Congrès de l'Association des Juristes Franco-Britanniques
Glasgow, les 19 et 20 septembre 2003

"JUSTICE ON THE MOVE"

THE IMPACT OF HUMAN RIGHTS

Lord Eassie
Senator of the College of Justice
Chairman of the Scottish Law Commission

Human rights have of course become a topic of much interest in the United Kingdom in recent years and from a time when little material was to be found in this country regarding the European Convention of Human Rights one finds now a profusion of textbooks and periodicals. Much of that activity is no doubt prompted by the enactment by the United Kingdom Parliament in 1998 of the Human Rights Act, although there is also a wider interest in many parts of the world in bolstering the rule of law and the protection of fundamental freedoms for individuals.

Within what has become an extensive field my focus today is naturally limited. The title given to this Colloquium is "Justice on the Move" and its theme is the extent to which the French, English and Scottish legal systems are convergent. And it is in that context of movement and convergence that I have been assigned the task of speaking about the impact of human rights.

Assessing convergence may not always be straightforward. An air traffic controller presented on his screen with precise information respecting the heights and courses of

aircraft can – at least one hopes – decide whether the aircraft are on convergent courses. I have to confess that I am not able to approach this afternoon's exercise as an air traffic controller. My knowledge of the height and course followed by the French and English systems is inadequate. What I have to offer is rather a pilot's view, from the Scottish system, and even that view may be flawed by the occasional misreading of my instruments.

I do not suggest the analogy between aircraft and legal systems is a particularly good one. Legal systems are not single bodies like aircraft or ships pursuing some course through the air or on the sea. Legal systems naturally develop and adapt in different directions and in different areas of law. So, I suppose, there is scope for debate on what amounts to convergence rather in the way that economists may argue over whether two economies are convergent. It occurred to me that the recently published papers by Her Majesty's Treasury respecting the tests for the United Kingdom's joining the Euro might contain much discussion on the very notion of convergence. You will be disappointed, or more probably relieved, to hear that I have not pursued that avenue of enquiry.

Self-evidently, one way in which convergence between two legal systems may be brought about is when both recognise and apply the same or similar legislative text. Harmonisation under European Union law provides many such examples and there are many fields in which Community legal instruments have produced common rules in the different member states. To the extent that the United Kingdom and France are parties to the same international instrument dealing with human rights there is a self-evident degree of convergence in that they recognise the common standards set down by the instrument in question. Among those instruments primacy of place must of course be given to the

European Convention for the Protection of Human Rights and Fundamental Freedoms. Insofar as our respective legal systems all recognise and protect the rights and freedoms enshrined in the European Convention they self-evidently have shared values. However, beyond the simple sharing of the text of the Convention, lies the issue the consequences for the procedural and substantive law which flow from the adoption and application of the Convention. In other words, what movement has resulted?

To those of us in the United Kingdom our natural focus is on the legislation of 1998 and what has occurred since its implementation. However, in order to facilitate a comparative discussion I think it may be helpful to say something about the constitutional position of the Convention and its impact on our legal systems prior to the coming into force of the legislation passed in 1998.

In common with English constitutional law, Scotland has traditionally adopted a clear duallist approach to the status of international treaties or conventions which have not been expressly incorporated into the domestic law by a national legislative measure. As I understand it, by contrast, at least as respects a convention such as the Human Rights Convention, the French legal system followed a monist approach whereby the treaty, on mere ratification, becomes part of the corpus of the law directly applicable in national courts. So French courts applied the Convention following its ratification on 3 May 1974.

To illustrate the duallist view traditionally adopted from Scotland it may be helpful to quote from a judgment delivered in 1980 in an immigration case in which an immigrant sought to evoke ECHR, Article 8 (family life).[1] The judge said this:-

> "In my opinion the Convention cannot be regarded in any way as part of the municipal law of Scotland. I accept that the Convention sets forth a number of very important principles relating to human rights, but the provisions of the Convention have never entered into the law of Scotland. As I understand it, the law of Scotland is to be found partly in enactments by a body with legislative power and partly in the common law. A treaty or convention is not part of the law of Scotland unless and until Parliament has passed legislation giving effect to the treaty provisions.".

He went on to say:-

> "So far as Scotland is concerned, I am of the opinion that court is not entitled to have regard to the Convention either as an aid to construction or otherwise … a convention is irrelevant in legal proceedings unless its provision have been incorporated or given effect to in legislation.".

Although that judgment was given at first instance, it was subsequently approved in another case at appellate level in 1985.[2] It has to be said that subsequently judicial disquiet was expressed about the strictness of that approach. Thus in 1997, Lord Hope described the approach as being "outdated".[3] Accordingly, in much more recent years the courts in Scotland began to interpret and apply domestic law in a manner which best accorded with the Convention and the case law coming from the Commission and the Human Rights Court in Strasbourg.[4]

---

[1] *Kaur v Lord Advocate* 1980 SC 319.
[2] *Moore v Secretary of State* 1985 SLT 38.
[3] *T Petitioner* 1997 SLT 724.
[4] See for example *McLeod v HMA* 1995 SCCR 77 (disclosure of documents by the prosecution to the defence) plus *Milne Petnr* 1999 SLT 215 (withdrawal of legal aid).

However, although the courts therefore regarded themselves as obliged to exclude the ECHR as a source of law, or even, until latterly, as an aid to interpretation, it would be a mistake to think that prior to 1998 the Scottish legal system was isolated from the Convention. The United Kingdom had recognised the right of individual petition to the Human Rights Commission in Strasbourg in 1966. A number of petitions were presented to Strasbourg by people living in Scotland. Some were successful and resulted in consequent alterations to the law, effected by the legislature. Strasbourg successes led, for example, to changes in the prison rules and paved the way for the eventual abolition of corporal punishment in schools. Of perhaps greater interest for the theme of this Colloquium is the success in Strasbourg of Mr Maxwell and Mr Boner.[5] Boner had been convicted after trial of an armed robbery and Maxwell had similarly been convicted of a serious offence. Both appealed against conviction. Legal aid was initially granted for their appeal but successive counsel for each of the appellants concluded that there was no possible ground of appeal which could be argued. Legal aid was accordingly withdrawn and Mr Bonner and Mr Maxwell were left to present their own appeals which, perhaps not unsurprisingly, were refused. They were successful before the Strasbourg institutions in establishing a breach of Article 6(3)(c) of the Convention in respect that legal aid ought to have been continued. For without legal aid the two appellants were required to present their cases unrepresented whereas the prosecutor was represented by experienced counsel. The Government's response to this result was to reform the system of criminal appeals, which hitherto had been primarily an oral procedure. The new system required all criminal appeals to undergo a preliminary procedure, conducted wholly in written form, whereby leave to appeal might be granted or refused. By that means, since no oral hearing took place, unworthy appeals are eliminated without infringing the notion of equality of arms and without there being any requirement to provide legal aid for an oral hearing of an appeal without merit.

---

[5] *Maxwell v UK* (1994) 19 EHRR 97; *Boner v UK* (1994) 19 EHRR 246.

In summary therefore the position prior to the coming into force of the legislation passed in 1998 was that on a theoretical basis the Convention formed no part of our law; nevertheless the courts were increasingly prepared to have regard to the terms of the Convention in interpreting existing law; and in some instances the legislature had intervened to amend the law in order to bring it into line with the decisions in Strasbourg which had been critical of it.

It was against that background that the Government elected in 1997 pursued its policy of making most (but not all) of the rights provided for in the Convention and its protocol more directly enforceable in the courts of the constituent countries of the UK by enacting the Human Rights Act 1998. I will not discuss the detailed provisions of the Act, but for those unfamiliar with it I would outline its principal features. First, the Act makes it unlawful for a public authority to act in a way which is incompatible with any of the Convention rights, unless constrained to do so by a provision of primary legislation. Secondly, the Act requires that so far as it is possible to do so such legislation, whenever enacted, should be interpreted in a way compatible with the Convention rights. In other words the courts must strive and strain so far as possible to read legislation in a way compatible with the Convention. And thirdly, although not going so far as to enable the courts to strike down an act of the United Kingdom Parliament, the Human Rights Act gives to the Superior Courts a power to declare a legislative provision incompatible with a convention right. A declaration of incompatibility does not however have any immediate consequences. Essentially it enables the Government, if it chooses to amend the offending legislation, to do so by a special, accelerated parliamentary procedure.

For Scotland, the year 1998 saw further human rights legislative provisions in the Scotland Act 1998, which set up the Scottish Parliament and a devolved Scottish Executive government. The provisions of the Scotland Act came into force in May 1999, nearly a year and a half before the entry into force, in October 2000, of the Human Rights Act. The Scotland Act is important for human rights law in Scotland. Briefly, its importance arises in this way. In setting up the Scottish Parliament and the Scottish Executive it was necessary to define the limits on the powers and competencies of both. That was done in a number of ways, one of which was to include in the Scotland Act an express provision that neither the Scottish Parliament nor the Scottish Executive could competently perform any act incompatible with the ECHR. Thus, any statute of the Scottish Parliament which is not in conformity with the Convention is invalid – or, to use the words of the Scotland Act, "not law". Accordingly, whereas in the case of Westminster legislation the Human Rights Act stopped short of the creation of a true "état de droit", legislation passed by the Scottish Parliament may be declared not merely incompatible, but null. The creation of a judicial power to declare a measure passed by an elected legislature to be null is of course a novel constitutional development in the United Kingdom. It should however be acknowledged that the grounds upon which the courts may declare legislation passed by the Scottish Parliament to be invalid are not restricted to incompatibility with Convention rights. Such legislation may also be declared invalid on the basis that it infringes European Community law or transgresses the division of competencies between Edinburgh and Westminster. However, to date, the only challenges to Scottish legislation have been based on alleged human rights violations. The first challenge related to legislation providing for the continuing detention of those suffering from untreatable anti-social personality disorder. It was unsuccessful.[6] The other challenge, which is still before the courts, relates to a measure placing restrictions on the hunting of foxes and other animals with dogs.

---

[6] *A (a mental patient) v Scottish Ministers* 2002 SC (PC) 63.

Another aspect of the Scotland Act which should be noted is that section 57(2) provides that a member of the Scottish Executive has no power to make any subordinate legislation "*or do any other act*" incompatible with any Convention right. All criminal prosecutions in Scotland are conducted in the name of or under the authority of the Lord Advocate, who is included in membership of the Scottish Executive. Accordingly, the resulting position is that, subject to one qualification, the Lord Advocate, as prosecutor, cannot competently do any act contrary to the Convention. Thus it was that very shortly after the Act came into force in May 1999 human right issues began to be raised in criminal prosecutions. Indeed, I understand that by the time the Human Rights Act came into force, human rights issues – known as "devolution issues" – had been taken in over 1,200 prosecutions.

I should say something about "devolution issues". Where a question arises as to whether legislation passed by the Scottish Parliament is outwith its competence, or whether action taken by a member of the Executive, including the Lord Advocate, is outwith his power (by reason of the restrictions in section 57) the question is termed a "devolution issue" for which special procedures are laid down. Among other things, the ultimate appellate instance is the Judicial Committee of the Privy Council, and not the ordinary appellate court. Moreover, the fact that in Scotland a human rights point may also constitute a devolution issue can have practical consequences as illustrated by *R v Her Majesty's Advocate and the Advocate General for Scotland*. The case was concerned with the consequences of delay in instituting criminal proceedings amounting to a breach of the right of an accused, in terms of Article 6 of the Convention, to trial within a reasonable time. Put shortly, the question was whether the breach necessarily prevented the Lord Advocate from proceeding with the

prosecution or whether the breach might be remedied by other means, such as imposing a reduced sentence in the event of conviction. The majority of the members of the Committee of the Privy Council held that the flexibility of remedy which would have been available under the Human Rights Act did not apply under the Scotland Act. Since, under the Scotland Act, a breach deprived the Lord Advocate of the power or competence to proceed, the prosecution could not continue. By a contrast, in *Attorney General's Reference No 2 of 2001*,[7] the Court of Appeal in England held in similar circumstances that the Human Rights Act did not require discontinuance. The judgment of the Court of Appeal is currently under appeal to the House of Lords. It thus remains to see whether in this particular instance the inclusion of human rights provisions in the Scotland Act brings about divergence and not convergence.

Article 6 of the Convention is, unquestionably, the provision which has been most frequently invoked since May 1999. Many of the cases have concerned delay in the criminal process. While Scotland had, and has, relatively strict time limits once criminal proceedings have been instituted, prior to the entry into force of the Scotland Act delay between the crime becoming known to the police and the start of criminal proceedings could only bar the criminal proceedings if the delay satisfied the test of oppression. It was rarely possible for an accused to establish that the delay was such that bringing him to trial would be oppressive. Since the "reasonable time" guarantee contained within Article 6 does not involve the test of oppression, it is plain that the prosecuting authorities must now bring criminal proceedings with greater speed.

[7] [2001] 1 WLR 1869.

While the delay cases have, I think, been the most numerous, the other aspects of Article 6 have also been relevant to criminal proceedings in Scotland. The requirement for "an independent and impartial tribunal established by law" led the Scottish Executive to promulgate legislation in the Scottish Parliament to remove any involvement by the Executive in the decision whether, and if so when, a person convicted of murder serving a mandatory life sentence might be released on licence. The courts are now required to specify a minimum period for retribution and deterrence which must be served before the prisoner becomes eligible for consideration by the independent parole board. So in promulgating that legislation the Scottish Executive anticipated the later decision in England of the House of Lords in *R (Anderson) v Secretary of State for the Home Department*.

The requirement for an impartial and independent tribunal led to one early successful challenge to the prevailing state of affairs in the decision of the High Court of Justiciary in *Starrs v Ruxton*.[8] In order to understand this challenge it should be explained that the legislation relating to the provision of judicial resources in the sheriff courts enabled the Lord Advocate to recommend the appointment of sheriffs and in practice he appointed them. Among such categories was that of a "temporary sheriff". Such a temporary sheriff would usually be a lawyer in private practice who would give up some days from his normal work in order to act as a sheriff. A temporary sheriff had no real security of tenure and the Lord Advocate could procure his removal of his appointment at any time. Over the years, the use of temporary sheriffs proved increasingly attractive to those administering the sheriff court. By 1999 some 25% of the workload of the courts was being dealt with by temporary sheriffs. In early 1999 the High Court held that for various reasons, particularly the absence of security of tenure, a temporary sheriff did not satisfy the Convention

requirement of an independent and impartial tribunal. Overnight the employment of temporary sheriffs was suspended.

Attention to the need for impartiality – particularly the perception of impartiality and independence – arose again in a case in which a member of the appellate court, called upon to decide arguments advanced under reference to the Convention, had shortly before issuing his judgment published an article in the popular press in which he had expressed hostility to the Convention, in language regarded as intemperate. The decision required to be quashed.

Such cases have, I think, led to a generally greater consciousness of the need for decisions which are in their essence judicial decisions to be taken by judges and of the need for judicial processes to be seen to be independent and impartial. Many of the challenges have been unsuccessful. I leave aside those which turn on their particular facts and mention simply three unsuccessful challenges to what might loosely be described as "the system". First, a challenge to civil jury trials as a mode of determining claims for damages for personal injury was rejected.[9] Secondly, our system of district courts, in which very minor offences are tried by a lay justice or justices advised by a legally qualified clerk, also came under scrutiny and – in the Privy Council – passed muster. Lastly, but importantly, the test of impartiality has not been applied to decisions taken by administrative bodies, such as decisions on applications for planning permission. The leading case is of course *Alconbury*[10]

---

[8] 2000 JC 208.
[9] *Heasman v J M Taylor & Partners* 2002 SC 326.
[10] *R v Secretary of State for Environment, Transport and Regions, ex parte Alconbury* [2001] 2 WLR 1389.

to which I would merely add a reference, in Scotland, to the subsequent decision in *County Properties Ltd v Scottish Ministers*.[11]

The right to a fair trial, which is enshrined in Article 6, has also been invoked in order to question the fairness of a variety of features of Scottish criminal procedure and the law of evidence. Most of those challenges have been unsuccessful and accordingly I would propose simply to mention a few instances or examples.

First, self incrimination. There is a legal requirement on the registered keeper of a motor vehicle to identify the person who was driving the vehicle at the time of a suspected offence. Failure to satisfy that requirement is punishable by a fine. In *Brown v Stott*[12] the facts were that police who had been called out to a supermarket at 0300 hours in response to an allegation by the staff that Mrs Brown, who was smelling strongly of alcohol, had stolen a bottle of gin made use of that power to obtain from Mrs Brown an admission that she was the driver of a car parked in the car park. Objection was subsequently taken by her lawyer to the use of that confession as evidence in a prosecution of Mrs Brown on a charge of driving with an excess of alcohol, the objection being based on Article 6, as interpreted by the ECHR in cases such as *Saunders v UK*[13] and *Funke v France*.[14] Success for Mrs Brown before the High Court of Justiciary was reversed in the Privy Council. The decision remains controversial, at least in certain sectors of the legal profession.

---

[11] 2001 SLT 1125. Cf *Tehrani v UK Central Council for Nursing etc* 2001 SLT 879.
[12] *Brown v Stott* 2001 SC (PC) 43.
[13] (1996) EHHR 313.
[14] 1993 16 EHHR 297.

Secondly as regards the presumption of innocence, statutory provisions placing the onus of establishing a particular defence – for example that the accused did not know the illegal drug in his possession was an illegal drug – on the accused have survived challenge.[15] Similarly, legislation relating to the confiscation of assets derived from drug dealing which creates certain rebuttable presumptions in favour of the Crown has been challenged, but unsuccessfully.[16] Other areas of interest have included the legitimacy of the practice of interviewing a suspect or the conduct of an identification parade in the absence of a solicitor and the use of hearsay evidence.[17]

One could of course mention other fair trial points which have been argued but I should now like to move from Article 6 to a completely different matter, namely the grounds for judicial review of administrative action. Traditionally, in both England and Scotland, these were encapsulated in Lord Diplock's well known classification in the *CCSU* case[18] namely illegality, procedural impropriety and irrationality. The last, irrationality, is commonly known as "Wednesbury unreasonableness" in view of its recognition by Green M R in *Associated Provincial Picturehouses v Wednesbury Corporation*.[19] Lord Diplock went on to describe Wednesbury unreasonableness thus:-

> "It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.".

[15] *R v Lambert*.
[16] *HMA v McIntosh* 2001 SC (PC) 89.
[17] *HMA v Beggs* (No 3) 2002 SLT 153.
[18] 1985 AC 474, 410.
[19] 1948 1 KB 223.

Lord Diplock's description is perhaps more vivid than the language used by the Master of the Rolls in *Wednesbury* but one can readily appreciate the limitation on the court's ability to enter into the merits of an administrative decision.

As you are no doubt aware, many of the rights protected by the Convention are qualified rights, in the sense that an interference with or restriction upon the right may be justified, in a wider public interest, provided that the restriction or interference is proportionate. The precise phraseology varies from one article of the Convention to another, but one will find the indication of the restriction's being necessary in a democratic society for the purposes of some public interest. The test is commonly and conveniently referred to as the proportionality test. The adoption of different tests for challenging administrative action, particularly the test of proportionality, was, and is perhaps still, seen as something relatively novel on this side of the Channel and as bringing us in closer alignment with Continental administrative law (though the extent to which the proportionality test is found in French administrative law is, I believe, debatable).

Lord Diplock, in 1985, contemplated at least the possibility of a test of proportionality developing as part of English law but in 1991, in *R v The Home Secretary ex parte Brind*[20] the House of Lords, particularly Lord Lowry, observed there was no authority for the existence of proportionality in English law and the opinion was expressed that contrary to the long-established approach of English law, a proportionality test must involve a review of the merits of the decision under review.

There has been a good deal of discussion as to what is involved in a proportionality test. It is sometimes said that application of a proportionality test requires or involves a "more intense" degree of judicial review or control. But in my view if one is to talk of intensity of judicial review, the extent of the margin of discretion or appreciation recognised in the decision-taker is probably of more importance. I think there is a growing belief that in practice there may often not be much difference between the two tests. In 1998 Lord Slynn observed,[21] albeit in the context of EEC law, that in *Brind* the House of Lords treated *Wednesbury* unreasonableness and proportionality as being different. He went on to say that though in some ways the concepts were different, the distinction between the two tests in practice is in any event much less than was sometimes suggested. The cautious way in which the European Court of Justice usually applied the test of proportionality, recognising the importance of the national authority's margin of appreciation, might mean that whichever test were adopted the result is the same. His Lordship expressed similar sentiments in *Alconbury*, adding that trying to keep the *Wednesbury* principle and proportionality in separate compartments seemed to him to be unnecessary and confusing. My own contribution by way of judicial dictum is to be found in an immigration case in which, as a recently appointed judge, I said in 1998 that there was a degree of overlap between proportionality and *Wednesbury* reasonableness particularly in a field such as immigration control and respect for family life. I went on to say that in judging whether a decision were reasonable in the sense of being outwith the range open to a reasonable decision, the human rights context was important and the more substantial the interference with human rights the more would be required by way of justification before a court might be satisfied that the decision was reasonable. The debate will no doubt continue, but

---

[20] [1991] 1 AC 696.
[21] *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* [1999] 2 Appeal Cases 418.

perhaps the effect of incorporating the Convention into national law on judicial review has not been as radical as some people may have expected.

Finally – on a perhaps somewhat disconnected note – may I briefly mention one case[22] in the field of civil law and procedure in which a Scottish court has been prompted by a human rights argument to adopt what it saw as a more "European" approach. The action concerned the right of a party pursuing a claim for debt to take provisional measures, consisting of a prohibition *pendente lite* on the defending party from disposing of his immoveable property. In Scotland that power to impose a prohibition is granted automatically without any prior hearing but subject to the ability of the person affected by it to ask for the provisional measure to be recalled on the ground that it is "nimious and oppressive". The judge, reviewed practice in various countries of Continental Europe noting in particular the features of and conditions of a *saisie immobilière* in France. He held that the grant of the inhibition without prior safeguards, including an oral hearing, was contrary to ECHR Protocol 1, Article 1 and was, indeed, "disproportionate".

And with that reference to the invocation of French law in Scotland I conclude this review of the impact of the Convention in Scotland. I think there is little doubt that in both Scotland and England the direct incorporation of the European Convention had led to what is commonly described as a "change of culture". The incorporation of the Convention into domestic law naturally provides many potential new pegs upon which litigants may hang an argument. Some may decry this but it is inevitable that an express conferral of new rights

[22] *Karl Construction Ltd v Parkside Properties Ltd* 2002 SC 270.

in the domestic system will be taken up and tested by the legal profession. They are of course right to do so in the perceived advancement of their interests of their client.

But although the Convention has provided new bases for argument and those bases are not infrequently used, my impression is that looking to the substantive changes which have resulted, there is little dramatic alteration of the landscape of the Scottish legal system. I mentioned earlier the statistic that in the interval between the entry into force of the Scotland Act and the Human Rights Act over 1,200 devolution issues were taken in prosecutions in Scotland. I should complete those statistics. Only 30 were decided adversely to the Crown. Of those 30, the bulk related to delay. And during the period of those 1,200 devolution issues, the number of prosecutions initiated was over 190,000. To exclaim *montes parturient* would be going too far. But the changes flowing from the ECHR in national law have been subtle rather than radical.

As to convergence, overall beyond the fact that we all now have the Convention directly applied it does not appear that any significant convergence has been brought about by reason of the Convention. I would, in conclusion, suggest that membership of the European Union had produced vastly more alignment, with common provision now existing in very many areas including, for example, employment, trademarks, jurisdiction in civil and commercial matters, in divorce and in insolvency, and even interest on late payment of commercial debt. And the EC Commission has suggested proposals for greater coherence in contract law.

The Hon Lord Eassie

September 2003