The JUSTICE Lecture 2000

Human Rights – Where are we now?

The Rt. Hon. Lord Hope of Craighead[1]

Just over 42 hours ago, when the date on the clock moved to 2 October, United Kingdom courts acquired the competence to apply the European Convention on Human Rights and Fundamental Freedoms as part of our national law. This was the moment when, in terms of the Human Rights Act 1998 (Commencement No. 2) Order 2000 which was signed by the Home Secretary on 12 July, all the remaining provisions of the Human Rights Act came into force. And what a masterpiece of timing this was – to bring the Act into force just as the newspapers were full of such feel-good headlines as "The Best Olympics Ever" and photographs of that marvellous display of fireworks in Sydney! The revolution in judicial thinking for which we have all been waiting has just begun, say some. "You'll probably never need it – but it's good to know it's there" is what the Home Office said, reassuringly, in its newspaper advertisements[2]. As the smoke and the smell of pyrotechnics drifts away to the horizon this seems to be as good a time as any to take stock.

So much has been said and written about human rights during the past two years that it is hard to find anything to say in a short lecture that has not been said before, several times. But it seems to me that there are two things that I can do for you this evening as we meet together to contemplate this very important subject. The first is to survey the scene that now presents itself, both here in the UK and in the EU. The second is to pose two rather obvious questions, and then to set out my own views as to how they may be answered.

[1] A Lord of Appeal in Ordinary since 1996; formerly Lord President of the Court of Session and Lord Justice General of Scotland.

[2] "The Human Rights Act. Safeguarding Your Rights", Saturday 30 September 2000.

The Scene

Seven years ago it all looked so simple. On the one hand there was the Convention – a proclamation of civil and political rights with limitations and balancing safeguards. On the other there were the institutions – the European Commission of Human Rights and the European Court of Human Rights ("the Strasbourg Court") – which enabled claims by individuals that they were victims of a violation of their human rights to be adjudicated. There was no such jurisdiction in the courts of the United Kingdom. But it had been established, in the words of Lord Bridge of Harwich, that the courts would presume that Parliament intends to legislate in conformity with the Convention, not in conflict with it: *Reg. v. Secretary of State, ex parte Brind* [1991] 1 A.C. 696, 747H-748A. This approach to the construction of legislation was to be followed six years later in Scotland: *T. Petitioner*, 1997 S.L.T. 724. The Convention was also beginning to make its influence felt on the common law, where the law was uncertain, unclear or incomplete[3].

But the Convention rights as such were not part of our municipal law. And while Scotland still had its own separate legal system, it was wholly dependant for legislation on the United Kingdom Parliament at Westminster. Many people, both north and south of the border, felt that this state of affairs in both respects was unsatisfactory. There was a widespread view that change was needed, particularly with regard to human rights.

The position within the European Communities could also be described, seven years ago before Maastricht, as one of extreme simplicity. But here too there was a feeling that change was needed. The founding treaties of the three Communities made no mention of fundamental rights. The primary motive of the six original member states, like that of the member states of the Council of Europe, was

to safeguard world peace within a broad political and security context. The focus of the treaties was on economic, not political, integration. It was not anticipated that the Communities would be operating in areas or by methods that were likely to violate human rights. Furthermore, while all the member states had acceded to the Convention, the Communities were not and could not be bound by the Convention. This is a privilege which is available only to member states of the Council of Europe, and the Communities were not member states.

It was not long however before questions of fundamental rights were raised in the context of Community law. The European Court of Justice at Luxembourg ("the ECJ") took the opportunity in the *Internationale Handelsgesellschaft* case[4] to declare that respect for fundamental rights formed an integral part of the general principles of Community law protected by the Court of Justice. It was made clear that the protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework and structures and objectives of the Community. But this was an assertion by the ECJ of its own jurisdiction. This was regarded as a necessary expedient to ensure the supremacy of Community law over that of member states whose constitutions contained a written list of fundamental rights. One thinks especially in this respect of Germany. It had no links with the system for the recognition and enforcement of Convention by the Strasbourg court. It was designed to serve the objective of according primacy to the rules of the Community.

Things began to change when the 1993 Treaty on European Union was concluded at Maastricht. Article F(2) required the EU to respect as general principles of Community law the fundamental rights guaranteed by the Convention and by the

[3] *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 830 B-C, Butler Sloss L.J.
[4] Case 11/70, [1970] ECR 1125.

constitutional traditions common to the Member States. But this provision was not directly justiciable in the ECJ: article L. Nor was article J.1(2), which stated that respect for human rights and fundamental freedoms was one of the objectives of the Union's common foreign and security policy. Nor was article K.2(1), which stated that the Union had to comply with the Convention in the field of justice and home affairs. It was not until the conclusion in 1997 of the Amsterdam Treaty that the concept of fundamental rights became entrenched in a way that was justiciable. Article 6(2) of the Treaty on European Union repeated the language of article F(2) of the Maastricht Treaty, but this Treaty went one step further. It brought its provisions directly within the jurisdiction of the ECJ – although the judicial protection of individuals under the present system is still somewhat limited: see article 230(4) EC.

There remains however one very significant feature – some might well say, very significant anomaly – which is inherent in this regime. The ECJ is not bound to follow the interpretation of the Convention by the Strasbourg Court when it is applying the Convention rights in Community law. The risk of discrepancies between the jurisprudence of the two courts was indicated in 1989 when the ECJ in *Orkem v. Commission*[5] held that the right of a party accused of an infringement of the law to remain silent and not to incriminate itself was not guaranteed by the Convention. Advocate General Darmon expressed the view that the ECJ was free to adopt an interpretation of the Convention which did not coincide exactly with that given by, the Strasbourg authorities. Some years later, in *Funke v. France*[6] the Strasbourg Court indicated that the right to remain silent was indeed guaranteed by article 6(1) of the Convention. In April 1999 the Court of First Instance expressly declined to follow the case law of the Strasbourg Court in *Limsburgse Vinyl Maatschappij and Others*[7] where the issue related to a search by the Commission of premises occupied by

[5] Case 374/87, [1989] ECR 3283.
[6] 25 February 1993 (A No. 256-A).

various companies without accompanying safeguards. In *Emesa Sugar*[8] the ECJ decided to depart from the case law of the Strasbourg Court in cases such as *Vermeulien v. Belgium*[9] as to the right of the parties in adversarial proceedings to have knowledge of and to comment on all evidence adduced or observations filed in those proceedings. It did so on the ground that this jurisprudence did not appear to be transposable to the opinion of the Court's Advocate General.

These decisions of the ECJ cannot be challenged before the Strasbourg Court. Article 34 of the Convention allows complaints to be brought against High Contracting Parties only. This excludes complaints against the EU. Unlike all the other supreme courts of the EU, the ECJ is immune from review by the Strasbourg Court. The treaty amendment which the ECJ concluded was needed to enable the Community to accede to the ECHR[10] did not take place when the Treaty of Amsterdam was being negotiated. The question of accession by the Union, as it has now become, is not on the agenda for the next Inter-Governmental Conference which is to be held in Nice in three months time under the French presidency[11].

When the present government took office in 1997 it was on a commitment to promote fundamental changes within the United Kingdom. First there was the devolution programme – to bring democracy closer to the people of Wales, of Scotland and of Northern Ireland. Then there was the policy of "Bringing Human Rights Home." The concepts are easy to state, but they are as beguiling in their simplicity as the words of the words used by the Convention.

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[7] Joined cases T-305/94.
[8] Case C-17/98, 20 February 2000.
[9] Reports of Judgments and Decisions 1996, p. 224.
[10] Opinion 2/94 pursuant to article 228(6) of the EC Treaty [1996] E.C.R. I - 1759.

Take devolution to Scotland, for example. Section 1(1) of the Scotland Act 1998 declares that "there shall be a Scottish Parliament." In keeping with what one would expect, both the Scottish Parliament and the Scottish Executive are required by the legislation to give effect to the Convention rights. They are also required to give effect to Community law[12]. Anything done by them that is incompatible with the Convention rights or Convention law is beyond their competence. In contrast to the position under section 4 of the Human Rights Act, which limits the power of the court in regard to legislation at Westminster which is not compatible with a Convention right to the making of a declaration of incompatibility, the devolution statutes could not do otherwise but enable the courts throughout the United Kingdom to declare legislation by the Scottish Parliament and the Welsh and Northern Ireland Assemblies which was incompatible invalid in terms of the statute and to set it aside[13]. The risk of conflict between Community law as to human rights and the Convention rights as interpreted by the Strasbourg court is not addressed.

The setting up of a framework of the kind that is to be found in the devolution statutes inevitably involves the judiciary. There has to be a system for the adjudication of devolution issues – that is, whether the Parliament or the Executive have acted within their powers. The final court of appeal from decisions of the Scottish courts in civil matters is the House of Lords[14]. It is the House of Lords that now has the ultimate responsibility of deciding issues under the Human Rights Acts throughout the United Kingdom. But the decision was taken that the final court of appeal in Scottish devolution matters, both civil and criminal, was to be the Judicial

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[11] For a discussion of this issue, see House of Lords Select Committee on the European Union, *EU Charter of Fundamental Rights*, 8th Report, 1999-2000, para. 154 and *The 2000 Inter-Governmental Conference*, 11th Report, 1999-2000, paras. 23-25.
[12] Scotland Act 1998, section 57(2).
[13] Scotland Act 1998, section 102; Government of Wales Act 1998, section 107(1); Northern Ireland Act 1998, section 6(1).
[14] There is no appeal to the House of Lords from the High Court of Justiciary, which is the supreme court of criminal jurisdiction in Scotland: *Macintosh v. Lord Advocate* (1876) 2 App. Cas. 41.

Committee of the Privy Council[15], and the same solution has been applied to Wales and to Northern Ireland[16]. The reasons for this appear to lie more in the realm of politics than that of logic. It was thought to be unacceptable for the democratically elected Scottish Parliament to be subject to decisions of the unelected House of Lords, albeit in its judicial capacity. If logic had been the criterion, it is likely that it would have been appreciated that for human rights issues in devolution cases to be decided finally by a different tribunal from that which is to deal with human rights issues in all other cases would run the risk, however small, of conflict. Are these two systems now to compete with one another?

Now we are engaged in a discussion with other member states about a proposed Charter of Fundamental Rights for the EU[17]. This is the result of a proposal at the Cologne European Council that the fundamental rights at EU level should be consolidated in a charter and thereby made more evident. The aim was to bring together in this charter all the fundamental rights and freedom guaranteed by the European Convention on Human Rights together with those derived from the constitutional traditions common to member states as basic principles of Community law. This inevitably raises a question as to the question as to the legal status which such a Charter is to have: is to be a declaration with no legal status, or is it to be legally binding on the member states? And if it is to be a declaration only, will it nevertheless be regarded by the ECJ as an authoritative document? The whole idea has proved from the outset to be highly controversial, not the least because there is a lack of agreement and considerable misunderstanding about the purpose which such a Charter would serve.

[15] Scotland Act 1998, Schedule 6.
[16] Government of Wales Act 1998, Schedule 8; Northern Ireland Act 1998, Schedule 10.

For present purposes I do not need to explore this controversy. It is enough to say that in its favour, while each of the member states is a signatory to the Convention and has incorporated the principles of that Convention into its national law, there is at present no equivalent regime at EU level. There are important gaps, particularly in the light of the Amsterdam Treaty which significantly restructured the third pillar by moving immigration to the first pillar and retaining under the third pillar police and judicial co-operation in criminal matters, that need to be filled. On the other hand there are obvious risks to the integrity of the law relating to human rights if the Charter were to make significant changes to the wording of the Convention or were to introduce social and economic rights into the Charter with equivalent status to the Convention rights. Here again there would be the risk of conflict between two regimes.

So the pattern with which we are presented, as we survey the scene, is one of increasing complexity. At the European level we have the ECJ and the Strasbourg Court. In the United Kingdom we have the House of Lords and the Judicial Committee of the Privy Council. We have the European Convention on Human Rights and Fundamental Freedoms, and we shall soon have the European Charter of Fundamental Rights. The ECJ is not bound to follow decisions of the Strasbourg Court, nor is the Strasbourg Court bound to follow decisions of the ECJ in regard to the application of the Convention in matters of Community law. The House of Lords is not bound by decisions of the Judicial Committee. It is only in regard to devolution issues under the Scotland, Government of Wales and Northern Ireland Acts that the Judicial Committee is given by statute the last word[18]. Furthermore, while the House of Lords must take account of decisions of the Strasbourg Court when it is applying

[17] See House of Lords Select Committee on the European Union, *EU Charter of Fundamental Rights*, 8th Report, 1999-2000. A final version of the draft Charter is now available: fundamental.rights@consilium.eu.int.

the Human Rights Act[19], it is not bound by that Act to follow them. The case of *Osman v. UK*[20] has created an uneasy tension between these two bodies which illustrates the unstable nature of their relationship.

A further point which must be mentioned is that there are significant differences between these courts as to the way in which cases are heard, as to the way in which their decisions are reached and as to the style and content of their judgments. I need not elaborate upon these differences. But in simple terms what we have is two courts – those in Strasbourg and in Luxembourg – whose practice and jurisprudence is based on the traditions of the civil law countries, and two courts – the House of Lords and the Privy Council – whose traditions are those of the common law. On the one hand there is a system in which judgments are arrived at largely on the basis of written material. On the other there is a system which still depends largely upon the presentation of oral argument. On the one hand there is a system in which the end product is a relatively terse judgment which follows an established pattern and is devoted for the most part to statements or re-statements of principle. On the other there is a system in which the end product is infinitely variable, ranging between a single judgment in cases where the Judicial Committee of the Privy Council is unanimous and five, or even seven, speeches – each of them perhaps pointing in different directions – in the House of Lords, and in which the writer of the judgment is free to adopt his own style of presentation and of reasoning. The two extremes are the House of Lords and the Luxembourg court. In the House of Lords every member of the Appellate Committee delivers a separate speech, even if only to express agreement with that which contains the leading judgment. In the

[18] Scotland Act 1998, section 103(1); Government of Wales Act 1998, Schedule 8, para. 32; Northern Ireland Act 1998, section 82(1).
[19] Human Rights Act 1998, section 2(1)(a).
[20] (1998) 5 BHRC 293.

Luxembourg court the judgment is always that of the court, and no record is ever made of any dissents.

It requires little imagination to appreciate that the strong institutional pressures which exist in Luxembourg, where the principle of collegiality is supreme and judgments are always those of the court, create an entirely different atmosphere from that which exists in the House of Lords where each individual Law Lord not only thinks but also speaks for himself. In between there are the Judicial Committee where dissents are permitted and nowadays are being expressed more frequently, particularly in human rights cases, and the Strasbourg court where dissents are also permitted and are commonplace. But even here there are differences. In the Strasbourg court dissenting judgments appear to have little, if any, jurisprudential value in that court. Section 2 of the Human Rights Act does not require them to be taken into account. The rule is simply that each member of the Strasbourg court who disagrees with the majority view must express his or her own reasons for doing so. The majority view can be expressed, conveniently, in a single judgment in the preparation of which officials seem to play a large part. Dissenting judgments in the Privy Council on the other hand, as in the House of Lords where Lord Atkin's dissent in *Liversidge v. Anderson*[21] provides a shining example, are on a different plane altogether. It has long been recognised that they may assist in the development of our jurisprudence. As Lord Steyn said at the outset of his dissenting judgment in *Fisher v. Minister of Public Safety and Immigration*[22]: "A dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow. In that way a dissenting judgment sometimes contributes to the continuing development of the law." It was for similar reasons that Lord Reid was strongly in favour of the tradition by which separate speeches are delivered in the House of

[21] [1942] A.C. 206.
[22] [1998] A.C. 673.

Lords. So the jurisprudence on which we depend for guidance as to the progress of European human rights law is soon going to look very different, as the common law systems get to work on it.

Lastly, in this chapter, there is the matter of scrutiny by institutions with a view to achieving the quick and effective protection of human rights without recourse to the courts. Institutions of that kind, commonly known as Commissions, are to be found in Ireland and in several of the leading countries of the Commonwealth – India, Sri Lanka, South Africa, Australia, New Zealand and Canada. I believe that they are also to be found in several countries in Francophone Africa, in Mongolia and Mexico. There is also a Commission in Ireland, which in its forthcoming Human Rights Act will reinforce the human rights provisions which are set out in the Constitution of that country by incorporating the European Convention itself into Irish law – the last of the 41 member states of the Council of Europe to do so.

Here in the United Kingdom the setting up of a Human Rights Commission was provided for by section 68 of the Northern Ireland Act 1998, and in March of last year appointments were made of a Chief Commissioner and of nine part-time Commissioners. One of the functions which this Commission performs is that of intervener in cases which raise issues about Convention rights and it can also act as an *amicus curiae.* Two cases have been brought to my attention from Northern Ireland in which the Commission has participated in these roles[23]. One of these is *R. v. The Lord Chancellor's Department and the Lord Chief Justice of Northern Ireland, ex parte Seamas treacy and Barry MacDonald*, which concerned the requirement that those seeking admission to the Inner Bar had to make a public undertaking to serve the Queen to be admitted. As for Scotland, the Minister of Justice in the Scottish Executive said at a seminar in June this year that the Scottish Executive had

not reached a final view on whether there should be a Commission in Scotland but that it did intend to issue a consultation paper. It is questionable whether the setting up of a Commission for Wales would be within the powers of the Welsh Executive. Amendments which would have provided for the setting up of a Commission for the United Kingdom were moved in the House of Lords when it was considering the Human Rights Bill, but they were not accepted by the Government.

The Questions

That then is the scene. Simple, neat and tidy the Human Rights Act itself may seem to be. But the fact is that human rights law as a whole is far from neat and tidy. There is much that we still have to discover about how the various pieces of the jigsaw fit together, and the process of structural reform still goes on. We reached a watershed yesterday, but we have yet to climb the mountain. No doubt I have painted an incomplete picture, but that is the best I can do in the time available. What I should like to do now, in the second half of this lecture, is deal with two very broad questions. These are perhaps the most obvious ones of all: (1) where will this all lead us? and (2) what is likely to happen next?

Where will this all lead us? One has to ask oneself what the emergence of the United Kingdom courts into this complicated arena is going to mean for the development of human rights law in the European context. In a lecture delivered to the Common Law Bar Association in November 1998 entitled *Human Rights and the House of Lords*[24] Lord Hoffmann drew attention to the dilemma caused by the fact that the jurisprudence of the Strasbourg court seemed to have passed beyond its original modest ambitions and was seeking to impose a uniformity of values upon all

[23] Margaret Gray, *The Northern Ireland Act 1998, Judicial Review and Human Rights* [2000] J.R 114.
[24] [1999] M.L.R. 159.

the member states. He expressed the hope[25] that, now that human rights have been brought home, we shall be able to keep them here. But the fact remains that the judges of our courts are not free to go their own way. The last word on matters of Community law lies with the Luxembourg court, and the last word in matters relating to the Convention rights lies with the court in Strasbourg.

Nevertheless there is good reason to think that, now that they are able to engage themselves directly in issues about the application of the Convention rights to our laws and our practices, our judges will have an increasing influence on the development of the jurisprudence of these courts. In particular the opportunity now exists for our judges to demonstrate, by means of reasoned judgments based upon established Convention law principles, how the basic human rights which are enshrined in the Convention can be respected without risk to the rule of law or to the established values of our democracy. Striking the balance is likely in many cases to be the crucial issue, as will be the development of the concept of proportionality.

I was much struck by comments made at a conference of the Commonwealth Magistrates' and Judges' Association which I attended last month in Edinburgh by judges from Commonwealth Africa. They described the difficulties they have in reconciling principles which they have inherited from this country, such as the presumption of innocence and the standard of proof beyond reasonable doubt, with the concepts of justice among their own people and what their own people see as the ingredients of a fair trial. These are courageous men and women who have striven hard, sometimes against considerable odds and at great personal risk, to preserve their independence. But they appreciate that to a large extent the maintenance of the rule of law depends on the trust which ordinary people have in the administration of justice. For these judges the crucial question is where the balance is to be struck

[25] Ibid, p. 166.

between indigenous custom and what some regard as the fallacies of the common law.

One does not have to look very far, even in our own country, for signs of a similar phenomenon. Indeed much of the sense of unease which is currently felt by those who doubt the wisdom of the Human Rights Act is directed to this very issue. They tend to see the rights and freedoms in the Convention in terms of absolutes – leading on the one hand to a culture of rights without responsibilities, and on the other to a situation where rights are at risk of being removed by judges who are unelected and unaccountable. Here too there is a balance to be struck if our human rights law is to win and to retain public confidence.

It is clear that the Strasbourg court has already grasped this issue. As the court said in *Fayed v. UK*[26] when it was explaining that the right of access to the courts secured by article 6(1) of the Convention is not absolute, the court's task under the Convention is to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual. In *Cadoc v. France*[27] the court indicated that, even in the context of the unqualified right in article 3 not to be subjected to torture or to inhuman or degrading treatment, there is room for the application of the concept of proportionality. And, although references to the rule of law are rather hard to find in the court's case law, it was pointed out in *Pullar v. UK*[28] that the rule of law lies at the heart of the Convention. The task of striking a fair balance, and of developing a jurisprudence relating this concept to our domestic law, has now been extended to the United Kingdom judges. Our judges too must not lose sight of the fact that the Convention is founded upon the rule of law, in which the community at large has an interest as well as the individual. I would agree

[26] (1994) 18 EHRR 393 at 429-430, para. 65.
[27] 20 July 2000.

with the sentiments of those who say that the purpose of the Convention is to create a fair and decent society, not to let criminals off the hook, and that victims and witnesses have rights too.

Some guidance as to where this will all lead us is available from north of the border. The system of devolution which was created for Scotland, Wales and Northern Ireland requires the devolved legislatures and executives to legislate and to act in a manner which is compatible with the Convention rights[29]. But the effect of this structure is much more visible in Scotland, which has its own legal system and where the legal profession has been very active in raising issues about possible incompatibility. I have to confess to a certain diffidence in addressing this audience about what has being going on in Scotland. For all I know, some of you may share Dr Johnson's view that the best thing about Scotland is the road that leads back to England. It is after all a strange country which uses odd words like delict and culpable homicide and has a curious legal system only partly rooted in the common law. You may be much more attracted, as many are when looking for guidance, by what is going on in far off places such as Canada or Australia. But on this occasion I hope that I may be permitted to try your patience just a little bit so that I can make three short points about the human rights jurisprudence which has been developing in Scotland since May 1999.

The first point is that statistics about the pattern of the cases raised in Scotland as devolution issues and the relative success rate, which have been referred to from time to time to reassure those who fear a flood of successful applications, are an imperfect guide to what is likely to happen both north and south of the border now that the Human Rights Act itself has come into force. I give three

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[28] (1996) 22 E.H.H.R. 391, para. 32.
[29] Scotland Act 1998, sections 29(2), 57(2).

reasons for this: (1) the only opportunity which has existed to raise Convention issues has been to bring them before the court as devolution issues under the Scotland Act, (2) the great majority of the issues raised have been in criminal cases, not in the much wider field over which the Human Rights Act now extends and (3) these issues have been directed almost entirely to the acts of the public prosecutor as a member of the Scottish Executive.

The Lord Advocate as a member of the Scottish Executive is precluded from acting in a manner which is incompatible with the Convention rights[30]. So are all the advocates depute and procurators fiscal who conduct prosecutions in his name in the High Court and the sheriff and district courts[31]. The criminal process is by its nature much more exposed, from the moment when proceedings are initiated, to the making of challenges on human rights grounds than the process of litigation in the civil courts and tribunals. Hitherto the opportunity which now exists under section 6 of the Human Rights Act to challenge the acts and omissions of public authorities on Convention grounds has been absent in Scotland. So the development of the jurisprudence has been on a very narrow front.

Furthermore, the lack of success which has been enjoyed by those who have sought to raise alleged breaches of Convention rights as devolution issues – one recent assessment suggested that more than 600 legal challenges have been made during the past twelve months, of which only 16 have been successful – is largely due to the fact that many of them have related to matters relating to the article 6 right to a fair trial such as the prevention of delay, the admissibility of evidence and the effect of prejudicial publicity. The Scottish judges have been following a clear line of authority in the ECHR jurisprudence to the effect that the fairness of the trial must be

[30] Scotland Act 1998, section 57(2).
[31] *H.M. Advocate v. Robb* 2000 J.C. 127.

determined in the light of the proceedings as a whole[32]. Attempts to have these issues determined before the trial has been concluded are being discouraged as one decision follows on another, and very many of the issues raised fall into that category.

So I do not think that you should attach much importance to reports about the success rate of challenges under the devolution in Scotland when you are trying to assess the likely impact of the coming into force of the Human Rights Act. I would expect the English judges to follow the same general line as their colleagues in Scotland when challenges are made, whether in criminal proceedings or by means of applications for judicial review, to things done or omitted to be done by the prosecuting authorities. So many of these issues are likely to depend on the way the proceedings as a whole are conducted by the trial judge. But now that the way is open for challenges across the entire field of action by public authorities the likely success rate is much less predictable. My guess is that it is likely to increase.

The second point is that a substantial number of the cases where success has been achieved have been strikingly far-reaching in their effects. They have raised complex issues of great importance, which in the past had been ignored or had been mishandled due to the absence of any legal basis for challenging them. The case of the temporary sheriffs, *Starrs v. Ruxton* 2000 J.C. 208, is perhaps the best example. These were judicial appointments made by the Lord Advocate, who is the public prosecutor. They had no security of tenure, as their appointments were for one year only and were renewable at the sole discretion of the Lord Advocate. A system which was initially introduced to deal only with emergencies had become, under the influence of the Treasury, a permanent and necessary resource which was

[32] See, for example, *H.M. Advocate v. Robb* 2000 J.C. 127; *Paton v. Ritchie* 2000 J.C. 271; *McKenna v. H.M. Advocate* 2000 J.C. 291.

employed virtually every day in every sheriff court throughout Scotland. Objections to its use on such a scale were often made by the senior judiciary. But they were ignored, because the money needed to appoint more full-time sheriffs was not available. When the challenge came and was successful its effects were immediately felt throughout the entire system. The administrators were forced overnight to abandon the use of temporary sheriffs. They had to rethink how they could best use their permanent resources. They had to plan a new and better system for the appointment of part-time sheriffs, which is now being formulated for legislation by the Scottish Parliament. Thus a much-needed improvement is being made to the system of justice in Scotland which, had it not been for the introduction into domestic law of the Convention right, was unlikely to have been forthcoming from the executive.

Other cases which are still under appeal, such as *Brown v. Stott*[33] in which it was held that evidence of identification consisting of an admission made in response to a requirement by a police office under section 172 of the Road Traffic Act 1988 was inadmissible on the ground that the requirement offended against the accused's right not to incriminate herself, and *County Properties Ltd v. The Scottish Ministers*[34] in which it was held that a decision by the Scottish Ministers to call in an application for listed building consent for their own determination led to consequences under the relevant planning legislation which were incompatible with the requirements of article 6(1), illustrate the same point about the far-reaching nature of these decisions. The present system for the prosecution of speeding offences relies heavily upon evidence of identification which has been obtained under section 172 of the 1988 Act. And the fact is that our planning system and the appeals structure which it contains, like so much else in our administrative law, has evolved without being subjected to the

[33] 2000 J.C. 328.
[34] 2000 S.L.T. 965.

discipline of scrutiny as to compliance with the Convention rights. It is hardly surprising that in this instance at least it has been suggested that human rights and planning law have come into collision with one another, with serious implications for the entire system.

The third point relates to the ability of the judges to strike down legislation enacted by the Scottish Parliament. As I have already mentioned, and everyone knows, no such power is given to the judges under the Human Rights Act. But it is worth noting, in view of concerns about the effect of the power that the judges will have under section 4 of that Act to issue declarations of incompatibility, that in *A. v. The Scottish Ministers*[35] which was the first such application to come before the judges in Scotland – now under appeal to the Judicial Committee - the application was unsuccessful. This was a case about an Act which had been passed as an emergency meansure by the Scottish Parliament[36] to deal with what was perceived to be a flaw in the Mental Health (Scotland) Act 1984 resulting from the decision of the House of Lords in *Reg. v. Secretary of State for Scotland*[37] which enabled a restricted patient who was suffering from a psychopathic personality disorder to obtain an absolute discharge from the State Hospital. The question in that case is whether a proper balance has been struck by the legislature between the interests of the community and the rights of the individual. So far, fears that the judges will become politicised in their approach to legislation have not been voiced very strongly in Scotland – but it is now government policy north of the border for a Judicial Appointments Commission to be set up to replace the current system of appointing judges on the advice of the Lord Advocate.

[35] 2000 S.L.T. 873.
[36] Mental Health (Public Safety and Appeals) (Scotland) Act 1999, asp 1.
[37] [1999] 2 A.C. 512.

What is likely to happen next? It has been said that judges are urging lawyers to be restrained in the cases that they bring, as indeed they are, and that they are urging their colleagues to be robust in refusing to allow such challenges, as indeed they should be if they are plainly unmeritorious. It has been said on the other hand, notably by the Lord Chancellor, that the value of the Human Rights Act lies in the fact that people will be saved the trouble of taking their cases to the court in Strasbourg. It seems to me that it there is an uneasy relationship between these two points of view.

If people are to be saved the trouble of going to Strasbourg they will have to be able to obtain their remedy here. The fact that it is simpler and quicker to apply to the courts of this country is bound to lead in the short term, as it has in Scotland, to a great increase in the number of cases that are brought. But I do not see this as reason for treating applications for relief against breaches of Convention rights any more robustly than any other kind of application, or for asking lawyers to exercise greater restraint in the bringing of these applications than they would do in other cases. The tradition in this country is that the courts are open to any person who feels that his rights have been infringed. Lawyers owe a duty of care to their clients, and the House of Lords has recently held in *Arthur J. Hall & Co v. Simons*[38] that even in the courtroom and even in criminal cases they no longer have the protection of immunity against claims for negligence. So the judges are in no position to complain if counsel err on the side of caution in their own interest in the making of these applications. They must also appreciate that the courts, as public authorities, are themselves under a duty of compliance with the Convention rights. The right of individual petition to the Strasbourg court has not been abolished. The United Kingdom will still be under an obligation in international law to bring its domestic law into line with the Convention as interpreted by that court, even if this is in conflict with

the view taken by our own judges. So I would be inclined to favour caution, in the initial stages at least, rather than robustness – lest, in a fit of enthusiasm for throwing cases out, the judges find themselves on the wrong end of a challenge under article 6 of the Convention.

It may be worth noting that the making of admonitions of that kind is not how the matter was handled in Scotland, although one must bear in mind the fact that the judges there have the advantage that all applications relating to the criminal process must be raised in the criminal courts and judicial review of such matters in the civil courts is not available[39]. Satellite litigation relating to criminal matters in the civil courts is excluded by this rule. The court did not rely on pronouncements that these applications would be handled robustly. I suspect that the view was taken that they would be of little effect, and that they could be counter-productive. Instead care was taken to establish appropriate rules of procedure for the raising of devolution issues in criminal cases[40], and to see that these issues were presented precisely in terms of the rules. For the rest the judges have settled down to the task of developing guidance through case law, on a case by case basis, so that everyone now has a clearer idea of where the boundaries lie between those applications which have merit and those which do not. In the result the initial burst of applications has lessened and the capacity of the courts to deal with the issues as they are raised is not now in question.

I hope, and I believe, that the courts in England and Wales will be able to follow a similar course. It may even be that the decisions of the Scottish judges, which are all available on the internet[41] and are being reported without delay both in

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[38] [2000] 3 W.L.R. 543.
[39] *Law Hospital N.H.S. Trust v. Lord Advocate* 1996 S.C. 301, 311.
[40] Act of Adjournal (Devolution Issues) Rules 1999.
[41] www.scotcourts.gov.uk.

the Scots Law Times and in Session Cases, will be of some assistance in this jurisdiction too. At the very least the substantial use which the Scottish judges have been making of Strasbourg and Canadian case law will provide guidance as to where to look for the important propositions of principle, and perhaps also as to how that case law can be employed under our systems of domestic law. As the Lord Justice General, Lord Rodger of Earlsferry, pointed out in *H.M. Advocate v. Montgomery*[42] it would be wrong to see the Convention rights as somehow forming a wholly separate stream of jurisprudence, as in truth they soak through and permeate the areas of law in which they apply. Moreover, although the language which one uses when examining and applying the Convention rights is different, the ideas which they express are not new. They are not alien rules which are being imposed upon us from outside. One can see, especially in the more recent Scottish cases, how they are being applied there with increasing confidence. I believe that, for the most part, these ideas will be woven into our law without too much difficulty.

One of the most beautiful places that I know of in the United Kingdom is a small island that lies in the open sea some distance to the south of Shetland. To get there by boat you must first encounter a formidable tide race. It is always there, whatever the weather. So even on the best of days there will always be period at the outset of your journey on leaving the harbour near Sumburgh when the boat will pitch and toss remorselessly as it navigates through the rough sea to the calm water that lies ahead. I have the same uneasy feeling that everyone must feel on emerging from that breakwater. All one can see at sea level is the tide race which lies ahead. But at least one has the assurance that once the tide race has been passed, on a good day, one can enjoy the voyage in reasonable comfort. As I see it now, we are just emerging from the breakwater. There will be a rough passage ahead of uncertain duration. But when it is over I believe that we shall all be able to settle

[42] 2000 S.L.T. 122, 127A-B.

down to the more interesting intellectual challenges that are presented by the Convention. The early signs from Scotland are that, despite the initial difficulties, it will be a force for good as the judges find a way, by striking the right balance, of retaining public confidence in our legal system and in the rule of law – which, after all, the Convention is all about.

2 October 2000 Lord Hope of Craighead