

Devolution in Scotland

- Legal coherence in a regionalised Europe

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Abbreviations

ECHR – The European Convention on Human Rights
Charter - Charter of Fundamental Rights of the European Union
Community - The European Community
Convention - The European Convention on Human Rights
Whitehall - The British Government
Holyrood - the Scottish Parliament
Strasbourg - The European Court of Human Rights
Luxembourg - The European Court of Justice
Westminster - The British Parliament
EC - The European Community
EU - The European Union
Executive - The Scottish Executive
MP - Member of Parliament in Westminster
MSP - Member of the Scottish Parliament, Holyrood.
ECJ - European Court of Justice in Luxembourg
SGC - Scottish Grand Committee in Westminster.

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1. Introduction

Most constitutions were drafted after years of struggle and most often as a way to safeguard an individual's rights against despotism, most often exercised by a king. Usually the constitution contained a bill of rights, which would set out these rights and control the power of the government.

But if a constitution would be drafted today, how would it be done? Scotland has since 1709 been a part of the United Kingdom, and was faced with this task after the devolution settlement was launched. A new constitution would be drafted in the light not only of UK law but also in accordance with the rights enshrined in the European Convention of Human Rights and the law and regulations made by the European Union. A framework, which could cope with the changes occurring in Europe, had to be set out and lines had to be drawn controlling the *vires* of the various legislating institutions. It is not only the king and the people anymore.

Via the devolution settlement Scotland was to be given the power to control a large part of its affairs. In many cases this will be done in close co-operation with the government in London, which often has the power to veto legislation and decisions emanating from Edinburgh.

This paper focuses on how rights can be enforced in Scotland. Scotland joins a small club of countries, which have taken the first step towards independence. It is therefore interesting to see how a legal system can operate when it has so many different parameters to consider. In this context it of particular interest too see how the courts apply the newly enacted legislation together with UK law so that the interpretation becomes coherent.

1.1. Devolution

The Scots have always regarded Scotland as a nation of its own, with its own culture and identity. They had for a long time worked towards more independence from London and after years of preparatory work the devolution¹ settlement was finally launched. In the summer of 1999 the Scottish parliament in Edinburgh was inaugurated which was the most visible aspect of the devolution process.

The main goal of the devolution settlement was to give Scotland a certain amount of independence from the government in London and to incorporate the European Convention on Human Rights² in to the domestic Scottish law before it was done in the rest of the UK. This entailed a vast array of problems which had to be solved. First of all the scope of the devolution had to be set out in a practical way to decide which government should have the jurisdiction in what areas. The UK government had to remain in control in the most important areas according to Westminster traditions and due to practical aspects of

¹ Devolution means the surrender of powers to local authorities by a central government.

² Also referred to as the ECHR or the Convention.

government. The line separating the jurisdiction between Westminster and Holyrood had to be clear to enable the devolution to work. Practitioners had to be able to know which laws to apply. This would be set out in the Scotland act, which is the main legal document for the devolution settlement.

The Scotland Act does not only incorporate the ECHR but it also makes a direct reference to EC law and other international agreements, which provides for individual's rights. The idea was to enable an individual to claim his basic rights at a local level, i.e. in a national Scottish court.

The Scotland act comported that an individual could for the first time claim that his rights had been breached by the government based on the ECHR, the rights emanating from the EU and other international human rights instruments. This would also entail that the Scots could argue their cases before a national court instead of taking the case to Luxembourg or Strasbourg.

One major difficulty was whether this development would be compatible with the present UK legislation. Problems were foreseen to arise concerning if the matter was devolved or not, i.e. if the case was under UK or Scottish jurisdiction. Therefore the Scotland act had to be constructed in way that it could deal with difficulties, which could arise during the initial stages of devolution.

The devolution settlement had to be compatible with Westminster traditions as well, such as the supremacy of Parliament, the relationship to the EU and the question whether Scotland could become independent at all relating to the Act of Union from 1707 between Scotland and England.

One very important aspect was how the new Scottish Parliament and the Scots would be able to take part in the legislation process in the UK and in the EU. This question works both ways; should Scottish representatives in Whitehall be able to take part in the legislation process for England when the English MPs cannot take part in Scotland?

This paper aims to explain how the devolution process works in relation to the above-mentioned problems. The analysis starts out by explaining the background to the devolution settlement and how the practical and jurisdictional issues between Whitehall and Holyrood are solved.

Since the EC law and the ECHR directly affect the Scottish law, the analysis then moves to an international level where the two legal institutions are examined and how this relationship affects Scotland. When the Convention and Community law directly affects the national Scottish law, it is necessary to look at their relationship and how they affect each other. This relation and the evolving case law affect the legal process in Scotland since the EC law comports different solutions than the convention.

Finally, the paper examines the case law from the Scottish courts handling devolution issues and what the future might entail concerning inter alia the future changes in EC law dealing with basic rights.

2. Historical background

Great Britain is formed by England, Wales and Scotland, all with their own history and culture. Moreover, the United Kingdom contains England, Wales, Scotland and Northern Ireland. The British Isles consists of the United Kingdom and Ireland. Ireland is of course a separate country since 1921 but it still enjoys certain rights in the UK. Its nationals may *inter alia* vote and join the British army.³

Furthermore there are the Channel Islands, which enjoy a quite independent position, with their own tax-laws, and the Crown colony Gibraltar. Moreover, the Commonwealth with its 49 members of which 17 have the Queen as their head of State, also play an important role for the United Kingdom. In this context it is easy to see the difficulties facing any attempt to change the constitution of Great Britain.

In 1292 Edward I, King of England, conquered Scotland and brought the two countries under one ruler. The Scots liberated themselves after a few years of war, and realised that they needed an allied against their powerful neighbour to the south. Thus, Scotland and France, England's sworn enemy, formed the "Auld Alliance" which lasted for more than 200 years.⁴

The first step towards some kind of unity between the two rivals Scotland and England was taken in 1603 when the Crowns were United. But even though both countries had the same royalty the conflicts remained.

2.1. The Union 1707

The next step towards a closer tie between Scotland and England was taken in 1707 when the parliaments were united. All Scottish matters were hence decided in Whitehall. The Scots were not satisfied with this arrangement and wanted to handle their own business on a local level. The general impression was that no one in Whitehall really cared much about Scotland. Further the Scots were ensured a minimum number of seats in the British Parliament and kept control over their universities, the church and most parts of the legal system.

In 1885, a secretaryship for Scotland and the "Scottish Office" was established with responsibilities for education, health, poor law, fisheries, local government, police, prisons, roads and public work.⁵

³ Bratt, Christian, Thatcher och det nya facket, p 93.

⁴ Zweigert, K, Kötz, H, An introduction to comparative law, p 202.

⁵ Scotland's Parliament, p 160.

This was the first step towards Scottish devolution but maybe more importantly, it was a way to ease the tension between Scottish nationalists and the government in London. The idea was to give some power to the Scots, which would hopefully keep them satisfied. Under the following years more power was transferred to Edinburgh and the Secretary of Scotland became a full Secretary of State in 1926 with his own office and more influence.

The Scottish national party (SNP), struggling for an independent Scotland, became increasingly popular after the war and won a seat in Parliament in the Motherwell by-election 1945. This was only the first victory for SNP and it would soon be followed by others. It also signalled to Whitehall that the Scots wanted more control over their country. But even though more power was transferred to Scotland, the idea of a Scottish regional parliament had already started to grow and gained increasingly more support amongst the Scots.

Finally, on March 12 1974, the Queen gave a speech where she stated that discussions and negotiations concerning devolution for Scotland and Wales would be initiated.

3. A Brief Guide to Scots Law

To understand the devolution settlement one must remember that there are several important differences between the Scottish and the English legal system. These differences still remain. The union of 1707 did not fully integrate the two legal systems.

The Scottish civil law is based on more generalised rights and duties than the English. Scots law argues deductively from principles and still holds the distinction between legal process and substantive law. The influence of English law is however significant and although an English decision is not binding for a Scottish court it is persuasive especially if the decision interprets a United Kingdom Statute.

Scots law, as such, does not appear until the 13th century even though many of its components can be traced to an earlier date. Scots lawyers studied in Europe due to the lack of universities in Scotland and were taught mostly Roman law. The influence from England at this time was remote due to the tense relation between the two countries who were in a constant state of conflict. Instead the French influence was stronger, due to the “Auld Alliance”, which meant that the Scottish law evolved in a different way.

The structure of the judiciary began to take form in the 16th century. The faculty of advocates evolved and started their work at the courts.⁶

In the late 17th century, Lord Stair, Lord president of the Court of Session and the first so called “institutional writer” published his first work “The institutions of the law of

⁶ The advocates still cherish the old traditions formed over the years. At the High Court in Edinburgh, the advocates still walk up and down the big hall briefing their clients. The procedure has the appearance of a ballroom dance but the real purpose is to let their private conversation drown in the sound of their footsteps on the parquet floor.

Scotland (1681)” where he set out the whole of Scots law as a rational, comprehensive and practical set of rules.⁷

In 1707 the Parliaments of England and Scotland were united and gradually English law began to replace Roman law as the main external source of influence since the majority of Scottish students now studied in England. The House of Lords became the final court of appeal for civil cases but the Scots kept their system for criminal cases.

In the nineteenth century the English influence became even stronger. Especially through enactments from the British Parliament, the areas of private law, commercial law, economic law, administrative law and social law apply in Scotland and in England identically or alike.⁸ But the Scottish legal system still applies the works by the institutional writers especially Stair, Mackenzie, Erskine, and Bell.

3.1. The Scottish court system

Civil cases

Sheriff Courts

Court of Session
Outer House

Court of Session
Inner House

House of Lords

Criminal Cases

Sheriff Courts

High Court of
Judiciary

High Court of
Judiciary
- Appeals

European Court
of Human rights

European Court
of Justice

Scottish civil cases are usually first tried before the Sheriff Courts in one of the six different sheriffdoms. The Court of Session in Edinburgh is the supreme civil court in

⁷ Zweigert, p 202.

⁸ Zweigert, p 203.

Scotland and functions as a court of first instance and a court of appeal. An appeal from the court in civil cases lies to the House of Lords in London.

The Court is divided into the Outer House and the Inner House. The Outer House consists of 19 Lords in ordinary sitting alone or in certain cases with a civil jury. They try cases at first instance on a wide range of civil matters, including tort and contract, commercial cases and judicial review.⁹ The Inner House is mainly an appeals court, though it has a small range of first instance cases. It is divided into the First and the Second Divisions, which are of equal authority and presided over by the principal judge, the Lord President, and the second in rank, the Lord Justice Clerk, respectively.

The Sheriff Courts also handle most criminal cases except murder, rape, treason and piracy. These cases are directly under the jurisdiction of the High Court of Judiciary in Edinburgh, which also functions as an appeals court. The High Court is the highest instance in Scotland handling criminal cases.¹⁰

Further the European Court of Justice in Luxembourg and the European Court of Human rights in Strasbourg are of significant importance, especially when it comes to providing case law and as the final appeals court in cases within their jurisdiction.

The Privy Council in London is also of importance since it is final arbitrator of devolution issues. The Privy Council normally deals with question of law within the Commonwealth but has since devolution increased its jurisdiction. The Council does not normally deal with any cases involving domestic UK law.

4. British Constitutional traditions

Before the discussion could start concerning the scope of devolution there were a number of constitutional hurdles which had to be overcome. The status of the Scotland Act had to be decided in the light of the constitutional traditions which had been formed over the years at Westminster.

4.1 The principle of sovereignty of Parliament

One of the key principles in the UK constitutional tradition is the principle of sovereignty of parliament.¹¹ The doctrine of parliamentary sovereignty means that an Act of Parliament can modify or repeal any previous Act without being in any way bound by its previous legislation. The British Parliament is legislative omnipotent, which means that no law made by it can be challenged. Further, the Parliament is never bound by a previous

⁹ www.scotcourts.gov.uk/session/session.

¹⁰ http://www.law.gla.ac.uk/scot_guide/COURTS.HTML.

¹¹ Also called parliamentary supremacy or supremacy of Parliament.

decision. This is probably the main factor why Britain has no written constitution and no charter of rights.¹²

4.2. The Union Act 1707

Ever since the Union between Scotland and England was formed and the state of Great Britain came to being the 1 May 1707 there has been a debate concerning the constitutional value of the Union Act.¹³ The act set out the conditions for the Union and *inter alia* how the two sovereign countries would be represented in the new Parliament. The discussion concerned whether the Act had any special constitutional value or if it was merely a law like any other.

If the Union Act was entrenched in any way, this would contravene the principle of sovereignty of parliament, which has been one of the cornerstones in the history of the Parliament. It would also mean that the changes made under the devolution settlement would be outside the competence of the UK parliament since the act stated that it should apply for all time. Lord Grey who had challenged the competence of the parliament in relation to the Union act argued that the Parliament was bound by the act and could not change it. This would in the long run mean that Britain had a written entrenched constitution and that no Scottish Parliament could be formed.

The judicial committee of the House of Lords tried the case and found that the Union Act was not entrenched in any way. The Union act had *inter alia* no mechanism for amending the paragraphs, which normally is a significant feature of a constitution. Further, the Union Act had also been fundamentally disregarded over the years. Thus the ruling states that Britain has no written constitution and that the Parliament still is sovereign.

4.3. The European Communities Act

One constitutional issue which had to be solved was the question whether the UK Parliament could give away some of its power to Scotland since this would contravene the principle of sovereignty of Parliament. This issue was however not a new one. When Britain entered the European Union the doctrine of Parliamentary Sovereignty had to be modified because under Community law all national laws are subject to Community rules. The answer given to this theoretical problem was that, in theory, Britain could repeal the act that set out the adherence to the Community¹⁴, and thus leave the Union.

When Britain adheres to an ECJ decision she does so, simply because she has agreed to do so on a voluntary basis. In the case *Macarthy's Ltd v. Smith*, Lord Denning stated that if the case should occur when parliament deliberately passes an act with the intent of repudiating the treaty or any provision in it the court would have the duty to follow it.¹⁵

¹² Nergelius, Joakim, Konstitutionellt rättighetsskydd, svensk rätt i ett komparativt perspektiv, p 342.

¹³ Monroe, Colin R, The Hume papers on public policy 1997, The Union of 1707 and the British Constitution, p 87.

¹⁴ 1972 European Communities Act

¹⁵ *Macarthy's Ltd v. Smith*, 1979 All E.R 325.

However, in the case *Factortame* the House of Lords followed an ECJ decision, which overruled a British act.¹⁶ The ruling clarified to some extent the UK position towards Community law and strengthened the Community's legislation in Britain.

It is interesting to see how the Parliament dealt with the supremacy of parliament principle, especially when it comes to the fact that EC law will override national law. The answer was however simple. The UK concedes on a voluntary basis.¹⁷

4.4. The doctrine of parliamentary sovereignty today

The Doctrine is disputed and considered to be slightly obsolete.¹⁸ The Doctrine entails that there is no UK legislation which is technically entrenched and it would be possible to repeal the European Communities Act 1972 which took Britain into the European Community. However, this would in, practise, be very difficult. The same goes for the incorporation of the European Convention on Human rights and the devolution legislation. The European Court of Justice and the Human rights Court are becoming increasingly important and Devolution gives the domestic courts the possibility to scrutinise laws and actions by the Parliament and the Government. In Scotland it will become even more difficult for the UK Parliament to intervene since there has been a referendum and the Scottish Parliament has begun to legislate on its own. However, it must be borne in mind that the UK parliament has by no means devolved all its powers to any of the above mentioned.¹⁹

According to the legal reasoning the UK parliament is still in control, in line with the principle of parliamentary sovereignty. In reality Scotland has the real power based on the fact that it would be politically impossible for the UK Parliament to overrule a major Scottish act. However it is interesting to see how the legislature dealt with the principle of parliamentary sovereignty. The principle does not hinder the devolution process but it influences all legislation.

5. The Process of Devolution

There is an ever-present fear in England that the Union might be dissolved and that Scotland will become an independent country. A strategy to prevent this is to give Scotland as much power as it needs to function efficiently, but without granting it independence. It is prudent for the Government in London to stay ahead of the nationalists by giving them what they want instead of being forced into something worse. Many Scots believe that they will manage on their own and that they have no real benefits in being a part of the UK. In view of the growing importance of the EU, it is not as vital to be a part of the UK any

¹⁶ C-221/89 *Factortame*, p 3905.

¹⁷ It is interesting to compare this statement with the similar approach by the German court in the *solange* case, see further section 9.1.2.

¹⁸ Hazell, Robert, *The new Constitutional settlement, constitutional futures*, p 185.

¹⁹ Similar provisions have been made throughout Europe by inter alia Germany in the *Brunner* case (*solange*) as a political statement as a safeguard against the ECJ.

longer. Nato and WEU can give the necessary protection and the WTO and the EU provides the necessary trading partners. The need to belong to Britain is not as strong as it was.

5.1 The first referendum 1979

After a long and agitated debate the first devolution bill was passed through the House of Lords and a date was set for a referendum. However during the reading in the House of Commons the so called Cunningham rule was amended, which entailed that at least 40% of the persons entitled to vote must vote in favour for devolution. If not, the whole act would automatically be repealed.

The referendum was held 1 March. Of those who voted 51.6% voted "Yes" but they only consisted 32.9% of the total electorate. The Act was thus repealed since it did not meet the requirements of the Cunningham rule.

For some this was seen as a major setback for Scottish devolution but it was also a valuable lesson for those involved, an experience that would prove to be useful later on.

After the setback in the 1979 referendum things went back to "normal". The Scottish Office in Edinburgh handled most of the important issues for Scotland, but if one scratched the surface, the ideas of a Scottish Parliament were still there.

After the Tory years, with Margaret Thatcher and later on John Major, the urge for devolution amongst the Scots peaked. The conservative party has never been very strong in Scotland and after the Poll tax tests their support hit rock bottom. Labour presented a manifest for the upcoming election in July 1997, where they pledged to modernise British politics by decentralising the power and thus to form regional parliaments. After the election, which labours won, a White paper was presented which laid out the key elements for New Britain. Regional Parliaments would be created after referendums in Scotland and Wales. Britain would also incorporate the European convention on Human rights into UK law. The white Paper also contained several other proposals on how to modernise British government *inter alia* the removal of hereditary peers in the House of Lords.

5.2. Devolution throughout the United Kingdom

Devolution in other parts of Britain also played an important role. Wales would be given the opportunity to have an Assembly but with less power than the Scottish Parliament. The Welsh are more tied to England than Scotland is and they have not been as interested in devolution as the Scots have been. The different regions in England would be given more power and there would be a Mayor in London. An assembly would also be created in Northern Ireland with the idea that this also might help the peace process. The White Paper states the belief that the union will be strengthened by recognising the claims of Scotland, Wales and the different regions in England with strong identities of their own. Devolution

will thus not only safeguard the union but also enhance it. Some critics believe that parts of the regional devolution plans are just a way to cover and smoothen out the Scottish devolution. Especially the formation of somewhat artificial regions in England has been criticised.

5.3. The white paper 1997

Scotland would be given the most devolved power amongst the regions in the UK. The White Paper set out the necessary framework and showed the determination of the Government to proceed with the constitutional reform. The White Paper was based the Scottish Office's existing powers which would be used as the basis from which the devolution boundaries would be negotiated with Whitehall.

The White paper "Scotland's Parliament" was published on 24 July 1997, and set out all the key principles on how the new parliament would work and its relation to Whitehall. There would be a Scottish Parliament and a Scottish Executive with a First Minister. The responsibilities would be roughly the same as before devolution but now the Scots would have the power to legislate themselves without having to take a detour over London. It was very helpful for the devolution process that the Scottish Office already had some powers and the experience of dealing with governmental matters. The Office and the Secretary of state for Scotland, Mr Donald Dewar, represented the devolved Scotland and prepared it for the first election. After heated discussions between Whitehall and representatives from Scotland, the Scotland Act was finally drafted.

5.4. The second referendum 1997

The Scotland act was drafted surprisingly quickly based on negotiations, previous experiences, and, of course, the White Paper.²⁰ Voters in Scotland voted on the proposals in a referendum on 11 September 1997, only three months after the White Paper was published, and gave their opinion on the two questions whether there would be a Scottish Parliament and whether it would have tax-varying powers. 74% of the voters answered yes to the first question, and 63% answered yes to the second question. The Scotland act received Royal Assent on 19 November 1998 after being passed through Parliament.

6. The Scotland act

The Scotland act is the main document setting out the devolution process. The Act contains 6 parts which set out the establishment of the Scottish Parliament and its powers, the

²⁰ Many believe that the preparatory work leading to devolution could be drafted so quickly because the Scottish had kept the idea of devolution alive and thus were better prepared to handle the issues.

Scottish administration, financial provisions, the Tax-Varying power and finally a miscellaneous and a supplementary section. The Act covers a wide range of issues. The most important are the jurisdictional limits, the vires, of the Scottish Parliament, and the incorporation of the Convention.

The Scotland act lacks one feature which is usually significant for as constitutional document, it is not entrenched in any legal way. Thus it can be repealed as any other law by the UK parliament. However, the act enjoys a special status per se due to its content. To repeal the Act would be politically impossible without great public support. This construction is a result of the need to be compatible with the principle of parliamentary sovereignty.

6.1. The scope of devolution

Sections 28-36 are in some respects the heart of the Act. They set out the Parliament's legislative powers and thus what is devolved and what is reserved. The key principle is that there is a presumption that all matters, which are not reserved, shall be seen as devolved.. Schedule 5 of the Scotland Act sets out a list of those areas of government, which are reserved, based on the White Paper. Schedule 5 has two parts where the first sets out general reservations and the second sets out specific areas where the UK Parliament wants to keep the control.

One of the biggest problems that had to be solved was how to decide on which areas the new Parliament in Edinburgh would legislate, and which would remain in London. To make devolution work as smoothly as possible the White Paper expressly states that all matters not specifically reserved will be devolved.²¹ There is thus a presumption that all matters not covered in the Scotland Act as being reserved are within the competence of the Scottish Parliament.²² This was one of the lessons from the 1978 Act, which probably was too specific for its own good.

6.1.1 Reserved areas

Westminster retained powers²³

Abortion

Broadcasting policy

Civil service

Common markets for UK goods and services

Constitution

Electricity, coal, oil, gas, nuclear energy

Defence and national security

²¹ White paper, Shaping Scotland's Parliament. Sect. 2.4.

²² White Paper, p 35.

²³ www.news.bbc.co.uk/hi/english/special_report/1999/06/99/scottish_parliament_opening

Drug policy
Employment
Foreign policy and relations with Europe
Most aspects of transport safety and regulation
National lottery
Political parties and their registration and funding
Protection of borders
Social security
Stability of UK's fiscal, economic and monetary system

6.1.2 Devolved areas

The Scottish Parliament Powers, albeit not expressly stated in the act, are thus.

Agriculture, Fisheries and Forestry
Economic development
Education
Environment
Food standards
Health
Home affairs
Law-Courts, police, fire services
Local Government
Sport and the Arts
Transport
Training
Tourism
Research and statistics
Social work

The list of reserved matters is very general and gives room for interpretation. The general principle is clear but as the White Paper sets out, there is also a need for a mechanism for adjusting the list of reserved matters as appropriate and as the need arises. This wish is fulfilled in the act by stating that an order under this section would need to be approved by both houses of the UK Parliament and by the Scottish Parliament.²⁴ Furthermore the Scottish Parliament can debate any issue regardless if it is devolved or not.

The Act further specifies the powers which are reserved to the UK Parliament including the constitution of the United Kingdom.²⁵ This includes all matters dealing with the Union between Scotland and England, the Crown and the structure of the highest Courts of Appeal in Scotland.

²⁴ Scotland Act, Section 30.

²⁵ Scotland Act, part 1, Schedule 5.

The registration and funding of political parties is further a reserved matter, which again indicates that London wants to control the most fundamental issues. Foreign affairs, international relations with territories outside the UK thus including the European Union and other international institutions are reserved. The civil service of the State is also reserved.

6.2. Legislative competence

The two most important sections of the Scotland act stating the competence of the Scottish Parliament and the Executive are section 29 and section 57. They set out the vires of all legislation and the vires of the acts mad by a member of the Scottish Executive.

6.2.1. Section 29 of the Scotland Act

Section 29 of the Scotland Act sets out the legislative competence of the Parliament.²⁶ Any provisions relating to reserved matters are outside its competence, thus ultra vires, and is not considered as good law. The same applies to any provision which is incompatible with any Convention right or Community Law.

This section fulfils the commitment to incorporate the European convention on Human Rights into Scots Law via the Human rights Act and nullifies any law contravening that act. Any Scottish legislation contravening Community Law will also, in the same way, be nullified.

The UK government is responsible for the relations with the European Community being the actual member state. The Scottish Executive will however be able to play a role alongside the UK government in forming a British policy. Scotland will also have responsibility for observing and implementing Community obligations in so far as they relate to devolved matters.

6.2.2. Section 57 of the Scotland Act

All legislation passed by the Scottish parliament is in a UK context viewed as subordinate legislation. Section 57 states that a member of the Scottish Executive has no power to make any subordinate legislation, or to act, in a way which is incompatible with any of the Convention rights or with Community law.²⁷ This entails that any act of a member of the Scottish Executive is void if it contravenes the European Convention on Human Rights. This also applies to any breach of Community Law.

²⁶ See appendix.

²⁷ See appendix.

The Section has been criticised for being unclear relating to the definition of an “act” and whether it encompasses a failure to act. Arguments have been made that only positive breaches would be considered under the Scotland Act. This is however very unlikely and it is probably safe to say that Section 57(2) includes a failure to act.²⁸

Section 57 refers directly to the act made by a member of the Scottish Executive.²⁹ This statement also includes all personnel carrying out functions under the actual ministers department. This entails that e.g. all judges and prosecutors are bound by the Section since they are appointed by the Lord Advocate who is the Scottish minister of justice.

The consequences are thus harsh. It is therefore very important for the executive to scrutinise all its procedures and bills to make certain that they are compatible. This is however a very difficult task since the Convention now is part of the Scottish law which gives the Scottish courts the opportunity to build up a case law of its own which might differ from Strasbourg. The Scottish ECHR case Law might also evolve faster since it only deals with Scottish problems.

6.3. Deciding the scope of devolution

There are procedures for safeguarding that no laws passed by the Scottish Parliament are ultra vires. A member of the Executive responsible for the actual Bill must before introduction, state that it is compatible i.e. intra vires.³⁰ The same procedure applies to the Presiding Officer who must decide whether or not the bill is within the Parliaments legislative competence. The Presiding Officer has his own staff of legal advisers who will scrutinise the Bill.

At this stage of the introduction of a Bill there is a possibility during four weeks for The Advocate General, the Lord Advocate or the Attorney General to interfere if they consider the Bill to be ultra vires.³¹ It is then within their power to refer the question to the Judicial Committee which will rule on the question. The same time limits apply to intervention regarding national security, international obligations or defence.

6.3.1. The Judicial committee of the Privy Council

The Law Lords in the Judicial Committee of Privy Council in London sits as the final arbitrator deciding on the scope of the devolution settlement. If the two governments cannot amicably decide the boundaries of devolution the question will be solved by the

²⁸ Statement by Lord Coulsfield in the Case Paul Clancy v Robin Dempsey Caird, p 32 where he argues that that conclusion would frustrate the whole framework provided by the Scotland Act.

²⁹ Scotland Act, Section 44.

³⁰ Scotland Act, Section 31.

³¹ The Lord Advocate is the main Scottish law officer whereas the Advocate General is the UK legal representative in Scotland. The Attorney General is also a UK legal official but based in London.

court in London. The Privy Council may also hear a case concerning a devolution issue on appeal from the Scottish higher courts or from the House of Lords.³²

This entails that the Privy Council can rule on a criminal matter which involves a devolution issue. Prior to the Scotland act this was not possible since all criminal matters were purely of Scottish concern.

6.4. UK possibilities to intervene in the process of legislation in Scotland

Even though the Scottish Parliament and the Executive will have a considerable degree of autonomy, Scotland will remain an integral part of the United Kingdom. The White Paper sets out that the Executive shall keep in close touch with Departments of the UK government.³³ The principle is that most matters should be dealt with through officials of the Departments in question if it is not necessary to negotiate on a higher level.

The UK Government has the power to intervene in the devolved areas in certain cases primarily involving matters dealing with international obligations, defence or national security.³⁴ Furthermore it is clear that the Scottish Executive and the UK Government may from time to time take different views of the Scottish Parliament's legislative powers. As mentioned above, the primary principle is that these matters shall be resolved by officials in a constructive and amicable atmosphere.³⁵

6.4.2. UK overriding legislation

There are thus several ways for the UK government to interfere during the process of law making in Scotland to make sure that the Scottish Executive has acted within its competence. There is however always the possibility for the UK Parliament to interfere by legislating a law which overrules a Scottish Act. The Scotland Act states that the UK parliament's power to legislate for Scotland is unaffected by devolution.³⁶ This entails that there is a possibility that the two parliaments can legislate on the same matter. This leads to a theoretical "Ping-Pong" effect, where one Parliament could repeal the other Parliament's Act by an act of its own, and so on. The risk for this to happen is remote since the political price would be too high. This clause is a safeguard for the principle of the supremacy of Parliament but also a way for Whitehall to interfere if need be e.g. when implementing European directives. This section is also important for the UK, which can interfere in matters relating to other international relations or its defence or national security. Thus the UK parliament is in power but it gives away some of its power by its own free will while

³² www.privacy-council.org.uk/judicial-committee/2000/jurisdiction.htm.

³³ White paper, para 4.12-4.14.

³⁴ Scotland Act, Section 35-58.

³⁵ White paper, para 4.15.

³⁶ Scotland Act, Section 28(7)

reserving the possibility to act if need be. The similarity in the legal reasoning compared to the European communities act is evident.

There is a general reservation of European matters to the United Kingdom authorities with the consequent limitations that this might impose on devolved matters. The devolved institutions are required to act within the bounds of Community law and the legal consequences for not complying accordingly can be that the act will be *ultra vires*.

Whitehall also has the opportunity to legislate for Scotland when it concerns Community Law. The main rule is that Scotland should implement European legislation, such as directives, by itself but Whitehall has the possibility to interfere if The Scottish Executive has not done so in time.

6.5. Scottish representation in the UK Parliament

There are not only difficulties with deciding the scope of devolution but also with its implications at Westminster. There are still UK elections which entails that Scotland has its own constituencies and thus representation at UK Parliament. Since the Union Act was found not to be binding the former fixed minimum number of Scottish MPs was removed.³⁷ The Scots would instead be represented at Westminster by the direct outcome of the elections.

6.5.1. The West Lothian Question

The question has arisen whether the Scottish Members of Parliament should be entitled to legislate on English matters when the English MPs cannot legislate for Scotland. This issue is called the West Lothian question and is still a dilemma. If the Scottish MPs should decide only on pure Scottish matters it would probably just make things more difficult. Furthermore it would entail that there would be an incitement for giving the Scottish Parliament more powers. This would not enhance the Union. Today there are only two solutions to the problem, no representation at all “or in and out”. The latter solution would mean that Scottish MPs should deal only with Scottish reserved matters and leave the room when pure English matters are dealt with. However neither of these solutions are workable.³⁸ Another suggestion is to decrease the number of Scottish representatives at Westminster. The first step in this direction has already been taken by removing the fixed number of representatives in both Houses. Today there is a higher percentage of Scottish MPs in Westminster than there are English. This means that the minimum number of representatives once decided in the Act of Union from 1707 in reality is somewhat obsolete. Nevertheless this is a tricky question which will not be easily solved since similar questions will arise concerning Wales and Northern Ireland.

³⁷ Scotland Act, Section 86.

³⁸ Scotland's parliament, fundamentals for a new Scotland Act, p 108.

6.5.2 Scottish Grand Committee

On 29 February 1999, the first meeting of the Scottish Grand Committee (SGC) took place in London. The SGC gives the Scottish MPs the opportunity to discuss pure Scottish questions which are not devolved or which are of concern in Scotland. The committee has no power to make any parliamentary decisions but its creation makes it possible for the Scottish MPs to take a common approach in many issues. There is no similar body concerning only English matters.

The reason for creating the SGC was also that this would give the Scots a better possibility to affect legislation in the reserved areas. This would entail that the differences between what is devolved and what is not should not be so significant.

7. Scotland and the European Union

Scotland has an interesting position within the EU. A small country within one of the largest and most influential member states. Scotland has been bound by EC legislation since the UK joined the Community. Thus, the Scotland act, implementing EC law, did not change the validity of EC law in Scotland. The Scotland act did, however, put focus on the fact that Scotland has to adhere to community law.

7.1. The Doctrine of direct effect

The European Union plays a key role for all the European countries. The field of Community law is constantly growing and the legislation emanating from Brussels can strike out national legislation under the doctrine of direct effect.³⁹ This means that EC law will strike out both primary and secondary legislation in Scotland. This stance is also explicitly stated in the Scotland act which entails that no law or act made by Scottish officials may contravene Community legislation.⁴⁰ The impact of Community law in Scotland is thus significant and it is one of the most important aspects that have to be closely followed by the Scottish legislators. Community law has played an important role in Scotland since the UK joined the Union. Thus the changes would not be as great as the incorporation of the Convention.

One of the difficulties facing Scotland is how it will make its voice heard in Brussels.

7.2. How Scotland can affect EC legislation

³⁹ See the evolution starting with Van Gend C-26/62, and Costa ENEL C-6/64.

⁴⁰ Scotland act, section 29 and 57.

Whitehall wanted to keep a British uniform "line" in Brussels. This means that all issues concerning Community Law must pass via Whitehall. This has created a need to co-ordinate policy making at an intra-ministerial level to ensure that the United Kingdom line reflects the needs of the United Kingdom as a whole. Thus it is vital to maintain good relations between government officials at all levels so that problems arising underway easily and efficiently can be solved.

Since Devolution started a number of bodies and committees have been introduced to create an efficient and solid framework on how to co-operate and communicate. A memorandum of understanding and four concordats on, the handling of EU business, International relations; financial assistance to industry; and statistics were published simultaneously in Edinburgh, London and Cardiff on October 1 1999.⁴¹ The purpose was to cover areas of administration where it would be sound to have a common approach. They are not legally binding but there is a clear dicta that they will be observed by all parties.

The memorandum of understanding also provides for the establishment of a joint Ministerial Committee, a forum where the Ministers of the UK Government and the Devolved administrations can meet to consult each other. The JMC has no decision-making power but it is a clear expectation that its position in different matters will be supported. The JMC can discuss virtually any question, especially concerning the thin grey line dividing the devolved and the reserved areas. The idea is to have a body which can deal with all the issues which might cause tension and problems between the different devolved administration and Whitehall.

7.3. Scotland's accessibility to Brussels

Scotland is just one of several players in Brussels and, as a region in the UK, it makes its voice heard via the UK delegation. It becomes slightly difficult when the Scottish Parliament and the Executive has to implement and follow community law without the possibility to challenge the validity of the Community acts alone.⁴² The only way to do so is via the UK. This adds to the difficulty to access the European court of Justice in matters that are important for Scotland since all cases will first be scrutinised by Whitehall. This problem is however present in all countries in one way or another, the problem here is that this might support the Scottish nationalists and their opinion that Scottish matters are not as important to Whitehall as the English. Hence this would call for more devolution.

It is important to the regional level of government that it is able to protect its own interests and prerogatives against encroachment by the European authorities. Even if the United Kingdom position is specifically "Scotland friendly" there is no guarantee that the United Kingdom line will ultimately be adopted by the Council of Ministers. More often than not decisions taken at European level are compromises between the views of all the Member states and trade-offs are made routinely to protect a number of vital interests.

⁴¹ www.scottishsecretary.gov.uk/SAC_%20memorandum%202029.03htm

⁴² Under article 230 of the EC Treaty.

Moreover the construction is rather fragile. Almost every governmental department deals with European law in one way or another and it is difficult to know where to draw the line. To make devolution efficient it was decided to have a rather loose structure and to let the problems be solved by close co-operation. But difficulties will arise in deciding if an act is within the scope of the Scotland Act. Such difficulties will also occur when the Scottish law differs from the English law. European matters is a reserved area but with the ongoing evolution in Community law this will be a part of the devolution settlement that must be revised in the near future. Apart from forming action committees handling the co-operation between the Parliaments, different measures have been taken to give the Scottish Parliament the opportunity to scrutinise EC documentation the same way as Westminster. This is primarily done by the European committee which will take a lead role in examining how EC legislation will impact in Scotland.

Scotland has quite recently opened "Scotland House" to promote Scotland in Brussels. For some, it might give the impression that it is a start for a more active Scottish policy towards Brussels, but in fact it is difficult to say at this stage what difference such representation it will make. Westminster however, supports a Scottish representation, maybe just because it does not really interfere with the "British" line. Several regions have their own "houses" in Brussels. A permanent representation has been seen as necessary to promote the region especially to attract the structural funds. But there is no real proof that such representation actually makes any difference.

Looking at the present structure of the Community it is clear that it will be difficult for Scotland to make its voice heard in Brussels. Here it will be more interesting to go via London.

7.4. Scotland's status in the EU

Scotland's present status within the European Union is rather unclear. The European Union has for a long time promoted regional democracy and regional governing under the principle of subsidiarity. However this has been done in so many different ways throughout Europe that one has so far not been able to find a unitary system for how it should work. This is mainly because it is up to the Member States to decide how they want to govern their territory. There are European institutions where the different regions can make their voices heard, such as the Committee of the Regions, the Association of European Border Regions, The Assembly of European Regions, the Association of regions with traditional industry, and the Association of frontier Regions.⁴³

7.5. The status of regional governments in Community law

The European Court of Justice has not ruled on the status of regional governments. In the few cases dealing with the subject the Court has so far managed to avoid the question.

⁴³ Nugent, Neill, *The Government and Politics of the European Union*, p 243.

Advocate General Lenz has however raised the question directly in his opinion in *Wallonia v Commission* where he stated that the region of Wallonia was a non-privileged applicant. Advocate Lenz argued that the Regional Executive was an organ under the state and despite the fact that it was vested with sovereign powers it could not be regarded as a Member State for the purposes of article 230.

This entails that the Regional Executive will be in the same position as any legal or natural person within the union.

The Commission does not really make the situation any easier for the parties since it tends to co-operate with nations, regions or communities depending on the matter in question. Thus there is no fix scheme. Scotland will therefore work with the Commission when it is preferable rather than just because the matter involves the region.

There is also another very difficult question for Brussels to solve. The European Union does not want to interfere in the member states internal affairs. It is not up to Brussels to decide which constitutional status Scotland should have.⁴⁴

7.6. Concluding remarks

The only way for Scotland to affect EC legislation is via London. The UK, being one of the larger EU countries, has a large influence in Brussels and Scotland has probably a bigger chance to affect the legislation process through the UK parliament than by its own.

Even though the doctrine of direct effect applies in Scotland, the Scotland Act contains a direct reference to EC law stating that all Scottish legislation must comply with EC law. Otherwise it will be considered as *ultra vires*. The procedural differences between UK legislation and Scottish legislation are thus remote.

8. Scotland and the European Convention on Human Rights

The European Convention on Human Rights was drafted in the aftermath of the Second World War. It originally focused on the issues which were seen to have contributed to the collapse of democracy in Europe during the 1930s and the growing threat of Soviet influence in Eastern Europe. The Convention thus focused mainly on civil and political rights and excluded social, economic and cultural rights. The idea was to create an enforceable list of human rights, which all parties to the Convention were obliged to secure to persons within their jurisdiction. The Convention came into force in 1953 when it was adapted by the Council of Europe. It was a radical measure for its time when it had a

⁴⁴ However if a country within the EU would split up this would create immense problems, specially relating to their representation in Brussels and the subsequent question how many votes they should be given.

practical effect with its to main bodies- The European Commission of human rights and the European Court of Human Rights and the Committee of Ministers.⁴⁵

Moreover the Convention provided the possibility for individuals to bring complaints of Human Rights violations before the Commission. However this was not compulsory. The idea was rather to let the member states decide whether they would allow individual application or not. Similarly, the jurisdiction of the Court of Human rights had to be recognised on a voluntary basis.

Matters regarded as fundamental human rights have evolved and cover a broader spectrum today than fifty years ago. The Convention has been able to grow via eleven additional protocols, which the Member states can ratify. All states in Europe have different attitudes and policies towards Human Rights depending on their current situation. This system makes it possible for the Member State to adapt or reject the obligations in these protocols, while being bound by the basic rights set out in the Convention.

From 1980 and onwards, the court faced an increased growth in the number of cases before it, which meant that it had difficulties in keeping the length of the proceedings within reasonable time limits.⁴⁶ After the accession of new Contracting States in 1990 the need for a reform was obvious. On 1 November 1998 the new European Court of Human Rights was set up. The new court consists of four sections with a staff of currently 41 full-time judges elected by the Council of Europe.

The United Kingdom ratified the Convention in 1951, albeit it did not recognise the right of individual application until 1966, and then only temporarily. Since the Convention never was incorporated into UK law it has only been possible for the applicants to take their case to Strasbourg, an expensive procedure which takes a very long time. Therefore the Labour Party proposed to incorporate the Convention into UK law so that British courts could handle the cases.⁴⁷ This would also give the Courts the possibility to build up their own case law and to interpret the Convention focusing on British matters.

8.1. Human rights law in Scotland before devolution

Before the Human rights act and the Scotland Act the legislative conformity or non-conformity with the Convention was stated in a principle set out in *Brind*.⁴⁸ The principle basically stated that all ambiguous legislation should be presumed to be in conformity with the Convention. Ambiguous legislation should be read in the light of the Convention so that the legislation itself would conform to it.⁴⁹ This interpretation applied only to England and Wales. In *Kaur*⁵⁰, Lord Ross concluded that the principle in *Brind* was not applicable

⁴⁵ The United Nations adapted the universal declaration on human rights in 1948, which did not have the binding force of a treaty nor any means by which it could be enforced until 1966.

⁴⁶ www.echr.coe.int/infodocrevised2.p2.

⁴⁷ Bringing rights home, labours plan to incorporate....

⁴⁸ *R v Secretary of State for the Home Department, ex parte Brind*, 1991 1 A.C. 696.

⁴⁹ The principle was clearly stated by Lord President Hope in *T, Petitioner* 1997 S.L.T.724 (at734)

⁵⁰ *Surjit Kaur v Lord Advocate*, 1981 S.L.T. 322.

in Scotland. This approach was however later on reversed in the case *T Petitioner*⁵¹ where Lord Hope stated that the Court in fact should interpret legislation in conformity with the Convention.⁵²

8.2. The Human Rights Act 1998

The decision was made to incorporate the Convention through national legislation, the Human rights Act 1998, which was brought into force in October 2000 throughout Britain. Its general provisions are to ensure that all Westminster legislation will be interpreted in a way which is compatible with the Convention rights, as far as it is possible. Scotland would start applying the act at the same time they inaugurated their parliament. The Human Rights Act affects all Westminster legislation and thus all reserved matters. The Act enjoys a special status since it is used to interpret all other legislation.

The Human rights act does not fully and unconditionally incorporate the Convention. The act states that a court or tribunal dealing with a question involving a convention right must only “take into account” decisions and judgements from the European Court of Human Rights.⁵³ In this context it is also worth notifying that the long title to the act, which summarises its contents starts out “an act to give further effect to rights and freedoms guaranteed under the European Convention...” Thus the courts are not bound to follow the jurisprudence from Strasbourg. However this approach should not be seen as a way to avoid the full consequences of an implementation, but more as a way to safeguard the sovereignty of Parliament. There is always the possibility to take the case to Strasbourg when the UK under international law is under the obligation to abide by its final judgement.⁵⁴ If it is not possible for the court to interpret UK legislation in a way so it complies with the Convention, the Court cannot quash that legislation. Instead it is up to the UK Parliament to remedy that inconsistency by new legislation.⁵⁵

8.2.1. The future development of UK case law

This approach also enables the courts to go further than Strasbourg. The British courts have the possibility to consider pure domestic issues without dealing with the political consequences that Strasbourg must take into account having a so much larger field of impact. The British courts will gradually, once they start using the Human rights act on a day to day basis build up their own case law which will probably develop much faster than Strasbourg. However the Convention and its case law will always set the minimum standard, a floor below which one cannot fall.

During the parliamentary proceedings of the Bill the Home Secretary stated that it was open for domestic law to provide greater protection than that given by the Convention. The

⁵¹ *T Petitioner v Lord Advocate*, 1997 SLT 724.

⁵² The Human rights act, A briefing paper for the Scottish judiciary, p 9.

⁵³ Human Rights Act, Section 2(1).

⁵⁴ ECHR, Article 46(1).

⁵⁵ Grosz, Human rights, p 7, 1-11.

Lord Chancellor specifically pointed out that the UK courts were free to develop human rights jurisprudence by taking into account European judgements and decisions.⁵⁶ This was made to enable the courts to move out in new directions in the whole sphere of human rights law. The Lord Chancellor even stated that “upon occasion it might be appropriate to do so, and it is possible that [UK Courts] might give a successful lead to Strasbourg”.⁵⁷

8.2.2. The Strasbourg Jurisprudence

A court determining a human rights issue, which has arisen during proceedings, must take into account judgements, decisions, declarations or advisory opinions of the European Court of Human rights.⁵⁸ The UK court has the possibility, because of its more expansive approach to the Convention, to apply a more generous Strasbourg ruling even though it has in a later decision been narrowed down. This is in line with the determination to evolve the UK human rights case law.⁵⁹ The Human Rights Act also points out *inter alia* the Reports and the Opinions of the Commission as being significant when it comes to deciding the scope of the substantive articles of the Convention.⁶⁰

8.2.3. Other sources of interpretation

the courts can also develop the Convention case law they may also draw inspiration from other treaties and conventions.

The Scotland Act gives the Secretary of State for Scotland the power to prohibit the implementation of an act which might be incompatible with any international obligation.⁶¹ In this context that means any international agreement which the UK has adhered to other than Community law or the Convention rights.⁶² This power is clearly discretionary, and it is only applicable before a bill receives royal assent.

The Convention must not only be interpreted by Strasbourg. As already mentioned the UK courts may and shall interpret the Articles to build up British case law. Other jurisdictions in the Council of Europe have for a long time applied the Convention. Many of those states also apply similar provisions forming part of their own national constitution. Lord Reed, judge at the High Court in Edinburgh, stated that decisions emanating from those jurisdictions give helpful guidelines concerning similar problems to those facing UK Courts.⁶³ But Lord Reed does not stop there. Even Human Rights decisions from outside Europe, such as Canada, New Zealand, India, South Africa and the United States, are relevant particularly in the absence of a relevant decision from Strasbourg. Decisions from the Commonwealth courts will be extra valuable since those countries often have the same

⁵⁶ Grosz Human Rights p 21.

⁵⁷ Hansard, H.L. Vol. 1712, Nov 24, 1997, col.835.

⁵⁸ Human Rights Act, Section 2(1) (a)

⁵⁹ Grosz, p 26.

⁶⁰ Human Rights Act, Section 2(1)(b)

⁶¹ Scotland Act, Section 35 (1)(a)

⁶² Scotland Act, Section 126(10).

⁶³ Lord Reed, Human Rights and UK Practice, p 11, How to find Convention law, based on a lecture given at the Faculty of Advocates in Edinburgh on 8 May 1999.

institutions as in Britain.⁶⁴ In such cases it will be more difficult to draw inspiration from the Civil law countries e.g. when it comes to jury trials.

Since the British Common law system has had such a great influence on other countries the British lawyers has a large amount of case law to work with. Especially the interpretation of the various charters of rights will be and are used in the Courts.⁶⁵ The Canadian Charter of rights and decisions from the Supreme Court of Canada will most likely be of significant importance.

8.3. Declaration of incompatibility

The Scottish Courts has the power to try a case involving a breach of an individual's rights based on EC law, the Convention or other human rights instruments and international agreements. This power does however only affect Scottish legislation or acts made by an official representing the Scottish administration. Therefore it is of procedural importance to locate the bases of the claim to see if the court has jurisdiction.

8.3.1. Primary legislation

Unlike Acts of the Scottish Parliament, the Scottish courts have no possibility to strike down primary Westminster legislation and a declaration of incompatibility will not affect the validity of the provisions in question. This follows from the principle of the sovereignty of Parliament.

Scottish courts shall however interpret Westminster legislation in a way which is compatible with Convention rights, as long as it is possible to do so.⁶⁶ If the Courts find that primary Westminster legislation contravenes the Convention they will be able to make a declaration of incompatibility.⁶⁷ The declaration of incompatibility does not affect the validity, the continuing operation or enforcement of the operation of the provision. Nor does it bind the parties to the proceeding in which it is made. The procedure is rather a measure for the Court to signal to the legislators that something is wrong. The expectation is that when this occurs the legislators shall amend the actual incompatible legislation either by a Bill or via a fast track procedure. The Fast track procedure is a way for the Government to rapidly pass a bill through Parliament without the normal procedures and time limits.

8.3.2. Subordinate legislation

The Courts will however have the possibility to quash incompatible Westminster subordinate legislation as long as its parent statute is in accordance with the Convention.

⁶⁴ Lord Reed, p 11.

⁶⁵ See Temporary Sheriffs case.

⁶⁶ Human Rights Act, Article 3.

⁶⁷ Only the Court of Session and the High Court of Judiciary in Scotland, Human Rights Act , Section 4(5)d.

Thus, primary incompatible legislation cannot be healed by changing subordinate legislation derived from it.

The effects of this provision are significant since all Acts of the Scottish Parliament are subordinate legislation and are therefore open to revocation by the Courts.⁶⁸ Moreover, an Act of the Scottish Parliament is not law in so far as it is outside the legislative competence of the Parliament, and legislation which is incompatible with any of the Convention rights is outside that competence.⁶⁹

8.4. Concluding remarks

It is important to decide if an act is subordinate or primary legislation to be able to decide which procedure to apply. The possibilities to quash legislation are only directly possible concerning subordinate legislation. Here we find the biggest difference compared to EC law, which can quash both kinds of legislation.

9. Draft charter of fundamental rights of the European Union

The case law emanating from Strasbourg progresses slowly compared to the development in the field of Community Law which expands much faster. It is therefore interesting to examine what the future changes in EC law might entail in the field of human rights.

In October 2000, the EU leaders met in Biarritz, France, where they discussed the proposed European charter of fundamental rights. The purpose was to try to make the draft convention binding on all EU members. The mandate for the creation of the Convention, which was the somewhat confusing name which was chosen by the working group, was outlined at the Cologne European Council meeting in June 2000. The working group consisted of 62 members, both from the EU governments and various parliaments including 16 members of the European Parliament. Even the ECJ and the European Council were represented.⁷⁰ The task was to create a consolidated charter of the fundamental rights applicable at European Union level. One specific objective was also to make those rights clear to the Union's citizens. The charter is based on the European convention on human rights, the constitutional traditions of member states and general principles of Community law. The Charter also includes the economic and social rights as contained in the European Social Charter and the Community Charter of fundamental Social rights of workers, insofar they do not merely establish objectives for action by the Union.⁷¹

⁶⁸ Human Rights Act, sect 21(1).

⁶⁹ Scotland act, Section 29(1) and 2(d).

⁷⁰ Europa Parlamentet nytt nr 10 nov 2000, p 3.

⁷¹ Article 136, TEC.

The working group had to consider several different issues, especially the *raison d'être* for the convention was questioned. One argument was that in light of the expansion of the EU, a wider all-embracing view of the Charter was necessary. The Charter is an opportunity to strengthen the European Union and to enhance the rights of its citizens, and the role of the European Parliament. There were also representatives of the opinion that the Charter could be construed in such a way that it would regain for member states some of the sovereignty they have pooled to the EU.⁷² The Majority, however, wanted a charter that would at least be a protocol of the Treaty and seen to be a legally binding document that covers all aspects of European Union activity, including the three pillars. Thus would common foreign and security policy, justice and home affairs and institutions such as Europol be included.

The most vital decision was however what status the drafted charter would have. The Cologne Council decision specifically pointed out that the charter would have no legal binding, although it raised the possibility of making it so at a later date. Even though some representatives wanted to go further the overall objective was accomplished, to make existing rights more visible.

9.1. A brief overlook of the EU Charter on Fundamental rights

The Charter is based on the European Convention on Human Rights and the economic and social rights as contained in the European Social Charter and the Community Charter of fundamental Social rights of workers insofar they do not merely establish objectives for action by the Union.⁷³ The language of the draft Charter is clearer and made with the intent that everybody, not only lawyers, should be able to read and understand it. Thus the Charter is a consolidation of already existing rights.

The Charter contains 7 chapters and a preamble. The headlines are Dignity, Freedoms, Equality, Solidarity, Citizenship, Justice and the final General provisions. Some view the charter as being too vague, which lessens the value of the more important rights therein.

The Charter has also been criticised for paving the way to a new European Constitution, which would form the backbone in a future European State, but it can also be seen as a way to ease the tension between the ECJ and the national courts.

9.2. The Charter and the Convention

One of the most controversial issues concerns the way the European Convention on Human rights will fit into the Charter and how consistency can be maintained in judgements made by the European Court of Justice and the European Court of Human rights. If the new charter is enacted the two Courts will have the same jurisdiction in many

⁷² House of Commons Hansard debate 22 Nov 2000, Col 72 WH.

⁷³ Article 136, TEC.

areas. It also creates problems relating to the vast Case law from Strasbourg and what status it will have in the ECJ.

Another view is that the Charter will create a more coherent system of human rights within Europe. The Community institutions as well as the member states will follow the Charter which would exclude the dual system which exists in Scotland today. The Convention would still play an important role in ensuring that the Member states and the institutions follow its decisions. This would create two layers of human rights protection, the downside is that this could lead to one for the EU, and one for the rest Europe. There is also a risk that the Charter could lessen the value of the Convention and the work which has been done under that institution.

9.3. Implications of the Charter in Britain

The Charter can in theory be used by the ECJ even though it is not legally binding. Instead it can be included via 6(2) TEU as a mean of defining, fundamental human rights which are protected by the Union. It is very likely that “inspiration” will be drawn from the various articles in the Charter. As a matter of fact this has already occurred, when the so called “wise men” investigating Austria, referred to the Charter as a source of European values.⁷⁴ But, since the Charter consolidates already existing rights it can also be seen as a clarification which does not really change any substantial law. However it will bring up the “forgotten” protocols and putting in particular the social rights at the same level as the Convention rights.

The Charter further extends the rights which, at least on a theoretical level, create problems in the UK. Primarily when it comes to the status and powers of Parliament but it also interferes with the present introduction of the Human Rights Act, which becomes to some extent a third human rights instrument.

The possible enactment of the Charter can have a significant effect on Britain in many cases. If the ECJ fully uses the possibilities given, there are some scenarios which might cause disturbance in the UK. Article 9 of the Charter guarantees the right to marry which could mean that the law must recognise gay weddings. Article 21, which bans discrimination on religious grounds, could be seen a threat to religious schools. The Charter also prohibits reproductive cloning of human beings and making the human body and its part a source of financial gain. More important are the workers rights which the Conservative party fears will threaten the competitive advantage the UK has over especially Germany. These arguments are of course not all of them viable, since there will most likely be some kind of mechanism such as the present “margin of appreciation” in the Convention.

The Charter could also be used in a Scottish court as an indication of what is considered to be human rights. This can be done either by valuing the charter as a direct definition of EC

⁷⁴ House of Commons, Hansard, 22 Nov 2000, Col 88WH.

law or indirect as an important international human rights document which should be followed.

This evolution is not likely to happen in the near future. It would be politically very difficult for the ECJ to apply the Convention via the back door on its own institutions and Member states when it has stated that it does not have the competence to accede to it.⁷⁵ The Court has so far not applied the Charter and all attempts to do so by parties have been revoked.⁷⁶

10. The relationship between the Convention and EC law in Scotland

An upcoming problem in the field of European law is the relation between the European Court of Justice in Luxembourg and the European Court of Human rights in Strasbourg. The same issues might appear in the Scottish courts i.e. when a case overlaps and deals with both a question of Community law and the European Convention on Human rights. This relationship is of great importance since the Scottish courts are so closely bound by both the Convention and EC law. The difference between EC law and the Convention entails, as above mentioned, different procedural rules and possibilities especially when it concerns overriding subordinate or primary legislation.

It is therefore important to analyse how the two legal systems functions together first on a European level to see what consequences this might entail in Scotland.

10.1. The European Union and the Convention

The Community's legislative power has expanded to such a degree that it more and more often enters areas where the Convention also is applicable. The need for the Community to comply with the ECHR and to define the jurisdiction of the courts in Luxembourg and Strasbourg is thus of great importance. The principle that acts of the European Community must respect fundamental rights has its origins from the case *Stauder v Ulm*⁷⁷ where the Court stated that it had interpreted a Community measure in such a way not to prejudice fundamental human rights. The Court went even further the following year in *Internationale HandelsGesellschaft*⁷⁸ there it asserted that the respect for fundamental rights inspired by the constitutional traditions of the Member states, formed an integral part of the general principles of Community law. In *Nold*⁷⁹ the Court stated that international human rights treaties was a source of guidelines against which to measure Community law. In *Rutili*⁸⁰ the Court examined for the first time a specific article of the Convention and has

⁷⁵ Opinion of the Court 2/94.

⁷⁶ *Mannesmannröhren-Werke AG v Commission*. T-112/98.

⁷⁷ *Stauder v Ulm* (C-29/69 ECR 419)

⁷⁸ *Internationale HandelsGesellschaft mbh* (C-11/70 (1970) ECR 1125)

⁷⁹ *J.Nold KG v Commission* (C-4/73 (1974) ECR 491)

⁸⁰ *Rutili* (c-36/75 (1975) ECR 1219)

done so ever since in several judgements. In *ERT*⁸¹ the court stated that the Convention has special significance in identifying human rights respected by the Community.

10.1.1 Treaties

The Treaty of Amsterdam further expanded the provisions in the Treaty of the European Union focusing on the respect for Human rights. Article 6 of the TEU sets out the key human rights principles which the Community must observe. Article 6(2) provides that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law"

Article 7 TEU makes it possible to suspend certain rights of a member state who persistently breaches the basic Human rights principles in article 6. It is however questionable how efficient this provision is since the procedures require an unanimous decision by the Member States together with a broad consensus in the European Parliament. Article 46 TEU empowers the Court to scrutinise the actions of the institutions so that they are compatible with the rights in Art 6(2). This provision gives the ECJ the power to ensure that the Union's various institutions follows the Convention even though the Union *per se* is not bound by it.

The Treaty of Nice went even further and called for a European charter of rights.⁸² The status of the charter is still unclear since its legal value was not decided. So far it is only a declaration and is not enforceable.

10.1.2. Incitements for the EU to follow the Convention

The European Union is not a signatory to the European Convention of Human Rights, and has not the power to do so.⁸³ However the union must respect the fundamental rights mentioned in article 6(2) TEU. The present status concerning the relation between an act by an EU institution and the ECHR is somewhat unclear. Since the EU has not acceded to the Convention those rights cannot be directly be enforced in Strasbourg. Instead the ECJ has, as above mentioned, created its own case law interpreting and using the convention as a guideline. This was partly done to remedy the democratic deficit and to ease some of the criticism from the Member states.

The EU has been, to some extent, forced to comply with the Convention by several member states, and is moving progressively towards that goal. The EU's apparent lack of a codified catalogue of fundamental rights caused the German constitutional court to act. Since the Union also does not have a democratically elected parliament with scrutinising

⁸¹ *ERT* (c-260/89) (1991) ECR I-2925

⁸² See chapter 11.

⁸³ Court's opinion 2/94 (1996 ECR I-4347)

and legislating powers the German *Bundesverfassungsgericht* stated in the *Solange* judgement of May 29, 1974, that it was necessary to conduct a secondary review of the Community legislation.⁸⁴ This judgement was later followed by the second *solange* case in 1986 where the German Court took the stance towards a conditional acceptance of the primacy of Community law. Thus Community law would be followed as long as the case law of the ECJ continued to guarantee the observance of fundamental rights.⁸⁵ This stance by the German court further indicated the need for the Union to accede to the Convention. The activist attitude inspired Germany to propose the European charter of rights.⁸⁶

Other Member states such as the UK and Italy, have taken a similar conditional stance as the *Bundesverfassungsgericht*. The ultimatum facing the ECJ and the Community is that if they do not follow and respect the fundamental human rights, the national courts do not consider them selves as being bound by that decision or legislation. This would entail a collapse of the whole system of primacy of EC law. Thus the member states' national courts function as the guardian of fundamental rights and forces the EU to comply with the Convention.

10.1.3. ECJ Jurisdiction and Competence

The Court progressively moved EC law into the ECHR field but this development was reversed somewhat in the Court's opinion 2/94⁸⁷ where the approach to the Convention field was summarised. The Court stated that the Community has no competence to enact rules on human rights or to conclude international conventions in this field. This competence can only be given by the member states. This statement by the Court must be read in the light of the criticism it had received by many member states that were of the opinion that the Court had gone to far in.

The Court continued by declaring that it was now well settled that the Community must respect fundamental rights as a part of the general principles of law whose observance the Court ensures. All Community acts must respect human rights as a condition to be lawful, both when it comes to interpretation and validation. The Court thus tried to find a balance between the demand for the protection of rights, as demanded in the *solange* cases, and the criticism from member states that thought that the Court had gone outside its competence.

In *Johnston v RUC*⁸⁸ the Court examined the act of a member state and the UK was found to have breached the respect for fundamental rights when implementing a Community directive. Thus the Court examines the implementation of community legislation and is not confined to Community actions only. All national rules that fall within the scope of EC law, even though they are not directly implementing Community law, may be scrutinised by the Court.

⁸⁴ BverfG v. EuGH 1975 EuR. 1-19.

⁸⁵ *Solange II* 1986 BverfG 73

⁸⁶ Koen Lenaerts, *Fundamental rights in the European Union*, p 576, note 5.

⁸⁷ Court's opinion 2/94 (1996 ECR I-4347)

⁸⁸ *Johnston v RUC* (C-222/84 (1986) ECR 1651)

In the case *Mannesmannröhren*⁸⁹ the Court of first instance stated in a case dealing with the right to not incriminate oneself under the Competition law that the Convention was not directly applicable but that international documents concerning the protection of human rights, notably the Convention, enjoyed the protection of the Community.⁹⁰ This meant that the Convention could not be applied via Community law concerning companies.

10.2. The Interaction between Luxembourg and Strasbourg

There is a significant increase in cases which involve both EC and Human rights issues, even though the area of overlap between Community law and the Convention is partial because in large measure the two systems pursue different objectives. The ECJ is the guardian of the European economic integration and the four freedoms whereas the European court safeguards the Convention rights. However, the overlap in jurisdiction may involve cases coming before both the ECJ and the Court of Human rights. Alternatively two cases concerning similar facts and issues may go separately to Luxembourg and Strasbourg. There are even cases which have been considered by both courts on different issues which have in fact involved no real overlap. The ECJ found in the *Agosi* case⁹¹ that silver coins confiscated by customs were not goods and thus not covered by the EC treaty. Strasbourg found on the other hand that the convention was applicable⁹². Another example is the *Grogan* case⁹³ where the Court avoided the issue finding that the Treaty was not applicable when there was no economic link between the providing of service and the information given to students concerning abortion possibilities in the UK for Irish students.⁹⁴ The same case went to Strasbourg in *Open Door Counselling*⁹⁵ where the court found that it did raise a Convention issue.

In *Matthews* case⁹⁶ the reverse situation occurred concerning a complaint about the British Act concerning elections to the European Parliament which excluded Gibraltar. The European Commission of Human rights decided that these elections fell outside the scope of the Convention.⁹⁷ The Court in Strasbourg however, took a different view than the Commission. The standpoint not to interfere in the jurisdiction of the European Court of Justice was somewhat changed. The Court stated that it cannot challenge the acts of the Community because the EU is not a contracting party to the Convention. Then it continued by adding that a contracting party's responsibility under the Convention continues even though it has conceded some of its powers to a supranational organisation.⁹⁸ The Convention is a living instrument which must be interpreted in the light of present-day conditions. The mere fact that a body, such as the European parliament, was not envisaged by the drafters of the Convention cannot prevent it from being applied.⁹⁹ The Court found

⁸⁹ *Mannesmannröhren-Werke AG v Commission* T112/98.

⁹⁰ *Mannesmannröhren-Werke AG*, para 84

⁹¹ *Agosi*, C-7/78 (1978) ECR 2247.

⁹² Art 1 of Protocol 1 of the Convention.

⁹³ *Grogan*, C-159/90 (1991) ECR I-4685.

⁹⁴ Steiner, Josephine, Woods, Lorna, p 100.

⁹⁵ *Open door counselling and Dublin Well Women v Ireland*, A246-A (1993)

⁹⁶ *Matthews v UK*, decision of the Commission of Human rights of 29 Oct 1997.

⁹⁷ Article 3 of protocol 1 of the Convention.

⁹⁸ *Matthews*, para 32.

⁹⁹ *Matthews*, para 39.

that the Act breached the Convention when it did not make it possible for the people of Gibraltar to vote in the election for the European Parliament.

The Judgement in *Matthews* has been seen, by some authors in the doctrine, as a major change in the relationship between the two courts where the European Court had taken the lead over the ECJ by striking out Community law.¹⁰⁰ This is probably not the case. The European court found that the actual provision was an international treaty and not pure Community law. Thus, the Court did not rule on Community law, and it is fair to say that the two courts still respect each other even if the thin line separating them clearly is disappearing.

The *Matthews* case indicates that the Court of Human rights distinguishes between primary and secondary Community law as to the possibility of holding the Member States responsible under the Convention for infringements of fundamental rights committed by Community institutions.¹⁰¹ The criterion for distinguishing between the two categories lies in the possibility to challenge the act in question before the ECJ. Secondary Community law can be challenged before the ECJ which can review its compatibility with the Convention. According to the *M & Co* decision, a Member State will incur no responsibility under the Convention as long as the international organisation which they have set up contains a system of judicial review offering an equivalent protection as the Court of human rights can provide.¹⁰² The *M & Co* decision together with the *Matthews* case covers the whole EC range. The Member States cannot ignore the Convention via Community legislation, but as long as the ECJ applies the Convention, that protection is sufficient in the eyes of the Human rights Court¹⁰³.

There are also cases where the two systems complement each other. In *Hornsby*¹⁰⁴, the ECJ found that two British nationals had the right to teach in Greece, a decision which was later enforced by Strasbourg when the Greek Government had failed to comply with the judgement.¹⁰⁵

Cases before the ECJ, which involves arguments on the compatibility of Community law with the Convention, carries the greatest risk for a jurisdictional overlap between the two Courts. However there are only a very small number of cases that might show this inconsistency. The *Orkem*¹⁰⁶ case and the *Solvay*¹⁰⁷ case might be considered to be inconsistent with the Court of Human rights decision in *Funke*.¹⁰⁸ In *Orkem* the ECJ found that the privilege against self-incrimination was not applicable to a Commission decision compelling the applicant to give evidence against itself in the field of competition. The Court's line was that this right only applied to persons charged with a criminal offence. The Strasbourg court found on the other hand in *Funke* that for customs to compel the

¹⁰⁰ Canor, Iris, Primus inter Pares. Who is the ultimate guardian of fundamental rights in Europe?.

¹⁰¹ Lenaerts, p 584.

¹⁰² Decision of the European Commission of Human Rights, Feb 9, 1990 (1990) 64 DR).

¹⁰³ There is an interesting similarity between the Court's stance and the arguments put forward by the German Constitutional Court in the Solange cases.

¹⁰⁴ C 147/86 *Commission v Greece* (1988) ECR 1637.

¹⁰⁵ *Hornsby v Greece*, judgement of the Court of Human rights of March 19 1997.

¹⁰⁶ *Orkem*, (C-374/87 (1989) ECR 3283.

¹⁰⁷ *Solvay*, (C-27/88).

¹⁰⁸ *Funke v France* A256-A (1993)

applicant to provide evidence of alleged offences was a breach of Article 6 of the Convention. In this context it appears that Article 6 of the Convention applies to acts by the Commission, especially the search and seizure procedures under EC competition law. Thus the *Orkhem* and *Solvay* case might no longer be regarded as good law.¹⁰⁹

10.3. The ECJ as an additional enforcer of rights

There might also be situations where the ECJ can enforce rights more efficiently than the European Court of Human Rights. The Community law provides for additional possibilities. The principle of non-discrimination defined by Article 12 TEU prohibits all discrimination on the grounds of nationality.¹¹⁰ Article 13 TEU allows the Community to adopt rules to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This provision does not have direct effect, but it provides for a legal basis which is intended to enable the Council to act.¹¹¹ Article 141(4) EC allows the Member States to adopt measures of positive action to compensate disadvantages between the sexes in professional life. A new protocol concerning non-discrimination has however recently been added to the Convention which entails that both systems may from now on pursue the same goal.

In the field of equal rights the ECJ has ruled in the case *Kreil v Germany*¹¹² that a "blanket" exclusion of women from certain military activities under national law was illegal. Properly justified measures for certain military units could however be allowed.¹¹³ In this case the court moved in to a field of Community law which is closely connected to the national security of the member states. The Court stated that this area does not fully fall outside the scope of Community law and that the principles of proportionality and equal treatment for men and women as regards to employment procedures have effect.

From these examples it is not far fetched to draw the conclusion that the two Courts try to respect each other's jurisdiction. The ECJ in particular does not seem to want to apply the convention too specifically. The Member states has so far decided not to incorporate the Convention into EC law and the Court has stated that the Community has no power under the Treaty to do so itself. The Court has however entered the field of Human Rights by referring to the member states constitutional traditions and general principles where the Convention is in the focal point.

¹⁰⁹ Steiner, p 111.

¹¹⁰ It should be observed that this article only applies to nationals of a Member State.

¹¹¹ Lenaerts, p 579.

¹¹² *Kreil v Germany*, C-285/98.

¹¹³ White & Case Commentary, www.ceps.be/commentary/feb2000/sutton.htm, p 2.

10.4. Cases involving both Community law and the Convention before Scottish domestic courts

England and Wales implemented the Convention in October 2000.¹¹⁴ Prior that date the success of a case involving a Convention point depended on whether a litigant could make his claim within the scope of Community law. The litigant must show that his fundamental rights protected by the ECJ are infringed and that the case involves a Community law point. To do this, the litigant could raise a large number of Community issues to create a platform for human rights arguments. Most often, these kinds of tactics could be seen through and rejected.

As already mentioned, litigants may now under the Human Rights Act argue convention points whether or not Community rights are involved. But when a case involves both Community legislation and the Convention the whole issue becomes more difficult. If the issues raised do not overlap or conflict with each other the Scottish court will probably first examine the Community law points and then to decide the Convention points. The Court might also consider making a reference to the ECJ under the procedures in Article 234 of the EC Treaty. This scenario is likely since the remedies under Community law are much more efficient than those under the Convention.

Within its scope, Community law strikes out any inconsistent national law, even primary UK law. Thus it is a more powerful tool for the litigant to use. As stated above the same situation only involving a Convention point will lead to the “fast track procedure” and cannot strike out primary UK law.¹¹⁵ Subordinate legislation, such as the law emanating from the Scottish parliament, will be stricken out directly.

Another possible scenario might occur where a directly applicable Community rule has been applied to a litigant so as to breach his Convention rights. The Scottish Court could make a declaration of incompatibility which would mean that it would strike down the actual Community legislation just as it could strike down any other legislation emanating from the Scottish parliament. The solution is however unlikely since it would not deal with the real problem. EC law is given domestic effect in the UK via the European Communities Act. To strike down that act would be rather artificial since the real problem lies in the actual EC law. It is more likely that the court in this instance would make an article 234 reference to the ECJ. This would give the court the possibility to ask the ECJ whether or not the Community rule breaches the convention and the subsequent question of its validity. The problem then lies in the hands of the ECJ. If the case involves a Treaty provision it is up to the ECJ to find the right interpretation. So far it is fair to say that the ECJ strives very hard not to breach and to avoid a conflicting situation with the Convention.

However if the ECJ declined to amend or annul the Community measure, the litigant would have to take the case to Strasbourg. The Court of Human rights would then have to examine if the Community provisions breaches the Convention.

¹¹⁴ Those cases are outside the scope of this paper.

¹¹⁵ HRA, Section 10.

A more likely scenario is when a national rule which implements Community legislation breaches the Convention. The case *Johnston v RUC*¹¹⁶ illustrates such a situation. In this case however, the ECJ settled the matter by referring to the Convention.¹¹⁷ In such a case the Scottish court would strike down legislation from the Scottish parliament since it is secondary UK legislation and thus ultra vires and make a declaration of incompatibility if it was primary UK legislation. This would lead to the above mentioned fast track procedure in Westminster.

Before devolution it was necessary to show that there had been a breach of human rights in the field of Community law to give the courts the possibility to strike down that legislation and to award damages. With the Human rights act it is now possible for a litigant to access those Convention rights without founding them on EC legislation. Nevertheless it might still be beneficial for a litigant to establish that a Community right is breached together with a Convention right. If the case involves secondary legislation there is no difference. But, on the other hand, if the case involves primary UK legislation, the act in question will only be set aside if it breaches Community law. It is also likely that the award of damages will be higher under Community law than under the Convention. The Scottish courts must allow effective enforcement under Community law which are more generous than those provided under the Convention.¹¹⁸ Strasbourg might give the litigant right but has not the same effective enforcement when it comes to awarding damages. Even though the Scottish court will rule on the matter it does so initially based on the available case law from Strasbourg. Another reason why it might be more efficient to establish a breach of Community law is the requirement to exhaust all domestic remedies in the Convention.¹¹⁹ Thus the Scottish Court may instantly refer the case to the ECJ via Article 234 if it involves a Community issue.

10.5. Concluding remarks

The difference between Community legislation and the Convention, especially relating to the difference between the accessibility, time frame and remedies compports that the court might first be faced with the difficult question of deciding if the case, or parts of the case is within the scope of EC law. In the long run this can only be cured by instituting the same remedies independent of which set of rules apply. The Judges must be updated concerning the development of Community law. It is rather strange that the Convention rights enforced via Community law enjoy higher enforceability and thus higher protection. The result seems to be that Community law takes precedence over national law, i.e. the Human rights act, but the Community legislation must conform to the Convention via the Treaty.

A Scottish national still has the possibility to access both courts, even though the main idea is that he should be able to hear his case before a national court.

¹¹⁶ *Jonston v Chief Constable of Royal Ulster Constabulary*, case 222/84.

¹¹⁷ Steiner, p 109.

¹¹⁸ See the development emanating from the case Harz C-17/93.

¹¹⁹ article 35 of the Convention.

To access Strasbourg it is necessary to have exhausted all national remedies. This is a procedure, which can take quite some time. The only way to access the ECJ is by making a reference via the procedure in article 234. This means that it is up to the national court to decide whether or not this shall be made, and not the parties. There is a small possibility for an individual to access the court and that is in the rare situation when a decision is of direct and individual concern to him.¹²⁰

In sum, EC legislation strikes out any UK legislation whereas a case tried under the Human rights act, thus mainly the Convention, only directly strikes out secondary legislation. It is thus important to found a case on EC law or a statute which can be stricken out. The continuing changes in EC law is in this aspect of great legal importance.

11. Case law involving a devolution issue

The new legislation proved to be very popular amongst lawyers, over 400 challenges has so far been made, even though only some ten has been successful. Both old and new legislation has been put up to the test. As a matter of fact the first legislation passed by the new Scottish Parliament was the Mental Health Act, an emergency legislation passed to cover a loophole in the existing act.¹²¹

By analysing the few cases which has so far emerged from the Scottish courts one can see how the Scottish judges deals with devolution in practice and how the ECHR as a living instrument is used by a common law lawyer.

11.1. Temporary Sheriffs

One of the first devolution issues in a criminal case emerged in Starrs and Chalmers. This case is therefore analysed more thoroughly to explain how the Scottish court approaches a devolution issue. The accused argued that they were not entitled to a fair trial under article 6 of the Convention since the Sheriff was not independent from the prosecutors and the Government. The case would have huge implications for the judiciary since Temporary sheriffs handled almost 25% of the total workload in the Scottish Courts.

On 5 May 1999 the complainers Hugh Latta Starrs and James Wilson Chalmers appeared for trial before temporary Sheriff Crowe in Linlithgow Sheriff Court on a summary complaint. The case was for practical reasons reallocated before Temporary Sheriff Alexander who allowed the accused to raise a so called devolution issue under the rules of the Act of Adjournal even though the accused had not done so in their original minute.¹²² Temp Sheriff Crowe repelled that decision on 30 July and thus refused the accused to adjust their minute. Starrs and Chalmers presented their bills of advocation seeking to

¹²⁰ article 230 TEU.

¹²¹ Ruddle, a patient at Carstairs, a high security mental institution, was released because he was considered by doctors to be incurable. The old act read together with the Convention stated meant that he could not be locked up since that would violate his human rights.

¹²² Devolution issues rules 40.5, p 3 opinion of the Lord Justice Clerk.

overrule the decision of 30 July. The Procurator fiscal challenged the decision of Sheriff Alexander of letting a devolution issue being raised.

The case thus came before the Appeal court, High court of Justiciary, in Edinburgh. The Solicitor General acted as prosecutor representing the Lord Advocate. Before the key issue was dealt with the Court had to clarify what relation the Lord Advocate had with the procurator fiscal and what the meaning of “act” was under section 57(2) of the Scotland Act. One of the difficulties is the somewhat dual situation in which the Lord Advocate operates. He is not only head of the judiciary and thus the prosecution service but he also takes part in the Scottish Executive.¹²³ The Court found that when the procurator fiscal continued the prosecution it constituted an act of the Lord Advocate since they were both bound by the Convention.¹²⁴ Thus section 57(2) of the Scotland Act applied.

11.1.1. Legal reasoning

The Court then moved to the main issue namely whether a temporary Sheriff was an independent and impartial tribunal in the sense of Article 6(1) of the Convention which provides.

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

The European Court of Human Rights stated in the case *Findlay v UK*.¹²⁵

“ In order to establish whether a tribunal can be considered as ‘independent’, regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of ‘impartiality’, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.”

Thus when deciding if a tribunal is independent it is vital to find if it presents the appearance of independence from an objective standpoint. The court also pointed out in this context the case *De Cubber v Belgium*.¹²⁶ In *Cubber* the Court stated that Article 6(1) of the Convention should not be interpreted restrictive in this particular context due to the fundamental importance of the right to a fair trial. In *Findlay v United Kingdom* the Court found such objective justification for doubts as to the independence and impartiality of the members of a court martial where they were subordinate to the convening officer who acted as the prosecutor. The process of review did not prove an adequate guarantee in that case.

¹²³ This was due to old parliamentary traditions.

¹²⁴ Starrs, p 4 .

¹²⁵ *Findlay v UK* ((1997) 24 E.H.R.R. 221 para 73)

¹²⁶ *De Cubber v Belgium* (1984) 7 E.H.R.R. 326.

When deciding if a tribunal is independent and impartial the Court found that the security of tenure was of great importance when deciding the impartiality of the judge.

The Court moved to examine how the system of temporary Sheriffs worked. The present system was introduced by the enactment of section 11 in the 1971 Sheriff Court Act. The idea was to have a pool of Sheriffs who could deal with temporary backlogs on a part time basis. The Sheriffs would be paid per day and a minimum number of working days per year would also be required. This system allowed solicitors and advocates to be employed as temporary sheriffs when the permanent sheriff was ill or when it was a seasonal bulge in cases that had to be tried. The appointment would also give experience for those who hoped to become permanent sheriffs one day.¹²⁷ Thus becoming a temporary Sheriff was almost a requirement in becoming a permanent Sheriff.

The commission for the temporary sheriff was one year at a time and was formally in the hands of the government, but since the Lord Advocate is the first minister's legal adviser, the power was in reality at his pleasure. This meant that the Lord Advocate had a crucial role in deciding who should be appointed to become a temporary sheriff and later on who should be given a permanent position, when he recommends that person.

The Court found that the one-year commission was not enough to satisfy the requirements under the Convention. The one-year period per se was not the crucial factor it was the way the period worked. The Sheriff could just be not re-appointed without stating any real reason since the job was of a temporary character. There was also the opportunity to not give the judge any assignments during his year, which would lead to the same effect as a discharge.¹²⁸ In the light of this scenario however theoretical the sheriffs lacked clearly in "security of tenure" which was one of the requirements in being independent.

Primarily article 12 of the UN general assembly resolution from 1985 relating to the basic principles on the independence of the judiciary, which states inter alia that there shall be a guaranteed tenure where also considered. Counsel for the defendant also drew the Courts attention to the Latimer House Guidelines of the Commonwealth Parliamentary Association of the 19th June 1998 which state: "judicial appointments should normally be permanent; whilst in some jurisdictions contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure". The court also examined other international guidelines and definitions on the independence of the judiciary. The Canadian charter of rights was examined together with its case law which clearly supported the Court's reasoning.

The Court further found that the system with temporary sheriffs had created two categories of judges. One, which could be fired at will and one, which was permanent. It could also give rise to the perception that the former was inferior in quality. In the light of the importance to keep an appearance of independence this could not be accepted.

The Lord Advocate plays a vital part in appointing new judges. He is also a part of the Executive and thus responsible for the prosecution service in Scotland together with the

¹²⁷ Opinion Lord Justice Clerk, p 8 referring to baroness Tweedsmuir of Belhelvie House of Lords cols 883-885.

¹²⁸ Opinion of Lord Clerk, p 15.

solicitor General. The fact that the same person leads the prosecution and appoints the judges cannot comply with the Convention. This leads to ascertain if there is a risk that justice might not be done, or be seen not to be done.

The Court also found that it was highly questionable that the court should in any way be or be perceived to be inter linked with the Executive, especially when the Executive takes part in the case. The Court here referred to a Norwegian case¹²⁹ where a decision made by a temporary judge was set aside in litigation against the state. The reasons where, that in terms of a statutory provision he was “incompetent” because there were particular circumstances which were “liable to undermine confidence in his impartiality”. The Court further concluded that there is such a real risk that a well-informed observer might think that a temporary judge might be influenced by his hopes and fears to his perspective advancement.¹³⁰

11.1.2. Conclusion

In *Starrs* the court interprets the Convention in the light of similar international conventions and other countries’ case law. Concerning the Norwegian case, the Court states in its opinion that foreign law has no direct value in a Scottish court but nevertheless the case was taken into account in the court’s judgement and legal reasoning. The court thus uses the full extent of the possibilities given in the Human rights Act.

The Executive’s representatives and the prosecutor did also give the complainers the possibility to raise a devolution issue. Under the Scottish procedural Court rules they could have argued much harder that the devolution issue could not be raised, but it appears that all parties wanted to try the scope of the new Scotland act and the vires of devolution.

11.2. Temporary Judges

The Inner house of the Court of Session gave on April 4 2000 its opinion on a devolution issue raised before a temporary judge in the civil contract case, *Paul Clancy v. Robin Dempsey Caird*. The original case concerned a claim for damages for an alleged breach of contract in respect of the sale of a nursing home. The case was handled by TG Coutts, Q.C. sitting as a temporary judge. During the initial stages of the trial the decision in *Chalmers v. Starrs* was published and the parties were given the opportunity consider their position in light of that ruling. In this context the pursuer objected that the hearing before a temporary Judge was in breach of Article 6 of the Convention and that the judge thus was incompetent. The Judge, Mr Coutts, took the view that it was inappropriate for him to consider the issue and referred the case to the Inner house of the Court of Session.

¹²⁹ *Plahte v Norska staten*, 19 Dec 1997.

¹³⁰ *Starrs*, p 41.

11.2.1. The Devolution issue

The Court first had to consider whether a failure to act in accordance with the Convention rights by the Scottish ministers fell within the provisions of the Scotland Act 1998. The Court found that it would be strange if the provisional application of the convention under article 129(2) of the Scotland Act only applied to a direct breach. To make the law as clear as possible and to remove any ambiguities concerning the definition of the word “act”, the Court ruled that the definition contains both an act and a failure to act.

As in the case *Chalmers v Starrs* the principal issue concerned Article 6.1 of the Convention and the Court had in the same way to interpret the meaning of the phrase “independent and impartial”.¹³¹ A substantial number of European and Canadian cases were referred to the Court together with the recent case *Chalmers and Starrs*.

Faced with this great number of different cases from various jurisdictions the Court continued by examining their status in Scots law. Decisions, made by the Court of Human rights and the Commission, are not treated in the same way as Scottish precedents. The principles which can be drawn from those decisions are on the other hand more relevant, and they should be applied. It is clear from the decisions emanating from Strasbourg that the decision in any particular case will depend upon the particular facts and circumstances of that case considered in the context of the legal system of the state concerned. The general principles found will remain constant but their application will vary depending on the particular facts and circumstances of that case. The Court then analyses relevant European and Canadian Case law to extract these principles in the light of the precedent decision in *Starrs*.

The Court’s approach was to find the relevant principles in the ECHR cases, then to look at the Canadian charter to find additional assistance. Lastly the Court would examine the *Starrs* case. One of the judges, Lord Coulsfield, was of the opinion that very many cases that they were referred to were of little or no assistance. His opinion differs somewhat from the one given by the Court in *Starrs*, and maybe he tries to lessen the direct implications of foreign influence to some extent. After excluding several cases Lord Coulsfield moved to point out two similar cases, one decision by the Commission of Human rights *Stieringer v Germany*¹³² and the Norwegian Supreme Court case *Plahte*¹³³. The Court here applies two cases which deal with the same issue. Thus they consider similar cases even though at least the Norwegian case stems from a very different jurisdiction. Lord Coulsfield comments the use of the two cases “It seems to me that these two decisions are useful illustrations of the kind of reasoning which has to be applied in a case like this, in conformity with general principles of the Convention.”¹³⁴

The Court did however find, using basically the same grounds as in *Starrs*, that the system of Temporary Judges differed compared with the system of Temporary Sheriffs. The

¹³¹ Opinion of Lord Sutherland, p 2.

¹³² *Stieringer v Germany*, (1996) Appl.no.28899/95

¹³³ *Plahte v Norway*, p 26.

¹³⁴ *Clancy*, para. 27.

Temporary Judges has a security of tenure during their appointment. Thus the system with temporary judges was in compliance with the Convention.

11.3. Brown v Stott

In the Case Brown v Stott article 6 of the Convention was applied again.¹³⁵ The High Court held that the right to a fair trial and the consequent right to silence and right against self-incrimination, was breached by the Road traffic act 1998. The act stated that it was an offence for the keeper of a motor vehicle to fail to give information to the police when required to do so as to the identity of the driver. The implications of this ruling could mean that the way the police worked by using automatic speed cameras was unlawful. One of the judges, Lord Rodger made an *obiter* comment that it would be difficult to apply article 6 on this practise.

However, the case was later overruled on appeal by the Privy Council. This was possible since the act in question involved a British Statute, which means that it can be referred to the Privy Council.

11.4. Gayne v Vannet

As mentioned, very few devolution claims have been successful. In Gayne v Vannet the accused argued that his right to effective representation under article 6(3) of the Convention was breached. The accused was limited to a fixed amount of legal aid (£500) that covered only the first 30 minutes of his trial. The Executive had as a measure to control the money spent on legal aid decided to introduce a fix sum which would be given regardless of the initial cost. (If the proceedings continued more than this time, additional funding would be provided) The accused based his argument on that the right to sufficient legal aid was a basic civil right which must be protected. The Appeal Court stated that it is within the state's margin of appreciation to decide how to distribute the resources available for legal aid. The court found that the arguments put forward by the accused as being speculative. Further the accused had failed to show that there had been an unfairness.¹³⁶

11.5. McLean

In the Mclean case¹³⁷ a similar question as in Gayne was raised. The accused argued that the fixed fees under the legal aid system limited his lawyers in doing a sufficiently good job. The main topic concerned the "inequality of arms", a principle protected by Article 6(3)(b) of the Convention. Since the prosecutor did have unlimited resources the court found that the legal aid system with fixed fees breached the Convention in this aspect and had to be changed.

¹³⁵ Brown v Stott, 2000 SLT 379.

¹³⁶ Anderson, Gavin W, Using Human Rights in Scottish Courts, p 7.

¹³⁷ PF Fort William v Norman and Peter McLean.

11.6. Conclusions from the case law

It is difficult to draw any wider conclusions from the case law which has emerged so far. There are still not enough cases to study to make any certain remarks. However some interesting features can be found.

The court in *Starrs* and in *Clancy* did not only consider the Convention but also many other international and foreign human rights instruments. In both cases the Court even referred to a Norwegian Supreme Court case. Even though the court did not directly apply the Norwegian case law it was one of the most persuasive arguments which was made during the trial. This was somewhat of a surprise for the Scottish legal community since Norwegian law has very little connection with the British.

The Court in *Clancy* seemed to take a more careful approach to directly referring to foreign cases than the Court in *Starrs* did. Maybe some of the judges were of the opinion that the Court in *Starrs* had gone to far. However the *Clancy* case clearly pointed out that the principles found in foreign case law dealing with similar situations was of significance.

There is a strong indication that the Scottish courts will be influenced by the level of protection enjoyed in other jurisdictions. The courts seems to take great interest in if a similar case has been tried before another court, which would give an indication of to which extent such rights should be protected. This would entail that the Scottish courts to a large extent will not sink below that “international” level of human rights protection. The argument seems to be that there is no reason why the Scots should not enjoy the same level of protection as an individual in another country.

The courts also apply a proportionality test to see if exceptions can be made. The test is similar to the “margin of appreciation” found in the Convention case law. In *Starrs* no exception could be given even though all the temporary Sheriffs would be removed. In *Brown v Stott* the provisions were upheld, but only after the case had been appealed to the Privy Council. Thus it was a British court and not a Scottish court that finally ruled on the matter.

In *Gayne v Vannet* the Court did conclude that there are limits to what can be demanded. Here the Court did apply a proportionality test, but it also added that the case was speculative and thus without any real basis.¹³⁸ In *Mclean* the Court handled, as above mentioned, almost the same issue but came to another conclusion. The similarities between the two cases are clear so to some extent these cases set out how far the courts will go so far.

Most successful cases have handled the right to a fair trial and especially the role of the judges. Article 6 of the Convention has been used in more Scottish cases. In *Hoekstra*¹³⁹

¹³⁸ During the trial many within the legal community were of the opinion that the case was argued by the law firm more to ensure that the firms would be properly paid by the legal system than to actually defend the accused.

¹³⁹ *Hoekstra v HM Advocate (No3)* 2000 GWD 12-417.

the appeal court bench was disqualified due to statements by one of its members which could give the impression of bias.

So far no legislation has been stricken out under EC legislation. All attempts to use EC law has been ruled out as not applicable. This is however not surprising since Community law has been enforced for a much longer time in Scotland.

Some of the cases raised contained pretty much all the articles in the Convention together with every possible Community point, which could help the lawyer in his case against the government. This showed that there was a great uncertainty amongst the lawyers how these issues should be handled. The Courts and the Executive's legal staff however dealt with all of these issues and answered all of the points made even though they some times seemed to me to be completely irrelevant. But there was a need for everyone to thoroughly sort these issues out. All the initial work would be helpful in creating a way to handle the future proceedings. In this context it must also be pointed out that the judiciary in no way tried to limit the scope of the incorporated legislation. Instead it was rather given a wide interpretation and influences were taken from other jurisdiction, such as the Commonwealth and other European countries which had already dealt with the same type of cases.

11.7. Criticism and reactions

After the decision in *Starrs* the Scottish judiciary came under a lot of pressure. The criticism was hard both from the press and from the Parliament. The ruling in *Starrs* took the legal community and particularly the Executive, somewhat by surprise even though it was well known that the system with temporary sheriffs probably would not stand up to the standards set by the Convention. The Judiciary had to take interim measures to cope with the fact that all 126 temporary Sheriffs no longer had a source of income and the work they had done now had to be done by the permanent Sheriffs. Criminal cases had to be prioritised, due to the time limits in those proceedings, and civil cases would have to wait, with the risk of growing huge back logs. The Judiciary further appointed ten new permanent sheriffs to deal with the caseload and increased the working hours for the staff.

In the Scottish Parliament the criticism was harsh. The whole relationship between Scots law and the Convention came in focus. One member stated

“We have been the guinea pigs on which the Government's theories about how best to protect human rights in the UK were tested”¹⁴⁰

The criticism never concerned a possible withdrawal from the Convention, it focused on the way the implementation was done. Scotland had enforced the Convention before the rest of the UK, and had done so in different way than Whitehall.¹⁴¹ The UK Government could learn valuable lessons from the Scottish experiment.¹⁴² Whitehall had, as mentioned

¹⁴⁰ David McLetchie, Con, 2 March 2000 Scottish Parliament Official report, Col 302.

¹⁴¹ This was done via Section 129 Scotland Act.

¹⁴² Which for some people was seen as a version of the “poll tax”.

above, also created the system with the fast track procedure which gives the legislators more time to deal with tricky issues. It is however clear that that procedure only concerns primary legislation which means that England and Wales might be facing the same difficulties as Scotland.

The Executive also faced extensive criticism for not preparing themselves and the Judiciary enough. Especially the scrutinising process before a Bill becomes an Act was criticised together with the Executives stance to wait for challenges instead of avoiding them.¹⁴³ It is safe to say that the Executive had not expected that the floodgates would open. Over 400 claims have so far been made relating to the Convention, even though only some ten has been successful. But nevertheless, this was not in any way anticipated, in fact Donald Dewar¹⁴⁴ stated:

“I am not terribly impressed ... with the idea that suddenly the floodgates will open, when no one can point me to any single change other than the forum in which the cases may be heard that will result from the Bill”¹⁴⁵

12. Concluding remarks

The devolution settlement changed many things for the Scottish judiciary. The lawyers and the Judges had to deal with these changes in order to make the devolution settlement function as smoothly as possible. The Scotland Act did not only affect the judiciary but also the scottish people who saw their new parliament start working and the start of a new era for Scotland.

12.1. Legal aspects of devolution in Scotland

So far most devolution cases have involved article 6 of the Convention. Lawyers are creative and will find other areas as well, which will further develop Scots law in this area. Other articles of the Convention will be examined and used. The already existing Scottish case law will also be used as a basis for further claims.

It is not strange that most cases involved a breach of the Convention and not EC law. EC law has been applied to all legislation since the UK joined the European Union. The Convention has not been applied in very many cases prior to devolution so there were plenty of areas which could be tried.

EC law will probably be used to a further extent in the near future. As the case law shows, EC law provides protection in many areas notably in the area of sex discrimination. The basic EC principles may also be used such as the principle of proportionality and the four

¹⁴³ Roseanna Cunningham Official report of the Scottish Parliament, Thursday 15 June 2000, Col 317.

¹⁴⁴ Secretary of state for Scotland at the time, later Scotland's First Minister until he passed away.

¹⁴⁵ Official report, House of Commons, 20 May 1998, Vol 312, Col 1067-68.

freedoms. Community law is not limited to Euro-defences and has the capacity to prescribe and prevent enforcement on a national level.¹⁴⁶ The EC legislation will probably appear to be more accessible since the Scotland act makes a direct reference to Community law and nothing prevents a Scottish judge from applying and interpreting the law even though the ECJ might not be able to make that decision. A Scottish Court is not bound by political considerations in the same way as the ECJ. The Charter will also entail legal basis for cases as soon as its legal status is decided. However it can be used in a Scottish court as a way to define rights. The principles derived from the Charter can be used in line with the ruling in *Starrs* and *Clancy*. Thus, the line separating EC law and the Convention will be increasingly important as the Scottish practitioners try to find new legal grounds for their claims.

Further, the UN charter can also be used as a source to define rights together with other statements made by the UN institutions. As seen in the temporary Sheriffs case the court takes a large number of different documents under consideration, even though their legal value differs.

It is certain that Scottish practitioners follow the development in other countries to see how far they have gone in the development of their national human right case law. As mentioned, a foreign case could persuade the court to follow in the same lane. In this context the Internet has been of great use to find applicable updated case law. One of the more striking examples of the use of Internet occurred during the *Mclean* trial when the Sheriff asked the parties how they interpreted a case posted on the web the same morning. It is fair to say that the question took the parties somewhat by surprise.

It is also clear from the Scottish case law that as soon as one case has been successful others will follow the same route. This is what the Executive fears. As soon as the first case is won concerning e.g. the Charter, lawyers will quickly use that case law in other cases. It is therefore important for the Government not to loose those “flood-gate” cases.

The present evolution requires that the lawyers and the judges know a great deal about the Convention and that they have the opportunity to stay updated with the new case law. This even comports case law from other jurisdictions than the British. The possibility to research through the Internet will be more and more important. If a similar decision already has been made somewhere in Europe or in other relevant jurisdictions that case might be vital for how the actual case turns out.

As a whole, the incorporation of the Convention into Scottish law makes sense. It seems rather artificial to try to interpret legislation in a way so it conforms with the Convention, as was done prior to devolution. It is more visible to make a direct reference, as was later done in the Scotland act. The same goes for Community law. However, the Scottish judiciary was not prepared enough for the floodgates to open. But even though the Government has faced much criticism it is fascinating that the politicians and the judiciary still encourage the courts to develop the national case law. The court can, and shall, go further.

¹⁴⁶ Boch, Christine, EC law in the UK, p 194.

12.2. The devolution settlement

Even though the devolution settlement shaped a Scottish Parliament it is most likely that Scotland will remain within the UK. The benefits of belonging to the UK are still great and it would for most Scots be strange to have a totally separate nation. Within the UK, Scotland takes part in one of the most powerful nations in Europe. This means that Scotland can affect especially EC legislation in a much more influential way than if it were to be a small country of its own. Further, if Scotland would become independent, it is difficult to see that the EU would support this, since it would interfere with the ongoing expansion eastwards, and call for a change of the Treaties.

However, it is important that the UK government co-operates with the Scottish Executive in all matters regarding Scotland. The small differences between Scottish and English law often creates problems since Whitehall often is not aware of them. On occasion, this causes irritation and unnecessary problems. Since London does not know about the differences, they might make laws, secondary or primary, which cause unnecessary difficulties for the administration. In the long run this might also lead to a demand for further devolution

On the political arena it appears that all problems relating to devolution can be blamed on “not enough devolution”, which would call for more devolution. This concern can be seen in many of the constructions that have been chosen, notably the Scottish Grand Committee and the lower levels of co-operation between the Parliament and the Executive.

There is a need to in the near future adjust the various systems in Scotland. Today the procedure differs depending if the matter involves a devolved or a reserved area, Community law or the Convention. It would make sense find common solutions to the same problems. This would remove many of the vague areas that are present today.

13 Appendix

13.1. The Author

In August 1999 I had the opportunity to work as an intern at the Office for the Solicitor to the Scottish Executive situated at Victoria Quay in Edinburgh. During the five months that followed in division A, the department which deals with all legal issues concerning EC law and Human Rights, I got an insight in how the Scots handle the devolution settlement. I also spent one month at the Office for the Advocate General which is the UK representative for Scotland which handles the reserved areas.

During my time at the office I also took part in different cases before the Scottish courts involving both Community law and the Convention. Of particular interest was the way that the Scottish Courts handled these new very difficult legal issues. It seemed to me that the judiciary was well prepared and very motivated in making the devolution work, even though it caused a lot of problems and concern. This will to make devolution work amongst the lawyers was the reason why devolution worked out so well.

I also spent a month at the office for the legal adviser to the Scottish Parliament where I was able to get an insight from the legislating point of view. The workload facing the lawyers at the Parliament was immense but they still strived to make devolution work.

Much of the information on which I have based this paper, is gathered through my own work and through everyday discussions with the staff at the different offices. Some of the more subjective remarks I have made in the paper are of course affected by my own personal opinion and they do not signify the tacit will of the Executive.

I found it fascinating to work in Scotland during the initial stages of devolution. There were so many new legal aspects to consider especially involving how the Convention and the Community legislation would function together. I believe that this open minded approach to human rights law is something that will grow even in other European countries and that there are many lessons and examples to learn from emanating from the Scottish devolution.

13.2. Selected sections of the Scotland Act

29. - (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply-

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or with Community law,

(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland

(3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

(4) A provision which-

(a) would otherwise not relate to reserved matters, but

(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters

is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.

57. - (1) Despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under Community law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.

(2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.

(3) Subsection (2) does not apply to an act of the Lord Advocate-

(a) in prosecuting any offence, or

(b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland

which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.

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