THE USE OF HUMAN RIGHTS LEGISLATION IN THE SCOTTISH COURTS

Paul Greenhill, Professor Tom Mullen and Professor Jim Murdoch, University of Glasgow

Sarah Craig, University of Stirling

Professor Alan Miller, Strathclyde University

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EXECUTIVE SUMMARY

1. The research analysed the uses made of human rights legislation in the Scottish courts since devolution. 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). Both the HRA and the Scotland Act have the effect of better incorporating the status of Convention rights into domestic law, broadening the range of situations where the domestic courts can provide remedies for rights violations. The Scotland Act also exceeds the protection of Convention rights afforded by 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 the ECHR and provides for challenges to actions of the Scottish Executive on human rights grounds.

2. To explore the ways in which the legislation was being used, in terms of arguments based upon the ECHR which had been advanced in supreme and sheriff court cases, the project gathered information about civil and criminal cases between May 1999 and August 2003. The human rights points examined could be central, supportive or incidental to the case.

3. Reported cases were identified from hard copy law publications, websites and databases. Unreported cases were mainly identified from ‘devolution minutes’, intimations of cases that have raised a human rights issue which must be given to the Lord Advocate and Advocate General under the Scotland Act, and from in-court case-tracking in the supreme courts and two sheriff courts. The retrospective identification of civil cases from court records was a formidable, intensive and complex task as many case categories will not raise devolution issues, and there has been no routine monitoring of human rights arguments in the courts. Uncovering the use of the legislation in unreported cases presented considerable methodological challenges. Due to the different procedures involved, it proved far easier to access the required data for criminal cases, so that information is more comprehensive than for civil cases. The vast majority of cases were citizen-state disputes.

4. Once collated in a database that recorded key features of the case, the data were analysed from quantitative and qualitative angles, with reference to:
   • the type of court and case;
   • the location of the court where raised;
   • the ECHR article referenced;
   • 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 - from both successful and unsuccessful challenges.

5. Quantitative analysis was undertaken in Chapter 2 to examine the prevalence of human rights arguments, the nature of the cases in which they occurred, and the use of specific ECHR articles. Qualitative interpretation of the data allowed the project to identify trends and key developments in the case law, especially where these had relevance to policy, or where they were of doctrinal significance in terms of the interpretation of the law, in Chapters 3 and 4.
A principal aim of the research was to examine the feasibility of continued monitoring of the ways in which human rights points are used in court cases. Suggestions from this element of the project are offered in Chapter 5. Currently, there are no mechanisms in place for the systematic collection of such data.

Human rights issues under ECHR have become an established category of argument in criminal cases in the Scottish courts. However, in the period studied, although human rights points were raised, at a steady rate, in an average of 150-200 cases per annum, this represents a tiny proportion of all cases brought to Scottish courts (a little over one quarter of one percent). The vast majority of these cases would have proceeded without the inclusion of a Convention rights argument, and arguments were generally raised in defences to prosecution.

The data, therefore, clearly disprove concerns raised prior to the implementation of the HRA that the justice system could be engulfed by use of the legislation. The legislation, therefore, had not had major resource implications for the criminal 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. Human rights law was referred to most often in high court trials and least in summary procedure cases in the district court.

Comprehensive data on unreported civil cases were not as accessible, so reported sources had to be relied upon. A human rights point featured most often in judicial review cases. The full range of rights was again being deployed, across a wide range of areas of Scots law and public administration. A significant number of the civil cases had been brought by prisoners, many on the single issue of ‘slopping 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 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 qualitative analysis offers some conclusions about the impact of the use of the Scotland Act and the HRA on different areas of public policy and the justice system. Reported cases suggested that, after criminal justice, immigration control was the public policy area, where human rights points were raised most frequently; and there were clusters of cases relating to children and prison conditions. However, a solitary case can have important repercussions for public bodies and policies, a clear example of this being the early abolition of the position of temporary sheriff, following a decision that this was incompatible with Article 6.

Most challenges that could have had a significant impact on policy have been unsuccessful. 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. This, however, only refers to changes introduced as a direct consequence of litigation, and not to more indirect impacts on legislation. The Scottish
Executive and Scottish Parliament have positively attempted to pre-empt a number of potential challenges through the introduction of legislation.

14. 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) Act 2001. None of these challenges was successful. There was, however, no invalidation of primary legislation in the period studied. Nor had the courts made any declarations of incompatibility in relation to UK statutes in Scottish cases. Nevertheless, there is the possibility that an Act of the UK Parliament could effectively be nullified in Scotland, where it relies for enforcement on actions of members of the Scottish Executive, despite the HRA and the constitutional principle of Parliamentary sovereignty, an important issue for the future.

15. Assessing the effects of human rights legislation on the courts and their performance in applying it is not straightforward. Often ECHR-based arguments are made alongside others based on existing legal principles of Scots or Community law (for instance, 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.

16. 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 substantially more or less willing than Strasbourg to find that Convention rights have been infringed.

17. The process of data collection for the study and analysis of the data made it possible for some recommendations to be made in relation to how ongoing monitoring of the use of human rights legislation in the Scottish courts might be undertaken. Given the availability of the data required for this kind of research, future monitoring 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, as the former would demand different and more intensive forms of data gathering, requiring considerable resources. Qualitative research would be needed to construct a rounder picture of whether a human rights culture in Scotland has been developing and the role of the Human Rights Act and Scotland Act in fostering one.

18. The findings from this study clearly indicate that 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.
CHAPTER ONE: INTRODUCTION

BACKGROUND

1.1 This report describes and analyses the use made of human rights legislation in the Scottish courts since the devolution of legislative and executive power to Scotland in May 1999. The expression ‘the human rights legislation’ means throughout this report the Human Rights Act 1998 and the Scotland Act 1998. This chapter explains the background to the research. The Human Rights Act 1998 was enacted in order to incorporate into UK law the European Convention on Human Rights and Fundamental Freedoms 1950 (‘the Convention’). The primary function of the Scotland Act 1998 was to set up a system of devolved government for Scotland, but it also included important provisions relating to the protection of the rights guaranteed by the Convention (‘Convention rights’). It is necessary to read both Acts in order to understand the status of Convention rights in Scots law.1 The research covered only the use of these two Acts and the Convention. It did not attempt to examine the use of human rights arguments based on other international instruments and statutes that implement them.

1.2 Before describing the effects of this legislation it is appropriate to describe the Convention itself. The European Convention on Human Rights is an international treaty which guarantees certain individual rights and liberties, and provides remedies for their violation. It was prepared by the Council of Europe, adopted on 3 November 1950, ratified by the UK in 1951 and entered into force in 1953. The Convention guarantees a number of specific rights, mainly civil and political rather than social and economic rights. Those that have been accepted by the United Kingdom are:

Rights in the original text of the Convention

- Article 2 the right to life
- Article 3 prohibition of torture and inhuman or degrading treatment or punishment
- Article 4 prohibition of slavery, servitude and forced labour
- Article 5 right to liberty and security of the person
- Article 6 right to a fair trial (criminal and civil)
- Article 7 prohibition of retrospective criminal punishment
- Article 8 right to respect for private and family life
- Article 9 freedom of thought, conscience and religion
- Article 10 freedom of expression
- Article 11 freedom of assembly and association
- Article 12 right to marry and found a family
- Article 13 right to an effective national remedy for violation of Convention rights
- Article 14 prohibition of discrimination

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Rights added by subsequent protocols

Protocol 1, Article 1 the right to peaceful enjoyment of possessions
Protocol 1, Article 2 the right to education
Protocol 1, Article 3 the right to free elections
Protocol 6 the abolition of the death penalty in times of peace
Protocol 13 the abolition of the death penalty in all circumstances

1.3 Other rights added by subsequent protocols such as the right to freedom of movement have not been accepted as treaty obligations by the United Kingdom. It is only the rights currently accepted as treaty obligations (above) that are protected by the Human Rights Act and the Scotland Act.

1.4 Some rights, such as the prohibition of torture and inhuman or degrading treatment or punishment in Article 3, and the prohibition of slavery and servitude (but not forced labour) in Article 4 are expressed in absolute unqualified terms. Others come with qualifications attached, for example, each of the rights protected by Articles 8 to 11 may be subject to interference on similar, although not identical, grounds which include, national security, public safety, the protection of health or morals, and the protection of the rights and freedoms of others. Most of the Articles are subject to derogations in times of emergency.

1.5 The Convention provided both for enforcement by state parties and by individuals through the right of individuals to petition which was recognised by the UK in 1966. The exercise of this right led to a large number of rulings by the European Court of Human Rights that the United Kingdom had acted in violation of Convention rights. The high number of applications made to the Convention authorities and the high number of rulings against the United Kingdom was partly a function of the limited impact of the Convention in domestic law which meant that the UK courts could not in many cases provide a remedy for violation of a Convention right.

1.6 The principal purpose of the Human Rights Act was to broaden the range of situations in which the domestic courts could give remedies for the violation of Convention rights, but without going so far as to give the courts power to review the validity of Acts of Parliament. The key provisions are sections 3 and 6. Section 3 states: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’ This provides a very strong principle of interpretation which should minimise the risk of legislation being found in violation of Convention rights. Where it is impossible to give primary legislation a meaning which is compatible with Convention rights the superior courts may make a declaration of incompatibility under section 4. Such a declaration has no effect on the validity of the provision concerned but it may trigger a fast-track procedure for amendment or repeal of the legislation under section 10.

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2 By late 2000, just before entry into force of the Human Rights Act, the European Court of Human Rights had found against the UK in over 60 cases. See Mullen, T (2001) The Human Rights Act 1998 and Scots Law, Glasgow: Legal Services Agency.

3 There have been several important decisions by the House of Lords on the meaning and application of section 3 of the Human Rights Act including R v A (No 2) [2002] 1 AC 45; Re (S) (Minors) (Care Order: Implementation of Care Plan) [2002] 2 ACC 291; and Anderson v Secretary of State for the Home Department [2003] 1 AC 837.
1.7 Section 6 states: ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right.’ In principle, this provision covers all actions and decisions of public authorities whether or not referable to some specific statutory power. There is a proviso that the action will not be unlawful if, because of the terms of primary legislation, the authority could not have acted differently, but this will only rarely apply given that most statutory powers confer significant discretion on decision-makers. There has been some uncertainty over the scope of application of section 6. Subsection 3 states that courts and tribunals are public bodies for this purpose which means that they ought not to make decisions which violate Convention rights, although the precise effect of this aspect of section 6 has yet to be fully clarified. Subsection 3 also states that the term “public authority” includes “any person certain of whose functions are functions of a public nature”. Despite the existence of this provision, the distinction in general terms between public and private authorities and public and private functions has also been an area of difficulty.\(^4\)

1.8 Sections 7 and 8 empower the courts to give remedies for violation of Convention rights. Section 2 requires the courts, in considering questions of Convention rights, to take account of the decisions of the Convention authorities (‘the Strasbourg case law’). This provision clearly does not make the decisions of the Strasbourg authorities binding on the UK courts so it is possible that our Courts may arrive at interpretations of Convention rights which differ from those adopted by the European Court of Human Rights.

1.9 The Human Rights Act applies throughout the United Kingdom and has allowed claims of violations of human rights to be made in the Scottish courts where they have jurisdiction since 2 October 2000. The Scotland Act provides additional protection for Convention rights and goes beyond the Human Rights Act in two ways. First, the human rights provisions of the Scotland Act entered into force earlier than the Human Rights Act and allowed claims concerning executive acts to be made from 20 May 1999 (the date on which prosecution functions were devolved to the Lord Advocate) and claims concerning Acts of the Scottish Parliament to be made from 1 July 1999 (the date on which legislative power was devolved to the Parliament).

1.10 Second, and in the long term more important, the Scotland Act goes further than the Human Rights Act in protecting Convention rights. Section 29(2)(d) provides that an Act of the Scottish Parliament is outside its competence if it is incompatible with the Convention rights. Therefore, although the courts cannot invalidate Acts of the UK Parliament, they can invalidate Acts of the Scottish Parliament. The Scotland Act also gives the courts more power over Executive action. Section 57(2) states that it is unlawful for a member of the Scottish Executive to make subordinate legislation or to do any other act incompatible with Convention rights. This is broadly equivalent to section 6 of the Human Rights Act although it has a narrower scope in that it does not apply to public bodies generally. It goes further than section 6 because there is no general proviso excusing acts required to be done by primary legislation. There is only a specific proviso applying to actions of the Lord Advocate, so that statutory authority is not a defence to claims of Convention rights violations made against other members of the Scottish Executive.

1.11 The other human rights provisions of the Scotland Act are sections 100 (which deals with bringing of proceedings for violation of Convention rights), section 101 (which deals with the interpretation of Acts of the Scottish Parliament, and is in this context broadly equivalent to section 3 of the Human Rights Act) and section 98. Section 98 together with section 6 treats any claim of violation of Convention rights by the Scottish Executive, and any claim that an Act of the Scottish Parliament is *ultra vires* by reason of incompatibility with Convention rights, as a ‘devolution issue’ and subject to special procedures. Either the Lord Advocate or the Advocate General for Scotland may raise proceedings to determine a devolution issue. Any other person raising a devolution issue must intimate this to both these law officers who may then intervene in the proceedings. Lower courts may refer such issues to higher courts, and the superior courts may refer them to the Privy Council.

1.12 It can be seen from this brief review of the legislation that the arrangements for the protection and enforcement of Convention rights in Scotland are significantly different from those for England and Wales, both in terms of substance and procedure. To summarise: many claims of human rights violations will raise issues under both the Human Rights Act and the Scotland Act; where the Scotland Act does apply it will allow remedies in some cases for which remedies could not be given under the Human Rights Act; and special procedures will apply to many human rights cases in the Scottish courts. The introduction of the human rights legislation generated enormous interest in political and legal circles, and rapidly spawned a substantial literature. Before the entry into force of the legislation conflicting views were expressed on its likely effects, although the dominant view was that it would have a major impact on the courts, and on government. One area of concern was a possible increase in the workload of the courts and the possibility that they might be swamped by human rights claims. Another was that the judges might be politicised. More positively, many hoped that the Human Rights Act would promote a human rights culture within the legal system, government and society. Now after five years experience of the operation of human rights legislation, we are in a position to be able to examine the extent to which the hopes and fears that preceded incorporation of the Convention into domestic law have been realised.

**AIMS AND OBJECTIVES OF THE RESEARCH**

1.13 The stimulus for this research was the desire of the Scottish Executive to assess the impact of the human rights legislation since devolution, as no other means exist of uncovering this. The specific objectives set by the Scottish Executive for the project were to:

- collate data about civil and criminal cases in the Scottish courts since May 1999 which raise human rights issues either under the Human Rights Act 1998 or the Scotland Act 1998, and to incorporate the data in a database
- estimate the volume of human rights cases being brought in Scotland
- analyse how the human rights legislation is being used
- analyse trends and key developments in human rights case law

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• analyse other factors relevant to the wider context of the topic
• make recommendations on the feasibility and operation of a nation-wide database that could include tracking of cases.

It was only possible to include a limited range of factors under the fifth objective - analysis of other factors relevant to the wider context of the topic - for example, assessing the extent to which the legislation had promoted the development of a human rights culture was not one of the research objectives, although some comments relevant to this issue are included in chapter 6.

1.14 There are a number of purposes which might underlie these objectives, and the research could contribute to some degree towards an assessment of:

• the impact of the legislation on the business of the courts, government and the legal profession
• the take up of Convention rights by persons
• the extent to which Convention rights are respected in practice.

It is important to note that the research, concentrating as it did on the courts, could make only a limited contribution towards each of these underlying purposes and to achieve these purposes fully would require other, complementary research.

RESEARCH METHODS AND DATA SOURCES

Methods

1.15 Realising the aims and objectives of the research, particularly the first two, presented substantial methodological difficulties which are discussed below and in more detail in the Appendix. In summary, the methods used were:

• collation of details of reported and unreported cases
• creation of a searchable Access database for this information
• quantitative analysis of data
• qualitative interpretation of the data
• interviews with Scottish Court Service staff.

Reported cases

1.16 We examined hard copy law reports, commercial databases and the Scottish Court Service Website in order to identify and analyse all reported cases raising human rights issues under the Convention since devolution. Substantial information about each case was then entered in a database which was used for further analysis. The fields in the database included the parties to the case, the court in which the case was heard, the procedure under which the case was brought, details of the human rights argument including the Convention (article and aspect of domestic law concerned), and the outcome including remedies sought and awarded. This aspect of the method was unproblematic and we are confident that we have identified all reported cases raising human rights issues under the Convention up to July 2003.
Unreported cases

1.17 It was necessary to examine unreported cases in order to get a fuller picture of the use of human rights legislation than could be obtained from reported cases, and in order to estimate the volume of cases being brought nationally. As might be expected, finding unreported human rights cases was a far harder task than finding reported cases. For criminal cases a short cut was available. Following cases such as *Starrs v Ruxton*\(^7\) and *Brown v Stott*,\(^8\) it became clear that any claim of a violation of Convention rights in the context of a criminal prosecution would be treated as raising a devolution issue, because of the position of the Lord Advocate as both head of the public prosecution system and a member of the Scottish Executive. The practical effect has been that any defence to, or objection to, the initiation or continuation of a prosecution on human rights grounds has had to be intimated to the Lord Advocate under section 98 of, and Schedule 6 to, the Scotland Act. The Crown Office has been recording such intimations since May 1999 and, therefore, has a record of all criminal cases raising human rights issues since executive functions were devolved. We were given access to the Crown Office database which enabled us to ascertain precisely the number of criminal cases raising human rights issues and gave us limited additional information, although the nature and details of this were not consistent across cases.

1.18 Many human rights arguments in civil cases will not raise devolution issues so there is no equivalent procedurally generated short cut, and the Scottish Court Service itself has not been making a contemporaneous record of human rights cases since devolution. Therefore, the only way to collect data about unreported civil cases and to estimate the volume of civil cases raising human rights issues would have been to attempt to gather information from court records. There were two difficulties with this approach, the first being the limited nature of court records and their purpose, the second being that of the scale of the exercise and the resources it would have required.

1.19 As to the first, the amount of information recorded for any case varies according to the court, the procedure and the history of the case, with the result that there might well be a significant number of cases in which a human rights argument is made but not recorded. To give an example, in summary cause proceedings in the sheriff court the summons and other papers are returned to the parties after the proceedings are concluded. If the sheriff has issued a reasoned opinion the court will have a copy of that. However, if there has been no written opinion, for example, because the case has settled, the records kept by the court will be very brief and may not record the fact that one or other party had raised a human rights argument.

1.20 As to the second, since human rights issues could conceivably arise in any court and under any procedure, the only sure way of arriving at a reliable estimate of the number of human rights cases in any given period would be to examine a large enough sample of records from all civil courts covering all civil procedures. This is what we would have liked to have done, in principle, but the resources available for the research fell far short of what would have been necessary to review a large enough sample of records. Indeed the resources required for such an exercise would have exceeded anything that could reasonably be expected for research of this nature. The researchers, therefore, decided to sample a limited

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\(^7\) 2000 JC 208.

\(^8\) 2001 SC (PC) 43. See, also "R" v Her Majesty's Advocate & Another [2002] UKPC D3.
range of records from both the Court of Session and two sheriff courts as described in more detail in the Appendix.

1.21 As a result of the limitations of the data gathered we were not able to realise fully the objectives of the research, in particular, to estimate the volume of civil cases raising human rights issues being brought nationally, and conclusions on some further points have had to be tentative or heavily qualified.

Analysis of the Data

1.22 Both the reported and the unreported cases were subject to quantitative analysis including analysis of numbers and subject matters of cases, types of proceedings and outcomes. The reported cases were subject to qualitative analysis assessing their doctrinal significance and their impact on Scots law and public policy.

Interviews

1.23 The purpose of interviewing court staff was primarily to further the second aim stated above, assessing the feasibility of, and making recommendations for, a nation-wide monitoring system that includes tracking of human rights cases. We conducted interviews with staff working in the High Court of Justiciary, Court of Session, and two Sheriff Courts. We interviewed six staff in all. The interviews were semi-structured interviews designed to gather information about the working practices of the court staff in each court, the extent to which information about human rights arguments were recorded, actual or potential difficulties that impeded the recording of information about human rights arguments and their views on the implementation of a nation-wide monitoring system for human rights cases.

THE STRUCTURE OF THE REPORT

1.24 Chapter Two provides a primarily quantitative analysis of human rights cases in the Scottish courts discussing the number of civil and criminal cases, the forms of procedure used, their subject matter and outcomes. Chapter Three analyses the doctrinal significance of the reported cases decided by the Scottish courts over the period of the research, the material being organised according to the structure of the Convention. Chapter Four assesses the policy implications of these cases in terms of the areas of Scots law and public policy affected, and then goes on to discuss the approach of the judiciary to arguments based on Convention rights. Chapter Five discusses the feasibility of introducing a system for monitoring human rights cases in the courts, and Chapter Six provides some conclusions and recommendations.
CHAPTER TWO: QUANTITATIVE ANALYSIS

2.1 In this chapter we present a primarily quantitative analysis of the use of human rights arguments in the Scottish courts since devolution. The sources of information used are described in more detail in the Appendix, but in summary were:

(i) the Crown Office record of devolution minutes in criminal cases;
(ii) our database of reported cases;
(iii) samples of (largely) unreported cases in the Court of Session, High Court of Justiciary, and two sheriff courts;

2.2 We hoped to find out the following:

(i) the total number of cases raising human rights issues since devolution;
(ii) if that could not be established, an estimate of the numbers;
(iii) the subject matter of cases in terms of the Articles of the Convention on which arguments were based;
(iv) the subject matter of cases in terms of the area of Scots law or public administration to which they related;
(v) the geographical spread of cases;
(vi) the courts in which such cases are heard (e.g. Court of Session, Sheriff Court) and the forms of procedure used;
(vii) the outcomes of cases in which human rights issues were raised;
(viii) whether human rights arguments were invoked under the Scotland Act 1998 or the Human Rights Act 1998;
(ix) the nature of the parties to cases.

The categories of information we gathered necessarily varied for different datasets (see Appendix), so we distinguish between civil and criminal cases with respect to some findings.

CRIMINAL CASES

2.3 We were given a copy of the Crown Office record of all devolution minutes in criminal cases intimated to the Lord Advocate between the devolution of Executive power on 20 May 1999 and the end of August 2003, a period of just over four and a quarter years. This represents a complete record of all criminal cases raising human rights issues since devolution. A study of the impact of the Human Rights Act on courts of first instance in England and Wales (Raine and Walker 2002) included a brief analysis of data up to the end of November 2000, but no subsequent analysis has been published.

Cases Raising a Human Rights Issue since Devolution

2.4 A number of duplicate entries in the Crown Office record were removed, leaving 1581 cases in the record. These figures include all cases in which a human rights issue was raised at any stage in the proceedings whether or not it had any impact on the disposal or outcome of the case. Had the numbers of such cases been consistent over that period, there would have been an average of 360 criminal cases a year raising human rights issues since
devolution. However, as Table 1 indicates, there was an initial surge, with 1011 criminal cases raising human rights issues in the first 19 months (20 May 1999-end December 2000). Thereafter, the number of cases raising human rights issues declined sharply, but then stabilised at around 175-200 per annum.

Table 1: Total criminal cases raising human rights issues

<table>
<thead>
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<th>2001</th>
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</table>

Source: Crown Office Devolution minutes

2.5 Although we were unable to date cases from earlier than September 2000 from the records made available to us, some information was provided by the Lord Advocate to the Scottish Parliament. There were 587 devolution minutes in the first year after devolution (20 May 1999-20 May 2000) and 969 in the first eighteen months (20 May 1999-20 November 2000). Our total of 1011 cases for 1999/2000 reflects the additional cases between 20 November 2000 and the end of the year. That makes it clear that the decline in numbers appears to come around the end of the year 2000 and is a very rapid decline. Why the decline was so rapid is unclear and examining its causes was beyond the scope of the research.

2.6 It is important to put these figures in the context of the overall workload of the criminal courts. Whilst this is a substantial number of human rights cases in absolute terms, it represents only a very small fraction of the total criminal caseload. Over the four years from 1999 to 2002 criminal proceedings were taken on average against an estimated 141,575 persons per year (Scottish Executive Statistical Bulletin: CrJ/2004/1, Criminal Proceedings in Scottish Courts, 2002; CrJ/2002/9; CrJ/2001/7; CrJ/2000/9). Over the period of study, human rights cases averaged about 370 cases per year, a little over a quarter of a per cent of the total criminal caseload negating any possible fears that might have been raised in advance of the implementation of the legislation that the courts would be swamped with cases raising human rights arguments.

Criminal Courts and Forms of Procedure

2.7 Table 2 illustrates case distribution in the court hierarchy and across criminal procedures.

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10 Available at http://www.scotland.gov.uk/stats/bulletins/00312-04.asp.
Table 2: Procedures in which criminal devolution minutes raised

<table>
<thead>
<tr>
<th>Court</th>
<th>No. of Cases</th>
<th>% of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Court Trial</td>
<td>211</td>
<td>13.3%</td>
</tr>
<tr>
<td>Sheriff &amp; Jury</td>
<td>398</td>
<td>25.2%</td>
</tr>
<tr>
<td>Sheriff Summary</td>
<td>818</td>
<td>51.7%</td>
</tr>
<tr>
<td>District</td>
<td>73</td>
<td>4.6%</td>
</tr>
<tr>
<td>Other(^{11})</td>
<td>81</td>
<td>5.1%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1581</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Crown Office Devolution minutes

2.8 This shows that a clear majority of the cases raising human rights points were cases under summary procedure. However, given the relative numbers of summary and solemn cases it is also clear that the proportion of solemn cases in which human rights arguments were raised is much higher than the proportion of summary cases in which they were raised.

2.9 The most recent figures available for the distribution of criminal cases across all courts and procedures are those for 2002,\(^{12}\) so it is not possible to determine exactly the proportion of criminal cases raising human rights arguments in each type of procedure across the whole period of the study. However, we can compare the annual average figures for cases under each type of procedure for the four years ending in 2001 with the annual average numbers of human rights cases for the period of the study. This suggests that human rights points came up most frequently in high court trials (4.7% of the 1999-2002 average), followed by trials in the sheriff court under solemn procedure (3.0% of the 1999-2002 average), then trials in the sheriff court under summary procedure (0.26%).

Subject Matter: ECHR Articles

2.10 The human rights arguments raised referred to 22 different Articles of, or protocols to, the Convention, including the majority of the substantive rights guaranteed in the Convention together with remedial or procedural provisions such as Article 13. Table 3 shows the most frequently raised issues in descending order.

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\(^{11}\) Includes the following types of cases: appeal, sheriff court petition, sheriff court referral, and closed.

Table 3: ECHR articles raised in devolution minutes in criminal cases

<table>
<thead>
<tr>
<th>Article</th>
<th>No. of Cases</th>
<th>% of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 6 delay</td>
<td>673</td>
<td>39%</td>
</tr>
<tr>
<td>Article 6 substantive fair hearing</td>
<td>375</td>
<td>22%</td>
</tr>
<tr>
<td>Article 6 equality of arms</td>
<td>175</td>
<td>10%</td>
</tr>
<tr>
<td>Article 6 access to independent and impartial tribunal</td>
<td>108</td>
<td>6%</td>
</tr>
<tr>
<td>Article 8 respect for private and family life</td>
<td>84</td>
<td>5%</td>
</tr>
<tr>
<td>All other articles and protocols (twelve)</td>
<td>80</td>
<td>5%</td>
</tr>
<tr>
<td>Article 5 right to liberty and security</td>
<td>64</td>
<td>4%</td>
</tr>
<tr>
<td>Article 6 relief from self-incrimination</td>
<td>61</td>
<td>4%</td>
</tr>
<tr>
<td>Article 6 presumption of innocence</td>
<td>50</td>
<td>3%</td>
</tr>
<tr>
<td>Article 6 right to remain silent</td>
<td>42</td>
<td>2%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1712</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Crown Office Devolution Minutes

2.11 There are more issues (1712) than cases (1581) because some cases raised more than one human rights issue and each substantive issue was entered separately in the database. The vast majority of the issues raised concerned criminal process (including the institutional question of the position of temporary sheriffs) rather than substantive criminal law: 86% were fair trial issues under Article 6 of the Convention (including cases in the twelve articles and protocols that each amounted to less than 3% of the cases). Breaking Article 6 down into its constituent parts, the largest single category, amounting to 39% of all human rights issues raised, was that of allegations of delay, that is, failure to bring a case to trial within a reasonable time. Overall, these figures are not surprising. It was anticipated before the enactment of the legislation that Article 6 would be the Article most frequently relied upon by accused persons in criminal cases, although not necessarily that it would be predominant to this degree. The large number of cases on the issue of independent and impartial tribunals is largely explained by the successful attack on the position of temporary sheriffs (see Starrs v Ruxton 2000 JC 208).

Geographical Distribution

2.12 The Crown Office records classify devolution minutes according to the office of the Procurator Fiscal responsible for preparation of the case. These offices correspond to the jurisdictions of sheriff courts, although the prosecutions originating in these offices might be brought in any of the criminal courts. Human rights arguments were raised in 45 of the 49 area offices across Scotland. Table 4 shows the number of human rights cases by area office. There were nine cases which it was not possible to identify with a particular area office.

13 The twelve articles and protocols included in this category were Articles 2, 3, 10, 11, 13, 14, Article 1 of Protocol 1 and Article 4(1) of Protocol 7. Together they accounted for less than 3% of all the cases; several represented less than 0.1%.
Table 4: Areas with 5% + of all criminal devolution records cases

<table>
<thead>
<tr>
<th>Area</th>
<th>No. of Cases</th>
<th>% of total criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airdrie</td>
<td>86</td>
<td>5</td>
</tr>
<tr>
<td>Edinburgh</td>
<td>222</td>
<td>14</td>
</tr>
<tr>
<td>Glasgow</td>
<td>428</td>
<td>27</td>
</tr>
<tr>
<td>Hamilton</td>
<td>73</td>
<td>5</td>
</tr>
<tr>
<td>Linlithgow</td>
<td>81</td>
<td>5</td>
</tr>
<tr>
<td>40 other courts</td>
<td>691</td>
<td>44</td>
</tr>
<tr>
<td>Total</td>
<td>1581</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Crown Office Devolution Minutes

2.13 Table 4 shows that only five offices accounted for 890 cases (56.3% of the total) although they do include the two largest PF offices. It appears as if human rights cases are not randomly distributed across Scotland and are instead clustered to a significant degree, for example, for the Glasgow area there was approximately one human rights case for every 49 prosecutions, in Edinburgh one for every 54 prosecutions and in Linlithgow one for every 50 prosecutions. By contrast there are comparative ‘cold spots’ such as such as Dundee with only one case for every 278 prosecutions and Greenock with only one for every 374 prosecutions. The differences in the incidence of human rights issues being raised are striking. The reasons for the uneven distribution of human rights cases cannot, however, be inferred from these statistics alone.

2.14 Some possible explanations would relate to the bringing of prosecutions, for example, that there are variations in the way prosecutions are instigated and conducted across area offices, or that there are differences in the prosecution caseload across areas (incidence of solemn and summary proceedings, nature of offences, etc.) which in some way affect the likelihood that human rights points will be raised. Other possible explanations relate to the approach of the defence, for example, the clustering might indicate that knowledge of human rights law and/or willingness to use it are unevenly distributed amongst local solicitors. To establish whether these or any alternative hypotheses are plausible would require further research.

2.15 The outcomes of criminal cases in which human rights arguments were raised are discussed below, as is the question of whether human rights arguments were invoked under the Scotland Act 1998 or the Human Rights Act 1998.

CIVIL CASES

2.16 Carrying out equivalent research on civil cases is substantially more difficult than for criminal cases. As detailed in the Appendix, it was not possible to identify all post-devolution civil cases raising human rights issues. Nor was it possible to produce a reliable estimate of the number of civil human rights cases in any given period. Our analysis in this section of this chapter is, therefore, based largely on reported cases and the sampling exercise, with some conclusions also being supported by information drawn from the tracking of cases in the Court of Session and two sheriff courts. These provided, for reported cases,

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14 Based on figures for numbers of prosecutions in each local authority area supplied by the Scottish Executive. The areas chosen are those in which the local authority area corresponds exactly or very closely with the jurisdiction of the relevant PF office.
an overview of the whole four and a quarter year period under study, and in the case of the sample cases, a snapshot of the position in early 2002. Together the overview and the snapshot give some indication of the level and nature of the use of human rights arguments on the civil side without the precision regarding these issues possible for criminal cases. The value of the sample is that it provides a check on the database of reported cases and give some indication of whether reported case are representative of cases generally. As indicated earlier, when we refer to ‘reported cases’ we mean reported cases in the broadest sense including hard copy law reports, commercial databases and cases on the Scottish Court Service Website.

**Human Rights Cases since Devolution**

2.17 The principal data source here is the information recorded in the database of reported cases. This includes 105 civil cases. Table 5 shows the total number of reported cases raising human rights points, and how they are divided between criminal cases, civil cases involving a public body, and civil cases between private parties.

**Table 5 Reported civil and criminal cases by category**

<table>
<thead>
<tr>
<th>Category</th>
<th>No. of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil/Private</td>
<td>31</td>
</tr>
<tr>
<td>Civil/Public</td>
<td>74</td>
</tr>
<tr>
<td>Criminal</td>
<td>127</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>232</strong></td>
</tr>
</tbody>
</table>

Source: Human Rights in Scottish Courts Project database

2.18 It is clearly not possible to extrapolate from the figures for reported cases how many additional unreported cases there have been. We had two other sources of information on civil cases. First, we were made aware of a further 23 cases from civil devolution minutes intimated to the Advocate General between May 2000 and October 2003. However, the Advocate General’s records were incomplete, did not cover the whole period of the study, and did not cover human rights cases which did not raise devolution issues. They were, therefore, not a good basis for estimating the numbers of unreported cases.

2.19 The other evidence of overall numbers we had was the cases found by our sampling exercise, in effect a snapshot of the position early in 2002. We should note that our sampling was not comprehensive. In the Court of Session we examined all petitions, appeals and family actions for a three-month period. We had originally intended to examine all cases begun by summons, but this process proved to be immensely time-consuming and given the limited resources for the research, this could not be done. (For what it is worth we noted that there were no summonses raising human rights issues in January 2002.) In the two sheriff courts the sample covered all ordinary causes and summary applications, other than divorces, adoptions, and referrals from children’s hearings. It did not cover summary causes or small claims. We did not seek access to adoptions and referrals from children’s hearings as this would have required special permission. However, the decision not to sample summary causes and small claims was made because of resource constraints. We think it likely that a comprehensive sample of all types of cases in the relevant courts in early 2002 would not
have turned up many more cases raising human rights points, but it must be accepted as a possibility that there were substantial numbers of cases raising human rights issues in the court records which we did not look at.

2.20 The sampling exercise identified a total of 38 civil cases for the period between the beginning of January and the end of March 2002, 23 in the Court of Session and 15 in the two sheriff courts. Assuming that the first quarter of 2002 was not atypical, we might have expected to find approximately 92 cases in the Court of Session and 60 cases in the two sheriff courts if the sample had covered the whole of the year 2002. Bearing in mind that only two sheriff courts were included in the sample, figures for the sheriff court for Scotland as a whole are likely to have been substantially higher. Given that there were only 105 reported cases over the whole four and a quarter year period of the study, it seems reasonably safe to conclude that that there were several times as many unreported civil cases as there were reported cases raising human rights arguments over the study period, even if the actual number of such cases cannot be estimated accurately. We began the study with the intuition that there have been far more criminal than civil cases raising human rights issues, however the sample when compared to the figures in table 1 suggests otherwise. The number of criminal cases stabilised after an initial surge at 150-200 cases per year. Assuming that there were a significant number of cases in sheriff courts not included in the study, the sample suggests that the numbers of civil and criminal human rights cases in 2002 may well have been broadly comparable.

2.21 In considering the relationship between the sample and the actual number of cases raising human rights points, we should also remember the point made in the introduction that the amount of information recorded by court clerks varies according to the courts and the procedure, and that the primary function of the written records is to ensure the proper progress of cases through the system. Therefore, a retrospective exercise gathering data on concluded cases, such as our sample, may well underestimate the extent to which human rights arguments are actually raised, particularly in the more informal procedures such as summary cause and the small claim.

2.22 It is not possible to determine any upward or downward trend across the period as it was for criminal cases. However, the data from the sampling exercise suggest that, whatever the position may have been in the period immediately following devolution, in early 2002 cases raising human rights issues amounted to only a minor part of the civil caseloads of either the Court of Session, or of two busy sheriff courts. The civil judicial statistics for 2002 indicate that 5,059 actions were begun in the Court of Session and 115,326 in the sheriff court in that year.

Civil Courts and Forms of Procedure

2.23 Table 6, which is based on the 105 reported civil cases, shows how cases raising human rights points were distributed in the court hierarchy and across the different forms of civil procedure. This table shows all proceedings in which human rights points have been raised. For some cases there were more than one set of proceedings. For example, one case began as a mental health appeal to the Sheriff, which was then appealed further to the Court of Session. Human rights points were argued in both courts. In all such cases we counted each set of proceedings separately. That is why the number of procedures at 138 is greater than the number of cases (105) in the database. This seemed the most rational approach if the
purpose was to assess the relative impact of human rights litigation on different courts and procedures.

**Table 6: Reported civil cases by procedure**

<table>
<thead>
<tr>
<th>Procedure</th>
<th>No. of Procedures</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of Session Judicial Review Outer House</td>
<td>42</td>
<td>30.4%</td>
</tr>
<tr>
<td>Sheriff Civil Summary Cause</td>
<td>26</td>
<td>18.8%</td>
</tr>
<tr>
<td>Court of Session Summons Outer House</td>
<td>22</td>
<td>15.9%</td>
</tr>
<tr>
<td>Court of Session Judicial Review Inner House</td>
<td>9</td>
<td>6.5%</td>
</tr>
<tr>
<td>Sheriff Civil Ordinary Cause</td>
<td>7</td>
<td>5.1%</td>
</tr>
<tr>
<td>Sheriff Principal Appeal Civil</td>
<td>7</td>
<td>5.1%</td>
</tr>
<tr>
<td>Other(^{15})</td>
<td>25</td>
<td>18.1%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>138</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Totals do not add up due to rounding

Source: Human Rights in Scottish Courts Research Project Database

2.24 This table might seem to suggest that human rights points are raised relatively more frequently in the Court of Session compared to the sheriff court with 83 such proceedings in the Court of Session (all entries above relating to the Court of Session other than appeal from a Sheriff Principal) and only 45 in the sheriff court when the latter had, according to the 2002 civil judicial statistics, approximately twenty-three times the case load of the former. However, whilst this probably is the case, it cannot be confirmed, nor can the relative frequency of human rights points arising in the two courts be estimated, because we do not know the proportion of cases raising human rights points that is reported for either the Court of Session or the sheriff court. The sampling exercise does not greatly assist in assessing the relative frequency of human rights points as it was restricted to two sheriff courts.

2.25 The most striking feature of Table 6 is the extent to which judicial review proceedings dominate the Court of Session caseload with 51 of the 83 proceedings being for judicial review and 32 other forms of action. This is not wholly surprising as it was anticipated that, given the purpose and content of the Convention, many human rights claims on the civil side would be challenges to official decisions and actions. Once again, it is necessary to consider whether this pattern is repeated with unreported cases.

2.26 Table 7 shows the distribution of cases in the sample. Here it is worth noting that the sampling exercise found that no cases begun by summons in January 2002 raised human rights points and that all twelve of the petitions raising human rights points were judicial reviews. The limitations of the sample mean that caution is required in drawing conclusions but the limited evidence we have is consistent with the conclusions that judicial review has

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\(^{15}\) This group consists of eleven procedures each representing less than 4% of all cases (6 with less than 1%): in the sheriff court, summary application, and children’s hearing appeal; in the Court of Session, Outer House petition (other than judicial review), appeal from sheriff principal, (Outer House), summons (Inner House) appeal from employment appeal tribunal, and other statutory appeal; in the High Court of Justiciary, petition to the nobile officium and devolution issue referral, devolution issue in the Judicial Committee of the Privy council; application to the Lands Tribunal.
become the predominant procedure for cases raising human rights issues in the Court of Session.

### Table 7: Procedures used in human rights cases found in sample

<table>
<thead>
<tr>
<th>Procedure</th>
<th>No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of Session Judicial Review Outer House</td>
<td>12</td>
<td>31.5%</td>
</tr>
<tr>
<td>Sheriff Civil Ordinary Cause</td>
<td>9</td>
<td>23.7%</td>
</tr>
<tr>
<td>Sheriff Civil Summary Application</td>
<td>6</td>
<td>15.8%</td>
</tr>
<tr>
<td>Court of Session Statutory Appeal</td>
<td>5</td>
<td>13.2%</td>
</tr>
<tr>
<td>Court of Session Summons Outer House</td>
<td>3</td>
<td>7.9%</td>
</tr>
<tr>
<td>Other(^{16})</td>
<td>3</td>
<td>7.9%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>38</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Human Rights in Scottish Courts Database

2.27 The inclusion of a significant number of summary applications in the sheriff court cases is perhaps not surprising given the subject matter of summary applications which include many forms of actions brought by public bodies in the exercise of statutory functions (such as assumption of parental rights and applications for anti-social behaviour orders) and many appeals against decisions of public bodies. It must be borne in mind that only two sheriff courts were included in the sample. Our research also suggests that the assumption that most cases raising human rights points will involve the state as a party (criminal cases almost necessarily do as private prosecution is virtually unknown in Scotland) appears to be well founded. There is also, however, a significant number of cases between private parties raising human rights issues. Out of 105 reported civil cases, there was a clear split between private law cases (31) and public law cases (74). It is interesting that more than a quarter of reported civil cases raising human rights points did not directly involve the state as a party. Of course, the ratio in unreported cases may differ.

**Subject Matter: ECHR Articles**

2.28 We analysed the subject matter of cases raising human rights issues in two ways: in terms of the rights specified in the Convention and in terms of the area of Scots law or public administration to which they related. This section covers the former and the next section the latter.

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\(^{16}\) These three Court of Session cases comprise one each of Children’s Hearing Appeal, Outer House Petition, and Planning Appeal.
Table 8: Reported civil cases by ECHR article

<table>
<thead>
<tr>
<th>Article</th>
<th>No. of Issues</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 8</td>
<td>31</td>
<td>18.8%</td>
</tr>
<tr>
<td>Article 6 substantive fair hearing</td>
<td>28</td>
<td>17.0%</td>
</tr>
<tr>
<td>Article 6 access to independent and impartial tribunal</td>
<td>17</td>
<td>10.3%</td>
</tr>
<tr>
<td>Article 3</td>
<td>16</td>
<td>9.7%</td>
</tr>
<tr>
<td>Protocol 1, Article 1</td>
<td>14</td>
<td>8.5%</td>
</tr>
<tr>
<td>Article 6 delay</td>
<td>8</td>
<td>4.8%</td>
</tr>
<tr>
<td>Article 6 equality of arms</td>
<td>8</td>
<td>4.8%</td>
</tr>
<tr>
<td>Other(^{17})</td>
<td>43</td>
<td>26.1%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>165</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Human Rights in Scottish Courts Database

2.29 Some of the reported cases raised more than one distinct human rights issues and the table shows all 165 human rights issues raised by the 105 civil cases in the database. Article 6 is the article most frequently invoked, accounting for 37% of the issues raised, although it does not dominate to the same degree as in criminal cases. Delay, in particular, seems far less significant as an issue. The next most frequently raised article was Article 8 with 19% of the issues raised. There were also substantial numbers of Article 3 issues (10%) and issues under Article 1 of the First Protocol (8%).

2.30 Once again, it is important to observe the caveat that the pattern in unreported cases may be different. However, as Table 10 shows, the sampling exercise revealed a pattern which was not greatly different in the early months of 2002 in the Court of Session and two sheriff courts. As with the reported cases, some cases raised more than one distinct human rights issues and the table shows all 57 human rights issues raised by the civil cases in the sample. The most frequently raised articles were the same, namely Article 6 (37% of issues), Article 8 (23%), Article 3 (23%) and Article 1 of the First Protocol (5%), although the relative proportions were different. This suggests that the reported cases give a reasonable indication of the relative frequency with which different articles are referred to in the courts.

2.31 It is worth remembering that we did not sample Summary Causes or Small Claims, and the addition of any human rights arguments made in those procedures might have revealed other articles being raised and/or a different distribution.

\(^{17}\) The twelve Articles and Protocols included in this category were Articles 1, 2, 4, 5, 7, 9, 10, 11, 14, 17 and 53, and Articles 1 and 2 of Protocol 1. There were also four cases in which an unspecified human rights issue was raised. These categories represented between 0.6% and 4.2% of cases in the database.
Table 9: ECHR articles in sample cases

<table>
<thead>
<tr>
<th>Article</th>
<th>No. of Cases</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 3 prohibition of torture etc</td>
<td>13</td>
<td>22.8%</td>
</tr>
<tr>
<td>Article 8 respect for private and family life</td>
<td>13</td>
<td>22.8%</td>
</tr>
<tr>
<td>Article 6 access to independent and impartial tribunal</td>
<td>10</td>
<td>17.5%</td>
</tr>
<tr>
<td>Article 6 substantive fair hearing</td>
<td>4</td>
<td>7.0%</td>
</tr>
<tr>
<td>Other Article 6 claims</td>
<td>7</td>
<td>12.3%</td>
</tr>
<tr>
<td>Protocol 1, Article 1 protection of property</td>
<td>3</td>
<td>5.3%</td>
</tr>
<tr>
<td>Other18</td>
<td>7</td>
<td>12.3%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>57</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Human Rights in Scottish Courts Database

Subject Matter: Scots Law and Public Administration

2.32 This section analyses the distribution of cases by subject matter in terms of domestic law and areas of public administration. Where a case could be related to more than one subject area both appear in the table, so that although there were only 105 reported cases there are 144 entries in the database. Table 10 shows the distribution of reported cases according to the area of Scots law or public administration to which they related.

Table 10: Reported civil cases by subject

<table>
<thead>
<tr>
<th>Subject</th>
<th>No. of Issues</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil procedure</td>
<td>27</td>
<td>18.9%</td>
</tr>
<tr>
<td>Asylum</td>
<td>20</td>
<td>14.0%</td>
</tr>
<tr>
<td>Child</td>
<td>14</td>
<td>9.8%</td>
</tr>
<tr>
<td>Property rights</td>
<td>14</td>
<td>9.8%</td>
</tr>
<tr>
<td>Immigration</td>
<td>11</td>
<td>7.7%</td>
</tr>
<tr>
<td>Delict</td>
<td>7</td>
<td>4.9%</td>
</tr>
<tr>
<td>Adoption</td>
<td>6</td>
<td>4.2%</td>
</tr>
<tr>
<td>Broadcasting/media</td>
<td>5</td>
<td>3.5%</td>
</tr>
<tr>
<td>Contract</td>
<td>5</td>
<td>3.5%</td>
</tr>
<tr>
<td>Planning</td>
<td>5</td>
<td>3.5%</td>
</tr>
<tr>
<td>Education</td>
<td>4</td>
<td>2.8%</td>
</tr>
<tr>
<td>Licensing</td>
<td>3</td>
<td>2.1%</td>
</tr>
<tr>
<td>Mental health</td>
<td>3</td>
<td>2.1%</td>
</tr>
<tr>
<td>Prisons</td>
<td>3</td>
<td>2.1%</td>
</tr>
<tr>
<td>Public Order</td>
<td>3</td>
<td>2.1%</td>
</tr>
<tr>
<td>Road Traffic</td>
<td>3</td>
<td>2.1%</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
<td>7.0%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>143</td>
<td>100%</td>
</tr>
</tbody>
</table>

Totals do not add up due to rounding

Source: Human Rights in Scottish Courts Database

18 The other Articles were Articles 2, 5, and 14 and Article 2 of Protocol 1.
2.33 The areas in which human rights points were most frequently raised were asylum and immigration control (together 22%), civil procedure (19%), child law and property rights (both 10%). Some examples will give an idea of the wide variety of issues raised. Several of the cases indicate that the boundary between civil and criminal cases cannot be entirely clear-cut, for example, one of the public order cases was an unsuccessful challenge to the Protection of Wild Mammals (Scotland) Act 2002 which made hunting with dogs a criminal offence, the property rights cases included challenges to confiscation orders under the Proceeds of Crime (Scotland) Act 1995, and the civil procedure cases included an unsuccessful attempt to interdict the Crown from prosecuting an individual for fraud. Table 11 shows the distribution of the 38 cases in the sampling exercise which yielded a total of 54 human rights issues. Where a case could be related to more than one subject area both appear in the table.

Table 11: Sample civil cases by subject

<table>
<thead>
<tr>
<th>Subject</th>
<th>No. of Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil procedure</td>
<td>11</td>
</tr>
<tr>
<td>Prisons</td>
<td>10</td>
</tr>
<tr>
<td>Child</td>
<td>6</td>
</tr>
<tr>
<td>Asylum</td>
<td>5</td>
</tr>
<tr>
<td>Licensing</td>
<td>4</td>
</tr>
<tr>
<td>Road Traffic</td>
<td>4</td>
</tr>
<tr>
<td>Immigration</td>
<td>3</td>
</tr>
<tr>
<td>Planning</td>
<td>3</td>
</tr>
<tr>
<td>Education</td>
<td>2</td>
</tr>
<tr>
<td>Property rights</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>54</strong></td>
</tr>
</tbody>
</table>

Source: Human Rights in Scottish Courts Database

2.34 The areas in which human rights points were most frequently raised were civil procedure (about a fifth of cases), asylum and immigration control (together about one seventh), and child law (about one ninth of cases). It can be seen that the distributions are broadly comparable in the two groups of cases with many categories appearing in both reported and sample cases, and some such as asylum and immigration and civil procedure figuring prominently in both. Both sets of data (human rights issues by Article and issues by subject) suggest that not only is the full range of substantive Convention rights being raised in litigation, but also that such rights are being raised in a wide variety of legal and
OUTCOMES FOR CIVIL AND CRIMINAL CASES

2.35 In this section we discuss the outcomes of cases in the sense of whether or not the courts granted a remedy for a human rights violation. Civil and criminal cases are considered together here. As the Crown Office database did not include information on outcomes, this section presents only the data from the reported cases and the cases in the sample.

2.36 Of the 232 reported civil and criminal cases, a remedy was awarded in 39 cases (16.8%). This suggests that remedies are being granted on human rights grounds in a small but significant minority of cases. We should point out here that we only treated a remedy as awarded on human rights grounds where there was a specific indication in the report that the human rights argument had influenced the award of the remedy. It is, therefore, possible that we have understated the effect of human rights arguments in achieving positive outcomes for those raising them. Whether these are appropriate outcomes is not something which can be judged from these figures alone.

2.37 We also tried to ascertain whether remedies were awarded under the Human Rights Act or the Scotland Act and the provision under which the remedy was awarded, an issue which seemed important given that special procedures require to be invoked for many human rights cases in Scotland.

2.38 In three of the 39 cases remedies were awarded under both the Scotland Act and the Human Rights Act. There were 11 cases in which remedies were awarded under the Human Rights Act only. The most common reason for granting a remedy was that a public authority has acted unlawfully in terms of section 6 of the Human Rights Act, there being ten such cases. There were three cases in which the principle of compatible interpretation in section 3 was the basis of the remedy, and one case in which relief was given in terms of section 12 (special provision for freedom of expression).

2.39 In 25 of the reported cases a remedy was granted under the Scotland Act only, all of these being granted in terms of section 57 of the Scotland Act (unlawful action by the Scottish Executive). All challenges to the validity of Acts of the Scottish Parliament under section 29 were unsuccessful.

2.40 Remedies were awarded in response to human rights claims in only 3 of the 95 civil and criminal cases (3%) in the sample of cases. One was in terms of the principle of compatible interpretation in section 3 of the Human Rights Act. Two were awarded for unlawful action by the Scottish Executive in terms of section 57(2) of the Scotland Act, and these both related to delay in bringing a prosecution. The success rate is significantly lower than for reported cases. However, two points may be made.

19 Entitlement to social security benefits (except benefits of a purely discretionary nature) is generally thought to fall within the scope of Article 6. See Harris, D J, O’Boyle M and Warbrick, C (1995) Law of the European Convention on Human Rights, London: Butterworths, 180-182; Lord Reed and Murdoch J (2001), 5.17. The primary forum for resolving benefit disputes in the UK is usually a tribunal, but there are circumstances in which cases may be heard in the ordinary courts whether by way of appeal or judicial review.
2.41 Firstly, a number of the cases in the sample were still continuing at the conclusion of our study. We know that the cases relating to the fixing of punishment parts in life sentences were ultimately successful, and others could also succeed. Secondly, reported cases will generally be cases in which the human rights argument, even if unsuccessful, had some merit. Whereas if there are a significant number of spurious or highly speculative human rights arguments being made, these are extremely unlikely to be reported.

CONCLUSIONS

2.42 We should begin this concluding section by emphasising the limitations of our data as described above and in more detail in the Appendix. This means that many of the inferences drawn from the data and statements made are to a degree provisional. However, it does appear possible to draw some general conclusions.

2.43 First, points based on Convention rights have become an established category of argument within the Criminal Justice system. Although there was a dip in the number of cases after the first eighteen months, there appears to be a steady stream of such cases continuing to go through the courts. However, these represent a tiny proportion of the total number of criminal prosecutions. The research was not designed to establish how much time the raising of a human rights point adds to a case, but given the small proportion of cases in which such arguments are made, even if the raising of human rights points is having a major impact on the time taken to dispose of individual cases, it does not appear possible for there to be a substantial impact on the resources required to run the system of criminal courts as a whole. This statement leaves out of account any indirect resource implications for the courts, such as the need created for judicial training on human rights law, and any resource implications for other agencies within the criminal justice system such as the police and the Procurator Fiscal service.

It is impossible to say whether the number of criminal cases raising human rights points which appears to have steadied at 150-200 cases a year is at an appropriate level, or unduly high or unduly low. By an appropriate level, we mean a level at which we could say that, (a) in most cases in which arguments based on Convention rights are made that those arguments are plausible, and (b) that in most cases in which those arguments could plausibly be made they are in fact made. We have to some extent been able to make judgments about whether the human rights points being made in practice are well-founded, but only in relation to reported cases (there being insufficient information in the Crown Office database). There were a few of the reported cases in which weak or ill-informed arguments were advanced although in the great majority of cases the arguments advanced had some substance. The doctrinal issues arising from the reported cases are discussed at length in Chapter 3. However, reported cases are only a small fraction of the whole and not necessarily representative of all criminal cases raising human rights points. It may be the case that spurious or weakly grounded arguments are more frequently made in unreported cases than in reported cases but our research did not provide the information that would be required to resolve this issue. On the possibility that opportunities to make plausible human rights claims are frequently missed we can make no comment as the research examined only cases in which human rights arguments were actually made.

2.44 Second, human rights points are raised in a higher proportion of cases under solemn procedure than under summary procedure.
2.45 Third, it appears that almost the full range of Convention rights is being deployed in argument in criminal cases but that the vast majority are essentially issues of procedural fairness under Article 6. A predominance of Article 6 cases was anticipated before the introduction of the legislation but perhaps not to this degree.

2.46 Fourth, it appears that criminal cases raising human rights points are not evenly distributed round Scotland, however, our research was not designed to establish the reasons for the distribution.

2.47 Fifth, it is not possible to establish the frequency with which human rights issues have been raised in civil cases because the research only examined reported cases and, even with far greater resources for the research, it would have been difficult to establish reliable figures in the absence of a comprehensive central record of human rights cases comparable to the Crown Office database. The possibility of producing such a record is discussed in chapter five. However, as with criminal cases, whilst it appears that points based on Convention rights are being regularly raised, it is unlikely that this is occurring in more than a small fraction of civil cases.

2.48 When considering the impact on resources expended on civil justice, the issues are different from those in criminal justice. In the criminal justice system human rights arguments are generally being raised in defence to prosecutions. Therefore, although they may increase the resources expended on a case, arguments based on Convention rights are not adding additional cases to the system. By contrast, on the civil side, whereas points raised by the defender do not by definition add to the caseload of the courts, pursuers may be raising cases which would not have been brought before the enactment of the human rights legislation. However, there will be many cases in which the pursuer is merely adding a human rights argument to an action that would in any event have been brought on other grounds. Many judicial reviews are likely to have fallen into this category. However, if our assumption that human rights cases form only a minor part of the civil caseload is correct, then it seems unlikely that there has been a substantial impact on the resources required to run the civil courts.

2.49 Sixth, judicial review is the most frequently used form of action for raising human rights points. It is also clear that of all the forms of civil litigation, judicial review is the procedure most affected by human rights.

2.50 Seventh, the full range of Convention rights is being used to make arguments in civil cases. It also appears that the cases concern a wide range of subject matter in terms of areas of Scots law and public administration. It appears that the area of public administration most affected to date by human rights claims in the civil courts is immigration control (including determination of asylum claims). There has also been a significant number of claims by prisoners, but many of these concern a single issue – the continuation of the practice of slopping out in some prisons.

2.51 Eighth, analysis of the outcomes of reported cases suggests that human rights arguments affect the outcome of cases in a manner favourable to the litigant raising them in a significant minority of cases. The success rates should also be treated with some caution because there are occasions when the court does not explicitly dispose of the case on human rights grounds, but still gives the litigant the result they wish, on other grounds.
2.52 Ninth, in the reported cases, remedies were more frequently sought under the Scotland Act than under the Human Rights Act. This reflects the larger number of criminal cases all of which typically invoke the Scotland Act because of the role of the Lord Advocate in prosecution.

2.53 Apart from the limitations of the data already referred to the most important point to be borne in mind in considering these conclusions is that this is a study of the ordinary courts. It did not cover tribunals as it would not have been feasible to include both in the same study. However, it is clear that human rights arguments are raised regularly in some tribunals, for example, the immigration tribunals (immigration adjudicator and immigration appeal tribunals). Some of these cases eventually reach the ordinary courts through appeal mechanisms or (in the case of the immigration tribunals) judicial review. Equally, many do not. Therefore, our study cannot be treated as an overview of the use of human rights arguments in the legal system, but only of their use in the ordinary courts. The lack of systematic information about tribunals is a gap that could usefully be filled by further research. Looking at the courts alone might produce a skewed impression of the extent and nature of the use of human rights arguments in legal disputes, and in particular the extent and nature of their use in the context of particular areas of public administration.
CHAPTER THREE: TRENDS IN HUMAN RIGHTS CASE LAW

3.1 This chapter presents a doctrinal analysis of the human rights issues raised in reported cases decided by the Scottish courts since the devolution of executive and legislative power in May and July 1999. The purpose of this chapter is to present a concise picture of the kinds of legal issues relating to human rights with which the Scottish courts have been dealing. More particularly, it involves:

- a survey of reported cases, attempting to trace trends and developments in human rights case law;
- discussion, where appropriate, of any apparent differences in approach between the Scottish courts and the Strasbourg Court and Commission; and
- indication of issues of potential difficulty where challenges to domestic law and practice on grounds of incompatibility with ECHR jurisprudence might have been expected to arise but have not yet done so.

3.2 With regard to the third bullet point, we identified issues as potential challenges worth discussing if they met any of the following criteria. First, that there was an argument based upon existing Strasbourg case law that existing arrangements may not be Convention-compliant. Second, that challenges under the Convention have been made elsewhere in the UK and the laws/policies/practices in question are sufficiently similar. Third, even where the first two points do not apply, that the issue is a recurring one and there is something about the issue that leads us to think that individuals may be expected to exploit any possible avenue of legal redress (for example, deaths in custody).

3.3 The analysis is presented under six headings which (generally) follow the order of guarantees contained in the European Convention on Human Rights:

- Physical integrity – the right to life; protection against torture, etc, and deprivation of liberty: Articles 2-5 and Protocol 6
- Fair administration of justice: Articles 6 and 7
- Private and family life; and education: Articles 8, 12 and Protocol 1, Article 2
- Civil and political freedoms: Articles 9-11
- Property: Protocol 1, Article 1
- General provisions: Articles 14 and 17

3.4 We emphasise that this chapter presents a concise summary of the case law. This is not a treatise on human rights law and the report is intended to be accessible to a wide readership. Accordingly, there is no attempt to provide a fully comprehensive discussion of the legal human rights issues that have arisen to date. For similar reasons, we have cited cases selectively in this chapter rather than providing a citation to support each statement in the text. We have cited cases which seem significant to us for a variety of reasons, and our judgments as to which cases are worth citing are inevitably subjective.
3.5 The cases indicate that limited use has been made of Article 2 arguments. Neither the quantity nor the range of arguments raising Article 2 arguments found in England and Wales is replicated in Scotland.

3.6 The only context in which Article 2 arguments have been used is the expulsion or deportation of individuals from the United Kingdom where it has been argued that returning them to a particular country would give rise to a real risk of death. These arguments have often been raised along with Article 3 submissions concerning the risk of infliction of torture if the person were returned to the country in question. These cases fall into three groups:

- cases concerning threatened return to another European state which is bound by the provisions of the ECHR and of the EU Dublin Convention of 1990, and in which there is a strong indication that the Dublin Convention (or the Immigration Act 1971) is of greater weight than the ECHR in determining challenges to removal;

- cases disposed of on the grounds that there is no well founded fear of death or persecution (and thus the Article 2 test is not satisfied); and

- cases disposed of on procedural grounds (for example, that tribunals had not properly considered the arguments raised and that leave to appeal should have been granted).

3.7 In general the Court of Session has disposed of these cases in a manner consistent with the Strasbourg case law. The one possible exception was *Jalloh v Secretary of State for the Home Department* which rejected a challenge to removal on the ground – contrary to Strasbourg case law – that removal to another state bound by the Convention absolves a state from considering whether its obligations under the ECHR have been met.

3.8 Two further areas which have been important in the Strasbourg case law, and which might have been expected to give rise to cases in the Scottish courts, are the responsibility for use of lethal force by state officials, and the positive duties of the state to safeguard life against threats from non-state actors. As to the first, Article 2 has been held to require a careful assessment of the following: the actual use of force, the prior training of officials and the planning of any operation. Article 2 also imposes a positive obligation to carry out an effective investigation of the circumstances surrounding any particular instance of the use of lethal force. As to the second, Article 2 imposes additional positive duties upon a state to take appropriate steps to safeguard life through the effective investigation and prosecution of the intentional or reckless taking of life and the taking of reasonable steps to ensure the proper protection of individuals who face imminent threats of violence from others. These key aspects of Article 2 protection simply have not been raised by litigants in Scotland,

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20 Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities. The 1990 Convention has since been replaced by EC Regulation 343/2003.
although these issues (and others such as the prevention of inter-prisoner violence and detainee suicides) may arise in future.

**Article 3 and the prohibition of torture and inhuman or degrading treatment or punishment**

3.9 Article 3 of the Convention requires that domestic law protect individuals against ill-treatment whether inflicted by state officials or by private parties. One of the conditions that must be satisfied in order to establish a violation is that the treatment must be sufficiently serious. The Strasbourg case law indicates that action consequent upon the taking of criminal or disciplinary proceedings (including the imposition of a ‘punishment part’ of a life sentence) will generally be deemed not to satisfy this test.

3.10 Scottish cases in which Article 3 arguments have been made concern:

- preventing risk to health though the removal of basic necessities of life (in a series of cases in which a city council sought the eviction from their homes of asylum seekers after their claims for asylum had been rejected);
- conditions of detention in Scottish prisons involving ‘slopping out’; and
- deportation or extradition to a country where there is a real risk of ill-treatment at the hands of state officials (including the risk of judicial execution if convicted of an offence) or of private parties.

3.11 With the limited exception of one case involving ‘slopping out’ (the one case decided to date being *Napier v The Scottish Ministers* 23), these arguments have not succeeded. The first set of cases involves questions which have not yet been determined in Strasbourg case law. In the third, the comparative importance of Article 3 arguments in disposals is not always clear from the judgments in which Convention arguments are considered alongside other legal issues which then become the primary reason for disposal, for example, the question of whether the 1951 Refugee Convention has been satisfied in the case of removal of an asylum seeker.

3.12 The challenge to slopping out has the potential to affect large numbers of prisoners in Scottish Prisons. However, although the argument that slopping out constituted inhuman and degrading treatment in terms of Article 3 succeeded in *Napier*, it is not clear that it will succeed in all cases, as this case appeared to turn in part on facts specific to the prisoner in question. Lord Bonomy did not decide that slopping out was a violation of Article 3 *per se*. *Napier* is under appeal and it is perhaps unlikely that the Inner House will decide that slopping out is necessarily a violation of Article 3. Strasbourg case law suggests that cases concerning the adverse effects of prison conditions should turn on the cumulative effect on each prisoner as assessed by the length of the detention and impact (if any) on the prisoner’s health. In Article 3 jurisprudence, the threshold test is relatively high, and not only the nature of the accommodation but its effects and duration are taken into account. It is not clear what line the Strasbourg Court would take if faced with such challenges, but a reasonable interpretation of recent decisions would suggest that the detention conditions endured in

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23 2004 SLT 555.
Scottish prisons would fall short of the minimum level of severity required to found a violation of Article 3.\textsuperscript{24}

3.13 A number of other Article 3 challenges to existing practices which have been made in England and Wales have not yet been mounted in Scotland. The positive obligation on the part of social work authorities to ensure that children at risk of abuse or neglect are properly protected (as confirmed in a recent Scottish case determined by the Strasbourg Court, \textit{E v United Kingdom}\textsuperscript{25}) is not reflected in cases in the Scottish courts. Similarly, there has been no consideration of whether the continuation of the possibility of corporal punishment of children by parents and guardians (who can rely on the defence of ‘reasonable chastisement’ in a prosecution for assault) is a violation of Article 3. (We were aware of one case which attracted some press commentary, but which does not appear in our database, which could well have provided an opportunity to review this defence.) Section 51 of the Criminal Justice (Scotland) Act 2003 now provides that certain sorts of punishment are not legitimate corporal punishment, and lists factors the court must take into account in determining the charge in other cases, but it remains to be seen whether Scots law will be deemed fully compliant with Article 3.\textsuperscript{26} Nor has there been any attempt to challenge the compatibility of existing police complaints systems with the Strasbourg Court’s expectations of an effective investigation of any arguable claim that an individual has been ill-treated.

\textbf{Article 5 and deprivation of liberty}

3.14 Article 5 protects liberty of person by insisting that any deprivation of liberty is lawful and in accordance with domestic procedures and is not arbitrary or otherwise motivated by bad faith. The impact of this guarantee on domestic law and practice has already been considerable as many of the violations of this much used provision established before the Strasbourg court have concerned the United Kingdom. The Scottish Executive took preemptive action to head off Article 5 challenges by introducing legislative proposals which ultimately became the Bail, Judicial Appointments, etc (Scotland) Act 2000 and the Convention Rights (Compliance) Act 2001, and this may help to explain why there has been only very limited reliance on Article 5 in Scottish cases since the introduction of the human rights legislation.

3.15 The reported cases have concerned both questions of the scope of Article 5 and the specific rights conferred on persons whose detention is itself lawful in terms of Article 5.

\textit{The scope of Article 5}

3.16 The cases on the scope of application of Article 5 have raised three distinct issues:

\begin{itemize}
  \item whether there has been a ‘deprivation of liberty’ through the imposition of bail conditions restricting movement;
  \item whether detention is lawful; and
\end{itemize}

\textsuperscript{24} The few findings of violation of this provision in respect of detention conditions have all involved factual circumstances of greater severity; see, for example, \textit{Peers v Greece} (2001) 31 EHRR 51; \textit{Kalashnikov v Russia} (2003) 36 EHRR 34; and \textit{Lorse v Netherlands} (2003) 37 EHRR 3.


\textsuperscript{26} See \textit{A v United Kingdom} (1999) 27 EHRR 611.
whether particular deprivations of liberty can be held to fall within one of the recognised categories of detention.

On the first issue, in *McDonald v PF, Elgin*, the High Court of Justiciary decided that a bail condition that the accused reside at home 22 hours each day did not restrict movement to such a degree as to amount to a ‘deprivation of liberty’ in terms of Article 5. The decision is probably inconsistent with Strasbourg case law (although that case law itself is not always consistent on this point).

3.17 As regards the second issue, lawfulness of detention, in *Anderson v Scottish Ministers*, the Privy Council upheld the provisions of the Mental Health Public Safety and Appeals (Scotland) Act 1999 (the first Act passed by the Scottish Parliament) against a challenge that they were beyond the competence of the Scottish Parliament because inconsistent with Article 5. The Act provides for the continuing detention of persons in hospital where the Scottish Ministers are satisfied that detention is necessary to protect the public from serious harm. It is in practice used to ensure the indefinite detention of persons with psychopathic personality disorders who have committed crimes of violence, and ensures that such persons may be detained even where they are no longer treatable, a situation which under the previous law would have required their release. The Act had retrospective effect in that it applied to persons already detained in the State Hospital at Carstairs. The Privy Council approached the issue in a manner which sought to apply the essential spirit of Article 5 rather than answer the narrower question of whether retroactive amendment of the law was compatible, stressing that the protection of the community is a relevant consideration and that the legislation was consistent with Article 5. In another case, the court refused to accept that extradition proceedings in Portugal were irregular, and, thus, had resulted in unlawful detention in Scotland such as to prevent the continuation of a prosecution. The disposals in both these cases are consistent with Strasbourg case law.

3.18 It is the third of these questions under Article 5, namely whether detention is for one of the permitted reasons, which has given rise to case law of particular interest in the Scottish courts. The recognised grounds for loss of liberty in the text of Article 5 are: court-imposed detention (for example, after conviction or for the enforcement of a legal obligation); detention for the well-being of the individual and for the protection of society (including of those with mental health problems, drug addicts, and young persons in need of educational supervision); detention with a view to extradition; and detention as part of the criminal process following upon suspicion of involvement in criminal activity. In *S v Miller*, the court ruled that a secure accommodation order made under the Children (Scotland) Act 1995, following upon determination that a child had committed an offence, was regarded as falling under the heading of ‘educational supervision’, thus emphasising that juvenile justice proceedings are considered to be essentially welfare rather than criminal in nature. However, following a recent Strasbourg judgment, it is arguable that the court did not adequately explore the question of whether the detention of a child in secure accommodation, which contains other minors convicted by criminal courts of serious offences, could be treated as falling under the heading of educational supervision if the essential nature of the regime is.

27 20th March 2003.
28 See Lord Reed and Murdoch, J (2001), 4.47.
29 2002 SC (PC) 63.
30 Vervuren v H M Advocate 2002 SLT 555.
31 *S v Miller (No 2)* 2001 SLT 1304.
punitive rather than educational. In MacMillan, Petitioner, the court dismissed a challenge made by a convicted person to the revocation without notice of his licence and recall to prison. He had argued that he posed no risk to the community. However, the recall had been based in some measure on other charges for which trial was pending but for which the accused had not yet been convicted, and the reason for the court’s disposal is not entirely clear.

3.19 There is one group of cases in which the Article 5 points are not fully and clearly argued. These are cases challenging removal from the United Kingdom by the immigration authorities. It is not always clear if the argument being made is that Article 5 will be breached if the person is expelled, or that Article 5 is being breached because the person is in detention in Scotland. In some cases Article 5 points appear to have been abandoned because the detainee has been released since the case started. The latter argument – that expulsion from the UK would be a breach of Article 5 would in the right circumstances be valid argument. While Article 5 justifies detention with a view to deportation or extradition, Strasbourg jurisprudence also indicates that expulsion of an individual to a country where he or she will be detained following a conviction that was a “flagrant denial of justice” will breach Article 5.

Specific rights conferred by Article 5

3.20 As well as determining when detention is permissible, Article 5 also confers certain rights on persons detained, including the right to be informed of the reasons for an arrest, the right to be brought promptly before a court and the right to take proceedings to review the legality of detention. These rights must be given to detained persons in order to ensure that detention is, and remains, lawful. Here the Bail and Judicial Appointments (Scotland) Act 2000 and the Convention Rights (Compliance) Act 2001 are relevant. The former removed several possible ground of challenge under Article 5 by removing the requirement to apply for bail, removing the exclusion of the sheriff from considering bail in the cases of persons charged with murder, and amending the provisions on appeals against refusal. The latter changed the rules governing the release of life prisoners in order to bring the arrangements for the release of adult mandatory life prisoners into line with those for other life prisoners. However, this pre-emptive action has not headed off all challenges. Cases have raised two issues:

- First, Burn, Petitioner raised the question of determination of the sufficiency of the reasons for refusing bail. The court held that the prosecutor must provide sufficient general information relating to the particular case to allow a sheriff before whom a detainee is brought to consider the merits of any motion that the accused should be detained for further examination.

- Second, several cases have raised the issue of the review of continuing detention in the context of the release of life prisoners. The Convention’s requirement of

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32 See DG v Ireland, judgment of 16 May 2002, Reports of Judgments and Decisions 2002-III.
33 This was a petition for judicial review and was one of the cases in the sample referred to in chapter two. There was no opinion.
34 Drozd and Janousek v France and Spain (1992) 14 EHRR 745, para 118.
35 2000 SCCR 384.
36 Flynn v HM Advocate 2004 SLT 863.
provision of an effective review of the lawfulness of the original detention, and of any continuing detention, applies to cases of life imprisonment. Where a distinction is made between the ‘tariff’, or punitive part of the sentence, and the ‘risk’ element which takes account of potential danger to the community, there is a right to seek review at reasonable intervals of whether the continuing detention can be justified. In several cases the provisions of the Convention Rights (Compliance) Act, which was applied to prisoners already serving life sentences, were challenged, primarily on the grounds that prisoners would have been eligible for consideration for parole at an earlier stage if the previous legislation had continued to apply to them. In one case the challenge was also on the ground that the length of the period was disproportionate.37 The challenge is considered further in respect of Article 7, discussed below.

Potential challenges

3.21 A number of Article 5 issues which might have been anticipated have not yet arisen in the Scottish courts. They include:

- The lack of clarity with which Scots law defines certain matters, for example, when a person can be said to be under arrest, and the test for establishing that conduct amounts to a breach of the peace.

- It is not clear how new developments in domestic law involving the introduction of electronic tagging in lieu of detention on remand will be classified.38

- The requirement under Article 5(3) that a person detained on suspicion of the commission of an offence is brought to court ‘promptly’ (that is, within 96 hours) may on occasion in Scotland not be met. As the European Committee for the Prevention of Torture noted in one of its reports, ‘at least in theory, a person arrested very early on a Friday morning might not be taken before a court until the following Tuesday morning, were the Monday to be a court holiday.’39

FAIR ADMINISTRATION OF JUSTICE.

3.22 Article 6 of the European Convention on Human Rights is concerned with the fair administration of justice. It seeks to ensure that the adjudication of legal disputes satisfies the requirements of procedural fairness. The central importance of Article 6’s guarantees of fair hearings is reflected in the volume and scope of applications in Strasbourg which exceed that for any other article. As we saw in Chapter two, Article 6 has also been the article most frequently cited in the Scottish courts.

3.23 The reported cases may be grouped under the following headings:

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37 The relevant provisions have been amended by section 39 of the Criminal Justice (Scotland Act) 2003.
38 See section 17 of the Criminal Procedure (Amendment) (Scotland) Act 2004.
• the scope of Article 6 protection;
• the content of the fair hearing;
• access to a court;
• independent and impartial tribunal;
• public determination;
• trial within a reasonable time;
• the presumption of innocence;
• additional guarantees applying in criminal proceedings;
• prohibition of retroactive criminal penalties.

In this section, we do not distinguish between civil and criminal proceedings (other than in the final three headings which apply only to criminal proceedings), although the bulk of reported cases are indeed criminal.

Scope of Article 6 protection

3.24 The right to a fair hearing guaranteed by Article 6 does not apply to all legal proceedings. Article 6 applies only to proceedings involving the ‘determination of... civil rights and obligations or of any criminal charge’. The meaning of these terms is clarified by the Strasbourg jurisprudence. Issues concerning the scope of Article 6 have arisen in a number of Scottish cases:

• Article 6 has been pleaded in a number of asylum and immigration cases. According to the Strasbourg jurisprudence, these and certain other public law issues fall outwith the scope of Article 6, a position which reflects the assumption that the phrase ‘civil right’ refers mainly to private law. However, in certain cases the Scottish courts have taken a broader view of the scope of Article 6 following the line adopted in English judgments and applied it in asylum cases.

• A complaint that restrictions on the availability of compensation under the criminal injuries compensation scheme were contrary to Article 6 was rejected but the complaint related to a decision taken before the Human Rights Act came into effect, and appears to have been rejected on the basis that the Act did not have retrospective effect, rather than on that basis that this was not a ‘civil right’ (although the outcome of the case under Article 6 would still have been similar, following Strasbourg case law).

• A handful of cases suggest that the determination of whether proceedings are criminal (important because the article imposes additional protections in criminal cases) is an area which requires further clarification. To give an example, the Scottish courts have confirmed that once the procurator fiscal has decided not to proceed with a charge against a child, subsequent proceedings under the Children (Scotland) Act 1995 are not criminal for the purposes of Article 6 as the reporter’s actions are designed to provide for the child’s welfare rather than to punish him. The extent to which this is in line with the Strasbourg approach may be doubted.

40 For example, Asifa Saleem v Secretary of State for the Home Department [2000] 4 All ER 814.
Substantive ‘fair hearing’ guarantees

3.25 The Strasbourg court has given substantial guidance on the meaning of the content of the fair hearing guarantee, that is to say, the precise procedural protections which it entails. The general approach of the Scottish courts has mirrored that of the Strasbourg court in that they have considered whether the proceedings as a whole, including any appellate proceedings, are fair rather than considering each stage of the procedure in isolation. Thus, defects at an earlier stage can be remedied by a later appeal or review. This has been the basis on which the courts have rejected claims that Article 6 was breached by a civil jury’s assessment of solatium in a damages claim (juries do not give reasons for decisions), by the involvement of Ministers in determining planning applications, and by the procedures of professional disciplinary boards.

3.26 Moving on to the specific procedural guarantees implicit in Article 6, the reported cases have concerned the issues below.

- ‘Equality of arms’: the need for proceedings to be broadly adversarial in nature has been considered in a number of cases which highlight that the key requirement is whether each side has a real opportunity to make observations on the evidence or arguments adduced by the other side, and not the form in which such observations may be made. Other cases have explored the extent of the requirement of disclosure of evidence to allow the opportunity for the other side to the proceedings to respond effectively. Several of these cases were successful. For example, an appeal against conviction for breach of the peace and for “threatening the lieges with violence” by brandishing knives was upheld, based in part on arguments that a charge could be regarded as inferring personal violence only if it was labelled as an assault, and failure to do this had violated his right to a fair trial under Article 6.41 In another case, the appellant alleged that the trial judge had misdirected the jury and had excluded questioning which was material to his defence, and further that the Crown’s cross-examination had constituted an abuse of process and a breach of Article 6(1). However, the court quashed the conviction on the basis that it was contrary to the interests of justice to exclude questioning which was material to the appellant’s defence, and that there had been a miscarriage of justice without the need to consider the Article 6 implications.42

- The importance of ensuring that each party has been accorded a proper opportunity to prepare and to meet the case presented by the other side to the proceedings has been stressed in a number of cases involving professional disciplinary tribunals. In one, it was suggested by the court that the professional body perhaps had not revealed the full basis of facts relied upon in disciplinary proceedings to the appellant, although this was not in itself the reason for quashing the decision of the disciplinary tribunal.

- Fair rules of evidence: the use of evidence obtained under ill-treatment or compulsion or in violation of the protection for self-incrimination unless an individual has been accorded adequate legal assistance during interrogation may be deemed unfair, but the Scottish courts have proved reluctant to accept that Convention tests have not been satisfied in a number of cases challenging aspects of Scots law of evidence.

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41 Paterson v Webster 2002 SCCR 734.
42 Tant v H M Advocate, 1st July 2003.
• The giving of reasons: it is accepted that Article 6 generally requires the giving of reasons for decisions. However, the Scottish courts have rejected contentions that insufficient reasons had been given for certain decisions concerning licensing and property rights, and accepted that although juries do not give reasons for their decisions, the possibility of appeal against a jury’s assessment of solatium addressed any possible defect in this regard.

3.27 The above gives an idea of the issues which have been raised under Article 6 fair hearing guarantees. However, in many cases it is difficult to assess the impact which arguments based on convention rights have had. Often the issue of Article 6 fairness is subsumed in discussion of domestic law principles so that it is not clear whether the convention argument made a difference to the outcome. On the whole, the approach of the Scottish Courts appears consistent with Strasbourg jurisprudence. However, the important case of Brown v Stott has given rise to some controversy. That case concerned section 172 of the Road Traffic Act 1988 which makes it an offence for a vehicle owner not to give information to police as to the driver’s identity if required to do so. This was held ultimately by the Privy Council not to violate Article 6, on the grounds that the right to silence and the right against self-incrimination were not expressly contained in the provision, and, so, were open to modification or restriction where this served a legitimate purpose and the means were proportionate. It has been forcefully argued that this reasoning is incompatible with Strasbourg case law, but on the other hand it has also been argued that the decision was correct.

Access to a court

3.28 Restrictions on access to courts may trigger Article 6 claims. Cases in this area have focussed upon the following issues.

• Restrictions on access to a court for good cause: restrictions on vexatious litigants have been upheld. However, in another case, a challenge to an order to find £10,000 caution for expenses as a disproportionate restriction on the defender’s right of access to the court was successful. The immunity from suit of advocates against allegations of negligence in the conduct of an accused’s defence was also justified on the grounds of public policy and not considered to be a violation of Article 6.

• Legal aid: Strasbourg jurisprudence makes clear that the right of access to a court may in certain cases involve an obligation to provide litigants with legal aid, however, there is no general obligation to provide legal aid across the board for all civil and criminal disputes. In S v Miller the Court decided that the structure of the children’s hearing system in Scotland complies in all respects with Article 6 requirements except in relation to legal aid, the absence of which meant that a child was unable to represent himself properly at a hearing. The court noted that the Convention Rights (Compliance) (Scotland) Bill then before Parliament proposed to amend the existing legal aid legislation so as to include provision for children’s hearings. In another

43 2001 SC (PC) 43.
45 See, for example, Pillay, R ‘Self Incrimination and Article 6’ [2001] EHRLR 78.
case, the lack of legal aid before a professional disciplinary tribunal was found not in the particular circumstances to have caused any Article 6 violation, the court holding that while legal representation is an advantage, the lack of it does not necessarily deprive the petitioner of a fair hearing and the appropriate test is whether legal representation is indispensable.

**Independent and impartial court or tribunal**

3.29 There has been a series of cases based on the requirement of an independent and impartial tribunal, some of which have called into question structural aspects of the administration of Justice. Several of these cases have been successful to some degree.

- **Temporary sheriffs:** in the well known case, *Starrs v Ruxton*, the position of temporary sheriffs, appointed by the Lord Advocate for periods of one year, was found to be incompatible with Article 6 owing to their lack of security of tenure. This decision led to the abolition of the office of temporary sheriff and their replacement by part-time sheriffs enjoying greater security of tenure. In a number of subsequent cases, challenges to convictions determined by temporary sheriffs were successful on the grounds that the Lord Advocate had no power to prosecute individuals before temporary sheriffs and that accused persons did not have sufficient knowledge to make an implied waiver of their right to an independent and impartial tribunal.

- **Judges who have held executive office:** the participation of a judge in determination of an issue concerning legislation which he had previously helped promote as Lord Advocate was considered as capable of giving rise to the appearance of bias.

- **Prior expressions of opinion by judges affecting judicial decisions:** in *Hoekstra v HMA (No 2)*, accused persons claimed that they could not get a fair trial where the presiding judge (Lord McCluskey) had written a highly critical newspaper article concerning the European Convention on Human Rights. Whilst the court considered that no actual bias could be detected in the disposal of the case, the article ‘would create in the mind of an informed observer an apprehension of bias on the part of Lord McCluskey against the Convention and against the rights deriving from it.’

- **Membership of organisations:** in one of a series of challenges to the composition of a court where the judges were members of a private society with restricted membership, the court accepted that a further hearing on this particular issue was required.

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46 2000 JC 208.
47 *David Millar v Dickson, Karen Payne and others v Heywood* 2002 SC (PC) 30. This issue is now before the court again in the cases of Robertson, O’Dalaigh and Ruddy, Glasgow Herald, 8th September 2004.
48 *Davidson v Scottish Ministers* [2004] UKHL 34.
49 2000 SLT 602.
3.30 On the other hand, a number of other challenges have not succeeded:

- Temporary judges: the position of temporary Court of Session judges appointed for a three-year period by the Lord President, in contrast to that of temporary sheriffs, was considered sufficiently secure to satisfy Article 6.\(^{50}\)

- District Court: The role of the assessor in the District Court was not inconsistent with Article 6.\(^{51}\)

- Members of children’s hearings: it has been accepted that children’s hearings meet the requirement of independence, although the panel members are lay persons without security of tenure.

- Licensing, etc., authorities: a number of challenges on the basis of alleged bias have been made to decisions by local authorities in licensing and adoption functions. Although such challenges have not succeeded, it is not always apparent that the Convention arguments were fully explored.

- Contempt of court: in some cases challenges have been made to a sheriff’s power to punish prevaricating witnesses for contempt of court on the ground that the sheriff was in effect acting as both judge and prosecutor and so the appearance of an impartial and independent tribunal was lost. These cases have not succeeded, as the courts have ruled that judges in such instances are discharging a judicial role in assessing the evidence given in a trial, although a recent practice direction states that an individual facing an allegation of contempt of court should be entitled to legal aid.

- Jurors: allegations of bias on the part of members of a jury have been considered in a handful of cases,\(^{52}\) but the approach adopted has perhaps lacked consistency. For example, in one case, as the jury was returning to court to announce its verdict of guilty, one of the jurors said in front of the others that she knew the appellant had been a shoplifter. The appeal court considered that the sheriff’s remarks to the jury on this issue would have been insufficient to dispel legitimate doubts as to the jury’s impartiality. This may be contrasted with another case in which arguments that one of the jurors in a trial knew the accused and was aware of his previous convictions (and further that this juror had a relative who had died in a drugs-related suicide where the offence concerned drugs offences) were considered not to found any bias against the appellant. Generally, the courts have taken a robust approach to the abilities of juries to set aside any personal bias or impressions gained from prejudicial pre-trial media coverage on the grounds that the time which elapses between publication and trial, as well as the manner in which a jury would be directed by the trial judge, would settle any doubt as to impartiality.

\(^{50}\)\textit{Clancy v Caird} 2000 SC 441. A challenge has since been made to the position of temporary High Court judges, Glasgow Herald, 8\(^{th}\) September 2004.

\(^{51}\)\textit{Clark v Kelly} 2003 SLT308.

\(^{52}\)For example, \textit{Beggs v H M Advocate} 2001 SCCR 836.
Public determination

3.31 Article 6 specifically requires a public hearing and that judgment be pronounced publicly. However, exclusion of the press and the public can be justified, ‘in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’ In the context of media reporting of proceedings, the Court has held that the Contempt of Court Act 1981 should now be read in the light of Strasbourg jurisprudence which provides that exceptions to a broadcaster’s freedom of expression should be interpreted narrowly.53

Trial within a Reasonable time

3.32 Article 6 requires that trial be ‘within a reasonable time’. While in Strasbourg the actual number of violations of this aspect of Article 6 protection found against the United Kingdom is low, delay in bringing (primarily criminal) cases to trial has been the Convention issue most frequently raised in the Scottish courts since devolution. A number of the reported cases turn on their specific facts and no more can be said than that they are examples of excessive delay. However, some points of general importance have been determined.

- The starting-point of any calculation: the point at which a person is ‘charged’ with a criminal offence has been a factor in certain cases where this was taken as the date of a police interview, but neither an interview under caution by the Inland Revenue, nor an investigation by the social work department, nor involvement in a children’s hearing was treated as giving rise to any such issue as these proceedings were not criminal in nature. Where disciplinary action is taken by professional tribunals, the relevant date for the purposes of the reasonable time requirement was taken as the date on which a complaint was lodged with the relevant tribunal.

- The extent of and reasons for delay: it is not possible to lay down precise rules on these issues. Violations of Article 6 have been established in a number of cases, for example, delays of some 9 years in the determination of a planning application, an unexplained delay of 19 months in criminal proceedings (delays for which the appellant’s advisers were responsible being ruled insignificant when considered against the overall period of delay), a three and a half year delay in determining embezzlement charges, and one of 9 months in a straightforward case of encashment of a stolen cheque. However, the courts have refused to condemn delays attributable to particular pressures (rather than shortcomings on account of systemic under-resourcing) and have accepted that it is legitimate for the prosecutor to prioritise cases in terms of their seriousness. Other factors taken into account in the assessment have included the complexity of the charges or evidence and the number of witnesses. Cases involving children as accused or as victims are considered as calling for particular expedition, taking into account the requirements of the UN Convention on the Rights of the Child.54

53 BBC, Petitioners 2002 JC 27.
54 PF, Linlithgow v Watson & Burrows 2002 SC (PC) 89.
• Effect of a determination that there has been a failure to ensure trial within a reasonable time: this has recently been clarified by the Privy Council ruling that the appropriate remedy or outcome of a violation of Article 6 is not a reduction in sentence, but the cessation of the prosecution.55

Presumption of innocence

3.33 Persons facing a criminal charge enjoy additional guarantees under Article 6, including the right to be presumed innocent until proven guilty. Thus far, all challenges based on the presumption of innocence have failed.

• Prejudicial pre-trial publicity: in several cases arguments that extensive press publicity has deprived the accused of any chance of a fair hearing have not succeeded by reason of the time which elapsed between the publicity and the trial, or the judge’s instructions to the jury, or the venue of the trial.

• References to previous convictions do not necessarily give rise to issues under the provision nor does the fact that charges are libelled as having been committed while on bail.

• Confiscation orders: an application for, or the making of, a confiscation order under the Proceeds of Crime (Scotland) Act 1995 (which allows for the confiscation assets of persons convicted of drug trafficking even where the assets concerned have not been the basis of conviction) does not involve the determination of a criminal charge56 (reasoning which was subsequently followed by the European Court of Human Rights in an application from the United Kingdom in another case).57

Additional minimum guarantees applying in criminal cases

3.34 Article 6(3) confers a number of specific procedural rights on persons charged with criminal offences: the rights to be informed promptly of the nature of the charge; to have adequate facilities to prepare a defence; to defend the charge in person or through legal assistance of one’s own choosing (or to be given free legal assistance when the interests of justice so require); to examine or have examined witnesses; and to an interpreter if required. These specific rights must be read in the context of the principal aim of Article 6: ensuring a fair trial. A number of Scottish cases have challenged established aspects of Scots criminal procedure, but in general these have not been successful. Decisions of particular interest include:

• denial of bail does not interfere with the right to have adequate facilities to prepare a defence, as the adequacy of time and facilities to prepare the defence case cannot be determined at the stage of making a bail application;

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55 "R” v Her Majesty’s Advocate & Another [2002] UKPC D3.
56 HM Advocate v McIntosh 2001 SCCR 191.
57 Phillips v United Kingdom, No. 41087/98, ECHR 2001-VII.
• the prosecutor cannot always be expected to know the exact date of the offence, and it is enough to give sufficient details of the cause and nature of the accusation to satisfy Article 6;

• restrictions on the right of access to legal assistance to particular aspects of the proceedings will not be deemed incompatible with the guarantee if they can be reconciled with the interests of justice, nor did the perceived inadequacy of legal aid under fixed payments regulations amount to a deprivation of the right of representation;58

• the right to call and to cross-examine witnesses is not absolute, and the impossibility of challenging statements made by a witness who had subsequently died did not in the circumstances lead to an unfair trial as other evidential safeguards existed and, viewing the proceedings as a whole, the trial had been fair.

Retrospective criminal penalties

3.35 Article 7 prohibits application of the criminal law to acts which were not criminal at the time they were done, or the imposition of a heavier penalty than that prescribed by law at the time the offence was committed. The cases which have arisen under Article 7 concerned the issues below:

• Legal certainty: an individual must be able to foresee to a reasonable extent the consequences of any acts or omissions, but this guarantee does not prohibit the gradual development of the law, or clarification of an earlier decision subsequently held to be erroneous. Challenges to the relatively open-ended scope of common law crimes of breach of the peace and shameless indecency have also arisen: in the latter instance, the challenge was successful (although in deciding that this crime has no satisfactory basis in Scots law, the court decided it was unnecessary for them to consider Article 7).59

• Retroactive imposition of a heavier penalty than the one applying at the time of the act or omission: Article 7 provided an additional ground of challenge in cases arising from the new arrangements for the fixing of the punitive element of sentences of life imprisonment made by the Convention Rights (Compliance) (Scotland) Act 2001, which led to some prisoners being considered for release later than under the previous arrangements. These changes were themselves introduced in response to developments in Strasbourg case law. The Privy Council held that the statute did not violate Convention rights as it could be read in a manner consistent with Article 7, but the fact that it could be read in a manner which could allow for longer periods of imprisonment than those set under the previous system had the potential for a violation of Article 7.60 The cases were returned to the appeal court for reconsideration of the punishment parts. (In this case, the minority of the judges were able to reach the same conclusion by referring to the common law presumption that

58 Buchanan v Mc Lean 2000 SC (JC) 603.
59 Webster v Dominick 2003 SCCR 525.
60 Flynn v HM Advocate 2004 SLT 863.
legislation should not be applied, as far as possible, so as to prejudice existing rights or interests.)

PRIVATE AND FAMILY LIFE; AND EDUCATION

3.36 Three of the Articles of the Convention are concerned with issues of private and family life. Article 8 specifically refers to private and family life, home and correspondence. It protects a range of interests including the development of personality, choice of lifestyle, and the determination of family relationships. Article 12 recognises the rights to marry and to found a family in accordance with domestic law. Article 2 of the First Protocol calls upon states to respect parental rights in the provision of education, although it is important to note that it also guarantees a more general right to education. A number of adverse rulings against the United Kingdom over the years in cases involving Scottish applicants have resulted in significant amendments to domestic law and practice, such as the abolition of corporal punishment in Schools (Campbell and Cosans v UK61), changes to the procedure in children’s hearings (McMichael v UK62), and narrowing of the powers of the prison service to censor prisoners’ mail (Campbell v UK63). However, a number of new issues have emerged since devolution.

Issues raised in this area

3.37 Article 8 potentially raises issues in a wide variety of domestic law contexts. The cases since devolution have included topics as varied as the scope of ‘private life’, child care and custody, immigration and deportation, prison conditions, mental health treatment, search and surveillance, and positive obligations to provide state support. On the other hand, there are no Article 12 cases, and only a handful in respect of Article 2 of the First Protocol.

Family life: child care and custody, etc, cases

3.38 A number of cases have concerned the care and custody of children.

- Decisions to free a child for adoption against the wishes of one or more parents: in some cases, ECHR arguments were considered at some length whilst in others they were avoided. In an important case on freeing for adoption Lord Reed commented that it was at least a matter for consideration whether a legislative framework which allowed for greater flexibility might not better enable courts to promote the welfare of the child, and also to strike a fair balance between the interests of the child and those of the natural parent as required by Article 8, rather than the current ‘all or nothing’ approach under which the parental rights and responsibilities of the natural parents are entirely extinguished.64

61 (1982) 4 EHRR 293.
63 (1992) 15 EHRR 137.
64 West Lothian Council v M 2002 SC 411. As the sheriff’s decision to free for adoption was taken before its entry into force it was not necessary for the sheriff to exercise his discretion in accordance with the Human Rights Act.
• Actions by unmarried fathers seeking parental rights under the Children (Scotland) Act 1995: in one case, a father’s action seeking parental rights in respect of children in care was decided without recourse to the ECHR since it was considered that the existing legislation - the Children (Scotland) Act 1995 – already encapsulated the requirements of the Convention.

• Actions by one parent seeking contact with a child: the Children (Scotland) Act 1995 has been specifically considered compatible with Article 8 as it reflects the Strasbourg Court’s own jurisprudence that the interests of the child are paramount.

• Defence to a criminal charge of plagium (child stealing): in one instance, an accused person’s claim that the charge of having removed his infant child by force from its mother was an interference with respect for his family life was rejected on the ground that the protection of the child in such instances is paramount, and the offence fell within one of the permitted categories of restriction in Article 8.

• Child protection orders allowing the removal of a child from its parents immediately after its birth: several attempts have been made to use Convention arguments to challenge local authority decision-making on the grounds that the action taken is disproportionate and unwarranted. Thus far, these challenges have failed, but such disposals may not be entirely consistent in every instance with Strasbourg case law which stresses that there must be ‘extraordinarily compelling reasons’ for taking a newly-born child into care, since such a measure is ‘extremely harsh.’ Moreover, the court has stressed the importance of domestic procedural safeguards and there may be some question whether Scottish decisions on the limited participatory rights of parents fully reflect the approach taken by the Strasbourg court.

3.39 Although the Convention has been referred to in all these cases, in many of them it appears to have played at best a marginal role in deliberations, with cases being disposed of largely by reference to domestic sources. The decisions appear, in general, consistent with Strasbourg case law, although with regard to the cases on removal of a child at birth from its mother, it may be argued that a stronger concern to ensure that European Convention concerns are addressed is appropriate.

Family life: immigration and asylum matters

3.40 There is no general right in international law for persons to live as a family unit in any particular country, since international law recognises a state’s right to control immigration into its territory. However, the state must exercise this right subject to its Convention obligations. The exclusion of a person from a state where other members of his family are living could give rise to an issue under Article 8. Issues may arise relating either to refusal of admission or to removal from the country. The state need not necessarily respect a couple’s choice of matrimonial residence and admit the non-national spouse (or children) for settlement as there has to be a fair balance between the needs and resources of the individual on the one hand and the interests of the community on the other. There have been cases in which the Strasbourg authorities have said that parents with settled status should have been

65 See, e.g. K and F, Applicants 2002 SCLR 769.
66 Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 471.
reunited with children they had left behind. In cases of threatened removal, the question is whether the immigration authorities should refrain from measures which will cause the rupture of family ties, and the English courts have given guidance on the approach to be adopted. Scottish cases in this area in the project database have raised the following issues:

- Deportation of an individual with long-established family roots: in one case, the court considered that the Home Secretary had failed to give sufficient weight to a genuine marriage in deciding to remove. In another case, however, a challenge to immigration policy which stated that marriage after the commencement of action to remove immigrants could not in itself be considered a compassionate factor was unsuccessful. In a third case, the court ruled that a wife who had chosen to marry an individual whose immigration status was precarious could not imply a right to remain in the UK.

- Eviction of Asylum seekers: in a series of cases in Glasgow sheriff court, asylum seekers who had occupied social housing under agreement entered into under the Immigration and Asylum Act 1999, which provided that the occupancy rights would terminate when their application for asylum and any subsequent appeals had been determined, challenged their eviction unsuccessfully under Article 8. The cases were disposed of on the ground of contractual, rather than human rights, arguments. In one instance, the court noted that the case was properly one to be raised by judicial review against the National Asylum Support Service, since this organisation had taken the decision to terminate the support. It is worth noting that cases in England have established that where asylum seekers have needs arising otherwise than from destitution or its physical effects, local authorities are obliged to provide assistance under community care legislation.

Private life

3.41 The concept of ‘private life’ in Article 8 is interpreted broadly and includes ‘the physical and moral integrity of the person, including his or her sexual life’, the quality of private life as affected by the amenities of his home, and the right to establish and develop relationships with other human beings. Cases have raised the following issues.

- Discrimination based upon sexual orientation: the policy applying in the armed forces whereby homosexuals were dismissed was considered within the context of employment protection legislation, a case which coincided with applications to Strasbourg which ultimately led to changes in domestic law.

- Attempts to widen the scope of Article 8 in regard to ‘private life’ to include participation in fox-hunting were rejected in *Adams v Scottish Ministers*, which had questioned the validity of the Protection of Wild Mammals (Scotland) Act 2002.

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69 R (on the application of Westminster City Council) v National Asylum Support Service [2002] 4 All ER 654
70 Secretary of State for Defence v Macdonald 2002 SC 1.
72 2003 SLT 366.
Privacy and press freedom: where a newspaper published details of the pursuer’s divorce in an article, which purported to be an account of evidence led in a proof, but was in fact contrary to the terms of the Judicial Proceedings (Regulation of Reports) Act 1926, the newspaper attempted to justify its action on the grounds of legitimate public interest and the Article 10 guarantee of freedom of expression, and the pursuer argued that Article 8 required publication of such details to be suppressed. The court was able to avoid direct discussion of the European Convention by relying solely on the 1926 Act as the basis for resolving the case.

Protection of physical integrity: Article 3, which protects individuals from ill-treatment, is complemented by Article 8, in that there will be some cases in which the level of the treatment complained about does not meet the minimum level of severity required for a breach of Article 3, but may involve a violation of Article 8. In some cases it will be appropriate to rely on both articles. This was the case in a number of challenges concerning ‘slopping out’ in Scottish prisons (discussed above under Article 3). Article 8 may also involve (as with Article 3) a positive obligation on the part of public authorities to ensure respect for the physical and psychological dignity of individuals (particularly vulnerable individuals), either by taking steps to ensure domestic law provides the minimum level of protection required, or by ensuring the effective prosecution of those who violate others’ rights. Occasionally, the steps taken to implement this positive duty may be challenged as infringing the Article 8 rights of others, for example, where an accused argued that her prosecution on a charge of shameless indecency with a male pupil who had reached puberty was an infringement of her Convention rights. The court rejected the argument.

Surveillance and search: there has been a number of unsuccessful challenges to the actions of the police and prison services, including challenges to the search under warrant of a property, to the conduct of surveillance operations in connection with drugs offences, to the application of ‘stop and search’ powers, and to the use of a tracking device by customs officials. Similarly, a challenge to the routine interception of telephone conversations in prisons, and the authority of the prison governor to pass details to the police when it is thought telephone conversations relate to criminal activity, were considered not to give rise to violations of Article 8, in part since prisoners are taken implicitly to have agreed to monitoring of conversations. However, such an approach may not fully address the requirements of Strasbourg case law that this practice is regulated and free from arbitrariness.

Regulation of surveillance activities by non-public agents was considered in one case where the victim of a road traffic accident was subject to surveillance by the defender in connection with civil proceedings and sought a declaration that the surveillance was unlawful. The court’s refusal to accept that Article 8 was infringed as the defender’s actions (including videoing of the pursuer outside his house and going to the pursuer’s house to question his wife) were proportionate and reasonable may not fully reflect the approach taken by the Strasbourg institutions.73

The right to education and parental rights in the provision of education

3.42 Article 2 of the First Protocol both guarantees access to existing educational facilities at elementary level (rather than advanced or higher education) and also places a duty upon a state to respect parents’ religious and philosophical convictions in exercising its responsibilities in this area. This provision has given rise to a number of challenges.

- Decision to close a particular school: the UK has made the reservation (referred to in the Human Rights Act 1998) that these obligations apply only in so far as, ‘it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.’ In one instance, this was of importance in disposing of a challenge to an educational authority’s decision to close a particular school.74

- Suspension of a pupil from a school imposed as a disciplinary measure: this will not give rise to a violation of the Article providing that the pupil has access to another educational facility, but in one case the court seems to have gone further by upholding the pursuer’s assertion that the decision to transfer amounted to an actual exclusion (although Convention arguments were not relied upon by the sheriff, and seemed to play only a minor part in the pursuer’s case).

- Respect for religious and philosophical convictions: this right belongs to the parents of a child and suggests more than mere acknowledgment, or that a parent’s views have been taken into account, but this does not imply any right to the provision of a specific form of teaching, for example, through the placement of a child in a particular school. In one case, the court noted that a challenge to removal of self-governing status from a school contained no averment as to how the child’s right to education and access to the school would be affected by a transfer of management control of the school, as teaching and the curriculum are not changed, and in any case, such views on the governance of a school are insufficient to constitute views amounting to philosophical convictions within the meaning of the provision.

CIVIL AND POLITICAL FREEDOMS: CONSCIENCE AND RELIGION, EXPRESSION, ASSEMBLY AND ASSOCIATION

3.43 Articles 9-11 essentially protect freedom of thought and belief of all kinds, and the ability to manifest those freedoms in various ways. The Article refers specifically to freedom of thought, conscience and religion, freedom of expression, and freedom of assembly and association. These guarantees (together with Article 3 of the First Protocol which guarantees free elections) lie at the heart of democratic and political life (although their significance goes beyond that), but they have not given rise to many cases in the Scottish courts since devolution.

Article 9: Freedom of thought, conscience and religion

3.44 Article 9 protects the right to hold religious beliefs and philosophical convictions, to change these beliefs, and to manifest these beliefs individually or in common with others.

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There have been only three rather speculative attempts to rely on Article 9. In *Adams v Scottish Ministers*, claims that the prohibition of hunting foxes with dogs, by the Protection of Wild Mammals (Scotland) Act 2002, violated Article 9 guarantees were rejected as the petitioners could not show that being prohibited by law from following an activity which in principle remained lawful (hunting animals) in the precise manner which they preferred, interfered with their freedom of conscience. In another case, arguments that an individual would suffer persecution on account of his Christian faith if returned to his country of origin failed, partly on account of the credibility of the petitioner (the adjudicator considered that the petitioner did not know some basic facts about Christianity). In the final case, attempts by a former teacher to prevent the holding of Standard Grade assessments of state school pupils, as this would have required the teacher to act against his conscience, were unsuccessful as he had been able to resign and had not been forced to do anything against his conscience.

**Article 10: Freedom of expression**

3.45 Article 10 protects freedom of expression including freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Very little substantive use has been made of Article 10 in the Scottish courts, apart from challenges to prohibition or restrictions on media broadcasting of events connected with pending legal processes. In these cases, the Scottish courts have placed a greater emphasis on press freedom that they did in the past through adoption of a more robust attitude to juries’ ability to disregard pre-trial publicity if given appropriate directions. On the other hand, an attempt to allow the transmission of trial proceedings in a case, where consent to transmission of the trial to the victims’ relatives had been given, was unsuccessful.\(^{75}\)

**Freedom of assembly and association**

3.46 Article 11 protects the freedoms of peaceful assembly and of association with others. The prohibition of fox-hunting was considered not to give rise to an issue under Article 11 as the right to assemble without hunting foxes still existed.\(^{76}\) However, there have been two successful challenges under Article 11 in which refusals of permission for holding processions by members of Orange Lodges under the Civic Government (Scotland) Act 1982 were overturned on appeal. In both cases, the court stressed the importance of giving adequate reasons for any ban on public processions.

**PROPERTY RIGHTS: PROTOCOL 1, ARTICLE 1.**

3.47 Article 1 of the First Protocol protects the peaceful enjoyment of their possessions by both natural and corporate persons, and forbids expropriation except in the public interest and according to the principles of public international law. Interferences with the right may involve absolute deprivation of property, imposition of limitations of, or controls upon, its use, or generally, any other form of interference with its enjoyment. Scottish cases have raised the following issues.

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\(^{75}\) BBC, Petitioners 2000 JC 521. This case related to the Lockerbie trial.

\(^{76}\) Adams, Petitioner 2002 SCLR 881.
Decision-making in licensing: domestic decision-making processes must ensure that due account has been taken of the rights of individuals in reaching a decision. Licensing decisions which have an impact upon the carrying out of a trade may fall within the scope of this provision, and human rights arguments have been raised in such cases, although only in one case was the issue of whether refusal to grant an extension to an existing licence amounted to an interference with a property right fully explored. The Strasbourg case law shows that a successful challenge must establish that the interference is disproportionate, or that the authority had fettered its discretion or acted irrationally. In the Scottish cases to date, the conclusion that the decision-making process has overall been fair is supportable in the particular circumstances of each case. For example, in one case, a taxi driver who had held a licence for many years had his licence suspended for 6 months by a licensing authority which had upheld a complaint of racist and threatening behaviour, relying upon the complainer’s account without having given the appellant an opportunity to cross-examine the complainer or give his version of events. Since the appellant’s version of events substantially supported that of the complainer, the court considered that the authority did not act unreasonably in deciding that the appellant was not a fit and proper person to hold a licence, although they also decided that the sanction of suspension for 6 months was disproportionate. Bearing in mind that the Strasbourg case law permits domestic courts to make a judgment on the proceedings as a whole rather than considering each stage of the decision-making process in isolation, the approach taken to the claims in question been appropriate. However, the courts have perhaps missed the opportunity to give guidance to licensing boards and local authorities on aspects of their procedures that may be less than ideal from the perspective of procedural fairness.

Housing: a handful of our cases have considered property rights and the home. The most complex of these concerned an application for the discharge of a property obligation under a feu contract restricting the use of the property and in which the court ruled that the relevant statutory provision had a legitimate aim in prohibiting restrictions on the reasonable use of property, and preventing superiors from exacting payments by way of ransom.

Remedies - arrestment upon the dependence: two cases concerned arrestment upon the dependence, but the disposal in each was different. In the first, an argument that the arrestment of an account was invalid on account of Article 1 of the Protocol was rejected on the ground that arrestment upon the dependence does not amount to a deprivation of property. In the other case, a warrant for inhibition and arrestment on the dependence of an action for payment was challenged by the defenders on the ground that the automatic grant of inhibition without the need for a justification advanced constituted a breach of the Article. Here, the court ruled that certain requirements must be fulfilled if a right to protective attachment of immovable property on the dependence were to conform to the guarantee: the pursuer must establish a prima facie case and a specific need for an interim remedy; there must be a hearing before a judge at which these matters are considered; and a party must be entitled to damages for loss suffered where no objective justification existed for the use of protective attachment. In this case, the attempted recovery of a contingent debt
with no special circumstances could not justify the inhibition, which had, therefore, been granted contrary to the provision.\footnote{Karl Construction Ltd v Palisade Properties 2002 SC 270.}

- Seizure of proceeds of criminal activity: confiscation orders made under the Proceeds of Crime (Scotland) Act 1995 were found not to have given rise to any breach of Article 1 of the First Protocol, as these struck a fair balance between the rights of the individuals and the interests of the community in combating drug-trafficking.\footnote{HM Advocate v Burns 2000 SCCR 884; and see HM Advocate v McSalley 2000 JC 485.} As stated above, this approach was subsequently supported by the Strasbourg Court.

- Payment of compensation: failure to pay compensation of an amount, reasonably related to the value of the property taken or otherwise subject to interference, will normally constitute a disproportionate interference with property rights.\footnote{Booker Aquaculture Ltd (t/a Marine Harvest McConnell) v Secretary of State for Scotland 2000 SC 9. In this case, which arose before the entry into force of the Human Rights Act and the Scotland Act, the petitioner relied on the fundamental right to Property in Community law which reflects the terms of the First Protocol.}

**GENERAL PROVISIONS CONCERNING THE ENJOYMENT OF RIGHTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**Article 14 and the prohibition of discrimination**

3.48 The list of prohibited grounds for discrimination in Article 14 is not exhaustive but merely illustrative. However, Article 14 can only be considered in conjunction with one or more of the substantive guarantees contained in Articles 2–12 of the Convention or in one of the Protocols: it does not confer any free-standing right not to be discriminated against. Discrimination cases have involved the issues below.

- Sexual orientation: the compulsory resignation of an RAF officer on the grounds of his homosexuality was challenged, the court ruling that ‘sex’ in domestic anti-discrimination legislation meant gender and not sexual orientation, but that such an interpretation was not compatible with the individual’s Convention rights.\footnote{Secretary of State for Defence v Macdonald 2002 SC 1}
- Determination of an appropriate comparator: an unsuccessful attempt was made to compare a self-governing school with other schools; and in the above case, the court ruled that the proper comparator was a homosexual female officer rather than a female heterosexual officer (but that this was incompatible with the Convention).
- Special needs, etc, of vulnerable groups: in one case\footnote{Fife Council v the Scottish Ministers, unreported.} a local authority appealed against a decision of an inquiry reporter, appointed by the Scottish Ministers allowing a traveller to use an old petrol station to park his caravans, inter alia on the ground that the reporter had had undue regard to the traveller's purported status as a travelling person. The reporter had referred to Article 14 and a relevant judgment of the Strasbourg Court, and commented that the vulnerable position of travellers as a minority meant that some special consideration should be given to their needs and lifestyle, both in the relevant regulatory planning framework and arriving at the decisions in practical cases. On appeal, the local authority relied on decision Chapman

\footnote{Fife Council v the Scottish Ministers, unreported.}
v United Kingdom\textsuperscript{82} to argue that travellers were not entitled to better treatment than holidaymakers. However, the appeal was dismissed on 29 January 2003 after adjustment of pleadings, on the motion of the appellant and of consent for the respondent. Thus, the human rights arguments were not considered by the court.

**Article 17 and the prohibition of abuse of rights**

3.49 Article 17 of the European Convention on Human Rights prohibits the interpretation of the Convention so as to imply ‘the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms’ in the Convention. In Strasbourg, its primary application has been in the context of disposing of ‘hate’ speech (for example, holocaust denial) questions under Article 10 where a state has taken action against such expression. Rather surprisingly, it has been invoked in six of our cases, but against action taken by judicial or legislative bodies in challenges to the imposition of a ‘punishment part’ of a life sentence (Flynn v HM Advocate), on the grounds that the period determined exceeded the ‘tariff’ which otherwise would have been served; and in relation to legislation prohibiting fox-hunting (Adams v Scottish Ministers). All of these arguments were dismissed.

3.50 This chapter has summarised the post-devolution human rights case law. The following chapter discusses the effect of the case law on Scots law and public policy, and the general approach of the judiciary to arguments based on Convention rights.

\textsuperscript{82} (2001) 33 EHRR 18.
CHAPTER FOUR: POLICY IMPLICATIONS OF HUMAN RIGHTS CASES AND JUDICIAL APPROACHES TO HUMAN RIGHTS ARGUMENTS

4.1 In Chapter Three, we analysed the post-devolution human rights case law in terms of the specific rights protected by the Convention. In this chapter we examine the case law from two different perspectives:

- a functional analysis of its effect on different areas of Scots law and public policy
- the general approach of the judiciary to arguments based on Convention rights.

The purpose of the former is to give a clearer picture than would emerge from Chapter Three of the significance of human rights litigation to date for different subject areas of law and policy. We thought that this would be of value to persons working in the relevant fields of law and policy. This inevitably involves some repetition of material from the previous chapter but we have tried to keep this to a minimum by referring back to the discussion in chapter three in many places. Following on from this functional analysis, we also discuss the type of consequence successful challenges have had (change in the law, change in policy etc.), before proceeding to discussion of the approach of the judiciary.

FUNCTIONAL ANALYSIS

4.2 This section will examine the impact of the cases on different areas of law and policy. It includes comment both on challenges to existing laws and policies and their application and on challenges which might reasonably have been expected but have not yet been made. In relation to the first category we comment both on successful and on unsuccessful challenges. In relation to the second category, as in the previous chapter, we identified challenges as possible - if they met any of the following criteria:

- existing Strasbourg case law could be read as implying that existing arrangements may not be Convention-compliant;
- challenges under the Convention have been made elsewhere in the UK and the laws/policies/practices in question are sufficiently similar;
- even where the first two points do not apply, the issue is a recurring one and there is something about the issue that leads us to think that individuals may be expected to exploit any possible avenue of legal redress (for example, deaths in custody).

4.3 There is no attempt to provide a comprehensive account of all areas of law and policy which might in principle be affected by the human rights legislation. Instead we consider only a selection of areas in which there has been, or we might have expected a significant impact. These are:

- criminal justice (including policing, sentencing and parole)
- civil justice
- family and child law
- education
- health care
• environment and planning
• immigration control

Criminal justice: challenges to date

4.4 Challenges to the organisation of the court system have arisen in a series of cases, which are summarised below.

The independence of judges

4.5 The decision in Starrs v Ruxton (see 3.29) led to the discontinuation of the use of temporary sheriffs (and in turn, to reforms in the appointment of members of other tribunals), although challenges to the positions of temporary judges in the Court of Session and assessors in the district courts did not succeed (see 3.30). A separate challenge to the position of temporary High Court judges has not yet been resolved. Hoejkstra (No 2) helped to clarify the acceptable limits of judicial participation in media discussion of matters of contemporary interest related to the legal system.

Grounds for determining release pending trial

4.6 Burn, Petitioner gave guidance on the extent and nature of information a prosecutor must provide, in the light of Article 5, when opposing bail (see 3.20).

Pre-trial press publicity

4.7 The courts have tended to reject claims that prospects of a fair trial have been unduly prejudiced by pre-trial publicity, relying on the ability of juries disregard prejudicial information by following the directions of the presiding judge (see 3.33).

Legal certainty and the definition of particular crimes

4.8 Challenges to the breadth of the definition of the common law offence of breach of the peace have not succeeded on the particular facts of the cases presented. On the other hand, the legal foundation for shameless indecency was successfully attacked but in that case arguments based on the Convention had little, if any, influence on the outcome (see 3.35).

Contempt of court and prevaricating witnesses

4.9 The imposition of sanctions on prevaricating witnesses were challenged in a handful of cases which arguably could have given rise to a successful challenge in Strasbourg. However, a practice direction has been issued to judges that is likely to address any shortcomings in this matter (see 3.30).
Sentencing and Prisons

4.10 Pre-emptive action was taken by the Scottish Executive and Scottish Parliament in this area in enacting legislation to address likely Convention concerns, particularly in respect of adult mandatory life prisoners and the appointment of members to the Parole Board. However, as described in Chapter Three, the application of the new rules for setting the ‘punishment period’ of mandatory life sentences for existing prisoners was challenged in several cases leading to a Convention-compatible interpretation of the legislation.

4.11 Pre-emptive action was also taken by the Scottish Executive when it reduced the range of disposals available in prison disciplinary cases, even though it is not clear that these would involve Article 6 considerations.

4.12 Conditions in Scottish prisons, including ‘slopping out’, were successfully challenged in *Napier* but, given that it turned to some extent on its own facts, and that it is under appeal, it is not yet clear whether a change in policy or practice affecting all prisoners will be necessary (see 3.11-3.12).

Delays in the prosecution of criminal charges

4.13 A significant number of cases have involved challenges to the time taken to determine a criminal charge. There have been two major issues for the domestic courts to resolve: first, whether the particular facts suggest a violation of the ‘trial within a reasonable time’ guarantee; and second, the implications of any finding that there has been undue delay (see 3.32). In respect of the first issue, it is clear that the courts now expect an explanation for any apparent undue delay. The issue of inadequate resources has featured in certain of our cases: the courts have appeared to acknowledge that prosecutors require to prioritise work, and also to discount delay which is not indicative of systemic under-resourcing (delay not attributable to particular pressures), although in another case the court observed that the state signatories to the European Convention on Human Rights were under an obligation to provide the facilities necessary to proceed with prosecutions in a reasonable time. The fact that some 40% of all criminal cases raising a human rights issue included the argument of undue delay could raise the question of whether there is a systemic problem, but exploration of this issue would have been beyond the remit of this research.

Criminal justice: possible challenges

4.14 There are a number of aspects of criminal justice to which challenge might have been expected, but where challenges have yet to be made. The list discussed is far from exhaustive:

- Investigating complaints against police officers where the allegation involves a possible violation of Article 3 (the positive obligation – the so-called ‘procedural aspect’ of Article 3 is unlikely to be met by existing practices);

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83 In one instance, however, the court raised the question whether in future it would be appropriate to consider whether it is relevant to take into account any failure by the accused to take such steps as may be open to him to try to expedite the hearing of the appeal, even although it is only delay attributable to the prosecutor or judiciary which can strictly be taken into account.
• Prison issues – dangerous prisoners; and suicide prevention (there are now heightened expectations as far as Strasbourg case law (some of which involves the United Kingdom) is concerned. In particular, prevention of harm to detainees (whether self-inflicted or inflicted by others) involves positive state obligations;

• The defence of ‘reasonable chastisement’ in criminal prosecutions of assaults on young people (see 3.13);

• Electronic ‘tagging’: developments in criminal procedure which seek to reduce the number of remand prisoners through electronic tagging or similar devices may require some greater consideration of Article 5 guarantees since certain disposals may well be considered a de facto ‘deprivation of liberty’ (see 3.21);

• First appearance before a judge (the requirement under Article 5(3) that a person detained on suspicion of the commission of an offence is brought ‘promptly’ before a judge may not always be met because of court holidays) (see 3.21);

• Interception of prisoners’ telephone conversations (routine monitoring of telephone conversations may still give rise to possible challenge) (see 3.41).

Civil justice

4.15 There has been less successful use made of European Convention on Human Rights arguments in cases involving the delivery of civil justice. The key areas of challenge can be summarised as follows:

• Restrictions on access to courts (the question of caution) (see 3.28).

• Temporary judges (see 3.29);

• Legal aid in children’s hearings (S v Miller commented adversely on the absence of legal aid in respect of children’s hearings, a deficiency which was put right by the Convention Rights (Compliance) (Scotland) Act 2001) (see 3.28);

• The General approach towards curing defects which have arisen at an earlier stage in proceedings (see 3.25);

• Regulation of surveillance by private parties (see 3.41);

‘Equality of Arms’ (there has been a number of cases relating to professional disciplinary tribunals (see 3.26).

Civil Justice: possible challenges

4.16 The possible challenges not yet made include:

• Lack of legal aid in disciplinary hearings before professional bodies where such proceedings fall within the scope of Article 6;
• Children’s hearing system (one aspect of the children’s hearing system that perhaps still give cause for concern is the line taken by the Scottish courts - that after a decision by the procurator fiscal not to proceed with a charge against a child, subsequent proceedings under the Children (Scotland) Act 1995 are not criminal for the purposes of Article 6 (see 3.18, 3.32);

• Defamation (the possibility of being sued for defamation even when the defamatory material is published only to the pursuer may well be a disproportionate restriction of freedom of expression);

• Privacy (the Scottish courts have not yet grappled with the difficult privacy issues arising in case such as *Campbell v Mirror Group Newspapers* [2004] UKHL 22.

**Family and child law**

4.17 Arguments based on Convention rights have had little impact in cases of a private law nature, for example, in claims by unmarried fathers for the award of parental rights, or claims by parents in relation for contact. On the ‘regulatory’ side of child law there has also been little impact as yet except in the context of children’s hearings (discussed above under civil justice), although in one case the court raised the question of amendment of the legislation on freeing for adoption in order to strike a better balance between the interests of the child and those of the natural parents (see 3.38).

**Family and child law: possible challenges**

4.18 There are several areas where challenges might be expected but have not yet been made:

*Rights to marry and to found a family*

4.19 There is an argument that the provision in Scots law requiring a delay of 5 years in the recognition of divorce on the grounds of separation, where one party to the marriage withholds consent to divorce, may be disproportionate; but proposals from the Scottish Executive announced recently to amend Scots law in this regard will address such a concern. It is still unclear whether the wife of a convicted prisoner, who is sentenced to a lengthy period of imprisonment, could rely upon Article 12 to obtain at the very least the right to seek artificial insemination facilities.

*Making of child protection orders, etc*

4.20 Challenges to the removal of a child from its parents immediately after its birth on the ground that such action is disproportionate and unwarranted have failed, but such disposals may not be entirely consistent with ECHR case law (see 3.38-3.39). There is also the question of the rights of the natural parent in adoption discussed above.
4.21 This judgment was the first finding by the European Court of Human Rights of a breach of Article 3 from Scotland and raises issues for public authorities in terms of their positive duties to protect children from abuse and possible consequential liability for any failure to meet Article 3 obligations. The case also raised issues under Article 8 regarding the provision of guidance on the complex matter of information sharing (an issue which has also arisen in other recent circumstances such as the Caleb Ness/City Council of Edinburgh inquiry). The sharing of information among the different agencies will assume an increasing relevance following the commencement of the Freedom of Information (Scotland) Act 2002.

“Anti-social behaviour” orders

4.22 With particular regard to the matters of electronic tagging of children and the police powers of dispersal proposed under the Anti-Social Behaviour (Scotland) Act 2004, Article 8 (which covers such matters as the right of development of relationships, personal autonomy, physical and psychological integrity) will call for particular consideration of compatibility with the Convention tests of legality, legitimate aim and “necessary in a democratic society”, matters which are likely to be assessed in terms of the United Nations Convention on the Rights of the Child.

Education

4.23 As yet there has been little impact upon the public education system, and challenges to, for example, the closure of schools and to exclusion of pupils on disciplinary grounds have been rejected.

Health care

4.24 As yet, there has been little impact on the public health care system. However, challenges might be anticipated in at least two areas.

Entrapped patients

4.25 Article 8 is of relevance to the problem of “entrapped patients” at the State Hospital who are no longer recognised as needing maximum security conditions, but for whom there are no alternative medium security facilities available. Whilst this issue is currently the subject of a case before the Scottish courts and has been recognised by the Mental Health (Care and Treatment) (Scotland) Act 2003, such attempts are unlikely to satisfy the need for a remedy for such patients allowing Article 8 arguments to be addressed.

Access to health care and treatment

4.26 Article 2 and access to adequate life-saving care or treatment has been the subject of UK applications to the European Court of Human Rights. Given current concerns over adequacy of accident and emergency services, “postcode lottery” and emergency maternity services it can be anticipated that such cases will be brought before the domestic courts at some point. Claims of negligence would likely argue that the Convention test of “adequacy” (as opposed to the established higher domestic threshold of negligence) should now be applied by the domestic courts.

Environment and planning

4.27 There have been a number of challenges in the areas of development planning. The most significant was the challenge to the decision-making processes in planning cases as incompatible with Article 6 in County Properties v Scottish Ministers, which, if successful, would have required considerable revision of existing arrangements. However, the House of Lords rejected similar arguments in the Alconbury case, and there have been no major changes to the planning system prompted by the Convention.

Immigration control

4.28 The major impact to date here is in the high volume of cases raising human rights arguments compared to other areas of public administration. However, many cases turn on their own facts and their outcomes have not called into question existing laws or policies. The high number of cases in which the objective is to prevent the removal of individuals from the UK is likely to continue. The restrictions on access to the courts which recent legislation has implemented may also result in more cases being taken to Strasbourg. The provisions in recent legislation which threaten to remove financial support and accommodation from failed asylum seekers and their families unless they carry out community work have attracted adverse comment from the Parliamentary Joint Committee on Human Rights are also likely to encourage challenges on human rights grounds.

General issues in public administration

4.29 The preceding sections have given a sectoral analysis. However, there are some general issues which are relevant across the public sector. We have identified four areas of general applicability from the cases.

85 2002 SC 79.
Giving adequate reasons for decisions

4.30 Two cases involving challenges to refusals to give permission for public processions highlighted the importance of councils basing their decisions on correct facts, to act *intra vires* and to give relevant and sufficient reasons.

Ensuring fairness in decision-making

4.31 The importance of ‘equality of arms’ has been discussed above, and this has particular importance in decision-making by local authorities, for example, in one of our cases, a report had only been made available at the start of a case conference to consider the taking of a child into care.

Delays in the determination of civil rights

4.32 Challenges to the time taken to determine cases have arisen outwith criminal proceedings. In one planning case, delays of some 9 years in the determination of an application (the decision still not having been reached) were considered clearly to violate Article 6.

Absence of bias towards an issue or a party

4.33 One of our ‘sampled’ cases involved the refusal by a licensing authority to renew a public entertainment licence for a health club which described itself as a ‘sauna’. The challenge was based in part on an adverse newspaper interview which appeared on the day of the hearing with the deputy leader of the local authority responsible for deciding the application. While the reasons for the dismissal of the action are unclear, it is not inconceivable that Article 6 considerations (including the scope for review of initial decisions) may arise in decision-making by local authorities in a range of instances.

Human rights challenges and the hierarchy of legal norms

4.34 The other question we should address in considering the impact of successful challenges is their impact in terms of the normative framework of the legal system. The cases in our database involve challenges to implementation of Acts of the UK Parliament, challenges to Acts of the Scottish Parliament, challenges to subordinate legislation, challenges to administrative policies, procedures and practices and cases which have no wider significance.

Challenges to the implementation of Acts of the Westminster Parliament

4.35 Cases arising under the Human Rights Act or Scotland Act have given rise to questions as to the compatibility of statutory authorisation for such matters as the provision of jury trials in civil cases, limitations on access to court on persons judged vexatious litigants, confiscation of assets under proceeds of crime legislation, appointment of temporary sheriffs,
and reverse onus of proof provisions of legislation affecting ‘known thieves’ in possession of tools which could be used in housebreaking. However, no case in our database resulted in a declaration of incompatibility.

**Challenges to Acts of the Scottish Parliament**

4.36 There have been two direct but unsuccessful challenges to legislative provisions of the Scottish Parliament (in respect of mental health detention and the prohibition of hunting with dogs). There have also been challenges to the implementation of Scottish legislation which have arisen in cases involving the requirement to give notice of the defence case in rape trials as a violation of the right against self-incrimination, and the imposition of a ‘punishment part’ in mandatory life sentences. Only in the latter instance have challenges been successful in terms of the particular circumstances of individual cases.

**Challenges to subordinate legislation**

4.37 There have been surprisingly few cases involving challenges to subordinate legislation. In particular, a challenge that the amount of legal aid fees fixed by subordinate legislation was inadequate under fixed payments regulations, and, thus, amounted to a deprivation of the right of representation, was rejected (see 3.34).

**Challenges to administrative policies or to procedures and practices where it would not be necessary – if the challenges were upheld – to change the legislative basis of the policy, etc**

4.38 The successful argument at first instance that ‘slopping out’ in prisons was incompatible with Convention rights is one clear example of such an instance. Other cases falling into this category include challenges to decision-making processes by local authorities (such as the giving of reasons and the duty to ensure that parties have an adequate opportunity to participate).

**Cases which have no wider significance beyond their own resolution, and are thus largely illustrative of the application of Convention principles in domestic cases**

4.39 Examples of such cases include the numerous cases requiring the application of Strasbourg case law concerning delay in the determination of civil rights or criminal charges under Article 6.

**JUDICIAL APPROACHES TO THE CONVENTION RIGHTS**

4.40 This section of our report seeks to identify the approaches adopted by domestic courts in interpreting Convention rights since the entry into force of the Scotland Act and Human Rights Act. The issue is potentially important because of the nature of the juridical

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88 As noted above, in *Flynn v HM Advocate*, the Privy Council was able to give the legislation a compatible interpretation.
relationship between the case law of the Convention institutions and the case law of the domestic courts. On the one hand, the Strasbourg court does not see its task as that of imposing a uniform level of implementation of human rights guarantees across European states. The doctrine of margin of appreciation applied by the Strasbourg institutions in interpreting the Convention means that states are allowed a certain, albeit limited, measure of discretion in deciding whether legislative, administrative or judicial action contravenes one of the Convention guarantees. If the Strasbourg case law represents only a minimum standard that raises the possibility that the Scottish courts might apply more demanding standards than the Strasbourg institutions in determining the compatibility of legislative or administrative measures with the Convention.

4.41 On the other hand, it is clear from Section 2 of the Human Rights Act that the Scottish and English courts are obliged to take the Strasbourg case law into account but are not bound to follow it. Although it is expected that courts will generally follow the decisions of the Strasbourg court, this leaves open the possibility that a court might choose not to do so and find that there had been no violation of Convention rights in circumstances in which the Strasbourg jurisprudence suggests that there would be a violation. Put more bluntly the issue discussed in this section is whether the standards applied by the Scottish courts in applying the Conventions’ guarantees are the same, ‘higher’ or ‘lower’ than those applied by the Strasbourg court. Therefore, this section considers post-devolution case law under three headings:

- instances where court decisions have exceeded the minimum level of Convention compliance
- instances where the courts have refused to extend Convention jurisprudence and
- instances where court decisions have not fully addressed Convention concerns.

4.42 When considering the first possibility (domestic courts applying more exacting human rights standards) it is important to note that, strictly speaking, the doctrine of margin of appreciation has no application to national courts specifying as it does the relationship between international institutions and national authorities. However, although national courts are not required to defer to legislative and administrative bodies within the state on this account, both the Scottish and English courts have developed the idea of judicial deference to legislative determinations on general democratic grounds, and this idea has undoubtedly played a part in the rejection of some challenges.

**Instances where court decisions have exceeded the minimum level of Convention compliance**

4.43 There has been some indication of Scottish courts applying a more demanding test than the Strasbourg court in two areas.

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90 See, for example, R v DPP, ex parte Kebilene [2000] 2 AC 326; A v Scottish Ministers 2001 SC 1; Stott v Brown 2001 SCCR 62.
Fairness in immigration hearings

4.44 The willingness to consider certain issues concerning immigration and deportation as giving rise to fair hearing considerations akin to the requirements of Article 6 is hinted at in certain cases, even although the Strasbourg Article 6 case law clearly indicates such cases do not strictly give rise to the determination of a ‘civil’ right.

Prison detention conditions

4.45 The decision in a *Napier v Scottish Ministers* discussed above (now subject to an appeal) was widely assumed in the media to be likely to lead to a significant number of additional challenges by individuals who had been subjected to similar detention regimes; but the threshold test for a violation of Article 3 is relatively high. It is not clear what line the Strasbourg Court would have taken, but a reasonable interpretation of recent jurisprudence would suggest that the detention conditions endured still would fall short of the minimum level of severity required to found a violation of Article 3. However, the decision in this particular case may be more properly seen as turning on its specific facts and, therefore, not a clear case of applying higher standards.

Instances where the courts have refused to extend Convention case law

4.46 By contrast, there have been several cases in which courts have refused to apply a stricter standard for assessing violations than the existing Strasbourg case law suggests.

Testing the fairness of proceedings

4.47 The approach of the Strasbourg Court to Article 6 seems to have been adopted in a number of cases involving such matters as disclosure of evidence by the prosecutor; the opportunities to make observations on evidence submitted by the other party to proceedings; the admissibility of evidence obtained in violation of Article 8; the assessment whether oral evidence had been obtained in a fair manner; and in the refusal to treat real and oral evidence as giving rise to the same considerations.

Consideration of the proceedings as a whole

4.48 From the perspective of the Strasbourg Court, the fairness of civil or criminal proceedings falling within the scope of Article 6 must be judged as a whole, therefore, all stages of domestic proceedings are considered, so that defects in earlier procedures may be remedied subsequently by an appellate court. While this is an understandable approach from the perspective of an international tribunal, it may be less so from a domestic perspective, particularly when public authorities are expected to apply Convention guarantees in decision-making. In one key case involving a challenge to planning determinations by ministers, the court considered that, since these decisions were themselves subject to judicial review, earlier defects (here, as to the independence of decision-makers) could in turn be cured on review. The same approach has been adopted in respect of decision-making by professional disciplinary tribunals. This approach perhaps begs the question whether it is entirely
satisfactory as it presupposes the willingness (and ability) of a dissatisfied party to engage in further legal challenge to secure Convention protection.

Jury awards

4.49 A number of challenges to the involvement of juries in determining possible solatium awards, on the ground that they did not give reasons for their decisions, have been made but have not succeeded, principally on the basis that awards are subject to appeal if unreasonable (or alternatively, that significant variation in awards may be expected).

4.50 There is also a noteworthy variant of this category: in two cases in our database, concerning the question whether the application for (or the making of) a confiscation order involves the determination of a criminal charge, the reasoning of the Scottish courts was subsequently followed by the European Court of Human Rights.

Instances where court decisions have not fully addressed Convention concerns

4.51 Under this heading we consider whether there is any evidence of the Scottish courts applying a lower standard in interpreting the Convention rights than would the Strasbourg court. However, for various reasons assessing whether there is a divergence between the Strasbourg court’s interpretation of the Convention and that of a Scottish court is not an entirely straightforward task. One is that there may be doubt whether the state action falls within the margin of appreciation accorded to states. The Strasbourg court gives the Convention a dynamic or evolutive interpretation which means that older authorities cannot always be treated as reliable guides to the minimum standards today. Another is that there may be no cases dealing with closely analogous circumstances to the instant case. Subject to those caveats our review of the cases suggests that there are only very few clear examples of the Scottish courts applying a lower standards than would the Strasbourg court:

Self-incrimination

4.52 The leading case of Stott v Brown,91 which concerns the compatibility of Section 172 of the Road Traffic Act 198 with Article 6 has already been discussed. As noted at 3.27, there has been some debate as to whether the decision is compatible with existing Strasbourg case law.

Bias on the part of members of juries

4.53 Arguably, not all cases have followed more recent Strasbourg jurisprudence which indicates a heightened concern that justice can objectively be seen to have been done.

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91 2001 SCCR 62.
Secure accommodation for young people

4.54 We have already noted the concern raised by the decision in *S v Miller (No 2)*. Detention of a child in secure accommodation which contains other minors convicted by criminal courts of serious offences would not be treated by the Strasbourg Court as falling under the heading of educational supervision if the essential nature of the regime is punitive rather than educational (see 3.18).

Procedural safeguards in child placement, decision-making etc

4.55 The importance of fair procedures may also arise in respect of Article 8 guarantees of respect for family life, but certain decisions seem not to reflect this. In one case, for example, the court considered that proceedings seeking to remove a child from its mother shortly after birth, without the right of the parents to be present at the hearing, did not necessarily result in a breach of Convention rights as it may be in the child’s best interests that the parents be absent.
CHAPTER FIVE: FUTURE MONITORING OF HUMAN RIGHTS CASES

5.1 The second principal aim of the research was to assess the feasibility of, and make recommendations for, a nation-wide monitoring system, which would include tracking of human rights cases through the court hierarchy. This research tells us about human rights cases in the early years of the operation of human rights legislation. However, if there is a desire to keep the operation of the legislation under review in the longer term, it would be valuable to have a permanent system for collecting data on human rights cases. Currently, there are no procedures in place whereby the courts themselves could systematically identify and record human rights cases proceeding through the courts. However, as explained earlier, the Crown Office has been keeping a record of criminal cases raising human rights issues since May 1999. Accordingly, we examined the possibilities for future continuous recording of data on human rights cases by court staff and by the Crown Office. Since some of the considerations applying are different for civil and criminal cases it is appropriate to consider each in turn.

CRIMINAL CASES

5.2 Criminal cases may proceed either in the district court, the sheriff court, or the High Court of Justiciary. All cases in the district court proceed under summary procedure, that is, without a jury. In the sheriff court cases may proceed either under summary (sheriff alone) or solemn procedure (sheriff and jury). In the High Court all trials proceed under solemn procedure. Appeals are heard by the High Court acting as court of appeal. There are pronounced differences between solemn and summary procedure, and consequently differences in the role and working practice of clerks of court in the two procedures. Account would have to be taken of these differences in designing any system to identify and record data about human rights cases.

Common problems

5.3 The clerks in both the sheriff court and the High Court whom we interviewed considered that there were several factors which would make it difficult to implement any system for recording and identifying criminal cases raising human rights issues:

- the scope of the exercise required
- the additional burdens imposed on court staff
- the extent to which proceedings were written rather than oral
- whether court clerks had the knowledge and ability to identify human rights points.

The scope of the exercise

5.4 Cases raising human rights issues could arise in either solemn or summary procedure, and in any criminal court. They would not be confined to any particular offence or group of offences. Human rights issues might relate to substantive criminal law, to
questions of evidence, or to questions of procedure. Moreover, human rights points might be raised at various stages of the procedure. In short, the field of inquiry would be the whole criminal caseload of the courts. A comprehensive monitoring system would have to adopt methods which would cover all criminal cases and would work in the context of each court and each form of process. This would be a more ambitious task than any other information-gathering exercise currently carried out by court clerks, for example, the recording of sexual offences which relates to a specific and limited group of offences, although the requirement to intimate devolution issues provided a possible short-cut.

Additional burdens on court staff

5.5 Clerks in both the sheriff court and the High Court strongly emphasised that their primary function was to ensure the dispatch of the business of the courts. Whilst they already engaged in information gathering exercises such as the recording of sexual offences, and more generally the production of annual criminal statistics, clerks doubted whether the additional task of recording human rights cases could be accommodated without compromising the smooth running of the courts, which was their main role. Alternatively, if clerks were giving priority to their primary function there was a danger that pressure of time in busy courts would make consistent recording of cases difficult to achieve. There were particular times at which this risk would be greater, for example, where the removal of persons to prison after the custody court awaited the completion of the paperwork by the clerk.

Written and oral proceedings

5.6 In general there ought to be a written record of whether a human rights issue had been raised in any case because a devolution minute should have been lodged, but it cannot be assumed that the correct procedure will always be followed. It is possible that human rights points may raise oral pleading without prior intimation, and the clerk may not necessarily be in the courtroom at the time the issue is raised.

Written and oral proceedings

5.7 In general there ought to be a written record of whether a human rights issue had been raised in any case because a devolution minute should have been lodged, but it cannot be assumed that the correct procedure will always be followed. It is possible that human rights points may be raised in the course of oral argument without prior intimation. We were told that due to pressure of work, clerks will sometimes have to leave the courtroom to perform other tasks while oral argument continues in a case. This means that the clerk may not necessarily be in the courtroom at the time the human rights issue is raised.

Capacity

5.8 Doubts were also expressed about the ability of clerks to identify the cases which raised human rights issues, as this might require significant knowledge of substantive law. It must be borne in mind that the expertise of clerks is primarily in matters of procedure rather
than of substantive law. Again, the possibility of using the devolution minutes submitted by accused persons might mitigate this difficulty, but would not do so where no minute was submitted.

Solemn and summary procedure

5.9 The clerks also drew attention to certain differences between solemn and summary procedure which might affect the feasibility of monitoring human rights cases.

Solemn procedure

5.10 All trials in the High Court and many sheriff court trials are conducted by solemn procedure. Solemn procedure makes greater use of writing, both in terms of material submitted by the parties and records made by the clerks, than does summary procedure, and the Justiciary clerks thought that it ought to be easier to implement a system for identifying and recording human rights cases in solemn than in summary procedure, whilst still emphasising the points made above about pressure of work and primary function. They thought that it would require a significant change in culture for staff to see this as part of their job.

Summary Procedure

5.11 As stated above, the oral element is more prominent in summary procedure. If we assume that human rights issues will occasionally be raised without intimation then this places a greater premium on the clerk’s presence in court. In fact the clerk is much less likely to be in court throughout the proceedings in a summary case in the sheriff court than in a solemn case. Whilst clerks do endeavour to ensure the court record is complete and, even if they have to leave the courtroom temporarily, the sheriff will often later bring issues to the clerk’s attention to be added to the record, these absences inevitably make it less likely that monitoring of human rights cases would be fully comprehensive and reliable. Sheriff Clerks felt that the task of recording the substance of human rights arguments as they arose in court was a fundamentally different task from their main task of ensuring that the courts process cases efficiently. Moreover, in the larger and busier sheriff courts, many people would be involved in any monitoring system, some of them relatively junior or inexperienced, a factor which would make it more likely that human rights arguments, especially those made orally, might sometimes be missed.

The mechanics of implementation

5.12 If a decision in principle were taken to require court clerks to monitor human rights cases procedures then appropriate procedures would have to be created. The clerks in both the sheriff court and the High Court thought that the best approach would be to create a specific human rights field in the computerised case management system for criminal cases, so that the presence or absence of a human rights issue could be checked for any case simply

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92 In the District Court the clerk must be present.
by looking at this field. The extent of the information that could reasonably be expected to be recorded would be limited by the factors described above (pressure of business, etc.), and, for the same reasons, the records made might not be entirely reliable.

The District Court

5.13 The existence of the district court is an additional complication as they are not administered by the Scottish Court Service, but by local authorities. If prosecutions in the district court were left out of any monitoring system it would not be comprehensive. On the other hand, if they were included, special provision would have to be made for the recording of data as they do not use the case management systems used in the sheriff courts and High Court.

The role of the Crown Office

5.14 As indicated earlier, as a consequence of the case law on the meaning of 'devolution issue' all challenges to any aspect of a prosecution on human rights grounds ought to be intimated to the Lord Advocate, by way of a devolution minute. Since May 1999, the Crown Office has maintained a database of all devolution minutes and, subject to the possibility that human rights arguments are sometimes made orally without intimation, this database provides a comprehensive record of all criminal cases raising human rights issues since devolution. We were able to check the reliability of this database as we used the Crown Office record of devolution minutes as a means of tracing human rights cases in court records. We found that the High Court records corresponded exactly with the Crown Office database, and the sheriff court records corresponded closely. In a few sheriff court cases which appeared in the Crown Office database, there was no mention of a human rights point in the court records. This is more likely to be because the court did not record the point than any error in compiling the Crown Office database.

Recommendation

5.15 In the light of the above we recommend that future monitoring of human rights cases should be based on the Crown Office database. As explained more fully in the Appendix, we consider that the Crown Office record of devolution minutes intimated to it under Section 98 and Schedule 6 to the Scotland Act 1998 provides a complete record of human rights cases raised, subject to a small margin of error. Comparison with court records suggests that they are a less reliable source as it more likely that human rights cases would be missed for the various reasons given above. Using the Crown Office database would also obviate the difficulty relating to the District court.

5.16 We recognise that if human rights points are made orally without formal intimation then such cases will not appear in the Crown Office database. However, it appears likely that if monitoring were conducted through the courts that a substantial number of such cases

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93 In Raine and Walker’s Research (2002) for the Lord Chancellor’s Department Human Rights cases were identified for the research by the court clerks. This was done by adding tick boxes to the standard forms already being completed court for each case.
would be missed, so a court-based system would have little advantage there. The information would be limited to what appeared in the devolution minute but, as Chapter Two indicates, that is a significant amount of information, and would permit analysis of a range of issues relevant to the operation of human rights legislation. It also unlikely that a court based system would provide more detailed information both comprehensively and reliably.

5.17 There are considerable advantages in making use of an existing and reliable system. However, it will be important to consider the resource implications for the Crown Office of performing this function. We have not attempted to quantify these.

5.18 This recommendation assumes that the law on devolution issues remains the same. Lord Bonomy’s review of the practices and procedures of the High Court of Justiciary found that devolution issues were a source of delay and, that where they challenged acts or failures to act by the Lord Advocate in his role as a prosecutor, they did not raise constitutional issues. He, therefore, recommended that Schedule 6 to the Scotland Act 1998 be amended so that the Lord Advocate’s decisions and actions in the prosecution of crime would no longer be treated as a devolution issue. As yet, the Scottish Executive has not announced any intention to implement this recommendation. If it did then our proposal for continued monitoring would not be practicable. In that case it would be necessary to consider whether it would be worthwhile, in view of the difficulties mentioned above, to implement a court-based system.

CIVIL CASES

5.19 Civil cases raising human rights issues could arise in any court and under any procedure. As indicated earlier, the devolution issue procedure cannot be used, as many human rights claims in civil cases will not raise devolution issues. Therefore, any system for gathering data about human rights cases would have to be based in the courts and rely on the clerks of court. Account would have to be taken of differences between procedures and courts in designing any such system.

Common problems

5.20 The types of problems faced in designing and implementing a system are essentially the same as those faced in criminal cases although, as discussed below, the extent of the difficulties posed might be different, in relation to:

- the scope of the exercise required
- the additional burdens imposed on court staff
- the extent to which proceedings are written rather than oral
- whether court clerks have the knowledge to identify human rights points.

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The scope of the exercise

5.21 The problem of the field of the inquiry is greater than in criminal cases: there is a greater variety of procedures and a much greater diversity of subject matter in terms of substantive law.

Additional burdens on court staff

5.22 Clerks in both the sheriff court and the Court Session made the same point as was made in relation to criminal cases that their primary function was to ensure the dispatch of the business of the courts. Although some of the pressures experienced in criminal cases which created a need for urgency were absent (for example, persons in custody) from civil cases, they were concerned as to whether the additional task of recording human rights cases could be accommodated without compromising the smooth running of the court, which was their main role.

Written/oral proceedings

5.23 In general civil cases rely more heavily on written pleadings than criminal cases but there are enormous variations between procedures, with small claim procedure being particularly informal and generating little in the way of written records.

Capacity

5.24 Whilst the presence of written pleadings is a factor likely to make it easier to identify the cases which raise human rights issues, the concern about the ability of clerks to recognise that a human rights issue has been raised is possibly more pressing on the civil side given the wider variety of subject matter contexts in which human rights claims might be made.

The mechanics of implementation

5.25 As with the criminal cases, the clerks in both the sheriff court and the Court of Session thought that the best approach would be to creating a specific human rights field in the computerised case management system for civil cases, so that the presence or absence of a human rights issue could be checked for any case simply by looking at this field.

5.26 However, although it would be technically feasible to add a human rights field to the case management system, the extent of information that could reasonably be expected to be recorded would be limited by the factors described above (such as pressure of business), and, for the same reasons, the records made might not be entirely reliable. There would be likely to be a difference between the reliability of the information gathered according to the procedure. Court clerks had more confidence about the reliability of the process in Court of Session cases and in sheriff court cases brought under Ordinary Procedure or otherwise commenced by initial writ, because the reliance on written procedure made it less likely that a human rights point would be missed than in criminal cases. However, there remains the possibility that clerks would fail to recognise human rights issues because of their limited
knowledge of substantive law, especially if a writ contains no obvious indicator such as a reference to the Human Rights Act or the Convention. They had much less confidence in relation to the informal procedures, summary cause and small claim.

5.27 Summary causes and small claims pose greater problems because the procedures are less formal, rely more on oral hearings, and the papers are retained by the successful party and not the court at the end of the case. However, human rights issues are raised in the less formal procedures, and if they were omitted from any system then it would not present an accurate picture of the incidence of human rights litigation. As an experiment, we provided both sheriff courts in our study with a pro-forma for the summary cause heritable court (the eviction court). In the larger sheriff court, 26 human rights cases were recorded in one month (all relating to the eviction of asylum seekers). Whilst this may have been an atypical month, it illustrates the point that human rights cases may arise in all procedures.

Recommendation

5.28 Since the research concluded the Scottish Court Service have added a field in their computerised case management system for recording that a human rights point has been raised. This is used for cases in the sheriff court, High Court, appeal Court and Court of Session. Although it could not be expected that the data would be fully comprehensive, it would be indicative.
CHAPTER SIX: CONCLUSIONS

THE EFFECTS OF THE HUMAN RIGHTS LEGISLATION

6.1 The enactment of the Scotland Act and the Human Rights Act both brought about major constitutional change. We hope our research will make a contribution to an assessment of the effects of that change and, more broadly, to evaluation of the legislation. As we indicated in Chapter One, there are many dimensions to the impact of the legislation, which might be described through effects on:

- the business of the courts (its volume, procedures and practices, training needs, resources required)
- the legal profession (increased business, changes in the way cases are argued, training needs, levels of awareness of human rights issues)
- the public (awareness and understanding, propensity to seek legal advice on human rights questions).
- public administration (need to change policies, procedures and practices, need to engage in ‘human rights proofing’ of activities, levels of awareness, development of human rights culture)
- policy development and the legislative process (rights-proofing in policy development, special procedures for legislation, awareness of human rights issues amongst Ministers, civil servants, MPS and MSPs)
- legal doctrine and judicial decision-making (how judges use human rights arguments to make decisions, weight given to Strasbourg case law, consistency with Strasbourg case law).

6.2 The aims and objectives of the research, although relevant to all of these dimensions, and the design of the research were such that it could contribute to the assessment of only some of these possible effects. In particular it did not seek data on general public awareness of human rights issues.

Effects on the courts

6.3 It is clear that cases raising human rights issues under the Convention have become an established category of argument in the Scottish courts in both civil and criminal cases. Although there has certainly been a drop in the number of criminal cases raising human rights arguments, since the initial post-devolution flurry of activity, there continues to be a steady stream of both civil and criminal human rights cases. Whether the frequency with which human rights points have been raised is appropriate, given the number of arguable Convention rights violations, is not something we could say. Forming a judgment on that question would require far more extensive research than our essentially court-based project.

6.4 It is important to note, however, that cases raising human rights issues are only a tiny fraction of the total caseload of the Scottish courts, on both the civil and criminal side. Bearing in mind that the majority of cases in which human rights arguments have been raised are cases which would have proceeded in any event, it is clear that the introduction of human rights cases has not had major resource implications for the justice system, in general, at least
in terms of caseloads and the time spent processing cases. There have been some resource implications in the area of judicial training.

6.5 Looking at specific procedures, it appears that, relative to total case load, human rights points are made most frequently in judicial review proceedings. However, it is unlikely that this has led to a substantial shift of judicial resources towards judicial review procedure, as in most cases a human rights argument has been included in an application that would have been brought on other grounds.

6.6 The vast majority of cases raising human rights arguments are citizen-state disputes. We cannot say how frequently cases in which both or all parties are private parties arise as we do not have data on all unreported civil cases, but analysis of reported cases suggests that they are not uncommon with 29.5% of the reported civil cases being of this type. This is an interesting finding in light of the extensive discussion in the literature of the so-called ‘horizontal effect’ of the Human Rights Act.

6.7 The full range of Convention rights has been deployed in argument, although with a predominance of Article 6 issues (fair trial) especially on the criminal side. It is worth noting that a claim of undue delay was made in nearly 40% of the criminal cases that the research identified as having raised a human rights issue. However, it is not possible to say on the basis of our limited data whether this suggests any systemic problem of delay in criminal justice in Scotland, and worth noting that all the criminal cases we found represent less than 1% of all criminal cases, and cases raising arguments of undue delay comprise less than 0.5% of all criminal cases in Scotland.

6.8 It was not possible to establish outcomes and whether they were affected by human rights arguments for all cases. However, a review of reported cases indicated that a remedy was granted under human rights legislation in a substantial proportion (40%) of reported cases, but it cannot be assumed that this proportion would hold good for cases generally. Indeed it seems plausible to assume that the proportion in which remedies were granted under the human rights legislation in unreported cases would be lower given that cases in which weak or speculative human rights arguments are deployed are less likely to be reported.

Effects on the legal profession

6.9 The human rights legislation has had some effect on the legal profession in that it has encouraged the deployment by lawyers of arguments based on Convention rights. The frequency with which such arguments were deployed before devolution could not be ascertained but anecdotal evidence suggests that such arguments were raised very rarely and, until the decision in T, Petitioner,95 the case law did not encourage Scots lawyers to use the Convention. Given the publicity surrounding the introduction of the legislation, the increase in training provision, the increased availability of relevant literature aimed at practitioners, and the volume of case law since devolution, the legal profession must be better informed than before about Convention rights.

6.10 Although it was not an aim of the research to assess levels of awareness and understanding of Convention rights, our review of reported cases provided some information

95 1997 SLT 724.
on this point. In some examples, the arguments of the party making the human rights claim seemed highly speculative or ill-founded, sometimes mistaking the relevance of particular articles of the Convention, but this was true of only a small minority of cases. However, for most of the unreported cases, court records did not disclose the details of the argument, so we were unable to determine how frequently poor or speculative arguments were used in human rights cases generally.

6.11 Two of our other findings give possible cause for concern over the readiness of the legal profession in Scotland to respond to the challenges posed by the Human Rights Act and the Scotland Act. The first was the uneven geographical distribution of human rights cases in the criminal courts (we did not have equivalent data for the civil courts), which might suggest that the possibilities for using human rights arguments are being under-exploited in some areas, a problem identified in a recent impact study of the Human Rights Act in South Wales (Costigan et al, 2004), albeit no such conclusion could be drawn as regards Scotland without more data. The second was that the reported cases did not display the richness and diversity of the challenges that have been mounted in England and Wales since the entry into force of the Human Rights Act. This, of course, is not conclusive as there are a variety of factors which might lead to a more diverse range of challenges in England and Wales, such as its being a much larger jurisdiction, the concentration of government in the South-East, and the concentration of well-resourced lobby groups, especially those with expertise in human rights, in the South-East.

Effects on the public

6.12 It is reasonable to suppose that the introduction of human rights legislation has had some effect on the public in terms of levels of awareness and understanding of human rights issues and any propensity to seek legal advice on related questions. After all, there has been considerable publicity given to human rights cases in the media. However, it was not part of the project design to assess levels of public awareness and understanding of Convention rights.

Effects on public policy and administration

6.13 In Chapter Four we discussed the impact of human rights litigation, primarily, by reference to reported cases, in particular areas of Scots law and on particular sectors of public administration. In terms of volume of cases, the most pronounced impact has been on the criminal justice system. On the civil side it is harder to judge the relative volume of cases as comprehensive data on unreported cases are impossible to obtain. Insofar as the breakdown of reported cases is a reliable indicator of the distribution of subject matter in cases generally, it suggests that the area most frequently subject to litigation is immigration control (including asylum). There is another cluster of cases on matters relating to children, and we are aware from our sampling exercise of a cluster of cases on prison conditions (mostly about the practice of ‘slopping out’).

6.14 Of course, the impact of litigation on public bodies and public policy is not just about numbers - a single case can be significant if it calls into question the legality of an established policy. The most clear-cut case of policy reversal has been the abolition of the position of temporary sheriff by the Bail, Judicial Appointments, Etc. (Scotland) Act 2000 following the
decision in *Starrs v Ruxton*, that the prior arrangements were incompatible with Article 6. Less dramatic but still important was the decision in *Flynn v HM Advocate* 2004 SLT 863 which ruled that the Convention Rights (Compliance) (Scotland) Act 2001 could not be interpreted to extend the punishment period in life sentences to more than it would have been under the earlier legislation. Admittedly, the court also relied on arguments not based on the Convention, so it is not clear that the same result would not have been arrived at anyway. A number of cases have challenged the continuation of slopping out in prisons. In *Napier v the Scottish Ministers*, Lord Bonomy found that the conditions experienced by the pursuer amounted to a violation of Article 3, but the decision turned in part on factors peculiar to the situation of the pursuer, and does not appear to say that requiring prisoners to slop out is unlawful *per se*. The decision is under appeal at the time of writing. The claim that fixed fees for legal aid in summary criminal cases were incompatible with Article 6 was also effectively rejected in *Buchanan v McLean,* but the court did accept that there were cases in which the fixed fee regime should not apply, and since then the Scottish Legal Aid Board has exercised a discretion to award a higher fee than the fixed fee in appropriate cases.

6.15 However, the majority of the more significant (in policy terms) challenges have been unsuccessful. For example, many aspects of the structure of decision-making and appeals in town and country planning were threatened by the claim advanced in *County Properties Ltd v the Scottish Ministers* but, following the decision of the House of Lords in *Alconbury*, the argument that there had been a violation of Article 6 was rejected. The challenges to the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 under Article 5 and to the Protection Of Wild Mammals (Scotland) Act 2002 under various articles were rejected in *Anderson v Scottish Ministers* and *Adams v Scottish Ministers* respectively. The challenge to the application of section 172 of the Road Traffic Act 1988 was rejected by the Privy Council in *Brown v Stott*, overturning the decision of the High Court.

6.16 Accordingly, although there has been a substantial number of cases in which human rights arguments have been successful, the case law under human rights legislation has had a significant, but not taken as a whole a major, impact on the policies and practices of government in Scotland. However, it must be stressed that this relates only to changes introduced as a direct consequence of litigation, and not to more indirect impacts on the legislation. In that regard, it is important to note that the Scottish Executive and Scottish Parliament have attempted to pre-empt a number of potential challenges through the introduction of legislation such as the Bail, Judicial Appointments, Etc. (Scotland) Act 2000, the Convention Rights (Compliance) (Scotland) Act 2001, new legal aid regulations, and through changes in practice. This is in contrast to the situation in England and Wales where there have been fewer obvious pre-emptive attempts, through the legislature or by means of executive action, to respond to developments in Strasbourg case law. It is likely that the positive manner in which the Scottish Executive and Parliament have addressed possible inconsistencies with the Convention through legislative reform has prevented certain judicial determinations of violation of Convention rights.

6.17 The legislation described above was designed to address perceived conflicts between the Convention and laws and policies which pre-dated devolution. However, Convention violations could arise from new policies and this raises the issue of human rights proofing in

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96 2000 SC (JC) 603.
97 2002 SC 79.
policy development generally. Several elements of the devolution scheme in effect require human rights proofing of policy. The Presiding Officer of the Scottish Parliament must state an opinion on the competence of any Bill, the Minister in charge of a government Bill must state that it is in his or her opinion within competence, and there is the possibility of referring a Bill to the Privy Council before it is enacted to determine whether it is within competence. These are clearly important safeguards but they do not amount to a comprehensive system as they apply only to devolved matters, and do not apply to policy developments which require only subordinate legislation or do not require new legislation at all. Nor, of course, can all plausible Convention challenges that might arise after enactment be anticipated in policy development.

6.18 The preceding paragraphs have considered the effect of the human rights legislation on the substance of laws and policies. Another way of looking at the impact on government of the human rights legislation is to ask what kind of response a finding by the courts of a Convention violation requires in terms of the hierarchy of legal norms. Many successful cases will have had little wider impact. For example, a finding of undue delay in bringing a case to trial may be based on facts peculiar to that example and have no significance for any other case. Conversely, a successful challenge may require a change to an existing practice or procedure, or a change in policy without requiring a change in the law. If a change in the law is required that may need to be a development of the common law, a change in accepted interpretation of legislation, amendment or repeal of subordinate legislation, or even amendment or repeal of primary legislation. The last possibility is the most significant in constitutional terms, bearing in mind the perennial debate over the legitimacy of courts using human rights guarantees to invalidate the enactments of elected legislatures.

6.19 This is a more pressing issue in Scotland than it is in England given that the Scotland Act requires provisions of Acts of the Scottish Parliament which conflict with human rights to be treated as invalid, whereas it is not possible to invalidate Acts of the UK Parliament, although the superior courts may make a declaration of incompatibility. Three Acts of the Scottish Parliament have been subject to challenges 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) Act 2001. None of these challenges has been successful, although in the third case the challenge was only repelled because the Privy Council adopted a different interpretation of the legislation from that of the High Court. So, it appears that the ultimate weapon of the courts – the invalidation of primary legislation - has not yet been wielded.

6.20 Nor have the courts made any declarations of incompatibility in relation to UK statutes in Scottish cases. However, the unsuccessful claim of a violation of Article 6 in Brown v Stott points the way to the seemingly paradoxical possibility that an Act of the UK Parliament can effectively be nullified, despite the terms of the Human Rights Act and the underlying constitutional principle of the sovereignty of Parliament. Section 172 of the Road Traffic Act 1988 makes it an offence to refuse to say who was driving a motor vehicle at a time when an offence had been committed. This power is essential in practice to the prosecution of many motoring offences because, without the admission of the owner of the vehicle, it would often be impossible for the police and prosecutor to prove who was driving the vehicle when the offence was committed. As noted above, the Privy Council reversed the

99 Special considerations would apply where the human rights argument was based on the human rights principles protected by Community law, given the principle of Supremacy of Community law.
finding of the High Court that this violated Article 6. However, had the challenge succeeded, section 172 would have become a dead letter in Scotland. This is because any step in the prosecution process is an act of the Lord Advocate and covered by section 57(2) of the Scotland Act: a finding in favour of Brown would have made it impossible for any future prosecution to be mounted on the basis of section 172.

6.21 Although it has not yet arisen, this is an important issue for the future. Provisions of Acts of the UK Parliament which depend for their effective enforcement on action by members of the Scottish Executive may be rendered nugatory by a finding that enforcement by the Executive is incompatible with a Convention right.

The approach of the judges

6.22 Finally, we considered the effects of the human rights legislation on the courts and their performance in applying it, which is a complex undertaking. In many cases arguments based on the Convention were made alongside arguments based upon existing legal principles of Scots or even Community law. For example, the interest in procedural fairness is protected both by Article 6 and by the principles of natural justice. It was not always clear in such cases whether or not the Convention arguments made a difference to the outcome. There are several examples of courts explicitly disposing of cases on ‘domestic’ grounds alone, but the inclusion of a Convention rights argument may have fortified or influenced this conclusion.

6.23 One obvious question, given how broadly stated are many of the provisions of the Convention, is whether the Scottish courts are deciding cases consistently with the Strasbourg case law which has helped to clarify the meaning of the Convention rights. In Chapters Three and Four we examined the extent to which the decisions of the Scottish courts are compatible with Strasbourg case law. Our conclusion is that in general the Scottish courts have been deciding cases consistently with the Strasbourg case law. However, there are several cases, such as Brown v Stott, 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 apparently applying a ‘higher’ standard then the Strasbourg court would, such as the cases which extend Article 6 protection to immigration appeals. But, looking at the post-devolution case law as a whole, it is impossible to say that the Scottish courts, in developing a domestic human rights jurisprudence, are breaking free of the Strasbourg moorings either by being much more or much less willing than the Strasbourg Court to find that Convention rights have been infringed.

6.24 In short, the introduction of human rights legislation in Scotland appears to have had significant but not dramatic impacts on the courts, the legal profession, public policy and the work of public bodies. Whether the experience of human rights legislation to date should be regarded as encouraging or disappointing is a contentious question, and not one that we would seek to settle. However, we hope that our report will help to facilitate a more informed debate to take place on that and other issues, such as the role and functions of the Scottish Human Rights Commission.
6.25 It is important to note that our report relates to the early years of human rights legislation and there may be important developments yet to come. We noted in Chapter Three a number of matters which have not yet come before the Scottish courts, although they have given rise to litigation in England and Wales or are prominent in Strasbourg case law. In addition to those specific examples, there would appear to be few (if any) cases which stress the importance of the nature of positive obligations imposed on state parties by the Convention, the vast majority of cases being challenges to actions and decisions of public authorities. Litigants in Scotland have not yet exploited the possibility of suing the state for failure to act where there is a positive obligation, for example, failing to ensure the effective prosecution of certain crimes in violation of victims’ rights under Articles 2 and 8 (some cases of homicide, assault, and sexual offences), whether by failing to prosecute at all or excessive delay in prosecution. This may be of particular concern in cases of assaults upon young people.

6.26 There may also be changes in the approach of public bodies to the ‘internalisation’ of human rights norms. In that regard, our research does suggest one specific issue that needs to be addressed in the future: the process, as opposed to the substance, of decision-making by public bodies (including professional disciplinary tribunals). In areas as diverse as determination of child care arrangements, licensing and freedom of public protest, challenges suggest that the Strasbourg requirements are not being met. Whilst the Strasbourg court will view the decision-making process as a whole (including any appeal or application for judicial review) in deciding whether Article 6 has been breached and allow initial defects to be cured by review or appeal, it may be doubted whether it is appropriate to take that approach within this jurisdiction. It would be better to improve the standards of initial decision-making to ensure that procedures are fair in all the circumstances, and that reasons are given for decisions, particularly where they affect Convention rights.

6.27 Although it was not part of our research to assess the future role of a Scottish Human Rights Commission, it is clear that the creation of such a body might have important effects on the operation of human rights legislation, depending in part on its statutory powers. Currently, the preferred approach of the Scottish Executive is that the Commission should be able to assist the court by intervening in appropriate cases, but only in civil matters in the Court of Session at appeal stage (and in judicial review cases at first instance where a human rights issue has arisen), but should not become or represent any party to a case. Whatever its precise powers one would expect the Commission to encourage the Scottish Executive to take pre-emptive action to address possible infringements of Convention rights without waiting for litigation, and to take an active role in persuading public bodies to internalise human rights norms.

6.28 If the Scottish Executive, or indeed anyone else, is to continue to monitor the effects of the human rights legislation then it will be important to have reliable data. It would, therefore, in principle, be desirable to continue to collect data on cases raising human rights issues, although as we indicated in Chapter Five, there are significant practical difficulties in achieving this aim.

REFERENCES

Pillay, R (2001) ‘Self Incrimination and Article 6’ EHRLR 78
Report of the European Committee for the Prevention of Torture to the United Kingdom, CPT/Inf (96) 11
Aims and objectives

The aims of the project were:

- To collate, monitor and review the uses and development of Human Rights legislation in the Scottish courts since May 1999; and
- To assess the feasibility of, and make recommendations for tracking of human rights cases through the court hierarchy.

The more specific objectives of the project were to:

- collate data about civil and criminal cases in the Scottish courts since May 1999 which raise human rights issues either under the Human Rights Act or the Scotland Act involving Convention question, and to develop a database for this information
- estimate the volume of cases being brought nationally;
- analyse how the legislation is being used;
- analyse trends and key developments in human rights case law;
- analyse other factors relevant to the wider context of the topic; and
- make recommendations on the feasibility and operation of a nationwide database that could include the identification and tracking of cases.

However, realising these aims and objectives presented substantial methodological problems, particularly with regard to the first two objectives, which are discussed below.

Methods

In summary, the methods used were:

- collation of details of reported and unreported cases
- creation of a searchable Access database for this information
- quantitative analysis of data
- qualitative interpretation of the data
- interviews with Scottish Court Service staff.

Finding Cases

The first difficulty in realising the aims and objectives of the project was that of finding cases which raised human rights issues.

Our approach here was to examine information contained in the following sources:

i. hard copy law reports of any cases raising human rights issues from May 1999 to August 2003;
ii. the commercial databases, Westlaw and Lexis, and the Scottish Courts Service Website for cases not reported in hard copy;

iii. the Crown Office database of criminal cases in which intimation of a devolution issue had been made to the Crown in terms of Schedule 6 of the Scotland Act 1998, which we obtained from the Crown Office;

iv. records of cases (not comprehensive) in which intimation of devolution issues had been made to the Office of the Advocate General in terms of Schedule 6 of the Scotland Act 1998;

v. court records in the Court of Session, High Court of Justiciary and two sheriff courts.  

The records examined under point v were:

1) all criminal trials and criminal appeals in the High Court of Justiciary begun between 1 January 2002 and 30 December 2002 in which devolution issues had been raised;

2) all criminal trials in two sheriff courts begun between 1 January 2002 and 30 December 2002 in which devolution issues had been raised;

3) all petitions, family actions and appeals initiated in the Court of Session between 1 January 2002 and 31 March 2002, and all cases initiated by summons in January 2002;

4) all civil cases initiated in the two sheriff courts between 1 January 2002 and 31 March 2002 under ordinary cause procedure, including summary application procedure but not including divorce actions, adoptions and appeals;

Summary cause procedure, small claims procedure and referrals from children’s hearings (which are sui generis rather than civil or criminal) were not included.

The cases identified in this way were then grouped into the following datasets for purposes of analysis:

1) **Reported cases**, meaning all cases reported in hard copy law reports or available through Lexis and Westlaw, or available on the Scottish Court Services Website;

2) **Crown Office Database of Criminal Cases**. This collection contained all criminal cases in which intimation of a devolution issue had been made by the Lord Advocate in terms of Schedule 6 of the Scotland Act 1998 between 20 May 1999 and the end of August 2003. This dataset overlaps with that above as a substantial number of criminal cases had been reported.

3) **Sample Civil Cases: Court of Session**. This collection comprises all the human rights cases identified in our sample of Court of Session records (point v above). It includes a few cases also included in (1) above.

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101 In addition to the sources already mentioned, before the research began, the Scottish Executive had initiated an exercise which attempted to obtain information about relevant cases from the supreme courts and five sheriff courts, by asking court staff to flag relevant cases in monthly returns to the Justice Department. However, this proved to be impracticable, for the same reasons detailed in the discussion of court-based monitoring in this report. What little information was submitted was not sufficiently reliable or comprehensive to be used for more than the identification of a small number of cases to be looked at.

102 In addition to examining court records and the Crown office database we piloted a postal questionnaire to solicitors. This had a low response rate and the exercise clarified that questionnaires to solicitors would not have been a reliable method of identifying cases.
4) **Sample Civil Cases: Sheriff Courts.** This collection comprises all the human rights cases identified in our sample of sheriff court records (point v). It includes a few cases also included in (1).

5) **Sample Criminal Cases: High Court of Justiciary.** This collection comprises all the human rights cases in our sample of High Court cases (point v). These cases were identified in the Crown Office database, so every case in (5) is also included in set (2) above. It includes a few cases also included in dataset (1).

6) **Sample Criminal Cases: Sheriff Courts.** This collection comprises all criminal cases raising human rights issues identified in our sample of sheriff court records (point v). It includes a few cases also included in (1) above. Again, the cases were identified from the Crown Office database so all these cases are also included in set (2) above.

Having explained how the data were collected and organised, we can now consider the methodological difficulties in relation to each of the objectives. The first general aim of the project was broken down into a number of specific objectives, the first of which was to collate data about civil and criminal cases in the Scottish courts raising human rights issues since 20 May 1999, when executive powers were first devolved to Scotland, with the devolution of legislative power to the Scottish Parliament becoming effective in July 1999. Ideally the research would have attempted to identify all cases raising human rights issues in the Scottish courts since May 1999. On the face of it this was a very ambitious objective as it required consideration of all courts and all forms of procedure. However, we are confident that we have identified all criminal cases raising human rights issues since devolution subject to a small margin of error, as we obtained a complete list of devolution minutes kept by the Crown Office.

As indicated in Chapter one, the practical effect of the case law has been that any defence to, or objection to, the initiation or continuation of a prosecution on human rights grounds has been treated as raising a devolution issue and, therefore, requires intimation to the Lord Advocate. So, every criminal case which has raised a question under the European Convention on Human Rights should now be included in the Crown Office record of devolution minutes. As the Crown Office began recording intimations in May 1999, their database should be a complete record of all criminal cases raising human rights issues since executive functions were devolved.

The existence of the Crown Office database meant also that the second of the specific objectives could readily be achieved as regards criminal cases to estimate the number of cases being brought nationally. In fact what we were able to produce was a very accurate estimate. This, of course, is to make certain assumptions about the data collected by Crown Office, and we ought, therefore, to discuss whether the Crown Office database is a complete record of criminal cases raising human rights issues. There are a number of possible reasons why it might not be.

The first is that accused persons may be raising human rights points without intimating them. Either the prosecution or the judge could, of course, insist that this is incompetent but the possibility remains that accused persons are from time to time permitted to argue human rights points without intimating them in terms of Schedule 6. Whether this has been happening to any substantial degree is not something our research methods were specifically designed to establish.
A second possibility is that Crown Office officials are not recording all cases actually intimated to the Lord Advocate. It appears unlikely that this happens to any significant degree as there is a clear system for recording cases and a small number of staff has been involved in this. It is also worth noting that our other sources of data (reported cases, cases identified by sheriff clerks) did not reveal any cases which did not appear in the Crown Office database. It seems reasonable to conclude that any margin of error in recording devolution minutes is small. If we also assume that the law on intimation is being observed, there are reasonable grounds for concluding that our estimate of the volume of criminal cases raising human rights issues is a very accurate one.

However, achieving the first two objectives in relation to civil cases proved much more difficult. The requirement to intimate a devolution issue in terms of Schedule 6 to the Scotland Act applies only to cases in which a claim is made either (a) that an Act of the Scottish Parliament is beyond legislative competence; (b) a purported or proposed exercise of power by a member of the Scottish Executive is incompatible with Convention rights; or (c) that a failure to act by a member of the Scottish Executive is incompatible with Convention right. A number of categories of cases raising human rights issues will not raise devolution issues, such as cases involving local authorities and Scottish quangos (unless the body in question is acting under legislation the validity of which may be challenged under the Scotland Act), cases involving UK departments and UK quangos and disputes between private parties. Nor is there any other obvious short cut to identifying human rights cases.

Whilst, in theory, the Scottish Executive could have decided to set up a system whereby Scottish Court Service staff could have identified and recorded human rights cases, no such system was set up when executive and legislative powers were first devolved. As noted above (at footnote 67), a pilot exercise for tracking human rights cases was conducted between the beginning of October 2002 and the end of April 2003 in certain sheriff courts, but was unsuccessful, although it did reveal the potential difficulties of monitoring such cases systematically.

In the absence of a system of contemporaneous researching of human rights cases, the obvious alternative would have been to examine court records for evidence of human rights arguments. However, this option faced a number of formidable difficulties. The first was the sheer scale of the exercise. Socio-legal research in the courts typically has a much tighter focus in terms of courts and procedures covered. However, human rights issues may arise in any civil court and under any procedure.

Therefore to attempt to identify all human rights cases retrospectively would have required us to trawl through all court records, case by case, over a period of more than four years in order to identify those which raised human rights issues. This would have been an immensely time-consuming process, and not one that would have been achievable within any conceivable level of funding.

So, identifying all human rights case was not feasible. That in itself would probably not be a matter of grave concern provided that the second objective could be achieved - a reasonably accurate estimate of the numbers of human rights cases being brought - for a shorter period. However, even this more modest aim would have been very difficult to fulfil.

103 Neither did the pilot questionnaire to solicitors.
The obvious approach would have been to look at a sample of court records over an appropriate period. However, to produce a reliable estimate of the number of civil human rights cases being brought in any period would have required us to look at records in the Court of Session and in a representative sample of sheriff courts. This would have involved far less work than attempting to identify all human rights cases, but given the need to include at least four sheriff courts to provide a representative sample, this would still have been an enormous task given the variety of procedures and the numbers of cases involved.

It was stated above that there was no obvious short cut to identify civil human rights cases. One possibility would have been to try to find out from lawyers details of cases in which they had been involved which raised human rights points, including names, case references and dates of calling in Court. The researchers could then have identified relevant records without trawling all court records, shortening the time taken. Obtaining information from solicitors, however, would itself have been a major task requiring, for example, time-consuming and costly postal and/or telephone surveys of all solicitors doing court work in the Court of Session and in the areas of the sheriff courts chosen, and the usefulness of such an exercise would depend upon the response rate. In fact we did carry out a postal survey of 300 solicitors in one sheriff court area to see whether that turned up human rights cases not identified in other ways. There were only 38 responses, a rate of only 5%, and this confirmed our initial assumption that such a survey was not likely to be a reliable means of identifying human rights cases.

The second major problem was the limited information available from court records, which varies according to the court, the procedure, and how far the case has progressed. If the judge has had to make a decision on the merits in order to dispose of the case then one would expect to find any human rights issue which had figured prominently in the pleadings or oral argument to be referred to in the judge’s opinion. However, many civil cases settle, so to examine only cases in which a reasoned opinion was issued would under-estimate the extent to which human rights arguments were being raised.

Of course, if a human rights argument were felt to be important to a case, one would expect the party raising it to put it in their pleadings. Cases proceeding in the Court of Session or under Ordinary Cause procedure in the Sheriff Court will generally have detailed pleadings which have will been retained by the court, which, theoretically, should make it easy to establish whether a human rights argument was raised. However, reading through such pleadings is extremely time-consuming – the problem identified above. By contrast in Summary Causes, the “pleadings” will only be available in live cases as, once a case is disposed of, the Summons is returned to the successful party. There may well also be cases in which the human rights argument is not mentioned in the pleadings, but only emerges at the stage of the oral argument.

For these reasons, trawling through court records is likely to fail to identify a significant number of cases in which human rights arguments have in fact been used.

Given the limitations of what may be established from court records, and the resource constraints described, it became clear that it would not be possible to produce a reliable estimate of the total volume of civil cases raising human rights issues. The data collection strategy adopted was, therefore, to undertake a more limited sampling exercise as described above to obtain some indication of the volume of litigation, and which could also be used to achieve the other objectives of the project. Although these samples related to a very brief
period we were able to compare them to the reported civil cases, and this gave some, albeit very limited indication of the volume of civil human rights cases.

Quantitative and Qualitative Analysis

The third objective was to analyse how the human rights legislation was being used. This required both quantitative and qualitative analysis. As regards the former, it meant first establishing the types of subject matter that were being litigated. For this purpose, the datasets were analysed both in terms of the Convention’s own categorisation of issues (Article 5, Article 6 and so forth) and in terms of domestic law and policy (criminal justice, child protection, immigration and asylum, etc.). We also analysed the cases in terms of the outcomes of litigation, the nature of the remedies used, the parties to the actions, and the geographical spread of litigation. However, our ability to perform these analyses varied for each dataset because the categories of information we had were not consistent across all datasets. To give an example, we were able to ascertain the geographical spread of criminal cases raising human rights issues because that information was included in the Crown Office database. We were not able to ascertain the geographical spread of civil cases because our research was limited. In the main text we make clear the nature of the data on which any conclusions about human rights litigation are based.

The third objective also required qualitative analysis, and the fourth objective - to analyse trends and key developments in human rights case law - was essentially qualitative. We interpreted “key developments” to mean both developments in doctrine, that is, decisions or sets of decisions which develop or clarify human rights law, and decisions which required or might require changes to, or otherwise had a significant impact on, domestic law or policy. This aspect of the research was methodologically more straightforward, albeit time-consuming, requiring us to read, analyse and consider the significance of reported cases in the database.

The fifth objective was to analyse other factors relevant to the wider context of the topic. This required us to examine and consider a range of material in the public domain such as judicial statistics and relevant legislation.

Interviews

The second main aim of the project was to assess the feasibility of, and make recommendations for, a nationwide monitoring system for identifying and tracking cases through the Court system. The research into reported cases and court records described above was clearly very relevant to this aim. In addition, the researchers conducted interviews with Scottish Court Service staff working in the High Court of Justiciary, Court of Session, and two sheriff courts. We interviewed six staff in all. The interviews were semi-structured interviews designed to gather information about the working practices of the court staff in each court, the extent to which information about human rights arguments were recorded, actual or potential difficulties that impeded the recording of information about human rights arguments and their views on the implementation of a nation-wide monitoring system for human rights cases.