

Human Rights and Scots Law

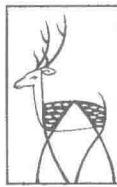
EDITED BY

Alan Boyle
Chris Himsworth
Andrea Loux
Hector MacQueen

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HUMAN RIGHTS AND SCOTS LAW

Foreword

The period since the entry into force of the Scotland Act 1998 and the Human Rights Act 1998 has been one of the unusually rapid change in Scottish legal and constitutional culture. The courts have had to cope with a large volume of litigation concerning the unfamiliar law of the European Convention on Human Rights. They have had to assess the compatibility with the Convention of common law principles which had long been taken for granted, and of statutory provisions which could not previously have been questioned. They have grown accustomed to the citation of case law from around the world, and have become conscious of their own decisions being the object of reciprocal interest in other jurisdictions. They have had to assume a more prominent constitutional role under the devolution settlement than they had formerly played, and to accept that the new dispensation has given the legal system and its participants a higher public profile than in the recent past. The legal profession and the university law faculties have equally had to cope with a demanding period of transition. Amongst the general public, there has been increased interest in the Scottish legal system and those who are active in it, with such issues as the appointment of the judiciary and the regulation of the legal profession, receiving increased attention.

The period of transition has not yet ended. The courts are still in the process of determining the meaning and scope of some of the basic concepts employed in the statutory provisions: what, for example, constitutes an 'act'; what precisely is meant by 'incompatibility'; and what is the consequence of requiring to courts not to 'act' in a manner which is 'incompatible' with the Convention. As successive cases pose new problems, and from time to time place in issue the appropriateness of the solutions proposed in earlier cases, the courts slowly feel their way towards a position which can be taken as more or less settled. That stage has not been reached.

In this situation, it is more than usually difficult for writers on the law to produce a commentary: new cases continue to flood out of the courts, some of them raising issues of fundamental importance. At the same time, and for the same reason, it is more than usually important that commentaries should be offered by those who can stand back from the fray, discerning any patterns that are emerging, assessing their implications and offering a view on their appropriateness.

The present volume has its origins in a conference held at the University of Edinburgh in 1998, at which an attempt was made to predict the potential implications of the legislation which was then emerging from Parliament. The

contributions to that conference have been revised and supplemented in the light of experience, and assess that experience from a wide variety of perspectives. Not the least interesting and useful aspect of the collection is the diversity of opinions expressed.

The present collection of essays will naturally be of interest to those working in universities who take a critical interest in the development of Scots law. For those of us grappling with problems on a daily basis as practitioners or as judges, a work such as the present is equally useful, reporting on our progress from a clearer vantage point, and enabling us better to steer a safe course.

Court of Session
Parliament House
Edinburgh
1 April 2002

ROBERT REED

Preface

This short book had its genesis in a conference organised by the Faculty of Law at Edinburgh University in 1998. The intention at that time was to educate ourselves in the changes in Scots law likely to ensue from the entry into force of the Human Rights Act. In doing so, we sought to encourage Scots lawyers to think about their specialisations from a human rights perspective. We also saw a need to learn from other legal systems that had undergone similar recent transformation, most notably Canada and Sweden. And of course, we had to grapple with the constitutional changes that the Act and its incorporation in the devolution legislation would bring about. Although much has been added or altered since then, these remain the objectives of this book.

Much of what could be said in 1998 was necessarily speculative. Four years on, it has been possible to begin to address the reality of what the Act has so far achieved, at least in Scotland, although many topics remain to be further explored in future litigation, or indeed in future books. All those who participated in the 1998 conference found it illuminating to look afresh at old law from a new perspective. We hope that these essays will achieve a similar impact on a wider audience.

Our thanks are due to Myra Reid, Peggy Dwyer and Felicity Stewart for their help in preparing the final manuscript for publication, to Richard Hart and Hannah Young at Hart Publishing for their patience and support, and to our contributors, for remaining with us to the end.

THE EDITORS
June 2002

Abbreviations

AD	Case of the Labour Court of Sweden (Arbetsdomstolens domar)
ALR	Alberta Law Review
Appln No.	Application Number
BBC	British Broadcasting Corporation
BSC	Broadcasting Standards Code
BverfG	Federal Constitutional Court of Germany (Bundesverfassungsgericht)
CFLQ	Canadian Family Law Quarterly
CJFL	Canadian Journal of Family Law
CJWL	Canadian Journal of Women and the Law
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLR	Criminal Law Review
CSA	Campaign for a Scottish Assembly
DLJ	Dalhousie Law Journal
DPP	Director of Public Prosecutions
EC Law	European Community Law
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
Edin LR	Edinburgh Law Review
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EU Law	European Union law
European LR	European Law Review
Fam Law	Family Law
Fam LB	Family Law Bulletin
GYbIL	German Yearbook of International Law
HC Deb	House of Commons Debate (Hansard)
HL	House of Lords
HL Deb	House of Lords Debate (Hansard)
HWLJ	Harvard Womens' Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International and Comparative Law Quarterly

IJLF	International Journal of Law and the Family
ILM	International Legal Materials
ISPs	Internet service providers
JCPC	Judicial Committee of the Privy Council
JLSS	Journal of the Law Society of Scotland
JR	Juridical Review
JT	Juridisk Tidskrift vid Stockholms Universitet (Law Journal of Stockholm University, Stockholm)
KU	Report of Sweden's Parliamentary Committee on the Constitution
LEAF	Women's Legal Education and Action Fund (Canada)
LCP	Law and Contemporary Problems
LQR	Law Quarterly Review
Med L Rev	Medical Law Review
MLI	Medical Law International
MLR	Modern Law Review
MP	Member of Parliament
MSP	Member of Scottish Parliament
NILQ	Northern Ireland Legal Quarterly
NJA	Cases of the Supreme Court of Sweden (Nytt juridisk arkiv)
NLJ	New Law Journal
OHLJ	Osgoode Hall Law Journal
OSAG	Office of the Solicitor to the Advocate General
PCC	Press Complaints Commission
PL	Public Law
PLI	Perspectives on Labour and Income
RÅ	Cases of the Supreme Administrative Court of Sweden (Regeringsrättens årsbok)
RCS	Review of Constitutional Studies (Canada)
RF	Swedish constitutional document, the Instrument of Government (Regeringsformen)
RH	Cases of the Court of Appeal of Sweden (Rättsfall från hovrätterna)
RSC	Rules of the Supreme Court
SCC	Scottish Constitutional Convention
SCLR	Supreme Court Law Review (Canada)
Scot Law Com	Scottish Law Commission
SFS	Swedish statute book (Svensk författningssamling)
SHR	Scottish Historical Review
SLPQ	Scottish Law & Practice Quarterly
SLR	Statute Law Review
SLT (News)	Scots Law Times (News)
SNP	Scottish National Party

SOU	Swedish Commission Report (Statens offentliga utredningar)
SvJT	Svensk Juristtidning (Swedish Law Journal, Stockholm)
UN	Decision of the Swedish Aliens Board (Utlänningsnämnden)
YbEL	Yearbook of European Law

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