

## INTERNATIONALISM AND TRADITION

### SOME THOUGHTS ON INCORPORATING HUMAN RIGHTS LAW

#### THE MACDERMOTT LECTURE

*The Honourable Lord Reed*<sup>1</sup>

#### INTRODUCTION

“The past is a foreign country: they do things differently there.” The famous opening sentence of L. P. Hartley’s *The Go Between* is one to which the common lawyer can hardly give unqualified assent. The common law proceeds upon the basis that there is a continuous tradition linking the present to the past in seamless unity. Indeed, any common lawyer is likely to find himself more at home in the law of his own country’s past than in the law of a foreign country of the present day. This may seem surprising. If one considers the solutions produced to legal problems, then on such matters as divorce, parental rights, consumer contracts, company law, product liability, employment law and so forth – probably most of the common legal problems – a modern European legal system, such as German law, would, I expect, produce solutions closer to modern Scots or English law than would the Scots or English law of, say, the eighteenth century. Similarly, if one considers the social context or the prevailing political or moral values, those to be found in modern Scotland are, I would have thought, closer to those to be found in modern Germany than to those of the Scotland of the eighteenth century. The explanation is, I think, essentially to do with what Lord MacDermott described as legal tradition<sup>2</sup>. In large part, this has to do with ideas and their history – the conceptual framework which lawyers use to define and express problems and their solutions, and which tends to persist, and evolve, over a very long period. It also has something to do with more amorphous aspects of legal culture: a continuity, usually reinforced by enduring institutions, in respect of reasoning, rhetoric and so forth, acquired by the members of a legal community through their education and interaction with each other. A legal system, in other words, is more than an accumulation of solutions to problems: even if two legal systems provided identical solutions to all the most common problems of life, they could nevertheless remain profoundly foreign to each other’s practitioners. But it is also important to remember that the differences between Scots Law and German Law reflect in addition differences which exist to some extent between the social context and the values prevailing in Scottish and German society.

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<sup>1</sup> Senator of the College of Justice in Scotland.

<sup>2</sup> *Protection from Power under English Law* (1957), p 41.

In this lecture I want to discuss the giving of direct legal effect to the European Convention on Human Rights, under the devolution legislation<sup>3</sup> and under the Human Rights Act 1998<sup>4</sup>. I want in particular to discuss this development in the light of two traditional concepts of our law – concepts which are so embedded in our thinking as to form part of the framework largely taken for granted by lawyers and non-lawyers alike: namely, Parliamentary sovereignty, and the distinction between national and international law. To put my thesis in a nutshell, it seems to me that the Convention, as incorporated into our law, does not sit altogether happily with our traditional ways of thinking about the constitutional role of the courts and about legal reasoning; and that its successful introduction into our law requires the thinking of lawyers, and also of the man and woman in the street, to change. This seems to me to epitomise a wider point concerning the increasing importance of international law at the domestic level. In the background of the discussion will be the more profound issues which I mentioned at the outset: the persistence of tradition, and its implications for the convergence of different legal systems; and the relationship between the law and prevailing values. I will illustrate what I mean by examples drawn from my own experience of the Convention as a judge in Scotland, where the Convention has been given effect under the Scotland Act since May 1999, and as an *ad hoc* judge of the European Court of Human Rights. I will be discussing issues which merit a more extended treatment than I can give them within the confines of a lecture. So I hope I will be forgiven a degree of tendentiousness.

### PARLIAMENTARY SOVEREIGNTY

I want to begin by going back into the past, to the seventeenth century. That century was a period of constitutional turmoil in these islands: a period of violent struggle over the powers of the monarchy. It ended with the drawing up of the Bill of Rights by the English Parliament, and a Claim of Right by the Scottish Parliament, in terms of which the monarchy of each country was offered to William and Mary. These documents were concerned with rights, but not to any great extent with what would now be called “human” rights: the Bill of Rights in particular was concerned primarily with the rights of Parliament against the Crown, reflecting the circumstances which had brought it into being. At the risk of over-simplification, it might be said that the consequence of the Glorious Revolution was that the divine right of Kings asserted by the Stuarts was transmuted into the absolute right of the King in Parliament. Sovereignty had to be exercised through Parliament; but it remained absolute.

The American Revolution against the British in 1775, on the other hand, was of a fundamentally different character. It was not a contest between competing institutions of government: it was a rebellion by a people against their government. That had two important consequences. First, it meant that the legitimacy of the revolution depended on asserting the rights of individuals against their government; and so it was greatly influenced by

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<sup>3</sup> *ie* the Government of Wales Act 1998 (c38); the Scotland Act 1998 (c46); and the Northern Ireland Act 1998 (c47).

<sup>4</sup> c42.

ideas about natural or human rights. Consider for example the opening words of the American Declaration of Independence. I shall quote Thomas Jefferson's original draft, which is more secular than the version finally adopted:

“We hold these truths to be sacred and undeniable; that all men are created equal and independent, that from that equal creation they derive rights inherent and inalienable, among which are the preservation of life, and liberty, and the pursuit of happiness.”

That is a classic expression of the concept of human rights. The second consequence of the nature of the American Revolution was that its success necessitated the drafting of a constitution to establish new institutions of government for the newly-created nation state: a constitution which defined and therefore limited the powers of those institutions. These two aspects – the theory of human rights, and the necessity of a constitution – came together in the drafting of the United States Constitution, in terms which guaranteed human rights and established a Supreme Court to give effect to them.

The concept of a constitution which guaranteed human rights of which a supreme or constitutional court was the arbiter eventually became widespread throughout the world. But it was not followed in the United Kingdom. Subject to one qualification, the constitutional arrangements established at the end of the seventeenth century and the beginning of the eighteenth century proved stable. The qualification of course concerns Ireland, where the Republic adopted the US model of constitutionalism, and the Province alternated between devolution and direct rule.

So a profound difference developed between the constitutional theory taken for granted in the United Kingdom and its dominions and the constitutional theory accepted in other countries such as the United States. There was an equally profound difference in political philosophy. The dominant British tradition, from David Hume onwards, was one of empiricism and scepticism of moral absolutes. One could, for example, contrast with the writings of Jefferson those of Jeremy Bentham, who described the doctrine of the rights of man as nonsense, and the doctrine of imprescriptible natural rights as nonsense on stilts<sup>5</sup>. These divergent traditions have continued down to our own day, as one can see in the debate in jurisprudence between leading representatives of each tradition such as Herbert Hart and Ronald Dworkin.

The distinctive features of British constitutional culture which I have discussed have profoundly coloured British attitudes towards constitutional guarantees of human rights such as are found in the European Convention. The Diceyan tradition emphasised the importance of constitutional conventions, such as Ministerial accountability to Parliament, rather than paper guarantees. The strength of this approach lies in reminding us that human rights ultimately depend on a constitutional culture rather than on legal documents. On the other hand, the nineteenth century system of Parliamentary government on which the Diceyan model was based seems increasingly remote.

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<sup>5</sup> There were of course exceptions, such as R. C. Collingwood.

So the constitution which developed in the United Kingdom was one based on a Parliament with unlimited legislative powers. There were no rights which were fundamental, in the sense that they enjoyed constitutional protection against infringement by Parliament. The courts interpreted legislation and applied it: they could not assess its legality against some higher norm. Moreover, since the task of law making was the province of Parliament, the judges' role even in the development of the common law was generally a conservative one.

One exception to this approach was the supervisory jurisdiction exercised by the courts over the Parliament of Northern Ireland: something in which Lord MacDermott was centrally involved. As counsel and as a judge, he took part in some of the leading cases where the courts had to adjudicate upon the validity of statutes passed at Stormont<sup>6</sup>. Those cases did not for the most part<sup>7</sup> involve issues of human rights; but an issue of that kind did arise in a matter on which Lord MacDermott had to advise as Attorney-General for Northern Ireland, namely the validity of legislation concerning religious instruction in state schools. His opinion on the matter, which cast doubt on the constitutionality of the legislation in question, was based on his interpretation of a provision prohibiting Stormont from making any law so as to endow any religion. His predecessor in office had interpreted that provision as prohibiting Stormont from endowing the Protestant churches in preference to the Catholic churches, or vice versa, whereas Lord MacDermott interpreted the provision not only as prohibiting Stormont from endowing any particular form of Christian belief, but as prohibiting the endowment of Christianity or any of the other world religions. This breadth of vision caused some controversy at the time. In a fascinating article on this episode<sup>8</sup>, a conclusion was drawn which is sometimes put forward also in relation the European Convention, and to which I shall return: that such broadly drafted constitutional provisions are dangerous and undesirable, because they enable important matters of social responsibility to be litigated in the courts, where different interpretations can be placed on the same phrase, instead of having such matters decided in a representative legislature. All I would observe at the moment is that if the highest legislature – Westminster – has decided that the subordinate legislature is to have only a limited power to legislate, then the courts have no alternative but to interpret and enforce those limits if called upon to do so.

### NATIONAL AND INTERNATIONAL LAW

I said earlier that I wanted to consider the European Convention in the light of two traditional legal concepts. The first of those was Parliamentary sovereignty. The second is the distinction between national and international law.

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<sup>6</sup> *Eg In re A Reference under the Government of Ireland Act 1920* [1936] AC 352; *Gallagher v Lynn* [1937] AC 863; *Benson v Northern Ireland Road Transport Board* [1942] AC 520; *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79.

<sup>7</sup> Exceptions are *Benson* and *Brown* (n 6, *ante*).

<sup>8</sup> E. Graham, "Religion and Education – The Constitutional Problem" [1982] 22 *NILQ* 20.

If I may be forgiven for again giving a brief sketch of a complex subject, we tend on the whole to think in terms of a world broadly divided into domestic and foreign realms. Our political and legal institutions reflect that broad division. Indeed, we see it reflected on any map. There is a territorial area known as the United Kingdom, within whose boundaries political power is exercised by H. M. Government, through Parliament. The law of the land is made by that Parliament and enforced by the courts. Through national elections, citizens can hold the Government to account; and, as a result of electoral consent, the Government can legitimately make laws in Parliament and pursue policies for the electorate.

It only requires a moment's thought to realise that this model of the nation-state as the basis of political and legal organisation is incomplete. One thinks, for example, of the increasing tendency of national governments to co-operate so as to address policy issues which cut across national boundaries, such as trade, communications, drugs, terrorism, asylum seekers and environmental pollution. These issues are addressed through collective decision-making at a supra-national level, with its own institutions. This development was acknowledged by the Foreign Secretary in a speech delivered in January this year<sup>9</sup>, when he said that the new century was going to be "the internationalist century, driven by the biggest ever expansion of internationalist forces." He identified four guiding principles of foreign policy. One was that "the global interest is increasingly the national interest". Using NATO as an example he said:

"To achieve (a) gain in security, NATO requires a pooling of sovereignty in the area most sensitive for traditional concepts of national identity. Surely, if it is desirable to pool sovereignty to obtain military security, it must also be sensible to pool sovereignty to create jobs, to protect our environment or to defeat cross-border crime."

Another guiding principle, which is of particular relevance to lawyers, was that "the global community needs universal values". That is true not only in the sense that successful co-operation depends on a shared commitment to objectives, but also in the sense that the standards laid down at an international level will express the values which are in future to prevail within the states in question. These values may not necessarily always be identical to those already prevailing within all of those states.

This developing globalisation has profound implications for international law. Its scope has widened beyond traditional concerns such as the law of war and the law of the sea, as it has become concerned with regulating economic, social, environmental and other matters. It has ceased to be concerned solely with the legal relations between states, as individuals have become recognised as subjects of international law, under for example the charters of the various war crimes tribunals and a variety of human rights treaties, including the European Convention. And the sources of international law have become more diffuse than the traditional treaties and conventions concluded by nation states, as legal recognition has been given to a vast array of standards agreed or observed by international institutions.

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<sup>9</sup> Chatham House, London, 28 January 2000.

One consequence of this development is a growing tendency for domestic legislation to be designed to give effect to international instruments of various kinds. In addition to the entire corpus of European Community law, itself of growing importance<sup>10</sup>, other examples could be given from the daily practice of the courts. Such instruments may have their background in a legal tradition with which British lawyers are unfamiliar, but with which they then need to familiarise themselves<sup>11</sup>; and the need for some such instruments to be given a uniform construction has necessitated our courts' having regard to decisions of foreign courts and the writings of foreign jurists<sup>12</sup>.

There has also been some blurring of the distinction drawn by the courts between domestic and international law. When I was an undergraduate, it was reasonably clear that a treaty was not part of domestic law unless and until it had been incorporated into the law by legislation<sup>13</sup>. The Scottish judge Lord Ross expressed the point with crystal clarity in a case in 1980 concerned with the European Convention:

“It was His Majesty’s Government in 1950 which was a High Contracting Party to the Convention. . . Under our constitution, it is the Queen in Parliament who legislates and not Her Majesty’s Government, and the Court does not require to have regard to acts of Her Majesty’s Government when interpreting the law.”<sup>14</sup>

In other words, the inability of the Crown, in general, to alter domestic law otherwise than through Parliament – one of the central achievements of the seventeenth century struggle between Parliament and the Monarchy<sup>15</sup> – underpinned the distinction between domestic and international law. The distinction has however become less clear in recent times. Quite apart from the special case of European Community law<sup>16</sup>, the courts have shown a greater willingness to have regard to international instruments<sup>17</sup>.

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<sup>10</sup> Even in cases with no international element whatsoever, *eg English v North Lanarkshire Council* [1999] *EuLR* 701.

<sup>11</sup> An example is the Commercial Agents (Council Directive) Regulations 1992: see *eg Moore v Piretta Ltd* [1999] 1 All ER 174; *King v T. Tunnock Ltd*, Court of Session, 16 March 2000, unreported.

<sup>12</sup> *Fothergill v Monarch Airlines Ltd* [1981] AC 251.

<sup>13</sup> *Eg Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143 *per* Diplock LJ; *R v Secretary of State for Home Affairs, ex parte Bhajan Singh* [1976] QB 198, 207 *per* Lord Denning MR; Hood Phillips, *Constitutional and Administrative Law* (6<sup>th</sup> ed.), p 446; Fawcett, *The Application of the European Convention on Human Rights* (1<sup>st</sup> ed.), p 17. That view was not universal: see *eg Ahmed v Inner London Education Authority* [1978] QB 36, 48 *per* Scarman LJ.

<sup>14</sup> *Surjit Kaur v Lord Advocate* 1980 SC 319.

<sup>15</sup> *Case of Proclamations* (1611) 12 Co. Rep 74.

<sup>16</sup> See *eg R. v Secretary of State for Transport, ex parte Factortame Ltd* (No 2) [1991] 2 AC 603.

<sup>17</sup> See *eg R. v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 748 *per* Lord Bridge of Harwich; *R. v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407, 499 *per* Lord Browne-Wilkinson; and *Ahmed v Secretary of State for the Home Department* [1999] Imm AR 22, 36-37 *per* Lord Woolf MR.

A different but, I think, not unrelated development is the growth of interest in comparative law, and reference to it for guidance as to the development of our own law. In a recent Scottish case in the House of Lords, for example, concerned with liability in negligence for pregnancy and childbirth resulting from a failed vasectomy, reference was made in the judgments to the law of the United States, New Zealand, Canada, Australia, France, Germany and the Netherlands<sup>18</sup>. A textbook<sup>19</sup> was also referred to, belonging to a series whose title, *The Common Law of Europe*, in itself epitomises this tendency. Such books reflect the desire to overcome barriers of communication between legal traditions, and can be related to the movement towards the closer convergence of European legal systems which forms part of the agenda of the European Community<sup>20</sup>.

One of the most important manifestations of what one might call “legal globalisation” is human rights law. It is no accident that rights-based thinking became increasingly influential after the Second World War. No-one could argue that Nazi atrocities should be tolerated out of respect for national sovereignty or cultural diversity. The International Tribunal at Nuremberg, in rejecting the defence of obedience to superior orders, affirmed that when international rules which protect basic humanitarian values are in conflict with national laws, the individual has in principle a legal obligation which transcends his obligations under national law. The theory underlying the charter of the Nuremberg Tribunal (and other war crimes tribunals) rejected the concept of the absolute sovereignty of states, and warranted intrusion into their internal affairs on the basis that a legitimate state was one which upheld certain values held in common by the international community<sup>21</sup>.

That approach was followed in 1948, when the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. In 1950 the European Convention was signed, repeating many of the provisions of the Universal Declaration and, for the first time, enabling individuals to bring legal proceedings against states, including their own government, through an international process of adjudication. In 1966 the United Kingdom Government accepted the individual right of petition to Strasbourg. Thereafter, the Convention became a significant source of law reform in the United Kingdom. Such reform could only be effected, however, as a result of decisions by the Strasbourg institutions, since British judges were unable to apply the Convention directly. Victims of infringements of the Convention

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<sup>18</sup> *McFarlane v Tayside Health Board* [1999] 4 All ER 961. This development can also be related to the greater accessibility of foreign law via the Internet.

<sup>19</sup> *Torts*, ed W. van Gerven *et al.*, 1998.

<sup>20</sup> See *eg* Section B of the Presidency Conclusions of the European Council meeting held in Tampere on 15 and 16 October 1999: <http://ue.en.int/new>.

<sup>21</sup> The concept of crime against humanity, introduced by the charter of the Nuremberg Tribunal, has been supplemented by the concepts of war crimes (under the 1949 Geneva Convention), genocide (under the Genocide Convention) and torture (under the Torture Convention), as crimes subject to universal jurisdiction. The lessening of respect for national sovereignty inherent in these concepts is illustrated by such recent events as the proceedings against General Pinochet, the indictment of President Milosovic by the Yugoslavian Tribunal and the bombing of Kosovo, and by the moves to establish an International Criminal Court.

were equally unable to obtain domestic redress, where our law violated the Convention, but had to embark on lengthy proceedings in Strasbourg. These considerations formed the background to the Human Rights Act.

The Convention should not however be considered in isolation. The contemporary human rights regime consists of overlapping institutions and conventions – global, regional and national. That is particularly true in Europe, where a strong regional framework for the protection of human rights under the auspices of the Council of Europe is complemented by a European Union committed to the notion of EU citizenship advanced by the Maastricht and Amsterdam Treaties and to respect for the European Convention. In that connection, the decision, taken by the European Council last year, to proceed with the drafting of an EU Charter of Fundamental Rights is potentially of great significance.

It may be worth observing that the development of human rights law, and the willingness of national governments to join together in adopting instruments which limit their own powers for the sake of achieving common objectives, is not simply a reflection of a growth in humanitarianism. International human rights law serves a number of policy objectives. Let me give one illustration. The EC Treaty, as amended by the Maastricht and Amsterdam Treaties, draws a direct connection between the creation of the internal market – an area without internal frontiers – and controls on immigration across the external borders of the Community, particularly in respect of asylum seekers<sup>22</sup>. The European Council has identified<sup>23</sup> that one means of reducing the number of asylum seekers (or at least the number of those with a colourable claim to asylum) and thereby assisting the creation of the internal market, is to ensure respect for human rights in their countries of origin; and that entails the EU states themselves accepting the standards and procedures which they wish other countries to accept.

One consequence of these developments is that they inevitably place limits on the activities of national or devolved legislatures, and expand the function of the courts. Legal instruments such as the Convention and its protocols have the effect of limiting (in practice, if not formally) what can be enacted by national or devolved legislatures, and what actions can be taken by national or devolved administrations. The devolution legislation makes the standards imposed by the Convention binding in domestic law, so far as the devolved legislatures and administrations are concerned, as well as in international law. The Human Rights Act makes those standards binding on all public authorities, subject only to the qualification that the courts cannot quash legislation enacted by Westminster but can only declare its incompatibility with the Convention, in which event one would normally expect the legislation to be amended or repealed. Whether it is desirable for courts to determine the range of issues covered by the Convention, or to enforce international standards in respect of such matters, is a political question; but if it is considered to be in the national interest, as is implicit in the United Kingdom's adherence to the European Convention as well as in the recent legislation, then the courts have to perform the function which has

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<sup>22</sup> See EC Treaty (as amended), arts 61-69.

<sup>23</sup> See *eg* para A.I.1 of the Presidency Conclusions of the Tampere Summit (*ante*, n 20).

been given to them. Criticism ought not to be directed at the courts if at times they have to adjudicate on issues which traditionally would have been left to an elected legislature or administration, even if on occasion the courts override the will of a legislature. That is an unavoidable possibility. It also, I think, has to be recognised that, over time, the conservatism inherent in the judicial role under our traditional system of Parliamentary sovereignty is liable to be affected by the adoption of this new constitutional role with different cultural origins.

There are two more pertinent criticisms which may be made; and they are, I think, related. The first is that which I mentioned earlier in connection with the Northern Irish experience of constitutional restraints on a legislature: that broadly drafted provisions are open to different interpretations, the choice between which is essentially a matter of personal opinion. If that is correct, then a further argument is that judges should be selected in such a way that their personal opinions will reflect generally accepted views on social and moral questions. This argument has been advanced in Scotland since devolution<sup>24</sup>.

The second criticism proceeds from what I would regard as a more sophisticated premise: that adjudication on controversial legal questions is not simply a matter of personal opinion, insofar as it is rationally based on traditions and values which are collectively accepted as authoritative. Thus the jurisprudence of Ronald Dworkin, whom I mentioned earlier, bases decision-making under the United States Constitution on general principles which can be identified in the case-law, and developed, as society develops, as a type of collective wisdom. The criticism made of the European Convention, on the other hand, is that although the European nations and their legal systems have cultural and historical connections, they are far from forming a political, social or cultural unity. In these circumstances, the idea of common traditions and values is said to be a fantasy.

I propose to consider these criticisms in the light of the Scottish courts' experience of the Convention since May 1999, and my own personal experiences both in Scotland and in Strasbourg. It may be helpful if I begin by summarising what the Scottish courts' experience has been.

As far as I am aware, there has been only one case in which legislation passed by the Scottish Parliament has been challenged as being incompatible with the European Convention. The challenge, which concerned legislation dealing with the detention in the State Hospital of persons with a personality disorder, was unsuccessful. There has been only one other civil case, as far as I am aware, in which a devolution issue has been raised. In that case the independence of a QC sitting as a temporary judge was challenged unsuccessfully<sup>25</sup>.

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<sup>24</sup> Eg Lord McCluskey *The Herald*, 27 December 1999. Lord McCluskey's doubts about the Convention are not new: see his Reith Lectures, *Law, Justice and Democracy* (1987).

<sup>25</sup> *Clancy v Laird*, 2000 SLT 546. *Anderson v The Scottish Ministers* 16 June 2000, Court of Session, unreported. Decisions appear at [www.scotcourts.gov.uk](http://www.scotcourts.gov.uk).

The criminal courts, on the other hand, have had to deal with a great many cases in which devolution issues have been raised<sup>26</sup>. The principal issues raised relating to the Convention can be summarised as follows:

1. Whether a criminal trial can take place before a temporary sheriff, the point being whether the temporary sheriff possesses sufficient independence to comply with Article 6(1)<sup>27</sup>.
2. Whether a criminal trial can take place compatibly with Article 6(1) when the legal aid available to the defence is said to be inadequate<sup>28</sup>.
3. Whether there has been excessive delay in bringing cases to trial, contrary to Article 6(1)<sup>29</sup>.
4. Whether the Crown can use in evidence a statement which the accused was required to provide to the police under Section 172 of the Road Traffic Act.<sup>30</sup>
5. Whether the Crown can, consistently with Article 6(1), lead evidence of a police interview with a suspect<sup>31</sup>, or of an identification parade<sup>32</sup>, the suspect not having had access to a solicitor during the interview or identification parade.
6. Whether pre-trial publicity has prevented the holding of a trial which would be compatible with Article 6.<sup>33</sup>
7. Whether hearsay evidence can be admitted.<sup>34</sup>

There have also been cases concerning the impartiality of a judge or a jury;<sup>35</sup> the refusal of bail;<sup>36</sup> contempt of court<sup>37</sup>, the specification of criminal charges<sup>38</sup>, a visit by a jury to the locus of an offence<sup>39</sup>, the disclosure of a prior conviction during the course of a trial<sup>40</sup>, and the consequences of a procedural irregularity during the course of appeal proceedings<sup>41</sup>.

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<sup>26</sup> There are said to have been approximately 800 as at the date of writing. The same issues have however been raised repeatedly in different cases, until the point at issue has been determined by the Court of Criminal Appeal.

<sup>27</sup> *Starrs v Ruxton*, 1999 SCCR 1052.

<sup>28</sup> *Buchanan v McLean*, 15 June 2000, High Court of Justiciary, unreported.

<sup>29</sup> *HMA v Little*, 1999 SCCR 625; *McNab v HMA*, 1999 SCCR 930; *McLean v HMA*, 2000 SCCR 112; *Docherty v HMA*, 14 January 2000, unreported; *Robb v HMA*, 2000 SCCR 354; *Crummock (Scotland) Ltd v HMA*, 2000 SLT 677.

<sup>30</sup> *Brown v Stott*, 2000 SLT 379.

<sup>31</sup> *HMA v Robb*, 1999 SCCR 971; *Paton v Ritchie*, 2000 SCCR 151.

<sup>32</sup> *HMA v Campbell*, 1999 SCCR 980.

<sup>33</sup> *Montgomery v HMA (No 2)*, 16 November 1999, unreported.

<sup>34</sup> *McKenna v HMA*, 2000 SCCR 159; *HMA v Nulty*, 2000 SLT 528.

<sup>35</sup> *Hoekstra v HMA (No 2)*, 2000 SCCR 367; *Crummock (Scotland) Ltd. (ante n 29)*.

<sup>36</sup> *Burn, Petitioner*, 16 March 2000, unreported; also *Selfridge v Brown*, 2000 SLT 437.

<sup>37</sup> *HMA v Scottish Media Newspapers Ltd.*, 1999 SCCR 599.

<sup>38</sup> *McLean v HMA (ante n 33)*.

<sup>39</sup> *Hoekstra v HMA*, (No. 1), 2000 SCCR 263.

<sup>40</sup> *Andrew v HMA*, 2000 SLT 402.

<sup>41</sup> *Hoekstra (ante n 39)*.

A number of observations can be made about these cases. The first is that although very few challenges based on the Conventions have been successful, those that have succeeded have had far-reaching consequences. The decision that temporary sheriffs were not compatible with Article 6, in particular, placed strains on the justice system in Scotland, since they performed 25 per cent of the workload of the Sheriff Court. The implications of the decision concerning Section 172 of the Road Traffic Act – which empowers the police to require the registered keeper of a motor vehicle to provide information as to the identity of its driver on a given occasion – are also potentially far-reaching. The same can be said of the decisions concerning the effect of delay in criminal proceedings, which have resulted in charges not proceeding solely because of delay, even though a fair trial remained possible.

The next observation I would make is that the courts are only gradually coming to appreciate the implications of the Convention as it has been incorporated by the devolution legislation; and the inter-relationship between that legislation and the Human Rights Act remains unclear. One particular problem is that compliance with the Convention is made by the devolution legislation into a question of *vires*. Undue delay in bringing a person to trial, for example, is not something which can be reflected in the sentence imposed, as the European Court of Justice has decided in a case concerned with Article 6<sup>42</sup>: it operates as a bar to further prosecution. That is in fact the only issue on which the devolution legislation seems to me to have so far produced a different result from our common law. Another problem concerns the scope of the *vires* provision, which affects “acts” of the Scottish Executive and of the Lord Advocate. The problem is not simply as to how one defines an “act”<sup>43</sup> – for example, whether it includes an omission – but whether one can, in effect, use the bar on acts which contravene the Convention to prevent a prosecution being conducted on the basis of domestic law – the law of evidence, for example, or the statutory basis of appointment of the judiciary – whenever the domestic law fails in some respect to meet Convention requirements<sup>44</sup>. A third problem is that the Strasbourg case-law is sometimes of limited assistance, not only because the Strasbourg cases may arise in a context which bears little resemblance to the context in which the point arises within our own system, but more fundamentally because the European Court of Human Rights always looks at the position after the national proceedings have been concluded, rather than considering during the course of national proceedings the consequences of a

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<sup>42</sup> Case C-185/95 *Baustahlgewebe v Commission*, 17 December 1998.

<sup>43</sup> *HMA v Scottish Media Newspapers Ltd* (ante. n 37); *HMA v Robb* (ante. n 31).

<sup>44</sup> The temporary sheriffs case illustrates the point: the court could not strike down the UK legislation under which temporary sheriffs were appointed, or even make a declaration of its incompatibility with the Convention; but it being conceded that the prosecution of accused persons before a temporary sheriff was an “act” of the Lord Advocate, that act could be held to be incompetent. The wide meaning which has been given to the term “act”, taken together with the wide scope of Article 6, also has the consequence that many issues of a familiar kind, such as common law pleas in bar of trial, may arguably be devolution issues, and therefore subject to a fairly elaborate procedure.

breach of human rights in domestic law<sup>45</sup>. Partly for that reason, assistance has also been sought in case-law from national courts applying similar concepts, such as the courts of the Republic of Ireland and Canada. The Scottish experience bears out an observation which Lord MacDermott made about the devolution cases in Northern Ireland:

“In this sphere adjudication has special reason to advance cautiously and from case to case”<sup>46</sup>.

The other observation I would make is that the incorporation of the Convention under the devolution legislation has been a spur to thought on the part of lawyers and judges about aspects of our criminal law – generally of statutory origin – which were previously taken for granted but which, on examination, proved not to reflect adequately values underpinning our legal system, such as the independence of the judiciary and the right not to incriminate oneself. In a sense, an innovation of international provenance has rejuvenated our own traditions.

Let me return now to the criticism that broadly drafted provisions, such as one finds in the European Convention, are open to widely differing interpretations, the choice between which is simply a matter of personal opinion. This criticism is not in my opinion borne out either by the Scottish experience or by my own experience in Strasbourg.

One of the principal tasks performed by judges is to interpret documents which give rise to legal rights and obligations. Such documents take many different forms – such as wills, contracts, Ministerial decisions, statutes and international treaties – but in each case the function of the court is to try to ascertain the meaning of the language which has been used. In relation to each type of document, there are legal rules as to how the court should go about its task of interpretation: for example, in relation to international treaties such as the European Convention, the general principles are set out in the Vienna Convention on the Law of Treaties. Essentially, in each case the rules require the court to interpret the document in the light of its context and purpose, and having regard to any established meaning which the language has been given by previous usage. I have already said something about the context and purpose of the Convention: it is an international treaty drawn up in the aftermath of the Second World War, and designed to maintain the values of a democratic society, such as pluralism, tolerance and broadmindedness, the rule of law, access to the courts, freedom of expression and freedom of political debate. Its drafting is much less detailed than one often finds in modern UK statutes: that in part reflects the fact that it is not a product of the Office of Parliamentary Counsel, but more importantly reflects the fact that the Convention attempts to lay down an enduring scheme, in terms which allow for interpretation to evolve as social conditions evolve – as it has evolved, for example, to reflect changing attitudes towards illegitimacy, homosexuality and corporal punishment. This is not a unique feature of the Convention. Even in domestic law, judges are used to interpreting wide language so as to give effect to the purpose of the language

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<sup>45</sup> See *eg Montgomery and Coulter v HMA* (*supra*, n 33); *McKenna v HMA* (*ante* n 34); *Paton v Ritchie* (*ante* n 31).

<sup>46</sup> “The Supreme Court of Northern Ireland – Two Unusual Jurisdictions” (1952-1954) II JSPTL 201, 209.

used. And as I mentioned earlier, judges are increasingly having to interpret other international instruments which are drafted as widely as the European Convention and similarly use the language of values: so as to decide, for example, what is meant by “persecution” in the Geneva Convention on Refugees. In relation to the European Convention also, judges are performing their task of finding the meaning of the language used and applying it to the facts of the case. If the language expresses a moral or political principle, then the judges have to give effect to that principle in accordance with their judgement of what the principle entails<sup>47</sup>; but that is a far cry from judges simply giving free rein to their own moral or political principles. It is also important to remember that the judge is not exploring virgin territory: there is a large body of case-law on the interpretation of the Convention, which can be supplemented by case-law on the interpretation of analogous provisions in national constitutions.

Let me give two illustrations. The question whether a trial before a temporary sheriff violated Article 6<sup>48</sup> turned on the interpretation of the words “an independent and impartial tribunal”, and in particular on whether those words included a tribunal whose independence and impartiality in decision-making were in practice respected by the Executive, or required a tribunal whose independence and impartiality were objectively guaranteed, for example through security of tenure. The court preferred the latter interpretation because it was supported by the case-law of the European Court of Human Rights. It was also supported by the case-law of the Supreme Court of Canada. In the cases of *T and V v The United Kingdom*<sup>49</sup> (more commonly known, after the child whose murder gave rise to the case, as the *Bulger* case), the European Court of Human Rights had to decide whether Article 6 permitted the Home Secretary, rather than a judicial body, to fix the minimum period of detention, or “tariff”, to be served by a person sentenced to be detained during Her Majesty’s pleasure. The critical words in Article 6 – “the determination of . . . any criminal charge” – had previously been interpreted as including the determination of sentence; and the question was whether the fixing of the tariff amounted to a sentencing function. The Court held that it did, since the tariff was imposed on convicted offenders for the purpose of punishment, and was therefore a sentence in all but name.

I would like finally to say a word about the more sophisticated criticism, that in giving effect to the moral or political principles expressed in a legal instrument, judges rely on a degree of consensus or shared tradition which is absent at a European level.

As I made clear at the outset of this lecture, I have no doubt that national judges belong to a shared tradition which has an important influence on the way they approach legal problems. Equally, national judges are likely to be influenced by the values of their society and to interpret legal provisions in the light of those values. What, then, of the contention that no common values can emerge from the states represented on the European Court of Human Rights, which form what have been described as a “disparate

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<sup>47</sup> *Cf Matadeen v Pointu* [1999] 1 AC 98, 108.

<sup>48</sup> *Ante* n 28

<sup>49</sup> 16 December 1999.

collection of states . . . some former police states”<sup>50</sup>. It is no doubt true that, for some states, the Convention reflects an aspiration: values which these states have espoused, rather than values which already are firmly embedded in prevailing attitudes and practice. What the judges in Strasbourg are aiming to do, however – and those from former police states with as much commitment, as far as my observation goes, as those from states where democracy has been longer established – is to interpret the Convention so as to give effect to the values expressed in that document. They do that in the light of generally prevailing standards, which may sometimes be those to which states have committed themselves, even if they are not yet fully reflected in internal practice. Where on the other hand there are no generally prevailing standards, the judges have taken care to avoid imposing a particular solution, and to respect cultural diversity.

The point can be illustrated by the *T and V* judgments. In relation to the age of criminal responsibility, almost all the judges came from states where the age was much higher than in England and Wales. If they had been asked for their personal opinion, they might well have considered that the age in England and Wales was too low. But that was not how the case was decided. The court asked itself whether the attribution of criminal responsibility to a child of ten constituted inhuman and degrading treatment within the meaning of Article 3. To answer that question, the court examined whether there was a prevailing standard amongst the member states, and held that there was not, given the degree of diversity which existed in practice, and the absence of any consensus in the international instruments which the states had accepted. In relation to trial procedures, on the other hand, the court was able to conclude that the procedures followed in England and Wales had not in that case ensured a fair trial. It might be said that the prevailing view on the court attached greater weight to the welfare and rehabilitation of child offenders, and lesser weight to the open administration of justice, than has been traditional in our domestic law. The court’s approach was however based on international standards, such as those contained in the UN Convention on the Rights of the Child, which the United Kingdom (like the other member states) has accepted at the international level, even if they have not yet been fully implemented at the domestic level and may not wholly reflect prevailing attitudes within our society.

If I can put the matter in a nutshell, the function of a judge in Strasbourg did not appear to me to be essentially different from the function of a domestic judge: the court was interpreting a text in accordance with established legal principles and then applying it to the facts as it found them to be. What was different, in the first place, was the constitutional importance of the judicial function: that, because the Government and Parliament accept that the Court’s judgments should be given effect in the United Kingdom (even if particular judgments may not always reflect the views of the Government or of Parliament), it followed that the Court was in practice exercising a function of greater constitutional weight than our domestic courts have done. For the reasons I have explained, however, it seems to me that that is also going to become, to an increasing extent, the role of the judiciary within our national legal system. What also was different was that the court was

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<sup>50</sup> Lord Hoffman, “Human Rights and the House of Lords” [1999] 62 MLR 159.

interpreting the relevant provisions not only in the light of the domestic traditions and values of the United Kingdom, but in the light of traditions and values prevailing at an international level. That too will, I think, increasingly be the task of national courts in the century that lies before us. It does not require us to jettison wholesale our own traditions: Scots law has not so far run into fundamental or widespread problems as a result of incorporating the Convention, and I would not expect the law of the other jurisdictions of the United Kingdom to fare differently.

At the same time, our traditions are likely to be influenced by a body of law made primarily by lawyers from outwith the common law tradition, and not only because of differences in terminology and in the drafting of judgments and other legal texts. Although the judges on an international court such as the European Court of Human Rights are distinguished lawyers used to studying legal problems arising in systems other than their own native systems, and have the assistance of a national judge, it nevertheless seems to me that, like any other judges, they are liable to approach a set of circumstances with a mental framework which reflects their legal background, and which can give rise to an educated expectation as to what constitutes an appropriate outcome. The difficulty which some British judges have had in understanding the *Osman* judgment of the European Court of Human Rights perhaps illustrates the point<sup>51</sup>.

To sum up, in conclusion: the public will have to understand that there has been a constitutional change, if it is to be accepted; and the courts will have to adopt an international breadth of vision, a preparedness to depart from tradition where necessary,<sup>52</sup> and self-confidence in their constitutional role, if they are to perform successfully their expanding function in a century of internationalism.

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<sup>51</sup> *Osman v The United Kingdom* (2000) 29 EHRR 245.

<sup>52</sup> *Cf Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, 631 h-j *per* Lord Steyn.