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HUMAN RIGHTS LEGISLATION

According to Richard Littlejohn, the political correspondent of the *Sun* newspaper, human rights are:

“A charter for terrorists, violent criminals, drug dealers, nonces, assorted troublemakers and chancers”.

My colleague Lord McCluskey has expressed similar views. Nevertheless, on this occasion, as on some other occasions, I have to say that I do not necessarily believe what I read in the *Sun*.

Mr Littlejohn's views are however widely shared in the media, and are fed by a constant diet of stories which would appear to support his thesis. I came across a good example recently, not in the *Sun*, but in the *Times Educational Supplement*. It reported that legal action had been taken after a secondary school refused to admit a boy who had tattooed the word “THUG” across his own forehead. As he had done the tattoo in the mirror, it actually read “GUHT”. The school's decision was challenged on the basis that it was interfering with the boy's right of freedom of expression, as guaranteed by article 10 of the European Convention on Human Rights. Unlike most tabloid reports of this type, however, the *TES* reported that the case had been dismissed by the courts.

What I would like to do this evening is to begin by saying something about human rights law in general, and the European Convention in particular. I shall then try to explain the status of the Convention in our law, and the effect of the Human Rights Act. I hope it will then become clear why the Act has caused some anxieties. I shall then explain what is special about the situation in Scotland. Finally, I shall say something about the consequences of these recent changes in our law. In 20 or 30 minutes or so I can only scratch the surface, but I shall try to give you a general impression of what is happening as I see it.

1. Human Rights in General, and the European Convention in particular

Human rights law, as that expression is generally understood, is essentially a creature of international law: in other words, treaties and conventions entered into between States, as distinct from the domestic law created by national institutions such as the Westminster Parliament. There have been proclamations of fundamental rights at a national level from time to time, usually as part of political revolutions or crises where it is thought necessary to repudiate the mistakes of the past and to start again by making important changes to the constitution. Examples are the English Bill of Rights and the Scottish Claim of Right, both of 1689, the French Declaration of the Rights of Man of 1789, and the US Bill of Rights of 1791. But human rights law in the modern sense can be traced to the UN's 1948 Universal Declaration of Human Rights, which responded to the events of the previous decade. The Universal Declaration might be seen as an expression of an idealistic hope for the future. The European Convention, which followed in 1950, was one of a number of initiatives around that time designed to foster European integration and to protect the European democracies against the spread of communism or the resurgence of fascism.

As matters have developed, however, international human rights law is no longer, as it seems to me, motivated solely, or perhaps even primarily by idealism. Human rights law is, of political importance to a Government such as ours, partly because it underpins other international initiatives. Governments such as ours cannot nowadays cope with the problems that confront them on a unilateral basis. They seek to cooperate with other States so as to deal with issues through international agreements. Many agreements of this kind are only possible if the States involved are committed to certain core values. For example, terrorism, drug trafficking and people trafficking are all problems which have to be confronted at an international level, through agreement on such matters as international arrest warrants and mutual extradition. For these agreements to be politically acceptable, however, it is essential that the other States involved accept that their systems of justice should meet certain minimum standards, guaranteeing for example that suspects are not tortured by the police and that they receive a fair trial. Equally, at a more mundane level, matters such as the custody of children, when parents split up, nowadays have to be regulated at an international level, because so many marriages involve couples from different

countries; but that depends on other States having systems of family law in which our Government can have confidence, for example to treat mothers and fathers with equal fairness. Even trade and investment by British companies in countries such as the former Soviet Republics depend to some extent on those countries having a legal system which meets minimum standards: for example, that cases will come before a judge who is not corrupt, and will be dealt with within a reasonable time. Perhaps most importantly, within a European context, the expansion of the European Union depends on the new countries accepting the core values shared by the existing members. That is one reason why the EU is currently putting in a lot of work in Turkey, and why the UK Government has made an effort in this area to assist countries in Eastern Europe.

So international human rights treaties express core values on which different States are able to agree and need to agree for the sort of reasons I have explained. They tend to focus on civil and political rights: for example, freedom of religion, freedom of expression, the prohibition of slavery, torture and State killing, the treatment of prisoners, the death penalty, and guarantees of a fair trial. They tend not to deal as fully with social and economic rights, because States find it much more difficult to agree about those matters at an international level and do not in general have the same need to reach agreement on them. The European Convention is typical in this respect. Within the European Union, however, the Charter of Fundamental Rights and Freedoms goes further than the Convention in addressing social rights. Its legal status is to be considered at next year's Intergovernmental Conference, along with the proposed Constitution.

2. The status of the Convention in our Domestic Law, and the effect of recent changes

So far I have been discussing human rights at the international level. I want to look next at the level of our domestic law.

Most European countries have written constitutions that guarantee fundamental rights, and in many European countries treaties which that country has ratified form part of their law.

The United Kingdom is different. The explanation lies in history. Like most other European countries we had a revolution, but ours occurred earlier, in the 17th century, and it did not result in the establishment of a republic under a written constitution. It established however that the Crown – the Monarch and his or her ministers – had to govern the country through Parliament.

The practical result was that Parliament became the supreme body in our constitution. It was understood that important legal changes were a matter for Parliament, not for the courts; and that the courts could only interpret the legislation passed by Parliament, they could not question or overturn it.

Our legal order was one of Parliamentary supremacy, moderated by rules of interpretation of legislation which were developed by the courts and which to some extent protected some basic freedoms.

International treaties, such as the Convention, are not signed or ratified by Parliament, but by the Crown. They therefore do not form part of our law. Parliament can however pass legislation to give effect to a treaty. Even then, it is not the treaty which forms part of our law, but the legislation passed by Parliament.

Whether Parliament should pass legislation in order to give effect to the Convention was for a long time a matter of controversy. The necessary political revolution for the adoption of a human rights charter into our domestic law appears to have been the overthrow of the *ancien regime* in 1997. The Labour Government decided to introduce legislation to give effect to the Convention, and the Human Rights Act was passed by Parliament in 1998 and came into force throughout the United Kingdom in 2000. Parts of it had however been brought into force earlier in Scotland, as I will explain in a moment.

What the Act does is to create rights under our domestic law, which it calls Convention rights. They are expressed in the same terms as the principal articles of the Convention.

The courts are required to take account of the decisions of the European Court of Human Rights in Strasbourg, which interprets and enforces the Convention at an international level, in interpreting the Convention rights, but are not required to follow them.

The courts are required also to interpret any legislation passed by Parliament so as to make it compatible with Convention rights, if it is possible to do so.

Parliament retains the power to pass legislation which cannot be interpreted compatibly with Convention rights, but the courts can then make a formal declaration that the legislation is incompatible with Convention rights.

If such a declaration is made, the Government can then introduce legislation to remove the incompatibility using an accelerated procedure.

3. Anxieties

The Human Rights Act remains controversial. Part of the controversy reflects political concerns about European integration, and about some of the more liberal decisions of the Strasbourg Court.

More fundamentally, however, there has been concern that the Human Rights Act takes power away from political institutions and gives it to the judiciary.

As you will understand from what I have said earlier, although the Act preserves the supremacy of Parliament, it involves some departure from our traditional understanding of the constitutional role of the courts. It is new to us that the courts should be entitled to assess the compatibility of legislation with fundamental rights or to interpret it so as to render it compatible with such rights.

It seems to me to be difficult to maintain a fundamental objection to powers of that kind being given to the courts if Parliament decides that that is appropriate in order to give greater protection to human rights.

At the same time, it is reasonable to be concerned that these powers should not be used by the courts in such a way that there is an unrestrained substitution of decision-making by judges for decision-making by Government and Parliament in areas which engage Convention rights.

That concern has been linked to concern about the composition of our judiciary and the methods of their appointment. It has been felt that if it is to be acceptable for judges to play a more important constitutional role, then the judiciary need to be more reflective of society as a whole, and the method of their appointment should be more transparent. That point of view is one that I share.

4. Scotland

So far, I have not mentioned Scotland specifically. But, in the area of human rights law, as has sometimes happened in other areas, Scotland has been a guinea pig. That is the result of another constitutional change the Labour Government made: to establish a devolved Parliament and Executive in Scotland, with responsibility for many areas of domestic affairs.

The Scotland Act, which set up these bodies, provided that the Scottish Parliament and Executive had no power to act in a way which would be incompatible with Convention rights: if they did, then the courts would have to overturn what they had done.

The Act came into force in 1999, and parts of the Human Rights Act were brought into force in Scotland at the same time.

The Scotland Act thus raised the same concerns as the Human Rights Act concerning the relationship between the courts and political institutions, and it did so more acutely, since it gave the courts, for the first time in our history, the power to overturn legislation passed by a democratic legislature.

It also raised the same concerns about the composition and appointment of the judiciary. Those concerns have been addressed in part, in Scotland, by reforms to the

system by which judges are appointed. The reforms have to some extent made the system more transparent. Reforms in England and Wales are presently being considered.

5. Consequences

So, on paper at least, the Human Rights Act and the Scotland Act have taken the United Kingdom, and Scotland especially, some distance away from pure Parliamentary supremacy, and towards constitutional supremacy of a kind that exists in most other European countries.

They enable the courts to play a more important part in the dialogue or interaction that always exists between the courts and political institutions.

In practice, however, the courts have not adopted a much more assertive role. That is partly because the rights guaranteed by the Convention are, for the most part, already well protected in the United Kingdom. There are however areas which are problematical, often concerning minority groups whose rights have not been as well protected by our media and our politicians as those of the majority: for example, the rights of prisoners, sexual minorities and the mentally ill. Many of the more serious challenges under the new legislation have been brought by people falling within categories such as these. An interesting group of challenges have also been brought against infringements of privacy by the Press – something which successive governments have declined to address by legislation – although some of the challenges have in reality concerned an attempt by celebrities to obtain control over access to their private lives so that they can exploit it commercially.

An examination of the case law shows uncertainty about how the new Acts should be applied by the courts. There is some disagreement about how far the courts should go in interpreting legislation so as to render it compatible with Convention rights. One can see a desire to fit the Human Rights Act within a traditional approach, as building on the common law, rather than as something new with its background in international law. The approach has in general been cautious and tentative. Emphasis has been placed on the need to defer to the democratic will of Parliament in what

might be called “grey areas”, and on the inappropriateness of the courts’ making major changes to the law, for example to allow transsexual people to marry persons of their former gender, or to establish a right of privacy. The constitutional tradition of deference by the courts to Parliament remains strong.

Major changes to our law, arising from the Convention, have continued almost always to result from legislation, sometimes prompted by decisions of the Strasbourg Court, rather than from decisions of our own courts.

On the positive side, much has been achieved since the new legislation came into force, especially in Scotland. The Scottish Executive has shown a commitment to the European Convention, and has introduced a number of reforms, without any pressure from the courts, in areas where reform remains controversial and unimplemented in England and Wales. An example is the conferring on the courts of the power to fix the minimum period to be served by persons convicted of murder. So far as the courts are concerned, human rights issues have formed a large part of the work of our Criminal Appeal Court and of the judges dealing with administrative law, that is to say, disputes between the citizen and the State. Some important cases, although not a great number, have been brought successfully on the basis of the new Acts. We are beginning to learn how to apply the methods of reasoning used by the Strasbourg Court, which derive from continental systems.

The doctrine of proportionality, for example, requires some laws to be expressed in a flexible form, so that they can be applied in a way which is sensitive to the facts in particular cases.

How this doctrine should be applied has become the central legal question in widely differing situations: for example, in cases concerned with a ban on assisted suicide, or with restrictions on the questioning in court of women who complain that they have been raped, or with rules concerning social housing or consumer protection that have more severe consequences for some individuals than for others.

Cases of this type may require our courts to make an assessment of the justification for legislation being drafted in a particular way, which is a new function for them;

and even where the case concerns an administrative decision – something which the courts have reviewed for centuries – the courts now have to undertake a more searching assessment than our law required in the past.

A critical question, of course, is to decide to what extent the justification for legislation or for administrative action is an issue which the courts can properly determine: in other words, at what point one reaches a stage where the assessment raises policy issues which the court cannot evaluate. We are at a very early stage in learning how best to apply this doctrine.

It seems to me that, in Scotland, the effect given to Convention rights forms part of a cultural change which one can feel since the establishment of the devolved institutions. As I have said, the Scottish Executive appears to have embraced Convention rights with rather less difficulty than some of the UK departments. Scottish judges appear also to have treated arguments based on the Convention with greater interest than some of their English colleagues. These differences may be related to one another, in that the Scotland Act places on the courts the responsibility to ensure that the devolved institutions stay within the limits set by Convention rights, whereas the English courts are operating within the more traditional framework of Parliamentary sovereignty.

The level of interest in Scotland in other European legal systems has also developed. Scottish judges now have regular meetings and exchanges with colleagues from Germany and France, and to a lesser extent with judges from other countries in all parts of Europe. Indeed, we see rather more of judges from a number of continental countries than we do of judges from England. When meetings and discussions are held with foreign judges, they often revolve around issues relating to the Convention, because it is a subject of such common interest and importance. The French judges, for example, find aspects of the Strasbourg case law derived from the common law foreign to their tradition; and their difficulties, compared with ours, are like a photograph and its negative. Thus the Convention is encouraging us to understand each other better, and gradually to develop our legal systems so that they draw closer together.

When I started in practice at the Bar, the links of Scots law to the continental systems appeared to many to be little more than an historical curiosity; and a young lawyer embarking on a career in Scotland might have had some concern that he or she was choosing to work in a small jurisdiction which was over-shadowed by its English neighbour. Today, on the other hand, and partly through the influence of the Convention, and also of EC Law, we are able to view our civil law heritage as an asset rather than a liability; to see ourselves in the context of European legal culture as whole, rather than in the context of the United Kingdom alone; and, after a long interval, to play once more an active part in the European legal community.

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