the criminal context. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. They include the right to silence and the right against self-incrimination with which this case is concerned. As these other rights are not set out in absolute terms in...Article 6 they are open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial."

1.09 The approach of the Judicial Committee in Brown was therefore directed at the question as to whether the provision in question represented a "disproportionate response to a serious social problem" given that (per Lord Bingham at 34) "the possession and use of cars (like for example, shotguns, the possession of which is very closely regulated) are recognised to have the potential to cause grave injury". None of the five judges had any difficulty in finding, in the light of the statistics presented to them for death and injury on the roads, that requiring the registered keeper of a vehicle to advise as to the identity of the driver of his or her car was a disproportionate measure, even if it meant the keeper being compelled to incriminate herself. This apparent readiness of the Privy Council in Brown v. Stott to find in favour of the Crown claims as to the proportionate nature of the legislative measure under challenge, and to hold that the individual's privilege against self-incrimination could properly be limited by the State highlights the fact that the importation of the European test of proportionality, long advocated by civil libertarian lawyers, may be something of a double-edged sword. The traditional black letter law approach to judicial review was concerned not with the merits of the particular decision as such, but with the decision making process, and by a strict and formal approach in favour of those affected by the decision, which emphasised the legal limits on the jurisdiction of the decision maker and the need for procedures of fairness could properly be taken by the courts, concerned as they were to police decisions rather than to make them. With the doctrine of proportionality, however, the courts are concerned with the merits of the decision in question and, in particular, with whether or not, (i) the decision or measure in question is in fact aimed at a legitimate end; (ii) the decision or measure is effective in achieving that end; and (iii) the decision or measure shows a proportionality of response in the light of the circumstances of the case..."
regard for, and balance, of the rights of the individual against the interests of society. Given the balancing exercise required in this last aspect of the proportionality, the procedural and substantive rights of the individual can no longer be regarded as the trump cards they were under the older model of judicial review. Accordingly, the doctrine of proportionality may, in fact, lead to greater rather than less deference by the courts to administrative and legislative decisions, than might have been expected under the older constitutional model, under which individual's substantive and procedural rights in effect ring-fenced against the whims of the decision maker.

A similar balancing exercise, treating the individual fundamental rights protected under Community law as “non-absolute” but important factors in coming to their decision, was adopted by the House of Lords in *R v. Chief Constable of Sussex, ex parte International Traders’ Ferry*. Domestic courts dealing with arguments concerning at least the non-absolute Convention rights will have to develop new doctrines of due deference in the interests of continued good government following the coming into force of the Human Rights Act.

The interpretative obligation and the indirect effect of Convention rights

In Scots law it is accepted that there is now a presumption in the common law that Parliament intends to legislate in conformity with its international commitments, including the Convention, and that where a statutory provision is susceptible of more than one interpretation the court should give it the construction which complies most closely with those commitments. As Lord President Hope stated in *T, Petitioner*:

“[W]hen legislation is found to be ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the [European] Convention, Parliament is to be presumed to have legislated in conformity with the Convention, not in conflict with it.”

Thus in *O’Neill v. H.M. Advocate* the criminal appeal court made reference to and relied upon certain of the case-law of the European Court of Human Rights in the context of the proper interpretation of the requirements of section 2(6) of the Prisoners’ and Criminal Proceedings (Scotland) Act 1993. In its judgment in the appeal, substituting a period of three years for the seven years

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imposed by the trial judge, the court observed that an exact decision in the matter in Robertson v. H.M.Advocate\(^27\) in which the purpose of the statutory provisions in question had been discussed without reference to this Strasbourg case law and had been made per incuriam.

The decision of the High Court in O’Neill illustrates the importance of the Convention even prior to its incorporation where failure to make reference to it and its associated case law actually led to a misunderstanding and misapplication of provision of national law. The point about the decision in O’Neill is that the court finds to be the correct meaning of the legislation, a purposive one which ensure convention compatibility, rather than the literal or plain meaning of the wording provision without reference to Convention considerations, such as appears to have been favoured in the decision in Robertson.

This common law doctrine of purposive construction of national legislation in line with the requirements of the Convention and decisions of the European Court of Human Rights has now been given statutory backing by section 3 of the Human Rights Act 1998. This provision, echoing the language of Lord Hope in \(T v. Petith\) restates the duty on all domestic courts and tribunals, so far as is possible, to do so, to read and give effect to all primary and subordinate legislation in a way which is compatible with the Convention rights which have been incorporated into United Kingdom domestic law by the Human Rights Act.

The Lord Chancellor, Lord Irvine of Lairg, has made a parallel with the interpretative obligation already imposed under Community law,\(^28\) and has emphasised the strength of the interpretative obligation placed on the courts by the Human Rights Act as follows:

>“The [Human Rights] Act will require the courts to read and give effect to the legislation in a way which is compatible with Convention rights ‘so far as it is possible to do so’. This...goes far beyond the present rule. It will not be necessary to find ambiguity. On the contrary the courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so....The court will interpret as consistent with the Convention...”

\(^27\) Robertson v. H.M.Advocate, 1997 S.C.C.R. 534 at 541C-D

\(^28\) See Litster v. Forth Dry Dock Co. Ltd, 1990 S.C. (H.L.) 1, per Lord Oliver of Aylmerton at 30: “[T]he greater flexibility available to the court in applying a purposive construction to legislation designed to give effect to the United Kingdom’s Treaty obligations to the Community enables the court, where necessary, to supply by implication words appropriate to comply with those obligations...Having regard to the manifest purpose of the regulations I do not for my part feel inhibited from making such an implication in the instant case.”
not only those provisions which are ambiguous in the sense that the language used is capable of two different meanings but also those provisions where there is no ambiguity in that sense unless a clear limitation is expressed. In the latter category of cases it will be 'possible' (to use the statutory language) to read the legislation in a conforming sense because there will be no clear indication that a limitation on the protected right was intended so as to make it 'impossible' to read it as
conforming.”

There is of course an ambiguity about the word ambiguity. Strictly the word means something capable of bearing two or more meanings. It is often used by the courts as if it meant that two
possible meanings were in the context of ordinary language use equally possible or convincing. This is, however, arguably to
confuse the ambiguous with the equivocal. Aside from the
interpretative obligation imposed by section 3 of the 1998 Act the
meaning of the provision might be said to be clear or obvious, and
in that sense unequivocal. This interpretative provision of the 1998
Act requires the courts to attempt, so far as possible, to interpret the
national provision in accordance with Convention rights. The
interpretative provision, however, requires the courts to attempt, so
far as possible, to interpret the national provision in accordance with
Convention rights. As Lord Hope noted in R v. Director of
Public Prosecutions, ex parte Kebeline:

“In Attorney General of Hong Kong v. Lee Kwong Kut [1993]
AC 951 at 966, Lord Woolf referred to the general approach to
the interpretations of constitutions and bills of rights in the
previous decisions [of the Judicial Committee of the Privy
Council] which he said were equally applicable to the Hong
Kong Bill of Rights Ordinance 1991.” He mentioned Lord
Wilberforce’s observation in Minister of Home Affairs v. Fisher
[1980] AC 319 at 328 that instruments of this nature call for a
generous interpretation suitable to give individuals the full
measure of the fundamental rights and freedoms referred to,
and Lord Diplock’s comments in Attorney General of the
Gambia v. Momodou Jobe [1984] AC 696 at 700 that a generous
and purposive construction is to be given to that part of the
constitution which protects and entrenches fundamental rights
and freedoms to which all persons in the State are to be entitled.
The same approach will now have to be applied in this country
where issues are raised under the Human Rights Act 1998 about
the compatibility of domestic legislation and of the acts of public

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30 Lord Irvine of Lairg “The Development of Human Rights in Britain under an
incorporated Convention on Human Rights” [1998] Public Law 221 at 228-9
31 See, now, Nicholas Roberts “The Law Lords and Human Rights: the experience
authorities with the fundamental rights and freedoms which are enshrined in the Convention.”

1.12 The provision in question, then, has to be at least capable (but not necessarily reasonably capable) of bearing such a Convention compatible meaning as well as (but not more obviously than) another prima facie meaning. In that sense a possible reading in accordance with the Convention may be said to render the provision ambiguous. The resolution of the matter seems to be as follows;

- in the absence of any Convention rights element, then the ordinary language canons of statutory construction should be applied to elucidate Parliamentary intention;
- where there is a Convention right element, however, a construction of the provision in question which accords with the requirements of the Convention should be favoured over even the ordinary language “obvious” or prima facie construction, however strained or artificial this may seem;
- it is only where the statutory language is so phrased as to make it impossible to construe the provision in accordance with the requirements of the protection of the Convention right, that the statute may be construed as in contravention of the Convention.

1.13 In summary, in contrast to clear and precise provisions of Community law, the rights incorporated from the European Convention by the Human Rights Act do not have “direct effect” against contrary Westminster legislation in the way that that term is understood in Community law as allowing the suspension of disapplication of contrary provisions of national law. Direct effect involves the assertion of rights which have been conferred by

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32 Compare with the position under Community law as seen in Garland v. British Rail Engineering [1983] 2 A.C. 751 in which Lord Diplock observed (at 770-I) that unless an Act of Parliament passed after the U.K.’s accession to the European Community expressly stated that it was passed with the intention of breaking Community obligations, then U.K. legislation should be construed in a manner consistent with Community law “however wide the departure from the prima facie meaning of the language of the provision might be needed to achieve consistency.”

33 See, again in the context of Community law, Litster v. Forth Dry Dock Co Ltd. 1990 S.C. (H.L.) 1, per Lord Oliver of Aylmerton at 27: “If your Lordships are in fact compelled to the conclusion [that the regulations are gravely defective and the Government of the United Kingdom has failed to comply with its mandatory obligations under the Directive], so be it; but it is not, I venture to think, a conclusion which any of your Lordships would willingly embrace in the absence of the most compulsive context rendering any other conclusion impossible.”

Community law but which, by definition, national law does not adequately reflect. It requires the national court to displace, rather than to uphold, the terms of national law. Sympathetic interpretation or indirect effect, on the other hand, is available, in the case of both Community law and Convention rights. The argument for sympathetic interpretation asserts that national legislation does indeed fully reflect the demands of the incorporated Convention rights if only the national court would interpret it in the manner required by section 3 of the Human Rights Act.34a

Thus, in the decision of the High Court of Justiciary sitting as a court of criminal appeal of three judges in Brown v. Stott,35 Rodger L.J.-G expressed the view (which was not reversed in the successful Crown appeal to the Privy Council) that the appropriate manner of proceeding in such cases where Convention rights were prayed in aid against provisions of primary Westminster legislation (in casu the privilege against self-incrimination implicit in Article 6(1) against section 172 of the Road Traffic Act 1988 authorising the police to require information of the registered keeper as to the identity of the driver of his or her vehicle), was for the following steps to be followed:

(i) first, the court was to “identify the scope” of the Convention right or rights relied upon in the circumstances of the case;
(ii) secondly, the court should consider whether the statutory provision at issue was, on its “established construction”, compatible with that Convention right. If it is then the established construction may be applied.
(iii) If, however, the established construction is found to be incompatible with the Convention right relied upon in the case, the court should then turn to consider whether or not the statutory provision could nevertheless be “read down” so as to make it compatible with the Convention right (see section 3 of the Human Rights Act 1998);
(iv) it is only where the statutory provision of (or made under) primary Westminster legislation cannot be read or given effect to in a way which is compatible with the Convention rights that a public authority could rely on section 6(2)(b) of the Human Rights Act (discussed below) and give effect to or enforce the national provisions, notwithstanding their incompatibility with the Convention.

The decision of the Employment Appeal Tribunal in MacDonald v.

34 See R. v. A [2001] U.K.H.L. 25 for an example of the House of Lords straining to give a Convention compatible interpretation of statutory provisions (s.41 of the Youth Justice and Criminal Evidence Act 1999) which seek severely to restrict the possibility of a complainant in a rape trial from giving evidence or being cross-examined as to any past sexual behaviour, including the existence of a sexual relationship with the defendant.
1.7 MOD, provides a recent example of the impact that human rights considerations might have on traditional methods of statutory construction. In the light of decisions from the European Court of Human Rights to the effect that dismissal of service personnel from the Armed Forces on grounds of their homosexuality contravened their Article 8 rights and that the Article 14 prohibition on discrimination covered discrimination on grounds purely of sexual orientation, the Employment Appeal Tribunal in Scotland persuaded to re-read the Sex Discrimination Act 1975 contrary established English authority so that the statutory phrase “discrimination on grounds of her sex” was held to cover not only discrimination on grounds of an individual’s gender but also grounds of his or her sexual orientation.

Declarations of incompatibility of primary Westminster legislation

1.14 Where it is not possible to read Westminster primary legislation in a manner which is compatible with Convention rights, section 3(2) provides that the legislative provisions in question remain valid, operative and enforceable. In contrast to the situation when there is an incompatibility with Community law, national courts are not empowered, even after incorporation of the Convention, to “disapply” or suspend primary statutory provisions emanating from the Westminster Parliament which contravene Convention rights.

If the court is satisfied that the provision cannot be “read down” so as to make it compatible with the relevant Convention right, it may then make, effectively as a last resort, a “declaration of incompatibility” under section 4(2) of the Human Rights Act 1998. Section 4 of the Act gives only the higher domestic courts in Scotland, that is the Court of Session or the High Court of Justiciary sitting as a court of criminal appeal) the power to make declarations as to the incompatibility of the national provision with the Convention rights as incorporated.

41 The E.A.T. decision was subsequently overturned by a 2–1 majority decision on appeal to the Inner House: see Advocate General for Scotland v. Macdonald, 2001/1, unreported decision of Lords Prosser, Kirkwood and Caplan accessible at www.scotcourts.gov.uk/
42 The other “higher courts” for the purposes of the power to make “declarations of incompatibility” are the House of Lords, the Judicial Committee of the Privy Council, the Courts-Martial Appeal Court and in England and Wales the High Court and the Court of Appeal.
In the case of a provision of secondary legislation, such a declaration of incompatibility is appropriate only where this provision is itself protected from amendment by primary legislation of the Westminster Parliament. The principle of ultimate Westminster Parliamentary sovereignty is said thereby to be maintained. As Lord Irvine of Lairg has stated:

"This innovative technique will provide the right balance between the judiciary and [the Westminster] Parliament. [The Westminster] Parliament is the democratically elected representative of the people and must remain sovereign. The judiciary will be able to exercise to the full the power to scrutinise legislation rigorously against the fundamental freedoms guaranteed by the Convention but without becoming politicised. The ultimate decision to amend [primary Westminster] legislation to bring it into line with the Convention, however, will rest with [the Westminster] Parliament. The ultimate responsibility for compliance with the Convention must be [the Westminster] Parliament's alone."\(^{41}\)

Where a higher court is considering whether or not to make a declaration of incompatibility, section 5 of the Act gives the Crown the right to be notified of this and under section 5(2) allows a Minister of the Crown or his nominee, as well as a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland Department to intervene in any such case as parties to the proceedings after giving due notice to the court.\(^{41a}\)

Such a declaration of incompatibility by the courts will, by virtue of section 4(6)(a) of the Act, have no effect on the validity, continuing operation or enforceability of the offending legislative provision. Further, section 4(6)(b) provides that any declaration of incompatibility is not binding on the parties to the proceedings in which it is made. The obtaining of a declaration of incompatibility will therefore be a Pyrrhic victory for the party in whose favour it is granted unless the applicable law is changed with retrospective effect in his case.\(^{42}\) It is therefore of no immediate assistance to the person challenging the national provision, although pressure group led litigation may present such a result as a political or moral victory. As the Lord Justice General put it in Brown v. Stott, "irremediable incompatibility assists the Crown".

\(^{41}\) Lord Irvine of Lairg "The Development of Human Rights in Britain under an incorporated Convention on Human Rights" [1998] Public Law 221-236 at 225

\(^{41a}\) In Wilson v. First County Trust (No. 2), May 2, 2001, CA, unreported decision of Sir A. Morriss V.C., Chadwick and Rix L.JJ., the Court of Appeal of England and Wales made a s.4 declaration of incompatibility in relation to provisions of the Consumer Credit Act 1974 which gave undue protection to consumers.

1.15 Questions as to the compatibility or otherwise of national legislation with the requirements of the Convention raise new problems of interpretation for the courts, notably in the case where the court is required to determine the justifiability of a national provision as a lawful and proportionate restriction (“necessary in a democratic society”) in relation to such non-absolute Convention rights as those set out in Article 8(2) (privacy and respect for family life), Article 9(2) (manifestation of religious beliefs), Article 10 (freedom of expression) and Article 11 (freedom of peaceful assembly and association including the right to form trade unions and Protocol 1 Article 1 (right to property). As has been noted:

“The determination of whether a legislative provision is compatible with a Convention right will require a court to interpret the allegedly incompatible provision as well as determining the meaning of the right that gives rise to the allegation of incompatibility. Moreover a court may be required to determine whether the interests served by an allegedly incompatible piece of legislation justify the restriction or interference with the Convention right, thus rendering the piece of legislation compatible. Where a court is required to determine the interests served or protected by the alleged incompatible legislative instrument, thereby determining whether the purpose of the instrument is compatible with the values protected and upheld by the Convention, it will be required to grapple with what are known as ‘legislative facts’.\(^\text{43}\)

1.16 Any final declaration of incompatibility, that is one against which no right of appeal exists or is being exercised, gives Ministers of the Crown the power to order under section 10 such amendment to, or repeal of, the primary or secondary legislation in question as they think is appropriate to remove the incompatibility. A remedial order may also be pronounced by a Minister of the Crown if it appears to him or her that a finding of the European Court of Human Rights produces an incompatibility with the United Kingdom's Convention obligations. Any such remedial order will require the approval of Parliament under the affirmative resolution procedure, all as set out in Schedule 2 to the Act. In cases of urgency, however, such approval may be made \textit{ex post facto} up to 40 days later.

It is to be assumed that the decision as to whether or not to make any such remedial orders, and whether or not to make any such order, with or without retrospective effect, will itself be subject to judicial review by the courts. The effect of section 6(6) of the Act

(discussed below) may simply be to prevent a review of any such omission being made on human rights grounds, and on that point at least avoid the possibility of an unending spiral of litigation.

It should be noted that in contrast to the position in relation to primary Westminster legislation, a provision of subordinate legislation relied upon by a public authority which is found to be incompatible with the Convention (whether emanating from Westminster, Holyrood or Cardiff) would seem, by contrast, to be impliedly repealed to the extent of its incompatibility, except where there is a provision of primary Westminster legislation which prevents such a reading of the secondary provision in question.

Section 101 of the Scotland Act 1998, however, seeks to give specific guidance to the courts in their approach to the interpretation of provisions of both Bills and Acts of the Scottish Parliament as well as of any subordinate legislation emanating from a member of the Scottish Executive. On the face of it, the effect of section 29(2)(d) and section 57(2) of the Scotland Act is that all and any legislation emanating from the Scottish Parliament or the Scottish Executive will be void because ultra vires insofar as it is incompatible with any of the Convention Rights. Section 101 of the Scotland Act however requires the courts to seek to avoid a finding that any such provision is ultra vires, by interpreting any provision which could be read in such a way as to put it outside either the legislative competence of the Parliament or the powers conferred on members of the Scottish Executive under the Act “as narrowly as is required for it to be within competence, if such a reading is possible” and to give effect to it accordingly. Further, standing the inclusion both of Acts of the Scottish Parliament and of any “order, rule, regulations, scheme, warrant, by-law or other instrument made by a member of the Scottish Executive” in the definition of “subordinate legislation” set out in Section 21 of the Human Rights Act 1998, the courts will also be required by section 3(1) of that Act to interpret and apply Scottish legislation so far as it is possible to do so “in a way which is compatible with the Convention rights.”

Public/Private Distinction under the Human Rights Act

Section 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority to act (or, by virtue of section 6(6), to fail to act) in a manner which is incompatible with a Convention right. Section 6(3) defines a “public authority” as including “any person certain of whose functions are functions of a public nature”. Section 6(5) provides, however, that in relation to a particular act or omission, a person will not be regarded as a public authority if the nature of the act or omission is private. This would seem to mean, on the face of

it, that the Convention rights incorporated by the Human Rights Act 1998 will not be able to used directly against private parties and will not provide a whole new list of additional rights which might directly be prayed in aid in private litigation. As the Lord Chancellor noted in the Second Reading of the Human Rights Bill before the House of Lords:

"[Section 6 of the Human Rights Act] should apply only to public authorities, however defined, and not to private individuals. That reflects the arrangement for taking cases to the Convention institutions in Strasbourg. The Convention had its origins in a desire to protect people from the misuse of power by the State, rather than by actions of private individuals."\(^45\)

The distinction between "public bodies" and "private acts" is not always an easy one to draw and indeed, has generated a considerable amount of case law, particularly in English law where, in contrast to the position in Scotland post-West v. Secretary of State for Scotland,\(^46\) this distinction is used to delimit the availability of judicial review. In effect, this statutory definition of reviewability under the Human Rights Act seems to be extending throughout the United Kingdom the public/private law test developed by the House of Lords as the basis for general judicial review in England and Wales.\(^47\)

"Public authority" as defined in the Act specifically excludes both Houses of the Westminster Parliament, as well as persons "exercising functions in connection with proceedings" in that Parliament. Section 6(6) provides that the failure to introduce or lay before the Westminster Parliament a proposal for legislation to make any primary legislation or remedial order will not constitute an act which, for the purposes of the Human Rights Act at least, requires to be compatible with a Convention right.

**Justified breach of the Convention**

1.18 Section 6(2) of the Act allows for the possibility of justified breach

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\(^{45}\) House of Lords Debates, November 3, 1997, vol. 582 columns 1231–1232

\(^{46}\) West v. Secretary of State for Scotland, 1992 S.C. 385, (IH)

of the Convention where, as a result of a provision of primary Westminster legislation the authority in question could not have acted differently or where it was acting to give effect to or to enforce a provision of or made under primary legislation which cannot be read in a manner compatible with Convention rights. In such a case the court cannot make a finding that the authority has acted illegally in breach of the requirements of the Convention.

Section 107(4)(a) of the Government of Wales Act and sections 71(3)(a) and 71(4)(a) of the Northern Ireland Act effectively place the Welsh Assembly and the Northern Ireland Assembly and Northern Ireland Ministers and Department in the same position as any other public authority under section 6(2) of the Human Rights Act 1998. Significantly, however, there is no such general tie in to section 6(2)(b) of the Human Rights Act in the case of the Scottish Parliament or Scottish Executive, although section 57(3) of the Scotland Act allows the Lord Advocate when prosecuting any offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland to rely upon this provision of the Human Rights Act allowing for justifiable breach of Convention rights. The implications of this will be considered below.

Courts as "public authorities"—the effect on the common law

Under the European Convention, national courts are regarded by the Strasbourg court as organs or emanations of the Contracting States. The national courts themselves, then, have a duty, under Article 1 ECHR, to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention. They are also required, under Article 13 ECHR, to ensure that there exists an effective remedy against what the European Court of Human Rights consider to be violations of the Convention rights and freedoms. Thus, in Markt Intern v. Germany the Strasbourg court found that the granting of an injunction by a German court on an application by a commercial competitor constituted an interference by a public authority with the applicant's free expression rights. Similarly, in Tolstoy v. United Kingdom the non-review by the judges of the excessively high level of a jury award of damages in a defamation case in England was held to constitute a disproportionate interference by the courts with the applicant's Convention rights, notably his right to freedom of expression under Article 10.

Section 6(3)(a) of the Human Rights Act 1998 follows this line of jurisprudence by providing that a court or tribunal is a public authority for the purposes of the Human Rights Act. In defining

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“public authority” to include courts and tribunals, the 1998 Act requires them to act and come to their decision in a manner which is compatible with a Convention Rights. In the discharge of their functions, then, the courts are themselves directly forbidden by the Human Rights Act 1998 from acting in any manner which is incompatible with the Convention Rights. The implications of this statutory definition are potentially revolutionary—arguably the Human Rights Act now requires courts to act in a manner which is compatible with the rights guaranteed under the Convention, regardless of the public or private nature of the parties appearing before it. In effect, the courts are arguably themselves required to act in a manner which is compatible with the Convention rights (each of) the parties appearing before them. As the Lord Chancellor also noted when the Human Rights Bill was under consideration by the House of Lords:

“We...believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not? In preparing the Bill, we have taken the view that it is the other course, that excluding Convention considerations altogether from cases between individuals, which would have to be justified. We do not think that it would be justifiable; nor indeed do we think would be practicable.”

1.20 What this may mean is that the Human Rights Act is not simply incorporating the European Convention in the sense that it is making the existing international obligations of the State directly enforceable in the domestic courts (what in a Community law context is known as “vertical direct effect”) but is in fact transposing by virtue of an interpretative obligation, what were the international obligations of the State into obligations owed by every individual within the State to one another (what Community law writers refer to as “horizontal indirect effect”) and, in effect, making what were constitutional public law norms applicable and enforceable within the purely private sphere.

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An alternative view is that the effect of section 3 and 6 of the Human Rights Act is to require the courts to develop the common law in conformity with the requirements of the Convention. Thus, while it will not be possible to say that an act or omission of a private party is unlawful purely and simply because it violates a Convention right (“horizontal direct effect”), it may be possible for the first time to say that an act or omission of a private party is unlawful because it is contrary to legislation (or is unauthorised by legislation) construed in accordance with section 3, or is contrary to the common law developed in accordance with section 6 (“indirect effect”).

Further, existing doctrines of precedent and the binding nature of past judgment of higher courts may themselves require to be subordinated to the requirements of the Convention. In other words, the courts may have to adapt their past law (reversing or distinguishing contrary precedents where necessary) to ensure that the law they apply is compatible with the full and proper protection of the Convention rights. By imposing a new rule of statutory interpretation, section 3 of the Human Rights Act renders pre-Human Rights Act decisions (insofar as based upon a different rule of statutory interpretation) ipso facto distinguishable. The statutory duty under section 3 requires all courts to interpret legislation in a new way, and they cannot be prevented from so doing by precedent. An even more radical interpretation of section 6 is that any court before which the protection of a Convention right is properly and relevantly raised will have the duty, if it considers the complaint to be well-founded, to “disapply” any contrary prior authority which might otherwise be binding upon it, in similar manner to the power already available under Community law wholly to subordinate existing doctrines of precedent and the binding nature of the past judgments of higher courts to the requirements of the Convention.


51a For arguments to this effect see J.A.Pye (Oxford) Ltd v. Graham, February 5, 2001, CA, unreported decision of Mummery L.J., Keen L.J.
As Francis Bennion has noted:

“No pre-1998 Act court decision on the legal meaning of an enactment to which a Convention right is relevant can now stand unexamined. Even though it truly reflected the intention Parliament had when passing the enactment, the decision need not to be looked at again in the light of [the interpretative obligation set out in] Section 3(1). Parliament’s original intention is no longer the sole deciding factor. While it retains its importance, it must now be reassessed in the light of the new rule. For pre-1998 Act enactment the interpretative criteria can therefore be ultimately reduced to legislative intention plus [Convention] compatible construction rule, to which must now be added the fundamental rights criterion [set out by Lord Hope in R v. Director of Public Prosecutions, ex parte Kebelit and others [1999] 4 All ER 801 at 838-839].”

Procedure for raising Convention points in domestic courts

1.22 Section 7(1) of the Human Rights Act provides that a person who claims that a public authority has acted or proposes to act in a way which is incompatible with a Convention right may (a) either rely on the Convention as a sword by bringing proceedings (including counter-claim) against the authority under the Act in the appropriate court or tribunal or (b) may use the Convention as a shield or defence by relying on it in any legal proceedings, including appeals, against a decision of a court or tribunal. Regulation 3 of the Human Rights Act 1998 (Jurisdiction)(Scotland) Rules 2000 provides that

“insofar as not determined by any enactment [for example section 65(2)(a) of the Regulation of Investigatory Powers Act 2000] the appropriate court or tribunal for the purpose of Section 7(1)(a) of the Act [bringing proceedings against a public authority] is any civil court or tribunal which has jurisdiction to grant the remedy sought.”

Section 22(4) provides that the Convention rights may be used defensively in any proceedings brought by or at the instigation of a public authority whenever the act in question took place, but that otherwise they cannot be so used as regards any act or omission prior to October 2, 2000, when the Act came fully into force.

54 Francis Bennion “What interpretation is ‘possible’ under Section 3(1) of the Human Rights Act 1998”[2000] P.L. 77 at 91
section 11(b) provides that a person's reliance on a Convention right does not restrict his right to make any claim or bring any proceedings which he could make apart from the provisions of the 1998 Act.

In the absence of any rule imposing a stricter time limit in relation to the procedure in question (for example, the three months from the effective date of termination in relation to complaints of unfair dismissal claims brought before Employment Tribunals which is fixed by section 111 of the Employment Rights Act 1996) section 7(5)(a) sets a time limit for the bringing of proceedings against a public authority alleging action or inaction incompatible with a Convention right.

Section 7(5)(b), however, gives the court a discretion or power to extend this period for "such longer period as the court or tribunal consider equitable having regard to all the circumstances." This time bar extension provision has a parallel in section 76(5) of the Sex Discrimination Act 1975 which provides that, in relation to an individual's claims to have suffered sex discrimination, "a court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so". In Mills v. Marshall the Employment Appeal Tribunal held that the Employment Tribunal properly exercised its discretion in allowing an application of sex discrimination on the basis of a transsexuality to proceed to a hearing on the merits notwithstanding a delay of over three years from the alleged act of discrimination. It was unsuccessfully argued by the respondents, under reference to the European administrative principle of "legal certainty," and the general public interest in there being a finality of claims, that the fixed statutory time limits, such as the three month limit in sex discrimination cases, should not be waived except in the most exceptional circumstances. Morison J. made the following observation:

"In this legislation, the Sex Discrimination Act 1975, the court's power to extend time is on the basis of what is just and equitable. These words could not be wider or more general. The question is whether it would be just and equitable to deny a person the right to bring proceedings when they were reasonably unaware of the fact that they had the right to bring them until shortly before the complaint was filed. That unawareness might stem from a failure of the lawyers to appreciate that such a claim lay, or because the law 'changed' or was differently perceived after a particular decision of another court. The answer is that in some cases it will be fair to extend time and in others it will not. The industrial tribunal..."
must balance all the factors which are relevant, including importantly, and perhaps crucially, whether it is now possible to have a fair trial of the issue raised by the complaint. Reasonable awareness of the right to sue is but one factor....If a fair trial is possible despite delay, on what basis can it be said that it would be unjust or inequitable to extend time to permit such a trial?" 58

1.23 The Human Rights Act makes provision in section 7(9) for rules to be made as regards the procedure to be followed in proceedings brought under the Act against a public authority alleging breach of Convention rights, having regard to section 9(1) which provides that a general rule that any complaint that a judicial act has been in breach of a Convention right may only be brought by way of appeal against the judicial decision or, if the court in question is otherwise subject to judicial review, by way of judicial review. Otherwise any Convention rights challenge to a judicial act must be brought before the Court of Session, regardless of the financial value of the claim.59

Section 12 of the Act makes particular provision in respect of remedies in relation to the right to freedom of expression under the Convention. The courts should not grant any relief which might affect this Convention right in the absence of the respondent against whom the relief is sought unless the court is satisfied either that all practicable steps have been taken to notify the respondent or that there are compelling reasons that no such notification should be made. In effect this provision provides for something like a deemed statutory caveat in the case of challenges to free expression, although section 12(2)(b) allows the court to grant appropriate relief in the absence of the respondent where it is satisfied that there exist compelling reasons as to why the respondent should not receive prior notification.59a Interim relief might only be granted where "the court is satisfied that the applicant is likely to establish that publication should not be allowed, having particular regard in the case of journalistic, literary or artistic material to, public availability or public interest and any relevant privacy code".

No prospective over-ruling

1.24 Where a human rights challenge is made under the Human Rights Act 1998 there is no statutory basis to allow the courts to limit or

59a See BBC, petr, May 2, 2001, HCJ, unreported, per Lord Justice General Rodger and Lords Kirkwood and Abernethy for a discussion of the effect of the Convention right of free expression on the courts' past practice of granting ex parte under s.4(2) of the Contempt of Court Act to restrict contemporaneous reporting of trials.
suspend the retrospective effect of their decisions. Any such power awarded for the sake of the preservation of good administration, would require specific amendment to the Human Rights Act 1998, in a manner which might be justified as simply a more general extension to the United Kingdom courts of the powers already granted to (though not yet exercised by) the courts considering devolution issues under the Devolution Statutes (on which see below).

"Victims" and title and interest to sue

Sections 7(1) and 7(7), read together, restrict the class of those who might either bring proceedings alleging breach of a Convention right or who might rely upon the Convention in legal proceedings to those who would be defined by the European Court of Human Rights (under reference to Article 34 of the Convention) as "victims".60 Article 34 of the post Protocol 11 Convention61 (previously Article 25) is in the following terms:

"The Court [of Human Rights] may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto. The High Contracting Parties undertake not to hinder the effective exercise of this right."

The effect of section 7(7) of the 1998 Act is that a party can only complain before the national courts of a breach of the rights incorporated within the Convention, if s/he or it would be recognised by the Court of Human Rights as having sufficient locus, title and interest, or standing as to permit him to take a case before the Strasbourg court alleging breach of the Convention.62

Legal persons or corporate bodies may bring applications insofar as they claim that there has been a violation of the rights actually granted them under the Convention, for example the right to a fair

60 See, too the parallel provision s.100(1) in the Scotland Act 1998 which similarly restricts the class of those whom might complain about a breach of Convention rights by the Scottish Parliament of Executive to "victims" for the purposes of Art. 34 of the Convention.


trial under Article 6(1)\textsuperscript{63} or the right to free expression under Article 10,\textsuperscript{64} or their right to property (Article 1, Protocol I).\textsuperscript{65}

It is clear from the Strasbourg jurisprudence that governmental bodies governed by and acting under public law cannot bring an application to the Court.\textsuperscript{66} Unincorporated associations who can point to specific individuals within their membership who, they claim, have suffered violation of their Convention rights have been permitted by the Commission to bring applications to the Court.

The standing of churches to bring actions in their own right alleging breach of their Convention rights has also been accepted by the Strasbourg institutions, and indeed it has been held to constitute a violation of the Convention for a State to refuse to recognise the separate legal personality of churches established within it.\textsuperscript{67} Interestingly, the Human Rights Act 1998 itself makes specific provision for formal recognition of the particular interests of religious organisations. By virtue of section 13 of the 1998 Act where a court’s determination of any question arising under the Act might affect the exercise by a religious organisation and/or its collective membership of the Convention right to freedom of thought, conscience and religion, the court is required to have particular regard to the importance of that right.

“Victim” in the context of the Convention has also been held to encompass potential victims in that the Commission on Human Rights has recognised the right of persons who can show that they run the risk in the future of being directly affected by the legal situation complained of to bring applications before the Court; for example, married persons denied the possibility of divorce.\textsuperscript{68} Indeed in certain circumstances individuals have been held by the Strasbourg Court to constitute “victims” simply by virtue of aspects of national legal systems which, for example, stigmatise certain behaviour or ways of life, even if the national laws in question are not enforced or have no actual effect on the individuals in question, for example, homosexuals in contracting states which continue to outlaw homosexuality,\textsuperscript{69} or transsexuals in countries which do not allow for any official recognition of an individual’s

\textsuperscript{63} See, for example, County Properties Ltd v. The Scottish Ministers, 2000 S.L.T. 965, (OH)

\textsuperscript{64} See, for example, British Broadcasting Corporation, Petitioners (No. 1), 2000 S.L.T. 845, (HCl) and British Broadcasting Corporation, Petitioners (No. 2), 2000 S.L.T. 860, (HCl)

\textsuperscript{65} See, for example, Booker Aquaculture Ltd v. The Secretary of State for Scotland [1999] Eu.L.R. 54, [1999] 1 C.M.L.R. 35, (OH); on appeal Booker Aquaculture Ltd v. The Scottish Ministers, 2000 S.C. 9, (IH)


\textsuperscript{67} See, for example, The Catholic Church of Canea v. Greece, Judgment of December 16, 1997, (1997) RJID VIII


change of gender.\textsuperscript{70}

Representative actions seeking to challenge the law in the abstract will not, however, be accepted from associations or campaigning groups by way of an \textit{actio popularis}, as the Commission has stated:

"[T]he applicant cannot complain as a representative for people in general, because the Convention does not permit such an \textit{actio popularis}. The Commission is only required to examine the applicant's complaints that he himself is a victim of a violation."\textsuperscript{71}

Concern has been expressed that the imposition of the "victim test" in relation to challenges made under the Human Rights Act will in effect restrict the class of individuals or other bodies who currently have been permitted to bring general judicial review challenges before the courts in England and Wales.\textsuperscript{72} Standing the Scottish courts' continued insistence that an applicant for judicial review must be able to show both title and interest to sue,\textsuperscript{73} it is unlikely that the statutory importation of the Strasbourg victim test as this is presently understood by the courts will make much difference to Scottish practice on standing in judicial review, since the Scottish and Strasbourg tests appear to be similar in their impact.

Compensation for damages for breach of a Convention right

Section 8 of the 1998 Act allows the court to grant such relief or remedy against an act, including a proposed act, which is contrary to the incorporated Convention rights as it consider just and appropriate including, if such is already within its jurisdiction, making an award of damages or compensation.\textsuperscript{73a}

By virtue of section 9(3) no damages will be awarded in respect of a judicial act done in good faith except as required by Article 5(5) of the Convention which provides that "everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation". Any such damages award falls to be made against the Crown, but may


\textsuperscript{73} See, for example, \textit{Scottish Old People Welfare Council ("Age Concern")}, \textit{Petitioners}, 1987 S.L.T. 179, (OH) and, more recently, \textit{The Rape Crisis Centre v. Brindley}, (OH) unreported decision of Lord Clarke, July 4, 2000 concerning a challenge by way of judicial review of a decision of the Secretary of State for the Home Department to allow Mike Tyson to enter the United Kingdom.

only be pronounced if the Minister responsible for the Court concerned has been conjoined as a party in the proceedings.

In court actions concerning claims that a Convention right has been unlawfully breached, damages should only be awarded if the court is satisfied that in all the circumstances of the case such an award is necessary in order to afford "just satisfaction" to the injured person. In deciding whether and how much to award by way of damages, the national courts are required by section 8(4) to take into account the principles applied by the Strasbourg court in relation to the award of compensation under Article 41 of the Convention as amended by Protocol 11 (previously Article 50),

which provides that:

“If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

The purpose of a just satisfaction award is compensatory rather than punitive, so that “the applicant should as far as possible be put in the position he would have been in had the requirements [of the Convention] not been disregarded.” and the Court has refused to award aggravated or exemplary damages. The just satisfaction award will normally include a sum to cover legal costs and expenses in bringing the case both in domestic and Convention proceedings. Such legal expenses must be found by the Strasbourg court to have been actually and necessarily incurred and must be considered by them to be reasonable as to quantum. If equitable in all the circumstances of the case, including questions as to the severity of the breach and the ready quantifiability of the loss, an award should be made covering pecuniary and non-pecuniary loss to achieve “a situation as close to restitutio in integrum as was possible in the nature of things”.

Under the head of pecuniary damage, loss of past and future

74 See s.100(3) of the Scotland Act 1998 which similarly restricts the national courts to Strasbourg damages in relation to claims of breaches of Convention rights by the Scottish Parliament or Scottish Executive
78 See, for example, Duncan Lustig-Preen v. U.K. (Article 41), unreported decision of July 25, 2000, ECtHR accessible at www.dhcour.coe.fr/hudoc) at para. 32
80 Windisch v. Austria(Article 50) Judgment of 28 June 1993, A/255-D at paragraph
earnings, reduction in the value of property and loss of opportunity have been compensated. Awards in respect of non-pecuniary or moral damage have been made by the court to cover such non-quantifiable matters as "anxiety, distress, loss of employment prospects, feelings of injustice, deterioration of way of life and other varieties of harm and suffering." Since October 1991 the Strasbourg Court has set out in the operative provisions of the judgment, a period of three months from the date of the decision within which the applicant must be paid. Since January 1996 the Strasbourg Court has provided for interest to be paid in the event of failure to comply with this time-limit.

Application to the Strasbourg Court

It should be borne in mind that insofar as the domestic courts have, despite incorporation, failed to give full and adequate protection of the right or rights protected and guaranteed under the Convention, this may form the basis for an application to the Strasbourg court, once all domestic remedies have been exhausted. Incorporation does not, then, remove the possibility or need of ultimately obtaining a final authoritative judgment from the European Court of Human Rights on the proper interpretation and application of the European Convention.

It is a basic principle of the Convention, set out in Article 35 of the post-Protocol 11 Convention, that direct recourse to the Strasbourg court is only possible once all domestic judicial remedies have been exhausted, otherwise it will not be possible to show that the State is in violation of the Convention. An application to the Court of Human Rights in Strasbourg must be made within a period of six months from the date upon which the final decision complained of was made, that is when all available domestic remedies have been exhausted.

The State must have been given the opportunity of remedying the alleged violation or redressing the damage by domestic measures. Accordingly the substance of the matter on which an alleged breach of the Convention is based should, if possible, be raised in the course of the domestic proceedings. By way of example, in McGinley and Egan v. United Kingdom the Ministry of Defence successfully thwarted an application by former servicemen to the Strasbourg court relative to the non-recovery of their Army medical

84 See Sharpe "Just Satisfaction under Article 50" in La Convention Européenne des droits de l'homme (Imbert and Pettiti eds., 1995) at paras 34-35.
86
records, as well as contemporaneous records of general environmental radiation level records, relating to nuclear weapons tests which had carried out by the United Kingdom at Christmas Island in 1958. The applicants sought such recovery in order to substantiate their claims for severe disability pension in respect of alleged radiation linked illnesses and cancers resulting from their participation in and exposure to the United Kingdom’s nuclear tests programme. The applicants were found to have failed to exhaust their statutory remedies since they had made no formal application to the President of the Pensions Appeal Tribunal for recovery of these documents as was apparently open to them under Rule 6 of the Pensions Appeal Tribunals (Scotland) Rules 1981. Consequently their claim before the European Court of Human Rights that their Article 6(1) fair trial rights had been violated failed, notwithstanding doubts as to the effectiveness of the procedure for recovery of documents under the 1981 Rules.  

Prior to incorporation, the failure to cite the provisions of the Convention by way of defence to a criminal trial in the United Kingdom did not bar the applicant from subsequently making an application to Strasbourg.  

With the coming into force of the Scotland Act and the Human Rights Act, it is clear that the Convention rights may now be relied upon directly as a defence in criminal trials in Scotland. Accordingly if a relevant Convention point is not timeously raised in domestic criminal proceedings, the Strasbourg court might be persuaded that there had been a failure to exhaust available domestic remedies and/or a waiver of the relevant Convention rights such as to bar an application to the Council of Europe institutions.

In cases where the applicant has been reliably and properly advised by counsel there is no prospect of an appeal or other judicial procedure being successful or effective in remedying the alleged breach, the Commission may deem the domestic remedies to have been exhausted.  

The onus is on the contracting state, if it wishes to take the point, to show that there was an effective domestic remedy which the applicant had failed to pursue.

Devolution Issues

The Scotland Act 1998, the Government of Wales Act 1988 and the Northern Ireland Act 1998, all make reference to and define a new category of legal questions, “devolution issues”, arising out of the creation of devolved governments for the non-English parts of the United Kingdom. Devolution issues are boundary markers. They are concerned with questions as to whether or not the devolved assemblies and administrations have transgressed the limits of the powers granted them under their founding acts—for example, by entering into areas reserved to the Westminster Parliament, or by being in breach of Community law, or in being incompatible with any Convention rights or by otherwise being outwith the legislative competence of the devolved institutions.

Since the limits of the new devolved legislative bodies and administrations are set out in statute, the task of ensuring that the devolved institutions stay within the limits of the powers granted to it is one for the courts. What has been created by the Devolution Statutes then are democratic institutions whose acts are, however, subject to control by the judiciary. As Lord President Rodger robustly observed in the first case to reach the courts concerning the rights and duties of the devolved Holyrood Parliament:

“[T]he [Scottish] Parliament [i]s a body which—however important its role—has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law.”

Questions as to the “constitutionality” of the acts or omissions of the devolved institutions and administrations (in the sense of whether or not these conform to the limits set out in their founding statutes) may, if relevant to the matter at hand, competently be raised in any proceedings before any courts in the United Kingdom. Such matters are not reserved for decision by the higher courts. In principle, devolution issues may arise within any of the legal jurisdictions of the United Kingdom, thus, questions as to the vires

91 For the various definitions of “devolution issues” see para. 1 of each of: Sched. 6 to the Scotland Act 1998; Sched. 8 to the Government of Wales Act 1998; and Sched. 10 to the Northern Ireland Act 1998
92 In Whaley v. Lord Watson of Invergowrie, 2000 S.L.T. 475, (IH) per Lord President Rodger at 481B.
of a Welsh measure might be raised before a Scottish Court; while Scottish legislation may be challenged in Northern Ireland or in England. Schedules 6, 8 and 10 of the Scotland Act, Government of Wales Act and Northern Ireland Act respectively set out the procedures to be followed when devolution issues are raised before courts in the United Kingdom. All provide that frivolous or vexatious challenges to the competency of devolved legislation or administrative action or omissions need not, however, be taken up by the courts.

The Privy Council as the constitutional court in devolution issues

1.30 While the Devolution Statutes have put it within the power of all United Kingdom Courts to review and strike down on grounds of competency both primary and subordinate legislation emanating from the devolved institutions, the three Devolution Statutes have also created a new role for the Judicial Committee of the Privy Council in that they have given it, rather than the House of Lords, jurisdiction on the question of the final domestic resolution of any “devolution issues”. But it is only those Privy Councillors who hold or have held the office of a Lord of Appeal in Ordinary, or high judicial office as defined in section 25 of the Appellate Jurisdiction Act 1876 (that is to say English and Northern Ireland High Court and Court of Appeal Judges and, in Scotland, Senators of the College of Justice) may sit and act as a member of the Committee in proceedings under the Act. In effect, what this means is that, first, Privy Councillors who are Commonwealth judges (for example Lord Cooke of Thorndon) are excluded from sitting in devolution issue proceedings, and secondly, unless new Privy Councillors are created who do not sit in Parliament are specifically called to sit on a particular hearing of the Judicial Committee—as Lord Kirkwood was in Brown v. Stott, there will be high degree of overlap between those who are active House of Lords judges and the Privy Council judges.

In Montgomery and Coulter v. H.M. Advocate and the Advocate General for Scotland, the first devolution issue case to come before

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the Privy Council acting under its Scotland Act jurisdiction, the Judicial Committee was composed in the traditional manner one now expects of Scottish appeals to the House of Lords, namely by two Scottish judges (Lord Hope and Lord Clyde) together with three non-Scots (Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Hoffmann). However, a clear division of opinion arose among these judges as to whether or not a decision of the Lord Advocate to initiate criminal proceedings on indictment against the accused could properly be said to raise a devolution issue at all. The non-Scots judges, led by Lord Hoffman, clearly tended to the view that the matter of respect for and enforcement of an individual’s Article 6 rights to a fair trial was not a matter for a prosecutor, but lay wholly with the court before which the trial was to be conducted. Accordingly, they tended to the view that one could not take Article 6 fair trial point against the prosecutor before the trial has actually started.

The Scottish judges, by contrast, emphasised the peculiar role and history of the Lord Advocate, noting his status as “master of the instance” in criminal trials and insisting that the approach which the Scotland Act had taken was to make the right of the accused to receive a fair trial a responsibility of the Lord Advocate as well as of the court. In what appears to be an implicit rebuke to Lord Hoffman, Lord Hope noted (at pages 15-16) that this case was the first time in which an appeal on a matter of Scots criminal law and procedure had ever come before a court situated outside Scotland; he therefore stressed the need for all the judges of that court to think themselves into the history and modes of understanding of Scots criminal lawyers, rather than simply for the judges to assume that the Scottish criminal system mirrored English criminal and the English derived criminal legal systems.

The matter at stake was clearly one of the highest general constitutional importance. If Lord Hoffman’s view were to prevail and questions regarding the proper protection of Article 6 did not raise devolution issues (since they concerned only the acts of the courts rather than the devolved Lord Advocate) then two consequences followed, first, it would appear that all of the Scottish jurisprudence on the Lord Advocate’s duties under Article 6

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97 Lord Hope relied in part on the following passage from Hume’s Commentaries on the Law of Scotland Respecting Crimes (1844) vol. II 134: “The Lord Advocate is master of his instance in this other sense, that even after he has brought his libel into court, it is a matter of his discretion, to what extent he will insist against the pannel; and he may freely, at any period of the process, before return of the verdict, nay after it has been returned, restrict his libel to an arbitrary punishment, in the clearest case, even of a capital crime.”

which had developed since the coming into force of the Scotland Act and prior to the implementation of the Human Rights Act had been decided on the wrong statutory basis; secondly, and perhaps more importantly, there would effectively be no role for the Judicial Committee in deciding on the proper interpretation and application of Convention fair trial rights within the context of Scottish criminal procedure. There would be no space for the Judicial Committee to carry out its envisaged function of ensuring a uniform United Kingdom wide interpretation for Convention rights in matters of both criminal and civil law. The result of this could well be the development of a peculiarly Scottish Convention rights jurisprudence in criminal matters, since there remains no appeal from the High Court of Justiciary to the House of Lords on "pure" human rights challenges which might be brought in the Scottish criminal courts under the Human Rights Act.

In the event, since all the judges in Montgomery and Coulter agreed that the appeal should be dismissed on the basis that the facts did not show any potential breach of the accuseds' fair trial rights, the non-Scots did not find it was not necessary for them to reach any final decision to be reached on the point as to whether the devolution issue had properly been raised as regards the applicability of Article 6 to the acts and omissions of the Lord Advocate, leaving the point to be argued and resolved on another occasion.

In Hoekstra (No. 4)\(^1\) the three judge screening committee of the Privy Council, comprising Lord SLYNN, Lord HOPE and Lord CLYDE, had little difficulty in rejecting the accuseds' application for special leave to appeal to with, with Lord Hope, delivering the judgment of the Board, noting that the Judicial Committee was not a constitutional court of general jurisdiction and re-affirming that it could only hear appeals from Scotland which raised a devolution issue as defined under the Scotland Act; which had been determined.

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98a See Angus Stewart Q.C. "Devolution Issues and Human Rights" 2000 S.L.T. (News) 239, for a detailed argument to the effect that the legislation has indeed been misunderstood and misapplied by the Scottish judges and that the Scottish Act was not intended to allow Convention points to be raised in ordinary criminal proceedings.

99 The non-availability of appeals from the Scottish Criminal Courts to the House of Lords was confirmed by the House of Lords in Mackintosh v. Lord Advocate (1876) 2 App. Cas. 41 and most recently statutorily re-affirmed by s.124(2) of the Scottish Criminal Procedure (Scotland) Act 1995.

\(^{1}\) Hoekstra v. H.M. Advocate (No. 4), JCPC, unreported decision of October 31, 2000, accessible at www.privy-council.org.uk
by the court appealed against. In all other issues every interlocutor of the High Court of Justiciary is final and conclusive and is not subject to review by any court whatsoever. Thus, where it was alleged that the judges of the High Court of Justiciary had acted unlawfully, this did not give rise to an issue which the Judicial Committee could adjudicate on, since such an allegation, although raising a constitutional point, did not raise a Scotland Act point. The limits within which the powers of the High Court of Justiciary may be exercised were said by Lord Hope to be for determination by that court and had nothing to do with the functions of the Scottish Ministers, the First Minister or the Lord Advocate.

The composition of the Judicial Committee in Brown v. Stott is of particular interest in the context of the split in approach between the Scots and non-Scots judges which was revealed in Montgomery and Coulter. Again the two Scottish Law Lords, Lord Hope and Lord Clyde were included on the Committee, but they were joined by a third Scottish judge, Lord Kirkwood, who was eligible to sit on the Judicial Committee by virtue of the recent appointment of Inner House judges to the rank of Privy Councillor. Thus, for the first time, Scottish judges made up a majority of the Judicial Committee, being joined in Brown and Stott by Lord Bingham and Lord Steyn. This time, the Committee were unanimous in deciding that the proposed acts of the Lord Advocate properly raised a devolution issue under reference to Article 6 fair trial rights. The disputed analysis of this issue by Lords Hope and Clyde in Montgomery and Coulter would seem to have prevailed over the approach of Lord Hoffmann, and the doubts expressed by Lord Slynne and Lord Nicholls. Had the Scots judges’ analysis of what constitutes a devolution not been followed, and the Hoffmann approach preferred, the likely result would have been that Lord Rodger’s finding, backed as it was by an impressive citation and detailed critique of many Commonwealth and US authorities, as to the central and (almost) absolute nature of the right against enforced self-incrimination implicit in Article 6 of the Convention would have prevailed in the context of the Scots criminal law and procedure. By contrast, it seems likely that the House of Lords in any criminal appeal in England would have followed the approach favoured by the pressure group JUSTICE (who were permitted to intervene in the Judicial Committee proceedings in Brown v. Stott) and allowed the right to be limited in a proportionate manner for legitimate reasons. One suspects that it was precisely the possibility of such a major disparity of approach between the two jurisdiction which drove Lord Hope’s insistence (in the face of Lord

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1a See, on this point, Lord Hope in Follen v. H.M. Advocate, March 8, 2001, JCPC, unreported, (accessible at www.privy-council.org.uk) at para.49 of his judgment.

2 Brown v. Stott, JCPC, unreported decision of December 5, 2000, accessible at www.privy-council.org.uk/
Hoffmann’s scepticism) as to the fair trial responsibilities of the Lord Advocate.

The Privy Council as the final court of appeal in human rights issues

1.33 Section 103 of the Scotland Act, section 82 of the Northern Ireland Act and paragraph 32 of Schedule 8 to the Government of Wales Act all assert the binding nature of decisions of the Judicial Committee of the Privy Council in proceedings under the Act in all other courts and legal proceedings, apart from later cases brought before the Committee. This alters the general rule that the House of Lords in its judicial capacity is not bound by decisions of the Judicial Committee of the Privy Council.3 It would appear that the purpose of this provision was to ensure uniformity of approach across the United Kingdom on matters of Convention rights, among others. It is a provision the significance of which has apparently been little understood, because in effect it means that on questions of the effect and scope of Convention rights (which have been duly raised under the Devolution Statutes) the House of Lords has been superseded as the final court of appeal in the United Kingdom. This will come as a great shock to many English lawyers who have been engaged in litigation over Convention rights issues since the coming into force of the Human Rights Act in England at the beginning of October 2000. The English final court of appeal in civil and criminal matters, the House of Lords, has itself been placed at level lower in the judicial hierarchy by another court, the Judicial Committee, which a developing constitutional convention seems to indicate will be a court composed substantially, (and at times by a majority) of Scots lawyers deciding cases brought primarily from Scotland.

The somewhat surprising (and surely unintended) result of this is an effective Scottish take-over of English law when matters of Convention rights are raised, and the exclusion of the majority of English lawyers and English judges effectively to reach final binding decisions on Convention points. Thus, while the English Court of Appeal4 has considered the compatibility with Convention rights of the procedure for property confiscation orders to be made in drug trafficking cases, the final decision on this matter has effectively been taken not on any appeal by the parties to the House of Lords, but by the decision of the Judicial Committee in the Scottish case of McIntosh.5 Similarly, in a series of conjoined judicial review application the English High Court in December

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5 McIntosh v. H.M. Advocate, unreported decision of Lord Prosser, Lord Kirkwood and Lord Allanbridge, October 13, 2000 (accessible at www.scotcourts.gov.uk)
2000 considered the applicability of Article 6 to the call-in procedure to the Secretary of State in planning matters. But again, as a matter of strict law, the final decision on this point cannot be made by the judges in this case whether at first instance or on appeal to the House of Lords. Instead all of these judges will have to defer on the Convention point issue to a decision of the Judicial Committee should Lord MacFadyen’s decision in County Properties v. Scottish Ministers be taken to the Privy Council.

One cannot but feel that this kind of ad hoc constitutional structure will not prove to be an inherently stable one. Ultimately, it is suggested, the logic of the on-going constitutional change will require the setting up a properly established constitutional court for the United Kingdom, with properly identified, tenured and independent judges, perhaps along the lines of the United States Supreme Court or the European Court of Justice. The genie of constitutional reform is out of the bottle and has acquired its own dynamic. It would appear that our legislators have not yet completed the task of writing the constitution.

Preliminary reference procedure to the Privy Council in devolution issues

The Devolution Statutes all provide for the possibility of preliminary references on a devolution issue from the lower courts to higher courts; a procedure modelled, in part, on Article 234 (formerly Article 177) of the Treaty of Rome. Under this procedure,

- courts and tribunals lower than the Court of Appeal (or, in Scotland, the Inner House or the High Court sitting as an appellate court) have a discretion to refer any devolution issue arising in proceedings before them to the relevant appellate court;
- lower courts against whose decisions there is no right of appeal have a duty to refer any devolution issue arising in proceedings before them to the relevant appellate court;
- the decision of the appellate court on the devolution reference

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6a See Alconbury, May 9, 2001, (HL), unreported decision of Lords Slynn of Hadley, Nolan, Hoffman, Hutton and Clyde.

7 County Properties Ltd v. The Scottish Ministers, 2000 S.L.T. 965, OH

8 See, paras 7, 9, 18, 19, 21 and 28 of Sched. 6 to the Scotland Act 1998; paras 6, 7, 15, 17, 18, 19 and 25 of Sched. 8 to the Government of Wales Act 1998; and paras 7, 15, 16, 18, 25, 27 of Sched. 10 to the Northern Ireland Act 1998

9 See, paras 8, 20, 29 of Sched. 6 to the Scotland Act 1998; paras 8, 16 and 26 to Sched. 8 to the Government of Wales Act 1998; and paras 8, 17, 26 of Sched. 10 to the Northern Ireland Act 1998
may itself be appealed to the Judicial Committee of the Privy Council,\textsuperscript{10} but normally only with leave;\textsuperscript{11}

- higher and appellate courts may themselves refer devolution issues which have been raised directly before them (rather than referred to them by lower courts) to the Judicial Committee of the Privy Council;\textsuperscript{12}
- provision is made for the House of Lords to refer any devolution issues arising in judicial proceedings before it to the Judicial Committee of the Privy Council “unless the House considers it more appropriate, having regard to all the circumstances, that it should determine the issue”.\textsuperscript{13} This provision is perhaps intended to parallel the “\textit{acte clair}” doctrine in the EC case law\textsuperscript{14} under which national courts against whose decisions there is no further right of appeal\textsuperscript{15} are relieved of their duty to make a preliminary reference to the European Court of Justice when the answer to the question at issue is so obvious as to leave no room for any reasonable doubt.

\begin{center}
\textit{The role of the law officers in devolution issues}
\end{center}

1.35 The United Kingdom Attorney General, the Attorney General for Northern Ireland, the Westminster based Advocate-General for Scotland, and the Lord Advocate (\textit{ex officio} a member of the Scottish Executive) are given a variety of powers and rights relative to the institution, defending and receiving of intimation of proceedings concerning the determination of any devolution issue. Mandatory references directly to the Judicial Committee of the Privy Council may be made of devolution issues in proceedings in which any of the Law Officers are parties, on their application.\textsuperscript{16}

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\begin{footnotesize}
\textsuperscript{10} See, paras 12, 23 and 31 of Sched. 6 to the Scotland Act 1998; paras 11, 20, 28 of Sched. 8 to the Government of Wales Act 1998 and paras 10, 20, 30 of Sched. 10 to the Northern Ireland Act 1998

\textsuperscript{11} See, paras 13, 23, 31 of Sched. 6 to the Scotland Act 1998; paras 11, 20, 21 and 31 of Sched. 8 to the Government of Wales Act 1998 and paras 31 of Sched. 10 to the Northern Ireland Act 1998

\textsuperscript{12} See, paras 10, 11, 22, 30 of Sched. 6 to the Scotland Act 1998; paras 10, 15, 18, 20 and 27 of Sched. 8 to the Government of Wales Act 1998 and paras 9, 19, 28, 31 of Sched. 10 to the Northern Ireland Act 1998

\textsuperscript{13} See, para. 32 of Sched. 6 to the Scotland Act 1998; para. 29 of Sched. 8 to the Government of Wales Act 1998 and para. 32 of Sched. 10 to the Northern Ireland Act 1998


\textsuperscript{15} See, \textit{H.M.Advocate v. Orru and Stewart}, 1998 S.C.C.R. 59 for an example of the application of this doctrine by the Scottish Criminal Appeal Court.

\end{footnotesize}
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When considering any devolution issue, the courts are given the express power under section 102 of the Scotland Act 1998, section 110 of the Government of Wales Act, and section 81 of the Northern Ireland Act to remove or limit the retrospective effect of any decision which they might make to the effect that the devolved legislature or administration has acted outwith their respective legislative competences. It is no longer the case that, as Lord Goff noted in another context, “[a] system [of prospective over-ruling...has no place in our legal system.”\(^{17}\) Under the Devolution Statutes, the courts may also suspend the effect of their decision as to incompetency “for any period and on any conditions to allow the defect to be corrected”. If considering whether to make any such limitation or suspensory order, the courts are required to intimate this to the appropriate law officer. Such intimation allows the law officers not already parties to the action to take part in the proceedings so far as they relate to the making of such an order. In deciding whether to make any order in relation to temporal limitation or suspension of their decision the courts are enjoined to have regard to, among other things, “the extent to which persons who are not parties to the proceedings would be otherwise adversely affected”.

While the courts have power to suspend or to limit the retrospective effect of their rulings in relation to successful challenges to the vires of the legislative activity of the devolved legislature or administration, the courts are given no such power to limit the retrospective effect of their decisions in relation to the non-legislative activity of members of the devolved administration. Thus, the finding by the High Court in \(Starrs v. Ruxton\)\(^ {18}\) that the bringing of criminal prosecutions before temporary sheriffs contravened the accused’s Article 6(1) Convention rights could not be made wholly or partly prospective or otherwise suspended by the court to allow the Scottish Executive time to remedy the situation. The challenge was made against an administrative act of the Lord Advocate, the decision to bring a prosecution, rather than against a legislative act of the Scottish Executive or Parliament.

It is a matter for the Westminster legislature to decide whether or not for the sake of consistency of approach the Devolution Statutes should be amended to give the courts the power to pronounce prospective judgments where devolution issues are raised against decisions or omissions of the members of the Devolved Executives acting in an administrative capacity. If such a power had already existed and been exercised, then the administrative uncertainty and lengthy delays to all business before the sheriff courts which

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resulted from the *Starrs v. Ruxton* decision might have been avoided. Alternatively, if a power of prospective over-ruling is seen as a good thing for judges to have in the new constitutional dispensation, it is not clear why it should be limited to cases which raise devolution issues under the Devolution Statutes.

The counter-argument to this is that the very power to limit the retrospective effect of judgments may not be consistent with the court's duty to ensure the full protection of Convention rights in cases before it. Thus, following the decision in *Starrs v. Ruxton* it seems clear that the Lord Advocate in bringing criminal proceedings against individuals to be tried before temporary sheriffs had been acting contrary to section 57(2) of the Scotland Act and hence acting *ultra vires* from at least May 20, 1999, the date when he became directly subject to the provisions of the Convention. Such action on the part of the Lord Advocate contravened the accused Article 6 rights, insofar as they had not waived these. Any attempt by the courts to limit the retrospective effect of this judgment, assuming that they had such power under national law, might itself contravene the Convention.

### DEVOLUTION ISSUES AND HUMAN RIGHTS

1.37 Given that the question as to the compatibility of Convention rights with devolved legislation and administrative (in)action is also designated a "devolution issue" under the relevant Schedules to the Devolution Statutes, it is necessary to consider how the provisions of the Devolution Statutes interact with the Human Rights Act 1998.

*Acts and omissions equally reviewable*

1.38 Section 57(2) of the Scotland Act 1998 provides that "a member of the Scottish Executive has no power to make any subordinate legislation or to do any other act so far as the legislation or act is incompatible with any of the Convention rights." It seems clear, at least from the case law to date, that it is not only the positive acts of the Scottish Ministers which are subject to review under the Scotland Act for their compatibility with individuals' Convention rights, but also their omissions.\(^\text{20}\)

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20 See *H.M. Advocate v. Robb*, 2000 J.C. 127 per Lord Penrose at 130D-E: "Section 6(6) of the Human Rights Act 1998 defines 'act' as including a failure to act subject to certain exceptions. There is no express provision to that effect in the Scotland Act, but it is plain that, while the express qualifications are necessarily different in the context of the two Acts, the expressions must have the same
This interpretation of section 57(2) of the Scotland Act to include, in line with section 6(5) of the Human Rights Act, omissions or failure to act is also consonant with section 100(4)(b) of the Scotland Act which, in the context of making provision for damages to be awarded by the court in respect of an act which is incompatible with any of the Convention rights, specifically defines act as meaning (a) making any legislation or (b) any other act or failure to act, if it is an act or failure of a member of the Scottish Executive”. Similarly, paragraph 1(e) of Schedule 6 to the Scotland Act includes within the definition of devolution issue “a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law”.

**Common “Victim test” for breach of Convention rights**

Section 100 of the Scotland Act 1998, section 107 of the Government of Wales Act 1998 and section 71 of the Northern Ireland Act 1998 provide that, apart from the relevant law officers, only those who would be regarded by the European Court of Human Rights as “victims” under and in terms of Article 34 of the European Convention on Human Rights are able to bring proceedings before the courts under the statute on the ground that an Act of the devolved legislature or an act or omission of the devolved executive or administration is incompatible with the Convention, or otherwise to rely on any of the Convention rights in any such proceedings.

**Common “Just satisfaction” rule for damages for breach of Convention rights**

Section 100(3) of the Scotland Act, Section 107(4)(b) of the general scope, and the word ‘act’ in Section 57(2) [of the Scotland Act] must include failure to act.” See for similar observations, Clancy v. Caird, 2000 S.L.T. 546, (II) per Lord Penrose at 567F para. 12 of his judgment: “In my opinion it is preferable to read Section 57(2) [of the Scotland Act] as encompassing both acts and failures to act, and in that way give content to the whole provisions of Schedule 6 [to the Act].” And in H.M.Advocate v. Burns, HCJ, unreported decision of August 4, 2000, accessible at www.scotcourts.gov.uk, Lord Penrose observed as follows: “The implement of any executive or administrative decision must involve an ‘act’, in my opinion, having regard to the unqualified use of that broad expression in the Scotland Act. I regard the repeated assertion that what had been done or omitted in pursuance of such decisions did not constitute an act to be wholly sterile. ... If there were a case in which a convention right had been infringed in some obvious way by the implement of an executive decision it might be less than clear that it reflected well on the department involved to seek to avoid responsibility by denying that it had acted, on the basis of a purported narrow interpretation of the Scotland Act.”
Government of Wales Act and sections 71(3)(b) and 71(4)(b) of the Northern Ireland Assembly all seem to be intended to parallel section 8(3) and (4) of the Human Rights Act 1998 and limit any damages which might be awarded by a national court for breach of Convention rights by the devolved legislatures and administrations to the measure and approach adopted by the Strasbourg Court in relation to the “just satisfaction” of an applicant’s claim under reference to Article 41 of the European Convention.

Justification for breach of Convention rights

1.41 As we have seen the effect of section 107(4)(a) of the Government of Wales Act and sections 71(3)(a) and 71(4)(a) of the Northern Ireland Act is to place the Welsh Assembly and the Northern Ireland Assembly and Northern Ireland Ministers and Department in the same position as any other public authority under section 6(2) of the Human Rights Act 1998. These sections make provision for the possibility of a lawful breach of Convention rights if, as a result of one or more provisions of primary Westminster legislation, the devolved Welsh or Northern Ireland institutions could not have acted differently or if the devolved Welsh or Northern Ireland authority was acting so as to give effect to or enforce Convention incompatible Westminster provisions.

The position of the Scottish devolved institutions in relation to justification

1.42 As we noted above there is no such general tie-in provision in the Scotland Act allowing the Scottish Parliament or Scottish Executive to similarly rely upon section 6(2) of the Human Rights Act to justify possible breaches of the Convention under reference to the requirements of Westminster legislation. The only reference to this provision of the Human Rights Act comes in section 57(3) of the Scotland Act which provides that only the Lord Advocate when prosecuting any offence or acting in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland may rely upon section 6(2) of the Human Rights Act to justify a breach by him of a Convention right on the grounds of the requirements of a contrary and incompatible provision of Westminster legislation. Without such specific Westminster derived authorisation, the Lord Advocate no longer has power to “move the court to grant any remedy which would be incompatible with the European Convention on Human Rights”.21

In relation to other Members of the Scottish Executive (and other acts of the Lord Advocate), section 57(2) of the Scotland Act simply provides that they have no power to do any act so far as "incompatible with any of the Convention rights or with Community law". As has been noted judicially:

"Section 57(2) is concerned with a further specific limitation on the powers of the [Scottish] Executive expressed by reference to the Convention and Community law. It is not a temporary or transitional provision. It will continue to apply after the Human Rights Act comes fully into force."

Similarly, section 29(2)(d) of the Scotland Act puts an absolute and unqualified limit on the power of the Scottish Parliament to legislate in a manner which is incompatible with any of the Convention rights or with Community law. The effect of this failure to tie in Scottish legislative activity to section 6(2) of the Human Rights Act is that, as we stated at the outset, although the European Convention is formally being incorporated into domestic Scots law by the same statute as it is incorporated into the laws of England and Wales and of Northern Ireland, the European Convention on Human Rights will be given a different constitutional status in Scotland from the rest of the United Kingdom.

Under the Scotland Act 1998, the rights guaranteed under the Convention have the status of a higher law as against all and any legislation passed by the Scottish Parliament or any act or omission of a member of the Scottish Executive. Breach of these rights cannot be justified in law. Thus whereas the English planning system may continue even if the Westminster statute on which it is based is found by the courts to be incompatible with the Convention, a judgment such as that of Lord MacFadyen in County Properties effectively bars the Scottish Executive and the Holyrood Parliament from operating, authorising or relying upon a similar system of planning controls in Scotland.

Given that there appears to be no possibility for justified breach of Convention rights for the devolved Scottish institutions, it is clear that the judges in Scotland have to take particular care in understanding and applying Convention rights, if the business of Government is to be possible (and popularly responsive) in Scotland. The judges have the last word on these issues in Scotland and in contrast to the position in relation to the powers of Westminster, there is no possibility within the devolved Scottish political system for their decisions on the law to be overruled. Under the devolved Scottish constitution, the judges have been placed at the apex, in a position similar to that of the United States.

22 In Clancy v. Caird, 2000 S.L.T. 546, IH per Lord Penrose at 566K, para. 9 of his judgment
23 County Properties Ltd v. The Scottish Ministers, 2000 S.L.T. 965, OH
Supreme Court, to questions the definition, extent and requirements for the proper protection of fundamental rights. This is an exposed position for judges to be in, given that in many cases the constitutional purpose of fundamental rights is to set limits on the popular responsiveness of government and to protect unpopular minorities from the tyranny of the majority.

One example of how this different constitutional status makes for radically different practical results is in relation to cases in which complainers of rape and sexual assault have been subjected to detailed cross-examination by those accused of carrying out those crimes who have decided not to be represented, but rather to defend themselves, in court. The Westminster response to the alleged abuses by such accused of their defence rights has been to see to take away the right of any person charged with a sexual offence to cross-examine in person the complainant in connection with that offence or any other offence with which he is also charged in the same criminal proceedings. The immediate reported response of the Scottish Executive and Scottish Parliament, by contrast, was to the effect that no changes could be made to the existing law in Scotland on the view that any attempt to increase the protection of complainers and further regulate defence rights might contravene the accused’s Convention rights under Article 6(3)(c) “to defend himself in person”. Hence any devolved legislation to this effect would be ultra vires both the Scottish Ministers and the Holyrood Parliament. Due to public outcry, however, the Scottish Ministers have announced that they will look again at the question. The ultimate resolution of this matter is, however, one for the judges, regardless of public feelings as to the requirements of popular justice.

An Act of the Scottish Parliament may also consolidate, update

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25 Compare, however, the decision in Croissant v. Germany A/237-B, (1993) E.H.R.R. 135, where the Strasbourg Court made the following observations [para. 29 of the judgment] in relation to the applicant’s objection to being represented by a third court appointed counsel in addition to the two counsellors already retained by himself; “It is true that Article 6 para. 3 (c) (art. 6-3-c) entitles ‘everyone charged with a criminal offence’ to be defended by counsel of his own choosing (see the Pakelli v. Germany judgment of 25 April 1983, Series A n. 6: p.15, para.31). Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts and certainly have regard to the defendant’s wishes; indeed, German law contemplate such a course (Article 142 of the Code of Criminal Procedure; see para.20 above). However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.”
and re-state the law, whether at common law or as comprised in an Act of the Westminster Parliament or subordinate legislation thereunder, even within the area of reserved matters, although if there is such restatement of the law in reserved matters by an Act of the Scottish Parliament, it remains outwith the legislative competence of the Scottish Parliament to make any substantive modification to that law. The Scottish Parliament has also been accorded full legislative competence in a broad range of domestic issues. These include; health, education, local government, social work, housing, economic development, judicial appointments, civil and criminal law and procedure, the criminal justice and prosecution system, legal aid; prisons; police and fire services, the environment, agriculture, forestry and fishing.

In England, all of the above areas remain wholly within the competence of the Westminster Parliament, thus:

- primary Westminster legislation in these areas will therefore be subject only to the “interpretative obligation” placed on the courts by section 3(1) of the Human Rights Act 1998, to read and give effect to that legislation so far as possible in a way which is compatible with the Convention rights;
- where the courts finds that the legislative provision in question cannot be interpreted in accordance with the requirements of the Human Rights Convention, the Westminster provision (and any Welsh or Northern Ireland devolved legislation based on it) nonetheless remains valid, operative and enforceable;
- and under sections 10 to 12 of the Human Rights Act 1998, it is a matter for the Minister of the Crown, answerable to the Westminster Parliament, to decide whether and how to amend the offending provision, and whether or not to give it retrospective effect.

The contrast with the situation in relation to Scottish legislation is stark:

- the courts will be required to strike down primary Scottish legislation which is found to contravene the incorporated Convention rights;
- further, it will be for the courts, and not the Scottish Parliament, to consider whether to limit the retrospective effect of any such ruling of invalidity under section 102 of the Scotland Act 1998;
- however, since the courts are themselves defined as public authorities by section 6(3)(a) of the Human Rights Act 1998, any decision limiting retrospectivity will itself have to be

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26 Para. 7(2) of Sched. 4 to the Act provides as follows: “7(2) For the purposes of paragraph 2 [the prohibition on the modification of the law on reserved matters] the law on reserved matters includes any restatement in an Act of the Scottish Parliament, or subordinate legislation under such an Act, of the law on reserved matters if the subject-matter of the restatement is a reserved matter.”
compatible with the rights guaranteed under the European Convention.

In relation to primary Westminster legislation, then, the manner of remedying any incompatibility between the law and Convention rights is under the Human Rights Act 1998 a decision for the Westminster Parliament and United Kingdom Executive. In relation to Scottish legislation, however, the manner of remedying an incompatibility between the law and the Convention rights rests with the courts before which the matter is raised.

**Remedies for breach of a Convention right**

1.45 The general principle *ubi ius, ibi remedium* remains a part of the civilian heritage of the Scots courts and Scots common law. It may affect the court’s interpretation and application of the human rights provisions of the Scotland Act as regards the provision of new remedies to ensure that Convention rights are respected by the devolved institutions in Scotland.

As has been stated, the Human Rights Act 1998 excludes from among the incorporated Convention rights, Article 13, which specifies that there should be an “effective remedy” available to individuals complaining of a breach of Convention rights by State authorities. The United Kingdom Government’s expressed reason for excluding Article 13 was that the effective remedies point was answered by the procedure set out in the Human Rights Act itself and so there was no need for the courts to venture outwith the four corners of the statute to invent new remedies and procedures, as they might otherwise be tempted to do were Article 13 to be made directly effective. Further, while section 6(6) of the Human Rights Act specifies that an act of a public authority includes a failure to act, it also provides that does not encompass a failure to introduce in or lay before Parliament a proposal for legislation or a failure to make any primary legislation or remedial order.

While there is no definition of “act” in the terms of section 57 of the Scotland Act, as we noted at the outset of this chapter, the courts have held that the word is to be construed broadly such as to include “failure to act”.\(^{27}\) Such an interpretation of section 57(2)

\(^{27}\) In *H.M. Advocate v. Burns*, HCJ, unreported decision of August 4, 2003, accessible at www.scotcourts.gov.uk, Lord Penrose observed as follows: "Its implement of any executive or administrative decision must involve an 'act', in my opinion, having regard to the unqualified use of that broad expression in the Scotland Act. I regard the repeated assertion that what had been done or omitted in pursuance of such decisions did not constitute an act to be wholly storic. There were a case in which a convention right had been infringed in some obvious way by the implement of an executive decision it might be less than clear that reflected well on the department involved to seek to avoid responsibility for denying that it had acted, on the basis of a purported narrow interpretation of the Scotland Act."

\(^{28}\) A positive example of such a legislative act, *Agriculture (Scotland) Act 1999* (c.3), where he held that the word "act" in the Convention Act 1998 as it applied to the Scottish Parliament and the Scottish Ministers should be read as including such acts as the Scottish Parliament might pass.
also in line with the express terms of section 100 of the Scotland Act which allows the Law Officers and victims to seek judicial review of acts incompatible with Convention rights and which, in section 100(4), defines "act" as meaning "(a) making any legislation or (b) any other act or failure to act, if it is the act or failure of a member of the Scottish Executive". In similar terms, paragraph 1(e) of Schedule 6 to the Scotland Act includes within the definition of "act", such failure to act would include a failure on the part of the Scottish Ministers to introduce an appropriate appeal procedure to the courts or other independent tribunal under the national provision justifies a finding of incompatibility of the statute with the Convention, under section 4 of the Human Rights Act 1998. More usefully and more radically, however, it could also be argued that the failure on the part of the Scottish Ministers to introduce an appropriate appeal procedure constitutes a breach of the Convention, and that therefore a positive declaratory or specific implement order might be sought from the court for such an appeal procedure to be introduced. Such procedure, although unusual, is justified on the broader reading of section 57(2) of the Scotland Act which makes ultra vires any act or omission on the part of the Scottish Ministers which is contrary to the rights conferred under the Convention.

In any event, such a positive declaratory order by the courts effectively ordaining the Scottish Ministers to introduce a particular legislative provision in order to comply with the requirements of the Convention would seem to be compatible with the whole scheme of the Scotland Act and, in particular, with section 58 thereof. Under section 58 the Secretary of State has the power to direct a member of the Scottish Executive either, (1) to refrain from proposed action where he has reasonable grounds to believe that such action would be incompatible with the international obligations of the United Kingdom; or (2) to order otherwise competent action from any member of the Scottish Executive where he has reasonable grounds to believe that such action is required for the purpose of giving effect to any such international obligations. Such positive action which may be

28 A positive declaratory remedy regarding an obligation to introduce a particular legislative provision was pronounced by Lord Cameron of Lochbroom in Booker Aquaculture Limited v. The Secretary of State for Scotland [1999] Eu.L.R. 54, [1999] 1 C.M.L.R. 35, OH
required of the Scottish Executive by the Secretary of State is stated in section 58(3) to include their “making, confirming or approving subordinate legislation” or indeed introducing a Bill to the Scottish Parliament. While the Secretary of State may order a Scottish Minister to introduce a Bill before the Edinburgh Parliament, the Secretary of State is given no power to order that Parliament to enact any such Bill: such power would, perhaps, be seen as too blatant a disregard for the democratic principle. The Secretary of State required to state his reason in making any such order, and his or her decisions will therefore be subject to judicial scrutiny review on the usual grounds for review of administrative action.

“International obligations” is defined under section 126(1) of the Act as meaning “any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights.” This reference to the international obligations of the United Kingdom is potentially of particular significance in that it effectively binds the Scottish Parliament to respect the whole range of international treaties which have been ratified by the Crown even where they have not been incorporated into the domestic law of the United Kingdom. Thus the Scottish Parliament will be bound by, among other treaties, the UN International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the European Social Charter concluded under the auspices of the Council of Europe in 1961.

Thus, while the Secretary of State has the power to seek positive action of the Scottish Ministers so that they comply with international obligations other than Community law and Convention rights, in matters of the effective protection of Community law and the Convention rights, it would appear that the Scotland Act leaves it up to the courts to develop and grant the appropriate remedies. Accordingly we may anticipate the possibility of court orders along the lines pronounced recently by the Canadian Supreme Court in Vriend v. Alberta29 and by the Supreme Court of Vermont in Baker v. State of Vermont.30 In Vriend v. Alberta the judge at first instance, Madame Justice Russell, holding that the apparent omission of protection against discrimination on grounds of sexual orientation in the Alberta anti-discrimination statute constituted an unjustified violation of the equal protection provision of the Canadian Charter of Rights.

30 Vermont Supreme Court Docket (98-032) Baker v. State of Vermont, unreported decision, filed December 20, 1999
31 This provision is set out in Section (S) 15(1) of the Canadian Charter and is in the following terms: “[E]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
ordered that the relevant sections of the Alberta statute be "interpreted, applied and administered as though they contained the words 'sexual orientation'".32 This first instance decision was reversed on appeal to the Court of Appeal of Alberta but was reinstated in a successful appeal by the plaintiff to the Supreme Court of Canada which found that sexual orientation discrimination must be included in the grounds of discrimination in both federal and provincial rights legislation because its exclusion violates section 15(1) of the Charter. The Supreme Court therefore ordered that "sexual orientation" be "read in" as one of the prohibited grounds of discrimination in the otherwise "under-inclusive" Alberta statute in the manner suggested by the judge at first instance. In Baker v. State of Vermont the Vermont Supreme Court ordered the Vermont legislature to amend the Vermont marriage statutes and enact legislation consistent with their mandate under the 1777 Constitution of the State of Vermont so as to provide for the establishment of same sex civil unions comparable to marriage.

Judges as legislators?

It may be that the apparent constitutional shift of power in favour of the judiciary will be regarded, in time, as a mixed blessing. It would certainly be somewhat ironic if, in holding individuals' rights to a hearing from an independent and impartial tribunal, the political independence and impartiality of the judges themselves was itself called into question. It would be unfortunate indeed if a result giving the Convention rights "direct effect" made what have previously been treated as purely political conflicts, effectively, a question of jurisdiction. Such a result could conceivably lead, in its turn, to demands for, or complaints of, the explicit politicisation of the national judiciary.33 The alternative might be that of the return to ivory tower or cloister with the effective imposition of a monastic rule of silence on (both actual and potential?) members of the judiciary to prevent them from speaking out or commenting in the public arena (including, arguably, as legislators in the House of Lords) on matters deemed to be publicly or politically controversial for fear of compromising the perception of their independence and impartiality.

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32 Vriend v. Alberta (1994) 152 A.R. 1, QBD
33 On April 20, 2000 the Scottish Executive initiated a consultation procedure relative to the creation of an independent Judicial Appointment Board intended to make the appointment of sheriffs and judges in Scotland "more open and transparent". The Scottish Minister for Justice, Jim Wallace MSP stated: "The judiciary serve the whole community. They must be people who understand and are in touch with that community. And just as importantly - they must be seen to understand that community. That is why I now want to introduce a lay contribution to the appointment process for the first time."
ality. Thus in Hoekstra (No. 2) the criminal appeal court, chaired by Lord Justice General Rodger, held that certain extra-judicial comments made in a series of newspaper columns by another serving judge, Lord McCluskey in which he expressed strong misgivings as to the wisdom of the policy decision to make the ECHR directly effective and allow judges “in effect [to] overrule the elected [Scottish] Parliament” and where he suggested that the incorporation of the ECHR was “a revolutionary instrument for change, a Trojan Horse” which would provide “a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers” were such as to cast doubt on the appearance of impartiality both of the individual judge and of any court in which he was sitting, when called upon to decide on Convention arguments.

Subsequently, in Hoekstra (No.3) the same appellants sought to impugn this decision of the High Court in Hoekstra (No. 2), albeit that it was apparently in their favour, and have a reference made to the Judicial Committee of the Privy Council. The argument was that the effect of the decision of the court in Hoekstra (No.2) to order that the interlocutor of the court in Hoekstra (No.1) be set aside on the grounds that it had been pronounced by a court which was not properly constituted by three impartial judges itself constituted an ultra vires act because it contravened section 124(2) of the Criminal (Procedure (Scotland) Act. The argument was rejected by the High Court (constituted by Lord Justice General Rodger, Lord Philip and Lord Carloway) as resting on “a gross distortion of the reasoning of the court” in Hoekstra (No.2). Leave to appeal to the Privy Council was refused and the Privy Council itself subsequently refused the accusers' applications for special leave to appeal to it.

Since section 6 of the Human Rights Act 1998 imposes a general duty on judges, as public authorities, to act compatibly with Convention rights, it is, on one view, difficult to see what judicial function the judge censured in Hoekstra (No.2) could carry out after the coming into force of the Act without compromising the appearance of impartiality. No reference was made, however, in the decision in Hoekstra (No.2) to the judge’s own rights to free expression protected under Article 10.

In Wille v. Liechtenstein the European Court of Human Rights affirmed that sitting judges have rights to free expression under Article 10 to allow them to comment on constitutional matters.

34 Hoekstra v. H.M.Advocate (No. 2), 2000 S.L.T. 605, HCJ, the criminal appeal court consisting in Lord Rodger of Earlsferry, Lord Sutherland and Lady Cosgrove
35 Hoekstra v. H.M.Advocate (No.3), HCJ, 2000 S.C.C.R. 676
36 Hoekstra v. H.M.Advocate (No.1), 2000 S.L.T. 602, HCJ, the criminal appeal court consisting of Lord McCluskey, Lord Kirkwood and Lord Hamilton.
“In the applicant’s view this statement [that the Prince of Liechtenstein was subject to the constitutional review and fundamental rights jurisdiction of the Liechtenstein courts] was an academic comment on the interpretation of Article 112 of the Constitution. The [Liechtenstein] Government, on the other hand, maintained that although it was being made in the guise of a legally aseptic statement, it constituted, in essence, a highly political statement involving an attack on the existing constitutional order and not reconcilable with the public office [of President of the Liechtenstein Administrative Court] held by the applicant at the time.

The Court accepts that the applicant’s lecture, since it dealt with matters of constitutional law and more specifically with the issue of whether one of the sovereigns of the State was subject to the jurisdiction of a constitutional court, inevitably had political implications. It holds that questions of constitutional law, by their very nature, have political implications. It cannot find, however, that this element alone should have prevented the applicant from making any statement on this matter.”38

Questions as to the appearance of impartiality of judges hearing particular cases are being increasingly raised before the courts in the light of the second Pinochet decision of the House of Lords39 which overturned their Lordships first decision (on the question of the lawfulness of the Spanish authorities’ application for extradition of the former Chilean Head of State to face charges on Spanish territory) in the light of the disclosure of Lord Hoffman’s links with Amnesty International, one of the parties who had been permitted by the Appellate Committee of the House of Lords as then constituted (of which he was a member) to intervene in their Lordships first consideration of the matter. The courts are now being required to make explicit specific rules when the courts are faced with claims of apparent judicial partiality.40 The decision in Wille v. Liechtenstein, makes it clear that in the formulation of these rules the judges’ own free expression rights under Article 10 will also require to be taken into account.

38 Wille v. Liechtenstein, unreported decision of October 28, 1999 of the European Court of Human Rights, accessible at www.dhcour.coe.fr/hudoc
40 See, for example, Locabail (U.K.) Ltd v. Bayfield Properties Ltd [2000] 1 All E.R. 65 in which the Court of Appeal had said that if, before a hearing had begun, the judge was alerted to some matter which might, depending on the full facts, throw doubt on his fitness to sit, he should enquire into the full facts, so far as they were ascertainable, ‘in order to make disclosure in the light of them’.
The Human Rights Act and the three Devolution Statutes of 1999, namely the Scotland Act, the Government of Wales Act and the Northern Ireland Act, were all separately drafted by different government departments. The result of this has been that on certain issues the question as to how the these various constitutional measures inter-relate is sometimes quite obscure. In particular, it is not entirely clear under which statute or rules of procedure a court should be acting in considering a claim that an act or omission of a devolved executive or legislature contravenes a Convention right. There are particular rules to be followed in raising and pursuing Convention rights issues under the Scotland Act.41 But on the face of it, section 7(1)(b) of the Human Rights Act 1998 allows a person who claims that a public authority (defined in section 6(3)(a) as “any person certain of whose functions is of a public nature”) has acted or proposes to act in a way which is incompatible with a Convention right to “rely on the Convention right or right concerned in any legal proceedings” before any court in the United Kingdom and section 7(9) envisages rules of court to cover the procedure.42 Since both the Acts of the Scottish Parliament and Northern Ireland Assembly and any secondary legislation issued by members of the Scottish Executive, Northern Ireland Minister or Northern Ireland Department or Welsh Assembly are defined as “subordinated legislation” for the purposes of the Human Rights Act 1998, it would seem to follow that any provision of such devolved legislation which appears to any court before which the matter is raised to contravene a Convention right may be treated as invalid and unenforceable under and in terms of section 3 of the Human Rights Act. And if a provision of devolved legislation is challenging under the Human Rights Act the courts will not make a declaration of incompatibility under section 4 since there is nothing in the Devolution Statutes, the primary Westminster legislation, which prevents the removal by the court of incompatible provisions of the devolved legislation.

In contrast to the position under the Devolution Statutes, however:

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there is a general one year time limit from the date of the act or omission complained of within which court proceedings alleging breach of Convention rights must be brought;

there is no provision under the Human Rights Act for filtering out frivolous or vexatious arguments;

there is no provision in the Human Rights Act for any variation by the court of the retrospective effect of the court’s decision on incompatibility;

there is no possibility for a fast track reference on the issue raised to higher courts;

final appeal against any decision on compatibility of devolved legislation with the Human Rights Act 1998 would lie either with the House of Lords or, if the question were raised in Scotland in the course of criminal proceedings, with the High Court of Justiciary acting as a criminal appeals court.

However, the incompatibility of the devolved legislation with the Convention right as raised in the course of legal proceedings is characterised by the courts as a “devolution issue”, then:

the question of the time within which an action raising a devolution issue is left unspecified in the Scotland Act, presumably allowing the matter to be regulated simply by the existing principles of *mora*, *taciturnity* and *acquiescence* as applied in judicial review in Scotland. In this regard it has been judicially observed on a number of occasions in the Outer House that there is no Scottish authority in which a petition for Judicial Review has been refused on the ground of delay alone, in the absence of *acquiescence* or prejudice.

- the matter has to be intimated to the relevant law officer(s) for the jurisdiction of the United Kingdom in which the proceedings in question take place;
- the courts are enjoined to consider whether and to what extent any decision on incompatibility should be made retrospective;
- the court may also suspend its judgment to allow the identified defect to be corrected; and
- the final decision on the question of the compatibility of

6 See, for example, *King v. East Ayrshire Council*, 1998 S.C. 182, IH per Lord President at 196C-D: “It is recognised that the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision for any longer than is necessary in fairness to the person affected by it”. See, too, *Swan v. Secretary of State for Scotland* 1998 SC 479, IH.

devolved legislation with the Convention rights, when this matter is raised as a “devolution issue” would lie with the Judicial Committee of the Privy Council.

1.52 It seems inherently unlikely that the Westminster Parliament would have intended that the complex systems of check, references and balances that has been put in place in relation to the resolution by the courts of “devolution issues” could simply be over-ridden in the case where it is alleged in the course of any legal proceedings that a provision of devolved legislation is incompatible with the rights incorporated by the Human Rights Act, but that is what appears, on one view, to have been done by omission.

It has been argued by some commentators that since the Scotland Act and the Northern Ireland Act both post-dates the Human Rights Act by some 10 days (the first two statutes having received Royal Assent on November 19, the last on November 9, 1998), then the provisions of these acts should be taken as impliedly repealing those of the Human Rights Act, insofar as there is any conflict between them: thus, anything which falls within the scope of the term “devolution issue” must be dealt with under the relevant Schedules of the Scotland Act. Such a line of argument, based on the traditional English constitutional claim that the Westminster Parliament cannot bind itself or its successors, seems to under-play the fundamental constitutional change wrought by the Human Rights Act and its domestication of the Convention rights. It also fails to take into account the fact that the third devolution statute, the Government of Wales Act was passed on July 31, 1998. It also be thought to require a somewhat mechanistic view of the hierarchy to be accorded Westminster statutes, with the later always displacing the earlier in a manner which is difficult to reconcile with the general acceptance of the claims of Community law, mediated through the European Communities Act 1972, to over-rule and require the disapplication of provisions of Westminster statutes (for example the Merchant Shipping Act 1988) passed subsequent to the entry of the United Kingdom into the European Union.\(^{45}\)

In any event, if the scheme of Schedule 6 to the Scotland Act Schedule 8 of the Government of Wales Act and Schedule 10 of the Northern Ireland Act are to be preserved in the case of challenges based on incompatibility with Convention rights, either the Westminster Parliament or the courts will have to stipulate that for the purposes of section 7(1)(b) of the Human Rights Act, the only reliance that can in law be placed on Convention rights in relation to provisions of devolved legislation is in the context of the matter raising a “devolution issue” for the purposes of the Devolution Statutes. No direct challenge could be made to

such ruling as not providing an effective remedy for the protection of Convention since this provision of the Convention, Article 13, has not been incorporated into the Human Rights Act 1998. One paradoxical result of any such approach would be that secondary legislation passed by members of the devolved Executives would receive more procedural protection from being set-aside by the courts than would subordinate Westminster legislation made by Ministers of the Crown.

The underlying logic and tenor of the approach of, in particular, Lord Hope, in the three Privy Council cases decided in the course of the year 2000, all of which emphasise the role of the Judicial Committee of the Privy Council in maintaining a uniformity of approach across the United Kingdom to, in particular, matters of Convention rights in criminal trials, would seem to point to such a ruling in favour of procedural exclusivity, that is to say if a question concerning compatibility of (in)action with a Convention right can be analysed as a raising devolution issue then it must be raised by way of the devolution procedure set out in the relevant statute, rather than by means of direct reliance on the Human Rights Act’s procedures. If such an approach to procedural exclusivity is not taken by the Judicial Committee of the Privy Council then the possibility arises of Scotland and England developing separate human rights jurisprudence since, unless a devolution issue is properly raised under and in terms of the Scotland Act, there is no appeal from the decisions of the High Court of Justiciary acting as a court of criminal appeal and decisions of this court while binding in Scots criminal law are, at best, only of persuasive authority in the rest of the United Kingdom.

Finally, if the Convention rights are acknowledged to have a fundamental constitutional status, then, of course, provisions of the Scotland Act may themselves be subject to human rights challenge under the Human Rights Act. For example, the question must arise as to whether the Judicial Committee of the Privy Council, whose members qua Privy Councillors are appointed solely at the pleasure of the Crown without formal grant or letters patents and who may be removed or dismissed from the Privy Council at the pleasure of the monarch (albeit on advice from the Prime Minister) simply by striking their names from the Privy Council book, themselves satisfy the Article 6(1) requirements as understood by the European Court of Human Rights of the appearance of an independent and impartial tribunal established by law, see, among others, the decisions of the European Court of Human Rights in McGonnell v.

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46 Art. 13 of the European Convention is in the following terms: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by a person acting in an official capacity.”
United Kingdom and Wille v. Liechtenstein. The answer may course be simply that since all the members of the Judicial Committee are tenured judges then no questions as to the independence and impartiality may arise, but it remains at least theoretical possibility that these appeal provisions of Schedule 6 of the Scotland Act could be declared to be incompatible with the Convention under reference to Section 4 of the Human Rights Act.

CONCLUSION

1.54 Lord Justice Sedley has asserted that:

"[W]e have today...a new and still emerging constitutional paradigm, no longer Dicey’s supreme Parliament...but a bipolar sovereignty of the Crown in Parliament and the Crown in the courts, to each of which the Crown Ministers are answerable—politically to Parliament and legally to the courts."

And Lord Justice Laws has also observed that “the doctrine of Parliamentary sovereignty cannot be vouched by Parliamentary legislation; a higher law confers it and must of necessity limit it” and has claimed that:

“There remains the possibility that the sovereign Parliament may pass a law which unquestionably denies a fundamental freedom and authorises a public body to give effect to the denial....[I]f the courts develop with sufficient energy jurisprudence which sets firmly in place a set of norms which chime with those of the European Convention, and elaborate principles of statutory construction which will precisely facilitate that task, the sovereignty of Parliament will remain...its proper place, which is to scrutinise and, as it sees fit, vouchsafe the policies of the government which the people...”

47 McConnell v. U.K., unreported decision February 8, 2000 of the European Court of Human Rights, accessible at www.dhcour.coe.fr/hudoc
48 Wille v. Liechtenstein, unreported decision of October 28, 1999 of the European Court of Human Rights, accessible at www.dhcour.coe.fr/hudoc
The introduction of a new fundamental rights jurisdiction for the courts which has been effected by the Human Rights Act and the Good and Act clearly will have a profound effect on our understanding of the constitutional structure of the United Kingdom in particular, of the proper role of judges within this new dispensation. The United Kingdom is finally falling into line with many other Western democracies in finally giving the judges a clear constitutional role in reviewing legislation and appointing them as guardians of fundamental values even against the legislature, as well as against the executive. Arguably part of that constitutional role involves the judges openly articulating their constitutional vision and giving due recognition to the democratic legitimacy of the legislature and executive. Others may differ on this point and seek to maintain the distance of the judges from the general political process.

Some support for this position can be seen in some recent Scottish court decisions on human rights matters. In the course of his judgment in *A v. The Scottish Ministers* (the challenge to the compatibility of the provisions of the first Act of the Holyrood Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 with the requirements of Article 5 regarding the conditions for lawful detention) Lord President Rodger quoted with approval the remarks of Lord Hope in *R v. DPP ex parte Kebelein* to the effect that

“difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.”

Significantly, the Lord President made specific reference (at paragraphs 31 and 52) to speeches made in the Holyrood Parliament not only by the proposer of the Bill, but also by other MSPs including spokespeople from all four of the main parties represented there, to illustrate the concerns of the legislators in passing the Act and their awareness of the need to consider, too, the Convention rights of individuals affected by the legislation. And at

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52. See A v. The Scottish Ministers, 2000 S.L.T. 873, IH

paragraph 53 he identified the central question for the court as follows:

“What we must therefore decide is whether, even though the members were conscious of the need to have regard to the human rights of the patients, the Parliament none the less failed to maintain the necessary fair balance by giving too much weight to the perceived danger to members of the public and, thereby, giving too little weight to the requirements of the protection of the patients’ right to freedom and in particular their rights under Article 5(1)(e) and (4). In determining that issue, as the authorities show, it is right that the court should give due deference to the assessment which the democratically elected legislature has made of the policy issues involved.”

There is no doubt that the Scotland Act and the Human Rights Act will have a profound effect on the culture and practice of Scots law. Despite the much vaunted European and Civilian roots to Scots law, Scots lawyers have tendencies toward the insular, the conservative and the antiquarian, harking back to the glories of a system whose authoritativegolden age is placed in the seventeenth and eighteenth centuries. The Human Rights Act and the Scotland Act will, it is hoped, shake us out of that elegiac complacency. By reason of the interaction of these two Acts Scottish courts and tribunals have been placed at the vanguard of the development of human rights protection in these islands. It is a challenging and potentially perilous position for them. One challenge is to maintain public confidence in their impartiality. The peril is always that in their emphasis on the rule of law they may be dragged them into the political arena, with their decisions being presented not as the upholding of individual rights but as the thwarting of the democratic will embodied in the acts of the new legislature and executive. Lord Hope has put things more positively, identifying the main challenge to the judiciary in the new dispensation as follows:

“[T]o maintain the devolution process, so that in the hands of the judges it will be a living instrument capable of adjusting to the demands of changing circumstances as the Parliament develops its expertise and authority in a creative process which will promote the interests of democracy.”

However one sees it, it is clear that all involved in the processes of legislation and adjudication in the new Scotland, whether as Members of the Scottish Parliament or Scottish Ministers, judges or lawyers, prosecutors or defendants, litigants or journalists, will have to be alive to the requirements of human rights and work together to develop a culture imbued with their principles.

Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle

Durchsetzung des Gemeinschaftsrechts von Francovich zu Köbler: Zwölf Jahre gemeinschaftsrechtliche Staatshaftung

La mise en œuvre du droit communautaire de Francovich à Köbler: Douze ans du principe de la responsabilité de l’Etat

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The Constitutional Supremacy of Community Law in the United Kingdom After the Human Rights Act

Aidan O’Neill QC*

A. Introduction

One of the paradoxes for those interested in the reception of Community law into the domestic legal systems of the Member States is this: while the United Kingdom has, from a political viewpoint, appeared a reluctant, unenthusiastic and, at times, semi-detached, participant in the European project, United Kingdom courts have, after a slow start, been at the forefront of the integration and subordination of national law to the requirements of Community law.

In contrast to the situation in Germany, Italy, Denmark, Spain, France and Ireland the supreme courts of the United Kingdom have had little apparent difficulty in reconciling UK national constitutional law with the constitutional demands of Community law, in particular the acceptance of its supremacy and direct effect. Indeed in the 1980s and 1990s, the House of Lords, as the United Kingdom’s highest court in civil matters, was almost enthusiastically communautaire in its willingness to apply European Community principles and doctrines to national issues. The approach generally taken by the judges was that, given that the UK Parliament had committed the United Kingdom to continued full membership of the European Union, the national courts in the United Kingdom had no option but to apply the law as developed by the Court of Justice, even where this led to them challenging and striking down legislation emanating from the national Parliament on the grounds of its incompatibility with Community law or legal principles, notwithstanding the apparent incompatibility of such an approach with the fundamental UK constitutional doctrine of “the sovereignty of Parliament”. This is plain from looking at two statements of Lord Bridge of Harwich made at different stages in the Factortame litigation. When the matter was first before the House of Lords, Lord Bridge stated:

“If the applicants fail to establish the rights they claim before the European Court of Justice the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament’s sovereign will... I am clearly of the opinion that as a matter of English law, the court has no power to make an order which has these consequences.”

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3 R. v. Secretary of State for Transport ex parte Factortame Ltd. and Others [1990] 2 AC 83 at 143, HL.
However, in his second judgment in the case following the Luxembourg Court's ruling on the preliminary reference from the House of Lords\textsuperscript{4}, Lord Bridge expressed the view that the United Kingdom's accession to the European Communities in 1973 meant that the courts of the United Kingdom had fully accepted the jurisdiction of the European Court of Justice with all that implied, including acceptance in full of the decision of the Luxembourg court in both Costa v. ENEL\textsuperscript{5} and Simmenthal\textsuperscript{6}. He stated:

"Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom Court, when delivering final judgment, to overrule any rule of national law found to be in conflict with any directly enforceable rule of law... Thus there is nothing in any way novel in according supremacy to rules of law in those areas in which they apply and to insist that, in the protection of rights under law, national courts should not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."

Following this judgment, it became generally accepted by judges in the United Kingdom that "the Treaty of Rome is the supreme law of this country, taking precedence over Acts of Parliament". Community law thus became the means whereby the judges could assert the sovereignty of judicial power over and against the Executive and Parliament. As the then Lord Justice Mustill stated:

"Since [the accession of the United Kingdom to the European Communities] the courts have been obliged to read statutes of the United Kingdom in the light of the general principles laid down in the Treaty of Rome, as developed in instruments of the Council and Commission, and as expounded by the European Court of Justice. The interaction between these instruments and the public and private rights of organisations and individuals in Member States is complex, but one thing must be taken as clear for the purposes of the present case; that if there is a collision... the former must yield."\textsuperscript{7}

A parallel might in fact be drawn between the self-transformation of the European Court of Justice from an administrative tribunal into a constitutional court, and the application and extension of Community law in the United Kingdom by the House of Lords in a way which over the eighteen years of Conservative administration from 1979 to 1997 transformed the relationship between the Government, Parliament and the Judiciary in the United Kingdom. European Community law has given the national courts of the United Kingdom the potential to alter the balance of the unwritten constitution, allowing the courts to (re-)claim powers denied them since the seventeenth century development of the doctrine of the sovereignty of Parliament and the nineteenth century enthusiasm for legislative reform through Parliament. The Court of Justice has been accused of becoming the master of the Treaty by translating the Treaty into a European constitution. Recent national case law involving Community law issues suggests that, by accepting the subordination of the national legal order to the Community legal order, the House of Lords has become master of the United Kingdom Constitution.

Since the coming into power of a Labour administration in the UK in 1997, further radical constitutional change has been introduced. Devolved Parliaments or legislative assemblies


\textsuperscript{5} Case 69/64 Costa v. ENEL [1964] ECR 585.

\textsuperscript{6} Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal [1978] ECR 629 at 644 "[Directly applicable provisions of Community law] not only by their entry into force render automatically inapplicable any conflicting provision of current national law but... also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions."

\textsuperscript{7} R. v. Secretary of State for Transport, ex parte Factortame (No. 2) [1991] 1 AC 603.

\textsuperscript{8} Stoke-on-Trent City Council v. B & Q plc [1990] 3 CMLR 31 per Hoffmann J. at 34.

\textsuperscript{9} In W.H. Smith Do-it-all Lid and Another v. Peterborough City Council [1991] 1 Q.B. 304 per Mustill LJ at 317 D-F.
have been introduced to govern the home affairs of Scotland, Wales and Northern Ireland, and many of the rights set out in the European Convention of Human Rights and Fundamental Freedoms have been made directly effective before the national courts of the United Kingdom with the coming into force of the Human Right Act 1998 in October 2000. For the first time, then, judges in the UK have been explicitly charged with protecting a list of fundamental rights against incompatible action by any public authority.

In this paper, I wish to examine whether this granting to the UK courts of a new fundamental rights jurisdiction might in fact lead to a re-evaluation by the national courts of the constitutional priority currently accorded by them to Community law. Whereas Community law might be said under the earlier dispensation to have empowered UK judges against the UK executive, it may be that the designation by the Human Rights Act of national courts as the primary guardians of fundamental rights may lead them to question the absolute primacy of Community law, at least in matters which impact upon fundamental rights.

B. Convention Rights and Community Law

It is something of a commonplace among European Community lawyers working in the United Kingdom that, even prior to the enactment of the Human Rights Act 1998, there had already been an effective incorporation of the provisions of the European Convention on Human Rights into domestic law and practice, at least in those areas falling within the scope of Community law, however that is defined. This limited degree of domestic incorporation had occurred as a result of the creative fundamental rights jurisprudence of the European Court of Justice. Community law was said to provide a direct gateway for national courts to have access to and to rely upon fundamental rights considerations, particularly those contained within the European Convention.

The coming into force of the Human Rights Act 1998 is, on this model, seen as simply opening another portal or gateway allowing national courts to rely directly upon the provisions of the Convention and to take into account the jurisprudence of the European Court of Human Rights. The gateway to fundamental rights provided by Community law is, then, seen as simply supplementing access, providing a wider doorway which, in matters within the scope of Community law, allows national courts to take into account fundamental rights considerations derived not only from the European Convention on Human Rights, but also from other international Human Rights Conventions and rules of customary international law which have been referred to by the European Court of Justice from time to time. It is argued in this chapter that such a model, which sees the two modes of access to fundamental rights considerations as complementary, is incorrect. Instead, it is submitted that the existence of two distinct means of reference to fundamental rights, either under reference to the Human Rights Act 1998 or under reference to the general principles of Community law, in fact exacerbates the possibility of conflict for national courts between competing fundamental rights considerations and interpretations.


11 In Case 47/73 Nold v. Commission [1974] ECR 491 the Court of Justice stated (at paragraph 13): “International Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law.”

12 In Case C-286/90 Poulsen and Dive Navigation [1992] ECR I-6019 the Court of Justice stated (at paragraph 9) that “the Community must respect international law in the exercise of its powers”. Further, in Case C-162/96 Racke v. Hauptzollamt Mainz [1998] ECR I-3655 at paragraph 46 that “the rules of customary international law concerning the termination and suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order”.

13 In Case C-192/96 Union Against Racism and Xenophobia v. France [1998] ECR I-1443 the Court of Justice stated (at paragraph 10) that “the Community must respect international law in the exercise of its powers”.

14 In Case C-286/90 Poulsen and Dive Navigation [1992] ECR I-6019 and C-192/96 Union Against Racism and Xenophobia v. France [1998] ECR I-1443 the Court of Justice referred to “the rules of customary international law concerning the termination and suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order”.

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I. Convention Rights and the European Union

While there is now no doubt that the central Community institutions are formally legally bound to respect fundamental rights in all their activities (although how that duty might actually be enforced by individuals remains problematic), the question as to the degree (if any) to which the Court of Justice may properly act as a human rights courts in relation to the activities of the Member States remains a vexed one however. There is no specific Treaty provision giving the Court of Justice jurisdiction in this regard, and indeed Article 6(3) EU provides that “the Union shall respect the national identities of its Member States.”

The Court of Justice has, however, by a process of “creeping pre-emption” apparently claimed to itself such power of review of Member State action on the basis that it is applying “general principles of Community law,” among which it includes the protection of human rights. The story is well known. From the mid-1980s on the Court of Justice increasingly began to use the language of fundamental rights, initially in cases concerning discrimination on grounds of sex and of nationality, in relation to its assessment of the compatibility of Member State action with the requirements of the Treaty. In 1989 the Court of Justice held, in the case of Wachau v. Germany that when Member States were seeking to implement or enforce a Community derived provision, their actions could be subjected to the same fundamental rights review as the Court of Justice reviewed the actions of the Community institutions. The Court of Justice went on to hold in the 1991 Greek Television decision that as soon as any national administrative decision or indeed primary legislation of the Member State sought to derogate from Community law, the Member State’s action was then “within the scope of Community law” and fundamental rights considerations could be used by the Court of Justice to consider and test the validity of the legislative and administrative actions of the Member State.

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11 Article 6(2) EU (formerly Article F of the Treaty on European Union) provides that: “The [European] Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” And Article 46(d) EU (formerly Article L of the Treaty on European Union) specifically gives the Court of Justice jurisdiction to interpret and apply this fundamental rights provision as regards “action of the [central Community institutions]” in the same way as the Luxembourg Court already has jurisdiction over them under the Treaty of Rome.


15 Thus in Case C-348/96 Criminal Proceedings against Donatella Calfo [1999] ECR 1-11, [1999] All ER (EC) 850, the Court of Justice declared a provision of Greek law which required the imposition of an order of expulsion from Greek territory for life of nationals of other Member States convicted in Greece of drugs offences to be incompatible with Community law as being a disproportionate interference with the Community principles of free movement of persons.


18 See, for example, Case 249/86 UNECTER v. Heyden [1987] ECR 4097.


The Court of Justice has now developed the following formulation to summarise its approach to fundamental rights review within the Community:

“[I]t is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court [of Justice] ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard the Court has stated that the [European] Convention has special significance. As the Court has also held, it follows that measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognised and guaranteed. ... Further ... where national legislation falls within the field of application of Community law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the Convention – whose observance the Court ensures. However the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law.”

The following points should be noted from this passage:

(i) first, the Court of Justice claims to draw inspiration from constitutional traditions common to the Member States, but is implicitly not bound by these common traditions in establishing the extent and content of the fundamental rights which it seeks to protect;

(ii) secondly, the Court of Justice claims as a possible source for the identification of fundamental rights which it seeks to protect any international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, but again the Court itself is not bound by the terms of any such treaties. As we have noted as well as the various Council of Europe treaties which we have identified above, this formulation of the Court of Justice could include conventions concluded by the International Labour Organisation as well as other UN and Council of Europe Conventions;

(iii) thirdly, the provisions of the European Convention on Human Rights are regarded by the Court of Justice as having “special significance” in establishing the content and extent of the fundamental rights protected under Community law;

(iv) fourthly, respect for human rights is a condition of the lawfulness of Community acts and accordingly Community acts which fail to respect fundamental rights will be struck down by the Court of Justice as ultra vires;

(v) fifthly, the Court of Justice considers that it is competent to advise national courts as to the requirements of the Convention where national legislation falls within the field of application of Community law;

(vi) finally it is only where the national legislation in question falls within the exclusive jurisdiction of the Member State and has no effect in an area covered by Community law, that the Court of Justice will decline to offer its opinion on the compatibility of a national measure with the requirements of the European Convention.

22 Case C-299/95 Kremzow v. Austria [1997] ECR I-2629 a case concerning the compatibility of national measures of criminal procedural law with the European Convention.
II. The European Court of Justice v. the European Court of Human Rights

Arguably the most significant development in the case law of the Court of Justice in relation to human rights protection within the European Union was its 1996 opinion to the effect that, under the Treaties as drafted, the EU lacks the legal competence to be able to accede as a body to the European Convention on Human Rights. The Court of Justice noted that no treaty provision conferred on the EU institutions any general power to enact rules on human rights or to conclude international conventions in this field, and felt unable to construe an implied power to this effect, stating as follows (at paragraphs 34-35):

"Accession to the [European] Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as the integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system for the protection of human rights in the EU, with equally fundamental institutional implications for the EU and for the member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 [now Article 308 EC]. It could be brought about only by Treaty amendment." 29

25 See Case C-351/92 Graff v. Hauptrzollamt Köln Rheinu [1994] ECR I-3361 at paragraph 17: "According to well-established case law, the requirements flowing from the protection of fundamental rights and principles in EU law are also binding on the Member States when they implement EU rules and the Member States must therefore, as far as possible, apply those rules in accordance with those requirements."

26 See also Case C-260/89 ERT v. DEP [1991] ECR I-2925 at paragraph 43: "Where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if the they are compatible with the fundamental rights the observance of which is ensured by the Court.

27 See, for example, Case C-144/95 Criminal Proceedings against Jean Louis Maurin [1996] ECR I-2909 at paragraph 12: "The offence with which Mr. Maurin is charged involves national legislation falling outside the scope of EU law and ... the Court therefore does not have jurisdiction to determine whether the procedural rules applicable to such an offence amounts to a breach of the principles concerning observance of the rights of the defence and of the adversarial nature of proceedings (see, in particular, the judgment in Case 12/86 Demirel v. Stad Schwerzh-Gmund [1987] ECR 3719, paragraph 28). See, too, Case C-299/95 Kremnow v. Austra [1997] I-2629, [1997] 3 CMLR 1289. See also Case 70/85 Sodamare SA and Others v. Roye Lombardia [1997] ECR I-3395, [1997] 3 CMLR 591.

28 Article 308 EC provides as follows: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."
The Constitutional Supremacy of Community Law in the UK

The suggestion has been made that in this judgment the Court of Justice is simply respecting the limits of its powers and confirming that accession to the European Convention by the institutions of the European Union is too important a step to be implied by the Court from the Treaty, requiring instead specific authorisation by way of Treaty amendment agreed to by all the Member States. It might be thought surprising that the Court did not appear to take the same view of concepts such as the supremacy of Community law and its direct effect in Member States finding in the absence of any specific Treaty authorisation, that these characteristics of Community law were implied within the Treaty.

In any event, given that the Court of Justice has held that the substantive fundamental rights provisions of the Convention were themselves already part of Community law and as such binding on the Community institutions and the Member States acting within the sphere of Community law, it is difficult to see why formal accession to the European Convention should now be regarded by the Court as a step of fundamental constitutional significance requiring explicit Treaty authorisation. It is hard to resist the conclusion that, in fact, the primary concern of the Court of Justice with the suggestion that the Community as a body might formally accede to the European Convention is that the effect of any such accession would be to place the central institutions of the Community, including the Court of Justice, within the jurisdiction of the Strasbourg European Court of Human Rights and would displace the Luxembourg Court of Justice from its position as the court of final reference for the European Union, at least in matters concerning fundamental rights.

One clear example of the on-going tension, or tussle for supremacy, between the European Court of Justice and the European Court of Human Rights may be seen in the attempts by litigants to invoke human rights norms derived from the case law of the Strasbourg Court to challenge the very procedures of the European Court of Justice and the role played by the Advocate General before the Luxembourg Court. The European Court of Human Rights has stated that the “right to adversarial proceedings” means in principle the opportunity for the parties to court proceedings falling within the scope of Article 6 to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's

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30 In his evidence to the House of Lords European Union Committee (noted in EU Charter of Fundamental Rights – European Union Committee 8th report 1999–2000 (HL Paper 67) at page 82 paragraph 179 and page 85 paragraph 188), Dr. Hans Christian Krüger, Deputy Secretary General to the Council of Europe stated the following: “We in Strasbourg very much see the [European] Union as being comparable to a domestic legal system in which the acts of the Union which more and more affect the European citizen should be subject to some sort of scrutiny in human rights and fundamental rights terms. [...] We always thought that at the very end there should be the European Convention on Human Rights, an international external control of the acts of the Union or of the EU and that is why we advocate the process of accession. (...) The House of Lords is not exempt from that. The German Constitutional Court was criticised for the length of time it took to deal with cases ... And Italian courts are constantly reminded that they should deal with the cases more quickly. Why should [the Court of Justice in] Luxembourg be exempt?”

31 In Opinion 1/91 Re a Draft Treaty on a European Economic Area [1991] ECR 1-6079 the Court of Justice had held that the proposed creation of a new court structure for the European Economic Area consisting in courts staffed by judges of the European Court of Justice sitting with non-EU judges was unlawful because it represented an encroachment on the exclusive jurisdiction of the Court of Justice under the EC Treaty and undermined the autonomy of the EU legal order in pursuance of its own particular objectives. The clear concern of the Court of Justice was to maintain its position at the top of any judicial hierarchy. This interpretation is also given some backing from the evidence given to the House of Lords European Union Committee by Advocate General Jacobs (speaking in a personal capacity rather than on behalf of the Court of Justice) and noted in EU Charter of Fundamental Rights – European Union Committee 8th report 1999–2000 (HL Paper 67) at page 95 paragraph 238: “[The decisions of our Court of Justice] have to be followed by the courts of the Member States. Otherwise the whole notion of EU law is in danger. I am not sure there is not a risk that, if the Member States of the [European] Union accept that the [European] Court of Human Rights has jurisdiction to review, in effect, the decisions of our court, the national constitutional courts, for example, will not also feel that they have the right to question decisions of our court; and whether there will not be in any event some greater degree of uncertainty about our case law than there is in the present system.”
decision\textsuperscript{32}. But the Opinion of the Advocate General, like the submissions of the parties and interveners, is intended to guide and influence the final decision of the Court of Justice\textsuperscript{33}. The Advocate General's reasoned Opinion surveys the relevant facts and law as they appear to the Advocate General and concludes with a recommendation as to how the Court of Justice should dispose of the case. This Opinion does not, however, bind the Court or the parties. Albeit that the Advocate General has status equal to that of the Judges, he performs a role which is quite distinct from that of the Court. The Advocate General is charged with assisting the Court. He is, however, excluded from the deliberations of the Court. He therefore expresses a view as to the merits and proper disposal of the case before the Court has itself reached a decision.

The European Court of Human Rights has affirmed that "in this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice."\textsuperscript{34} In \textit{Emesa Sugar (Free Zone) NV v. Aruba}\textsuperscript{35}, however, the Court of Justice dismissed the parties' application for leave to submit written observations in response to the Opinion delivered by the Advocate General.\textsuperscript{36} In making that order the Court of Justice made reference to certain case law of the European Court of Human Rights concerning the right of parties to comment on observations filed in their cases by various independent members of the national legal service (or \textit{magistrats independents}).\textsuperscript{37} After referring to this case law, the Court noted as follows (at paragraphs 14 to 16):

"[The] Opinion of the Advocate General brings the oral procedure to an end. It does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which 'derives its authority from that of the Procureur Général's department [in the French version, "ministère public"]' (Judgment in \textit{Vermeulen v. Belgium}, cited above, paragraph 31). Rather, it constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself. The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it. Furthermore, the Opinion is published together with the Court's judgment. Having regard to both the organic and the functional link between the Advocate General and the Court, referred to in paragraphs 10 to 15 of this order, the aforesaid case-law of the European Court of Human Rights does not appear to be transposable to the Opinion of the Court's Advocates General."


\textsuperscript{33} The Court of Justice has, on occasions, wholly endorsed the approach of the Advocate General and referred to nothing more than his Opinion for the reasons supporting aspects of its decision: see, for example, \textit{Case C-59/92 Hauptzollamt Hamburg St.-Annem v. Ebbe Schönichsen} (1993) ECR I-2193 at paragraph 4 and \textit{Case C-369/92 P. SEP v. Commission} (1994) ECR I-1991 at paragraph 21.


\textsuperscript{36} Case C-17/98 \textit{Emesa Sugar (Free Zone) NV v. Aruba} (2000) ECHR I-665.

In making its Order in *Emesa*, however the Court of Justice appears to have interpreted Article 6(1) ECHR\(^{38}\) in a restrictive manner\(^{39}\) and failed to make reference to, or to follow, the line of case law of the European Court of Human Rights which emphasises that parties to a cause have a right to comment on observations which have been submitted even by other judicial officers and courts within the national hierarchy.\(^{40}\) In its post-*Emesa* decision in *Kress v France*\(^{41}\), a Grand Chamber of the Strasbourg Court considered the Article 6 compatibility of the procedures of the French *Conseil d'État*, in particular the role played in the proceedings by the *Commissaire du Gouvernement*. At paragraph 86 the Strasbourg Court noted too that the role of the Advocate General at the Court of Justice of the European Communities was “closely modelled” on that of the *Commissaire du Gouvernement* of the French *Conseil d'État* with the crucial difference that the *Commissaire du Gouvernement*, unlike Luxembourg Court’s Advocate General, attended the deliberations of the Judges, albeit that he had no vote in determining the outcome. The Court held that such participation by the *Commissaire du Gouvernement* in the judges’ deliberations was incompatible with the appearance of a fair trial as between the parties.

Significantly for the *Emesa* decision, however, the European Court of Human Rights held (at paragraph 76) that the only reason that the pre-deliberation open court participation by the *Commissaire du Gouvernement* was Article 6 compatible was because there were sufficient procedural safeguards for the parties to ensure compliance with the adversarial principle contained in Article 6. In particular, in proceedings in the *Conseil d'État* lawyers who so wish can ask the *Commissaire du Gouvernement*, before the hearing, to indicate the general tenor of his submissions; parties may reply to the *Commissaire du Gouvernement*’s submissions by means of a written memorandum for the Court’s deliberations; and in the event of the *Commissaire du Gouvernement*’s raising orally at the hearing a ground not raised by the parties, the presiding judge in the *Conseil d'État* would adjourn the case to enable the parties to present argument on the point. None of these procedural safeguards exist in the case of the Advocate General’s participation before the Court of Justice where parties are given no prior warning of the general tenor of the Advocate General’s submissions, are given no opportunity to reply to the Advocate General’s submissions in writing and the Court continues with its deliberations without further participation by the parties regardless of whether or not the Advocate General has raised points in his Opinion which were not raised by any of the parties or interveners.

It is hard to see how, in the light of the decision of the European Court of Human Rights in *Kress v France*, that the current procedures before the European Court of Justice might be

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\(^{38}\) Article 47(1) of the EU Charter parallels and corresponds to Article 6(1) ECHR in guaranteeing a right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”

\(^{39}\) Compare for example: *Moreira de Azevedo v. Portugal* 23 October 1990, A/189 at paragraph 66 where the European Court of Human Rights observed that the right to a fair trial is seen as holding so prominent a place in democratic society that there is no justification for interpreting Article 6(1) restrictively.

\(^{40}\) Thus in *Nideröst-Huber v. Switzerland*, 18 February 1997, RJ 1997-1, 107 the *Vermeulen* line of case law was expressly applied by the European Court of Human Rights to a case in which the appellant from a judgment of the Schwyz Cantonal Court to the Swiss Federal Court did not receive, prior to the judgment of the Federal Court dismissing his appeal, observations by the Cantonal Court to the Federal Court on the merits of the appeal. Similarly, in Application 37929/97 *F. R. v. Switzerland*, ECHR Judgment of 28 June 2001, the Strasbourg Court upheld the applicant’s complaint of a breach of Article 6 arising from the fact that while in his case he had been given sight of the observations of the lower court, the Administrative Court of the Canton of Schwyz, in his appeal to the Federal Insurance Court, the appellate court had refused to take into account his reply thereto.

said to be properly Article 6 compliant. The denial of the right of the parties to the litigation to comment on the Opinion of the Advocates General in cases before the Court of Justice and be afforded a “genuine opportunity” to submit additional observations, if so advised, on the Opinion of the Advocate General constitutes a departure from the case law of the European Court of Human Rights and the provision of less protection to individual litigants than is required by the provisions of the Convention. Such a course would appear to be in direct contravention of the principles laid down in Article 52(3) of the EU Charter.

Other examples of divergences in approach between the European Court of Justice and the European Court of Human Rights on fundamental rights matters include the following:

Article 6(1) – the privilege against self-incrimination

In Orkem the Court of Justice ruled that, while the Commission could not compel a company to provide it with answers which might involve an admission of a breach of Community law which it was incumbent upon the Commission to prove, Article 6 of the European Convention did not confer a right not to give evidence against oneself. By contrast, the Strasbourg Court in Funke stated that Article 6 of the European Convention did indeed protect the right to remain silent and not to contribute to incriminating oneself and in John Murray v. United Kingdom reiterated that “the right to remain silent

42 Significantly, in Application no. 36590/97 Göç v. Turkey 11 July 2002 and in Application nos. 33911/96, 35237/97 and 34595/97 Meftah and others v. France 26 July 2002 the European Court of Human Rights, sitting in an appellate capacity as a Grand Chamber in both cases, confirmed this line of case law and held that the applicants’ lack of opportunity to respond to the submissions of the Principal Public Prosecutor to the Court of Cassation of Turkey (in the former case) and to the Advocate General’s submissions to the Court of Cassation of France (in the latter cases) constituted a violation of their rights to a fair hearing guaranteed under Article 6 § 1 of the Convention. See, too, Application no. 45019/98 Pascoli v. France, ECHR, 26 June 2003 where Article 6(1) was found to be breached where an applicant was not provided with a copy of the reporting judge’s report to the Court of Cassation and Applications nos. 38410/97 and 40373/98 Fontaine and Berin v. France, ECHR, 8 July 2003 where a violation of Article 6(1) was found both in the failure to provide the applicants with a copy of the reporting judge’s report to, and in the presence of the Advocate General at the deliberations of, the Court of Cassation.


44 In Case C-466/00 Arben Kaba v. Secretary of State for the Home Department (No. 2) 6 March [2003] ECR I-nyr, the European Court of Justice refused to reply to the referring court’s question as to what mechanisms there existed to ensure that proceedings before the ECJ were indeed Article 6 compliant in the light of the above ECHR case, describing the question as “unnecessary”. The Opinion of Advocate General Ruiz-Jarabo Colomer in the case (which at paragraphs 104-117 sought to distinguish and to cast doubt as to the correctness of the Kress line Strasbourg case law) was delivered on 11 July 2002 and so failed to take into account the Grand Chamber decisions in Göç and Meftah referred to above.

45 Article 52(3) of the Charter provides that: “Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”


under police questioning and the privileges against self-incrimination” should be recognised as a standard “which lies at the heart of the notion of fair procedure under Article 6(1) ECHR” 49.

Article 8 ECHR – privacy, “dawn raids” and business premises

- Under EC Regulation 17/62, 50 the European Commission has broad powers to police the observance by undertakings of the Community competition law regime. It may request all necessary information from Member States and individual undertakings and conduct voluntary or compulsory searches of company premises. 51 It may impose fines where its demands are not met. In *Hoechst* 52 the Luxembourg court held that the right to respect for the individual’s “privacy, family life, home and correspondence” guaranteed under Article 8(1) of the European Convention did not extend to business premises and so upheld the legality of “dawn raids” by the European Commission seeking evidence for anti-competitive practices. By contrast, the Strasbourg Court has held in *Niemitz v. Germany* 53 that the purpose of Article 8 was to protect the individual against arbitrary interference by public authorities and so its protection extended to the individual’s professional or business activities or premises. 54 And in *Colas Est and Others v. France*, the Strasbourg court also unequivocally endorsed the idea that companies, as well as private individuals, were accorded rights to privacy and respect for their home/domicile. 55 Whereas, in *Limburgse Maatschappij v. Commission* the Court of First Instance refused to depart from the decision of the Court of Justice in *Hoechst* that business undertakings could not pray in aid a right to privacy, stating:

“Insofar as the pleas and arguments put forward by LSM and DVM are identical to or similar to those put forward at that time by Hoechst the Court of First Instance sees no reason from the case law of the Court of Justice. That case law is moreover based on the existence of a general principle of Community law, as referred to above, which applies to legal persons. The fact that the case law of the European Court of Human Rights concerning the applicability of Article 8 of the ECHR has evolved since the judgment [of the Court of Justice] in *Hoechst*, *Dow Benelux*, and *Dow Chemical Ibérica* therefore has no direct impact on the merits of the solutions adopted in those cases.” 56

49 Thus in *Saunders v. United Kingdom*, A/702 (1997) 23 ECHR 313 the applicant complained that he had been obliged to give evidence to DTI inspectors in relation to the Guinness take-over of Distillers. He was questioned at nine lengthy interviews. This evidence was then used against him at his trial, in a manner which sought to incriminate the applicant. The Strasbourg Court pointed out that the right to silence and the right not to incriminate oneself, although not specifically expressed in article 6, lay at the heart of the notion of fair procedure and applied in all criminal proceedings from the most simple to the most complex. In *Brown v. Stott (Procurator Fiscal, Dunfermline)*, 2001 SC (PC) 43; 2001 SLT 59; [2001] 2 WLR 817, JCPC, the Judicial Committee of the Privy Council (the supreme court in the United Kingdom for matters raising “devolution issues”) refused to follow the line of case law set out in *Saunders* and held that the proposal by the Crown prosecuting authorities to lead and rely in court upon evidence of the admission which the accused was compelled to make to the police under Section 172(2)(a) of the Road Traffic Act 1968 did not contravene her Convention right against self-incrimination implicit in Article 6. See, too, the decision of the House of Lords in *R v. Herefordshire County Council, ex parte Green Environmental Agencies Ltd.* (2002) 2 AC 512 per Lord Hoffmann at 423 on the non-application of this principle to extra-judicial inquiries, contrasting again with the Strasbourg decision in *Application 31827/99 JB v. Switzerland*, ECHR 2002, 4 May 2002.

50 01 1962, L/3204.


55 *Colas Est and Others v. France*, ECHR judgment of 16 April 2002, at paragraph 49.

56 T-305/94 Limburgse Maatschappij v. Commission [1999] II-931. The appeal to the ECJ (Case C-238/99P 15 October 2002) ECHR 1.n.y.c against this part of the decision was unsuccessful on the grounds that the ECHR case-law cited had no “direct impact” on the merits of the case – see paragraph 251.
However, in its decision of October 2002 in Roquette Frères v. Director General of Competition, the ECJ reversed this position and brought it into line with the Strasbourg jurisprudence by acknowledging that Article 8 considerations and the requirements of the doctrines of proportionality could be used by national courts in assessing whether or not to accede to an application to them by the Commission for authority to use coercive measures in dawn raids seeking evidence for breach of Community competition law.

Articles 8 and 14 ECHR – rights to privacy and non-discrimination

More recently, while the European Court of Human Rights has found that the dismissal of homosexuals from the UK Armed Force on grounds purely of their sexual orientation contravenes their human rights, that discrimination in child custody disputes on grounds of the sexual orientation of the parent contravenes Article 14, that "just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification" other than traditional prejudice and that the homes set up by established homosexual partnerships are protected under Article 8. The Court of Justice has held on two separate occasions that they consider it lawful under EU law for employers (in one case the Council of Ministers) to discriminate in the employment benefits paid as between its heterosexual and homosexual employees. Until the decision of the European Court of Human Rights in Goodwin v. United Kingdom trans-gendered people have, however, benefited from a broader interpretation of fundamental rights under Community law than that accorded them by the European Court of Human Rights: compare the ECJ's decision in P v. S and Cornwall County Council with the contrary Strasbourg line of case law last affirmed in X, Y and Z v. United Kingdom.77

Article 10 ECHR – free expression

In Society for the Protection of the Unborn Child v. Grogan the European Court of Human Rights held that national restrictions on the dissemination by a students organisation in Ireland of details about the availability of abortion in Great Britain, although a matter falling within the field of Community law, did not amount to a breach of Community law and the fundamental rights protected therein, since there was no economic link between the information provider and the abortion service provider. The self-same restrictions on Irish abortion counselling services were, however, found by the European Court of Human Rights Open Door Counselling and Dublin Well Woman Clinic v. Ireland to constitute a breach of the applicants' rights to free expression under Article 10.

60 Application No. 45330/99 S. L. v. Austria, 8 January 2003, ECHR at paragraphs 37, 44.
61 Application No. 40016/98 Siegmann Karner v. Austria, ECHR, 24 July 2003 upholding a complaint by a male homosexual as to his inability to inherit the protected tenancy of an apartment from his deceased partner. See, too, Fitzpatrick v. Sterling Housing Association [2001] 1 AC 27, where the House of Lords reinterpreted a UK statute protecting family members to included same sex partners.
64 See, now, however Council Directive 2000/78/EC which outlaws employment discrimination on a number of grounds, including sexual orientation. The directive is due to be implemented into national law by 2 December 2003.
69 Open Door Counselling and Dublin Well Woman Clinic v. Ireland A/246 (1992) 15 ECHR 244.
Article 1 Protocol 1 – the protection of property and international sanctions

In its 1996 decision in *Bosphorus*, the European Court of Justice held that the confiscation of an aircraft by the Irish authorities acting under an EC regulation introduced to enforce UN sanctions against the former Yugoslavia did not contravene the respect for property rights recognised under Community law. However, in its 2001 Admissibility decision in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, the European Court of Human Rights found that the self-same facts gave rise to an arguable case of breach of Article 1 Protocol 1 ECHR.

The means for achieving “an ever closer union among the peoples of Europe” within the European Union are primarily economic, through the establishment of a single internal market throughout the territory of the Union in which the “four freedoms” are secured. It is instructive to note that when first coined by US President Franklin Roosevelt, the phrase “the four freedoms” meant freedom of speech and expression, freedom of religion, freedom from want and freedom from fear. In the context of Community law, however, the phrase has been used, more prosaically, to mean the freedom of persons, goods, services and capital to be able cross, without let or hindrance, the national borders of the Member States within the European Union. Grander aims are now espoused in Article 6(1) of the Treaty of European Union which provides that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. Provision is made in Article 7 EU and Article 309 EC for the possibility of suspension of certain of the Treaty rights (but not obligations) of a Member State found to be in serious and persistent breach of these principles, but the whole European Union project still remains at base (if not at heart) a mercantile one. Certain commentators on the work of the Court of Justice have noted a tendency on the part of the Court of Justice, perhaps understandably as the Supreme Court of a Common Market and Economic Community based on Free Trade, to translate fundamental rights arguments into economic arguments, with a consequent tendency to distort the substance of those rights into questions of money or money’s worth, equating them with rights to trade in the free market. It is certainly clear from its decisions that the Court of Justice expressly disavowing any “moral agenda” in its talk of fundamental rights speech. Thus, the provision of abortion and prostitution are both treated by the Court of Justice purely as economic services which are protected by the Community “free movement principles” on the grounds that “it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally”. The Court seems unaware of or ignores the fact that to take such a purely economics based and supposedly “value free” approach to the question as to when
the law's protection may be prayed in aid is already to take a positive moral position which may itself properly be the subject of both moral and legal argument.\footnote{For example, for such moral debate compare the essays in \textit{M. Nussbaum Sex and Social Justice}, NYC: OUP, 1999; particular Chapter 14 on "Sex Liberty and Economics" with the approach advocating an economic analysis of all legal questions set out in \textit{R. Posner The Economics of Justice}, Cambridge MA: Harvard University Press, 1981.}

In adopting the language of the protection of fundamental rights protection the European Court of Justice has placed itself in a critical dilemma. If it interprets those rights in the context of the overall aims of the EC Treaty and the Treaty on European Union to promote an ever closer union of the peoples of Europe by establishing a single market, it is accused of downgrading real concern for individual human rights, both by subordinating them to the political aim of further European integration favoured by the central Community institutions, and by equating rights of respect and dignity owed to all human beings with the economic freedoms accorded to and exercised only by the commercially active and useful. If, however, the Court of Justice takes a broader view of the protection of fundamental rights divorced from any specific economic context, however, and present itself as the protector of the rights of the individual European citizen\footnote{See the claims of Advocate General Jacobs in Case C-168/91 \textit{Konstantinidis v. Stadt Altneu}} against the excesses or failings of the Member States it is accused of "running wild"\footnote{See generally \textit{Rasmussen: On Law and Policy in the European Court of Justice}, Copenhagen, 1986; and: The European Court of Justice, Copenhagen, 1998, for a sustained attack on the policy choosing and making role of the European Court of Justice. See, too: \textit{Lord Neil: The European Court of Justice: a case study in judicial activism published as Evidence submitted at the House of Lords Select Committee on the 1996 IGC (Session 1994–95, 18th Report HL Paper 88) at pp 218–252; and D. R. Phelan Revolt or Revolution: the constitutional boundaries of the European Community, Sweet & Maxwell: Dublin, 1997.} and usurping a role which was never intended for it, particularly where the Member States constitutions embody values which are not wholly or accurately reflected in the European Convention on Human Rights or other international instruments for human rights protection from which the European Court of Justice draws its inspiration.\footnote{See \textit{Wetler: Problems of legitimacy in post-1992 Europe}, in: \textit{Außenwirtschaft} 46, 1991, p. 411 at 425–426.} Such publicly expressed doubts over the legitimacy of the adoption of fundamental rights rhetoric by the European Court of Justice, and general attacks on its perceived activism, have left the Court of Justice appearing to lack consistency in its approach to fundamental rights protection, appearing at times surprisingly progressive\footnote{For example in Case C-13/94 \textit{P v. S. and Cornwall County Council} [1996] ECR I-2143 the Court stated that the prohibition on grounds of sex contained in the Equal Treatment Directive 762/2007 embodied "a fundamental right whose observance the court has a duty to ensure" and held that it extended to transsexuals or those undergoing "gender re-assignment". To tolerate employment discrimination against transsexuals would, in the words of the Court, "be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court of Justice has a duty to safeguard."} and other times unaccountably politically timid.\footnote{Case No. C-249/96 \textit{Grant v. South West Trains} [1998] ECR I-621, [1998] ECR 449, ECI where the Court stated at paragraph 35: "[I]n the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of the opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex."} The fact that, in contrast to the practice of the European Court of Human Rights, it does not permit dissenting opinion in its judgments and produces, as a result, decisions which are the result of compromise of sometimes radically opposed views, cannot add to public confidence in its persuasive powers of its reasoning. The underlying suggestion was that it would be better to leave the development of human rights to courts specifically designed to protect them, namely the Strasbourg based European Court of Human Rights.
In summary, while the European Communities and European Union remain outwith the jurisdiction of the European Court of Human Rights, the claim by the European Court of Justice that it may properly consider and apply fundamental rights principles to assess the compatibility with Community law of the action and omissions of Member States creates problems for national courts attempting to apply and protect fundamental rights within their own jurisdiction in that it potentially creates two standards of fundamental rights protection – that guaranteed under the ECHR and that protected by Community law.

It is not clear how divergences between the two European Courts on the proper interpretation of fundamental rights provisions might be resolved as a matter of strict law: although both courts cite the others case-law there is no legal machinery for the formal reconciliation of their competing judgments. In *Al-Jubair* Advocate General Darmon stated that, as a matter of prudence to maintain the position taken by the European Commission of Human Rights that complaints made under the European Convention against national decisions enacted pursuant to a Community Act were inadmissible before the machinery of the Council of Europe the Court of Justice should seek to avoid "conspicuous discrepancies" between the construction placed by the Luxembourg Court of Justice on the rights to a fair trial and the requirements as laid down by the Strasbourg based European Court of Human Rights. And in his evidence to the House of Lords European Committee, Advocate General Jacobs, speaking in a personal capacity rather than on behalf of the Court of Justice, asserted as follows:

"There have been one or two cases where the Court of Justice reached a view in interpreting the [European] Convention which was subsequently not shared by the Strasbourg Court and in those cases the Court of Justice has been prepared to modify its own position to take account of the Strasbourg jurisprudence. That jurisprudence of course is not formally in any way binding on the Court of Justice and indeed there is question whether the Strasbourg jurisprudence is generally binding except in relation to the particular case in which the Court [of Human Rights] has given judgment. (...) I have heard it said from time to time that the Court of Justice has not followed the Strasbourg cases. I would say that in those cases the Court of Justice has distinguished the Strasbourg case law and found that it did not apply in the particular circumstances."88

Finally, it should be noted that the authorities in the Contracting States may be found by the Strasbourg Court to have breached the requirements of the Convention even where the matter at issue comes within the sphere of EU law and the Member State has in fact no discretion or

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84 See, for example Application No. 28541/95 Pellegrin v. France (2001) 31 EHRR 651 where the European Court of Human Rights seeks specifically re-aligns its case law with that of the European Court of Justice on free movement of workers in relation to the rights to be accorded employees in the public sector (though quere whether the result in the particular case is indeed compatible with ECJ jurisprudence seen in Case 322/84 Johnston v. Chief Constable of the RUC [1986] ECR 1651 on the reach of fundamental rights even in relation to employment in the police and Case C-273/97 Stridar v. Ministry of Defence [1999] ECR I-7403, [1999] All ER (EC) 929, ECJ at paragraph 20, to working in the armed forces). Similarly in Case 798 Kronbach v. Bamberski [2000] ECR I-1935, the Court of Justice at paragraph 39 cites and relies upon case law of the Strasbourg Court on the requirements of a fair trial under Article 6(1) ECHR. While in Application no. 28957/95 Christine Goodwin v. United Kingdom, 11 July 2002, the Court referred to the terms of the EU Charter of Fundamental Rights in coming to the view that transgendered people had a right to marry persons of their opposite chosen gender.


power to do other than what is required of them under EU law.\textsuperscript{89} It would appear that in such a situation the authorities of the Member State will be damned by the Strasbourg court if they act in accordance with EU law but in breach of Convention rights, but they will be damned by the Luxembourg Court if they act in breach of the requirements of EU law.\textsuperscript{90}

The overall result of the human rights jurisprudence of the European Court of Justice, whether or not intended by the European Court of Justice, is that from the point of view of the national courts of the European Union there are effectively two final Human Rights courts in Europe—one based in Luxembourg as regards matters of Community law and another, based in Strasbourg, as regards non-Community law matters.\textsuperscript{91} This potentially places the Member States in a difficult position. It is submitted that the existence of two distinct means of reference to fundamental rights, either under reference to the Human Rights Act 1998 or under reference to the general principles of Community law, in fact exacerbates the possibility of conflict for national courts between competing fundamental rights considerations and interpretations.\textsuperscript{92}

The resolution of such conflicts will, it is suggested, require national courts in the United Kingdom to make profound legal/political choices which will shape the future development of the form and structure of the ever changing and dynamic relations between the European and national constitutions\textsuperscript{93}.

\section*{III. Are national courts bound by the ECJ on fundamental rights questions?}

The answer to the question as to whether or not the courts of the Member States are bound by the decisions of the European Court of Justice in questions concerning the interpretation and application of Convention rights depends, really, on who one is asking and when one is asking it: from the point of view of the European Court of Justice, the answer is obvious. Within the sphere of Community law, the decisions of the European Court of Justice are supreme and override any contrary opinion or national legislative provision. As the Luxembourg Court stated in \textit{Internationale Handelsgesellschaft}:

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{89} See, for example \textit{Matthews v. United Kingdom} [1999] 28 EHRR 361 where the United Kingdom was held responsible by the Strasbourg Court for the denial of voting rights to the European Parliament to British citizens resident in Gibraltar contrary to those individuals' Convention rights under Protocol 1 Article 3 to participate in free elections "which will ensure the free expression of the opinion of the people in the choice of the legislature", notwithstanding the fact that the extent of voting rights to the European Parliament was a matter for the European Union institutions rather than individual Member States. And in \textit{Cantonu v France} 15 November 1996 RJD 1996-V, 1614 the European Court of Human Rights held that the fact that a national legislative provision at issue was based almost word for word on a EU directive does not remove the provision from the requirements of the Convention, or the responsibility of the Contracting State to ensure that any offences imposed thereby met the standard of clarity and certainty required by Article 1 of the Convention. See too Application 517/17/199 Guérin Automobiles EURL v. The Member States of the European Community, decision of 4 July 2000 concerning a complaint of the failure by the European Commission to act on the applicant's complaint of a competitor's breach of EU competition law after the exhaustion of remedies before the Court of Justice (see Case 282/95P Guérin Automobiles EURL v. The Commission [1997] ECR I-1503).
\item \textsuperscript{91} Opinion 294 Re ECHR Accession [1996] ECR I-1759.
\item \textsuperscript{92} European, however, the Opinion of Advocate General Jacobs in Case C-168/91 Konstantinidis v. Stadt Altensteig Sandkam [1993] ECR I-1191 at paragraphs 50–51 where he states: "[I]f the Court of Justice were to extend the circumstances in which the Convention maybe invoked under Community law, the result would simply be to increase the likelihood of a remedy being found under domestic law, without the need for application to the organs established by the Convention."
\item \textsuperscript{93} As Christine Boch has noted in: EC Law in the UK, Longman: Harlow, 2000, p. 199–200: "It is conceivable that once the UK incorporates the European Convention ... the validity of some Community action or legislation will be challenged in the UK courts as being incompatible with the Convention. Even if the [European] Union respects fundamental rights and freedoms such as that contained in the Convention, given the real possibility of diverging interpretations between the Luxembourg and Strasbourg courts such challenge to the validity of Community law could also be mounted before UK courts. In this way new challenges to the supremacy of Community law in the UK may arise."
\end{enumerate}
\end{footnotesize}
"Recourse to the legal concepts of national law in order to judge the validity of measures adopted by institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact the law stemming from the Treaty [of Rome], an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure cannot be affected by allegations that it runs counter either to fundamental rights as formulated by the constitution of that State, or the principles of the national constitutional structure.94

And in Simmenthal, the Court of Justice stated:95

"[E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."

The requirements of Community law are, then, clear: national courts have an obligation to apply Community law in its entirety to the cases before them, including, it would seem, any judgments of the Court of Justice in fundamental rights matters.96 It has indeed been suggested97 that the case law of the Court of Justice on direct effect and the primacy of Community law over all provisions of national law, howsoever derived, has now been given specific Treaty backing by a Protocol annexed to the Treaty of Amsterdam.98

But under the European Convention, national courts are regarded by the Strasbourg court as organs or emanations of the Contracting States,99 and therefore themselves bound, under Article 1 ECHR, to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention and required, under Article 13 ECHR, to ensure that there exists an effective remedy against what the European Court of Human Rights consider to be violations of the Convention rights and freedoms.100

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94 Case 11/70 Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125 at paragraph 3. It is of note that the Bundesverfassungsgericht did not accept these claims by the Court of Justice and in Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel ("solange I") [1974] 2 CMLR 540 held that the fundamental rights safeguards provided by the Court of Justice were inadequate and that therefore Community law acts remained in principle subject to fundamental rights review by the German Courts in accordance with the German constitution.


96 In Case C-224/01 Köbler v. Republik Österreich, [2003] ECR I-10239, the ECJ held that manifest errors in law made by a Member State's Supreme Court of last instance could, in principle, give rise to the Member State's liability for Francovich damages.


98 The Protocol on the application of the principles of subsidiarity and proportionality annexed by the Treaty of Amsterdam to the EC Treaty provides (in paragraphs 2–3) that: "The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the acquis communautaire and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law. (...) The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice."

99 See, for example, Markt Intern v. Germany (1989) 12 EHRR 161, where the Strasbourg court found that the granting of an injunction by a court constituted an interference by a public authority with the applicant's free expression rights. Similarly, in Tolstoy v. UK (1995) 20 EHRR 442, the high level of a jury award of damages in a defamation case had been held to constitute a disproportionate interference with the applicant's rights under Article 10 ECHR.

100 See, e.g., R. v. Lyons [2002] 3 WLR 1562, HL per Lord Bingham at 1571 paragraph 13: "[t]he efficacy of the Convention depends on the loyal observance by member states of the obligations they have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the Convention so far as they are free to do so."
C. The UK Human Rights Act and the Primacy of Community Law

Section 3(1) of the Human Rights Act 1998 requires the UK courts, so far as it is possible to do so, to read and give effect to primary and subordinate legislation, whenever enacted, in a way which is compatible with Convention rights. And Section 6 of the Human Rights Act 1998 makes it unlawful for a “public authority” (defined in Section 6(3)(a) as including a court or tribunal) to act in a way which is incompatible with a Convention right unless (as Section 6(2) provides) the authority is constrained so to act by one or more provisions of Westminster primary legislation or was giving effect to or enforcing provisions of, or made under, primary legislation which could not be read or given effect to in a way which was compatible with the Convention rights.

These two provisions of the Human Rights Act, pulling as they do in different directions, must apply to those statutory provisions which oblige the national courts to decide cases involving matters of substantive Community law under the EC Treaty and associated treaties “in accordance with the principles laid down by, and any relevant decision of, the European Court of Justice.”

As we have seen, the Court of Justice is clear that Community law takes precedence over other agreements, such as the European Convention on Human Rights, concluded within the framework of the Council of Europe, certainly insofar as Community law is more favourable to individuals and, in any event, in all cases involving a conflict over fundamental rights guaranteed under national law, whatever the degree of protection to individuals conferred thereupon.

Similarly, then, Section 6(2) of the Human Rights Act 1998, effectively allows for the continued primacy of Community law, including the decisions of the European Court of Justice in fundamental rights matters, over all other provisions of national law in the United Kingdom, including Strasbourg and other court decisions on Convention rights: in that it allows “public authorities” to justify their breaches of Convention rights on the grounds that they were required to do so by provisions of primary Westminster legislation which incorporate Community law and make the jurisdiction of the ECJ binding precedent on the national courts. Thus, public authorities generally, may rely upon the provisions of Community law as incorporated by the European Communities Act 1972 to over-ride the Convention rights transplanted by the Human Rights Act 1998.

104 See Section 3(1) of the European Communities Act 1972. See, to similar effect, Section 3 of the Civil Jurisdiction and Judgments Act 1982 and Section 3 of the Contracts (Applicable Law) Act 1990 which requires domestic UK courts to apply the jurisdiction of the European Court of Justice in relation to matters concerning the 1968 Brussels Convention on Jurisdiction in Civil and Commercial Matters and the 1980 Rome Convention on Choice of Law in Contract, respectively. Section 60 of the Competition Act 1998 also requires UK courts to interpret and apply the provisions of that Act consistently with any relevant decisions of the European Court of Justice (and taking into account any relevant decision or statement of the European Commission) with a view to minimising conflict between the domestic and the European competition law regimes.


I. The position of Scotland – the double bind of Community and Convention law

The Scotland Act 1998 sets up the new devolved Scottish Parliament and a Scottish Executive. Section 29 of the Scotland Act 1998 provides that “an Act of the Scottish Parliament is not law so far as any provisions of the Act ... is incompatible with any of the Convention rights or with Community law”. Similarly Section 57(2) of the Scotland Act 1998 provides that “a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.”

By way of contrast with the situation of other public authorities in the UK there is no general tie in to Section 6(2) of the Human Rights Act, except by virtue of Section 57(3) of the Scotland Act 1998 in the case of the Lord Advocate in prosecuting any offence or acting in his capacity as head of the systems of criminal investigation of deaths in Scotland. The result of this is that it is not possible for the devolved Scottish Parliament or for the Members of the Scottish Executive to seek to justify action incompatible with Convention rights on the grounds that they were required to do so by provisions of primary Westminster legislation, including the European Communities Act 1972. In effect, this means that neither the Scottish Parliament nor the Scottish Executive can justify any action incompatible with a Convention right on the grounds that they were required so to act by Community law. They are required at the same time to respect the Convention (which arguably means as interpreted and understood by the European Court of Human Rights) just as much as they are required to act in accordance with Community law, as interpreted by the European Court of Justice.

The (perhaps unexamined) assumption behind the provisions which render ultra vires any action of the Scottish devolved administration and legislatures which contravene Convention rights as well as Community rights, seems to have been that Community law and the European Convention will never be in any significant conflict. As we have seen, such an assumption is not necessarily well-founded.

II. A Constitutional Crisis in the UK?

Arguably, as a result of the simultaneously binding nature of both Convention rights and Community law, we now have the makings of a potential constitutional crisis in the UK which is particularly acute for, but not confined to, Scotland:

(i) national courts, and public authorities generally, in the United Kingdom are bound by Section 6 of the Human Rights Act 1998 to act in a manner compatible with Convention rights;

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104 In H. M. Advocate v. R., 2001 SLT 1366, HCl Lord Reed sitting as a Scottish criminal judge in the High Court of Justiciary in a case without any Community law content, expressly relied upon Case C-185/95P Baustahlgewerbe GmbH v. Commission [1998] ECR 1-841, a decision of the European Court of Justice on the consequences of breach of the provisions of Article 6 ECHR relating to trial within a reasonable time. Lord Reed observed at paragraph 61 of his judgment as follows: "In considering this decision, it is relevant to bear in mind that section 57(2) of the Scotland Act is concerned with Community law as well as Convention rights; and the Baustahlgewerbe decision therefore provides guidance as to the approach which should be adopted in the application of section 57(2) in circumstances where a contravention by the Scottish Executive of the reasonable time guarantee in Article 6(1) occurs within an area of activity governed by Community law."

105 Case C-168/91 Konstantinidis v. Stadt Altensteig Standesamt [1993] ECR 1-1191 Advocate General Jacobs stated in paragraphs 50-51 of his Opinion: "As for the possibility of conflicting rulings on the interpretation of the Convention that has existed ever since the Court of Justice recognised that the Convention may be invoked under Community law. Such a possibility does not seem to have caused serious problems."
while Section 2(1) of the Human Rights Act only obliges national courts to "take into account" Strasbourg jurisprudence when deciding a matter concerning Convention rights, from the point of view of the European Court of Human Rights there will only be compliance with the Convention if the UK courts interpret and apply the Convention in accordance with evolving Strasbourg jurisprudence. Further, since as we have seen under the European Convention national courts are regarded by the Strasbourg court as organs or emanations of the Contracting States the crisis is not resolved by the national courts following Luxembourg precedents in the event of any conflict with Strasbourg cases, since national courts have an obligation under international law to comply with the rulings of the European Court of Human Rights.

in matters falling within the field of Community law, however, the European Court of Justice reigns supreme and Section 3(1) of the European Communities Act 1972 effectively binds national courts in the United Kingdom to apply the Luxembourg jurisprudence in its entirety;

in a question falling within the field of Community law, there is a conflict between the European Court of Justice and the European Court of Human Rights over the interpretation and effect to be given to a Convention right, the national court will potentially be acting in a manner contrary to the Convention if it upholds the interpretation of the Luxembourg court, and in a manner contrary to Community law if it upholds the interpretation of the Strasbourg court;

[16] R v (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2000] 2 All ER 929, HL, per Lord Slynn noted at 969, paragraph 26: "Your Lordships have been referred to many decision of the European Court of Human Rights on Article 6 of the Although the Human Rights Act 1998 does not provide that a national court is bound by these decision it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that this case will go to that court which is likely in the ordinary case to follow its constant jurisprudence." By contrast, perhaps, Lord Hoffmann noted at 982, paragraph 76: "[S]ection 2(1) of the Human Rights Act requires an English court, in determining a question which has arisen in connection with a Convention right, to take into account the judgments of the European Court of Human Rights ("the European Court") and the opinions of the Commission. The House is not bound by the decisions of the European court and, if I thought that the Divisional Court was right it would be wrong that they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed."

[17] Application no. 28957/95 Christine Goodwin v United Kingdom ECHR 11 July 2002, the Strasbourg court noted as follows at paragraph 74: "While the Court is formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, Chapman v the United Kingdom [GC], no. 27238/89, ECHR 2001-1, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, Cossey v the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 14, § 36, and Stafford v the United Kingdom [GC], no. 46295/99, judgment of 24 May 2002, to be published in ECHR 2002-2, §§ 97-98). It is of crucial importance that the Convention is interpreted and applied in a manner which respects its practical and effective, not theoretical and illusory, scheme. A failure by the Court to maintain a dynamic and evolving approach would indeed risk rendering it a bar to reform or improvement (see the above-cited Stafford v the United Kingdom judgment, § 68)."

[18] See R v Kanal [No. 2] [2001] 3 WLR 1562 per Lord Hope at 1580, 1587 paragraphs 55 and 79: "The United Kingdom is required by its treaty obligations to comply with article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' The United Kingdom has also undertaken under article 46 of the Convention to accept the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention. These obligations have been binding on the United Kingdom in international law since ratification in 1951. Since 1966 the right of individual petition against the state under article 25 has been available. ... [A]ll three branches of government, including the judiciary, are bound by the treaty obligations which have been assumed by the state under the Convention."
The Constitutional Supremacy

(v) if the national court considers that Community law constrains it to act in a manner which it considers to be incompatible with its interpretation of the requirements of the directly effective provisions of the Convention, it may make a declaration of incompatibility under and in terms of Section 4 of the Human Rights Act 1998, either in respect of Section 3(1) of the European Communities Act 1972 (the primary gateway provisions for EC law and ECI jurisprudence in the UK) or in relation to specific provisions of secondary legislation, for example national regulations implementing Community Directives made under the 1972 Act. Even if any such declaration of incompatibility is made, however, the offending provisions still remain in full force and effect, the Convention rights remain breached. And any such declaration of incompatibility would render any action of the Scottish Ministers and Parliament reliant upon the provision at issue ultra vires as a matter of domestic law, albeit one required by Community law. Further, standing the decisions in Factortame it would appear to be beyond the powers of the Westminster Parliament or Government unilaterally to alter the offending provision, at least while the UK remains a Member State of the European Union;

(vi) if, alternatively, the national court restrictively interprets Section 3(1) of the European Communities Act 1972 so as to enable it to decide questions of Community law in accordance with its own understanding of the requirements of the Convention, it is arguably acting in breach of Community law (and may conceivably open up the UK government to claims of Francovich damages from any persons who may claim to have sustained losses as a result of the national court’s decision);

(vii) in any event since under the Scotland Act, neither the Scottish Ministers (other than the Lord Advocate) nor the Scottish Parliament can be authorised by any particular Westminster statutory provision to act in a manner incompatible with either the Convention rights or with Community law, the devolved administration and parliament in Scotland will accordingly be bound under the Scotland Act by potentially incompatible judgments on fundamental rights of both the Luxembourg Court of Justice and the Strasbourg Court of Human Rights. Section 2 of the Human Rights Act (which makes the case law of the European Court of Human Rights of persuasive rather than of binding force, applies only to courts or tribunal determining a question which has arisen in connection with a Convention right and cannot directly be prayed in aid by the Scottish Ministers or the Holyrood Parliament.

Thus, the resolution of “devolution issues” by the domestic courts in the United Kingdom may result in their being impelled by the logic of the new constitutional settlement to be the final

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109 See H.M Advocate v. R [2003] 2 WLR 317; 2003 SLT 4, JCP (Lord Steyn, Lord Hope, Lord Clyde, Lord Rodger, Lord Walker), per Lord Rodger of Earlsferry at paragraph 155: “In enacting a constitutional settlement of immense social and political significance for the whole of the United Kingdom, Parliament has itself balanced the competing interests of the Government of the United Kingdom, of the Scottish Executive, of society and of the individuals affected. Having done so, Parliament has decided that the Scottish Ministers should have no power to do acts that are incompatible with any of the Convention rights.

110 Case C-213/89 R. v. Secretary of State for Transport, ex parte Factor tane (Factortane 2) [1990] ECR I-2433, ECI (1991) 1 AC 603, HL

111 Joined Cases C-6/90 Francovich and others v. Italy [1991] ECR I-5357

112 In R v. Kansal [2001] 3 W.L.R. 1562, HL Lord Hope observed (at 1587 paragraph 80) as follows: “In the context of the Scotland Act 1998 the position is different, for the reasons which I gave in Montgomery v. HM Advocate [2001] 2 W.L.R. 779, 796–798 and Brown v. Stott [2001] 2 W.L.R. 817, 846–848. The system which the legislation provides ensures that the state’s obligations are respected both by the Scottish Parliament and the Scottish Executive by limiting their competence. The Lord Advocate is a member of the Scottish Executive and all those who preserve in his name or under his authority have no power to do anything that is incompatible with any of the Convention rights section 57(2). But these limits on competence do not apply to the court, which is a separate branch of government from the Scottish Executive. The limits on the court’s competence are to be found in section 6(1) of the Human Rights Act 1998.”
Aidan O’Neill

publishers in any divergence on fundamental rights issues as between the European Court of Justice and the European Court of Human Rights in much the same way as the German Constitutional Court, the Bundesverfassungsgericht, has re-asserted against the claims of the European Court of Justice that it and not the Luxembourg Court is the final arbiter on matters concerning the protection of fundamental rights in German territory, even within the field of Community law. As Paul Kirchhof, former Justice of the German Constitutional Court, has put it extra-judicially:

“...Community law were to seek to abridge the fundamental rights protection deemed immutable by [the German Constitution] the Grundgesetz, [German] constitutional law would then have the mandate and the power to reject this imposition as not being legally binding.”

But as the English Court of Appeal judge, Lord Justice Laws has observed in a judicial capacity:

“...in the event, which no doubt would never happen in the real world, that a European [Community] measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the European Communities Act 1972 were sufficient to incorporate the measure and give it overriding effect in domestic law.”

D. Conclusion: The Flawed or Fluid UK Constitution

It has been argued that the reception of Community law by the United Kingdom courts in the course of the 1980s marked a paradigm shift in the UK constitution, whereby the national courts at last began to use and apply long-settled principles of Community law such as direct effect and primacy over national law to re-assert their independent sovereignty as the judicial branch of the constitution. Community law thus became the means whereby the judges could assert the sovereignty of judicial power over and against the Executive and Parliament.

The underlying thesis was that the political constitution which had developed in the course of the twentieth century up until the Thatcher premier-ship was based on a see-saw pattern of regular shifts in the identity of the governing party which controlled the Executive and Parliament, and the control of political power resulted not from any synchronic tension among the executive, legislature and judiciary based on classical doctrines of the separation of powers, but instead relied on a regular shift over time in the identity of the controlling political party, alternating “elective dictatorships”, and the fact of such regular changeovers to the ruling political party made for effective political opposition. Once the Thatcher government had gained a third term in office, however, it became clear that the constitutional mechanisms for controlling the excesses of executive power were no longer functioning since there was no effective political opposition to which political power might be transferred. Accordingly in order to re-establish a balance in the constitution the judges developed new forms of...
control of executive power. Thus the activist approach of the English bench, in particular of the House of Lords, in developing and expanding the scope and substance of judicial review, may be seen as a more or less conscious response to what has been seen by the judges to be the growing dominance of Parliament by the Executive. As Lord Mustill noted in R v Secretary of State for the Home Department, ex parte the Fire Brigades Union in the absence of effective recourse to Parliament by individuals to obtain redress for wrongs suffered by them at the hands of the public authorities, and “to avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers, the courts ... had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen thirty years ago.”

It is against that background that one may then understand the claims made by a number of English judges writing extra-judicially after almost twenty years of rule by the Conservative Party in which they, apparently, sought to revive Coke CJ’s seventeenth century claims as to the existence of limits on Westminster’s legislative competence and the possibility of judicial review thereof for the modern age even in matters untouched by Community law. Thus Lord Woolf has stated that “ultimately there are ... limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold.” While Lord Justice Sedley has asserted that:

“[W]e have today ... a new and still emerging constitutional paradigm, no longer Dicey’s supreme Parliament ... but a bi-polar sovereignty of the Crown in Parliament and the Crown in the courts, to each of which the Crown Ministers are answerable – politically to Parliament and legally to the courts.”

And Lord Justice Laws has also observed that “the doctrine of Parliamentary sovereignty cannot be vouched by Parliamentary legislation; a higher law confers it and must of necessity limit it” and has claimed that:

“There remains the possibility that the sovereign Parliament may pass a law which unquestionably denies a fundamental freedom and authorises a public body to give effect to that denial ... [I]f the courts develop with sufficient energy a jurisprudence which sets firmly in place a set of norms which chime with those of the European Convention, and elaborate principles of statutory construction which will precisely facilitate that task, the sovereignty of Parliament will rest in its proper place, which is to scrutinise and, as it sees


118 R v Secretary of State for the Home Department, ex parte the Fire Brigades Union [1995] 2 AC 513, HL per Lord Mustill at 567.

119 In Dr. Bonham’s case (1610) 77 Eng Rep 646, 652 (CP 1610) Chief Justice Coke felt able to make the following assertion: “The courts at common law may control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void”.


fit to vouchsafe the policies of the government which the people have elected without diminishing their inalienable rights.”

Lord Hoffmann reins this principle of court supremacy to protect fundamental rights only slightly when he observed in *R v Secretary of State for the Home Department ex parte Simms* as follows:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

In much the same vein, in *International Transport Roth GmbH v. Home Office* Laws LJ updated and refined his constitutional thesis to take account of the coming into force of the Human Rights Act, noting:

"In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy ... Parliament remains the sovereign legislature; there is no superior text to which it must defer (I leave aside the refinements flowing from our membership of the European Union); there is no statute which by law it cannot make. But at the same time, the common law has come to recognise and endorse the notion of constitutional or, fundamental rights. These are broadly the rights that are expressed in the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), but their recognition in the common law is autonomous."

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123 Dicey's *Law and the Constitution* [1994] Modern Law Review 213 at 227. See also *Lord Chancellor, ex parte Wilson* [1998] QB 575, QBD per Laws J. at 581C-F for an apparent application of these principles by Laws J. sitting as a judge in Chancery in finding that access to justice is a fundamental constitutional right protected at common law by statute. "The common law does not generally speak in the language of constitutional rights, for the good reason that it is not always to be inferred from any sovereign text, a written constitution which is logically and legally prior to the power of the executive and judiciary alike, that there is on the face of it no hierarchy of rights such that one of them is more entitled to protection than any other. And if the concept of a constitutional right is to have any meaning, it must surely sound as if the protection which the law affords it (...) In the unwritten legal order of the British state, at a time when the common law continues to accord legislative supremacy to [the Westminster] Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confer the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law and their existence would not be the consequence of the democratic process but would be logically prior to it." See also *Pett v Secretary of State for the Home Department* [1998] AC 538 Lord Browne-Wilkinson observed as follows: "Although I must not be taken as agreeing with everything said in the judgment in that case [ex parte Wilson] (in particular whether basic rights can be overridden by necessary implication as opposed to express provision) I have no doubt that the decision was correct for the principal reasons relied upon by Laws J. in his judgment. Such basic rights are not to be overridden by general words of a statute since the presumption is against their abrogation by such basic rights", a position subsequently approved of by the Court of Appeal in *R v Lord Chancellor, ex parte Lightfoot* [1999] 4 All ER 583, CA.

124 See also *Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 at 131F-G per Lord Hoffmann.

But at the same time as the judges are emphasising the fundamental nature of, in particular, Convention rights within the new constitution, there have also been expressions of anxiety that these rights should not be regarded as in all circumstances absolute. In the view of these judges, it would appear that fundamental rights carry with them basic responsibilities to the community as a whole. Thus, in Brown v. Stott, the Judicial Committee of the Privy Council held that the fair trial protection afforded by Article 6 ECHR does not guarantee an absolute privilege against enforced self-incrimination, with Lord Steyn observing:

"The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights. The direct lineage of this ancient idea is clear: the European Convention (1950) is the descendant of the Universal Declaration of Human Rights (1948) which in article 29 expressly recognised the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others."127

In a judgment finding that on order under the Football Spectators Act 1989 preventing UK nationals from leaving the UK to attend international football matches was not in breach of their EC Treaty free movement rights, Lord Justice Laws has also held that even the fundamental rights granted under Community law have to be applied and understood in an non-absolute manner, stating:

"This case is about the scope or reach of rights of free movement given by the EU Treaty. Now, there exists a great danger in allowing any pride of place to rights. ... It is inherent, then, in any principled approach to rights enjoyed by the individual under the general law that the right's very justification, and its consistency with the State's sound fabric, critically depend upon its being subject to limits imposed to protect the public interest: to protect, comprehensively, the rights of others. If there are absolute untrammeled rights, they are very few and far between. The right not to be tortured, the right to think whatever one likes, and the right to a fair trial are candidates, but it is difficult to think of others. Otherwise rights are divisive, harmful, ultimately worthless, unless their possession is conditional upon the public good."128

It would be unfortunate, indeed, if the national courts of the United Kingdom were discouraged from developing a high and properly balanced level of protection of the Convention rights incorporated under the Human Rights Act 1998 as a result of a differing approach to the protection of fundamental rights to actions and omission by public authorities in areas said by the European Court of Justice to be within the scope of Community law in matters of Community law and subject to its fundamental rights review. The coming into force of the

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126 The right to an independent and impartial judiciary would appear to have been elevated to the status of an absolute right. See, for example, Millar v. Dickson, 2001 SLT 988, JCPC per Lord Hope at paragraph 52 and Lord Clyde at paragraph 80: "Judicial independence is of fundamental constitutional importance. It is an indispensable condition for the preservation of the rule of law. It is a principle which has been stoutly protected by the Scottish for centuries (Mitchell, Constitutional Law, 2nd ed (1968) 261). We are fortunate in this country that for a very considerable length of time this principle has never been lost, although through the annals of history there may have been times when its light burned less brightly. But the complaisance which such a situation can inspire should never allow it to be forgotten that the principle is not so robust that it can always withstand the pressures which some forms of government may impose upon it. In my view the requirement that a tribunal be independent and impartial is of such fundamental importance that it should not lightly be subordinated to other considerations of fairness."

127 Brown v. Stott (Procurator Fiscal, Dunfermline), 2001 SC (PC) 43; 2001 SLT 59; [2001] 2 WLR 817, JCPC, per Lord Steyn at 839F in which the Judicial Committee upheld the Crown appeal and reversed the unanimous decision of the High Court of Justiciary (reported at 2000 SLT 379) to the effect that the proposal by the Crown to lead and rely on evidence of the admission which the accused was compelled to make to the police under Section 172(2)(a) of the Road Traffic Act 1988 contravened her Convention right against self-incrimination implicit in Article 6.

Human Rights Act 1998 may, indeed, serve as a bulwark against the acceptance by UK courts of the Court of Justice’s expansive claims for the reach Community law, in the same way that the fundamental rights provisions of the Grundgesetz have served the German courts. Of particular interest in this regard are certain comments of the then Mr. Justice (now Lord Justice) Laws in _R v. Ministry of Agriculture, Fisheries and Food and another, ex parte First City Trading and others_129 in which he states that the Court of Justice as a court of specific attribution and limited (rather than general) jurisdiction is bound by, and can only bind national courts and other national authorities in accordance with, specific provisions of the Treaty in a manner which does not breach the fundamental protections guaranteed by the constitutions of each Member State.130

This approach of Lord Justice Laws seems to indicate the beginnings of a new paradigm shift within the UK constitution.131 Whereas in the late 1980s and 1990s Community law was being used by national judges to affirm their independent sovereignty from an overweening Executive and a supine Parliament, human rights law now seems to have the potential in the first decade of the new Millennium to be used by the national courts of the United Kingdom to affirm their independent sovereignty from the institutions of the European Union, including the Court of Justice challenging, at least in issues concerning fundamental rights, the absolute nature of the principle of primacy of Community law.

It would, after all, seem to be anomalous and wrong in principle for the content of the fundamental rights introduced into our legal system by the Human Rights Act 1998 and the Scottish Act 1998 to vary depending on whether or not the matter at issue is one which falls within or outside the field of Community law. It seems clear that a situation in which there is more than one final arbiter as to the correct interpretation and application to be given to fundamental rights provisions is an inherently unstable one and one likely to increase the understanding of

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129 _R v. Ministry of Agriculture, Fisheries and Food and another, ex parte First City Trading and others_ [1997] EuLR 95 per _Laws_ J. at 210: “These fundamental principles ... are not provided for on the face of the Treaty of Rome. They have been developed by the European Court of Justice out of the administrative law of the Member States. They are part of what may perhaps be called the common law of the Community. That being so, it is to my mind by no means self-evident that their contextual scope must be the same as that of Treaty Provisions relating to discrimination or equal treatment which are statute law taking effect according to their express terms. ... Like any statute law containing orders or prohibitions, the Treaty is dirigiste; it is law in the shape of command. Law of this kind may intrude into areas previously altogether free of any legal controls, because of the sovereign force of the legislation. It may open a new jurisdiction. But it is to be sharply distinguished from law which is made by a court of limited jurisdiction, such as the ECJ. The legitimacy of that law depends upon its being elaborated by the court within the confines of the power with which it is already endowed. Its writ cannot run where it could not run before. The position is, or may be, different in the case of a court whose powers are inherent an original, not conferred by legislation. But the ECJ has no inherent jurisdiction. Its authority derives solely from the Treaties. Although (by vote ultimately of the European Communities Act 1972) its decisions are as a matter of English law supreme, its supremacy runs only within its appointed limits.” Paradoxically, the views of _Laws_ J. seem to receive some support within the case of the Court of Justice itself. In Case C-249/96 _Grant v. South West Trains_ [1998] ECR I-621 the Court of Justice observed as follows (at paragraph 45): “[A]lthough respect for the fundamental rights which form an integral part of those general principles [of Community law] is a condition of the legality of Community acts, those rights cannot themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community.”

130 Sir John Donaldsonhack in the remarks of _Laws_ J. in his dissenting opinion in _R v. Secretary of State for Health, ex parte Imperial Tobacco_ (2000) Eu LR 70, QBD, CA at 147 paragraph 117: “[T]he European Union possesses no general competence to legislate, however benignly, for the conduct of the public or private affairs of the Member States. Its competence is limited; ... in any given field it has to be found in positive law contained in the Treaty provisions. The Community legal order is gravely offended by the making of legislation which is not authorised by its asserted parent in the Treaty, not least because the power to make subordinate law in many cases determines the procedures to be adopted: such as, for example, the requirement of unanimity among the Member States as opposed to a qualified majority vote. If such a context the rules to vire is not strictly kept, the rule of law is very seriously undermined. But where, taken a measure for which there is no vire anywhere in the Treaty is introduced under the colour of a Treaty article which cannot possibly justify, the damage to the rule of law is all the greater.”

The Constitutional Supremacy of Community Law in the UK

fundamental rights and their permeation throughout the legal system. The fact that the Scottish Parliament and Executive are unqualifiedly bound both by Community law et separation by Convention rights means that a resolution by the national courts of the issue as to which of the two sets of rights are, in the event of conflict between them, to be regarded as normatively superior cannot be avoided or fudged. The national courts cannot abdicate this responsibility, because otherwise the business of government may potentially grind to a halt in a situation of "legal perplexity", drawn in different directions by potentially competing and incompatible fundamental rights claims. We live, at least in the United Kingdom, in interesting constitutional times.
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Chapter 10

Parliamentary Sovereignty and the Judicial Review of Legislation

Aidan O'Neill QC

INTRODUCTION

It is sometimes suggested that one cannot properly talk of 'United Kingdom constitutional law' because of the underlying differences between English and Scots law on such fundamental issues as the rights and liabilities of the Crown and the nature and extent of parliamentary sovereignty. Arguably, too, Scots law historically contained less recognition and protection than did English law for what would now be regarded as the fundamental rights and freedoms of the individual. But the reality is that there is simply insufficient material in the Scottish case law to allow one to reconstruct a complete and coherent theory of the relationship between government and individual in Scotland which consistently differed (and differs) in its essential aspects from the position as applied in England from time to time.

The UK constitution is, in any event, a dynamic and evolving affair. There is no one foundational written document, nor any Founding Fathers (or Mothers) whose views are thought to carry particular significance. Even if the constitutional position in Scotland pre-1707 as regards the relationship between individuals, the courts and the state did indeed differ from that of England, Article XVIII(2) of the Treaty of Union provided that 'the laws concerning public right, policy and civil government may be made the same throughout the whole United Kingdom'. And the judges in Scotland have typically relied upon this provision to support the claim that 'the constitution of Scotland has been the same as that of England since 1707 [and] there is a presumption that the same constitutional principles apply in both countries'. The result has been that the courts in Scotland have tended simply to follow established English lines of authority on constitutional issues such as

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1 See Chapter 13 in this volume.
2 See MacCormick v Lord Advocate 1953 SC 39 at 41 per Lord President Cooper. See further Chapter 2 in this volume.
3 In Mackintosh v Lord Advocate (1876) 2 App Cas 41 (HL(Sc)) at 59–60 Hemmings QC cites a paper by JF Macqueen QC, read at the Manchester Congress of Social Science on 8 Oct 1864, to the following effect:

'The blessings of the English Constitution, however, were not extended to Scotland [at the Union in 1707]. The Scotch consequently have no Magna Charta, no Bill of Rights, no Habeas Corpus.... Personal freedom depends on the temper of the existing government, or rather on the discretion -- peradventure the caprice -- of the Lord Advocate. When that high functionary incarcerated a gentleman supposed to entertain dangerous political opinions, the Lord Advocate justified himself in the House of Commons by the proud boast that he represented the Scottish Privy Council, and that his powers were unlimited. Under the sway of a benignant sovereign Caledonian grievances have practically disappeared. But the grave question remains whether it is consistent with the dignity of an intellectual people that their political rights should depend on the clemency of the government.'

4 Macgregor v Lord Advocate 1921 SC 847 at 848 per Lord Anderson.
the liability of government departments in negligence, the application of general statutory provisions to the Crown, the susceptibility of government departments to coercive orders from the courts, or the possibility of, and the conditions for, finding the Executive to be in contempt of court. Admittedly, the doctrinal traffic is not always one way. On the issue of whether the courts could overrule the Executive’s claim to be able to withhold documentation relevant to court proceedings on the grounds of public interest immunity the House of Lords relied upon Scottish authority to overrule the earlier English rule that it was not open to the courts to look behind any such claim by the Executive. But the tendency remains one of seeking harmonisation throughout the UK, rather than a desire to preserve constitutional differences between Scotland and England.

Older UK constitutional paradigm

From the Union of Parliaments of 1707 through to the entry of the UK into the European Communities in 1973 the UK constitution could be characterised as one which sought to instantiate (more or less) the following as fundamental constitutional principles: the sovereignty of Parliament and the separation of powers. The interaction of these two principles resulted in the following propositions of basic constitutional law for the UK: (1) it is for (the Westminster) Parliament to make the laws; (2) it is for ministers of the Crown to govern within the limits of the law set down by Parliament; (3) it is for judges to interpret (but not question) that law and enforce its limits; and (4) international legal obligations entered into by the Crown have no effect within the domestic forum unless and until expressly incorporated into national law by Parliament. On the accepted constitutional theory of the sovereignty of Parliament what would be regarded as anomalous or exceptions to the constitutional rule would be any substantial law-making outside the bounds of Parliament, whether by the Crown exercising executive powers, or by the judges applying statutory law in ways never intended by Parliament or by the judges embarking on major changes in the existing common law.

Paradigm shift in the UK constitution?

On the face of it the Scotland Act 1998 (SA) has expressly departed from the tendency toward constitutional harmonisation by introducing within the UK a wholly new constitutional model which is based on judicial rather than parliamentary primacy. It is certainly crucial to any proper understanding of the

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5 Magregor at 853 per Lord Salvesen.
6 Lord Advocate v Dumbarton District Council 1990 SC (HL) 1.
7 Davidson v Scottish Ministers (No 1) 2006 SC (HL) 41.
8 Beggs v Scottish Ministers 2005 SC 342.
9 Glasgow Corporation v Central Land Board 1956 SC (HL) 1.
11 Courmay v Rimmer [1968] AC 910 at 938, 950 per Lord Reid.
12 See R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513 at 557-558 per Lord Mustill (dissenting).
13 See R v Lyons [2003] 1 AC 976 per Lord Hoffmann at paras 27-28. The rules of customary international law may be incorporated into the domestic legal system without express incorporation: see Lord Advocate’s Reference (No 1 of 2006) re nuclear weapons 2001 JC 143 (HCJ) and R v Jones [2006] 2 WLR 772.
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role of the judiciary in relation to the Scottish Parliament that it be recognised that that Parliament has not been accorded the status in law of a sovereign body. Thus, notwithstanding that they require specific royal assent as a condition of their validity, Acts of the Scottish Parliament (ASPs) are defined in the Human Rights Act 1998 (HRA) as 'subordinate legislation' (s 21). And SA section 29(1) provides that 'an Act of the Scottish Parliament is not law so far as any provision is outside the legislative competence of the Parliament'. The powers of the Scottish Parliament and Executive are delimited and circumscribed by the provisions of the statute which set them up. What has been created in the Scottish Parliament is a democratic legislature whose Acts are subject to control by the judiciary, both in terms of pre-legislative judicial review by the Judicial Committee of the Privy Council and post-enactment judicial review by all courts in the UK hierarchy. Possible conflict between the Westminster Parliament and the Holyrood Parliament on claims that the new body is exceeding its limited powers is thus made into a juridical rather than a nakedly political matter.

But the tendency — the internal dynamic — within the constitution toward doctrinal harmonisation remains. In that light, it is submitted that the introduction of the principle of judicial supremacy in the context of devolution will have effects and resonance even within the non-devolved aspects of the UK constitution. In addition to the granting of legislative and administrative devolution to Scotland, Wales and Northern Ireland, other significant changes in the constitution include the UK's entry into the European Union, the incorporation into domestic law of substantive provisions of the European Convention on Human Rights, and the institutional reform of the House of Lords, both as a legislative body (in removing the attendance and voting rights of (all but ninety-two of) the hereditary peers) and as a judicial body (in removing the Lords of Appeal in Ordinary and setting up a distinct UK Supreme Court). It is suggested that the cumulative result of these legislative changes has been to make the older constitutional paradigm — based on the principle of unfettered sovereignty of the Westminster Parliament — increasingly untenable as an accurate description of the manner in which legislative, judicial and executive power in fact operates in the UK as a whole.

It is suggested in this chapter that we are in the throes of a constitutional paradigm shift, of a legal revolution which has been initiated (perhaps unwittingly) by the Westminster Parliament but which is now being (perhaps more consciously) effected and furthered by the judges particularly of the House of Lords (and Privy Council) who have increasingly shown themselves, in the words of Lord Nicholls:

14 Though in Adams v Advocate General 2003 SC 171, the Lord Ordinary, Lord Nimmo Smith, observed, obiter, at 201:

'Despite the reference in the Human Rights Act to Acts of the Scottish Parliament being subordinate legislation, such Acts have in my opinion far more in common with public general statutes of the United Kingdom Parliament than with subordinate legislation as it is more commonly understood. Indeed, the definition of subordinate legislation in the Scottish Act makes this distinction clear. The Parliament is a democratically-elected representative body. It has under sec 28(1) a general law-making power, except in relation to reserved matters and the other matters specified in sec 29(2). In consequence of this, it can not only pass its own Acts, it can amend or repeal, in their application to Scotland, pre-devolution acts of the United Kingdom Parliament. An Act of the Scottish Parliament, once passed, requires Royal Assent to become law. It is of a character which has far more in common with a public general statute than with subordinate legislation, though it might be preferable to regard it as being sui generis.'


16 Constitutional Reform Act 2005.
as being 'prepared to depart from a strict and narrow interpretation of the judiciary’s adjudicative role'. If this apparent constitutional change is being carried forward by the actions of the judges – in what under the older constitutional paradigm might have been characterised as a *trabizon des juges* – this is a revolution without revolt since the change being wrought is not in the formal structures of the law, but in our understanding of the existing legal and constitutional structures. Lord Hope has stated that ‘the principle of parliamentary sovereignty itself which … has been created by the common law is built upon the assumption that [the Westminster] Parliament represents the people whom it exists to serve’. Lord Justice Laws has also noted that ‘the doctrine of [Westminster] parliamentary sovereignty cannot be vouched by Parliamentary legislation; a higher law confers it and must of necessity limit it’. What has been created by the courts as a common law principle may, presumably, be altered by the courts exercising their jurisdiction to develop the common law. And Lord Nicholls observes:

‘In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary. … In all cases development of the common law, as a response to changed conditions, does not come like a bolt out of a clear sky. Inevitably the clouds gather first, often from different quarters, indicating with increasing obviousness what is coming’ (emphasis added).

In this context, the particular issue which this chapter explores is the extent to which the judges may claim and seek to exercise a power of judicial review over primary legislation and the implications that the existence of such a power has for constitutional analysis. Ultimately the thesis put forward is that there is a momentum in favour of a shift in the central descriptive motif which characterises the UK constitution. There is a move from the primacy of the legislature to one in which the judges have the last word on matters of constitutionality. The constitutional revolution in the UK is clearly not yet completed, but the changes in the judicial role within the polity which have been expressly mandated by the devolution statutes indicate the direction in which we are headed.

GATHERING CLOUDS: COMMONWEALTH CONSTITUTIONALISM AND THE PRIVY COUNCIL

Although the Judicial Committee of the Privy Council has been accorded a role as a UK domestic court by the devolution statutes (the Scotland Act 1998 (SA), the Northern Ireland Act 1998 (NIA) and the Government of Wales Act 1998 (GWA)), the vast bulk of the work of the Privy Council remains that of deciding upon Commonwealth cases. The Board considers on average around sixty overseas
The 'new Commonwealth' constitutions which were drafted by the Foreign and Commonwealth Office (FCO) in the years following the 1939–45 War gave the Privy Council a role not simply as a final court of appeal on the Westminster model but as the supreme/constitutional court for the various Commonwealth nations, entrusted with the task of ensuring that the authorities of the newly independent states stayed within the bounds of the constitution. In this latter role the Privy Council gradually began to develop new techniques of legal reasoning which sought to establish a rationale and justification for post-enactment judicial involvement in the legislative decisions of the democratic legislature. The FCO's 'standard constitutions' for the former colonial territories also commonly contained provisions authorising the courts to construe ordinary laws of the territory in a manner which ensured their constitutionality (and fundamental rights compatibility). The Commonwealth courts were enjoined to read statutes which appeared on their face to be incompatible with the constitution 'with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the constitution'.

Thus, as the highest court in Commonwealth cases the Privy Council has not regarded itself as being constrained to apply the language of the statute in question but instead, in order to avoid striking down a provision as void because unconstitutional, sees itself as constitutionally authorised to effect modifications or amendments to the statutory language in order to bring the provision into conformity with the constitution. This might be thought to be the judiciary exercising a quasi-legislative power rather than a purely interpretative one.

Perhaps conscious of this, the Privy Council has stated that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and that the burden on a party seeking to prove invalidity is a heavy one.

This 'new Commonwealth' case law of the Privy Council of the period since the end of the 1939–45 War is also of particular interest in the development of its fundamental rights jurisprudence. When it was signed and ratified by the UK in 1950, the European Convention on Human Rights (ECHR) also applied to its then independent territories, the vast majority of which subsequently went on to become independent nations within the Commonwealth. As part of the process of decolonisation, the FCO included in the constitutional instruments which set up the former colonies as independent nations, and which were expressed to be the supreme law of the new state, entrenched fundamental rights provisions modelled on the terms of the ECHR. Thus in this 'new Commonwealth' case law the Privy Council has from the early 1980s been referred to, and from the early

24 See Ghaidan v Godin-Mendoza [2004] 2 AC 557 per Lord MIllet at para 64 and per Lord Rodger of Earlsferry at para 120.
27 The first reported references by counsel before the JCPC to ECHR jurisprudence are to be found in Ong Ab Chuan v Public Prosecutor [1981] AC 648 (on appeal from the Court of Criminal Appeal of Singapore). Riley v Attorney-General of Jamaica [1983] 1 AC 719 appears to mark the first occasion on which judges expressly referred to this jurisprudence (Lord Scarman and Lord Brightman (dissenting) at 734).

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:Laws LJ at para
1990s regularly come to rely upon, relevant decisions of the European Court of Human Rights (ECtHR). One of the techniques developed by the Privy Council has been to treat the matter of the interpretation and application of constitutional fundamental rights provisions terms in a generous and purposive manner: as Lord Wilberforce stated in *Minister of Home Affairs v Fisher*, 'avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to'. In the same case, Lord Wilberforce also emphasised that the proper understanding and application of a constitutional instrument called for 'principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law'.

**Spill-over into Human Rights Act case law**

In its Commonwealth case law (as influenced by the ECtHR), the Privy Council increasingly saw its role to be that of upholding and protecting the fundamental rights of the individual even against the duly sanctioned decisions of the majority, as expressed by their representatives within the various Commonwealth nations' Parliaments. This growing familiarity with the case law and jurisprudential techniques of the Strasbourg institutions has been instrumental in developing the conditions for a judicial human rights culture in the UK following the coming into force of the fundamental rights provisions of the devolution statutes and the HRA. The evidence for this is to be found in the spill-over of concepts derived from the Privy Council's constitutional Commonwealth jurisprudence into purely domestic UK case law which occurred almost as soon as the UK courts were vested with a fundamental rights jurisdiction by the devolution statutes and the HRA.

Thus in *R v Director of Public Prosecutions, ex parte Kebilene*, a case decided by the House of Lords after the enactment but before the coming into force of the HRA, Lord Hope explicitly referred to and relied upon this Commonwealth case law in the following terms:

'In *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 966 Lord Woolf referred to the general approach to the interpretations of constitutions and bills of rights indicated in previous decisions of the Board, which he said were equally applicable to the Hong Kong Bill of Rights Ordinance 1991. He mentioned Lord Wilberforce's observation in *Minister of Home Affairs v Fisher* [1980] AC 319, 328 that instruments of this nature call for a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to, and Lord Diplock's comment in *Attorney-General of The Gambia v Momodou Jobe* [1984] AC 689, 700 that a generous and purposive construction is to be given to that part of a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled. The same approach will now have to be applied in this country when issues are raised under the Human Rights Act of 1998 about the compatibility of domestic legislation and of acts of public authorities with the fundamental rights and freedoms which are enshrined in the Convention' (emphasis added).

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28 *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 marks the first Privy Council decision when a majority of the Board refers to and relies upon ECtHR jurisprudence.
30 At 329.
31 [2000] 2 AC 326 at 375.
Similarly, in *R v Lambert*, Lord Hope cited two Privy Council Commonwealth decisions in which the Board was prepared to read in or interpolate markedly different formulations from the actual words contained in the relevant legislative provisions in order to bring them into conformity with the fundamental rights guaranteed by the constitution. He stated that these two decisions provided good examples of the use of an interpretative obligation of the kind that has now been written into our domestic law by section 3(1) of the 1998 Act.

**Spill-over into devolution case law**

Significantly, in passing the devolution statutes, the UK Parliament decided that the Privy Council should become a UK court *superior to* the House of Lords. This might be interpreted as providing statutory backing to the importation of the Privy Council's Commonwealth jurisprudence into the domestic UK sphere. This seems at least to have been the intention of the government, as was made clear by Lord Sewel, in the course of its promoting the Scotland Bill through the House of Lords, when he stated as follows:

> 'The Government believe that it is important that the decisions of the Judicial Committee of the Privy Council are binding in all legal proceedings other than proceedings before the JCPC itself. Amendment No 292EA would mean that they were not binding upon this House, and we do not accept that position.

> 'Devolution issues will seldom be decided by this House. In normal circumstances, under Schedule 6 of the Bill any devolution issue which arises in judicial proceedings in this House will be referred to the Judicial Committee unless this House considers it more appropriate that it should determine the issue itself. We think it is appropriate that this House should not be able to depart from the earlier decisions made by the JCPC. We believe that the JCPC is ideally placed to resolve disputes about *vires*. It has a vast experience of dealing with constitutional issues from the Commonwealth, making the provision that the JCPC's decisions of the highest status will ensure that clear decisions with a clear status are produced and that devolution issues are treated consistently. That is the advantage behind the line that we are advocating' (emphasis added).

Consistently with this, the scheme of the devolution statutes, and in particular the Scotland Act, may best be understood as introducing, within the domestic sphere, a model for constitutionalism which has been tried and tested in the new Commonwealth states under the supervision of the Judicial Committee of the Privy Council over the last fifty years. And, as has been seen, this is a constitutional model based on *judicial primacy* rather than on the *legislature's sovereignty*. Thus the quasi-legislative power given to the court under the model constitutions for Commonwealth states to construe local statutes 'with such modifications as may be necessary to bring them into conformity with the Constitution' is now echoed in SA section 101(2) which instructs the UK courts to read a provision of devolved legislation which might otherwise appear to be ultra vires (because outwith devolved competence) 'as narrowly as is required for it to be within competence, if such a...
reading is possible. And the UK courts have, under the devolution statutes, been given the express power to remove or limit the retrospective effect of their decisions that any devolved legislation passed by the devolved legislatures or made by the devolved executives is in fact ultra vires and hence a nullity. Further, the UK courts are also authorised to suspend the effect of any such decision for any period and on any conditions to allow the defect identified in relation to the devolved legislation to be corrected. In deciding whether to make any such order of suspension or limitation of retrospectivity the courts are to have regard, inter alia, 'to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected. It is particularly noteworthy, from the point of view of constitutional spill-overs and paradigm shifts, that in framing these provisions of the devolution statutes account was taken by the UK drafters of the similar provision in Article 172(1) of the South African Constitution, a constitution which relies upon judicial primacy over the legislature in the protection of fundamental rights.

In a classic instance of constitutional 'spill-over' of the specifics of the devolutionary settlement into the UK's general constitutional law, In re Spectrum Plus Ltd, a seven-judge House of Lords bench relied upon the fact that the UK courts had been given the express power under the devolution statutes to remove or limit the retrospective effect of their decisions regarding the vires of devolved legislation to hold the courts now had a general inherent power at common law to vary the retrospectivity of their decisions. The earlier observations of Lord Goff of Chievely to the effect that 'a system of prospective overruling, ... although it has occasionally been adopted elsewhere (with, I understand, somewhat controversial results) has no place in our legal system', were held no longer accurately to reflect the actual constitutional position post-devolution. It could no longer be said to be contrary to the proper role accorded to judges under the UK constitution that they should claim and exercise this power in appropriate cases, even where not specifically empowered to do so by the legislature.

NEW CONSTITUTIONALISM AND THE SCOTLAND ACT

SA section 29 provides that an Act of the Scottish Parliament will be 'not law' so far as any provision of it contravenes the various limits on the legislative competence of the Scottish Parliament which are laid down under the Scotland Act. Thus the Scottish Parliament may not pass an ASP which contains provisions which 'relate to' matters specified in SA Schedule 5 as being reserved to the Westminster Parliament (see SA s 29(2)(b) and (3)). What is meant by 'relate to' is further expanded

36 The parallel provision in Northern Ireland is NIA s 83(1) which requires the courts when considering potentially ultra vires legislation passed by the Northern Ireland Assembly or made by a Northern Ireland authority to construe it 'in a way which makes it within that competence or, as the case may be, does not make it invalid'.

37 See SA s 102(2)(a); NIA s 81(2)(a); and GWA s 110(2)(a). For an example of the court in Scotland considering the possible use of its SA s 102 powers see Shelagh McCall v Scottish Ministers [2005] CSOH 163 per Lord Cardlow at para 18.

38 See SA s 102(2)(b); NIA s 81(2)(b); and GWA s 110(2)(b).

39 See SA s 102(3); NIA s 81(3); and GWA s 110(3).

40 See Minister for Home Affairs v Pourrie [2005] ZACC 7 for an example of the exercise of this power.

41 [2005] 2 AC 280.

42 Kleinwort Benson Ltd v Lincoln County Council [1999] 2 AC 349 at 379.
in SA Schedule 4, paragraph 3 as meaning, in effect, substantive modification or amendment rather than simple restatement of the reserved enactments in question. The Scottish Parliament is, however, empowered to pass what might be termed ‘harmonisation measures’ – namely provisions which make incidental and proportionate modifications of Scots private law (defined in SA s 126(4)) or Scots criminal law (defined in SA s 126(5)) as these apply to reserved matters, provided that the purpose of these amendments is to ensure consistency in the application of law as between reserved and non-reserved matters (see SA s 29(2)(b) and (d)). But certain statutes of the Westminster Parliament (specified in SA Sch 4, para 1) are given specific protection against any amendment by the Scottish Parliament (see SA s 29(2)(c)). Further, the Scottish Parliament has no power to remove the Lord Advocate from his position as head of the systems of criminal prosecution and of the investigation of deaths in Scotland (see SA s 29(2)(e)), and its laws are prohibited from having any ‘extra-territorial effect’ in the sense of purporting to form part of the law of a country or territory other than Scotland, or seeking to confer or remove functions exercisable outside Scotland (see SA s 29(2)(a)). The Scottish Parliament may also not enact provisions which are incompatible with Community law (see SA s 29(d)), and in this at least, is in much the same position as the Westminster Parliament. By virtue of UK courts’ acceptance and application of the (Community law) doctrine of the primacy of Community law over all and any provisions of national law the courts will not enforce any national law, no matter its provenance, in so far as it is incompatible with Community law. But it is the Scotland Act’s prohibition on legislation which is incompatible with Convention rights being made by either the Scottish Parliament (s 29(2)(d)) or by the Scottish Executive (s 57(2)) which has had the most impact to date on the relationship between the courts and the devolved legislature.

Protection of fundamental rights under the Scotland Act

Although there has been a certain degree of co-ordination between the devolution statutes and the HRA in terms of fundamental rights protection, there are some significant differences among the four statutes in relation to how these rights are to be protected. The phrase ‘Convention rights’ has been given the same meaning in the four statutes; and the same ‘victim status’ is required for individual private parties for them to be able to complain of violation of their Convention rights by public authorities and seek an appropriate remedy from the courts. But unlike the HRA, the three devolution statutes all give a role to the various law officers (the Attorney-General, the Attorney-General for Northern Ireland, the Advocate General for Scotland and the Lord Advocate) to raise ‘policing’ proceedings concerning the Convention compatibility of acts of the devolved administrations and legislatures. These are matters which the law officers would not be able to raise under the HRA because they would not be ‘victims’ and hence would have no

44 See R v Secretary of State for the Home Department, ex parte Factortame Ltd (No 2) [1991] 1 AC 303 at 658–659 per Lord Bridge of Harwich.
45 See HRA s 1(1); SA s 126; NIA s 98; and GWA s 107(5).
46 See HRA s 7(1) and (7); SA s 100(1); NIA s 71(1); and GWA s 107(2).
47 See SA s 100(2); NIA s 71(2); and GWA s 107(3).
title and no right to raise any complaints as regards breach of Convention rights under the HRA. On this matter the devolution statutes go further than the HRA in defining the range of persons who may take the devolved institutions to court on Convention rights issues, that is, individual victims plus the law officers. But the Scotland Act departs from the schema for the protection of fundamental rights laid down both in the HRA, and in the other two devolution statutes, on one significant issue. It provides that, with the exception of the Lord Advocate when prosecuting any offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, the Scottish Ministers cannot pray in aid the provisions of HRA section 6(2) (which allow for the possibility of the Westminster Parliament providing for a lawful breach of Convention rights by public authorities). As Lord Hope has observed:

"The purpose of... paragraphs [(a) and (b) of HRA section 6(2)] is to prevent section 6(1) being used to undermine another of the [Human Rights] Act's basic principles. This is that in the final analysis, if primary legislation cannot be interpreted in a way that is compatible with them, parliamentary sovereignty takes precedence over the Convention rights."

The Scottish Ministers by contrast—and unlike any other public body or devolved authority—are bound absolutely as a matter of vires by the requirements of the Convention. No provision is made for the possibility of any 'lawful' breach of Convention rights by the Scottish devolved authorities relying upon, or seeking to enforce, Convention incompatible provisions of Westminster legislation. Thus, because the Scottish Ministers and Parliament have no HRA section 6(2) defence open to them, a declarator by a court (whether under HRA s 4 or at common law) that a provision of Westminster legislation is incompatible with the requirements of the Convention will have the effect of rendering ultra vires any act or omission of the Scottish Ministers or Parliament which relies upon the Westminster provision in question.

This decision not to afford the Scottish devolved institutions the possibility of an HRA section 6(2) defence is one with radical constitutional implications for the whole of the UK that have perhaps not yet been fully realised. For the decision means that, in relation to the assessment of the lawfulness of acts of the Scottish Ministers, Westminster statutes are placed in a position which is normatively subordinate to the requirements of the Convention. Because the Scottish Ministers have no HRA section 6(2) defence, Convention rights have the same effect against the Scottish Ministers as do directly effective provisions of Community law: both render their acts ultra vires. Thus any Convention incompatible provision of a Westminster statute effectively falls to be 'disapplied' as regards the Scottish

48 But see, now, the Equality Act 2006, s 30(3) which gives the new Commissioner for Equality and Human Rights statutory title to raise actions before the courts in Scotland, England and Wales in any proceedings relevant to its functions (including human rights issues in 'reserved matters') notwithstanding its lack of 'victim status'. Northern Ireland is already being served by the Northern Ireland Human Rights Commission which under NIA s 69(5)(b) is able to 'bring proceedings involving law and practice relating to the protection of human rights', a category which includes, but is greater than, Convention rights.

49 See SA s 57(2), (3).

50 R (Hope) v Secretary of State for Work and Pensions [2005] 1 WLR 1681 at 1700 per Lord Hope of Craighead.

51 See NIA s 71(3)(a) and (4)(a) and GWA s 107(4)(a).
Ministers, just as any Community law incompatible provision of a Westminster statute is to be disappplied as regards acts or emanations of the UK state. The Scotland Act provisions have thus unequivocally placed the ultimate responsibility for ensuring compliance with the Convention rights by the devolved authorities in Scotland with the judges, rather than with the democratically-elected Parliaments or the publicly-accountable Executive. Thus had there been no successful appeal to the Privy Council against the decision of the Scottish criminal appeal court in Brown v Stott then the prosecuting authorities in Scotland would simply have been unable, by reason of Convention incompatibility, to lead and rely in court on evidence of an admission (regarding the identity of the driver of a car) which the accused was compelled to make to the police under the Road Traffic Act 1988, section 172(2)(a). And, similarly, the result of the decision of the court of criminal appeal in HM Advocate v McIntosh (which was also overturned on appeal to the Privy Council) was that the Scottish authorities would not have been able to rely upon the provisions of the Proceeds of Crime (Scotland) Act 1995, section 3(2), relating to the recovery of the proceeds of drug trafficking.

Consistently with this approach mandating judicial primacy within the Scottish constitution, SA section 100(4)(a) allows Convention rights challenges to be brought in relation to ‘making any legislation’. This is again to be contrasted with the intent and effect of the HRA which seeks to remove the possibility of Convention rights-based challenges to the legislature’s making of (or failure to make) primary or secondary legislation: thus, HRA section 6(3) prohibits any Convention-based challenge to the exercise of parliamentary functions. Further, SA section 100(4)(6) allows any act or failure to act by a member of the Scottish Executive to be subject to Convention rights challenge. It is accordingly broader in scope than the HRA which, by section 6(6), limits the scope of failures reviewable on Convention grounds by excluding failures to (a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order. The intent of the SA, by contrast, is clearly to allow for, among other omissions, failures by the Scottish Ministers to make positive legislative provisions required by the Convention rights, to be reviewable on Convention grounds under that Act. Finally, SA section 100(3) permits the courts to make orders for payment of damages by way of just satisfaction in respect of Convention rights challenges brought under the Scotland Act by individuals otherwise qualifying as ‘victims’.

Judicial review of legislation under the Scotland Act

Notwithstanding the fact that the Scotland Act has granted the courts an explicit power of judicial review of legislation there has been, to date, only a handful of challenges under SA, whether to primary legislation emanating from the Scottish Parliament (ASPs) or to secondary legislation made by the Scottish Ministers (SSIs). In Adams v Advocate General, Lord Nimmo Smith held at first instance that…

52 See Factortame (No 2) [1991] 1 AC 603.
53 2000 JC 328.
54 Brown v Stott 2001 SC (PC) 43.
55 2001 JC 78.
56 2001 SC (PC) 89.
the SA provided a comprehensive framework for the operation of the legislative procedures of the Scottish Parliament itself as well as the Parliament's relationship to the courts such that traditional common law grounds of judicial review were excluded and any challenge to the validity of ASPs has to be made within the four corners of the constituting statute. But no challenge to any ASP or SSI to date has been made on any ground other than alleged Convention incompatibility and no court challenge to the validity of devolved legislation has been brought by any of the UK's law officers otherwise empowered under the Act to raise such actions. Instead the challenges to date have all been brought by individuals claiming to be victims of a breach of their Convention rights. And in no case to date has the court yet exercised its powers to strike down as unconstitutional any such devolved legislation.

Medical treatability and detention in secure hospitals

In A v Scottish Ministers there was an unsuccessful challenge to the Convention compatibility of the emergency legislation which had been passed by the Scottish Parliament with retrospective effect and targeted and specific intent to close a perceived loophole in the law whereby persons who had been sentenced after trial to be detained indefinitely in a secure hospital were able to secure their release on the grounds that they were not now held to be suffering from any treatable mental illness. Medical opinion had shifted since these individuals had been sentenced such that their condition - psychopathic disorder manifested by abnormally aggressive or seriously irresponsible conduct - was not now regarded as being capable of receiving treatment likely to alleviate or prevent a deterioration in their condition. The Privy Council held that the Scottish Parliament's legislation was justified by considerations of continued safety of the general public as well as the staff and inmates of ordinary prisons, all of which could properly be used to justify the continued detention of restricted patients in hospital, whether or not their mental disorder was treatable.

Hunting with dogs

There have been a number of challenges to the Convention compatibility of the Scottish Parliament's attempt to outlaw hunting of wild mammals with dogs. In Whaley v Lord Watson of Invergowrie a pre-emptive attempt was made by an individual, whose livelihood would be affected by the ban, to prevent the presentation before the Parliament of a Member's Bill which dealt with the issue. The basis for the interdict was the allegation that the promoter of the Bill had breached the Parliament's rules relating to members' interests in that the drafting of the Bill had effectively been paid for by an outside interest, an animal welfare lobbying group. The challenge was rejected by the Inner House on the somewhat

58 2003 SC 171 at 200E–1 per Lord Nimmo Smith.
59 See Ruddle v Secretary of State for Scotland, 2 Aug 1999, Sheriff J Douglas Allan (unreported) ordering the release of a patient suffering from a psychopathic disorder where the treatability test was not satisfied.
60 Reid v Secretary of State for Scotland 1999 SC (HL) 17 at 39 per Lord Clyde.
narrow technical grounds that the individuals concerned had no title and interest to complain of any breaches of the Parliament's Standing Orders. The Parliament's susceptibility to judicial review was, however, robustly affirmed by the court in the following terms:

"[T]he [Scottish] Parliament [i]s a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law....

'[I]n many democracies throughout the Commonwealth, for example, even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which uphold the law. The Scottish Parliament has simply joined that wider family of parliaments. Indeed, I find it almost paradoxical that counsel for a member of a body which exists to create laws and to impose them on others should contend that a legally enforceable framework is somehow less than appropriate for that body itself....

'While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can of course be asked to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a Parliament which is sovereign: on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a "self-denying ordinance" which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law."60

The Bill was duly presented to the Parliament and passed by it as the Protection of Wild Mammals (Scotland) Act 2002. The Act was then subject to a post-enactment Convention compatibility challenge by those whose livelihoods would be affected by the hunting ban. This challenge was unsuccessful both in the Outer House64 and the Inner House.65 The petitioners chose, however, not to exercise their right of appeal to the House of Lords.

**Fixed fees legal aid in summary prosecutions**

In *Buchanan v McLean*66 a collateral challenge was brought as to the compatibility with the Convention right to a fair trial of the new criminal legal aid regulations introduced in Scotland with effect from 1 April 1999 by the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999.67 It was argued on behalf of the accused that these new criminal legal aid regulations breached the Convention principle of equality of arms, by substituting a fixed fee scale, the adequacy of

\[62\text{ See the opinion of Lord Woolf MR in } R v Parliamentary Commissioner for Standards, ex parte Fayed (1998) 1 WLR 669 at 670.\]

\[63\text{ 2000 SC 340 (IH) at 348H, 349D–E, 350B–C.}\]

\[64\text{ See } Adams v Advocate General 2003 SC 171.\]

\[65\text{ See } Adams v Scottish Ministers 2004 SC 665 and Friend v Lord Advocate 2006 SC 121.\]

\[66\text{ 2002 SC (PC) 1.}\]

\[67\text{ SI 1999/491.}\]
which cannot be challenged in any particular case, for the previous 'time and line' basis for reimbursing solicitors in respect of their investigation, preparation and conduct of the defence in summary criminal trials. It was submitted that any decision of the prosecuting authorities (whose funds are not similarly limited in any particular case) to initiate proceedings where the defence funds are so arbitrarily limited would potentially constitute action by the Lord Advocate incompatible with the accused's Convention rights under Article 6(3)(b) 'to have adequate time and facilities for the preparation of his defence', under Article 6(3)(c) 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require', and under Article 6(3)(d) 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. The Lord Advocate, and those acting under his authority, are statutorily bound to respect all of these rights when bringing prosecutions. In the event, the Privy Council dismissed the challenge in the particular case on the basis that it was clear that a solicitor had been willing to take up and argue the case, notwithstanding the limits placed on his remuneration. The Board noted, however, that if it could be shown that no legal representation was available to an individual because of the legal aid limits, this might constitute a breach of his Convention rights. Lord Clyde exhorted the Scottish Ministers in his judgment to amend the regulations by introducing an element of flexibility whereby fixed fees could be increased at the discretion of the Legal Aid Board in appropriate circumstances. This hint was duly taken up by the Scottish Ministers.\(^\text{68}\)

**Individual punishment and public protection in mandatory life sentences**

A sentence of life imprisonment is the penalty which judges have been required by law to impose on all adults found guilty of murder since the abolition of the death penalty in the UK in 1965. In practice, however, except in the tiny minority of cases, life does not mean life. The mandatory life sentence has, instead, generally been treated as a maximum possible period of detention. Once they have been deemed to have served a sufficient period of imprisonment by way of punishment for their crime, convicted murderers become eligible for parole allowing them to be released on licence from prison so long as they are deemed no longer to represent a danger to the public. The question then arises how, why and by whom is the period necessary to serve as punishment for the crime to be determined. Over time, the ECHR's jurisprudence has established that this decision is a matter for judges alone and cannot be left by contracting states for determination by ministers, who may be subject to populist and political pressures in particular cases in making these sentencing decisions. The Convention Rights (Compliance) (Scotland) Act 2001 was passed by the Scottish Parliament, inter alia, to introduce a regime which would respect the Convention rights of persons convicted of murder in Scotland by removing all ministerial discretion on the matter of the date of release from prison of those serving a mandatory life sentence. The problem that arose in *Flynn and others v HM Advocate*\(^\text{69}\) was that the introduction of this new system for those...

\(^{68}\) Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2002 (SSI 2002/247).

\(^{69}\) 2004 SC (PC) 1.
already serving mandatory life sentences meant that the High Court of Justiciary was required to determine for the first time the length of time to be served by way of punishment for the crime for which they had been convicted. In a number of cases this resulted in life prisoners becoming ineligible for consideration for parole where they had previously been eligible because the court determined that a longer term should be served by way of punishment than the minister had assumed under the previous system, resulting in situations which were perceived by the affected prisoners as retrospective lengthening of their terms of imprisonment. In rejecting a challenge to the Convention compatibility of the 2001 Act the Privy Council held that the legislation had in fact been misunderstood by the High Court and that a properly Convention compatible reading should have taken into account and given appropriate weight to the parole board hearing dates previously notified to the individuals to ensure that new procedures did not operate in any significant way to the disadvantage of the prisoners concerned.

Retrospective application of new criminal legal aid fees regime

In McCall v Scottish Ministers the petitioner sought judicial review of the manner of introduction of the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 which set the rates for counsel’s fees in the criminal courts. The Scottish Legal Aid Board purported to apply the new regulations to all fees where the proceedings were concluded on or after 4 April 2005 which meant that, where a case concluded after that date, all the work done by counsel prior to the commencement date would be paid on the basis of the new Schedule albeit that it came into force after that work had been done. In some cases, the work in question would have been completed months before the Schedule came into force, resulting in the counsel affected receiving considerably less under the new Schedule than they would have done under the old scheme, even though they had undertaken the work on the basis of the applicability of that earlier scheme. Lord Cardoway in the Outer House held that the fees for work carried out prior to the coming into force of the new Schedule constituted ‘possessions’ for the purposes of Article 1, Protocol 1—the Convention right to respect for property—and that the manner of the retrospective implementation of the new Schedule could not be justified as a proportionate or fair interference with the petitioner’s acquired property rights in accrued fees due for work already done. In the light of this decision the Scottish Ministers amended the legislation in question before any order was made invalidating it.

PRECEDES FOR JUDICIAL PRIMACY IN UNITED KINGDOM CONSTITUTION

The fact that the Scotland Act has followed the constitutional model which provides for judicial rather than legislative primacy should not be regarded as utterly radical and alien to our domestic constitutional traditions for a number of reasons.

70 2006 SC 266.
71 SSI 2005/113.
72 Criminal Legal Aid (Scotland) (Fees) Amendment (No 3) Regulations 2005 (SSI 2005/58).
Constitutional statutes in the UK

There is a growing judicial acceptance that certain Acts of Parliament are to be regarded as ‘constitutional statutes’, which status carries with it certain consequences for the interpretation and application of their terms.73 Thus in a House of Lords decision on the proper interpretation of the NIA – and, in particular, on the question whether or not candidates had been validly elected by the Northern Ireland Assembly to the offices of First Minister and Deputy First Minister – Lord Bingham observed that the Act was ‘in effect a constitution’ and as such deserving of a generous and purposive interpretation ‘bearing in mind the values which the constitutional provisions are intended to embody’. And Lord Hoffmann stated that ‘the principles laid down by the Belfast Agreement … form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States’.74 Similarly, in R v HM Advocate Lord Rodger of Earlsferry picked up the language of constitutionalism, noting that:

‘the Scotland Act is a major constitutional measure which altered the government of the United Kingdom’ and that ‘in enacting a constitutional settlement of immense social and political significance for the whole of the United Kingdom, [the Westminster] Parliament has itself balanced the competing interests of the government of the United Kingdom, of the Scottish Executive, of society and of the individuals affected’.75

Recovery of the pre-1707 Scottish constitutional tradition

Although the point is not without difficulty, there has long been academic and judicial discussion which states that the claim that a Parliament has untrammeled legislative sovereignty to do as it wills (even to act contrary to fundamental rights) is not a constitutional provision which has ever formed part of Scots law. Thus in MacCormick v Lord Advocate Lord President Cooper observed that ‘[t]he principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law’ and that ‘[t]he Lord Advocate conceded this point by admitting that the Parliament of Great Britain “could not” repeal or alter … “fundamental and essential” conditions’ of the Treaty of Union.76

European Community law

The effect of the already noted acceptance in UK domestic law of the principle of primacy of Community law over national law77 has been such that it is no longer legally, politically or constitutionally proper to talk of unlimited parliamentary sovereignty at Westminster. The courts are given a role under Community law

75 R v HM Advocate 2003 SC (PC) 21 per Lord Rodger of Earlsferry at paras 16 and 50.
76 1953 SC 396 at 407–408. See further Chapter 2 in this volume.
77 See R v Secretary of State for the Home Department, ex parte Factortame Ltd (No 2) [1991] 1 AC 603.
to correct the 'mistakes' of the national legislature by the principle of 'conforming interpretation'\textsuperscript{79} whereby the courts might 'write in' words into statutory provisions which have been omitted by the legislature in order to ensure conformity with the requirements of Community law.\textsuperscript{79} The fact that UK courts can, by virtue of Community law, now effectively treat provisions of an Act of Parliament as 'invalid' and disapply them in the particular case by granting (interim and final) injunction/interdict against their application\textsuperscript{80} and can award (Francovich)\textsuperscript{81} damages to individuals affected by the application of offending provisions of the national statute\textsuperscript{82} shows that the constitutional position following the UK's entry into the EU is perhaps somewhat more complex than a simple Diceyan analysis which might have applied heretofore. A shift begins to take place whereby the central constitutional model is increasingly seen as one of judicial primary rather than parliamentary supremacy and it is this new model which comes to be regarded as the explanatory norm.

**Influence of the Human Rights Act**

The new constitutional model for the relationship between courts, legislature and executive provided for in European Community law has been used by the House of Lords to sanction an extremely expansive approach to the duty of Convention compatible interpretation of legislation imposed by HRA section 3. The strength of this interpretative duty - and the dominant influence of the Community law model in the judges' understanding of it - is seen in the House of Lords' decision Ghaidan v Godin-Mendoza\textsuperscript{83} where their Lordships held that HRA section 3 gave the court powers that were at least as strong as their duty and powers to rewrite national legislation to comply with the requirements of Community law. Thus, by a 4:1 decision (Lord Millett dissenting), the House of Lords found that a surviving member of a same-sex couple who was residing in a privately-rented house immediately before the death of his partner, the original tenant, was to be regarded for the purposes of the Rent Act 1977, Schedule 1, paragraphs 2 and 3 as 'the surviving spouse of the original tenant', so as to be entitled to become the statutory tenant of the property in the same way that a person who was living with the original tenant 'as his or her wife or husband' would have been treated. This decision differs little in its substantive effect from the decision of the South African Constitutional Court in *Minister for Home Affairs v Fourie*\textsuperscript{84} which held that the statutory and common law exclusions of same-sex couples from the possibility of marrying was unconstitutional, notwithstanding that the South African constitution is one explicitly based on the model of judicial primary.

80 Factortame (No 2) [1991] 1 AC 603.
82 R v Secretary of State for the Home Department, ex parte Factortame Ltd (No 5) [2000] 1 AC 524.
The only limitation on the HRA section 3 interpretative obligation, according to the House of Lords decision in *Ghaidan*, is that in reading words into the legislation or in deleting offending words, the courts have to be satisfied that such emendation could not be said to go ‘against the grain’ by overriding some cardinal feature of the legislation in question, or otherwise raise generally policy issues that a court cannot properly seek to resolve by a process of judicial rewriting. Thus, although the HRA is said to embody a constitutional model which remains faithful to the idea of parliamentary sovereignty, this is perhaps difficult to reconcile with the breadth of discretion which HRA section 3 is said to give to the courts to construe unambiguous legislation in a Convention compatible manner. HRA section 3 allows, indeed requires, the court to give an interpretation to a legislative provision which may be entirely contrary to the expressed will of Parliament at the time of passing the provision in question, if this is necessary to ensure Convention compatibility. The very strength of this ‘interpretative’ obligation might indicate that there is in fact little distinction between the two constitutional models, of legislative as opposed to judicial primacy, when it comes to the protection of fundamental rights.

**Judges as guardians against Westminster Parliament of constitutional rights**

More generally, the classic Diceyan analysis of an untrammelled or wholly unlimited Westminster parliamentary sovereignty has come under increasingly close scrutiny by the judges, even in non-Community law and non-Convention rights cases. Lord Hoffmann noted in one pre-HRA case:

> In the absence of express language or necessary implication to the contrary, the courts … presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

And in *A v Secretary of State for the Home Department* – the challenge to the regime of the special detention, without charge or prospects of a trial, of foreign nationals said by the Executive to be suspected of having connections with terrorism – Lord Bingham, giving the leading speech (which was expressly concurred in by six of his brethren on the bench), unequivocally proclaimed the legitimacy of the judges’ role in reviewing the lawfulness of the Executive’s approach to this issue (albeit that the Executive’s stance had been expressly sanctioned by Parliament) noting that ‘the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself'.

In *Jackson v Attorney-General*, the matter before the court looked very like (and in reality was) a direct challenge to the validity of an Act of Parliament, the

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85 See *R v Holding [2006]* 1 WLR 1040 (CA) at 1050–1051, paras 47–48.
87 *R v Secretary of State for the Home Department, ex parte Simms [2000]* 2 AC 115 at 131 per Lord Hoffmann.
88 *2006* 2 AC 68 per Lord Bingham at para 42.
Hunting Act 2004, which made the hunting of wild animals with dogs unlawful, but rather than simply throw the matter out of court as clearly and obviously an 'unconstitutional' attempt to impugn the sovereignty of the Westminster Parliament, the Appellate Committee convened itself as a court of nine judges and characterised the issue as a justiciable one: namely what was the true interpretation of the Parliament Act 1911? Lord Steyn took the opportunity to state that the classic Diceyan account of the absolute sovereignty of Parliament was 'out of place in the modern United Kingdom'. And while he accepted that 'the supremacy of Parliament is still the general principle of our constitution he did not regard it as 'unthinkable' that circumstances might arise – he cited as examples an attempt to abolish judicial review or the ordinary role of the courts – as a result of which the judges might expressly modify this principle to hold that 'even a sovereign Parliament acting at the behest of a complaisant House of Commons might not lawfully interfere with such constitutional fundamentals'.

Similarly, in *In re Spectrum Plus Ltd (in liquidation)*, Lord Hope gave, in his summary of the current UK constitutional position, pole position to the judicial power to uphold, against all comers, the rule of law and the protection of fundamental rights, when he noted that the House of Lords as a judicial body

> 'must respect any limits on its jurisdiction that have may been imposed by Parliament, so long as these are compatible with our treaty obligations under Community law and with the rights that are defined by section 1(1) HRA as the "Convention rights". A statutory limitation which was found to be incompatible would have to be read down under the doctrine of direct effect or under section 3(1) of the 1998 Act to remove the incompatibility.'

**JUDICIAL DEFERENCE TO THE LEGISLATURE**

The direct judicial review of primary and secondary devolved legislation in such constitutional challenges raises interesting questions regarding the proper relationship of the courts to the democratically-elected legislature. Since the limits of the new devolved legislative bodies and administrations are set out in statute, the task of ensuring that the devolved institutions stay within the limits of the powers granted to them is one for the courts. As already noted the devolution statutes have created democratic institutions whose acts are, however, subject to control by the judiciary.

Lord Rodger's robust remarks in *Whaley v Lord Watson*, equating the Scottish Parliament with any other statutory institution to be treated by the courts as 'any other litigant', must now be seen in context. They may perhaps be read now as no more than an assertion that the internal workings and privileges of the Scottish Parliament are not to be regarded as immune from judicial scrutiny. However, once that Parliament has duly acted in a legislative capacity, the court recognises the legitimacy that inheres to the substance of the resulting statute, by virtue of its being produced by a democratically-mandated assembly. This does not mean that the terms of the statute are immune from substantive judicial review, rather that the doctrine of proportionality should be applied in a careful and nuanced

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89 *Jackson* [2006] 1 AC 262, para 102.
90 *In re Spectrum Plus Ltd* [2005] 2 AC 280, para 69.
way, with the court not rushing in to substitute its assessment of policy matters for that of the legislature. This certainly seems to have been the approach taken by both the Inner House of the Court of Session and the Privy Council in *A v Scottish Ministers* in deciding to uphold the validity of the Scottish Parliament’s legislation. A deferential approach to the will of the Westminster Parliament as expressed in legislation also seems to characterise the few Convention rights-based challenges to the interpretation and application of Westminster legislation which have been brought to date before the Privy Council exercising its devolution jurisdiction.91

Clearly, a balance has to be struck. The courts have to recognise the importance of the democratic mandate given to both the Westminster and the Edinburgh Parliaments. They have to recognise too that the rights conferred under the Convention have to be interpreted and applied in their social context: they are fundamental rights but not, in all circumstances, absolute ones in the sense of overruling all considerations of the public interest. As Lord Hope noted in Kebilene:

'Difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.’92

Still, while Parliaments articulate the public interest, in the final analysis it is the courts which must ensure due respect for individuals’ (and minorities’) rights. It is, therefore, vital for the proper functioning of the constitution that the public have faith in the impartiality of their judiciary. But the issues concerning what standard of review the courts ought to adopt would be rather different in the context of non-fundamental rights challenges. Where the conflict is between two sets of democratically-elected institutions, the notion of judicial deference may be of itself insufficient; the court might be deferring to different institutions each with their own democratic legitimacy and mandate. In these circumstances, the court might be required to make a more substantive assessment of the relative constitutional importance of the Scottish and Westminster Parliaments. In this regard it should be borne in mind that the Scotland Act does not dissolve the 1707 Union: SA section 37 specifically provides that the English Union with Scotland Act 1706 and the Scottish Union with England Act 1707 continue to have effect, subject to the new Act. And SA section 1(1), which states that ‘there shall be a Scottish Parliament’, does not restore the old Estates of Scotland but rather establishes the new Scottish Parliament as a subordinate legislative body ultimately remaining (like parish councils in England) subject to the control of the Parliament of the United Kingdom at Westminster. The power of the Westminster Parliament to make laws for Scotland is unaffected by the Scotland Act (see s 28(7)). It is clear, however, that the acquisition of broad powers of legislative judicial review creates a challenging new role for the judges. It raises large questions which have yet to be faced: for example as to the interrelationship between the principle of judicial respect for the democratic will of the Scottish people (as expressed by the Scottish Parliament)

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91 *Brown v Stott* 2001 SC (PC) 43 and *McIntosh, Petitioner* 2001 SC (PC) 89.
92 [2000] 2 AC 326 at 381.
and the enforcement by the judges of the limits laid down on that legislature in accordance with the democratic will of the peoples of the UK (as expressed by the Westminster Parliament and government in the provisions of the Scotland Act).

CONCLUSION

Under the Diceyan theory of absolute parliamentary sovereignty, there was no possibility of judicial review of legislation duly passed or confirmed by the Westminster Parliament. As Ungoed-Thomas J in Cbeney v Conn observed, in dismissing a claim by a taxpayer that taxes were being levied from him unlawfully because a substantial part of the tax so raised was allocated to the construction of nuclear weapons and so contravened the Geneva Conventions Act 1957:

'What the statute itself [in case, the Finance Act 1965] enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known in this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law of this country, is illegal.'

It is apparent from the more recent cases cited above that while a certain lip-service continues to be paid to the older constitutional paradigm of parliamentary sovereignty, the reality is that the judges no longer consider it to be an absolute, or perhaps even the primary, principle of the UK constitution. Instead it is clear that the judges now consider that there are justiciable limitations on the freedom of the Westminster Parliament to legislate and that it is the proper constitutional role of the judges to ensure that those limitations are observed by the legislature and enforced by the courts. Under the older paradigm the judges could aspire to nothing more than ascertaining the intention of Parliament in framing laws in particular terms and, having established that intention, to interpret and apply the laws consonantly with it. But the new role which the judges seem to be fashioning for themselves is that of guardians of the values underpinning the constitution and, in particular, the fundamental rights of the individual against excesses of the state and the tyranny of the majority.

Judges in the UK do in fact now exercise powers of direct judicial review of legislation and hold that the UK Parliament has acted unlawfully in cases where provisions of national legislation are found to contravene provisions of Community law intended to confer rights upon individuals. And a power of direct judicial review of legislation is also conferred under the Scotland Act which requires judges to strike down ASPs which exceed the limits of the power of that legislature as set down in its constituting statute, the Scotland Act, and to disapply – at least vis-à-vis the Scottish devolved institutions – any Convention-incompatible provisions of primary Westminster legislation. Finally a power of indirect judicial review of Westminster legislation is also now operated by the judges, both by virtue of the strong interpretative obligation in favour of Convention compatibility imposed by HRA section 3, as well as by the requirements of Community law compatible-interpretation exemplified in the judgment of the European Court of Justice in Marleasising.

Notwithstanding the terms of the English Bill of Rights of 1688 and the Scottish Claim of Right of 1689 (which have been understood as asserting parliamentary sovereignty as a constitutional fundamental) it would appear that the judges, under their new guise as the ultimate guardians of the constitution, are becoming increasingly emboldened to claim the general right to exercise, in appropriate circumstances, a power of suspending of laws, or the execution of laws passed by Parliament, where those laws threaten to breach basic constitutional norms, and in particular fundamental rights. A constitutional historian might indeed seek to argue that all this shows is that the seventeenth-century civil war which raged in these islands is not yet over. Instead a third force, not Parliamentarian nor Royalist but judicial, is now gaining the upper hand to effect what may properly be called a constitutional revolution since it may be thought simply to seek to restore the primacy of the (judge-made) common law over the presumption of statute law and so vindicate the claims of Coke CJ in 1610 when he stated that the judges could lawfully:

'controul acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void'.

If that is indeed once again going to become a basic principle of the UK constitution, the new task for our constitutionalists and our judges is to develop principles of legitimacy which can justify the extent of any priority of the individual's fundamental rights over the claims of the legislature and the executive to protect the general public interest in a democracy as well as principles for determining the legitimate relationships among the Scottish, UK and European legislatures and executives governing the land. Legal practice will require a substantive moral and political theory. There is much work to be done. The revolution is not yet completed: la lotta continua.

96 *Dr Bonham's case* (1610) 77 Eng Rep 646 at 652.
Law Making and the Scottish Parliament
The Early Years

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A. INTRODUCTION: A NEW KIND OF CONSTITUTION FOR SCOTLAND

B. INTERNATIONAL (HUMAN RIGHTS) LAW AND THE SCOTTISH CONSTITUTION

C. THE SCOTTISH PARLIAMENT AS A GUARDIAN OF HUMAN RIGHTS?

(1) No human rights committee of the Scottish Parliament
   (a) Slopping out
   (b) Tainted blood and the NHS

(2) The Convention Rights Proceedings (Amendment) (Scotland) Act 2009

D. THE SCOTTISH COURTS AND THE PROTECTION OF CONSTITUTIONAL RIGHTS

E. CONCLUSION: LONDON CALLING

A. INTRODUCTION: A NEW KIND OF CONSTITUTION FOR SCOTLAND

In February 1998 the Judicial Committee of the Privy Council gave judgment in *Matadeen v Pointu*. This was an appeal to the Board sitting in London by the Mauritius Minister of Education and Science from a decision of the Supreme Court of Mauritius to the effect that, in introducing new school exam regulations without due notice, the government of Mauritius had acted unconstitutionally because, *inter alia*, it had acted in a manner contrary to art 3 of the Declaration of the Rights of Man and Citizen of 1793 (which provided that “all men are equal by nature and before the law”); as Lord Hoffmann notes, the 1793 Declaration had been “adopted by the Assemblée Colonielle of the Île de France on XIV Thermidor Year II (1 August 1794), no doubt unaware of the overthrow of the Robespierre government which had occurred five days earlier in Paris”. In holding that, on its true construction,

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the Constitution of Mauritius entrenched the protection of the individual against discrimination only on a limited number of grounds, the Board noted that "a self-confident democracy ... may feel that it can give the last word, even in respect of the most fundamental rights, to the popularly elected organs of its constitution". The Board accepted, however, that the Diceyan theory of absolute parliamentary sovereignty was "an extreme case" and acknowledged that the experience of many other countries was that "certain fundamental rights need to be protected against being overridden by the majority ... by entrenching them in a written constitution enforced by independent judges". However, the Board concluded that there was no reason why a democratic constitution "should not express a compromise which imitates neither the unlimited sovereignty of the United Kingdom Parliament nor the broad powers of judicial review of the Supreme Court of the United States".  

We might bear this "compromise" in mind when comparing the constitutional conservatism of the Human Rights Act 1998 with the new constitutional model in the Scotland Act 1998. The enactment of the Human Rights Act – which received Royal Assent on 9 November 1998 – resulted in an amendment to the United Kingdom constitution to allow for a modified form of judicial review of primary statutes of the Westminster Parliament, albeit in a manner which was said to be consistent with continued adherence to the idea of the sovereignty of the UK Parliament. The Human Rights Act was consciously drafted on the basis of the precedent provided by the New Zealand Bill of Rights Act 1990. Like the New Zealand Act, its primary concern was to preserve the central constitutional concept of the sovereignty of the United Kingdom Parliament while allowing for an enhanced degree of legal protection under domestic law for the fundamental rights set out in the European Convention on Human Rights (hereafter "ECHR"). The model embodied in the Human Rights Act is one of delicate constitutional dialogue and a dance of deference between judiciary and legislature, but one where, ultimately, the UK Parliament has the last word. 

By contrast, the Scotland Act – which received Royal Assent on 19 November 1998 – was not drafted with a view to preserving any constitutional idea of the (devolved) legislature’s sovereignty. The constitutional structure which it embodied was modelled, instead, on the constitutions created by the Foreign and Commonwealth Office for the newly independent nations of

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3 See Whaley v Lord Watson of Invergowrie and The Scottish Parliament 2000 SC 340 (IH) per Lord Rodger at 348H, 350B-C.
emerging from the post-World War II transformation of the British Empire into the British Commonwealth.\textsuperscript{4} The new constitution of post-apartheid South Africa was also taken, in part, as a model.\textsuperscript{5} As a result, the Scotland Act contains quite different constitutional checks and balances from those which form the basis of the Human Rights Act. The protection of Convention rights under the constitutional settlement set out in the Scotland Act is embedded within the concept of limits on the powers or competence of the devolved authorities. Thus, the Convention-compatible interpretative obligation for UK legislation in the Human Rights Act s 3 is paralleled by an interpretative obligation for Scottish legislation in the Scotland Act s 101, relative to competence.\textsuperscript{6} section 101(2) enjoins the courts, when faced with devolved Scottish primary and subordinate legislation which \textit{could} be read in such a way as to be outside competence, to read the provision “as narrowly as possible as is required for it to be within competence, if such a reading is possible” and to give effect to it accordingly.\textsuperscript{7} And the “implicit dialogue” provisions between court and legislature set out in the Human Rights Act s 4 in relation to Westminster legislation have their parallel in the Scotland Act s 102 as regards Scottish legislation: s 102(2)(a) permits the court to remove or limit the retrospective effect of any finding that legislation – whether passed by the Scottish Parliament or the Scottish Ministers – is beyond its legislative competence and hence \textit{ultra vires}; and s 102(2)(b) of the Scotland Act allows


\textsuperscript{5} See, e.g., Scotland Act s 102 and art 172(1) of the Constitution of South Africa which both give power to the courts to suspend and/or modify the retrospective effect of their decisions as to the constitutional incompatibility of laws to give the legislature the opportunity of suitably amending the offending laws. \textit{Minister of Home Affairs v Fourie} (2006) 20 BHRCS 368 provides an example of the use of art 172(1) by the South African Constitutional Court.

\textsuperscript{6} See \textit{DS v HM Advocate} 2007 SC (PC) 1 per Lord Hope at paras 21-24.

\textsuperscript{7} See \textit{McCall v Scottish Ministers} 2006 SC 266. Section 101 of the Scotland Act also parallels and reflects the provision common in Commonwealth constitutions enjoining the courts to read statutes which appeared on their face to be incompatible with constitutional rights “with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the constitution”. See \textit{Rejas v Berlalique (Attorney General for Gibraltar inter-}

Paragraph 2 of the transitional provisions [which states “the existing laws ... shall be construed with such modifications ... as may be necessary to bring them into conformity with the Constitution’] imposes a far-reaching obligation on courts. As noted in \textit{Director of Public Prosecutions of Jamaica v Mollison} [2003] 2 AC 411, 425-427, paras 16-17, this type of obligation goes beyond the limits of construction of statutes as usually understood. In the usual course the process of construction involves interpreting a provision in a manner which will give effect to the intention the court reasonably imputes to the legislature in respect of the language used. The exercise required by these transitional provisions is different. The court is enjoined, without any qualification, to construe the offending legislation with whatever modifications are necessary to bring it into conformity with the Constitution.
the court to suspend the effect of its decision on lack of legislative vires for such period and on such conditions as might allow the defect identified by it to be corrected by the legislature.

Significantly, however, there is no such power or discretion vested in the court to suspend its decisions in relation to administrative (non-legislative) acts of the Scottish devolved institutions, just as there is no discretion given to the courts to permit the Scottish Ministers to act in a manner which is incompatible with the Convention (see the Scotland Act s 57(2)). But the centrally important feature in the scheme of the Scotland Act – and the manner in which it differs fundamentally from the other devolution statutes – is that the Scottish Ministers are not given the Human Rights Act s 6(2) defence which is otherwise available to public authorities. No provision is made for the possibility of any “lawful” breach of Convention rights by the Scottish devolved authorities relying upon, or seeking to enforce, Convention-incompatible provisions of Westminster legislation. Section 57(3) of the Scotland Act is the only provision of the Act which allows for the possibility of any member of the Scottish Executive – namely the Lord Advocate when acting in prosecuting any offence or in his capacity as head of the system of criminal prosecution and investigation of deaths in Scotland – acting in a manner which is incompatible with any of the Convention rights. It is only by this member of the Scottish Executive, and only when exercising these functions “retained” by this office alone (see Scotland Act s 52(5)(b), that a Human Rights Act s 6(2) defence might be claimed. To date it has rarely been prayed in aid by the Scottish Law Officers, and only once successfully. It is clear from the parliamentary history that this failure to allow for any Convention-incompatible activity on the part of the Scottish Parliament or other member of the Scottish Executive was not a matter of inadvertence or oversight. The fact that no similar amendment was made in respect of the

8 As the First Division acknowledged in Somervilla v Scottish Ministers 2007 SC 149 at 166 (italics added):

[50] By s 6(2) of the Human Rights Act, subs (1) of that section (which renders unlawful incompatible acts of a public authority) is disapplied where, as a result of one or more provisions of primary legislation, the authority could not have acted differently; a similar disapplication applies to subordinate legislation where the authority is acting so as to give effect to or enforce primary legislation. By contrast the existence of primary legislation having such results does not save acts amenable to the control of the Scotland Act.

9 See Hansard: HL Deb 28 October 1998 at cols 2041-2042 per the then Lord Advocate, Lord Hardie.

10 See: Starrs v Ruxton 2000 JC 208 per LJ-C Cullen at 231B-C and Lord Reed at 256A; Brown v Scott 2000 JC 328 per the Lord Justice General, Lord Rodger of Earlsferry, at 334; and Miller v Dickson 2002 SC (PC) 30 per Lord Bingham at 43D-E, Lord Hope at 55A-D and Lord Clyde at 60H.

11 See Dickson v HM Advocate 2008 JC 181.
other Scottish Ministers – or for the Lord Advocate when acting other than as head of Scotland’s criminal prosecution service – shows it was intended by Parliament that the Convention-based limits imposed on the powers of the Scottish devolved government would be subject to no exception.

The Scottish Ministers, then – unlike any other public body or devolved authority – are bound absolutely as a matter of vires by the requirements of the Convention. Thus, because the Scottish Ministers and Parliament have no Human Rights Act s 6(2) defence open to them, a declarator by a court (whether under the Human Rights Act s 4 or at common law) that a provision of Westminster legislation is incompatible with the requirements of the Convention will have the effect of rendering ultra vires any act or omission of the Scottish Ministers or Parliament which relies upon the Westminster provision in question. Since all those who hold office by virtue of their effective appointment by the Scottish Ministers within areas of devolved competence are governed by the vires controls of the Scotland Act s 57(2) – rather than by the lawfulness controls of the Human Rights Act s 6 – this means that a declaration of incompatibility made under the Human Rights Act s 4 has the effect of actually setting specific and particular limits on the power of those Scottish officials. It is also to be noted in this regard that the Scotland Act s 57(2) refers to limitations on the powers of the Scottish Ministers under reference to both European Community law and Convention rights. Because the Scottish Ministers have no Human Rights Act s 6(2) defence, Convention rights have the same effect against the Scottish Ministers as do directly effective provisions of Community law: both render their acts ultra vires. Thus, any Convention-incompatible provision of a Westminster statute effectively falls to be “disapplied” as regards the Scottish Ministers, just as any Community-law-incompatible provision of a Westminster statute is to be disapplied as regards acts of emanations of the UK State. And the fact that the Scottish Parliament may pass a Sewel motion to allow for the UK Parliament to legislate in an area otherwise within devolved competence – for example in the case of sex offenders registration legislation – does
not empower the Scottish Ministers to enforce (or make a commencement order in respect of) any resulting UK legislation in so far as it is Convention-incompatible. In relation to the assessment of the lawfulness of acts of the Scottish Ministers, the Convention is placed on a par with Community law – with the result that Westminster statutes are placed in a position which is, from the viewpoint of the Scottish Ministers, normatively subordinate to the requirements of the Convention.

The Scotland Act, then, embodies the principle of judicial primacy in which the courts police and may strike down all and any “unconstitutional” acts of the devolved legislature and administration. As Lord Hope observed in his contribution to the House of Lords debate on the introduction of the Scotland Bill before the Second Chamber, the Scotland Act creates a “new kind of sovereignty” for Scotland. He distinguished the situation of the UK Parliament whose “power to legislate on whatever matter it chooses cannot be called into question before the courts” from that of the devolved Parliament for Scotland which “can only legislate within the powers which have been devolved to it”. Scottish legislation, he said, was “vulnerable to attack on the ground that it is ultra vires” and “it is the judges, not the devolved parliament nor even the executive, who will have the last say as to whether or not it is within the powers of the parliament”.

Thus, within Scotland there now exist two wholly discrete constitutional models in relation to the protection of the fundamental rights of the individual against the organs of government. The Human Rights Act regime, which applies to all public authorities within the United Kingdom, is based on the principle of the ultimate supremacy of the (United Kingdom) legislature. The Scotland Act provisions for the protection of fundamental rights rest, instead, on the idea of the primacy of the judges within the Scottish legal system over the Scottish Parliament and the Scottish government. But it should not be assumed that the giving of greater powers to judges results in any stronger protection for fundamental rights in Scotland in comparison with the rest of the United Kingdom. If anything, the self-regarding complacency, the mulish resistance to change, the thrawn conservatism, which has for so long characterised the ruling elites of Scottish society, not only its judiciary and its lawyers.  

15 See A v Scottish Ministers 2006 SLT 412 (OH); [2007] CSOH 189. 
16 Hansard: HL Deb 17 June 1998 per Lord Hope of Craighead at col 1637-9. 
It cannot be said that the Scottish judiciary has been a major agency of change in the last hundred years. The House of Lords has made abrupt turns from time to time and perhaps that is the appropriate place for changes to be made. The Court of Session has been, on the whole, conservative; it has refused to break new ground, not only because there was precedent.
but also its politicians, has meant that the promise of radicalism implicit in the
new constitution for Scotland has not (yet) been fulfilled.

B. INTERNATIONAL (HUMAN RIGHTS) LAW AND THE
SCOTTISH CONSTITUTION

The legal systems of both Scotland and England and Wales formally remain
dualist, which is to say that, until formally incorporated by Parliament into
domestic law, the domestic courts will not have regard to or seek in any way
to enforce such treaty obligations as the United Kingdom may have assumed
as a matter of public international law. However, international law is not
a thing writ on water. Section 126(10) of the Scotland Act defines “international
obligations” for the purposes of the statute as meaning “any international
obligation of the United Kingdom, other than obligations to observe
and implement Community law or the Convention rights”. Sections 35(1)(a)
and 58 of the Scotland Act also create an enforcement mechanism whereby
the UK Government can ensure that, when acting within their devolved
responsibility, the Scottish Parliament and the Scottish Ministers will exercise
their devolved functions and act in a manner which is compatible with the
United Kingdom’s international obligations. And the Scotland Act Sch 5 para
7 states that:

(1) International relations, including relations with territories outside the United
Kingdom, the European Communities (and their institutions) and other inter-
national organisations, regulation of international trade, and international develop-
ment assistance and co-operation are reserved matters. (2) Sub-paragraph (1)
does not reserve— (a) observing and implementing international obligations,
obligations under the Human Rights Convention and obligations under Commu-
nity law, (b) assisting Ministers of the Crown in relation to any matter to which
that sub-paragraph applies.

The effect of these provisions is that observing and implementing interna-
tional obligations which have been assumed by the United Kingdom (even if
they have not – fully – been incorporated into national law) falls within the
competence of the Scottish devolved institutions. And the United Kingdom is
party to the following international human rights conventions, among others:

against it, but also because there was no precedent for it. ... The best that can be said for the
judges is that they have kept the system going; that is, perhaps, their function.

16 The position is different as regards the norms of customary international law which are automatic-
ally incorporated into the domestic law of Scotland: Lord Advocate’s Reference (No 1 of 2000)
re nuclear weapons, 2001 JC 143 (HCJ). See too In re McKerr [2004] 1 WLR 807 (HL (NI)) per
Lord Steyn at paras 49-50, 52.
• the UN International Covenant on Economic Social and Cultural Rights (1966);
• the UN International Covenant on Civil and Political Rights (1966);
• the UN Convention on the Elimination of All Forms of Racial Discrimination (1965);
• the UN Convention on the Elimination of All Forms of Discrimination against Women (1979);
• the UN Convention on the Rights of the Child (1989);
• the International Convention on the Protection of all Migrant Workers and Members of their Families (1990).

The intention of the UK Parliament, as revealed in the scheme of the Scotland Act, was that the Scottish government should not exercise the powers that were devolved to it in a manner which would put the United Kingdom in breach of its international treaty obligations.19 As a matter of constitutional principle and good government, it is clear that if the United Kingdom’s international obligations are to be breached, it will only be as a result of a deliberate and conscious decision on the part of Crown in right of the UK government. It is for this reason that the Scotland Act s 58 was enacted (to give the Secretary of State power to prevent action by the Scottish Ministers incompatible with international obligations). Further, in so far as the Scottish Ministers fail to act in a manner which might otherwise be required to be done in Scotland under and in terms of an international obligation binding upon the United Kingdom, they may be subject to enforcement action against them on the part of the Secretary of State by virtue of the Scotland Act s 58. There are no parallel provisions in the Human Rights Act which set out the continued significance of public authorities abiding by the United Kingdom’s international obligations. Collectively these provisions of the Scotland Act might be said to bind the Scottish Ministers to exercise their powers in a manner which respects the whole range of international treaty obligations entered into by the United Kingdom – even where they have not been incorporated into the domestic law of the United Kingdom.20

The House of Lords in Whaley v Lord Advocate rejected an argument put forward by an unrepresented party litigant (and in the absence of any amicus curiae to make his case) that “the Scottish Parliament was obliged to observe and implement international obligations in just the same way as it was obliged

20 Compare, pre-devolution, T, Petitioner 1997 SLT 724 (H) on the relevance of provisions of the ECHR prior to the incorporation of various of its provisions into domestic law by the Human Rights Act and the devolution statutes.
to implement and observe the Convention rights and Community law”.21 Nothing in their Lordships’ decision or reasoning, however, forecloses the argument that a legitimate expectation enforceable by a private party22 may exist to the effect that the actions of the Scottish devolved institutions will be compatible with the United Kingdom’s “international obligations”. Thus, while not making international obligations directly part of the domestic Scots law, the Scotland Act may itself be said to embody and create a legitimate expectation, enforceable by those with the necessary title and interest, that the actions of the Scottish devolved institutions will be compatible with the United Kingdom’s “international obligations”.

Further, as we have noted, the Scotland Act Sch 5 para 7(2)(a) provides that it is within devolved competence for the Scottish Ministers (and Lord Advocate) to observe and implement “international obligations, obligations under the Human Rights Convention and obligations under international law”. Thus the Scottish Ministers have the power to take any action which might be said to implement the United Kingdom’s international obligations, including all those under the international human rights treaties listed above. In granting the devolved institutions power to implement international obligations the Scotland Act Sch 5 para 7(2)(a) may in fact be used to expand the competences of the Scottish government even into areas (for example, anti-discrimination laws) which otherwise look to be reserved to the UK Parliament. There is Australian precedent in using the international law to affect the internal distribution of powers within a federal legal system. In Commonwealth of Australia v State of Tasmania23 (the “Tasmanian Dam” case) the High Court of Australia upheld the claim of the Commonwealth of Australia that it could properly rely upon the external affairs powers granted it under the Australian constitution to give it the legal competence to pass the World Heritage Properties Conservation Act 1983. This federal Act was made in avowed implementation of a UNESCO declaration designating the Franklin River area a “world heritage site” and its purpose was to prevent the construction of the Franklin Dam by the Tasmanian government, a matter which would otherwise have fallen wholly within State competence. Again, we see the possibilities in the new Scottish constitutional model.

21 Whaley v Lord Advocate 2008 SC (HL) 107 per Lord Hope at 110-1 paras 8-9.
C. THE SCOTTISH PARLIAMENT AS A GUARDIAN OF HUMAN RIGHTS?

(1) No human rights committee of the Scottish Parliament

There is no committee or organ of the Scottish Parliament which plays any role equivalent or comparable to that played in Westminster by the UK Parliamentary Joint Committee on Human Rights ("JCHR"). All that the Scottish Parliament has had in the first ten years of its existence is an informal cross-party group on human rights and civil liberties which functions as a forum in which members of NGOs may meet some MSPs interested in human rights issues. But this cross-party group is not a committee of the Scottish Parliament and has none of the powers or prestige associated with that status. By contrast, Westminster's JCHR is made up of twelve members appointed from both the House of Commons and the House of Lords. The Joint Committee is charged with considering human rights issues in the UK and undertakes thematic inquiries on human rights issues, reporting its findings and recommendations to Parliament. It scrutinises all UK government Bills and picks out those with significant human rights implications for further examination. The JCHR also looks at UK government action to deal with judgments of the UK courts and the European Court of Human Rights where breaches of human rights have been found.

The failure by the Scottish Parliament to establish any analogous Scottish Human Rights Parliamentary Committee with the resources and expertise to be able and willing to test the Convention compatibility of the administrative and legislative action and inaction of the Scottish government casts grave doubt on the extent to which a human rights culture has indeed taken root at the heart of Scotland's institutions of government. What this means is that, by default, claims by the Scottish government as to the human rights compatibility of its actions and legislative programme go unchallenged before the Parliament. It is a cause of some disappointment that Scotland's democratic legislature should be so passive on the issue of human rights protection in Scotland and on holding the Scottish government to account on human rights grounds. The fact is that when criticisms are made of Scottish government policy by the Scottish Parliament, these criticisms would be immeasurably strengthened if they were also couched on human rights grounds: in so doing they would be drawing attention to absolute and enforceable legal limits on the powers which the Government was purporting to exercise, or failing to exercise.
(a) Slopping out

Certainly the fact that in the early days of the Scottish Parliament the Justice Committee was very proactive in calling the Scottish Ministers to account over their willingness to maintain a regime involving slopping out in Scottish prisons was crucial to the subsequent court finding in *Napier v Scottish Ministers*. The court found that the regime in which remand prisoners were commonly being held in HM Prison Barlinnie, involving their being locked for up to twenty-three hours per day, two to a cell which had originally been intended for single occupancy and in which there was no provision for internal sanitation, requiring them to use a plastic potty for their sanitary needs, constituted – at least in Scotland by 2004 – “inhuman and degrading treatment” for the purposes of the ECHR art 3. But the fact that the court, in coming to its decision, took into account evidence, taken from the Scottish Parliamentary record, that the Scottish government had made a deliberate choice to move funds originally allocated for the elimination of slopping out to spend in favour of other projects was the subject of some public criticism on constitutional grounds. The former Solicitor General and Court of Session judge Lord McCluskey objected that

the decision as to how limited public (i.e. taxpayers’) funds are to be spent within the criminal system is a matter for elected politicians not for judges. How can it be for judges to decide that spending money on improving toilet facilities for convicted criminals is more important than spending that money on tackling domestic violence or on trying to fight the menace of dangerous drugs?

The Scottish Government failed to mark an appeal against the decision of the Lord Ordinary within the required time. Neither the Minister of Justice of the time nor the then Lord Advocate was willing to accept responsibility for this failure, each, apparently, being ready to blame the other. In the event, the Scottish government paid the pursuer’s legal expenses and the sum of £2,100 damages which had been awarded to him at first instance, and it was given leave by the Inner House to appeal out of time, not on the merits of the actual case but only on the purely academic point as to whether the civil or criminal standard of proof was required to be met before a domestic court could hold in the context of a judicial review that conduct or inaction was in breach of the ECHR art 3. On this point the Inner House found in favour of the pursuer, and confirmed that the normal civil standard of proof on the balance of probabilities only applied on this question.

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24 *Napier v Scottish Ministers* 2005 SC 229 (OH).

25 See now a contrasting view expressed in *R (Wellington) v Secretary of State for the Home Department* [2009] 1 AC 335 per Lord Hoffmann at para 27.

26 *Napier v Scottish Ministers* 2005 SC 307 (IH).
(b) Tainted blood and the NHS

Another instance in which the court has felt able to support the views of the Scottish Parliament over those of the Scottish government is seen in the judicial review application **Kennedy v Lord Advocate**, in which the decision of the Lord Advocate to refuse to hold a public inquiry into the deaths of individuals infected with hepatitis C virus from blood transfusions while in NHS care was overturned. The court held that a proper appreciation of the procedural duties implicit in the ECHR art 2 guarantee of the right to life required there to be a public inquiry into the issue raised by these deaths at which the families of those who had died could be properly represented. This decision by the court at first instance reflected and echoed repeated calls from the Scottish Parliament that such an inquiry should be set up and the incoming SNP administration expressly accepted the court’s findings and decided not to appeal against the judgment and, in the light of the court’s judgment, set up the Penrose inquiry to look into the issues raised by the judicial review.

(2) The Convention Rights Proceedings (Amendment) (Scotland) Act 2009

But by far the most egregious failure to date on the part of the Scottish Parliament to challenge or test the Scottish government’s claim concerns the passing by the Scottish Parliament of the Convention Rights Proceedings (Amendment) (Scotland) Act 2009. This was a Scottish Executive Bill put before the Scottish Parliament to close the “loophole” said by the Ministers to have been exposed by the majority decision of the House of Lords in **Somerville v Scottish Ministers**. This decision rejected the Scottish Ministers’ argument that they could rely upon a time-bar provision contained in the Human Rights Act s 7(5) to defeat claims which had been brought against them under and in terms of the Scotland Act. Section 100 of the Scotland Act expressly contemplates the possibility of challenges being made under that Act on Convention rights grounds to Acts of the Scottish Parliament (ASPs) and to the action or inaction of the Scottish Ministers, but the Scotland Act contains no provision for time limits for the making of such legal challenges. This had been expressly drawn to the attention of Parliament by Lord Hope

27 Kennedy v Lord Advocate (No 1) 2008 SLT 195 (OH); Kennedy v Lord Advocate (No 2) [2009] CSOH 1.
28 Somerville v Scottish Ministers 2008 SC (HL) 45 (Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe forming the majority; Lord Scott of Foscote and Lord Mance dissenting).
of Craighead – speaking in his then capacity as legislator – when the Scotland Bill was being debated in June 1998. The majority decision of the Appellate Committee of the House of Lords in Somerville v Scottish Ministers, which was handed down in October 2007, simply confirmed the position but it was presented by the SNP administration as a revelation, if not a revolution. The difficulty for the Scottish government was that the Somerville decision turned upon the proper interpretation of the Scotland Act 1998. This is a reserved enactment which the Scottish Parliament has no power to amend. The Scottish government was therefore obliged to lobby the Westminster government for a change in the law. In his statement to the Scottish Parliament on 11 March 2009, the Scottish Cabinet Secretary of Justice Kenny MacAskill MSP said this:

The UK Government had suggested that we might address the Somerville issue by changing the law on time bar in Scotland more generally. However, that would reduce the rights of many deserving claimants, such as those who suffer from pleural plaques or been injured through the negligence of an employer.

Three points can be made immediately in relation to these claims by the Justice Minister. First, the application to Convention rights (“just satisfaction”) damages claim of the same (currently three-year) period which applies to private law damages claims for personal injuries would not result in the reduction of any right of any existing claimants, since all that this would do would be to establish parity of treatment between these two categories of case. Secondly, an insinuation is being made by the Justice Minister to the effect that all who seek damages in respect of the violation of their Convention rights are ipso facto less deserving than those seeking damages for personal injuries. Finally, in any event, quite different rules, principles and procedures

30 See Lord Hope of Craighead in Hansard: HL Deb 17 June 1998 col 1638 (italics added):
One has only to look at the devolution issues listed in paragraph 1 of Schedule 6 to see the scope which will exist for challenges to be made. No time limit is set for the making of those challenges. As has been pointed out by several noble Lords, there is to be no revising chamber. So in theory at least – I stress the word theory – subject to the exercise of the powers given to the court in Section 93 to vary retrospective decisions, legislation by the Scottish parliament could be set aside as not being within that parliament’s competence long after it had been put into effect.

31 See, e.g., the Scottish Parliament, Official Report, Justice Committee, col 1181 (7 October 2008), per the Scottish Minister for Community Safety Fergus Ewing MSP:
'The fundamental legal issue raised by the Somerville case ... is that the Scottish ministers are the only public authority exposed to claims for damages arising from breaches of human rights without a one-year time bar. We asked the UK Government to assist us in tackling that. Because we have not obtained a satisfactory response from Westminster, we are left facing these slipping out claims without the time bar that applies to every other authority. That seems to me to be a shocking neglect.'

32 See Statement to the Scottish Parliament on 11 March 2009 by the Cabinet Secretary of Justice.

33 See Prescription and Limitation (Scotland) Act 1973 s 17.
already apply in relation to public law damages claims, since these are usually brought in the context of judicial review petitions. The introduction of changes in relation to the time limits applicable to such public law damages claims need not have any impact upon private law delictual damages brought by way of ordinary action. By April 2009 the Scottish government had managed to exert sufficient political pressure on the UK government – based mainly on repeated but quite unsubstantiated claims that a failure to change the law as it requested by the summer of 2009 would result in a further £50 million having to be paid out by the Scottish Ministers to convicted prisoners34 such that the Cabinet Secretary of Justice was able to advise the Scottish Parliament that the UK Government had agreed to vest the Scottish Parliament with power itself to amend the Scotland Act by introducing a time bar of one year or less in relation to proceedings brought by individuals against the Scottish Ministers on Convention rights grounds.35 Less than a week after this power was granted, the Scottish Ministers introduced the Convention Rights Proceedings (Amendment) (Scotland) Bill before the Scottish Parliament. Two days after being published and introduced before the Parliament the Bill was passed, unamended, by a unanimous Scottish Parliament in one day on 18 June 2009. No proper reason was ever given by the Scottish government as to what emergency existed which required this legislation to be pushed through in one day without public consultation or debate almost two years after the House of Lords decision complained of. It is clear, however, that this change in the law allows for far more than setting a cap on the bringing of aged claims by prisoners for just satisfaction damages in respect of their slopping out, as was its professed rationale.36 Instead, it provides for the imposition of a time bar of at most one year in relation to any Convention rights claim against the administrative action or inaction of the Scottish Ministers, regardless of whether just satisfaction damages were sought by the Convention rights victims in these actions, and regardless of whether these actions are brought by or on behalf of the apparently deserving

34 See statement to the Scottish Parliament on 11 March 2009 by the Cabinet Secretary of Justice (italics added):

The situation created in Scotland by the judgment is untenable and unacceptable. Introducing a 1-year time bar would enable us to draw a line under our liability in relation to claims of the kind made in Somerville, and so could release up to some £50m for spending on more worthwhile purposes. It would also reduce our liability in relation to other human rights claims that might arise in the future. £50m is a large amount of money. For instance, it could pay for 8 new primary schools or 500 new affordable housing units, or employ 1250 teachers or 1600 nurses for a year. So this is a very real and important issue.


(for example, the pensioners whose situation was repeatedly mentioned in the Scottish Parliament) as contrasted with the allegedly undeserving (for example, convicted prisoners). This change in the law involves, under the guise of limiting prisoners’ rights, a significant reduction in the level of judicial protection afforded to the (Convention) rights of every private individual in Scotland vis-à-vis the Scottish government. And all this was done without any public consultation, in a helter-skelter rush to change the constitution to the Scottish government’s advantage before anyone apparently noticed the implications of what was being done. It was an example of the Scottish government playing politics with the (Scottish) constitution and a supine, complaisant Scottish Parliament provided no protection, no scrutiny, against this.

D. THE SCOTTISH COURTS AND THE PROTECTION OF CONSTITUTIONAL RIGHTS

In another constitutional arrangement a second revising legislative or advisory chamber might have had a role to play in testing the factual and legal claims of the Scottish government in support of significant constitutional changes such as that contained in the Convention Rights Proceedings (Amendment) (Scotland) Act 2009. In the absence of such within the Scottish polity, might one then rely upon the courts in Scotland to carry out this constitutional function? The experience of the first ten years of litigation in a devolved Scotland makes this seem unlikely.

The purpose of litigation, as usually conceived of and judicially presented in the contemporary Scottish legal system, has been to obtain a resolution of a real dispute between individual parties about their respective rights and obligations inter se. The Scottish courts have, in the course of the twentieth century, insisted that there require to be both title and interest to sue as a prerequisite to an individual or body being permitted to raise any action in court. The passage constantly cited in support of this approach is some passing observations of Lord Dunedin in the 1915 case of D & J Nicol v Dundee Harbour Trustees, that for a person to have title to sue “he must be a party (using the words in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies”. This same test (which focuses on private rights)

37 See further the Scottish Government's Executive Note on the Scotland Act 1998 (Modification of Schedule 4) Order 2009 of 1 April 2009, repeated verbatim at para 22 of the Policy Memorandum to the Bill, which confirms that the only consultation was in the form of a statement to the Scottish Parliament.
appears, then, to have been applied by default to public law challenges by way of judicial review, notwithstanding that, as Sedley LJ has observed (italics added):

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.

In Scotland, by contrast, the interest which the party has to show he seeks to protect must also be considered by the court to be “a material or sufficient interest” specific to him which will be prejudiced by the decision complained of. The rationale for rules on standing was explained by Lord Ardwell in *Swanson v Manson* as follows:

The grounds for this rule are (1) that the law courts of this country are not instituted for the purpose of deciding academic questions of law, but for settling disputes where any of the lieges has a real interest to have a question determined which involves his pecuniary rights or his status; and (2) that no person is entitled to subject another to the trouble and expense of a litigation unless he has some real interest to enforce and protect.

Notwithstanding some judicial extra-curial criticisms and observations in the Outer House authority to the effect that the Scottish rules on title and interest should not be applied in an artificial, technical or restrictive manner, particularly in a context such as judicial review, it is clear that the rules on standing to take judicial reviews in Scotland have, to date, been applied far more restrictively than their equivalent rules in England and Wales.

39 See *Scottish Old People’s Welfare Council v Secretary of State for Social Security* 1997 SLT 179 (OH) per Lord Clyde at 184; and *Adams v Advocate General* 2003 SC 171 (OH) for a discussion of the requirements of title and interest in public law cases.
41 *Air 2000 v Secretary of State for Transport (No 2)* 1990 SLT 335. See also *Air 2000 v Secretary of State for Transport (No 1)* 1989 SLT 698.
42 See *Simpson v Edinburgh Corporation* 1980 SC 313 for a relatively narrow definition of what constitutes “prejudice” sufficient to ground an action for judicial review.
43 *Swanson v Manson* 1907 SC 426 per Lord Ardwell at 429. See, more recently, *Davidson v Scottish Ministers* 2002 SC 205 (IH) per Lord Hardie at 216.
46 But see now *AXA Insurance v Lord Advocate* [2010] CSOH 2 per Lord Emslie at paras 57 and 59.

[T]he domestic rules [on title and interest] may, like article 34 of the Convention, be seen as intended to exclude access to the courts where a pursuer’s interest in, or connection with, the subject-matter of a proposed litigation is remote, tenuous, academic or theoretical. But... where a party’s personal, social, political, economic or proprietary interests are demonstrably
particular, the Scottish courts seem loath to admit the possibility of public
interest challenges being taken before the courts to the lawfulness of execu-
tive or legislative action. Scotland’s restrictive rules on standing compared
with the practice in England has meant that there is no real scope for public
interest litigation by pressure groups or (quasi-) non-government organi-
sations. Indeed, the Scottish Human Rights Commission – set up by the
Scottish Parliament under the Scottish Commission for Human Rights Act
2006 – while permitted to intervene in legal proceedings “for the purpose
of making a submission to the court on an issue arising in the proceed-
ings”, is expressly forbidden by its constituting statute to “provide assistance to or
in respect of any person in connection with any claim or legal proceedings
to which that person is or may become a party”. And s 7 of the Equality Act
2006 also prohibits the Equality and Human Rights Commission from taking
“human rights action” in Scotland, or even from considering the question
whether a person’s human rights have been contravened “if the Scottish
Parliament has legislative competence to enable a person” to take such action
or consider this question. The result has been a dearth in Scotland of what
might be termed “public interest litigation”. In so far as the public interest
has been considered by the courts in Scotland, it appears at times to have
become equated to the claims of the State - particularly as represented to the
court on behalf of the government by the Scottish Law Officers.48

But the Lord Advocate exercises a far less prestigious and powerful role
than prevailed in the pre-devolutionary settlement. The Lord Advocate is

47 See, e.g., Glasgow Rape Crisis Centre v Secretary of State for the Home Department 2000 SC
327 (in particular the latter at 534 per Lord Clarke). Compare, however, Wilson v Independent
Broadcasting Authority 1979 SC 351.

48 See Hetter v McDonald 1961 SC 370 per LJP Clyde at 378-379 (italics added):
From time immemorial it has, therefore, been recognised, as Baron Hume puts it Crimes,
vol ii, p 135 that “a constitutional trust is reposed in that high officer, selected by His Majesty
from among the most eminent at the Bar; and it will not be supposed of him, that he can be
actuated by unworthy motives in commencing a prosecution, or fall into such irregularities
or blunders in conducting his process, as ought properly to make him liable in amends.” As
Alison says (vol ii, p 93) he is absolutely exempt from penalties and expenses. It is, therefore,
an essential element in the very structure of our criminal administration in Scotland that the
Lord Advocate is protected by an absolute privilege in respect of matters in connexion with
proceedings brought before a Scottish Criminal Court by way of indictment.
See, too, Crichton v McBain 1961 JC 25 per LJ-General Clyde at 28-29.
no longer in charge, for example, of judicial appointments and preferment. The office has become little more than a Scottish Director of Public Prosecutions. Under the influence of Convention rights jurisprudence, the courts have in more recent years begun to be willing to consider legal challenges to — and at times to overturn — decisions of the Lord Advocate exercising the role of the head of the system for investigation of deaths in Scotland.

More generally, the tradition of judicial deference to the “powers that be” may be seen to be changing under the devolved settlement. Thus, the peculiarly Scottish interpretation of the UK-wide provisions of s 21 of the Crown Proceedings Act 1947,52 that it had the effect of prohibiting the courts from, in any circumstances, pronouncing any coercive or interim orders against the Crown, was eventually overturned, but only after a long and hard-fought campaign of litigation before the unwilling judges of the Court of Session,53 and requiring three visits in the same case to the House of Lords.54 The Scottish Ministers have also now been found to be guilty of contempt of court in their failure to ensure that an undertaking given to the court was duly respected by their civil servants.55 And the judges of the First Division56

49 Judicial appointments are now in the hands of the Judicial Appointment Board for Scotland which, by virtue of s 14 of the Judiciary and Courts (Scotland) Act 2005, is required to have regard to the need to encourage “diversity” in the range of individuals available for selection for judicial appointments.

50 But see Emms v Lord Advocate 2008 SLT 2 (OH) and Niven v Lord Advocate 2009 SLT 876 (OH) on the duties of the Crown as regards an ECHR art 2 compliant investigation into a pre-Scotland Act death.

51 See, e.g., Global Santa Fe Drilling Co (North Sea) Ltd v Lord Advocate 2009 SLT 598 (IH), rejecting the Lord Advocate’s submissions that it was not competent for a sheriff to make an award of expenses against the Crown in a fatal accident inquiry; and Kennedy v Lord Advocate (No 2) [2009] CSOH 1; Kennedy v Lord Advocate 2008 SLT 195 (OH) where the Lord Ordinary held that the refusal by the Lord Advocate to institute an inquiry into the deaths of individuals infected with hepatitis C virus from blood transfusions while in NHS care was incompatible with the requirements of ECHR art 6.

52 Set out by the Second Division in McDonald v Secretary of State for Scotland 1994 SC 234 (IH), refusing to follow the opposite interpretation by the House of Lords on the same statutory provision given in M v Home Office [1994] 1 AC 377 on the basis that this was an interpretation based on peculiarities of English law which were difficult for a Scots lawyer to understand or give effect to.

53 See, e.g., Davidson v Scottish Ministers [2002] 1 Prison Law Reports 58 (OH) per Lord Johnston and 2002 SC 205 (IH) per Lords Marnoch, Hardie and Weir; Callison v Scottish Ministers unreported, 25 June 2004, Lord Drummond Young (OH); Beggs v Scottish Ministers 2004 SLT 755 (OH) (Lord Drummond Young); McKenzie v Scottish Ministers 2004 SLT 1236 (OH) (Lord Carloway); Balston v Scottish Ministers 2004 SLT 1263 (OH) (Lady Smith).

54 See Davidson v Scottish Ministers (No 3) 2005 SC (HL) 1; Davidson v Scottish Ministers (No 2) 2005 SC (HL) 7; and Davidson v Scottish Ministers 2006 SC (HL) 42.

55 Beggs v Scottish Ministers 2006 SC 649 (IH).

and the House of Lords in Scottish appeals have been willing to give general declaratory judgment on legal issues which, by the time the cases were before them, had become academic as between the specific parties to the cause.

Yet the restrictive rules on standing remain stubbornly and capriciously in place in Scotland, despite occasional judicial criticism and notwithstanding even the requirement – at least in areas of environmental law falling within the scope of the Aarhus Convention – for wide public access to the courts to defend their (environmental) rights. These restrictive rules on standing have significantly inhibited the development of public law in Scotland.

Notwithstanding the position of judicial primacy which the devolved settlement gives to the judges over the Scottish Parliament in the first full

59 Article 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereafter "the Aarhus Convention") provides as follows:
   9(2) Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
   (a) Having a sufficient interest or, alternatively,
   (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

   have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.
60 The Environmental Impact Assessment (Scotland) Regulations 1999 (which seek to implement in Scotland the Environmental Impact Assessment Directive 85/337/EEC) were amended with effect from 1 February 2007, apparently to increase NGOs’ rights of access to the court by the following provisions:
   46A Access to review procedure before a court
   Any non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10(a) of the Directive and rights capable of being impaired for the purposes of Article 10a(b) of the Directive.

   62A Access to review procedure before a court
   Any non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10a(a) of the Directive and rights capable of being impaired for the purposes of Article 10a(b) of the Directive.

This is apparently the only amendment which was considered necessary or desirable by the Scottish government to ensure that environmental rights accorded the individual under the Environmental Impact Assessment Directive and the Aarhus Convention were able to be protected before the court in Scotland.
ten years of its legislative programme, there have been only a handful of court challenges to the validity of provisions of primary legislation emanating from the Scottish Parliament. The Acts of the Scottish Parliament which have been subject to challenge in this period were: the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, allowing for the continued detention in the state hospital of medically untreatable psychopaths on grounds of public safety,\(^{61}\) the provisions of the Convention Rights (Compliance) (Scotland) Act 2001, which removed ministerial discretion on the matter of the date of release from prison of those serving a mandatory life sentence;\(^ {62}\) the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which regulated the issue of disclosure of previous convictions in sexual offences cases;\(^ {63}\) the Protection of Wild Mammals (Scotland) Act 2002, which regulated fox hunting with hounds;\(^ {64}\) the Criminal Proceedings etc (Reform) (Scotland) Act 2007, which increased to twelve months the maximum sentence of imprisonment which could be imposed by the sheriff, sitting as a court of summary jurisdiction in respect of both common law and statutory offences;\(^ {65}\) and the Damages (Asbestos-related Conditions) (Scotland) Act 2009, which sought to ensure that delictual damages might continue to be claimed in respect of the development of asymptomatic pleural plaques and other specified asbestos-related conditions upon negligent exposure to asbestos fibres.\(^ {66}\) None of these challenges was said to have been taken in the general public interest. All were made by persons who claimed that they were “victims” in respect of a violation of their Convention rights. And none of these challenges has, to date, been successful in the sense of resulting in a finding by the court that either the Act of the Scottish Parliament or any of its provisions in question required to be disapplied or suspended or declared void on grounds that they had been made out with the Scottish Parliament’s legislative competence.

Perhaps the best one can hope for on the issue of the reform of public interest litigation in Scotland is not a series of individual court decisions (which ultimately would require to be taken to and upheld by the United Kingdom Supreme Court in order to have a chance of becoming properly established within the Scottish legal system) but by way of the systematic reform of the whole system promised by the Gill Review on civil justice reform. This promises the introduction of a new test of sufficient interest in

61 See A v Scottish Ministers 2002 SC (PC) 63.
63 DS v HM Advocate 2007 SC (PC) 1.
64 Whaley v Lord Advocate 2008 SC (HL) 107.
judicial review, the imposition of a three-month time limit in which judicial review applications are to be brought, and new rules allowing specifically for class actions. Whether and when these reforms might be brought in is not clear. It seems unlikely that it would be a priority of the Scottish government to introduce reform in the court system which would make it easier for individuals and interest groups to take cases against them (at public expense) before the courts, though it is arguable that this is precisely what a properly constitutional democracy requires. What is clear, however, is that something has to be done. The Scottish judicial and legal system cannot continue to ignore the need for the very possibility of public interest litigation. The administration of justice is supposed to be blind (in terms of being impartial). It is not supposed to be deaf to the clamour for justice.

E. CONCLUSION: LONDON CALLING

In March 2001 Lord Bingham observed in his evidence on the constitution to the Joint Committee on Human Rights that “one of the anomalous, and to me surprising and unexpected, results of devolution is that for the first time one does have judges, Scots prominently among them but nonetheless judges, sitting in London ruling on questions relating to Scots criminal trials”. In almost 300 years of the Union with England, Scottish criminal law and procedure was developed in splendid isolation by the High Court of Justiciary, with little substantive input (or interference) from the (Westminster) legislature. But in the ten years of its existence the Privy Council’s devolution jurisdiction was prayed in aid only in relation to appeals from Scotland, and these almost exclusively concerned issues of Scots criminal law and procedure, albeit dressed up in the language of Convention rights (primarily the fair trial rights set out in the ECHR art 6(1)). Although the criminal appeals from decisions of the High Court of Justiciary to the Privy Council were relatively few in number, they had a significant impact in opening up the traditionally insular (and almost wholly judge-made) world of Scottish criminal law and procedure to a degree of external scrutiny which does not now appear to be welcomed by the judges in Edinburgh. This devolution jurisdiction of the Privy Council and the appellate jurisdiction of the House of Lords from Scotland were transferred to the UK Supreme Court by the Constitutional Reform Act 2005.


The SNP is apparently committed to ending the possibility of any appeals, whether in civil or criminal matters from Edinburgh to London. Paragraph 4(1) of Sch 4 to the Scotland Act, however, prevents the Scottish Parliament from modifying the Scotland Act itself. The Scottish Parliament has no *Kompetenz-Kompetenz*, which is to say no power to expand the range of its own powers. And Sch 6 to the Scotland Act makes provisions for appeals and preliminary reference on “devolution issues” to, ultimately, the UK Supreme Court. So it would seem to be outwith the legislative competence of the Scottish Parliament – and consequently not within the devolved competence of the Scottish Ministers – to alter, or indeed abolish, the current jurisdiction of the UK Supreme Court, at least as regards devolution issues. It may be competent, however, for the Scottish Parliament to legislate to alter, expand or indeed, abolish any appeals to that court from Scotland in non-devolution issues. But were the legality of any such measure to be challenged before the courts it would itself raise a “devolution issue”. And under our current constitutional arrangements the ultimate resolution of such a challenge would lie with the UK Supreme Court itself, albeit acting pre-eminently in such a situation as *tudex in causa sua*. Certainly some Scottish-based judges, academics and politicians have taken the opportunity of this inauguration of the UK Supreme Court to call into question the need for appeals outwith

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70 See A Le Sueur, *A Report on Six Seminars about the UK Supreme Court* (2008) and, in particular, the remarks apparently to be attributed to Lord Gill on civil appeals from Scotland as noted at p 43.


If difference of laws with an inevitable majority of non-Scottish members makes the House of Lords inherently unsuitable for Scottish criminal appeals, then the case is, if anything, stronger for private law appeals. One does not need to be a legal nationalist to see this.

72 Prompted by the imminent setting up of the UK Supreme Court, in December 2008, the Scottish Minister of Justice, Kenny MacAskill MSP, of the Scottish National Party, commissioned Professor Neil Walker of Edinburgh Law School to look into possible options for reform of the constitutional arrangements which currently allow for appeals to be taken to London from decisions of the courts in Scotland. The report Final Appellate Jurisdiction in the Scottish Legal System (available at http://www.scotland.gov.uk/Publications/2010/01/1915481313/14) was published on 22 January 2010 and recommended that the appellate jurisdiction of the UK Supreme Court from Scotland be both extended and reduced. It should be extended so as to cover not only civil appeals from the Court of Session but criminal appeals from the High Court of Justiciary. It should be reduced so as no longer able to hear any appeal from Scotland unless the case raises “common UK issues”. There would be no right of appeal from Edinburgh in any case which concern issues purely of Scots law. Professor Walker described this proposed re-arrangement of the appellate jurisdiction to London as transforming the UK Supreme Court, at least from the viewpoint of the Scottish legal system, into a “quasi-federal” Supreme Court.
Scotland to ensure that Scots law can develop in a manner uncontaminated by English law. But there is no intrinsic merit in having different legal systems, in all their integrity, existing for their own sake. What seems to be lost in such views is the fact that the legal system is of value only to the degree that it properly achieves and delivers justice to the people whose lives it governs.

Scotland is a small country and its legal system, lawyers and judges all benefit from appeals outside it.\textsuperscript{73} It is important for all judges to think that they may be judged in another forum – the classic problem of \textit{quis custodiet ipsos custodes?} – so that even if they are not appealed against, they know that they might be, and their reasoning analysed and held up to rigorous scrutiny. Arguably the possibility of appeals to the UK Supreme Court from Scotland does precisely that, and keeps the judges of the Court of Session and High Court of Justiciary and those who practise before them sharp, less likely to fall into unreasoned prejudice, more careful in how and what they decide. The European Court of Human Rights and the European Court of Justice perform a similar (but not as pervasive) function. The Scottish legal system will only flourish and serve the people of Scotland in so far as it and its practitioners remain open to the broader world. The mark of a mature legal system is the self-confidence to be open to outside influences. Scotland's people deserve nothing less.

\textsuperscript{73} As the then Lord Advocate Colin Boyd QC (now Lord Boyd of Duncansby) in a speech to the Conference of the Law Society of Scotland on the UK Supreme Court Proposals, 21 January 2004, observed at para 52:

As a legal system in a small country on the edge of Europe, we must be conscious of the risk of becoming self-centred and inward looking. It would be very easy for us to fall into the trap of defining our unique legal qualities and character in a negative sense, of simply not being the same as others.
Trident and International Law

Scotland's Obligations

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Prosecuting Crimes Against Peace before the Scottish Courts

AIDAN O’NEILL QC

The Nuremberg Principles

The Nuremberg trials prosecuted in Germany in the wake of the Second World War Crimes tribunal at Nuremberg, the principle of individual criminal responsibility for acts contrary to the requirements of international law was affirmed by the prosecuting Allied Powers as to private individuals whether or not they were directly part of the State apparatus but who actively co-operated in its acts (which consequently been deemed by the Allies to be unlawful). 1

The idea that all individuals have overriding duties to obey a higher interest that of the (Nazi) State also lay behind various prosecutions were brought in Germany before its domestic courts in the immediate post-war period against private persons who had informed denounced relatives and colleagues to the authorities for ‘political展望’. As a result of these calculated denunciations those informed had been handed over to a judicial system (in particular the Nazi Courts) ‘which dealt mercilessly with political opponents at the, as the population was well aware’. 2 Thus a woman who, with no effecting a swift end to her marriage, reported her husband to authorities for slandering Hitler in their private conversations. Her action resulted in his imprisonment and sentence of death (later extended to service on the Eastern Front). She was subsequently convicted of the post-War period of de-Nazification by national German courts for relying in bad faith on unjust laws of the Nazi system. 3

These may be understood as examples of the application (and in the case denouncing wife, of the extension to conduct other than crimes of peace, war crime or crimes against humanity) of the principle that individuals have legal duties derived directly from fundamental rights considerations to be found in international law, which
may bind those individuals, even against the claims and justifications of national law.⁴

The ideas behind these Nuremberg and post-Nuremberg prosecutions were subsequently codified into the ‘Nuremberg principles’ which sought authoritatively to summarise the principle of individual responsibility under international law in the following terms:

i  Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefore and liable to punishment.

ii The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not free the person who committed the act from responsibility under international law.

iii The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

iv The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

v Any person charged with a crime under international law has the right to a fair trial on the facts and law.⁵

As was observed by the Special Rapporteur of the International Law Commission charged by the United Nations in 1950 with the task of reformulating the Principles applied by the Nuremberg Tribunal:⁶

The general principle of law underlying Principle I is that international law may impose duties on the individual without any interpretation of domestic law directly, a conception which in theory is considered as involving the ‘international personality’ of individuals. The findings of the Court are very definite on the question of whether rules of international law may apply to individuals. ‘That international law imposes duties and liabilities upon individuals as well as upon States’, says the Court, ‘has long been recognised.’⁷ And elsewhere: ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who
such crimes can the provisions of international law be

principle [11] that a person committing an international crime is

responsible therefor and liable to punishment under international law,

independently of the attitude of domestic law, implies what is com-

monly called the ‘supremacy’ of international law over domestic law.

Accordingly considered that international law can bind individuals

and domestic law does not direct them to observe the rules of inter-

national law (It is in this sense that the term ‘supremacy’ is used here).

Characteristic of the above inference is the following passage of the

Court’s findings: ‘... The very essence of the Charter is that individuals

bear international law duties which transcend the national obligations

imposed by the individual State.’

The Nuremberg Principles sets out the crimes which are to

be considered as ‘punishable as crimes under international law’ as follows:

Crimes against peace:

i Planning, preparation, initiation or waging of a war of

aggression or a war in violation of international treaties,

agreements or assurances;

ii Participation in a common plan or conspiracy for the

accomplishment of any of the acts mentioned under (i).

War crimes:

Violations of the laws or customs of war include, but are not

limited to, murder, ill-treatment or deportation to slave-

labour or for any other purpose of civilian population of or in

occupied territory, murder or ill-treatment of prisoners of war,

of persons on the seas, killing of hostages, plunder of public

or private property, wanton destruction of cities, towns, or

villages, or devastation not justified by military necessity.

Crimes against humanity:

Murder, extermination, enslavement, deportation and other

inhuman acts done against any civilian population, or perseg-

trations on political, racial or religious grounds, when such

acts are done or such persecutions are carried on in execution
of or in connexion with any crime against peace or any war crime.¹⁰

And Nuremberg Principle VII provides that ‘complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.¹¹

The Nuremberg principles were formally adopted into international law by UN Resolution 95(1) of UN General Assembly of 10 December 1945 and by Article 51 of the UN Charter, in relation to the prohibition of wars of aggression.

The United Kingdom Parliament was advised in 1963 by the then Lord Chancellor that the United Kingdom Government then took the view that the Nuremberg Principles, as formulated by the International Law Commission, were ‘generally accepted among States and have the status of customary international law’.¹²

The Nuremberg Principles and the European Convention on Human Rights

The post-Nuremberg assertion that a higher normative authority inheres in principles derived from international humanitarian (and human rights) law, even as against the requirements of national law, was also specifically incorporated into the 1950 European Convention on Human Rights by the terms of Article 7 ECHR which is in the following terms:

(1) No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute an offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one which was applicable at the time when the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 7 ECHR contains, then, two main strands: first a requirement for the proper prior definition in respect of crimes charged; and secondly, a requirement against retrospectivity in the defining of, and punishing for,
Prosecuting Crimes Against Peace Before the Scottish Courts

181

Offences. Article 7 ECHR was intended to re-state the existing legal principles of *nullum crimen sine lege* (no crime without statute) and *nulla poena sine lege* (no punishment without a statute), while also seeking to take into account and reconcile principles with the existence of the jurisprudence concerning individual responsibility for gross breaches of international humanitarian and human rights law, as these concepts were first articulated at the World War II Nuremberg trials. In interpreting and applying ECHR (that is to say in determining when and how an individual properly be found guilty of and punished for a criminal offence under the law) the domestic courts have also to take account of the principles of law recognised by civilised nations', that it so say statements of customary international (humanitarian and human law.

Nuremberg Principles and the Human Rights Act

When including Article 7 ECHR as one of the ‘Convention rights’ purposes of the Human Rights Act 1998 (HRA) (and associated, such as the Scotland Act 1998) the United Kingdom Parliament has also effectively introduced Nuremberg derived principles regarding liability of conduct under national and international law directly domestic law. It might therefore be thought that, within the constitution, there can properly be that between the requirements of the (domestic) ‘law of the land’ and international law. At least as derived from international legal since both domestic law and international humanitarian and rights law would now appear to operate in principle within the normative framework.

Finally, there has been an ever growing official realisation in the that the Nuremberg trials of the need for officials and individuals that their conduct in war and in preparation for war is legal international law, and this understanding is percolating down more society in the United Kingdom. For example, as Lord Hope
unequivocal advice that the invasion [of Iraq] would be legal he was not thinking of the physical risks that his troops would be exposed to. His concern was that, if it was not legal, they might be at risk of being prosecuted. As Lord Kingsland said in the debate I have already mentioned, the issue is essentially one of morale: Hansard (HL Debates), 31 January 2008, col. 790. An individual soldier needs to know that he will not be prosecuted for a war crime.

23 The International Criminal Court Act 2001 gave effect in domestic law to the Rome Statute of the International Criminal Court. It has raised awareness of the need to ensure that armed conflict takes place within the established framework of international law: see also the International Criminal Court (Scotland) Act 2001 (asp 13). The definition of war crimes in article 8 of the Rome Statute, which is reproduced in Schedules 8 and 1 of these Acts respectively, is very wide. Much depends on the laws and customs applicable in international armed conflict. Rules of engagement can only go so far. The umbrella of an assurance that the conflict is lawful in international law is essential if soldiers are to feel confident that it is an operation that they can properly engage in. This is so too of their commanders, who under section 65 of the 2001 Act are responsible for the acts of their subordinates.128

The decision in Lord Advocate’s Reference (No. 1 of 2000)

It is against this general post-Nuremberg background that the decision of the High Court of Justiciary in Lord Advocate’s Reference (No. 1 of 2000) re nuclear weapons129 may best be understood. This was a case which the then Lord Advocate referred to the High Court of Justiciary, pursuant to his powers under Section 123(1) of the Criminal Procedure (Scotland) Act 1995. The Lord Advocate wished the High Court’s advice and guidance on four questions of law which he raised before the court following the acquittal by the Sheriff at Greenock of three women (Angie Zelter, Ulla Roder and Ellen Moxley) who had been charged with causing malicious damage to a vessel involved in facilitating the transport and deployment of Trident nuclear missiles.

These women had successfully argued before the Sheriff that the
PROSECUTING CRIMES AGAINST PEACE BEFORE THE SCOTTISH COURTS

...to property which they admitted having caused was not 'malicious' but was instead justified since, they said, the deployment of the United Kingdom's nuclear weapons system was in breach of customary international law, and therefore in breach of Scots law. They were accordingly not in breach of the law but were rather to be seen as 'citizen warriors' seeking to enforce the law, even against officials of the State.20

...argued, in effect, for the existence of an 'international law enforcement motivation' defence within the Scots common law sufficient to enable them to defeat their prosecution for having done a prohibited act requisite mens rea. The basis for this defence was the avowed motivation of their apparently criminal action: namely to bring a wrong-doer (the United Kingdom Government) to justice, or to expose its (greater) evil wrong-doing.21 An alternative analysis was that the actions for which they had been prosecuted had, in fact, been done by them in exercise of the implicit power and responsibility—possessed by every law-abiding citizen—to take proportionate action to prevent or impede apprehended breaches of the law by another, and thereby in keeping the peace within the realm (and internationally).22

It was not open to the prosecution authorities to appeal against theittal of these three women. Concerned, however, that the decision of a sheriff might be thought to set a general precedent for anti-nuclear武士 intent on direct action, the Lord Advocate referred the following questions to the High Court of Justiciary, in an attempt to restore presumed status quo ante:

1. In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

2. Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?

3. Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?

4. Is it a general defence to a criminal charge that the offence was...
committed in order to prevent or bring to an end the commission of an offence by another person?

After some days of complex and lengthy argument (in a hearing at which the Lord Advocate was represented by senior and junior counsel, the Advocate General who appeared for the UK Government's interest was represented by senior counsel, senior counsel was appointed as amicus curiae to represent the interests of and position of Angie Zelter who appeared and argued on her own behalf, Ellen Moxley was represented by senior and junior counsel; and Ulla Roder by two junior counsel) the court answered the four questions put to it by the Lord Advocate as follows:

1. No. In a Scottish criminal trial, evidence could not be led as to the content of customary international law. A rule of customary international law was a rule of Scots law and the jury were not entitled to consider expert evidence but must be directed thereon by the judge;

2. No. The conduct of the UK government had not been illegal because the peacetime deployment of Trident as a deterrent was not a 'threat'. Furthermore there was, said the court, currently no rule of customary international law justifying the commission of a crime in order to prevent the commission of another crime, even in times of war;

3. No. The (subjective) belief of the respondents Zelter, Roder and Moxley that the deployment of Trident was in breach of customary international law did not provide a defence of justification to the charge of malicious damage;

4. Except for the defence of necessity, it was not a defence to a criminal charge that the relevant actions had been taken to hinder the commission of an offence by another person. Although the defence of necessity could be employed where the malicious damage was remote from the threat to people or property, it was only available where the perceived threat was immediate and there was no alternative to a criminal act in order to avert the threat. In any event the defence of necessity was not available in the instant case where the actions of the Government had not been shown to be unlawful.
The significance of the decision for Scots law

At the levels, then, the decision of the High Court of Justiciary was an unexpected defeat for direct action campaigning involving breach of law, but the decision of the court did in fact mark a number of significant developments in, and for, Scotland and Scots law.

In the first place the High Court accepted (by the very fact that it heard the question posed to it by the Lord Advocate) that questions relating to the lawfulness of the deployment of weapon systems by the United Kingdom government were justiciable before the courts.

Secondly, customary international law was recognised by the court as potentially to form part of municipal Scots law without need for any statutory incorporation. It would appear that the court implicitly found, too, that customary international law could be relied upon by individuals in determining the lawfulness of their actions – and the lawfulness of the actions of the State.

Finally the case highlighted the importance of international law generally before the Scottish courts. As we shall see, the relevance of (and potential for direct reliance upon) international treaty law before the courts in Scotland has been increased by the provisions of the Scotland Act notably Sections 35, 58, 108(6) SA) which make it clear that the acts of Scottish Parliament and of the Scottish Government may be subject to legal challenge in so far as these acts are thought to be incompatible with the United Kingdom’s ‘international obligations’ (which Section 108(1) SA ar meaning ‘any international obligation of the United Kingdom, whether obligations to observe and implement Community law or the Convention rights’). The obligations on the part of the devolved Scottish institutions to respect Community law and Convention rights are, of course, subject of other more specific provisions within the Scotland Act.

Criminal law wholly distinct from English criminal law

It could be noted that there was no possibility of any appeal against the decision. This is because the High Court of Justiciary is the highest court in matters concerning Scots criminal law. In contrast to the position in England, Wales and Northern Ireland, the House of Lords has appellate jurisdiction in criminal law matters from Scotland.23
As Lord Bingham has noted:

When Scotland was united with England and Wales in 1707 it was clearly implicit in the Act of Union that there was no criminal appeal from Scotland to London ... There was originally a doubt as to whether there was even a civil appeal from Edinburgh to London, but it was very quickly established that there was and indeed extensive use of it was made to such an extent that there was very little time to hear English appeals! But what is important is that the Scots criminal system has always been self-contained and has had no English input at all.24

With the coming into force of the Scotland Act, however, the Judicial Committee of the Privy Council (which has traditionally been the final Imperial court of appeal in cases for the British Commonwealth) was given a role to play in matters of Scots criminal law in that it could hear appeals or references from the Scottish criminal court on matters which raise 'devolution issues' – typically the proper interpretation of Convention rights. But the jurisdiction of the Privy Council in issues concerning crime in Scotland is strictly a limited one – at least so the judges of the High Court of Justiciary claim – and it is not given general or overall competence to decide upon matters of criminal law or procedure in Scotland. With effect from October 2008 the Privy Council's devolution jurisdiction (including that exercised in Scottish criminal matters) was amalgamated with the appellate jurisdiction previously enjoyed by the House of Lords in Scottish civil matters into the new UK Supreme Court.26

The decision of the House of Lords in R. v. Margaret Jones and others

In R. v. Margaret Jones and others the House of Lords, exercising the criminal appellate jurisdiction which it has for England, Wales and Northern Ireland, considered the cases of a number of individuals, all of whom had either been charged with or convicted of aggravated trespass or criminal damage arising out of their individual protest actions against the invasion of Iraq War at various military bases in the United Kingdom. In their resulting criminal trials some of the protesters sought to rely upon the statutory defence available to them under Section 3 of the Criminal
At 1967 to the effect that their actions were lawful since they properly be regarded as the use of reasonable force to prevent the commission of a crime by the State, namely the pursuing of an unlawful aggression contrary to the binding norms of international law. Argued that because the actions of the Crown in mobilising the forces for the invasion of Iraq could not be said to be lawful under international law, the protesters’ admitted acts in seeking to disrupt those acts) was sufficiently defined and clearly established in customary international law to permit lawful prosecution and punishment of those acts. This is perhaps an unsurprising conclusion given that it was on the basis of such charges that various high functionaries in the German Nazi and Japanese wartime governments were charged convicted (and in some cases executed) in the post-War Nuremberg and Tokyo war crimes trials. And, in any event, in its decision in Kuwait Airways v. Iraqi Airways Co (Nos. 4 and 5) the House of Lords had recognised the concept of the international crime of aggression. Held that the fact that the invasion of Kuwait by Iraq was generally conceded to be an unlawful war of aggression contrary to customary international law and to the provisions of the UN Charter could be given effect by the English courts in a purely domestic context. Their Lordships therefore refused to recognise the validity of an Iraqi decree purported to transfer property in certain Kuwaiti state-owned assets to the Iraqi state in recognition of the fact that these acts had been pursuant to an unlawful war of aggression. In subsequent decision in R. v. Jones their Lordships held, however, there was no automatic assimilation of crimes recognised and defined in customary international law into domestic English criminal law. Specifically they held that there need to be express Parliamentary
authority before it was possible to treat the customary international law crime of aggression as a domestic crime in English law. Accordingly, the international crime of aggression was not to be regarded as a crime or an offence in domestic law within the meaning and for the purposes of either section 3 of the 1967 Act or section 68(2) of the 1994 Act. This meant that – regardless of whether or not the United Kingdom's prosecution and participation in the Iraq war was lawful in international law – the resolution of that issue would provide no statutory defence in domestic English law for the protesters.

Scots criminal law and the common law declaratory power of the High Court of Justiciary

While the decision of the House of Lords in R. v. Margaret Jones definitively established the legal position under English criminal law it did not, of course, apply in Scotland, for the reasons already mentioned: namely that the House of Lords has no jurisdiction in matters of Scots criminal law. More importantly however, the decision of their Lordships was in some way so specific to the features of English criminal law that it might not even be regarded as being even a persuasive authority in Scotland, since much of its central constitutional reasoning could not readily translate into Scottish terms. In particular, the decision of Lord Bingham rested centrally on the assertion that:

[T]here now exists no power in the courts to create new criminal offences... While old common law offences survive until abolished or superseded by statute, new ones are not created. Statute is now the sole source of new criminal offences. ... [This] reflects what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle.

But these strictures about the court having no power to create new offences or to be able to change the substantive definition of what constitutes criminal conduct do not apply within the context of Scots criminal law. In contrast to the position in England and Wales, there is no general
The substantive criminal law in Scotland. Crimes in law are not, as a rule, defined in and/or regulated by statute. Much criminal law in Scotland is the product of the common law, that is, the decisions of the judges. In Scotland the High Court of Justiciary takes a far more proactive approach in defining and developing substantive criminal law to match contemporary expectation of the national (and at least, also the international) community. There is no particular tradition or custom of deference by the courts in Scotland on issues of common law when the legislature has not spoken. One academic commentator has summarised the position in Scotland thus:

It is important to note that most major crimes are creatures of the common law in Scotland. Indeed, that the substantive criminal law in Scotland relies greatly upon the common law has been described as its "most noteworthy feature." The starting point for determining the definition of a common law crime in Scotland is Commentaries in the Law of Scotland Respecting Crimes, written by Baron David Hume in 1797. Hume is frequently referred to by the judges in the Supreme Court of Justiciary, Scotland's supreme criminal court. The offence of murder is defined by the common law in Scotland. So too is "indefensible homicide", a crime similar to the English crime of manslaughter. Rape is a common law crime, as are assault, theft, and robbery, to name but a few. Most of the general principles of criminal liability are to be found in the common law, including matters such as accessory liability and attempts to commit crime.

Yet that the criminal law is in large part the creation of the common law in Scotland the judges of the High Court of Justiciary may—exceptionally in the exercise of the court's inherent declaratory powers—find and declare certain conduct to be criminal. The court may also exercise this inherent declaratory power to find certain conduct no longer to be criminal at common law by, for example, abolishing a common law defined crime and replacing it with another. Judges in Scotland might equally, in the exercise of their common powers (re-)define what might be considered to constitute valid defences to a criminal charge, or may alter the previously understood essential elements for a known crime. For example in its decision in Lord Advocate's Case (No.1 of 2001) the High Court of Justiciary re-defined (in effect...
reformed) the crime of rape by judicial fiat, removing the previous requirement of the law that there be a forcible overcoming of the rape victim’s will and holding, instead, that all that had to be established for the crime to be committed was that the victim had, as a matter of fact, not consented to sexual intercourse without any need to show force or overcoming of the will. Lord Nimmo Smith, one of the judges on the divided (5:2) seven judge bench which made this decision said this:

Ours is, however, ‘a live system of law’ and it lies within the powers of this court, as custodians of the common law, to review it, and to correct the way in which it is stated, when it is necessary to do so in order to take account of developments in the law and to meet the needs of the community. This latter consideration appears to me to be of particular importance in a case such as the present. There have been profound changes in the position of women as members of society, and in attitudes to sexual conduct, since Baron Hume wrote. So it appears to me to be necessary to examine with particular care the way in which the crime of rape has been defined from time to time.42

As Pamela R. Ferguson has noted

Some judicial development of the common law is of course inevitable and indeed desirable. The European Court of Human Rights has described this as ‘a well entrenched, necessary part of legal tradition’ (sw v. UK (1995) 21 E.H.R.R. 363 at 399). Nor does the evolution of the common law offend against the principle of legality and non-retrospectivity contained in Article 7 of the Convention. According to that court, Art.7 ‘cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.’ However, judicial development of the common law should be kept within proper limits.43

**Breach of the Peace in Scots law**

An example of judicial development or clarification of the Scots common law may be seen in Smith (Pamela) v. Donnelly in which the Crown resisted the accused’s claim that ‘breach of the peace’ in Scots criminal law might mean anything that the prosecution wanted it to mean, in breach of the requirements of legal certainty and the principle embodied
PROSECUTING CRIMES AGAINST PEACE BEFORE THE SCOTTISH COURTS

The Crown argued that, while past case law certainly had wide variations and a variety of actual circumstances, that did not alter the essential definition of the crime. In rejecting the accused’s challenge to the Convention compatibility of the offence of ‘breach of the peace’ with which she had been charged as a result of her actions at the court sought to clarify the legal position by stating that in order to constitute the crime of breach of the peace, there has to be conduct sufficient to cause alarm to an ordinary person and to threaten disturbance to the community. Mere annoyance or irritation is insufficient, but rather conduct which was genuinely alarming or disturbing to the reasonable person was required.

In giving the breadth in the concept of ‘breach of the peace’ in Scots law which the case of Pamela Smith v. Donnelly highlighted, the question then arises as to whether or not it would be possible for an individual to take action to seek to prevent or impede the State authorities which had taken action in (threatened) ‘breach of the peace’ which was the question which the House of Lords were faced with but avoided in the decision in R. v. Jones. Certainly given that customary international law has been determined automatically to form part of Scots law, and that the substance of the criminal law in Scotland is one which continues to be shaped and created by the judges, it might be thought that the Scottish criminal justice system would be far more permeable to developments in the field of customary international law than the English statutory based domestic criminal legal system, at least as it was explained by the House of Lords in R. v. Jones.

Prosecution in domestic courts for international crimes – position in international law

Regina (Gentle and another) v. Prime Minister and others Baroness B. opened her speech with an arresting narrative detailing the concerns of the United Kingdom personnel to act in support of the United
States invasion of Iraq forces and that ‘the proposed military action ... would be in accordance with national and international law’.

Baroness Hale indicated that both the Chief of the Defence Staff and the Treasury Solicitor had concerns about possible legal consequences for individual UK operatives if the decision to engage in the conflict failed to conform to the requirements of international law, in particular the Charter of the United Nations which defines the situations in which one state may lawfully use force against another. And Baroness Hale considered the Chief of the Defence Staff and Treasury Solicitor to be ‘right in principle to seek the assurance which they did’ on the basis that since UK law as currently interpreted allows for no defence of no defence of conscientious objection to an order and instead, contrary to the provisions of article 33 of the International Criminal Court Statute, requires its service personnel to obey superior orders irrespective of their own individuals views as to the lawfulness of those orders, then ‘the State has a correlative duty to its soldiers to ensure that those orders are lawful.’

But despite repeated invitations made to them the courts in England and Wales, and in particular the judges of the House of Lords, have consistently sought to avoid judging on the legality of decisions relating to war or the preparations for war. The judges say that it is not their function to review the exercise of prerogative powers in relation to the deployment of the armed services. They defer to the executive in matters of foreign policy. And they say are unwilling to adjudicate on rights and obligations arising out of transactions entered into between sovereign states on the plane of public international law.

But as Professor Rosalyn Higgins QC, now President of the International Court of Justice, has written:

The international responsibility of a State is engaged when it violates international law, with various possible consequences. And from the perspective of international law, ‘the State’ encompasses all the organs of the State, the judiciary as well as the executive and legislative. The responsibility of the State is incurred by the acts and decisions of the judiciary, notwithstanding the proper separation, in a democracy, of the judiciary from other State organs.

And the doctrine of judges as ‘State actors’ is also evident from the series of trials organised by the American authorities subsequent to the main war crimes trial at Nuremberg and which concerned the relationship of
The professional sectors of German society with the Nazi regime. And United States v. Alstötter and others concerned the prosecution of a selection of some 16 jurists (public prosecutors, presiding judges and ministers in the Ministry of Justice) who had assisted the administration of the legal system during the Nazi era. These defendants were presented by the American prosecuting authorities as being representatives of the entire judicial system for the administration of ‘what to do for justice in the Third Reich’. These jurists were put on trial as their involvement in or complicity with war crimes, organised and crimes against humanity, in particular ‘judicial murder and other crimes which they committed by destroying law and justice in Germany by utilising the empty forms of legal process for persecution, to implement and extermination on a vast scale’. In line with their international law remit, the American prosecuting authorities concentrated such crimes as committed against non-Germans and the conscious complicity by these individuals in.

nation-wide government-organised system of cruelty and injustice, violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.

It is clear from this trial (and from the conviction of a number of the accused) that it was considered by the Allied prosecuting authorities and judges at Nuremberg that officers of the judicial system themselves owed their duties to give effect to and apply provisions of national law insofar as they contravened these international humanitarian and human rights principles.

Prosecution in domestic courts for international crimes – the position in Domestic Law

The written advice of 7 March 2003 of the Attorney General to the United Kingdom government shows that the Attorney General was clearly aware of this and other Nuremberg precedents. In discussing the issue as to whether an invasion of Iraq by the United Kingdom might be found to be lawful under international law, the Attorney General expressly raised
the concern of possible criminal prosecutions for those involved in the decision to go to war, noting:

Two further, though probably more remote possibilities, are an attempted prosecution for murder on the grounds that the military action is unlawful and an attempted prosecution for the crime of aggression. Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts.55

Now while this argument that there might be a prosecution before the courts in England in respect of the customary international law crime of international aggression was later rejected by this House of Lords in R. v. Jones (Margaret) it would appear that the possibility of such a prosecution in Scotland is not yet a closed one, as a matter of Scots criminal law and procedure. And as one academic commentator has noted:

Perhaps there might emerge for international crimes a correspondingly mounting influence upon the interpretation of domestic crimes, bolstered by increasing state ratifications of the Rome Statute, the effective operation of the ICC itself, and also the Rome Statute's expectation (in Art.1) of complementarity in terms of a firm national response so as to avert the need for international action. Based on the sentiments expressed in the Preamble of the Rome Statute, one might wish every success to the ICC and that the UK courts will eventually take due notice of that progress.56

Further, as the decision of the House of Lords in Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 3)57 shows, there is no immunity from the criminal jurisdiction of the United Kingdom in respect of a (former) head of state for any acts or omission – even when done in his official capacity as head of state – if those actions constituted international crime against humanity and jus cogens. In the case of General Pinochet the crimes with which he was charged were those of torture or conspiracy to torture. It is not immediately clear why different rules or considerations should apply in respect of possible prosecutions of officials in respect of any of the other international crimes defined and condemned in Nuremberg Principle vi.
PROSECUTING CRIMES AGAINST PEACE BEFORE THE SCOTTISH COURTS

Scotland Act and International Law

As earlier briefly referred to Section 58 of the Scotland Act 1998 which provides that the UK Secretary of State has the power to order a member of the Scottish Executive (including necessarily, the Advocate) either: (1) to refrain from proposed action where he has reasonable grounds to believe that such action would be incompatible with the international obligations of the United Kingdom; or (2) to take otherwise competent action from any member of the Scottish Executive where he has reasonable grounds to believe that such action is required for the purpose of giving effect to any such international obligations. As we have seen ‘international obligations’ is defined under Section 126(10) of the Act as meaning ‘any international obligations of the United Kingdom other than obligations to observe and implement community law or the Convention rights.’ Section 58(5) SA provides that the Secretary of State is required to state his reason in making any order, and his or her decisions will therefore be subject to judicial review on the usual grounds for review of administrative action. This means that the Scottish Government’s duty to comply with international obligations may become the subject of an order produced by the domestic courts if, for example, the Secretary of State’s order is unsuccessfully challenged before them.

In Friend v Lord Advocates the House of Lords unanimously rejected the challenge argued by a party litigant to the Convention compatibility of the Scottish fox hunting ban. Unfortunately, given that this was a case argued by a litigant without the benefit of any legal representation and were no amicus curiae had been appointed, their Lordships also saw fit to pronounce on the issue as to whether Sections 35 and 58 of the Act might have modified the heretofore accepted dualist approach to international law (which requires specific incorporation of international treaty obligation into domestic law before they become enforcable before the court). There remains at least an interesting argument to the effect that by statutorily binding the Scottish Government under the Scotland Act to respect all of the United Kingdom’s international obligations (albeit an obligation which Section 58 SA envisages to be enforced by action on the part of the Secretary of State) then this is sufficient to incorporate these international obligations of the UK into
domestic Scots law – at least as against the Scottish Government – such as to allow these obligations of the Scottish Government to be relied upon by any private parties who could show themselves prejudiced as citizens by the Scottish Government (in)action which was not compatible with the UK’s international treaty obligations.59

Notwithstanding the dicta of the House of Lords in Friend it may still be argued that Section 58 SA provides the basis for an enforceable legitimate expectation to the effect that the actions of the Scottish devolved institutions will be compatible with the UK’s international obligations. On this basis it might be said that the Scotland Act effectively binds the Lord Advocate (and the other Scottish Ministers) to respect the whole range of international treaty obligations which have been ratified by the Crown, even where they have not been incorporated into the domestic law of the United Kingdom.60 The scheme of the Scotland Act may be said also to provide further statutory authority to underpin and confirm the obligation already incumbent upon the Scottish Ministers and Lord Advocate at common law to respect the norms of customary international law in so far as these create international obligations on the United Kingdom. Thus, we may say that the Lord Advocate and the other Scottish Ministers are legally obliged both to refrain from acting in a manner that would be incompatible with both customary and treaty international obligations of the United Kingdom, and may indeed have obligations under domestic law to take positive action for the purpose of giving effect to any such international obligations.

In particular, it seems clear that the Lord Advocate’s prosecutorial discretion requires to be exercised in a manner which is both compatible with an individual’s Convention rights and in a manner which is compatible with the United Kingdom’s obligations under general international law. What this might mean is that the devolved Lord Advocate cannot lawfully initiate a prosecution against an individual if that individual’s actions are properly found upon and justified under international law. By the same token it might be argued that a decision by the Lord Advocate to refuse to initiate a prosecution—for example against a State official or politician in respect of the international crime of aggression—might be subject to judicial review before the courts to test the lawfulness of this decision. Standing the specific exception provided in Article 7(2) ECHR (which provides that the application of the general principles of nullum
sine lege 'shall not prejudice the trial and punishment of any person any act or omission which, at the time it was committed, was criminal (ac- to the general principles of law recognised by civilised nations') would be difficult to argue that the prosecution before a domestic nal for a crime clearly defined in Nuremberg Principle vi (for example crimes against peace' such as 'planning, preparation, initiation or ting of a war of aggression') could, in itself, be said to be contrary to Convention rights of the accused.

The decision by the Lord Advocate on whether or not to prosecute any case has not heretofore been the subject of any challenge before The decision by the Lord Advocate on whether or not to prosecute any case has not heretofore been the subject of any challenge before the courts in Scotland. But there is no constitutional reason that such decisions should not be open to challenge by way of judicial review, just the decisions of the prosecution authorities are in England. Indeed, n the capacity as head of the system investigation of deaths in Scotland to refuse an inquiry has recently 63 The legal philosopher has noted as follows:

When the very institution whose purpose is to realise human rights is used to trample them, when justice is turned against itself, the virtue of justice will be turned against itself too. Concern for human rights leads the virtuous person to accept the authority of the law, but in such circumstances adherence to the law will lead her to support institutions that systematically violate human rights. The person with the virtue of justice, the lover of human rights, unable to run to the actual laws for their enforcement, has nowhere else to turn. She may come to feel that there is nothing for it but to take human rights under her own protection and so to take the law into her own hands.

As we have seen, one way in which concerned individuals have consci-ously sought to resolve their dilemma of an apparent conflict between the requirements of domestic law and their perceived requirements of on the issue of the stockpiling of nuclear weapons in the United Kingdom has been their attempt, in their prosecutions for direct action ests, to rely on customary international law before the courts in
Scotland. These protesters have sought to use international law in such a way as to provide them with a lawful defence against their prosecution for direct actions which they have taken by way of protest against—and in order to highlight their claims as to—the unlawfulness of the State's own actions in pursuing its policies of nuclear weapon stockpiling as part of a strategy of nuclear deterrence.

In Lord Advocate's Reference (No. 1 of 2000) legal submissions were made to the High Court of Justiciary on behalf of Ellen Moxley to the effect that in this intersection of public international law, constitutional law, humanitarian law, human rights law and criminal law the court might usefully adapt the classic tri-partite test of proportionality known in European law (and which was originally developed in German domestic law to test the lawfulness of police action) to set out the conditions for any possible 'citizen intervention necessity' defence. The proportionality test would mean that such a defence would only be available in circumstances where it can be said that:

- the action of the State against which it was aimed was in fact illegal, whether under domestic or applicable international law;
- the action was necessary in the sense that there was no legal reasonable alternative in fact available to the actor (for example because the relevant authorities had refused or refrained from enforcing the law in relation to the illegal act);
- the actor could reasonably expect that the actions taken would be effective in at least impeding, if not wholly preventing, the illegal act;
- the actions of the protesters or interveners were marked by a 'fidelity to legal values' within our democratic polity in that they were proportionate, involved no possibility of harm to individuals and no attempt was made to avoid detection in the doing of the act.

It was submitted on behalf of Ellen Moxley that the corollary of admitting and applying the proportionality test to any such defence would be that there would clearly be no possibility of successfully relying upon it where:

- the State action complained of was not in fact illegal, or
- that the action was unnecessary (in the sense that reasonable alternatives were open) or
- that it could not have been reasonably expected that it would impede the commission of the unlawful act, or
that the action was not one which was characterised by fidelity to legal values because, for example, it was done clandestinely with a view to escaping detection or because the action was disproportionate in the sense that its evil or undesirable effects (for example in resulting in physical harm to individuals) outweighed the evil that it was seeking to prevent.

High Court of Justiciary rejected these legal submissions. And in all and any attempts to have the courts recognise any such conscious 'citizen interveners' defence against a criminal charge have been firmly (and perhaps unsurprisingly) unsuccessful. The judges express fear that anarchy will result should they allow for the possibility of individuals being authorised to break the law, in order to highlight the omission of greater State crimes. 65

There is an alternative strategy which might be used to bring before domestic court the current state of international criminal law on matters of war and peace. This would be to request the State prosecutorial authorities to initiate criminal investigations and the prosecution of persons within the jurisdiction against whom a case might colourably be made of their complicity in recognised international crimes, in particular the crime of international aggression, or other crimes against peace.

Article 5 of the Rome Statute which set up the International Criminal Court (the ICC) includes the international crime of aggression in the list of those offences 'the most serious crimes of concern to the international community' over which the ICC has jurisdiction. But the Rome Statute provides, in Article 5(2), that

the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

That means is that the ICC is precluded from exercising jurisdiction for the crime of aggression unless and until the assembly of States that ratified the Rome Statute passes an amendment to the Statute defining the crime of aggression. This has not been done. The result has been an international political stalemate as the crime of aggression does not yet fall within the purview of the ICC.

In any event the ICC will not adjudicate on a crime enumerated in its
Statute unless it is satisfied that the ‘national authorities are “unwilling or unable” to carry out a genuine investigation and, if appropriate, prosecution’. The ICC is intended to supplement or complement national criminal justice systems. Accordingly the jurisdiction of the ICC need not be called upon where those national criminal justice systems are effective in the prosecution of international crimes. And as the House of Lords noted in its decision in R. v. Margaret Jones the parameters of the crime of aggression are sufficiently well-known for it to be capable of being considered a crime in domestic law. The only reason they said that it is not yet a prosecutable offence in English law is because the Westminster Parliament has not yet made specific provision for its incorporation into the domestic legal system. But such considerations do not apply (or, at the very least, do not apply with the same force) within the Scottish criminal justice system, given that Scots criminal law – based as it is on the common law – still allows for the incorporation of new crimes into the law by judicial fiat rather than requiring in all cases specific Parliamentary enactment.

Accordingly it would appear to be at least competent for the prosecution authorities in Scotland, if so advised, to raise prosecution in Scotland in respect of the international crime of aggression. Insofar as the Scottish prosecution authorities fail or refuse to do so where there are otherwise reasonable grounds for so proceeding, it would seem in principle that such a decision might itself be the subject of challenge before the courts by way of judicial review. It has to be said, however, that the judges in Scotland are, if anything, temperamentally, culturally and institutionally, even more conservative than their English counterparts. As the late Professor Bill Wilson of Edinburgh University once observed:

> It cannot be said that the Scottish judiciary has been a major agency of change in the last hundred years. The House of Lords has made abrupt turns from time to time and perhaps that is the appropriate place for changes to be made. The Court of Session has been, on the whole, conservative; it has refused to break new ground, not only because there was precedent against it, but also because there was no precedent for it. ... The best that can be said for the judges is that they have kept the system going; that is, perhaps, their function.66

So the likelihood of any such challenge having any immediate success, at least before the judges in Scotland, would not be great. However, given that judicial review is a matter of civil law in Scotland, there would
Within the possibility of taking the case, as a matter of constitutional
jurisdiction, without the need for leave of any court,67 on appeal to the House
of Lords, or as from October 2009 its replacement the UK Supreme
Court. Neither the House of Lords (nor the UK Supreme Court) would
be bound by their previous decision in R v. Jones since this would be an
appeal from Scotland on a matter ultimately of the incorporation of
customary international law into Scots criminal law.

Unlike the situations pertaining in their decisions in R. v. Jones and
(Gentle) v. Prime Minister their Lordships would be faced in any such
case with the question as to the lawfulness under domestic law
decisions made by the governing powers to prepare for war (in the
case of the Trident stockpiling) or to go to war (in the case of Iraq). We
might then at last learn from the highest court in the land whether such
official decisions pertaining to war which can be said to fall within the
scope of the ‘crime of aggression’ for the purposes of customary inter-
national law, might also constitute – for the purposes of the domestic
criminal law of the northern part of the United Kingdom at least – an
executable breach of the (international) peace.68