

The Use of Human Rights Legislation in the Scottish Courts

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The research investigated the use of human rights legislation in Scottish court cases between May 1999 and August 2003. The study examined the impact of the Scotland Act and the Human Rights Act in terms of arguments that had been advanced in the supreme and sheriff courts based upon the European Convention on Human Rights (ECHR). It looked at the prevalence of the use of such points across Scotland, the nature of the cases in which they occurred, and the use of specific ECHR articles. The research allowed the identification of areas of potential significance for policy development and explored the feasibility of continued monitoring of the uses of human rights points in the courts.

Main Findings

- Human rights legislation was used in a wide range of criminal and civil case-types in the Scottish courts between devolution and August 2003, with important, but moderate, impacts on the courts, public policy and practice and the legal system.
- The full array of Convention rights was being invoked in Scotland, but an expectation that Article 6 points would predominate was confirmed by the data.
- Human rights points had been deployed at a steady rate since devolution, but occurred in only a very tiny fraction of cases, and did not appear to be being used consistently across Scotland.
- Most of the cases were citizen-state disputes, and the legislation appeared to have had a greater impact on the criminal justice system.
- Notable clusters of cases raising human rights points occurred in relation to immigration control, prison conditions and children. However, a single case can have disproportionately wide repercussions for public bodies and practice (for example, the abolition of temporary sheriffs).
- Few challenges that might have had a significant impact on public policy and administration had been successful. The Scottish Executive had, furthermore, in several instances moved to pre-empt potential challenges through the introduction of legislation.
- In the period studied, no primary legislation had been invalidated as the result of a human rights-based challenge.
- The effect on the course and outcome of a case of the use of human rights laws in argument was not always clear, as Convention rights arguments were often made alongside others based on existing principles of Scots or European Community law.
- Generally, the decisions of the Scottish courts were consistent with Strasbourg case law.

Background

This paper summarises a study that is more fully described in the project report of the same name. The research described and analysed the uses made of human rights legislation in the Scottish courts since devolution in May 1999. The relevant legislation was the Scotland Act 1998, the Human Rights Act 1998 (HRA), and the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR). Other international human rights instruments and statutes were not covered by the project.

ECHR is an international treaty which guarantees certain individual rights and liberties (Convention rights), and provides remedies for their violation. It came into force in the UK in 1953.

Both the HRA and the Scotland Act establish the status of Convention rights in Scots law. The HRA was enacted to better incorporate ECHR into UK law by broadening the range of situations where domestic courts could provide remedies for rights violations. Previously, many remedies would have to be pursued at the European Court of Human Rights.

The primary function of the Scotland Act was to set up a system of devolved government. It also provides for additional protection for Convention rights, exceeding the HRA in two important aspects: it entered into force earlier than the HRA; and, more significantly, it provides that an Act of the Scottish Parliament is outside the competence of the Parliament if incompatible with ECHR. This contrasts with the HRA, which does not empower courts to review the validity of Acts of Parliament. The Scotland Act also provides for challenges to actions of the Scottish Executive on human rights grounds.

Aims and Methods

The research aimed to assess the impact of this legislation in the ordinary courts since devolution.¹ Its objectives were to gather information about civil and criminal cases, in the supreme and sheriff courts, as a basis for analysing the ways in which the legislation was being raised in the courts. This could be either as a central, supporting or incidental point in a case. It sought to identify any trends and key developments in case law, especially where these had relevance to policy, or where they were of doctrinal significance.

¹ Tribunals were not included in the research.

Data were collected on cases in the period from May 1999 to August 2003. Reported cases were identified from law publications, websites and databases. Unreported cases were mainly identified from 'devolution minutes', intimations of any case that raises a human rights issue which must be given to the Lord Advocate and Advocate General under the Scotland Act.

Once collated in a database that recorded key features of the case, the data were analysed quantitatively and qualitatively, with reference to:

- the type of court and procedure;
- the location of the court where raised;
- the subject matter (ECHR article and area of Scots law);
- the outcomes of cases;
- trends in post-devolution human rights case law, including comparison of the approaches of the domestic courts and the Strasbourg Court and Commission;
- the impact on areas of law and policy.

The research provides an overview of how the legislation has been used in specific areas of the law.

Findings

Case types

Due to the different procedures involved, the ways in which case types progress through the courts and are documented, it proved far easier to access the required data for criminal cases. That information is, therefore, more comprehensive than for civil cases.

Data derived from reported criminal cases were supplemented by information on unreported cases noted in devolution minutes. Over the period studied, a human rights point was raised in an average of 150-200 cases per annum, a tiny proportion of all cases brought to Scottish courts (a little over one quarter of one percent). The data disprove pre-HRA and ongoing fears that the courts would be engulfed by use of the legislation. Arguments were generally raised in defences to prosecutions, which would not add cases to the justice system. Almost the full range of Convention rights was being invoked in criminal cases and an anticipated predominance of Article 6 issues of procedural fairness was borne out as the vast majority of arguments cited this, being concerned with procedure rather than substantive criminal law (87% of

all cases, including the 39% that raised allegations of delay).

It was not possible, from court records, to estimate the total number of civil cases raising human rights arguments, so analysis of civil cases was based primarily on reported cases data. A human rights point featured in 105 reported cases, most often in applications for judicial review (32% of the points raised). Judicial review supplied the largest number of cases in the sample. Next was ordinary cause in the sheriff court (24%), but the *proportion* of ordinary causes in which human rights points were raised would be much lower than for judicial review. The majority were citizen-state disputes but in a significant minority all parties were private individuals or corporations. The full range of rights was again being deployed, across a wide range of areas of Scots law and public administration (immigration, family and child law, property and civil procedure being more affected). A significant number of the civil cases were brought by prisoners, but many concerned the single issue of 'stopping out'.

Despite there being less complete data for civil cases, comparison of reported figures suggests that the numbers of cases including human rights points may be closely comparable across civil and criminal justice.

In reported cases, remedies were more often sought under the Scotland Act than under the HRA, reflecting the predominance of criminal cases in the data, which typically invoke the Scotland Act due to the role of the Lord Advocate in prosecution.

The full report contains an overview of post-devolution case law, explaining the issues that have arisen in relation to each of the substantive Convention articles. It is not possible to summarise this essentially doctrinal analysis here, but general observations based on it are made below.

The effects of human rights legislation

The research offers some conclusions about the impact of the use of the Scotland Act and HRA on the legal system and public administration. The main ones are summarised here.

Courts

Human rights issues under ECHR are an established category of argument in the Scottish courts. Despite a decline, after an initial post-devolution flurry of activity, a steady stream of human rights issues had continued in criminal justice. However, this was a tiny fraction of cases, the vast majority of which would proceed

anyway without the inclusion or incidence of a Convention rights argument. The legislation therefore had not had major resource implications for the justice system.

Public policy and administration

Human rights arguments have been raised in cases affecting a wide range of domestic law and policy areas. However, a single case can have important repercussions for public bodies and policies, a clear example of this being the early abolition of the position of temporary sheriffs following a decision that this was incompatible with Article 6.

Although a substantial number of human rights cases have succeeded, the developing case law, overall, has not had a major impact on government policies and practices in Scotland. Most challenges that could have had a significant impact on policy have been unsuccessful. This, however, only refers to changes introduced as a direct consequence of litigation, and not to more indirect impacts on legislation; the Scottish Executive have positively moved to pre-empt a number of potential challenges through the introduction of legislation.²

Three Acts of the Scottish Parliament have been subject to challenges as to their competence: the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, the Protection of Wild Mammals (Scotland) Act 2002, and the Convention Rights Compliance (Scotland) 2001. None of these challenges was successful.

Nor had the courts made any declarations of incompatibility in relation to UK statutes in Scottish cases. There was no invalidation of primary legislation in the period studied. Nevertheless, there is the possibility that an Act of the UK Parliament could effectively be nullified in Scotland, despite the HRA and the constitutional principle of Parliamentary sovereignty, an important issue for the future. Provisions of UK Acts that depend for their effective enforcement on action by members of the Scottish Executive might be rendered nugatory by a finding that enforcement by the Executive was incompatible with a Convention right.

The approaches of judges

Assessing the effects of human rights legislation on the courts and their performance in applying it is not straightforward. Often ECHR-based arguments were

² For example, the Bail, Judicial Appointments, etc (Scotland) Act 2000 and the Convention Rights (Compliance) (Scotland) Act 2001.

made alongside others based on existing legal principles of Scots or Community law (e.g., procedural fairness is protected by Article 6 and by the principles of natural justice). It was not always clear whether ECHR arguments made a difference to the outcome: where a court explicitly disposes of a case on 'domestic' grounds alone, the inclusion of a Convention rights argument may have fortified or influenced the conclusion or had no effect.

A major question, given the breadth of many ECHR provisions, is whether Scottish courts are deciding cases consistently with Strasbourg case law. In general, the research found that this was the case. However, there were cases in which it is arguable that the Scottish courts have repelled challenges where the European Court would have found a violation. Conversely, there are examples of the courts applying a higher standard than the Strasbourg court would. To date, post-devolution case law does not suggest that domestic courts are overall more or less willing than

Strasbourg to find that Convention rights have been infringed.

Conclusion

The introduction of human rights law has had an important, yet only moderately significant, impact on the courts, public policy and administration, and the legal profession. Given the availability of the data required for this kind of research, future monitoring of the use of human rights legislation in the Scottish courts would have to rely heavily on reported cases and intimations of relevant cases in the form of devolution minutes. This would not, however, allow equality of data completeness for civil and criminal law, as the former would demand different and more intensive forms of data gathering, requiring considerable resources. Qualitative research would also be needed to obtain a rounder picture of whether a human rights culture in Scotland has been developing, and the role of the HRA and Scotland Act in fostering such.

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