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Devolved Human Rights

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Abstract

The reception into Scotland of human rights protection under the ECHR and the Human Rights Act 1998 has turned out to be both problematic and controversial as a result of the combination of the devolution settlement under the Scotland Act 1998 and the separate legal system of Scotland since the Union of 1707. The paper explores the ways in which, in particular, the conflicts which have arisen as to which court should make final decisions on human rights issues have achieved an iconic status in the relationship between the Scottish and UK Governments.

Keywords

Law; public law, human rights, United Kingdom, Scotland, devolution, Supreme Court.

DEVOLUTED HUMAN RIGHTS

Chris Himsworth

INTRODUCTION

To combine in the same mindscape the separate ideas of human rights protection and of devolution prompts a number of consequential thoughts. Some may be at quite a high level of generality; some much more specific to the arrangements of a particular state. At the most general level one might first have in mind the contribution that the study of devolution might make to an understanding of those processes whereby rights, first formulated and proclaimed at an international level, may ‘cascade’ down to the level of the nation state and then to regions within that state and perhaps beyond. This might be seen as a process in which there is an increasing degree of specificity of the rights to be applied - perhaps involving an idea of an initial rights baseline which may be enhanced to a higher degree of rights protection (however such a notion is to be understood¹) or customized to take account of the conditions - political, social or legal - particular first to the state and then to the regions of a state. If such a cascading vision is to be adopted it has presumably to be routinely assumed that this process is one which will not be wholly unproblematic. Some of the conditions, specific to a state or region, may, at least at first, conflict, either in their substance or their procedures, with the cascaded rights. Rights deriving from prior national or regional (eg Europe-level) rights may not chime precisely with existing ‘rights’ at the devolved level. Judicial procedures for the enforcement of rights (including, for instance, those rules which determine who may seek the enforcement of rights, on what time scale and in the expectation of what remedies) may also adjust only with some difficulty to the enforcement of the newer generation of rights. Rules and procedures may well be necessary for the resolution of uncertainties of hierarchy to decide which rights rules should prevail. Institutions (presumably mainly courts but not exclusively so) need to be empowered to apply these rules of conflict resolution, an issue which may be of particular concern where there is some expectation of a

¹ On the problems of understanding such ‘higher’ levels of rights protection, see eg JHH Weiler, *The Constitution of Europe* (1999) 102-107.

degree of uniformity in the application of rights and yet also a sensitivity to local conditions.

Injected into these general considerations about tiers of rights and their protection is a more specific concern about the divergence of purpose between the process of devolving power and the process of incorporating rights protection into a devolution settlement. To the person in the devolved street, there may appear to be no conflict between the idea of combining a new form of democratic governance with new protections of human rights. They may be readily linked as simply two perfectly compatible aspects of the same reform project. To the devolved institutions of government, however, whether legislative or executive, the two strands may easily be in conflict. They have received a new set of freedoms to act within their defined areas of competence and yet these new freedoms may appear to be curbed by the restrictions imposed out of respect for the newly defined human rights of the population² - in a situation which may appear not too dissimilar to the situation of those former British colonies liberated on independence to legislate and to govern with a new freedom suddenly subordinated to obligations to respect the newly defined human rights of their citizens, obligations which the imperial state had never chosen to impose on its own forms of government prior to independence.³

Before we move on to consider these questions with greater specificity in relation to devolution in the United Kingdom and, in particular, Scotland, an acknowledgement should be made of the importance of the national (ie United Kingdom-level) dimension of the human rights project. When rights were to be 'brought home'⁴ under the Blair government in 1997-98, this was a policy to be implemented across the United Kingdom as a whole. It was the United Kingdom that was the party to the European Convention on Human Rights (ECHR); it was the UK Government's responsibility to ensure, that the state's obligations under the Convention were observed; and it was the UK Government's view that this would best be done by a form of 'incorporation'⁵ of the Convention rights by legislation passed by the UK

² See eg AC Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (1992).

³ See eg S A de Smith, *The New Commonwealth and its Constitutions* (1964) ch 5.

⁴ See *Bringing Rights Home* (Cm 3782, 1997).

⁵ For the argument that the Human Rights Act 1998 did not truly 'incorporate' the Convention, see eg the then Lord Chancellor at HL Debs, 585, col 422 (5 Feb 1998).

Parliament to apply across the country as a whole. There was an underlying assumption – an assumption which has been sustained during the period since the Human Rights Act 1998 ('HRA') was passed - that the international treaty base of the rights demanded a high degree of harmonisation (if not uniformity) of observance and implementation of rights and that the means of achieving this through United Kingdom-level judicial supervision was in the form, initially, of the (Appellate Committee of the) House of Lords and the Judicial Committee of the Privy Council ('JCPC') and, latterly (since October 2009), of the UK Supreme Court.⁶ Prior to the passing of the HRA, there was a much weaker recognition of 'human rights' as a formal element in the UK constitutional order. 'Civil liberties' was the more usual language and, although such liberties might be reinforced by legislation passed by the UK Parliament, there was no insistence that they should have a UK character overall. But the period since the HRA has been different. The experience of so much ECHR-orientated litigation and so many important issues being propelled into the top courts has inevitably given the human rights project a stronger UK-level character. This has been a position reinforced by the debates generated in the later years of the Labour governments to 2010 and, since 2010, of the Coalition (Conservative-Liberal Democrat) government to produce a British or UK Bill of Rights either to replace or to supplement the HRA.

Against that backdrop of the HRA as a UK-level project, we have now to turn to its devolutionary aspects, and with particular reference to Scotland. In doing so, we have to recognise that, as a manifestation of substate government, there is indeed something special about devolution – in the form, at least, that it has taken in the United Kingdom; and that there is something special – many special things, in fact – about Scotland. By the specialness of devolution is meant that, as opposed to the situation of federalism with the federal-state relationship governed by an overarching written constitution guaranteeing an autonomy protection to both tiers, both devolution and human rights protection were projects of the UK Government and Parliament and remain, in the manner assumed by the underlying doctrine of parliamentary supremacy, formally subject to the overall supervision and regulation of the UK Parliament. This is a familiar (if evolving) feature of the UK constitution. It

⁶ See eg the recent debate on reforming the law on appeals on human rights grounds to the UK Supreme Court at 000 below.

is not, therefore, surprising to the constitutional observer. But the consequences of the human rights regime and the devolution regime remaining malleable at the hand of the UK Parliament rather than their being protected from unilateral amendment by Parliaments at both levels are of enduring significance.

In the specific case of Scotland, these consequences have three inter-related characteristics. The first is the relationship – which has turned out to be one of considerable technical complexity – between the HRA and the Scotland Act 1998. But, secondly, that relationship has to be understood against a constitutional and political backdrop which has produced conflict about the sustainability of the HRA but, more importantly, of the devolution ‘settlement’ created by the Scotland Act. The situation has, in particular, been complicated by the election in Edinburgh of a minority SNP Government from 2007 and a majority SNP Government from 2011. And, thirdly, there is an interaction between the combined devolution and human rights projects, sustainable or not, and that other feature of the United Kingdom which has made it a country, in ways dating back long before devolution, of three separate legal systems – England and Wales, Northern Ireland and Scotland. Scotland is not only one of the components of the United Kingdom’s asymmetric devolution arrangements but is also home to a legal system of its own.⁷ These three characteristics and the ways in which they interact will be considered in the sections which follow.

THE HRA AND THE SCOTLAND ACT 1998

In certain respects, the ‘incorporation’ of the ECHR by means of the HRA operates to exactly the same effect in Scotland as it does in all other parts of the United Kingdom. Thus, for instance, the obligations on public authorities to behave in ways compatible with Convention rights and the obligations of courts to enforce those rights are straightforwardly applicable in Scotland – even if the particular public authorities may be different and the courts are also different. The obligations of Scottish courts in the face of UK legislation found to be incompatible with Convention rights⁸ are the same as those of courts in other parts of the United Kingdom. The superimposition of devolution does, however, make some differences and if, for instance, a court makes a

⁷ See CMG Himsworth, ‘Devolution and its Jurisdictional Asymmetries’ (2007) 70 MLR 31.

⁸ HRA s 4.

declaration of incompatibility in respect of a provision in a UK Act within a sector of legislative competence now devolved under the Scotland Act to the Scottish Parliament, then any obligation to legislate to remove the incompatibility falls on that Parliament and the power to make a ‘remedial order’ is available to the Scottish Ministers rather than to a UK-level minister.⁹

But the consequences of devolution go much deeper. In common with the provision made for the other devolved territories,¹⁰ special provision was made in the Scotland Act to impose on the Scottish Parliament and also on the Scottish Executive¹¹ human rights obligations over and above those imposed by the HRA. In addition to other restrictions on its competence, most notably those which restrain it from legislating on reserved matters such as foreign affairs, tax and social security, the Scottish Parliament is specifically prohibited from legislating in a way which is incompatible with Convention rights.¹² It is beyond its competence to do so. And the same applies to acts of the Scottish Government. In relation to the Scottish Parliament this has the important constitutional consequence that its status as a legislature inferior to the UK Parliament is formally reconfirmed. The Scotland Act provisions reinforce these in the HRA which declare Acts of the Scottish Parliament (ASPs) to be ‘subordinate legislation’¹³ in contrast with the UK Parliament’s ‘primary legislation’. Not for the Scottish Parliament the benefit of mere declarations of incompatibility under s 4 of the HRA. If a provision in an ASP were ever held to be incompatible with Convention rights,¹⁴ that provision would be held to be ‘not law’¹⁵ and invalid. Even if this is a feature which is arguably wholly consistent with the formal subordination of the Scottish Parliament in the structure of devolution, it gives rise to inevitable sensitivities about its status vis-à-vis the courts and the UK Parliament?

⁹ See eg the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 (SSI 2010/370) but see also SSI 2011/45.

¹⁰ See Government of Wales Act 1998 (and the Government of Wales Act 2006), Northern Ireland Act 1998.

¹¹ For a long time now, and especially since the SNP came into power in 2007, the Scottish Executive has been informally known as the ‘Scottish Government’. If the current Scotland Bill of 2010-11 is enacted, that will become the official term. Throughout this chapter, ‘Scottish Government’ is used.

¹² S 29(2)(d).

¹³ S 21(1).

¹⁴ None has, so far, been held to be so.

¹⁵ Scotland Act s 29(1).

Another distinguishing and related feature of the Scotland Act is that it provides special procedural machinery for the determination of questions which arise for resolution by courts as to the competence of either the Scottish Parliament or the Scottish Government. These procedures apply as much to questions involving Convention rights compatibility as they do to competence challenges on any other grounds. Such competence challenges are defined as ‘devolution issues’.¹⁶ The detail of the procedures which they attract need not be addressed here. There is mention below, however, of the role of the law officers (at both the Scottish and UK Levels) in relation to devolution issues and also of the circumstances in which the provisions permit not only civil law questions but also human rights issues arising in the Scottish criminal courts to be taken to the UK Supreme Court.

Despite these special substantive and procedural rules contained in the Scotland Act, there was a clear intention from the start that the human rights provisions of that Act should operate entirely harmoniously with the provisions of the HRA itself. For this purpose, some obvious precautions were taken and, at relevant points in the Scotland Act, definitions of terms in the HRA were adopted – in relation to ‘Convention rights’ themselves, ‘victims’ of violations, and available remedies.¹⁷ Not everything, however, has gone wholly smoothly. Quite apart from the issues of high political and constitutional difficulty relating to the conduct of criminal trials (see below), the interweaving of the two statutory regimes has been far from comfortable. One illustration of this was the explosive confrontation which took place in the *Somerville* case.¹⁸ In a human rights challenge raised as a devolution issue against the Scottish Prison Service, the most contentious issue was whether the petitioners’ case was time-barred. The Scottish Ministers defended the action by claiming that, although the Scotland Act was itself silent on the matter, the 12-month time bar of the HRA should be read into the Scotland Act as well. In short, this approach was approved by the Inner House of the Court of Session but was then, in a robust critique of the lower court, denied on appeal to the House of Lords. The case involved a conflict between two different visions of the relationship between the two Acts.¹⁹ The House of Lords preferred the view that, in contrast with the style adopted in the HRA, the Scotland

¹⁶ Scotland Act s 98 and Sched 6.

¹⁷ Sec s 126(1), s 100(1) and s 100(3) respectively.

¹⁸ *Somerville v Scottish Ministers* 2008 SC (HL) 45.

¹⁹ See C Himsworth, ‘Conflicting Interpretations of a Relationship’ (2008) 12 Edin Law Review 321.

Act placed Convention rights compatibility on the same footing as other restrictions on the competence of the Scottish Parliament and Government. In respect of challenges on grounds of lack of competence, there could be no time bar. The consequence of the decision was, after a long delay and much acrimony between the Scottish and UK Governments, that the Scottish Parliament was given the authority to establish a time bar by Act of the Scottish Parliament.²⁰

If *Somerville* (and its aftermath) illustrates some of the problems inherent in the operationalisation in tandem of the two reforming projects contained in the HRA and the Scotland Act, other questions can arise about how the two projects interact. Two broad areas will be considered. First, there is the question of how devolution impacts on any possible further reform of human rights law. Secondly, we shall consider the vexed issue of how human rights law has impacted on the conduct of criminal trials in Scotland. Beyond examination of the current rules applicable to devolution and to human rights protection, these two case studies illustrate rather vividly the questions generated by the current politics of Scottish devolution.

A NEW UK BILL OF RIGHTS?

In two broad senses, the passing of the HRA was never likely to be the last word on the development in the United Kingdom of human rights protection by law. In the first place, there could be institutional innovation designed to promote the cause of human rights, either in direct support of the HRA initiative or at least to make a contribution in a complementary field. Secondly, there have been proposals to replace or substantially to modify the HRA regime, whether in the direction of strengthening or amplifying its existing provision or in the direction of weakening its impact, in particular by disengaging the regime to a greater or lesser degree from its Convention roots and from the authority of the Strasbourg Court. Both of these projects raise important devolution-related questions because of the division of competences which the Scotland Act and the other devolution Acts have produced. This is neatly illustrated, in relation to post-1998 institutional developments by the creation, on the one hand, of the Equality and Human Rights Commission,²¹ and the Scottish Human

²⁰ The Scotland Act 1998 (Modification of Schedule 4) Order 2009, SI 2009/1380 enabled the passing of the Convention Rights Proceedings (Amendment) (Scotland) Act 2009.

²¹ Equality Act 2006, Pt I.

Rights Commission (SHRC).²² The first is a UK-level Commission (with an outpost in Glasgow) with a general responsibility to promote and monitor human rights; and to protect, enforce and promote equality. The SHRC also has the task of promoting human rights. The parallel existence of the two institutions reflects the terms of the devolution settlement. Although the HRA itself is a UK measure and is itself protected from amendment by the Scottish Parliament,²³ ‘human rights’ are not, in terms, reserved under the Scotland Act and it was, therefore, seen as wholly competent for the Scottish Parliament to legislate to establish the SHRC. On the other hand, the Scotland Act *does* exclude from the Parliament’s competence the power to legislate on equal opportunities²⁴ and the UK-level Equality Commission has correctly been given powers in those areas by the UK Parliament. That Commission is expressly prohibited from straying into areas within the SHRC’s own remit.²⁵

When one turns to the ways in which the HRA regime might itself be reformed or replaced, two principal projects fall to be considered. One was the proposal in 2007 of the Labour Government for the introduction of a new Bill of Rights²⁶ and, in 2009, a Bill of Rights and Responsibilities.²⁷ More recently, and still, at the time of writing, in its earliest stages, there has been the Conservative-Liberal Democratic Government’s establishment, in accordance with its Coalition Agreement of May 2010,²⁸ of a Human Rights Commission with a remit to investigate the case for a UK Bill of Rights. Although very different in their underlying political motivations and in their intended objectives, these projects have had the common feature that they are conducted, quite deliberately, at the UK level. They have had a shared concern to customise in a British way the ECHR-orientated HRA.

Under the conditions of devolution these projects inevitably create sensitivities in the devolved parts of the United Kingdom. In Northern Ireland, where not only the

²² Scottish Commission for Human Rights Act 2006.

²³ Scotland Act, Sched 4, para 1(2)(f). It is understood that the (Westminster) Health and Social Care Act 2008 was viewed as ‘modifying’ the HRA (although not amending its actual text) and thus, in relation to Scotland, beyond the legislative competence of the Scottish Parliament. That Parliament passed no legislative consent motion.

²⁴ SA Sched 5 Pt II, S L21.

²⁵ Equality Act 2006, s 7.

²⁶ *The Governance of Britain*, Cm 7170.

²⁷ Rights and responsibilities: Developing our Constitutional Framework, Cm 7577.

²⁸ Coalition Programme for Government, ch3.

current mechanisms of devolution but also the conditions of peace themselves may depend upon the continued honouring of the Belfast Agreement 1998, and the Northern Ireland Human Rights Commission has, within that framework been consulting on a proposal for a Northern Ireland Bill of Rights,²⁹ the disruptive intrusion of a British initiative may be very damaging.³⁰ But, even in the less-precarious conditions of Scotland, questions are raised. These have a combined technical and constitutional character.

Towards the technical end of the scale are questions of competence under the Scotland Act. Of course, both on the strength of the general theory of UK parliamentary supremacy and the terms of s 28(7) of the Scotland Act, the UK Parliament can legislate on *any* matter – the feature which principally distinguishes devolution from federalism. But in a constitutional context in which there has been an acknowledgement that, in terms of the ‘Sewel Convention’ (whose obligations, although devised by a Labour Government, appear to have been seamlessly inherited by the Coalition Government), where devolved sectors of competence are encroached upon, the consent of the Scottish Parliament (by a legislative consent motion) must be obtained, difficulties may arise. An extension of ‘rights and responsibilities’ into devolved fields such as education, health or criminal procedure would certainly be problematic if any doubts arose as to whether a legislative consent motion would be forthcoming. Because ‘human rights’ themselves are not formally reserved, even if the current HRA *is* reserved, there might well be a need for a legislative consent motion if the HRA were to be replaced.

But, quite apart from technical issues of legislative competence, a British Bill of Rights project is also a matter of constitutional sensitivity in Scotland. The Labour Government’s original initiative in 2007 made the error of simply ignoring any devolutionary aspect of the project. Following criticism,³¹ their 2009 document did include a chapter on devolution. The Coalition’s Commission does, at least, contain a very distinguished Scottish member in Sir David Edward, former Judge in the European Court of Justice. But the problem is not merely one of procedural

²⁹ Belfast Agreement: Rights, Safeguards and Equality of Opportunity para 4.

³⁰ *Devolution and Human Rights* (JUSTICE), 2010.

³¹ See, in particular, the Report of the Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2007-08) HL 165, HC 150, vol I, ch 3.

inclusivity. It derives also from the sharp division within Scotland about the country's constitutional future. In that context, *any* explicitly 'British' constitutional project is potentially controversial. Since the launch of devolution and especially since the formation of the first SNP Government in 2007, views on Scotland's future have been sharply divided between the unionist parties' vision of a United Kingdom to be strengthened by the Scotland Act 1998 and reinforced by a new Scotland Bill³² and, on the other hand, the SNP's commitment to an independence referendum.³³ Inevitably, any proposal for a new *British* Bill of Rights is a contentious issue.

COMPETENCE CHALLENGES, ESPECIALLY IN RELATION TO CRIMINAL PROCEEDINGS

One of the principal effects of the human rights restrictions imposed by the Scotland Act upon the Scottish Parliament and Government must be that felt by members of the Scottish Government and their legal advisors as they routinely seek to ensure that executive action to be undertaken, subordinate legislation, and the content of Government Bills in the Scottish Parliament conform with the Convention rights and all other constraints on competence. Such activity is largely hidden from public view, although its consequences are seen, in summary terms, when, for instance, ministers certify Bills as within competence on their introduction into the Parliament.³⁴ Opportunities are also available during the passage of Bills for the discussion of human rights aspects.

But the highest profile public debate on the Convention rights compatibility of measures taken by the Government or Parliament may be observed in the circumstances of challenge in the courts. In general, however, the level of such challenges has been very low. In relation to legislation, there have, thus far, been no references of enacted legislation by law officers prior to Royal Assent.³⁵ The number

³² Yet to be enacted, at the time of writing.

³³ See Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper (Feb 2010); First Minister Salmond, SPOR, 26 May 2011, col 67.

³⁴ Scotland Act, s 31(1). In addition, under s 31(2) the Presiding Officer must pronounce upon the competence of all Bills. Another public point at which human rights compatibility is discussed is where the Scottish Law Commission comments on legislative competence in relation to draft Bills it has prepared.

³⁵ Scotland Act s 31(2).

of ASPs challenged after Royal Assent can be counted on one hand³⁶ and none has yet been successful. *Anderson v Scottish Ministers*³⁷ was a challenge to the Parliament's first ASP, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. *Adams v Scottish Ministers*³⁸ was one of several challenges to the Protection of Wild Mammals (Scotland) Act 2002. In *AXA General Insurance Ltd, Petitioners*,³⁹ the Inner House rejected a challenge by various insurance companies to the validity of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 and a decision by the UK Supreme Court is awaited. In general, there has also been very little by way of legal challenge to the executive action of the Scottish Ministers. Thus, if there had ever been a fear that the Scottish Government and Parliament would find themselves routinely subject to court action on the grounds of straying beyond the limits of their competence, this is a fear which has not been substantial in practice.

There is, however, one major qualification to this general proposition. Challenges to the acts of the Lord Advocate taken, as head of the system of criminal prosecution, in trials in Scotland have loomed very large, whether measured in terms of the significance of the issues raised or in terms of their volume. The Lord Advocate is a member of the Scottish Government. He or she must act in a Convention-compatible way – a position which derives, in particular, from s 57(2) of the Scotland Act which provides that a member of the Scottish Government has no power to do anything incompatible with Convention rights. An alleged breach of s 57(2) gives rise to a 'devolution issue'.⁴⁰

Five related effects have flowed from this positioning of the Lord Advocate under the Scotland Act:

1. Some of the challenges based on the Lord Advocate's role as prosecutor have raised very significant issues in the conduct of the Scottish criminal justice system.

³⁶ The only significant cases so far decided on the reserved/devolved borderline (as opposed to human rights grounds) have been *Martin v HMA* 2010 SC (UKSC) 40 and *Imperial Tobacco Ltd, Petitioner* 2010 SLT 179. *Sinclair Collis Ltd v Lord Advocate* 2011 SLT 620 was decided on grounds of EU competence.

³⁷ 2002 SC 1.

³⁸ 2003 SLT 366.

³⁹ 2011 SLT 439.

⁴⁰ Discussed in eg *Montgomery v HMA* 2001 SC(PC) 1.

Important cases have included *Starrs v Ruxton*⁴¹ in which the procurator fiscal's prosecution before a temporary sheriff was successfully challenged – on the grounds that the prosecutor could not prosecute in a court held not to be reliably 'impartial' under Art 6 ECHR – and led to the abolition of the office of temporary sheriff. *R v HM Advocate*⁴² explored the human rights consequences of delay in criminal trials – although to different effect from the English case of *Attorney General's Reference (No2 of 2001)*.⁴³ And, most notably, in the recent cases of *Cadder v HM Advocate*⁴⁴ and in *Fraser v HM Advocate*⁴⁵ to be discussed further below, it has been held by the UK Supreme Court that the absence of a solicitor during pre-trial questioning and a failure to disclose information to the defence were, respectively, incompatible with the Convention.

2. The volume of devolution issues arising in relation to criminal prosecutions has been very substantial. One indication has been that some 10,000 had been notified to the Advocate General for Scotland (the UK Government's Scottish law officer) in the period to 2010.⁴⁶ Although only a very small proportion of these challenges have been successful, they have had, it is claimed, a delaying effect on proceedings in the courts.⁴⁷

3. This situation is one which has attracted much high-profile criticism – criticism which falls broadly into two strands. The first focuses on the arguably cumbersome and delay-inducing operational aspects of the devolution issue procedures just mentioned. The second, however, derives from issues much more deeply embedded in Scottish legal culture, or at least in one version of that culture. Triggered by conditions introduced by devolution under the Scotland Act and the intersection of human rights and criminal procedure, there has been, for the first time in the 300 year period since the Union between Scotland and England an exposure of the top criminal appeal court in Scotland – the High Court of Justiciary – to review by a London-based court - first the JCPC, and now the UK Supreme Court. Whilst *civil*

⁴¹ 2000 JC 208.

⁴² 2003 SC(PC)21.

⁴³ [2004] 2 AC 72. And see C Himsworth (2004) 8 Edin LR 255.

⁴⁴ 2010 SLT 1125.

⁴⁵ 2011 SLT 515.

⁴⁶ See para 3.13 of the report of the Expert Group (note 00 below).

⁴⁷ *Ibid*, para 3.12.

appeals were taken to the House of the Lords from the very early days of the Union, all *criminal* appeals were disposed of finally in Edinburgh. At many points in the history of its evolution the civil appellate jurisdiction of the House of Lords has been controversial in Scotland but, at the time of the creation of the UK Supreme Court, the asymmetry was retained. There has been strong opposition from some quarters in Scotland to allowing a ‘non-Scottish’ court to meddle with the distinctively Scottish criminal law and procedure.⁴⁸

Although some interventions by the JCPC occurred from the early days of devolution, matters came to a head in the *Cadder*⁴⁹ case where a seven-judge UK Supreme Court overturned the decision of a seven-judge High Court in Edinburgh⁵⁰ on the issue of the Convention compatibility of practice under the Criminal Procedure (Scotland) Act 1995 in relation to the police questioning of suspects and specifically the force of the Strasbourg Court’s judgment in *Salduz v Turkey*.⁵¹

The *Cadder* decision had three significant consequences. The first was the need for an immediate adjustment to police procedures which was achieved by the passing of an emergency Bill in the Scottish Parliament.⁵² The effect of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 was to amend the law on access to a solicitor. What was most interesting about its passage, however, was not the content of the Bill itself but the tenor of the debate in the Parliament. That debate took place on 27 October 2010⁵³ and it provided an opportunity for the venting of many human rights frustrations and resentments. Kenny MacAskill MSP, the Cabinet Secretary for Justice, had two principal complaints. In the first place, the devolution arrangements left the Scottish Government and Parliament open to

⁴⁸ See eg Lord Hope of Craighead in *R v Manchester Stipendiary Magistrate, ex p Granada Television Ltd* [2001] 1 AC 300 at 304.

⁴⁹ *Cadder v HM Advocate* 2010 SLT 1125.

⁵⁰ *HM Advocate v McLean* 2010 SLT 73.

⁵¹ (2009) 49 EHRR 19.

⁵² Even before the announcement of the Supreme Court decision, deliberately delayed from the hearing in May 2010 to its announcement in October, new provisional guidance was issued by the Lord Advocate. In addition to introducing the new legislation, the Government established a more wide-ranging review of criminal procedure (including revisiting the vexed question of corroboration in Scots law) was established under a Court of Session judge (Lord Carloway).

⁵³ The Bill was introduced as an emergency Bill, following approval of a motion to that effect, and all stages of the Bill were taken in the one day - see SPOR (27 Oct 2010) cols 29553 – 29585; 29611 – 29679.

challenge ‘on each and every thing’.⁵⁴ As the First Minister put it: ‘In a normal country...[i]f the Court of Session ruled against a person, they would have recourse to the Strasbourg Court and we would be able to argue a case in front of that court. The reason why Scotland is uniquely vulnerable is that the system in Scotland does not even allow us the right to argue the case in front of the court in whose name we are required to make the changes to Scots law’.⁵⁵ Secondly, it was, instead, the UK Supreme Court which was empowered to decide the issue and, as the Cabinet Secretary said, that court had decided in *Cadder* that Scottish practice was contrary to the ECHR – ‘overturning an earlier Scottish appeal court ruling by our highest court of criminal appeal just last year..... I will make clear to the UK Government our view that the centuries-old supremacy of the High Court as the final court of appeal in criminal matters must be restored’.⁵⁶

The indignation was carried further by other SNP MSPs. Stewart Maxwell MSP said: ‘There should be no UK Supreme Court, as we simply do not have a single legal system within the United Kingdom.’⁵⁷ He had more confidence in the decision of seven judges (including the Lord Justice General and the Lord Justice Clerk) with a lifetime of experience in the law of Scotland than in a decision of the UK Supreme Court sitting in London with a majority of English judges.⁵⁸ Dave Thompson MSP regretted that the UK Supreme Court had not respected the position and decision of the Scottish criminal appeal court of seven senior and highly respected Scottish High Court judges, ‘each with a strong grasp and deep understanding of Scottish law’.⁵⁹ Although the debate also provoked in some MSPs a broader antipathy to the status of the ECHR in Scotland and the United Kingdom,⁶⁰ SNP Members confined their attention to the problems created for the Scotland by the powers of the UK Supreme Court under the Scotland Act. One problem they had to confront, of course, was that, for all the Supreme Court’s predominantly English membership in *Cadder*, it was the two Scottish judges who had led the attack on the Scots law rule.⁶¹

⁵⁴ Col 29555.

⁵⁵ Col 29571.

⁵⁶ Col 29557.

⁵⁷ Col 29567.

⁵⁸ Col 29568.

⁵⁹ Col 29572.

⁶⁰ See eg Bill Aitken MSP at cols 29669-70.

⁶¹ See John Lamont MSP at col 29563; Robert Brown MSP at col 29565 and David McLetchie MSP at col 29672.

In consequence not only of *Cadder* but also the longer-standing criticisms of the devolution issue procedure in criminal matters,⁶² the Advocate General for Scotland set up a review of the working of s 57(2) of the Scotland Act. The group of experts entrusted with the review was chaired by Sir David Edward and its investigations and report⁶³ are significant for the wide range of views attracted in submissions to the group and then for the middle line steered in its principal recommendations. Whilst the Scottish Government, the Scottish judiciary⁶⁴ and also the Scottish Law Commission were in favour of terminating human rights appeals to the Supreme Court, the Faculty of Advocates and the Law Society of Scotland were among those who favoured retention. The group itself recommended that alleged failings of the Lord Advocate as prosecutor should cease to be treated as ‘devolution issues’ but that a new form of statutory appeal to the Supreme Court on human rights (and EU) grounds should be set up in its place. These recommendations were accepted by the Advocate General and amendments to the Scotland Bill to implement them were introduced by the UK Government at the House of Commons report stage on 21 June 2011.⁶⁵

5. By that time, however, the other side in the great human rights turf war was mobilising its response. Invigorated by its return to power with an overall majority on 5 May 2011, the SNP Government in Edinburgh declared its outrage at a new decision by the Supreme Court in *Fraser*.⁶⁶ In that case, the Supreme Court unanimously overturned a decision of the Appeal Court in Edinburgh to declare the conviction of the appellant unsafe on the grounds that evidence had been withheld from the defence. Indignantly and accompanied by acutely personal interventions by the First Minister and the Justice Secretary,⁶⁷ the Scottish Government declared its renewed hostility to all Supreme Court appeals in criminal matters. Its response to the Edward expert group was the setting up of a new review group under the chairmanship of former judge Lord McCluskey. An interim report was demanded

⁶² The discontents of the Scottish judges had earlier been recorded in the report of the (Calman) Commission on Scottish Devolution: *Serving Scotland Better* (2009) paras 5.29-5.37.

⁶³ 11 Nov 2010. [www.oag.gov.uk/oag/files/Expert%20Group%20report\(1\).doc](http://www.oag.gov.uk/oag/files/Expert%20Group%20report(1).doc)

⁶⁴ The judiciary of the Court of Session and the High Court of Justiciary.

⁶⁵ HC Debs col 275.

⁶⁶ *Fraser v HMA* 2011 SLT 515.

⁶⁷ Both were flamboyant in their criticism of current arrangements. For the First Minister, see *Holyrood Magazine*, 10 June 2011. The Justice Secretary was reported to have threatened a reduction in spending on the UKSC – ‘he who pays the piper calls the tune’! *Scotsman*, 2 June 2011 p 8.

from the group in time for debate in the Scottish Parliament before its summer recess,⁶⁸ with a final report to follow later in the summer. Interestingly, the group stuck to the middle ground in its interim report,⁶⁹ with a renewed recommendation that appeals to the Supreme Court should be retained - although with the rider that, seeking a degree of symmetry with English procedure, appeals should reach that Court only if certified by the Appeal Court in Edinburgh as of general public importance; or, in ways not spelled out in the interim report, following a new form of reference by the Lord Advocate or the Advocate General. It has become wholly unclear how the battle between the two Governments is to be played out – whether in the initial context of the current Scotland Bill⁷⁰ (subject, as it is, to renewed scrutiny by the Scottish Parliament under the Sewel Convention) or in the longer term.

CONCLUSION

In the context of the debate just outlined there are no clear conclusions to be drawn. Scotland finds itself in a highly *unsettled* devolution settlement. The conditions of constitutional autonomy defined by the combination of devolution under the Scotland Act with the much longer-standing separateness of the Scottish legal system have produced a fluidity and antagonism which have come to be most prominently characterised by reference to the iconic lightning conductor of human rights adjudication. It is true that this is a field which has also been on of some technicality as the precise relationship between the HRA and the Scotland Act has come to be played out, but it has, above all, become a focus for political mobilisation. The constitutional future of Scotland is being debated by reference to the contested authority of the Supreme Court of the United Kingdom on the human rights of accused persons in the criminal courts of Scotland.

FURTHER READING

R Reed and J Murdoch, *A Guide to Human Rights Law in Scotland* (2nd ed, 2008).

A O'Neill, 'Limited Government, Fundamental Rights and the Scottish Constitutional Tradition' 2009 *Jur Rev* 85.

⁶⁸ SPOR, 30 June 2011 col 1226.

⁶⁹ *Examination of the Relationship between the High Court of Justiciary and the Supreme court in criminal Cases* (2011).

⁷⁰ The Bill is to be carried over into 2011-12.

A O'Neill, 'Human Rights and People and Society' in EE Sutherland et al (eds), *Law Making and the Scottish Parliament* (2011).

C Himsworth, 'Rights versus Devolution' in T Campbell, KD Ewing, and A Tomkins (eds), *Sceptical Essays on Human Rights* (2001).

C Himsworth, 'Human Rights at the Interface of State and Sub-state: The Case of Scotland' in T Campbell, KD Ewing and A Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (2011).