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EDITORIAL BOARD

EDITORIAL

Welcome to the eighteenth volume of the **Scottish Journal of Criminal Justice Studies**. In addition to the Chairman's Report for the year, this year's Journal contains several presentations from the 42nd Annual Conference which was held for the second time at Dunblane Hydro and chaired by The Rt Hon Lord Brodie QC.

The theme of the conference was ***'The Impact of Europe on Criminal Justice in Scotland'*** and it commenced with a key note address entitled *'The European criminal justice jigsaw and its relevance to Scotland*' given by Professor Estella Baker, Professor of European Criminal Law and Justice at the University of Sheffield. This address - reproduced here in its original form as an oral presentation - provided an excellent overview of the subject matter of the conference, and provided insights into the structure and operation of criminal justice in Europe.

Continuing the theme of European developments and their relevance to Scotland, the key note address given by Professor Sonja Snacken, Professor of Criminology and Sociology at the Free University of Brussels (VUB) and Ghent University is entitled *'Legitimacy of non-custodial sanctions - a European perspective'*. This provides a unique overview of the historical development and application of the range of non-custodial sanctions and their philosophical underpinnings.

The SASO Memorial Lecture in memory of The Rt Hon Lord Rodger of Earlsferry PC, QC 1944-2011 was given by The Rt Hon the Lord Hope of Craighead, KT PC QC FRSE, Deputy President of The Supreme Court: '*The role of the Supreme Court of the United Kingdom'*. The lecture traces the development of the Supreme Court's jurisdiction in devolution cases during Lord Rodger's ten year period as Lord of Appeal in Ordinary and Justice of the Supreme Court. It provides fascinating insights into Lord Rodger's judgements and sentiments and, in its detail and humour, is a fitting tribute to this most energetic and charismatic man.

The paper by John Scott QC entitled: *'Criminal Law in Scotland post-Cadder: Are Human Rights Really Coming Home?'* discusses ECHR law in Scotland before engaging with the Cadder decision and the subsequent Carloway Report and their

implications for human rights in Scotland. Professor Tony Kelly, Solicitor and Visiting Professor in Human Rights, University of Strathclyde provides a strong defence of the importance of human rights, especially for those prisoners who he has represented, within his paper 'Prisoners: What price European rights?'

The paper by Carole Wilkinson, Chair of the Scottish Children's Reporter Administration called '*Welfare and Rights at the heart of the Children's Hearing System?'* lays out changes to the Children's Hearing System, in particular those influenced by human rights legislation, and discusses the challenges to the Kilbrandon principles and philosophy which the System faces.

Also included in this volume is the prize-winning student essay by Kath Murray, who is currently undertaking a PhD at the University of Edinburgh. Her essay, which was the judges' unanimous choice, is entitled *Stop and search in Scotland and perceptions of police fairness.* This essay was written in the early exploratory stages of Kath's PhD research and its conclusions are both preliminary and provisional, rather than definitive. Yet, it makes for fascinating reading.

This edition contains the final Chairman's Report by Alec Spencer, who stepped down as Chair of SASO in 2011. On behalf of SASO and the Journal, can I once again extend our warm thanks and gratitude to Alec for his unwavering commitment and gracious presence over the years.

In future volumes, SASO hopes to continue to publish as articles those papers presented at Branch Meetings or at Day Conferences that Branch Secretaries consider suitable for a wider audience. The **Journal** is also keen to publish original articles on matters of interest to the Scottish criminal justice community. I would particularly like to encourage articles from practitioners, and those with practice experience, which inform the realities of work in criminal justice. Contributors are asked to send articles (in word or in .rtf format) to the Editor (michele.burman@glasgow.ac.uk). All articles will be reviewed by two members of the **Editorial Board**.

Michele Burman

CONTENTS

Editorial 2

Conference Papers

'The European Criminal Justice Jigsaw and its Relevance to Scotland'
by Professor Estella Baker, Professor of European Criminal Law
and Justice at the University of Sheffield 5

The SASO Memorial Lecture: In memory of The Rt Hon Lord Rodger of Earlsferry PC, QC 1944-2011

'The role of the Supreme Court of the United Kingdom'
by The Rt Hon the Lord Hope of Craighead, KT PC QC FRSE,
Deputy President of The Supreme Court: 26

'Criminal Law in Scotland post-Cadder: Are Human Rights
Really Coming Home?'
by John Scott, QC Solicitor Advocate 44

'Legitimacy of non-custodial sanctions - a European perspective'
by Professor Sonja Snacken, Professor of Criminology and Sociology
at the Free University of Brussels (VUB) and Ghent University 58

'Prisoners: What price European rights?'
by Professor Tony Kelly, Solicitor and Visiting Professor
in Human Rights, University of Strathclyde 72

'Welfare and Rights at the heart of the Children's Hearing System?'
by Carole Wilkinson, Chair Scottish Children's
Reporter Administration 97

SASO Prize-Winning Student Essay

Stop and search in Scotland and perceptions of police fairness
by Kath Murray, University of Edinburgh 106

SASO

Objects and Membership 132
Office Bearers 133
Branch Secretaries 134
Chairman's Report 136

The European Criminal Justice Jigsaw and its Relevance to Scotland

Presented by: Professor Estella Baker, Professor of European Criminal Law and Justice at the University of Sheffield

Introduction

Last week in Sheffield I gave my inaugural lecture. I began by saying that, at the time that I first started to examine the impact of what we now know as the European Union upon matters of criminal law, my opening research question was whether there would ever be a criminal code of the European Community? People used to laugh at the idea that this would ever happen. That was in 1992, which is not really that long ago. However, many things that were believed to be impossible then have come to be taken for granted now, as I hope to illustrate in what I am going to say.

The conference programme says that it presents 'a fantastic opportunity to learn and discuss how Europe, and human rights are creating drivers for change within the Scottish Criminal Justice System'. That statement, I think, reflects a growing recognition that 'Europe' is significant, but at the same time, some lack of understanding about quite how it affects domestic criminal justice matters; particularly, perhaps, when it comes to the EU.

The Union has become a powerful criminal justice actor in a remarkably short space of time, but the means and methods through which it acts are confusing and have undergone repeated change during this rapid period of development. Added to that, in the UK, much of the discussion in the media, as well as much political debate, is characterised by obfuscation. It is a regular event for the Convention on Human Rights and its legal order, on the one hand, and the Union and its legal order, on the other, to be muddled up. For example, the EU has come in for heavy criticism for asserting that prisoners must have voting rights. But the relevant ruling is nothing to do with the Court of Justice of the European Union (CJEU), but is the product of the decision of the European Court of Human Rights in App. no. 74025/01 *Hirst* v *United Kingdom.*

Sometimes the conflation is a genuine accident, but there are instances where it is perpetrated by those who must know the difference. As the gist is always

that 'Europe is bad', it is hard to escape the conclusion that is done for instrumental ends. That is, at least some of those who take a Eurosceptic view regard it as fair game to perpetuate the confusion whenever doing so serves to reinforce their general message. Having said that, their task is made easier by the fact that, in practice, the two legal orders are not completely discrete, as I will explain in due course.

In some ways, the recent treaty changes that have been effected by the Lisbon Treaty are a great help because they are bringing what have been disparate elements of regulation together to form a much more coherent package; but we have not got there yet. In the meantime, it remains necessary to get to grips with the basic building blocks of European law, and use them to piece together 'the criminal justice jigsaw'.

Against this background, what I am aiming to do in this presentation is:

- to provide a broad overview of the EU's competence in criminal justice matters and their policy context, which is the 'Area of Freedom, Security and Justice';
- to say something about how this relates to fundamental rights protection, fundamental rights being 'EU speak' for human rights;
- to reflect briefly on the question of who is in the 'driving seat', by examining the respective roles of the EU institutions and what this tells us about the power distribution as between Union and national levels; and, lastly,
- to offer some thoughts on what all of this means for Scotland.

Before I start, I should say that preparing this final part of the presentation has been a revelation to me. A lot of the time, tackling issues of Union law means fixing attention at Member State level, which, of course, is the UK for us. What I had not appreciated before was just how much I was guilty in my own thinking of equating 'UK' with 'England and Wales'. Therefore, I have learnt something valuable that will colour my perspective from now on, and for which I owe the conference organisers a debt of thanks.

EU Criminal Justice Milestones

According to much of the commentary, EU involvement in the criminal justice field did not begin until the early 1990s, when the so-called 'third pillar' (something I will explain shortly) was founded. However, that is a mistaken view. In reality, the Member States have been cooperating together in their capacity as Member States for an awful lot longer, albeit not necessarily

within the framework of the treaties (for discussion, see Baker and Harding, 2009). Therefore, I want to start by identifying the principal milestones in the development of EU criminal justice, which I will divide into four phases of development.

Phase one: before the third pillar

Trying to trace when criminal justice cooperation started is a bit like looking for the original source of a major river: there are lots of tributaries, all flowing into what we now recognise as criminal justice competence at Union level. However, if I had to identify anything as the first key development, it is the founding of the Trevi network in 1975. An acronym that stood for 'terrorism, radicalism, extremism and political violence', the network stood outside the scope of the treaties and provided a framework for administrative and executive cooperation that was aimed at combating the terrorist problems of the 1970s.

By itself, the existence of this venture makes the point that the Member States began to collaborate in the field of criminal justice what is now relatively a long time ago. However, that is not the only significance of Trevi. Over time, the network grew quite considerably to cover other matters of criminal justice and public order. And, although its original brief was quite distinct from the mission of the then treaties, as that development occurred, its function and purpose started to converge with the evolving agenda of the Union. In particular, in the early 1990s, a new working group was added to the network specifically to deal with internal security problems that were forecast to arise from the establishment of the Single Market. These were anticipated because, in principle, the removal of border controls would liberate licit and illicit persons, goods, services and capital alike. Something had to be done to compensate for that, leading to this line of development.

The second significant event during this period occurred in 1985, when five of the then ten Member States concluded the Schengen Agreement. Its goal was to create a common travel zone between them. Just like the Single Market, however, this project had internal security implications for the participant Member States. The task of addressing them was left to a second agreement. It took another five years to negotiate, resulting in the much longer Convention Implementing the Schengen Agreement, or 'CISA', of 1990.

By instituting the Schengen arrangements, the Member States had created two organisational structures with an overlapping role: Trevi, which involved all of what had by 1986 become twelve of them, and Schengen, which initially

involved only five of them. Like Trevi, Schengen also stood outside the scope of the treaties; a state of affairs that gave them a further common characteristic. The existence of both sets of arrangements, and the activities conducted as part of them, were substantially hidden from public view. Therefore, they lacked either democratic or judicial accountability; something that caused understandable consternation in national parliaments when they discovered what was going on. Notably, however, the intention of the Schengen states, right from the beginning, was that the Schengen infrastructure should be absorbed into the framework of the Union in due course.

Phase two: the 'justice and home affairs' third pillar

The next phase of development was triggered in 1993, when the Treaty of Maastricht entered into force. It was this treaty that turned the European Community into the European Union by adding two intergovernmental 'pillars' to the original economic core. One, the 'second pillar', which is not relevant here, dealt with 'common, foreign and security policy'; the other, the 'third pillar', dealt with 'justice and home affairs'. It was through the creation of the third pillar that explicit competence in criminal law and justice was introduced into the framework of the treaties for the first time. This is the reason that many commentators date the start of Union engagement to 1993. What is less well known than it ought to be, however, is that the legal infrastructure and institutional organisation of the justice and home affairs pillar was based on Trevi. Therefore, the ancestry of the pillar, and some of its body of law, dates back to that earlier stage.

Use of the pillar got off to a slow start because it adopted a conventional intergovernmental methodology that made it procedurally clumsy and difficult to use. For an instrument to be adopted, a unanimous vote of the Council of Ministers was required, followed by ratification at national level. Added to that problem, there was next to no democratic or legal accountability. The Council of Ministers is composed of members of the Executives of the Member States and the European Parliament was virtually excluded from any say. Therefore, the pillar had dubious democratic credentials. Likewise the CJEU had next to no role, thereby ensuring little by way of judicial accountability. Despite these deficiencies, there is no doubt that the creation of the pillar was a landmark event as it provided a vital stepping stone to where we are now.

Phase three: the new third pillar and the 'area of freedom, security and justice'

In 1999, the Treaty of Amsterdam made major changes to the Union's regulatory framework in the criminal law and justice field, and to its

composition. First, it split the original third pillar in two, so that the part that was concerned with 'visas, asylum, immigration and other policies related to free movement of persons' became part of the first, Community pillar (Title IV of the EC Treaty). The rest remained as the intergovernmental third pillar, but was renamed 'police and judicial cooperation in criminal matters' to reflect its newly focused subject matter.

Second, the body of Schengen law was absorbed into the structure of the Union and allocated to new legal bases under the EU treaties. A complicated manoeuvre in itself, an added difficulty was caused by a mismatch between the Schengen and EU Member States. By this time, the Union had enlarged to fifteen, now including Finland and Sweden. They already participated in the common Scandinavian travel zone, along with Iceland and Norway. In order not to lose that benefit, the latter two non-EU states signed an association agreement with the Schengen states. On the other hand, Ireland and the United Kingdom, who were EU Member States, declined to sign up to Schengen –about which more later.

Third, the third pillar legislative instruments were revised to make them practical and effective to use. Most notably, framework decisions were introduced, and I will say more about these shortly. Fourth, the severed parts of the third pillar were tied together by a new horizontal objective that was written into Article 2 of the Treaty on European Union (TEU) 'to maintain and develop the Union as an area of freedom, security and justice' (AFSJ). In conjunction with the broader package of treaty reforms, this last change provided the impetus for rapid development.

Immediately, the Union embarked upon a series of multi-annual programmes to put the AFSJ in place, modelling its approach on that which had been taken in establishing the Single Market. The first, the 'Tampere Programme' was agreed in 1999 and expired in 2004 (European Council, 1999). It was followed by the second 'Hague Programme', which lasted from 2004 to 2009 (European Council, 2005). Apart from the fact that the Member States had enough enthusiasm and engagement to commit themselves to another programme, one of the interesting things about Hague is that it contains many statements along the lines of 'When we get the new competencies in the Constitutional Treaty this will happen…, and… will be possible'. In other words, much of its content was premised upon the entry into force of the Constitutional Treaty; something that was meant to happen on 1 November 2006. In the event, however, as we know, the project was aborted owing to the 'no' votes in referenda in France and the Netherlands. Yet I am not

the only commentator to have observed that the loss of the Treaty does not seem to have proved an obstacle to the Programme's implementation (see also Weyembergh, 2005). What this attests to, I think, is the level of political backing for the Programme and determination to make it work, coupled with an accountability deficit in the then treaties. It is all very well to suggest that people might not have been satisfied that what was being done was wholly legitimate, but in the absence of effective legal avenues to challenge it, it was difficult to stop.

Before looking at the most recent developments, I want to say something more about the importance of framework decisions. In terms of legal character, they were defined in terms that made them the third pillar equivalent of directives. According to Article 34(2)(b) TEU, they placed a legally binding obligation on the Member States as to the result to be achieved, but left it to them to choose the form or methods by which they did so. Crucially though, the Treaty stated explicitly that they did not have direct effect. Therefore, contrasting with directives, an individual cannot rely on a framework decision before a national court. Leaving that point aside, framework decisions proved to be a much more effective instrument for facilitating collaborative action than those that had previously been available for use under the third pillar.

Now superseded by the Lisbon changes (see below), a series of framework decisions was adopted that fell into three broad categories. They are:

- sectoral measures on the crime control side that dealt with matters of cross-border and serious organised crime, such as human trafficking, money laundering, drug trafficking and terrorism;
- mutual recognition instruments to facilitate judicial cooperation in criminal justice: the original and best known of these is the framework decision that introduced the European arrest warrant (Council framework decision 2002/584/JHA). But it belongs to a whole family. Among the last of them to be adopted are the framework decisions on prisoner transfer (Council framework decision 2008/909/JHA) and on probation and alternative sanctions (Council framework decision 2008/947/JHA), both of which are meant to be implemented by next month;
- one framework decision on victims' rights (Council framework decision 2001/220/JHA).

Phase four: pillar dissolution and entry into the Union law 'mainstream'

In 2009, the most recent major developments occurred. One was the entry into force, on 1 December, of the Lisbon Treaty. It has again made important

changes to the treaty architecture in the field of criminal law and justice. Although commonly summarised as 'Lisbon has abolished the pillars'; that is not totally accurate. What the Treaty actually does is to pave the way for the third pillar progressively to become absorbed into the supranational first pillar over an indeterminate period. What does this mean in practice?

The starting point is that all criminal law instruments adopted since 1 December 2009 now take the 'Lisbonised' form of what we used to think of as Community instruments, in other words regulations, directives and so on. They also have the same legal effect, so that the conventional doctrines of what we used to call 'Community law' apply to them. In other words, the new treaty arrangements bring the Union's criminal law into the 'mainstream', thereby ensuring that that the newly adopted instruments are vastly more powerful than the existing pre-Lisbon ones. In the criminal law area, it is directives that are critical. Six have already been adopted (Directive 2010/64/EU; Directive 2011/36/EU; Directive 2011/82/EU; Directive 2011/92/EU; Directive 2011/99/EU; Directive 2012/13/EU), and a growing number of others is in the pipeline. Therefore, the Union has 'hit the ground running' when it comes to using the new legislative framework. But what is the fate of the existing body of pre-Lisbon third pillar instruments?

The answer is provided by Protocol 36 to the treaties, which deals with transitional arrangements. Article 9 of the Protocol states that all of the pre-Lisbon third pillar instruments remain good law, and their legal nature remains unaltered, unless and until they are amended using the post-Lisbon treaties. As and when that happens, they will take on a 'Lisbonised' character. According to Article 10 of the Protocol what will change, however, is that the CJEU will assume its full jurisdiction over whatever remains of the body of third pillar law once a five year transitional period has ended; after 30 November 2014, in other words.

The second recent significant development occurred almost simultaneously with the Lisbon Treaty's entry into force, when the Union adopted the Stockholm Programme, the third programme to put the AFSJ in place (European Council, 2010). It is due to expire in 2014, by which time the Union will have put fifteen years of investment into the AFSJ. As the Programme is already nearly half way through, the Union is now on the verge of having to decide whether there will be a fourth one. So far, the programmes have been named after a place in the Member State that holds the Presidency of the Union at the time of their adoption. In preparation for the lecture last week, I checked to see who will be holding the Presidency in 2014 and discovered

that it is scheduled to be Greece for the first six months, and then Italy for the second six months. Given the severe effects of the current economic crisis upon those two Member States, I had to wonder what the chances are that there will be a putative 'Athens' or 'Rome' Programme, even if the Union does decide to go ahead…

Frivolity aside though, summing up the evolution that has occurred over the span of the three AFSJ Programmes, I think we have gone from 'faith' in Tampere, to 'trust' in Hague, and 'confidence' in Stockholm. By that I mean that, at the time of the Tampere Programme, everything was very tentative and the tone of the Programme was defensive, equivocal and hesitant. By comparison, there is more assurance in the Hague Programme that the Union's engagement with criminal justice matters is legitimate, and that it does not have to justify its reasons for acting in such a fundamental way; a transformation that I discussed in a paper in 2009 (Baker, 2009). The Stockholm Programme goes further still. It is very assertive and takes it for granted that the AFSJ policy field is fully a matter of the Union's business in a way that was unimaginable a very short time ago. It is an astonishing change when you consider that the adoption of the Tampere and Stockholm Programmes occurred only ten years apart.

The Contribution of the CJEU

The CJEU is making its own contribution to the development of EU criminal law to add to everything that I have already said. Quite a significant body of case law has grown up, with relatively large numbers of decisions on the *ne bis in idem* (or double jeopardy) principle and on victims' rights, as well as smaller numbers relating to specific criminal instruments, especially the European arrest warrant. In addition, certain of the Court's decisions have established general principles.

The prime example in the latter category is the Court's ruling in Case C-105/03 *Pupino*, which recognised that the duty of 'harmonious interpretation' (otherwise known as the doctrine of indirect effect) applied to the third pillar. Already a well-established doctrine in Community law, it places national courts under an obligation to interpret national law in the light of third pillar law on so far as it is possible to do so and is consistent with Article 7 ECHR. This was a contentious decision because the basis of the duty was Article 10 of the EC Treaty, i.e. a first pillar treaty provision, with no third pillar equivalent.

Another, more recent example is the ruling in Case C-135/08 *Rottmann*, which has expanded the criteria for establishing that a set of circumstances falls within the scope of the treaties and is thus subject to Union law regulation. The conventional position had been that Union law was engaged either by the exercise of a right under the treaties, such as one of the rights of free movement, or because it was regulated by Community or Union legislation (Case C-299/95 *Friedrich Kremzow*). In *Rottmann*, however, the Court ruled that Union law applied, not for either of these reasons, but because the case concerned the threatened loss of entitlement to the status of 'citizen of the Union'; something that Article 20(1) of the Treaty on the Functioning of the European Union (TFEU). This was despite the fact that the affected individual had in fact exercised the right of free movement from one Member State to another, and the Court could have elected to decide the case on that basis.

Two more recent cases of particular interest are Case C-137/09 *Josemans* and Case C-145/09 *Tsakouridis*. *Josemans* may already be familiar to you because, relatively unusually, it received some media coverage in the UK. It concerned Dutch 'coffee shops': premises where people go to consume cannabis and cannabis products. Owing to problems with 'drug tourism', the Dutch authorities wanted to restrict entry to coffee shops to Dutch residents only. Such residency requirements are ripe for challenge under Union law because it is all-but inevitable that they have a discriminatory impact as far as the nationals of other Member States are concerned; and discrimination on grounds of nationality is prohibited under the treaties. Therefore, the question was whether the restriction was lawful as a matter of Union law.

Leaving aside the legal point that was in dispute, the case makes for some fascinating reading, especially the Advocate General's Opinion, which contains interesting data on such things as economic turnover and visitor numbers. He was also quite candid about the cultural motivation behind the desire for regulation: the Dutch regard coffee shops as a haven of peaceful enjoyment -a place to 'chill out'- and their way of life was being destroyed by large numbers of visitors, whose attitudes did not match theirs.

Unsurprisingly, the Court dismissed the proposition that the proposed restrictions were incompatible with Union law, basing its conclusions on a fairly straightforward 'free movement of services' analysis. Of rather more interest in the criminal justice context is the Opinion of the Advocate General, whose observations revealed a marked lack of sympathy towards Dutch policy. While it was all very well for the Dutch to tolerate coffee shops and take a relaxed attitude to certain kinds of drugs, he suggested that they needed

to think about the consequences of those policies. And the consequences were not limited to their impact within the Dutch territory, but affected other Member States and the AFSJ as a whole. In other words, this was not just a matter of Dutch public order, but of European public order. Essentially, the stance taken by the Dutch is out of line with the whole tenor of all EU policy, which is against drugs. Even though the Court did not endorse these comments, it is instructive that the Advocate General is prepared to put them on record.

In *Tsakouridis* the Opinion was delivered by the same Advocate General. The case concerned a Greek national, who had been born and grown up in Germany. He was then convicted of drug offences, for which he was sentenced to a term of imprisonment. The German authorities wanted to expel him to Greece at the end of his sentence, even though he was deeply integrated into German society. However, as a 'citizen of the Union' who had resided there for over ten years, he enjoyed a high level of protection from expulsion under the Citizenship Directive (Directive 2004/38/EC). Relying on its provisions, he tried to use this to resist his removal. Although the Advocate General concluded that it would not necessarily be inconsistent with the Directive for the expulsion to go ahead (as did the Court), he suggested that the decision had to take account of the goals of punishment and, as in *Josemans*, the consequences for other Member States.

According to the Advocate General, 'rehabilitation is an established principle of punishment in Europe', a proposition for which he cited a provision of the German criminal code as authority –and nothing else. Apparently, of the German criminal code is good enough to stand for all of us…! More seriously, he proceeded to state that rehabilitation is in everyone's interests. If the German authorities repatriated Mr. Tsakouridis to Greece, that sever all of his community ties in Germany, which would not be beneficial because (as we know) such ties are important in supporting desistance and rehabilitation. Furthermore, Mr. Tsakouridis would still be able to exercise his right of free movement to go to any of the other twenty five Member States. Therefore, if not properly rehabilitated, he might pose a threat to any or all of them. In other words, the German authorities had to think about the impact upon the wider space across the Member States when taking their decision about expulsion and not just in purely national terms. Like his remarks in *Josemans*, these comments suggest a different vision of the borderlines of criminal justice from the one that we are used to.

Fundamental (Human) Rights

As if matters were not already complicated enough, the human rights side of the picture must also be considered. The first thing to point out is that all of the EU Member States belong to the Council of Europe, are signatories to the ECHR, and also to a number of other Council of Europe instruments. So, legally speaking, each has its own autonomous relationship with the Convention's legal order. In addition, though, the Member States are required to have it as a matter of EU law. This is because 'respect for human rights' is one of the founding values of the Union (Article 6 TEU) thus a condition for membership (Article 49 TEU). One of the ways in which a state is required to demonstrate that it satisfies this condition is through membership of the Council of Europe, and being a signatory to the Convention and certain of its other instruments, such as the Convention Against Torture, Inhuman or Degrading Treatment or Punishment. In fact, one of the reasons why membership of the Council of Europe has expanded so much over recent years is that the Central and Eastern European states joined it as a preparatory step towards their ultimate goal of accession to the Union.

As far as the protection of fundamental rights in Union law is concerned, it started in the late 1960s through the judicial action of the Court of Justice. This was necessary because there was then no provision in the treaties that afforded protection to human rights, and its lack had started to cause problems. Consequently, it fell to the Court to establish that respect for fundamental rights was a fundamental principle of Union law. As key sources of its doctrine, it took the ECHR, to which it attached 'special significance' as the 'local' human rights instrument; the constitutional traditions of the Member States; and other human rights instruments to which the Member States are signatory, such as the International Covenant on Civil and Political Rights (Case C-260/89 *ERT*). Eventually, the Court's formula was codified in the TEU, although without reference to human rights instruments other than the Convention (Article 6(2) TEU). More recently still, both the CJEU and the Court of Human Rights have delivered important rulings that concern the status of fundamental rights protection in the EU legal order and its relationship with that of the Convention.

On the EU side, in Cases C-402/05 and C-415/05 *Kadi*, the CJEU asserted, in paragraph 285 of its judgment, that: 'all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness.' And, more than that, it declared this to be a constitutional principle of the Union. (For 'Community' read 'Union': this is a pre-Lisbon case, so the Court

is using the old language). This was strikingly forthright as the case related to the rights of suspected terrorists to seek judicial review of measures to freeze their assets that the Union had adopted in compliance with UN obligations. Such review is not available at UN level, but the effect of the Court's ruling was to ensure that it is as far as EU implementing measures are concerned. In taking that decision, the Court overturned the earlier rulings of its own Court of First Instance.

On the ECHR side, the question of whether Union law affords adequate respect to Convention rights arose in App. No. 45036/98 *Bosphorus* v *Ireland*. The Court of Human Rights said that it operates a presumption that the EU legal order confers equivalent protection upon Convention rights to that which is provided by the Convention's own legal order. Although the presumption is rebuttable, the ruling confirmed that a regime of mutual respect operates between the two European courts. Therefore, while the doctrine of fundamental rights in Union law may not provide identical protection to that under the Convention, as long as the Strasbourg Court assesses it to be comparable, it will not step in to declare that Union law is incompatible with the ECHR.

The *Bosphorous* decision has become more significant in view of what is now on the horizon. In much the same way that the Lisbon Treaty has made significant reforms on the criminal justice side, it has also done so in relation to the protection of fundamental rights. In fact, it could be said that the two fields are maturing together. The relevant provision here is Article 6 of the post-Lisbon TEU. One of its consequences is to enhance the legal status of the Union's own Charter of Fundamental Rights so that it now has "the same legal value as the treaties" (Article 6(1) TEU). That means that the Charter is now a justiciable instrument. In keeping with the general doctrine of fundamental rights protection under Union law, the content of the Charter is based upon the Convention, the constitutional traditions of the Member States and other human rights instruments to which the Member States are signatories. Given that list, it will be appreciated that its provisions are more extensive than those of the Convention. For example, Article 49(3) of the Charter provides an explicit right to proportionate punishment, which the text of the ECHR does not. It must be remembered though that the Charter only has purchase in relation to matters that fall within the scope of the EU treaties in the first place. Therefore, the Convention provides more extensive coverage than the Charter does.

The second thing that Article 6 does is to mandate the EU itself to accede to the European Convention on Human Rights (Article 6(2) TEU). Already,

the negotiations to enable this to happen are very well advanced. The trickier problems to resolve are on the Union side, but nevertheless a draft accession agreement has been drawn up. That does not mean, however, that accession is not going to happen overnight. Although few people seemed to notice at first, probably because it is so well buried, Article 218(8) TFEU states that the accession agreement must be ratified by each Member State individually, according to its own constitutional requirements. That means for at least some Member States that it will have to be put to a referendum, something that does not bode well for the completion of the accession process. In recent years we have witnessed quite a number of occasions when national electorates have voted 'no' when asked to endorse treaty changes. And, thanks to the provisions of the European Union Act 2011, which has enacted comprehensive requirements for holding referenda in the UK, the British electorate will now be included among those who have the opportunity to send such a message. Anybody who believes that EU accession is going to happen any day soon is, I think, engaging in wishful thinking.

Overall, there is a significant degree of interaction between the legal orders of the Union and of the Convention, and to some extent they are getting rather closer together. Of course, as part of EU accession, if it happens, a proper arrangement will have to be sorted out between their respective supreme courts: the CJEU, on the one hand, and the Court of Human Rights, on the other. When I last heard, both were resisting the idea that the relationship between them should be committed to a formal protocol. But my knowledge here is a little out of date, and it may be that thoughts have now moved on.

But the Lisbon Reforms are not Unequivocal....

What I have said so far paints an unmitigated picture of progress: rapid proliferation, concentration, intensification of European developments, both on the criminal justice and on the fundamental rights side, all coming together to coalesce into a major body of law. However, this is not entirely representative because there are some equivocal aspects to the Lisbon changes.

One is the introduction of the so-called 'emergency brake' which applies to measures that are based on Articles 82 and 83 TFEU. Article 82 is the provision that governs judicial cooperation in criminal matters and the adoption of further mutual recognition instruments. Article 83 confers competence upon the Union to legislate to approximate criminal offences and criminal sanctions. The emergency brake comes in if a Member State believes that a proposed directive based on one of theses Articles would threaten a fundamental aspect

of its criminal justice system. It may then interrupt the legislative process and the matter will be referred to the European Council - the Union institution that sits at its political summit –for resolution by political and/or diplomatic means. If that is indeed what happens, then the legislative process resumes and all is well. If a resolution proves impossible to achieve within four months, then, provided that at least nine Member States want to go ahead, they can proceed with the disputed measure by means of enhanced cooperation.

Secondly, there is the 'subsidiary check', another post-Lisbon innovation. Under the terms of the Protocol on the Role of National Parliaments in the European Union (Protocol (No.1)), draft EU legislation is now referred to national parliaments for them to check that it is consistent with the principle of subsidiary. The principle of subsidiarity provides that:

> in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5(3) TEU).

Under the terms of a second Protocol, on the Application of the Principles of Subsidiarity and Proportionality (Protocol (No.2)), if a sufficient number of national parliaments object that a proposed measure is inconsistent with subsidiarity, then the Commission must review the draft. Note: this does not necessarily mean that the legislative process will stop. The normal threshold for triggering a review is that a third of national parliaments object; but it is lower in relation to the AFSJ. Only a quarter need object before a review is triggered.

Thirdly, we have the famous 'opt ins' and 'opt outs' and, of course, the UK is the primary culprit in bringing them into existence. We (the UK) have negotiated four sets of special arrangements that are relevant to the criminal justice field. The first relates to the Schengen zone. According to the public face, we do not participate in Schengen. However, under Protocol (no.19) on the Schengen Acquis Integrated into the Framework of the European Union we are able to opt in to Schengen measures, and the reality is that, on the quiet, we have done so in relation to a significant proportion of the Schengen acquis. The parts that we have *not* opted in to are those relating to the relaxation of border controls: the parts that would be very visible if you were moving between the UK and a fully participating Schengen state.

But we have opted in to the criminal justice measures and to the Schengen Information System (the supporting common database).

The second special arrangement concerns the AFSJ Title of the TFEU, the part of the treaty that covers criminal law matters. Under Protocol (No.21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, the presumption is that the UK is not participating in any relevant measures unless it explicitly exercises the right to opt in. So far, even with the complexion our current national government, we have opted in to most measures. A particularly notable exception is the directive that is under negotiation on the right of access to a lawyer in criminal proceedings. The reason for our non-participation is that the draft is too much at odds with the British (English and Welsh?) model of criminal justice. However, we are still 'negotiating hard' with the aim of eventual participation. Otherwise, we have usually participated from the very start, or opted in retrospectively, once it has become certain that the final text is acceptable. This may not match your perceptions from much political discussion.

The third special arrangement concerns the Charter of Fundamental Rights. In this instance we have insisted on a Protocol that declares the Charter has no effects that are outside the normal scope of Union law (Protocol (No.30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom). This is despite the fact that the application of normal Union law principles would lead to this conclusion anyway. The point appears to be to prevent the influence of the Charter from seeping more generally into national law, causing the sort of controversy that is associated with our domestic Human Rights Act. Whether the Protocol has any tangible legal effects is, however, a moot point.

The final special arrangement relates to the five year transitional phase. As I stated previously, at the end of this period the CJEU will assume its full jurisdiction over whatever remains of the pre-Lisbon third pillar law. Hidden away in the Protocol on Transitional Arrangements is a further opt out provision that applies uniquely to the United Kingdom (Articles 10(4) and (5)). At least six months before the end of the transitional phase, so by 31 May 2014, the UK may give notice that it is withdrawing from whatever is left of the third pillar law that has not yet been amended using post-Lisbon powers. That is quite remarkable: no Member State has ever had the right to opt out of parts of Union law like this before.

As the time for making the decision approaches, I think this is going to become very interesting. Not only are the next elections to the European Parliament

due in May/June 2014, but if the Coalition Government at Westminster runs its full course, the next General Election will be but a year away. Therefore, there will be a considerable opportunity for those who are so minded to try to make political capital from the decision. How much that matters of course depends on what is left to opt out from. It could be that 'the rump' of third pillar laws is not very important because all of the significant measures have been superseded by post Lisbon instruments; but perhaps not. Perhaps measures that have a valuable practical purpose will still remain, and we will nevertheless end up opting out of them. Even though we are not precluded from selectively opting back in to any measures that we wish to keep, further political and practical questions are liable to arise in relation to making that happen.

Who is in the Driving Seat?

One of the critical questions that arises in all of this is who is really driving the Union's development of criminal law. Is it right to assert that it is being 'imposed upon us by Brussels', or is the reality rather different from that? During the course of what I have had to say, I have mentioned a number of the EU institutions and I want to examine their contributions a little more closely now, starting with that of the European Council.

As I said previously, this is the institution that sits at the political summit of the Union. It is made up of heads of government and/or heads of state of the Member States and has played an important role in this area because it has taken the lead in agreeing the multi-annual programmes to put the AFSJ in place. As an aside, it has been claimed that the Tampere programme was literally drawn up by the heads of government/state, which explains why it was perceived not to be very well informed about matters of criminal justice. Consequently, when it came to drafting the Hague Programme, the task was assumed by Ministries of Justice and of the Interior to try to ensure that its content was more expertly fashioned (Peers, 2008). Overall, the European Council is strongly intergovernmental in nature; that is, it is identified with the Member States themselves. Therefore, its contribution is shaped by their political agendas and the compromises that are reached between them.

The second institution on the list is the Council of Ministers. It is composed of members of the Executives of the Member States and is therefore also intergovernmental in character. As I mentioned, despite being constitutionally suspect, up until the Lisbon changes, the Council acted as the legislature for the third pillar. Under the post-Lisbon treaties, the legislature with respect

to the AFSJ is usually composed of the Council of Ministers acting jointly with the European Parliament. Added to that, the Council now usually acts by qualified majority vote, whereas previously unanimity was required. On the face of it, these alterations imply that the new treaty arrangements have effected some lessening in the Council's power and influence, and thus some loosening of control by the Member States with respect to the adoption of legislation.

The third institution is the European Commission, the institution that is most strongly supranational in character, as it is charged with guarding the interests of the Union itself. Unlike other policy fields, in that of the AFSJ, the Commission shares its right to initiate legislation with the Member States (at least one quarter of whom must support a proposal to get it on the table). That might suggest some watering down of its normal influence.

However, certainly in the early months after the Lisbon reforms entered into force, rivalry with the Member States seemed to drive a competition to put proposals forward. That fits the general picture, which is that the Commission is proving to be a very enthusiastic and active player in this area. One reason is that the Justice Commissioner, Viviane Reding, who is also the Vice President of the Commission, has visionary ambitions for what the Union can achieve (see, for example, Reding, 2010). In that respect, she has something in common with the Advocate General who delivered the Opinions in *Josemans* and *Tsakouridis*. Overall, there is no doubt that the Commission intends to take advantage of the new treaty settlement in order to exert considerable influence over the development of the Union's criminal law.

Fourth is the European Parliament. Now that it has acquired a formal legislative role, it is on the ascendant in this field. I think it will prove to be quite interesting to see how it uses its newly acquired powers and what consequences this brings.

Lastly, there is the CJEU. It already enjoys its full jurisdiction over measures that have been adopted on the basis of the post-Lisbon treaties; and, as I have mentioned, it will acquire full jurisdiction over what remains of the third pillar at the end of the five year transitional period. Even now, a relatively robust body of case law has built up. As more issues of criminal law come before the Court, its decisions are bound to assume increasing importance; all the more so as its judgments on criminal law start to coalesce with those on Union citizenship and fundamental rights.

From this rapid survey, it can be seen that the constitutional balance at Union level is continuing to evolve. That makes it difficult to assert that any one of the Union's institutions is master of the agenda, but relatively easy to refute the claim that what results is 'imposed by Brussels'.

What Does This All Mean for Scotland?

To begin with it is worth making the basic point that, as a part of the UK, constitutionally speaking, Scotland is bound by the obligation of loyal cooperation under Article 4(3) TEU. Accordingly, all branches of government in Scotland and all emanations of the Scottish state, must implement and apply EU law, including its criminal law.

The UK, as a whole, faces a challenge in relation to the Union's criminal law because it (certainly the jurisdiction of England and Wales) is in a minority of Member States that has a common law based system of criminal justice. There are only four Member States that do, and the other three are small: Ireland, Malta and Cyprus. So, in numbers terms, the common law 'club' is vastly outnumbered by the rest. That means that there are special concerns about getting the 'common law voice' heard, and making sure that the instruments that are adopted are suitable for implementation in the UK. Because of its size, the UK is the leader of the common law group, and is at the forefront of trying to ensure that its interests are accommodated. For example, formal meetings are held between the common law Member States to discuss their shared interests and how best to pursue them. The issue is very much a 'live' one as the decision not to opt in to the prospective directive on access to a legal advice in criminal proceedings demonstrates.

On the other hand, of course, as one of the 'big' Member States, the UK enjoys clout and influence. In this context, I should mention something that I have not had time to discuss at all, which is the so-called 'G6'. It is an arrangement, completely outside the scope of the Union treaties, whereby the six largest EU Member States meet together to discuss its justice and home affairs (the older term for the AFSJ policy field). If I tell you that David Blunkett was instrumental in setting the arrangement up when he was Home Secretary, you will understand that it is been in place for several years now. Apart from the UK, its membership consists of France, Germany, Italy, Spain, and, the most recent addition, Poland. So here is a forum in which the UK can exert influence over the Union agenda and that brings potential for Scotland to benefit.

Reflecting on what I might say at this conference, it occurred to me that Scotland within the UK is, in a sense, a bit like the UK within the EU. You have your own distinct criminal justice system and the task of getting your voice heard in the national context is perhaps not dissimilar to that which faces the UK when it tries to influence the EU's agenda. That led me to wonder whether we could ever see a situation in which, for example, the UK pulled the so-called 'emergency brake' specifically because a measure threatened the Scottish criminal justice system? Or whether the UK Government might ever take the view that it was not going to opt in to a proposed criminal justice measure because of its consequences for the Scottish criminal law? Of course, I do not know the answer to either of these questions. However, the sense that I have from discussions with policy-makers is that it is the English and Welsh perspective that tends to be dominant in defining the UK position. Sensitivity to the potential impact of Union measures upon the other domestic jurisdictions is something of an afterthought.

Were the UK to break up, and Scotland to become independent but remain a Member State of the EU, there would certainly be consequences with respect to criminal law. For example, Scotland would then get the opportunity directly to participate in negotiations towards the adoption of legislation. Even though the smaller Member States (which Scotland would be) sometimes feel that they get trampled on by the larger ones, it would seem surprising if that were not an attractive prospect. Second, if Scotland retained a similar package of opt in arrangements to that which the UK has secured, you would also have the opportunity to take your own independent decisions about whether to participate in the Union's criminal justice instruments. In principle, it would therefore be open to Scotland to decide to become a full Schengen member, for instance; or to opt in to measures in which the rest of the UK was not participating. Third, you would in any event get the opportunity to pull the emergency brake on your own behalf, as that is a right that is afforded to all Member States. Finally, there might be implications in terms of the 'subsidiary check'. It is devolved down to national level, and it is optional whether regional parliaments are asked to participate. Were Scotland to have independence, the Scottish Parliament would automatically participate in this constitutional mechanism as of right.

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The role of the Supreme Court of the United Kingdom

The Lord Rodger of Earlsferry Memorial Lecture

Presented by Lord Hope of Craighead

This lecture is being given in memory of the late Lord Rodger of Earlsferry. The high offices which he held during his lamentably short life were many, but none of them were as significant for the development of our law as those of Lord of Appeal in Ordinary and Justice of the Supreme Court of the United Kingdom. I had the great privilege of working closely with him throughout the ten years that he occupied these offices. It was those years that moulded the role which the Supreme Court now fulfils in regulating the way that the Convention rights are to be given effect in our criminal justice system. It was through him that Europe began to make its impact. I know what held his attention – and what irritated him, for in the nicest possible way like so many very clever men he was often irritated. I also have a good idea of what he would have thought of the McCluskey Group's suggestions for the reform of the Court's role[1] and of Lord McCluskey's criticisms of our decision in the *Cadder* case,[2] although we never got round to discussing them. He died just as the storm was breaking as a result of our judgment in *Fraser v HM Advocate.*[3] In one of my last emails to him I wrote my comment in Latin about what we should expect after it was given: *ruat caelum, fiat justitia*[4] – let the skies fall in, justice must prevail. He did not reply, but I am sure that those words express exactly how he felt. He was not one for making the slightest compromise on the principles that he believed in.

I should like in this lecture, therefore, to trace the development of the Supreme Court's jurisdiction in devolution cases during Lord Rodger's period. That development began, of course, in the comparatively serene confines of the Judicial Committee of the Privy Council in Downing Street – the JCPC as it came to be called in Scotland, although the Law Lords who sat there used to

1 The Group's Final Report was published on 14 September 2011. It can be found at http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf

2 *Cadder v HM Advocate* 2011 SC (UKSC) 13; see Lord McCluskey, *Supreme Error* 2011 Edin LR 276.

3 2011 SC (UKSC) 13.

4 This maxim, which is not attributable to any classical Latin source, is sometimes phrased *"Fiat justitia, ruat caelum."*

refer to it simply as "the Privy". As the Supreme Court inherited the entirety of the Privy's jurisdiction on devolution issues when it was created on the abolition of the appellate jurisdiction of the House of Lords,[5] it will be simpler to think how the Justices in the Supreme Court are regarded now as I trace this development. So from time to time in this lecture I will use the expression "the Supreme Court" to refer to the two institutions collectively.

The main drivers towards the position that we have now reached occurred before the reform that led to the creation of the Supreme Court took place. As this conference is all about the impact of Europe, it is worth noting that these drivers are not to be found in any of the Convention rights. The two pillars on which the Court's jurisprudence rests are to be found in the wording of the Scotland Act 1998 itself. It is section 57(2) of that Act, and the fact that the definition of "Scottish Ministers" includes the Lord Advocate, that has created the situation which appears to have created so much difficulty. But some may see the jurisdiction which the Scotland Act brought into existence as the foundation for a welcome reinvigoration in our system of respect for human rights.

When I cast my mind back to the winter of 1997 when the Scotland Bill was being discussed at the Committee Stage in the House of Lords I cannot recall any mention being made of the effect that section 57(2) was expected, let alone intended, to have on the system for the prosecution of crime in Scotland. Lord Rodger did not take part in these debates as during this period, he was still the Lord Justice General. But I did and so did Lord Clyde, whom Lord Rodger was to succeed as a Lord of Appeal in Ordinary on his retirement in 2001. It was still acceptable in 1997 for the Law Lords to take part in the ordinary business of the House of Lords. That all came to an end in 2000 when the Human Rights Act 1998 came into force and the Law Lords had to be especially careful to be seen to be independent of the legislature, but in 1997 nobody thought that our participation in debates on the Bill was objectionable. I was not present during all the debates, and I may have missed something. But to say that the scene that the legislators had in mind in 1997 has changed would be a massive understatement. The changes that have taken place have been far-reaching and they have been fundamental. And we have lost not only Donald Dewar who was the architect of the Scotland Bill and who would, had he lived, still have had much to say about how the process of devolution should be handled. We have lost Lord Rodger too.

5 Constitutional Reform Act 2005, section 57 and Schedule 10

It was no secret among his colleagues that Lord Rodger did not think much of devolution. He had worked closely with the powers that be at Westminster. He knew how their system worked, and he admired it. Faced with legislation for devolution that he did not much favour, he dug his heels in. He took the legislation literally, warts and all. He relished the contact which devolution issues gave him with Scots criminal law, to which he had devoted so much of his time before he went onto the Bench. But his approach to the legislation was to take the words of the statute as he found them.

As I have already indicated, he was not interested in trying to smooth things out or in compromise. For example, he deplored the phrase "the Scottish Government" as this was not then to be found in the statute. He simply could not bring himself to use it in any of his judgments.[6] And one of the very few occasions when we disagreed with each other in public was in the case of *Martin*,[7] which was about the legislative competence of legislation by the Scottish Parliament which increased the sentencing powers of sheriffs sitting summarily. He analysed the provisions of the Scotland Act about legislative competence with relentless energy and came to a conclusion which the majority of the court could not accept. Lord Walker, who was one of the majority, said that it was important to try and see the provisions in question as part of a rational scheme defining the Parliament's legislative competence.[8] Lord Rodger said in reply that up to then judges, lawyers and law students had had to try to work out what Parliament meant when, in enacting the Scotland Act, it referred to a rule of Scots criminal law that is *"special to a reserved matter*":

> *"That, in my view, is a difficult enough problem. Now, however, they must also try to work out what the Supreme Court means by these words. It is a new and intriguing mystery."* [9]

The role he saw for the Judicial Committee and in its turn the Supreme Court – and it is no secret that he did not think much of the setting up of that institution either – was the role it had been given by words used in the Scotland Act: no more than that, but certainly no less.[10]

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6 See *Martin v Most* 2010 SC (UKSC) 40, paras 85-89

7 *Martin v Most* 2010 SC (UKSC) 40.

8 Ibid, para 52

9 Ibid, para 149

10 See fn 47.

The origin of the jurisdiction that is now vested in the Supreme Court is to be found, of course, in the concept of devolution itself. Central to the whole scheme were to be the limits that the statute placed on the legislative power of the Scottish Parliament and on the powers of the Executive. The impact of Europe was to be found in the provisions that were designed to ensure that these institutions gave effect to the United Kingdom's treaty obligations. They confirmed that the new system was subordinate to Community law. They also confirmed the position that was to be established in domestic law when the Human Rights Act 1998 took effect. Convention rights were to be enforceable in domestic law. In very simple terms, the role of the Supreme Court was to supervise the exercise of their powers by the Parliament and the Executive – but, of course, only when it was called upon to do so.

It has been suggested that the role that was envisaged for the Supreme Court was that of a constitutional court. The McCluskey Group said in its recent report that this was to ensure that the Convention rights were interpreted and understood in the same way throughout the United Kingdom.[11] I think that there was a bit more to it than that. Reading the package as whole, including the provisions that excluded reserved matters from the legislative competence of the Scottish Parliament, the Supreme Court was given a general supervisory role over the entire process. This was to be exercised in a variety of ways – by the scrutiny of Bills prior to their enactment,[12] by appeals in devolution issues from the superior courts and on references from the superior courts and by law officers.[13] These words, as Lord Rodger would insist, were carefully chosen and they must be taken to mean what they said. The functions that these various provisions contemplate are all different. The issues that they gave rise to were likely to be constitutional in nature. But I think that the general idea at the time of enactment was simply that an appeal in a devolution case would ultimately have to be dealt with by the court of last resort in the United Kingdom in the same way as any other kind of appeal. It was, of course, understood that there would be no difference between Scots law and English law as to the meaning to be given to any of the Convention rights. So in that respect decisions of the court of last resort could be expected to iron out any differences as to their meaning that may have emerged in the lower courts.

The body that was entrusted with the ultimate responsibility of determining devolution issues was the Judicial Committee of the Privy Council – a

11 Final Report, para 24.

12 Scotland Act 1998, section 33.

13 Ibid, Schedule 6, paras 10-13 and 33 and 34

comparatively obscure organisation which dealt with appeals from the British Overseas Territories, the Crown Dependencies and several independent states within the Commonwealth. This was thought to be a preferable, and less provocative, alternative to the Appellate Committee of the House of Lords which was too easily identifiable with the Westminster Parliament. But it was to fulfil the same functions as the appellate committee of the House of Lords would have done had it not been open to that objection. So when the Act used the word "appeal" in para 13 of Schedule 6 to the Scotland Act it must be taken to have had in mind the ordinary process of appeal that everyone was familiar with. If the analogy with a constitutional court is meant to suggest that the powers of the court in handling appeals were in some unspoken way limited, Lord Rodger would, I am sure, have rejected it.

It was, of course, never the intention that the Supreme Court should become a court of last resort in matters of Scots criminal law in place of the High Court of Justiciary. The statutory provision that declares that the decisions of that court shall be final and not open to review by any court whatsoever remains unchanged and in full force and effect, just as it always was.[14] But the risk that the Supreme Court might be seen to be entrenching on that court's exclusive jurisdiction in our system of criminal justice was not foreseen. The main area for disagreement between Holyrood and Westminster was thought likely to be about the extent of the reserved matters and the legislative competence of the Scottish Parliament, to which particularly close attention was paid when the legislation was being drafted.

I said earlier that the two pillars on which the Supreme Court's jurisprudence rests are to be found in the wording of the Scotland Act 1998. The first pillar was revealed to us when, in a judgment which he delivered in September 1999, Lord Penrose held in *HM Advocate v Robb*[15] that the tendering by the Crown of the transcript of an incriminating statement made by the accused when he was being interviewed by the police as a detainee under section 14 of the Criminal Procedure (Scotland) Act 1995 was an act of the Lord Advocate within the meaning of section 57(2) of the Scotland Act. Rejecting the Crown's argument that the word "act" in that subsection did not include everything which was incidental to the Lord Advocate's powers, he declared that there was no justification for giving the word a restricted meaning. The word was apt to encompass all actions taken or avoided in the prosecution of

14 Criminal Procedure (Scotland) Act 1995, section 124(2).

15 2000 JC 127.

offences.[16] He referred to Lord Justice General Rodger's observation three months earlier in *HM Advocate v Scottish Media Newspapers Ltd*[17] that, as he was a member of the Scottish Executive, the Lord Advocate had no power to move the court to grant any remedy which would be incompatible with the European Convention on Human Rights. Lord Penrose's declaration was acquiesced in by the Lord Advocate, and it was referred to with approval by the Judicial Committee of the Privy Council in *Montgomery v HM Advocate*, which was the first devolution issue appeal which was heard by that body, with the leave of the Appeal Court, in October of the same year.[18] The huge volume of devolution minutes that soon followed showed how far reaching that declaration was.

Robb does make rather strange reading today, following the Supreme Court's ruling in *Cadder's* case[19] in the light of the ruling by the Grand Chamber of the Strasbourg court in *Salduz v Turkey.*[20] Robb was charged with an assault, and the Crown anticipated that the eyewitness evidence against him was likely to be weak. So the main source of the evidence against him was the admission he made when he was being interviewed while in detention. As the questioning became more penetrating and he was asked why he had nothing to say he responded "I just want to speak to a lawyer". He repeated this response several times. He was told that his lawyer would not be coming, but that he might get access to one when he was arrested. Eventually he began to provide self-incriminating evidence and was then charged. Lord Penrose, who was dealing with the issue at the preliminary stage, left it to the trial judge to decide whether the fairness of the trial would be infringed by the leading of the evidence. He rejected the argument, based on a decision of the Strasbourg court in a case from Northern Ireland,[21] that the concept of fairness in article 6 required that the accused should have the benefit of the assistance of a lawyer at the initial stages of police interrogation. What took place in that case was unsurprising, measured by the standards of those days, and Lord Penrose quite rightly left open the question whether as a result of that interrogation the accused would be deprived of a fair trial. As we now know, however, the position that a detainee was not entitled to access to a

16 Ibid, p 131.

17 2000 SLT 331, p 333.

18 *Montgomery v HM Advocate* 2001 SC (PC) 1, pp 18 and 32.

19 2011 SC (UKSC) 13.

20 (2009) 49 EHRR 19

21 *Murray v United Kingdom* (1996) 22 EHRR 29.

lawyer when being questioned by the police became unsustainable once the ruling in *Salduz* had been given.

The second pillar is to be found in Lord Justice General Rodger's declaration in *HM Advocate v Scottish Media Newspapers Ltd*[22] that, as he was a member of the Scottish Executive, the Lord Advocate had no power to move the court to grant any remedy which would be incompatible with the European Convention on Human Rights. The words "no power" are as absolute as they are uncompromising. Lord Rodger, of course, knew that perfectly well. But he was at pains to point out that this is precisely what the section 57(2) of the Scotland Act itself says:

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

He returned to the issue in *R v HM Advocate*[23] which was a case about the consequences of the Lord Advocate's failure to bring proceedings within a reasonable time. He put the point this way:

> *"The conclusion must therefore be that, whenever a member of the Scottish Executive does an act which is incompatible with Convention rights, the result produced by all the relevant legislation is not just that his act is unlawful under section 6(1) of the Human Rights Act. That would be the position if the Scotland Act did not apply. When section 57(2) is taken into account, however, the result is that, so far as his act is incompatible with Convention rights, the member of the Scottish Executive is doing something which he has no power to do: his 'act' is, to that extent merely a purported act and is invalid, a nullity. In this respect Parliament has quite deliberately treated the acts of members of the Scottish Executive differently from the acts of Ministers of the Crown."*

One hears the complaint from time to time that the devolution system places Scots criminal law at a disadvantage as compared with other parts of the United Kingdom as the Lord Advocate has no power whatever to act incompatibly with the Convention rights, whereas elsewhere an act of the prosecutor which

22 2000 SLT 331, p 333.

23 2003 SLT 4, para 128.

is not open to this very precise and prescriptive objection. There is force in this complaint, as a violation that occurs in England and Wales or Northern Ireland will be unlawful under the Human Rights Act[24] with the result that the court can grant such remedy or relief as it considers appropriate,[25] but the act which gave rise to it is not a nullity. Should we have not followed that approach in Scotland? To them Lord Rodger's reply would simply be: look at section 57(2) and see what it says – tell me how it can be said to mean something else. There was, of course, no answer to his unflinching logic.
The effect of the rulings in *Robb* and in *Scottish Media Newspapers Ltd* has been to focus attention on the concept of a fair trial, and what in that respect article 6(1) of the Convention guarantees, in a way that in 1997 was quite unforeseen. But we are where we are, and their effect has been to bring before the criminal courts very many so-called devolution issues where it is contended that the prosecutor has no power to do this thing or the other and that as a consequence the proceedings should be stopped or a conviction set aside. It has been suggested that the Supreme Court, which is the final port of call for issues of that kind under the Scotland Act, has been routinely interfering with Scottish legal system. In fact the devolution cases that have reached the stage of a hearing in the Supreme Court are, in comparison to the whole, very few: a tiny tip of a very large iceberg. Much more often, where we have been asked to give leave because leave to appeal was not given by the Appeal Court, we have refused to give leave.

I do not have figures for the entire period since the start of the system in the JCPC, but we have refused leave in 19 cases since the jurisdiction in devolution cases was transferred to the Supreme Court in October 2009 and given leave in only two. Only 29 cases in all have gone to a full hearing since the jurisdiction was introduced 12 years ago: 14 of them with leave given by the Appeal Court, six of them on references by the Appeal Court or by the Lord Advocate and nine in which we gave leave to appeal. This is an average of about two and a half devolution cases heard a year. As one would expect, all of these cases raised very significant issues. If that were not so, they would not have been given leave or referred to us to consider. It is worth repeating that in the majority of cases that have been taken to a full hearing it was the Appeal Court in Edinburgh that gave leave or sent the case to us on a reference. We have disagreed with the Appeal Court on the question of leave on only nine occasions since the jurisdiction came into operation in 1999

24 Human Rights Act 1998, section 6(1).

25 Ibid, section 8(1).

(*Holland,*[26] *Sinclair,*[27] *Kearney,*[28] *DS,*[29] *McDonald,*[30] *Burns,*[31] and *Allison*[32] in the JCPC and *Cadder*[33] and *Fraser*[34] in the Supreme Court) and in 4 of these cases (*Kearney*, *DS*, *McDonald* and *Allison*), after hearing the argument, we dismissed the appeal.

Two themes in particular stand out. One is disclosure. That is what a sextet of these cases – *Holland* and *Sinclair*, *McDonald* and *Murtagh*[35] and *Allison* and *McInnes*[36] – were all about. The other is the right of access to a solicitor when being questioned by the police. This to be found in *Cadder* and what have been referred to as "the sons of *Cadder*" cases. They are concerned with the circumstances in which the right of access to a solicitor exists when the accused has not yet been detained in a police station and the circumstances in which that right can be shown to have been waived. We have dealt with the cases in the first group.[37] We will be issuing our decision in the group of cases about waiver[38] next week. It is remarkable that by the use of the devolution issue mechanism, which relies of course on Strasbourg case law, Scots practice on both of these issues is being brought into line with what the position has been in England and Wales for decades. I do not think that either of us would have been attracted to that result had it not been for the influence of Strasbourg. As Lord Rodger said in *Murtagh,*[39] it is no part of the Supreme Court's functions to keep English and Scottish procedures in alignment. There have long been substantial differences between them which in general have caused no particular difficulty, since the aim of suppressing crime and punishing criminals throughout the United Kingdom can be achieved by the two systems working in parallel[40]40. But when the Strasbourg cases came

26 2005 1 SC (PC) 3.

27 2005 1 SC (PC) 28.

28 2006 SC (PC) 1.

29 2007 SC (PC) 1.

30 2010 SC (PC) 1.

31 31 2010 SC (PC) 26.

32 2010 SC (UKSC) 19.

33 2011 SC (UKSC) 13

34 2011 SC (UKSC) 13.

35 2010 SC (PC) 39.

36 2010 SC (UKSC) 28.

37 *Ambrose v Harris* [2011] UKSC 43; *H M Advocate v P* [2011] UKSC 44.

38 *McGowan v B* [2011] UKSC 54; *Jude v HM Advocate* [2011] UKSC 55.

39 2010 SC (PC) 39, para 46.

40 See *Burns v HM Advocate* 2010 SC (PC) 26, para 19, per Lord Rodger.

to be studied in the Supreme Court the conclusions that they led to were irresistible. It has been the impact of Europe that has brought this about.

The development of the law about disclosure was, as Lord Rodger put it in *Murtagh,*[41] a long-running saga. It really began with an announcement by the Solicitor General in the High Court of Justicary in *McLeod v HM Advocate (No 2)*[42] that the Crown would no longer make a claim for confidentiality for police statements of Crown witnesses. This engaged Lord Rodger's interest as a former Law Officer and Lord Justice General. The matter then proceeded step by step through the series of decisions in which he took part, assisted by a careful review conducted by Lord Coulsfield[43] and by the active co-operation of the Crown Office as it reformed its practice under the leadership of the then Lord Advocate, Dame Elish Angiolini. The presentation of the Crown's position to the Supreme Court in *Murtagh* by the then Solicitor General, Frank Mulholland, now the Lord Advocate, was a model of clarity and fairness. There is a diminishing backlog of cases under the old system which still have to be sorted out. But I think that we have ended up with a system of disclosure which, taken overall, is both fair and workable. Lord Rodger's contribution to this exercise was uniquely valuable. His insight into the workings of our prosecution system inspired confidence in all of us throughout this exercise.

The decision in *Cadder* is so well known that I need say very little about it. In his introduction to his Review was published last Thursday[44] Lord Carloway said that it was a serious shock to the system. No-one could disagree with that, or with his comment that there is an acute need to ensure that, so far as possible, the system is not vulnerable to further upheaval as a result of a single court judgment. I would like to take this opportunity of paying tribute to the outstanding work which he and his Review team have done to measure up to that challenge. Some of their recommendations are controversial, as one would expect. Others are plainly very sensible and, one might even say, obviously overdue. Whatever one thinks of *Cadder*, it can at least be said that our decision in that case has proved to be a catalyst – a catalyst for identifying and putting into effect changes to ensure that, as Lord Carloway himself as put it, the system of criminal justice in Scotland fully embraces and applies a human rights based approach.

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41 2010 SC (PC) 39, para 46.

42 1998 JC 67.

43 *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (August 2007).

44 *The Carloway Review*, 17 November 2011.

Lord McCluskey has been much less tactful. He has described the decision in *Cadder* as "flawed, mistaken and misconceived".[45] In the evidence that he gave to the Scotland Bill Committee in the Scottish Parliament on 1 November 2011 he said that it was "a wrong and bad decision."[46] As Lord McCluskey sees it, the Supreme Court should have followed the example it set in *R v Horncastle.*[47] In that case, which was an English appeal, a court of nine Justices refused to apply a decision of the Strasbourg court called *Al Khawaja*[48] in which that court held that a conviction which was based solely or to a decisive extent on hearsay evidence was an infringement of the right to a fair trial. The Supreme Court thought that this was one of the rare occasions when the domestic court had legitimate concerns as to whether the Strasbourg court had sufficiently appreciated or accommodated particular aspects of our domestic system.[49]49. The question was whether the regime for the use in an English criminal trial of hearsay evidence of a witness who had died or was absent due to fear for her safety which had recently been enacted by Parliament,[50] after consideration of the issue by the Law Commission, would result in an unfair trial. Lord McCluskey's point is that we should have followed that example and refused to apply *Salduz* in the *Cadder* case for all the reasons that the Appeal Court gave when the same issue was before it in the seven judge case of *McLean.*[51]

Lord Rodger, to whom that criticism is directed as well as me, would have had none of that. The situation that the court was faced with in *Cadder* was entirely different. *Salduz* was a unanimous decision by the Grand Chamber. *Al Khawaja* was a decision of the Fourth Section, so it was quite reasonable for the court to be asked to think again. That was not so in *Cadder*. Sir Nicolas Bratza, the United Kingdom judge on the court in *Salduz*, made it clear in his joint concurring opinion that he did not think that in that case the Grand Chamber had gone far enough. The fact that there was already a right of access to a lawyer under statute in each of the other parts of the United Kingdom would also have made the position that would have had to have been adopted on our behalf very difficult. As Lord Rodger put it in his judgment, there was not the slightest chance that Strasbourg would have

45 *Supreme Error* 2011 Edin LR ...

46 The Scottish Parliament, Official Report Debate Contributions, 1 November 2011, p 12 of 58.

47 [2010] 2 AC 373.

48 *Al Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

49 [2010] 2 AC 373, para 11, per Lord Phillips of Worth Matravers

50 Criminal Justice Act 2003, section 116.

51 *HM Advocate v McLean* 2010 SLT 73.

found that, because of the protections in the Scottish legal system, it was compatible with the Convention rights to omit that safeguard.[52] We were, of course, referred to *Horncastle*.[53] Indeed three of the seven Justices in *Cadder* sat on that case too,[54] and we were all very familiar with it as it had given rise to so much discussion in the court. Needless to say, Lord McCluskey sat on neither of these cases. He is entitled to his views, of course. But Lord Rodger would have rejected utterly the idea that our decision in *Cadder* was misguided and misconceived.

Sir Nicolas Bratza took part in a seminar which was held in the Advocates Library in Edinburgh in March 2011 at which *Cadder* and its implications for the Scottish legal system were discussed. He said in his paper that, as President of the Grand Chamber in *Salduz*, he had to accept at least part of the responsibility for that judgment but that he found it difficult to accept some of the criticisms that have been made of it.[55] He went on to say this:

> *"The fact remains that it was judgment which was a foreseeable development of the Court's more recent case-law; it was a judgment which was consistent with contemporary standards in the procedural protection of those suspected of a criminal offence; and it was a judgment supported by the practice in a substantial number of Member States, including, as is pointed out by the Supreme Court itself, in the jurisdiction of England and Wales."*

This is as powerful an endorsement of Lord Rodger's appraisal of the situation as one could wish to find. Sir Nicolas Bratza was recently elected by his colleagues to be the President of the Strasbourg court. His view, surely, must finally put to rest the idea that the decision in *Cadder* was wrong because a different ruling could have been obtained from Strasbourg. The Supreme Court is, of course, well aware that each decision that comes from Strasbourg needs to be examined very carefully to see whether it is directed to its own facts or is laying down a fundamental principle, and if it is the latter whether there is room for us to decide not to follow it. *Salduz* was simply not a case of that kind.

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52 2010 SC (UKSC) 13, para 93.

53 See para 45 of my judgment.

54 Lords Brown, Mance and Kerr.

55 *The Relationship between the UK courts and Strasbourg* (2011) EHRLR 505, p 510.

I should make it clear that the results that Lord Rodger and I arrived at in these cases were not dictated to us by our English colleagues. They agreed with us, but it was the two Scots Justices who took the lead and our colleagues were content that we should do this. In some of the earlier cases which raised other issues Lord Bingham wrote the leading judgment.[56] He had a particular interest in the law relating to Convention rights and on almost every issue we welcomed the contribution he made. More recently our English colleagues have supported the Scottish Justices in resisting a more expansive interpretation of the jurisprudence of the Strasbourg court that has been urged on us by one of our number than that which Lord Bingham's approach in the well-known case of *Ullah*[57] would seem to justify. It has been suggested that we should lay down what would appear to be inescapable rules for the conduct of interviews in the police station – "an indispensible pre-requisite", as it has been put[58] – rather than to allow the current procedures and any improvements that may be made to them to be assessed in the broader context of whether there has been a fair trial. I have been determined to resist that approach. It is not only that for us to lay down rules would create the same kind of upheaval that *Cadder* gave rise to, because of the prescriptive nature of section 57(2) of the Scotland Act. It also would run contrary to Lord Bingham's view that, while it is open to member states to provide for rights more generous than those guaranteed by the Convention, such provision should not be the product of interpretation of the Convention by national courts. Strasbourg itself too is quite cautious about this. Sir Nicolas Bratza said in his Edinburgh paper that it has been careful, in general, to leave the national authorities to devise a more Convention-compliant system without itself imposing specific requirements on the State.[59] The words "in general" acknowledge, as *Salduz* itself shows, that there will be exceptions to that approach. The Supreme Court should, I believe, be no less careful in the way that it deals with the Scottish system.

We have not had the benefit of Lord Rodger's views on this most recent debate. But I am confident that he would not have wanted to impose indispensable rules on this area of our practice unless they were to be found to have been clearly stated in the jurisprudence of the Strasbourg court. To do that, as he said in one of his unpublished lectures, would be to introduce under the guise of applying the Convention rights freestanding rights of the court's own creation. That is not the function of the judges under the Scotland Act.

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56 *Eg Brown v Stott* 2001 SC (PC) 43; *Dyer v Watson* 2002 SC (PC) 89.

57 *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 423, para 20

58 *Jude v HM Advocate* [2011] UKSC 55, para 53.

59 fn 48, p 510.

We had a narrow escape on the issue of time limits. English law has always taken a more relaxed view than we have of the potential injustice of holding people of custody for long periods while awaiting trial. Our 110 day rule, which has of course been modified to some degree, would have been quite impossible for them to live with due to their backlog of cases and what appears to us here to be the rather leisurely way cases proceed to trial in that jurisdiction. The issue came before us in the case of *R v HM Advocate*[60] which I have already mentioned, when the three Scots – Lord Clyde, having recently retired, was sitting with us on that case – disagreed with Lord Steyn and Lord Walker. As Lord Rodger explained,[61] the appellant was using the power given to him by the Scotland Act to rely on his rights under article 6(1). More particularly, he was trying to show that the Lord Advocate's act in continuing to prosecute him was incompatible with his right to have the charges in the indictment determined within a reasonable time. If he could show that, then section 57(2) provided that the Lord Advocate had no power to continue to prosecute them. His act was not just unlawful. He had no power to do it at all.[62] Lord Steyn's view was that he did have that power if a fair trial was still possible, and that the remedy which the appellant sought, which was a declaration that the charges could not proceed to trial, was not the appropriate remedy. When the same issue came before the House of Lords in an English appeal in which Lord Bingham delivered the leading judgment[63] we were predictably outnumbered by 5 to 2. It seemed to be only a matter of time before the issue was brought back as a devolution issue where, without a third Scottish judge, we would be almost certainly in the minority again. When the issue did come back,[64] however, by a lucky chance Strasbourg had spoken[65] – in favour of the English view that it would not be incompatible with the appellant's Convention rights for the Lord Advocate to continue to prosecute him if a fair trial was still possible.[66] So we were able to agree as to the result that Lord Steyn had argued for without embarrassment.

During this period we have been keen to stress two things. The first is the limited nature of our jurisdiction. I started the process right at the beginning

60 2003 SC (PC) 21.

61 Ibid, para 124.

62 Ibid, para 128.

63 *Attorney General's Reference* (No 2 of 2001) [2004] 2 AC 72.

64 In *Spiers v Ruddy* 2009 SC (PC) 1.

65 *Kudla v Poland* (2002) 35 EHRR 11; *Zarb v Malta* (Application no 1663/04), 4 July 2006.

66 See 2009 SC (PC) 1, para 22.

in *Montgomery v HM Advocate*[67] in which I rather boldly told my colleagues that they would have to get used to the Scottish way of doing things. What I said then has probably been forgotten. But more recently, as much to reassure the judges in Edinburgh as to put down a marker for my colleagues, I have gone out of my way to stress that it is not part of our function to adjudicate on issues of Scots criminal law. I said that the court must be careful to bear in mind that the High Court of Justiciary is the court of last resort in all criminal matters in Scotland, and that when the Supreme Court is dealing with questions of that kind it is the law of Scotland that must be applied.[68] Lord Rodger did not make the same point in so many words in any of his judgments, but in another of his unpublished lectures which he gave in October 2005 on the fifth anniversary of the coming into force of the Human Rights Act 1998 he said:

> *"There could well be situations where, according to the rules of Scottish procedure or evidence, one could say that the actings of the Crown had made the trial unfair, but where there would be no breach of the right to a fair trial according to the criteria embodied on article 6 of the Convention. In such a case the allegation that the actings of the Crown had made the trial unfair would not, as it seems to me, raise a devolution issue and the Privy Council would have no role to play."*

The second thing that we have stressed is that if we are entirely satisfied that the trial is unfair for a Convention reason the conviction must be quashed. This was something about which Lord Rodger felt particularly strongly. In the same lecture he said that in considering whether a trial had been fair in terms of article 6, the violations, if any, had to be taken together and their total impact on the trial assessed. Sometimes however an individual breach would be so obviously fundamental as, *ipso facto*, to make the trial unfair. Having given some, admittedly rather extreme examples, he said

> *"If such a violation occurred, leaving aside the position in domestic law, it would amount to such a fundamental breach of the right to equality of arms under article 6 that the accused would not have had a fair trial in terms of article 6. Any conviction would obviously have to be quashed."*

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67 2001 SC (PC) 1, pp 12-13.

68 *Robertson v Higson* 2006 SC (PC) 22, paras 5 and 6; *McInnes v HM Advocate* 2010 SC (UKSC) 28, para 5; *Fraser v HM Advocate* 2011 SLT 515, para 11.

He went on to say that any such case would be wholly exceptional. But his theme was that if, for whatever reason, the trial is unfair, then the conviction *must* be quashed. As he put it:

> *"That is said in Holland and Sinclair, if a little sotto voce."*

We both knew that the Supreme Court's decision to quash the convictions in those cases was not well received in Edinburgh. But there is no doubt that Lord Rodger would not in the least have been put off by that. They were, as already mentioned, cases where the Crown had failed to disclose material that ought to have been disclosed to the defence. In *Holland* the Appeal Court had dismissed the appellant's appeal on the devolution issue and in *Sinclair* it had dismissed his devolution minute. Leave to appeal to the Supreme Court had been refused in both cases, and they had come before us not as references but as appeals. As Lord Rodger had observed,[69] the Judicial Committee had been given by statutory instrument all the powers of the court below in devolution cases.[70] He saw no reason why they should not be exercised as, in his opinion, the Appeal Court would have been bound to set the conviction aside if the case had been returned to it. He took the same view of the procedure that the Supreme Court should adopt in the case of *Fraser.* His response to anyone who objected to this was simple. The Supreme Court had been given those powers and, in a case where it was satisfied that the trial was unfair, it should not hesitate to exercise them. As he put it to me when we were discussing what we should do in *Fraser*, any other course could be taken as suggesting that the trial had been fair after all. He was firmly of the view that we could not avoid saying that there was *a real possibility*, having regard to the way that trial was *actually* conducted, that the jury would have arrived at a different verdict if the material had been disclosed. That led logically to the conclusion that there was a miscarriage of justice and that the conviction should be set aside.

This brings me to the recommendations of the McCluskey Group. As I said at the beginning, I have a good idea what Lord Rodger would have thought of them. For obvious reasons I do not wish to put my own views on record, but I can tell you what I think his views would have been. He would, of course, have welcomed the Group's acknowledgment that the Supreme Court should continue to have a role in devolution issues relating to the powers of the Lord Advocate. But I think that he would have wanted to resist the two qualifications that the Group wishes to make: that the Supreme Court should

69 *Holland v HM Advocate* 2005 SC (PC) 3,. para 86.

70 The Judicial Committee (Powers in Devolution Cases) Order 1999 (SI 1999/1320).

be a court of reference only on devolution issues and not a court of appeal, and that it should be a pre-condition of leave to appeal to the Supreme Court that there should be a certificate as is the case for criminal appeals from the other parts of the United Kingdom. But I think that he would have been more concerned about the effects of certification.

It is true that the devolution system laid down by the Scotland Act 1998 has been more invasive than was anticipated. But whether this has been a good or a bad thing depends on your point of view. It all depends on where your priorities lie. If your priority is to protect the integrity of the Scottish system, then the more protections there in place the better. But if your priorities are those which the European Convention had in mind when it was formulated, the balance may well tilt the other way. One has to wonder, Lord Rodger would have said, if the McCluskey Group's proposals had been in place from the beginning where we would be now. The probability is that the impact of Europe on the criminal justice system would have been much less. It is unlikely that the disclosure cases would have been certified. In both *Holland* and *Sinclair* leave to appeal was refused. It is certain that *Cadder* would not have been certified standing the decision of seven judges in *McLean*. *Fraser* would not have been certified either. And we would not have had the Carloway Review. One has to bear in mind too that one of the most striking features of the Convention is that the rights which it describes are given to everyone. Even, if I may coin a phrase, to *"the vilest people on the planet."*[71] There are dangers in reducing the procedural protections against the risk of an unfair trial that presently exist. It is not obvious that they will be strengthened if the Group's recommendations were to be put in place and subjected to the test of general public importance. The record to date suggests that the protections might well be less strong than they are at present. Going to Strasbourg for, at best, a finding that there has been a violation of a Convention right is really no substitute for what it has been possible to achieve for the individual under the present system. You may think too, in the light of the figures I gave earlier, that the suggestion that the Supreme Court's jurisdiction is interfering too frequently has been somewhat exaggerated.

There is one more point. Much has been made of the perceived unfairness produced by the lack of a certification system when such a system is in place in the other two jurisdictions. But the comparison is not as sound as has been

71 A phrase used by the First Minister, Alec Salmond MSP, in an interview in the *Holyrood* magazine in June 2011 to describe those who were claiming compensation for slopping out and who stood to benefit from the decision of the House of Lords in *Somerville v Scottish Ministers* 2008 SC (HL) 45 on the issue of time limits.

suggested. There is an unrestricted right of appeal to the Supreme Court in those other jurisdictions, subject only to the requirements of leave and certification. In our case there is no right of appeal at all except in devolution issue cases. And, more fundamentally, there is none of the feeling of antipathy to cases being sent to London that lies just below the surface here. This phenomenon, which applies whether the case is civil or criminal and which Lord Rodger described as a corrosive anti-English sentiment, is not present elsewhere. If one is frank, and Lord Rodger would be just that if he were here, that sentiment can be a real obstacle to progress.

Leaving these contentious issues aside, there is much to enjoy in Lord Rodger's judgments. He was deeply interested in the history of our criminal justice system, and he took obvious pleasure in exploring it and describing it for us as he reasoned out his opinions. There is a rich vein of scholarship there which ought not to be overlooked. His discussion in *Cadder*[72] of the long pedigree in Scots criminal law of the issue whether legal advice should be available to suspects being questioned about an offence is just one example, among many more. It was typical of him that, once he was engaged with a subject, his restless enthusiasm for research found its way into his judgments too. We have the influence of Europe to thank for the fact that, even after he had moved to London, he was still able to work in this field and tell us what he thought about it. It goes without saying that his contribution to the work of the Court is sorely missed. But I think that we can feel that the main steps forward that had to be taken have been taken. The pattern of our jurisprudence has been settled, and so have the tests that have to be applied. That is not to say that there is no more work to be done. But the path should be easier from now on. We must all be grateful to Lord Rodger for all that he has done to point us in the right direction.

72 2011 SC (UKSC) 13, paras 73-86.

Criminal Law in Scotland post-Cadder: Are Human Rights Really Coming Home?

Presented by: John Scott
QC Solicitor Advocate

In an earlier time of some excitement and considerable promise, a newly elected Government offered up the prospect of a homecoming for human rights. That this was only 14 years ago staggers me, given the packed and often troubled history of human rights here since then. In particular, the track record of that particular Government adds an unwelcome element of irony to its orchestration of the homecoming. Instead of the open and welcoming arms of the father of the prodigal son, we soon started to see the bitterness of the prodigal's brother at the special treatment of his undeserving sibling. By 2011, and perhaps especially in Scotland, the homecoming had developed into the full-blown trial of Martin Guerre with a determination to expose the guest as an imposter who had deceived his way into our community.

As usual, when it comes to discussion of the treatment of human rights by Governments, politicians, the media and sometimes even the courts, I am starting to sound gloomy again. If human rights conferences can be equated to the BBC's Dad's Army, and in many ways, with no offence intended, I think they can, then I am a natural Private Fraser.

That this conference should take place in the immediate aftermath of the publication of Lord Carloway's Report has, however, caused me to pause. I am not yet sure whether to abandon gloom and embrace cheer. The timing of today's conference could certainly not be better and the Carloway report is a near-perfect book-end to my talk today, albeit one of such potentially huge significance that I may have to mention it even though I am still trying to take it all in. Along with the *Cadder* case and its fallout this report has such implications for the landscape of criminal justice in Scotland that we seem to have been unwitting victims of the Chinese curse about living in interesting times.

First, a very potted history of ECHR in Scots law.

Human Rights in Scotland Pre-Scotland Act

Human rights in Scotland came into sharp focus because of the way they were built into the constitutional framework in the Scotland Act. Things started promisingly. This was undoubtedly easier because of the extremely unreceptive attitude towards ECHR pre-Scotland Act. I am thinking, in particular, of what Lord Ross said in *Kaur v Lord Advocate* (1981SLT 322) - that the Convention was irrelevant in legal proceedings unless and until its provisions had been incorporated or given effect to in legislation and therefore the court was not entitled to have regard to it either as an aid to construction or otherwise. It might be thought that there has been more to this type of Scottish approach than just barely concealed hostility. I think it is possible on occasion over the passing years to detect an underlying superiority complex. As ever, it probably didn't help that the Convention was explicitly a European treaty. The extreme view expressed in *Kaur* softened over time and, even before the Scotland Act, by 1999 the Convention was being expressly considered.

On the civil side in 1996 we had *T Petitioner* 1997 SLT 724 (re gay adoption) where Lord Hope, then Lord President, appeared to depart from the earlier antipathetic approach, and on the criminal side we had *McLeod Petitioner* 1998 SCCR 77 (a decision from late 1997 which is still the leading Scottish authority concerning disclosure) in which Lord Justice General Rodger said:

> "*In seeking to formulate the approach of our law we may, however, look at the decisions of the Strasbourg court just as we look at the decisions of any other court of authority to see what persuasive effect they may have.*"

The Scotland Act and Human Rights – a good start

The first bite of the Scotland Act came over 12 years ago on Law Officers Day. Indeed the very first human rights or devolution issue surfaced later that same day. On the criminal side this gave us an earlier exposure to devolution issues than in the civil courts where the HRA did not come into force until roughly 18 months later.

In relation to the article 6, the right to a hearing within a reasonable time, we had for a while in Scotland a situation where the courts enforced this with an interpretation which actually brought to an end prosecutions which failed to meet that requirement. On occasion our judges used it to do justice even more

enthusiastically and it was possible to see them using ECHR to try to drive up standards, especially on the part of the police and the Crown.

There are many who think that the Scotland Act also allowed ECHR considerations to help our courts blow away some obstructive cobwebs which had developed over a number of years. In particular it was used as a significant tool for enforcing Crown accountability. It helped us to move further away from the idea of sole reliance on the Crown as arbiters of almost everything. An example of this is *Burn Petitioner* 2000 SCCR 384 which considered a 1995 decision of Lord McCluskey and overruled it. The case concerned bail being opposed by the Crown on an unvouched assertion that further enquiries would be impeded if the accused were to be released. Lord McCluskey had said "*In my view the proper course for me to take is to accept the Crown's assertion without attempting any further enquiry"*. This approach seemed rooted in another time and was wholly out of step with the idea of meaningful judicial scrutiny.

The Scotland Act quickly allowed that view to be challenged and, as a consequence Lord Rodger said –*"in future the Crown must provide sufficient general information relating to the particular case to allow the sheriff to consider the merits of their motion that the accused should be detained."*

A similar approach was taken in relation to the scrutiny given to the grant of warrants.

One high-point for ECHR in Scottish courts came in the case of *Brown v Stott* 2000 S.C.C.R. 314 which dealt with section 172 of the RTA 1972 and the requirement to name the driver at the time of a suspected offence. It was held that, as the appellant was subjected to compulsion to make an incriminating reply under threat of being found guilty of an offence and punished with a fine, and the Crown proposed to use the evidence of the answer given by her as a significant part of the prosecution case against her at her trial, the use the Crown proposed to make of her answer would offend her right not to incriminate herself, which was a constituent element of the basic principles of fair procedure under art.6(1).

In the High Court Lord Justice-General Rodger said: "*The right of silence and the right against self-incrimination are not lately minted. In Scots law, for instance, a right against self-incrimination was recognised in 'capitall crymes' in the Claim of Right 1689.*"

You could almost sense the judicial pride in being able to point this out. This was the real Martin Guerre. Rights had indeed come home. How long they would be staying was perhaps another matter.

It is ironic, given recent complaints about its jurisdiction over Scots law, that it took the JCPC to uphold a Crown appeal and restore the position in Scotland, thereby ensuring the admissibility of the replies given to such RTA requirements.

Wait a Wee Minute

And then the judges seemed to tire of this new tool. Bringing prosecutions to an end seemed like an excessive response in some cases. And, as a living instrument, the Convention was growing. The European Court was still developing its own jurisprudence. And our judges seemed to increasingly resent the suggestion that our system was lacking in any way.

Judicial impatience increased when it came to Devolution Issues and ECHR generally. That impatience has not really gone away.

Robertson and Gough v McFadyen 2008 SCCR 20
This is the 5 judge case relating to contempt of court. Mr. Gough is more often referred to as the Naked Rambler.

> Lord Justice Clerk Gill
> *Article 6 and the common law of Scotland*
>
> [*64] Counsel for the petitioner and the complainer has based his submissions on article 6. He has made only passing reference to the common law. It seems at times that contemporary practitioners believe that the Convention introduced the principle of fair trial into Scottish criminal procedure. Scottish criminal procedure is founded on that principle. It is the duty of this court constantly to reassess what fairness requires and to re-examine the presuppositions on which existing rules and practices are based. Where it is recognised that an accepted aspect of procedure is unfair, this court puts the matter right...*
>
> Lord Johnston
> *[109] ...Continued references in this context to Article 6 to my mind are both meaningless and superfluous.*

Poor Pleaders

Since May 1999, many cases have involved Devolution Issues being lodged – certainly tens of thousands. Often the relevant minutes have not been lodged in accordance with the rather byzantine rules in the Act of Adjournal. This offers sceptical sheriffs and judges their first opportunity to decline to consider the merits of even sound arguments. On the other hand, and most unfortunately, many cases involve the use of devolution issue minutes as a prop for poor or non-existent arguments. ECHR implications have often not been properly understood and equally often not properly argued. There is a recent example in the case of *King v PF, Dunoon* [2011] HCJAC 109 where Lord Bonomy said:

> *[22].... The very reference to article 10 in the context of this case is an example of the sort of thoughtless reliance upon the Convention that has brought it into disrepute in the minds of many.*

Unless cases are pled better and with greater consistency we can expect similarly unimpressed Judges year on year. And even then we may continue to feel a backlash against outside interference, whether European or from London.

UK Supreme Court and Cadder

Which brings us to the other side of the devolution issue equation - the Supreme Court. In particular it brings us to the *Cadder* case. There is a question as to whether murmuring judges is still a criminal offence but, fortunately for some of our Ministers, even if it is, prosecutions no longer occur.

Perhaps even more fortunately for them they murmured judges whose jurisdiction in Scottish criminal cases isn't terribly popular with some. Some of the comments have been offensive and personal, with a suggestion that the Court's knowledge of Scotland is based on attending the Edinburgh Festival. He may not remember it now but the First Minister suggested that the Scottish decisions of the Supreme Court are the work of Lord Hope alone who, he suggested, seemed intent on dismantling our distinctive characteristics while ignoring the views of the majority of Scottish Judges in the High Court - *"It boils down to the potential replacement of Scottish law by Lord Hope's law. I don't think that's a satisfactory situation."*

The most sinister remark was the CSJ's suggestion of withdrawing Scottish funding for the UKSC – *"he who pays the piper calls the tune."*

Unfortunately the contributions from our Government generated a blinding amount of heat, thereby masking the possibility of sensible discussion about improvements to the workings of this jurisdiction and the development of human rights through our courts. Things have calmed down quite a bit since then, although several opportunities for apologies have been ignored.

It was perhaps unfortunate for the UKSC that it had to consider the *Cadder* case. The court's decision saw Scotland brought into line with the rest of Europe in terms of solicitor access for suspects at police stations – something we didn't have as a right despite almost everyone else having it and there being no good reason to exempt us from its protection. A bench of 7 judges of the High Court in Scotland had considered the ECHR case of *Salduz* and decided that it didn't apply to us because of 15 other safeguards here. In October 2010 the Supreme Court merely pointed out the inevitable, that we were not immune from such international developments, regardless of how fair we might be in other ways. Lord Hope said:

> *"There is no doubt that a ruling that the assumption* [i.e. that admissions made by a detainee without access to legal advice during his detention are admissible] *was erroneous will have profound consequences. But there is no room, in the situation which confronts this court, for a decision that favours the status quo simply on grounds of expediency. The issue is one of law, as the court appreciated in McLean. It must be faced up to, whatever the consequences."*

There have been many criticisms of the *Cadder* decision. I believe that they overlook the truly determinative effect on a whole prosecution of what might be said by a suspect at the outset, when he is probably at his most vulnerable.

There have been significant ripples from *Cadder*, but these could have been mitigated if matters had been approached differently before the case got to the UKSC. After *Cadder* the Government started jumping up and down again because of the UKSC decision in the *Fraser* case. If you look at the case you will see that some crucial evidence was not disclosed to the defence. Our High Court decided that it didn't matter. The Supreme Court said that the

Crown's failure to disclose meant that the trial was unfair. Hardly startling you may think, but again it took the Supreme Court to point out what many in the legal profession thought to be obvious.

Post Cadder

The *Cadder* decision was handed down on 25th October 2010. After thorough deliberation and detailed consultation the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 was passed 48 hours later on the 27th October and brought into force on 29th October. Sometimes emergency legislation is actually necessary. Many were unconvinced that this was such an occasion. Allowing access to a solicitor was clearly necessary although this was already being achieved through the Lord Advocate's Interim Guidelines which were introduced in the summer of 2010 in anticipation of the UKSC decision. Maximum detention times of 6 hours were immediately doubled with the possibility of 24 hours also allowed. Oddly to the minds of some, various general restrictions were introduced on the right of appeal. Perhaps most worrying of all, the Act introduced restrictions on how miscarriage of justice cases were to be handled, giving the High Court a new power to simply refuse to accept referrals from the SCCRC. A few weeks later the CSJ announced a review under Lord Carloway of issues arising from *Cadder.* The Scottish Government chose the terms of reference. In some ways they were too wide, for example, in
including the question of corroboration. In others, the review was too narrow, as it could not consider the whole of Scots criminal procedure and the peculiar alchemy of our various safeguards as a protection against miscarriages of justice. Many thought that a fuller review was needed over a longer period. Many still do. The Law Society of Scotland suggested that a full audit should be made of the compatibility of Scots criminal law with the European Convention on Human Rights, to ensure the mistakes that led to the *Cadder* case cannot easily recur. For all its length and the welcome approach to human rights in many respects, make no mistake, the Carloway Report is not such an audit.

Before turning to the Carloway Report it is worth mentioning other significant human rights developments stemming from *Cadder*. Firstly, on 6th October, we got the Judgment of the UKSC in the so-called Sons of Cadder cases in which the Lord Advocate sought to establish the point in time when the right to legal assistance kicks in. The UKSC held that it was from the point of police questioning of a suspect who is in custody or is otherwise subject to a significant curtailment of his freedom of action.

In the case of *Jude and others* 2011 SCCR 300 the High Court considered the question of waiver of the right to legal assistance. In that decision the Court appeared to suggest that the right to legal assistance could not be waived without legal assistance. The Lord Advocate decided to take this point to the UK Supreme Court, particularly as the implications of such an approach would be enormous, not least in terms of resources in an already stretched justice system. Lord Carloway deals with this issue but we shall find out soon what the UKSC made of the point.

There are other issues around the *Cadder* case which may require further judicial decision, for example, the extent to which the rules on solicitor access apply to interviews by agencies other than the police who also report cases to the Crown for prosecution.

Stooshie Continues

Whatever the motivation, whether it related to a fear for Scottish legislation or was genuinely a misconceived concern for the integrity of Scots law, matters are now in the balance for the future of the UKSC as part of the system for ensuring appropriate application of human rights law in Scotland. The question was debated very recently at Holyrood and the Scotland Bill Committee at Holyrood is presently considering gate-keeping arrangements for the UKSC. The other week the Scottish Government promised amendments to the Bill. This follows two consultations held by the AG which recommended no changes of any substance, and the McCluskey Review which told the Scottish Government a great deal of what it wanted to hear, albeit not everything. The reviews were predicated on misunderstanding and fuelled by panic-mongering. The integrity of Scots law has not been under threat from the UKSC. Indeed, I consider that its integrity is under threat from a reactionary attitude to developments in procedures to fair hearings which are crossing Europe with considerable momentum. The UKSC is merely telling us what Strasbourg otherwise will. The wording of the HRA was chosen carefully by Parliament. A key aim of the Act was to "bring rights home". This meant rather than having to go to the European Court of Human Rights in Strasbourg, people in the UK could enforce their rights in domestic courts. And, just as importantly, UK judges could begin to develop their own case law on human rights and so not have to rely on Strasbourg and its partial understanding of UK social issues.

But surely the critics wouldn't make such a fuss if there wasn't really a problem?

The Flood?

As at May, since the Human Rights Act and the Scotland Act came into force, the Judicial Committee of the Privy Council, and subsequently the Supreme Court, have only heard twenty two cases, of which five were brought by the Crown. This number produced an average of two or three cases a year. Last year, the only case heard was *Cadder v HMA*. Of these cases, fourteen were dismissed, limiting the ability of bringing similar points back before the Court. Only eight appeals were allowed, four of which were in favour of the Crown. This year's additions to the list have all been at the instance of the Crown. There is no evidence from these appeals and the judgments handed down that the Supreme Court has extended its jurisdiction or heard cases it ought not to. Indeed it appears to me that the Supreme Court operates entirely within its special jurisdiction, and appropriately respects the position of the High Court of Justiciary.

The Scotland Bill Committee heard evidence from a number of eminent jurists.

Lord McCluskey, Evidence to Scotland Bill Committee, 1 November 2011

> *Similarly, if the European Court of Human Rights in Strasbourg determines a matter of law and rules against what the High Court has been applying, the High Court will accept that and apply the law.*
>
> *We have a unique chance—perhaps the last for several decades—to correct what is an egregious error that distorts the system of criminal justice in Scotland. I hope that you will advise, as we do, that the opportunity should be taken to remedy it in the way that is proposed.*
>
> *What does the word "fair" mean? We could ask any child whether it is fair that his brother got this or his sister got that, and we will get no for an answer. Fairness is rather subjective and it creates the opportunity for ingenious people to come up with events at a trial and say that they are not fair. Almost everything that goes wrong for the accused in a trial could be represented as unfair. We have to prevent the floodgates from opening. That is what makes a practical difference here.*

I will speak for myself and not for the review group. Cadder was a wrong and bad decision, and I have written an article for the Edinburgh Law Review explaining in some detail why that is so.

The significance is that we would be left with a system that David Edward properly described as "constitutionally inept" and which I have described as egregious nonsense. Forgive me for being direct, but there is not time to be polite. We just tell the truth.

If Mr McLetchie's question is to be answered differently by Strasbourg, it raises a big constitutional crisis: do we have to subvert our procedures and laws just because a bunch of Lithuanians, Georgians, Armenians, Russians, Frenchmen, Maltese and Cypriots have come to a view without considering the Scottish or the English position?

The Lord Advocate

My direct answer is that I would look at the two full-bench decisions in Paton v Ritchie, in which five judges were involved, and the McLean case, in which seven judges were involved, and take the view that the law was clear, that there was not an issue, and that there was compatibility. Therefore, I would not exercise my power to refer the case to the Supreme Court.

It is very important that we navel gaze and look at what is coming up in Strasbourg, what is important, and what has implications for not only Scottish law, but the law in England, Wales and Northern Ireland. I certainly welcome the UK Government's intervention in the Scoppola case on prisoners voting and I wish that there had been an intervention in the Salduz case. I think that Judge Bratza, who chairs the Strasbourg court, gave a seminar to the Scottish public law group in which he publicly expressed concern or a desire—perhaps that is not the best way of putting things— certainly a wish that, in the Salduz case, the UK Government had intervened on behalf of the Scottish Government.

One of our judges, Lord Reed, is an ad hoc judge in the Strasbourg court and has written a leading textbook on it. Our Lord President has recently sat in the Supreme Court, in the grandsons of Cadder case, which was argued two weeks ago. Lord Clarke, a senior judge

in Scotland, also sits on the Supreme Court. So I disagree completely with the notion that our judges are getting human rights decisions wrong. They do sometimes get things wrong, as all courts do—the Supreme Court itself sometimes gets things wrong in Strasbourg's view.

Lord Hope said that is very important that there is a dialogue between the Supreme Court and the Strasbourg court; Judge Bratza, the chair of the Strasbourg court, has alluded to that as well. On Horncastle, the Supreme Court expressed concern that the Strasbourg jurisprudence proceeded without a proper understanding of English law: that is the basis upon which it has asked the Strasbourg court to reconsider its earlier judgment. I welcome that: it is good when the Strasbourg court is adult enough to take that into account. We await the judgment from Strasbourg, but that is an important case for Scotland as well.

Advocate General

There is a question about whether the certification procedure succeeded in that respect, but we are not talking about the Supreme Court being flooded with cases from Scotland. The figures—as best we can tally them up—are that, since the Supreme Court's establishment some two years ago, permission to appeal has been granted on four and refused on 17 occasions. In the four cases in which it was granted, two appeals were upheld and two were dismissed. To me, that does not seem to amount to a torrent, so I do not think that the practical reason for the bringing in of certification in England and Wales applies in this case.

I have heard, although we cannot now confirm it, that Donald Dewar was anxious for the newly established Scottish Parliament to have a shining record on human rights and that we should not give any easy let-outs.

The suggestion from the McCluskey Review of requiring certification of general public importance has raised concerns. In principle, I have no difficulty with the notion but, in practice, the Scottish Courts have dealt with such issues in a manner which leaves me unconvinced that they would be able to approach the question of certification in the same mature manner as the courts in England. This has implications for the application of human rights law in Scotland.

Carloway Report

> *The Review's recommendations are designed to re-cast and modernise the system so that it meets the requirements of the Convention, and provides a comprehensive, effective and fair criminal justice system for the foreseeable future. It seeks to rebuild and reinforce the system's foundations by incorporating Convention rights in larger measure and at greater depth. It has challenged traditional legal thinking, looking to modernise, clarify and simplify the system as a whole wherever possible. The ultimate intention has been to re-establish Scotland at the forefront of law and practice of human rights in general.*
>
> *The aim is to have a system that not only surpasses minimum requirements today, but also stands up to developments in the foreseeable future.*
>
> *A primary concern of the Review has been to ensure that key Articles of the Convention are seen to underpin the emerging system. These are principally, although not exclusively, the Article 5 right to liberty and the Article 6 right to a fair trial. Although they must be at the heart of any provisions on custody and police questioning in particular, they must also permeate the system as a whole.*

The Report makes important recommendations about the rights of a suspect or arrested person while in custody. The maximum length of time in custody before charge should become 12 hours. Court appearance should be within a maximum of 36 hours of arrest. In many cases that latter limit would be an improvement.

Personally I think that the normal maximum for custody before charge should be 6 hours, as it was before *Cadder*. Most detentions are completed within 6 hours, and extensions of the 6 hours could be allowed for the more exceptional cases. Access to a lawyer is an integral part of what the Report recommends. The role envisaged is not just that of offering advice in relation to what, if anything, to say during police interview. As the Report says:

> *If a person has been arrested on suspicion of having committed a crime, he/she may wish to instruct immediate steps to demonstrate his/her innocence and secure his/her freedom. These might include, for example, the ingathering of evidence to support an alibi or real evidence such as CCTV recordings.*

Indeed the role envisaged appears to extend well beyond the mere giving of legal advice and to encompass the broadest range of support for a suspect.

The Report recommends a letter of rights to be given to every suspect. This is a development which was coming anyway as part of the EU Roadmap of Procedural Safeguards. Indeed this is one Proposal for a Directive to which the UK did sign up, having decided not to do so in relation to the Proposal relating to access to a lawyer. If the Carloway Report is implemented in full Scotland may get closer to that EU Proposal even without a UK opt-in.

There are to be greater protections for children, defined as those under 18, and vulnerable suspects. Current protections, such as appropriate adults, are too often entirely ineffective. Tying them in with increased use of legal advice may improve the situation.

In general terms the Report fully recognises the start of a 24 hour justice system. That we should have a 24 hour system may come as a shock to those of you who thought we already had one. The police, in particular, operate 24 hours a day, as do many others in the system, although even with the police the timing of scheduled activities may well be geared towards the normal working day when resources are greatest. For the legal profession *Cadder* and its fallout has seen lawyers have to consider how best to help and advise their clients at any hour of the day. Before *Cadder*, or at least before the Law Society's Interim Guidelines, we didn't have to bother as, whatever might have been suggested, we were simply not allowed into interviews and received word about clients detentions either when we could do nothing about it or when it was already too late because they had been interviewed, and whether entirely guilty or not, had said stupid and unguarded things which would later convict them.

Obviously the headlines about the Carloway Report have focussed on the recommendation that corroboration should be abolished. To my mind it would be a most regrettable if the loss of a key Scottish safeguard for ensuring fairness in trials and avoiding miscarriages of justice was considered an acceptable price of recognising the inevitability of greater access to legal advice. Increased fairness in the police station should not mean greater unfairness in a trial.

This type of approach, which saw corroboration included in Lord Carloway's Terms of Reference, is typical of the lazy and meaningless idea of rebalancing the justice system. Yes, we should treat victims and witnesses well, and no

doubt better than we do, but taking away rights from suspects or accused people will not necessarily lead to that. The thinking of some after *Cadder* seemed to be - we've had to make the system fairer in a way we resisted, so we must deliberately set out to make it less fair in some other way to restore the balance.

The Future

Earlier this year Lord Hope addressed the SYLA.[73] He said:

> *What then of the future? I am as strong a believer in the virtues of the Scottish legal system as I ever was. In some respects my belief in it has been strengthened by what I have learned south of the Border. But I also believe very strongly that, if it is to be kept up to date and able to compete with the English system, our system must look outwards and not inwards as it adapts to the realities of modern life. One of the great virtues of Scots law, as a mixed system, was its willingness to adapt itself so as to keep pace with the way things were done elsewhere. Pride in our own system is one thing; isolationism is quite another. We have much to gain by maintaining contact with the way that law is practised in England and Wales and beyond. We have much to lose if we were to raise the drawbridge and cut ourselves off from the outside world. The Supreme Court, where Justices from all three jurisdictions of the UK engage with each other on so many important and difficult issues, is there as a vital point of contact. That applies to Convention rights issues as much as it does to issues of private law. I hope that I have been able to reassure you that, from the Scots point of view, our precious legal system is indeed respected in that court and that it is secure in its hands.*

In many respects the Carloway Report offers us an opportunity to approach the future in a more positive way in relation to human rights. Personally, I think it is not a safe enough foundation on its own. I like the idea of a full human rights audit of our system, to bring it fully up to date with the latest human rights developments, but also to anticipate challenge and embrace useful change.

Only if we do that might we have greater confidence in the notion that rights have come home.

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73 http://www.supremecourt.gov.uk/docs/speech_110401_v2.pdf

Legitimacy of non-custodial sanctions and measures – a European perspective

Presented by : Professor Sonja Snacken
Vrije Universiteit Brussel, Belgium

Thank you. First I would like to express my gratitude for being invited here, it's a great honour to be part of this event. In terms of background for my presentation, apart from the fact that for more than thirty years I've been doing empirical research into sentencing and implementation of sentences in my own country, Belgium, I have acted as an expert since 1994 to the Committee for the Prevention of Torture (CPT), and have been a member since 2001 of the Council for Penological Cooperation of the Council of Europe, and its Chair since 2006. This is a group which tries to find a consensus between 47 countries, trying to see what kind of Europe we want, together.

Non-custodial sanctions and measures in Europe

There is a large variety of non-custodial sanctions and measures in Europe. Different countries and regions have different histories in this regard. Non-custodial sentences were introduced in the 19th century following criticisms of short term imprisonment. The emphasis was then still on *retribution* and *deterrence*, with little discussion about *treatment*. The idea of re-socialisation arose in the period between the 1950s and the 1970s, with the introduction of probation. But again, we see a lot of variety. In some countries, like Sweden, Malta, Luxembourg and Britain, probation was introduced as an autonomous sanction, emphasising the need for treatment, while in other countries like my own it was part of a suspended sentence. In this latter case the deterrent effect was as strongly emphasised in probation as the treatment effect. So we have already different penal philosophies within one particular sanction. In the 1970s several countries introduced community service, with again different penal philosophies - retribution and re-socialisation - but also deterrence.

Looking at the application of this first generation of non-custodial sanctions and measures, we see that Anglo-Saxon and Scandinavian countries use probation quite widely, while in other Western European countries, its use was very exceptional. In Belgium, for example, probation was rarely used, contrary to the suspended sentence which was much more in line with the neoclassical penal culture emphasising retribution and deterrence. The later

criticisms of the 'nothing works' and the 'just desert' movements were absent in Belgium and in other western European countries because rehabilitation was never the main official discourse or penal philosophy. The south of Europe is different again because, as you know, in the 1970s several countries, including Spain, Greece and Portugal, had dictatorships. When those countries became democratic, the first things they changed were their penal code and prison code – and they introduced non-custodial sanctions and measures. This illustrates how much the criminal law is linked to political issues, and to a particular vision of society. The same is true for Eastern Europe, where the idea of rehabilitation was taken up in the Communist system, and evident in the prisons and labour camps, which were supposed to turn offenders into 'good communists'. There again, the political changes in the 1990s resulted in the introduction of probation services.

Most European countries have introduced probation measures now. The application of non-custodial sanctions and measures gave rise to new problems. Many countries developed a policy of bifurcation, with non-custodial sanctions and measures being used at the lower end for 'petty offenders' and those with a limited criminal record, but this seemed to be compensated for by reinforcing imprisonment at the upper level, leading to longer sentences. Parole became difficult for the more serious offenders, and this seemed like a price to pay for introducing the non-custodial sanctions at the lower end. The result was penal inflation in several western European countries and, of course, the prison overcrowding that we know in many of our prisons. According to the CPT standards and the case law of the European Court of Human Rights (ECHR) prison overcrowding can in itself result in inhumane conditions.

The search for making non-custodial sanctions more legitimate, more credible, then led to the introduction of what became known as "intermediate sanctions". With more emphasis on control of the offender, they were supposed to be 'safer' for society than less intervening forms of probation. Yet, when we look at empirical research into the effectiveness of intermediate sanctions, we see that recidivism rates are not so much different from traditional probation measures. However, the incidence of technical violations is much higher because, of course, the more control you have, the more technical violations you can discover. This in turn results in more recalls to prison, not because of new offences, but because of technical revocations. The phenomenon of 'net widening' is also present on those intermediate sanctions; so intensive probation replaces normal probation, electronic monitoring is added to normal probation for people who may not really need it..... So, the question of

whether we are saving money by introducing that kind of sanction compared to prison depends absolutely on whether it is used instead of prison or is used for people who would not have gone to prison. This latter case of course becomes even more expensive because then you have people in prison on revocation who would not have been in prison in the first place! When we look at Europe there is much variety in intermediate sanctions. Whilst intensive probation is not very popular, we see an explosion of electronic monitoring all over Europe and particularly in Central and Eastern European countries. Of course, private companies try to foster its application.

A more recent development is the generation of non-custodial sanctions which are emphasising restorative aspects, emphasising not only the harm done by offenders to victims and to the community, but the needs both of victims and offenders. The underlying philosophy and the emphasis here are quite different. Although this generation includes some previously existing sanctions - such as community service, which also has a symbolic reparation philosophy to potential victims and to society at large, and mediation which has been introduced in several countries - the future of this kind of sanction is unclear. It is not so easy to introduce restorative justice philosophies into traditional criminal justice systems. Our criminal justice system also offers guarantees that some of the restorative justice programmes tend to forget, such as proportionality and legality. However, despite what is often thought, public surveys - such as the British Crime Survey and those of other countries - indicate that the public is quite supportive of this kind of sanction. Respondents often state that *"well of course judges are too lenient"* and *"we want more prison"*. But at the same time, they want *more* non-custodial sanctions, *more* reparation and *more* community sanctions. Hence, we need to be careful when using public opinion research (see also Verfaillie 2012). A point to which I will return.

Legitimacy of non-custodial sanctions and measures

This brings me to the discussion of the legitimacy and the credibility of non-custodial sanctions and measures. "Legitimacy" is a multidimensional concept, which has been used very differently in different areas. In an influential political philosophy book, *The Legitimation of Power* (1991), David Beetham refers to three main groups of professionals who use "legitimacy" in different ways. These are: 1) constitutional lawyers, who refer to legal validity. But not solely legal validity because the law itself must of course be legitimate, so there are other criteria as well; 2) moral and political philosophers, who question whether the exercise of power is justifiable from a moral point of

view. These have universalising claim, looking for general universal values that are the basis for legitimacy; and 3) the social scientists, who look into the empirical consequences of discussions of legitimacy within a particular social context, so they refute universalising claim. As far as the latter are concerned, Beetham is very critical of Max Weber's definition. He claims that Weber's definition of legitimacy is 'a disaster' because he seems to say that, as long as people believe in something, it is legitimate. I have myself referred to this in an article in *Theoretical Criminology* (2010), for that would mean that if a majority of people support genocide of a minority, then that would be legitimate! There are no moral criteria; there is nothing except "people support it". I think that is very dangerous, especially when we talk about punishment in society. Beetham concludes from these three levels that legitimacy is not what people think is acceptable but how, in fact, you can justify a certain form of power in view of the beliefs that people have. So it's not a question whether people *like* non-custodial sanctions and measures, but whether we can *justify* non-custodial sanctions and measures in view of the values and beliefs that are current in our society. Moreover, the constitutional validity of those forms of penality is also important.

I will start with the *legal constitutional discussion*. We know that punishment is one of the most intrusive forms of the exercise of state power. We consider ourselves democratic constitutional states, so the exercise of state power requires legitimation. The legitimation of power in constitutional democracies requires respect for human rights, rule of law and democracy. But what does that mean for punishment? Traditionally, human rights were seen as a bulwark against state interference; so punishment is only legitimate if it is absolutely necessary. In that sense, human rights protect citizens from undue punishment, or disproportionate punishment. In a book I published with Dirk van Zyl Smit in 2009, we analysed the European prison standards as expressed by the European Court of Human Rights (ECtHR), the CPT standards and the recommendations of the Committee of Ministers. These should of course not been taken for the reality. The standards may all be very nice, but you can see from the CPT reports and from the case law of the court that the reality in European prisons is much below those standards. Nevertheless, the Court has obviously reinforced the protection of the human rights of offenders (protection against torture, inhuman and degrading treatment) and of prisoners, especially over the last ten years. However, the court at the same time has always accepted that punishment, and more particularly imprisonment, is inherently humiliating. Article 3 of the Convention expresses an absolute prohibition on inhuman and degrading treatment, but the threshold for a violation to be accepted by the Court is quite

high. The Court has repeatedly stated, in several cases, that imprisonment is humiliating in itself, but that this is not sufficient to make it a breach of Article 3. However, the Court has never defined why it is humiliating to be in prison. When I tried to develop a definition in this book, I came to a Flemish philosopher, Leo Apostel, who defined human dignity (outside criminal justice areas) as '*respect for individual and social identity and the possibility to autonomously choose, act and decide.*' If you take that definition of human dignity, then I think it is quite obvious that even the most liberal prison will never be able to respect that kind of human dignity. No prison can function while accepting full autonomy in acting, deciding and choosing of prisoners and completely respecting their individual and social identity. So from there, I tried to develop a new argument why imprisonment should really be a last resort.

As far as sentencing is concerned, the European court has been much more timid. It has refrained from getting really involved into sentencing issues, stating that it is up to the national legislation and national courts to decide what "appropriate" sentencing levels are. In a survey for the Council of Europe conducted in 1997, I asked member states how they defined 'long-term' imprisonment: the Netherlands answered "more than 6 months", Norway "18 months", most Western European countries "3, 4 or 5 years" and most Central and Eastern European countries "10 or 15 years" (Snacken 1999). So, what is appropriate sentencing in Europe if you have that range? Hence I understand why the court is timid in getting involved in this issue. On the other hand, I have tried to develop arguments as to why and how the court could do more than it is doing now by applying a stricter interpretation of the principle of proportionality in sentencing (see below).

Of course, human rights also refer to the human rights of victims. And we see all over Europe an increasing emphasis on the human rights of victims. But again with quite some variety. The UK seems to follow the US in developing a "zero sum policy" – you have to choose between victims and offenders. If you are *pro* victims, you are *against* offenders and *vice versa.* You cannot defend human rights both for victims and for offenders and policies in favour of victims are by definition tough on offenders. I have always refused that choice. And both the Council of Europe and the European Union have – so far - avoided that kind of dichotomy. At the European level, protection of the human rights for victims has been mainly translated into *procedural justice:* respect for victims, information to victims, listening to victims… Not the *impact model* where the individual victim influences the sentencing and parole decisions of offenders.

The two other parts of constitutional democratic states, *rule of law and democracy*, also raise specific questions when we discuss punishment. The rule of law has been defined as the 'guarantee of rational and impersonal laws protecting citizens against arbitrary and emotional decisions'. However David Garland, a world-famous Scotsman, has described the essence of punishment as 'irrational and unthinking emotion.' What does that mean for the rule of law with regard to offenders and prisoners? The rule of law is applicable to every person in a country - whether they are offenders or prisoners. But there is this tension between the guarantee of rational decision making and rational legislation and the emotions involved in punishment. That brings us, I think, to the core of the difficulty of how a democracy is supposed to handle this tension. Democracy has often been defined as 'the will of the majority' – but that is a very dangerous definition. Alexis de Tocqueville warned already a long time ago that this could very well lead to a new kind of tyranny – the 'tyranny of the majority.' What I have tried to argue, with others, is that the difference between a democracy and a totalitarian state is not the will of the majority, but is aiming for the general interest. And this general interest includes the interests of unpopular minorities – such as offenders and prisoners. In some areas, Europe has used this more constitutional interpretation of democracy rather than the populist interpretation of democracy. The abolition of the death penalty is one example. The EU charter for fundamental rights prohibits death penalty under the chapter 'human dignity'. The death penalty is prohibited not because it is ineffective or unpopular, but because it is contrary to human dignity.

But of course there are other definitions of democracy. And having spent a year in New York lately, I have had quite some discussions about the legitimacy of more populist forms of democracy. It is also a cultural and political choice, a choice of which kind of society you want to live in, which kind of democracy you believe in, which traditions, history and culture you have. What does that mean for the constitutional legitimacy of non-custodial sanctions and measures? As I have argued, if we take human rights seriously, then punishment should aim to choose that kind of sanction that is least interfering with the human rights of the offender while respecting the interests of the victims and of society. Article 5 of ECHR protects the right to liberty. There are, of course, possible derogations - deprivation of liberty through remand custody or sentencing for example - but that does not mean that the right to liberty does not remain the priority. All European countries now have non-custodial sanctions and measures, at the level of pre-trial detention, sentencing and parole. If we take the principle of proportionality seriously, then a deprivation of liberty is only legitimate if there is really no other possibility. The exercise

in each individual case should then be to question whether imprisonment is really necessary. And it should be up to the State to prove that imprisonment is necessary, not for the offender to prove that he still deserves an "alternative". The deprivation of liberty should be the exception, not the other way around (Snacken 2006). Of course I realise that this is far from the penal culture in our countries. But human rights aim for a better future, offer a mirror of how that future could look like and how it could look better for everybody. Such an exercise also requires recognition of the punitive value of non-custodial sanctions and measures. Indeed, some non-custodial sanctions can be very punitive and very interfering with the human rights of the offender as well. In my own country, an increasing number of long-term prisoners refuse parole because the revocation rates are so high. The criteria for granting parole are perceived as so unrealistic and the conditions imposed as so restrictive that they prefer to "max out" and to serve the whole sentence (Bauwens, Robert, Snacken 2012). How does imprisonment compare to parole, if prisoners refuse parole and prefer to stay in prison? Similar questions can be raised with regard to electronic monitoring. How interfering is electronic monitoring, not only in the human rights of the offender but also in the life of the family of the offender? Ioan Durnescu rightly wrote about "the pains of probation", which should be studied as much as the "pains of imprisonment".

In most cases though, the detrimental effects of imprisonment, not only for the offender but also for his family and for society, will exceed those of non-custodial sanctions. If we defend a truly reductionist policy in which imprisonment is really used as last resort, then non-custodial sanctions and measures are to be preferred over imprisonment. But politicians who would defend such a criminal policy are still accountable to the general public in a democracy. The next question is then "how can you defend this kind of reductionist policy?" Returning to Beetham's definition of legitimacy, this does not mean that people must like non-custodial sanctions and measures, but that you can justify the use of non-custodial sanctions and measures in view of the values and beliefs in that society.

Empirical legitimacy of non-custodial sanctions and measures

This "empirical legitimacy" of non-custodial sanctions and measures involves many different actors. How are probation officers themselves defending their legitimacy? How are judges and prosecutors looking at non-custodial sanctions and measures? Why is imprisonment remaining for many the symbol of punishment - why is it so difficult for non-custodial sanctions and measures to take the place of prison? Is it linked to the symbolism of

the walls, the "us versus them"? Or is it incapacitation? How do offenders themselves perceive the legitimacy of such a sanction? Why do they comply with it? Is it acceptable for victims to see their offender not being put in prison, but in a community sanction or measure? How do politicians or the general public think about it?

As an example, let us look at what has happened at the political level in Europe with regard to non-custodial sanctions and measures. At the level of the Council of Europe, several Recommendations explicitly advocate a reductionist policy: the 1992 European rules on community sanctions and measures, the 1999 Recommendation on penal inflation and prison overcrowding, the 2010 Council of Europe Probation Rules. The European Union has issued Framework Decisions on the transfer of probation measures and on supervision measures as an alternative to provisional detention. But what are the values and beliefs embodied in non-custodial sanctions and measures, and how do they respond, or not, to values and beliefs in our society?

From the Council of Europe 2010 Probation Rules, we can infer that the main arguments in favour of non- custodial sanctions and measures are: i) human rights and human dignity; ii) social inclusion, and iii) community safety. Let us now look at the Eurobarometer, which measures "public opinion" within the European Union.

1) Human dignity and human rights

When respondents are asked to choose in a list what their three most important values are, human rights come out as first (table 1):

Table 1: Standard Eurobarometer 74 (autumn 2010): 3 most important personal values

- Human rights: 47%
- Peace: 44%
- Respect for human life: 41%
- Democracy: 29%
- Individual freedom: 23%
- Rule of law: 22%
- Equality: 19%
- Solidarity: 15%
- Tolerance: 15%
- Respect for other cultures: 8%
- Religion: 6%

Of course this is *not* about human rights for *offenders,* but human rights in general. But again, my argument is that if human rights are an important value in a given society, then you can use it even for non-popular minorities.

A similar result is found with regard to the question 'which values best represent EU?', where the top answers relate to democracy and human rights, both at 38 per cent (table 2):

Table 2: Standard Eurobarometer 74: 3 values which best represent the EU:

- Democracy: 38%
- Human rights: 38%
- Peace: 35%
- Rule of law: 25%
- Solidarity: 20%
- Respect other cultures: 18%
- Tolerance: 11%
- Religion: 3%

The EU is hence very much seen as a defender of democracy and human rights.

2) Social inclusion

With regard to social inclusion (the Council of Europe Probation Rules use this concept rather than rehabilitation), non-custodial sanction and measures try to tackle offending behaviour by keeping people *inside* society and working for their social inclusion. But is social inclusion a fundamental human right in Europe? At the political level, some constitutions - like in my own country - provide for the right "to live a dignified life". This is then translated into the right to participate in the main areas of society and hence to have access to employment, housing, cultural activities, etc. This illustrates a link in some national documents between human dignity and social inclusion. However, in general, is the protection of social economic rights much weaker in Europe than civil and political rights. The Council of Europe has issued a European Social Charter, but it is not supervised by a court, only by a European Committee for Social Rights which produces reports, and is hence much weaker than the ECtHR. The EU Charter of Fundamental Rights elaborates a whole chapter on "Solidarity", which entails social rights like social security benefits, protective social services in case of unemployment, maternity, illness etc.. The EU Charter hence emphasises solidarity and social issues more than the traditional ECHR. But when we look at reality, we see that the 'penal

Europe' has developed much more quickly than the 'social Europe.' There is quite some discourse in Europe about the importance of social inclusion: see for example the "renewed social agenda" of the European Commission, and the "European year for combating poverty and social exclusion" in 2010. But at the end of that year, the Belgian Presidency report concluded that "there was still much work to be done in that respect"- and that sounds very much like an understatement.

And how important is social inclusion for European "public opinion"? Table 3 shows the main concerns of Europeans:

Table 3: Standard Eurobarometer 74 (Autumn 2010): main concerns:

- 1-3: Economy:
  - Rising prices (38%)
  - Economic situation (25%)
  - Unemployment (20%)
- 9: Crime: 7%
- 12: Immigration: 4%

The economy is 1st ('rising prices', 'economic situation, 'unemployment'), while 'crime' ranks only 9th and 'immigration' 12th. The UK data are comparable to the European average. The first three concerns are exactly the same; 'crime' is 6th and 'immigration' is 9th. The predominance of the concerns for the economy and economic issues is quite clear all over Europe.

Another public opinion survey, about social inclusion, asked who respondents think are most at risk of poverty and what the causes and solutions are.

Table 4: Poverty & social exclusion (Special survey 321, October 2009)

- Who is at risk of poverty:
  - Unemployed: 56% (UK: 38%)
  - Elderly: 41% (UK: 47%)
  - Low level education: 31% (37%)
- Causes of poverty:
  - Injustice: 47% (UK: 33%)
  - Laziness: 16% (UK: 26%)
- Solutions for poverty:
  - Action by Government: 89% (UK: 85%)
  - Reduce income inequality: 88% (UK: 82%)

- Redistribution of wealth by Government: 82% (UK: 74%)
- Higher taxes by well off: 75% (UK: 65%)
- No point, poverty will always exist: 35% (UK: 43%)

The main reason for Europeans is 'unemployment' (56 per cent; in the UK 38 per cent), then 'elderly people', and then those with a 'low level education.' For the causes of poverty, interestingly, 47 per cent answered 'social injustice' (in the UK this was 33 per cent), then 'laziness' (16 per cent for Europeans and 26 per cent for the UK). But asked about the solutions for poverty, the UK is very much in line with the EU-average, emphasising the importance of government and social policy in tackling poverty and social exclusion.

Table 5: Poverty & social exclusion (Special survey 321, October 2009): Solutions for social and economic problems?

- More health care, education, social spending, even if this means raising taxes: 63% (UK: 77%)
- Minimal wages, even if less jobs: 62% (UK: 72%)
- Free education, even if less quality: 60% (UK: 69%)
- More responsibility Government: 55% - self: 34% (UK: 40-51%)
- National Government to provide jobs for unemployed: 54% (UK: 57%)

The responses all over Europe, including in the UK, suggest a 'social' rather than a 'neo-liberal' approach to solutions, referring to traditional social democratic values of 'more government', 'more health care' and 'free education'. The UK scores even more strongly in these responses than the European average, especially with regard to health care, minimal wages and free education. Only with regard to the division of responsibility between 'Government' and 'self' does the UK score differently. However it is exactly in these issues that the EU is considered to perform very poorly:

Table 6: Eurobarometer 71 (September 2009): ratings of EU performance

- EU fighting unemployment: 3.9/10
- EU protecting social rights: 4.8/10
- EU ensuring economic growth: 4.6/10

There is obviously an imbalance in the main concerns of the citizens in Europe and how Europe is perceived to deal with these. Again of course, these

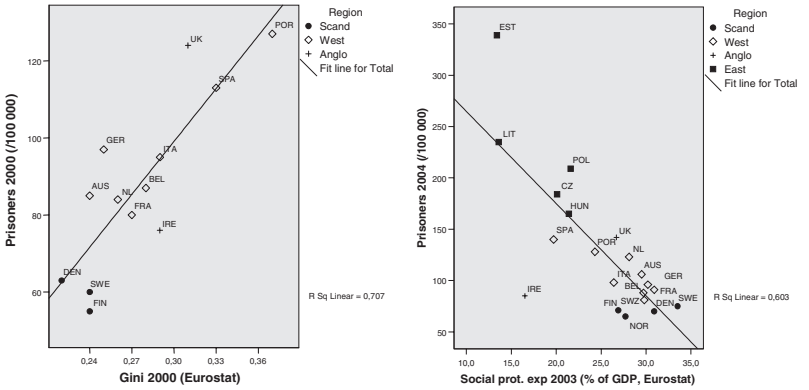
surveys on poverty and social exclusion are not about offenders. But as with human rights, they illustrate that fight against social exclusion is an important value and concern in Europe. When we look at the European values studies of 1999 and 2008, we see that solidarity, social inclusion and the fight against poverty is considered an "important European value", but not for immigrants. This illustrates what has been called "welfare chauvinism": we want welfare and social inclusion for ourselves, we want human rights for ourselves, but not for the immigrants, not for the "others". But again - in a constitutional democracy it is then up for the politicians to argue that 'everyone is included in a democracy - even those people you don't like'.

3) Community safety

What does that mean for the last point about non-custodial sanctions fostering community safety? There is a lot of research indicating - and increasingly so with the literature on desistance - that imprisonment is in fact hampering all those factors that help people to desist from crime: human and social capital, building positive relationships, "generativity" (taking up responsibility for the next generation), decreased pressure of deviant peer groups... All these elements are hampered by imprisonment. Imprisonment breaks up social relationship, brings people together who are part of the same peer group, makes it more difficult to find employment and housing, to build positive relationships or a positive self-image, and so on.

But how should policymakers deal with these nice, rational academic arguments against imprisonment and in favour of non-custodial sanctions and measures in the face of the irrational and emotional feelings linked to crime and punishment? To answer this question, I would like to end with the beautiful charts by Tapio Lappi-Seppälä (2012), where he shows that the Scandinavian countries, which have the highest welfare investments and the lowest prison populations, also have the highest legal, political and judicial legitimacy, contrary to the UK and the Central and Eastern European countries.

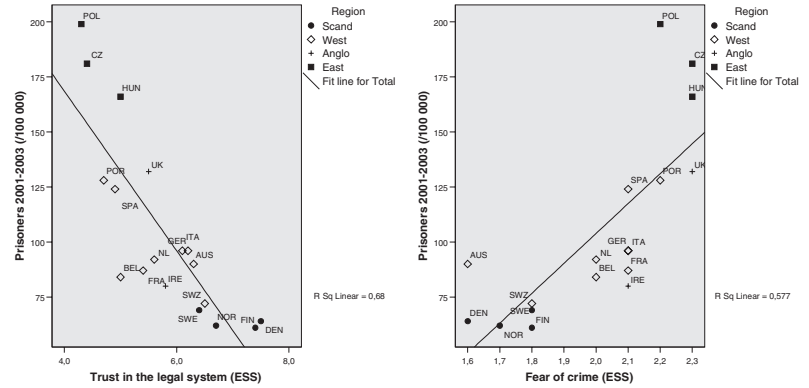
Figure 1: Income inequality, social expenditures and prisoner rates



Source: Lappi-Seppälä (2012)

The first chart represents social inequality in Europe. The less social inequality there is, the lower the prison population. The Scandinavian countries rank low in social inequality and in imprisonment, the UK ranks high in both. The second chart demonstrates that Scandinavian countries have high social expenditures in welfare and a low prison population, the UK vice versa. But in the Scandinavian countries public trust in the political and the legal system is much higher than in the UK, despite the low prison population. A similar picture arises with regard to fear of crime: low prison population, low fear of crime for the Scandinavian countries, high fear of crime, high prison population for the UK (figure 2). Please note that these charts are controlled for crime rates, so this cannot be explained by differences in crime.

Figure 2: Trust, fear and legitimacy



Source: Lappi-Seppälä (2012)

To conclude. I have tried to address the following questions:

- What kind of values do non-custodial sanctions and measures in Europe represent?
- How legitimate are those values in a European context?
- What does that mean for the people involved in decision making?

I have emphasised mainly the political level. But much of the arguments could be transposed also to the judicial level. What kind of values do we believe in, and how does punishment - imprisonment versus non-custodial sanctions and measures - relate to those values? We do need more research on community safety, and on 'what works?' Not only what works within the psychological paradigm of 'what works?' to reduce recidivism. One of the big problems of the work we are doing is the predominance of negative feedback in the field. The media mainly report on people who fail. Judges only see those people who come back in court, they never see the success stories. Probation officers may know a bit better about who is succeeding and who is not, but it's very often those who have failed who are getting all the attention. So I believe we need a lot more research into what works - in the sense of what is helpful and what can be positive in what we are doing. Communication between academics and practitioners is very important in this regard. I know that's what SASO is trying to do. So, thank you again for inviting me here and being able to give this talk.

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Prisoners: What price European rights?

Presented by : Tony Kelly
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> *"If the judges were themselves to exercise powers which properly belong elsewhere it would be a usurpation of authority and they would themselves be acting unlawfully. As Lord Hailsham pointed out in his 1983 Hamlyn Lectures, Thomas Fuller's warning … ('Be you never so high, the Law is above you') applies to judges no less than ministers. But in properly exercising judicial power to hold ministers, officials and public bodies to account the judges usurp no authority. They exercise a constitutional power which the rule of law requires that they should exercise.*
> …
> *This is the inescapable consequence of living in a state governed by the rule of law. There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live."* (Tom Bingham "The Rule of Law")

In Scotland human rights are perceived to be the rights of those in the minority. Prisoners, accused persons and suspects all claim Convention rights and the jurisprudence from mainland Europe they invoke is said to be alien to Scots law. That perception is inaccurate. I am not able to address that misperception today. I want to recognise, however, that my focus is a skewed one. I concentrate upon one particular loathed and despised minority group. The skewing of the discussion and consequent (mis)perception of Convention rights - to which my cases have played a part - is an important question, perhaps for another day.

I want to recognise that human rights do not equal prisoners' rights. What I *do* want to say from the outset is that human rights are not imported, or supplanted, or foreign, or alien.

What is new is the mechanism for enforcement – the legislative framework – for us in Scotland, the devolution settlement under the Scotland Act 1998.

There are a number of perspectives from which to approach the question posed by my title. There are a number of people, groups and institutions that will assess the impact of prisoners' rights. These different understandings of human rights, apply different considerations as to how these could be costed, assessed and quantified. They sometimes compete and clash; in a number of respects they overlap. I think it important, however, to recognise that they deserve separate consideration.

Scottish Prison Service

In a way I am the least qualified to talk about quantifying the effect on this organisation of the assertion of individual rights by prisoners. From the outside, the institution has had to pay out as custodians for some appalling and grievous violations of human rights. At the same time they have had to update their policies, practices and most importantly the fabric of their prison buildings. They have had to do these various difficult tasks at the same time.

I am not here to criticise or critique the response of the prison service to the challenges made of them – again I am ill equipped to do so. I have always been reluctant to try to ascertain how much human rights have cost the Scottish Prison Service. What I can say is that on a number of occasions when speaking to – at times high ranking - officials within the Scottish Prison Service (I am clearly not their friend) some of them indicated that the 'slopping out' litigation was not necessarily a bad thing for them. That much can be seen from the inflow of investment funding.

Judges/Courts

There was a potentially huge logistical problem in the progress of cases through the Courts. There is no facility at present for the taking of a 'class action'. The Scottish Law Commission published a report on this issue as long ago as July 1996 – "Multi-Party Actions", Report Number 154. The issue may be addressed in the implementation of the (Gill) Civil Justice Review. It has been raised as an issue expressly with reference to the 'slopping out' body of litigation. Each of the cases in that litigation had to be raised individually. Aside from being able to manage the influx of cases, we can surely deal with the despatch of this sort of 'volume business' in a more efficient manner.

That is not to say that the business of the slopping out litigation was handled inefficiently. There was extensive collaboration and co-operation between

parties about testing certain propositions. This was far from perfect but, in many cases, in debates and arguments that I was involved in before the Courts, there was a prediction of chaos. That never transpired.

On a human level one can sympathise with judges who, in one day sentence convicted criminals to jail, and in the next have to deal with Initial Writs for compensation claimed for the conditions that those prisoners have had to endure as a result of that order.

It is an appalling picture to paint – of prisoners being rewarded for their incarceration.

Lawyers

Despite what is reported, the progress of this litigation was far from straightforward. The main driving force was risk management. Individuals claimed a breach of their human rights. They sought vindication. They were entitled to seek assertion of legal rights. Individual actions *had* to be raised and pursued.

Slopping out

I want to touch briefly upon the cases, which decided the main points in the context of slopping out. You will be relieved to hear that I do not intend to take you through the minutiae – either of the Court procedure or the process of slopping out.

HMP Barlinnie – *Napier v Scottish Minsters* 2005 SC 229

Mr. Napier was housed in C Hall in Barlinnie prison in Glasgow. Shortly after his remand there he suffered an acute outbreak of eczema. Detailed evidence was led from prisoners and prison officers about the routine of C Hall and the conditions within the cell, which Mr. Napier shared with a fellow inmate. After hearing the evidence Lord Bonomy formulated a test for infringement of Article 3 and its application to Mr. Napier

> "My consideration of the evidence of those whom I have called experienced students and examiners of prison conditions, in light of these various authorities, has led me to conclude that to detain a person along with another prisoner in a cramped, stuffy and gloomy cell which is inadequate for the occupation of two people,

> to confine them there together for at least 20 hours on average per day, to deny him overnight access to a toilet throughout the week and for extended periods at the weekend and to thus expose him to both elements of the slopping out process, to provide no structured activity other than daily walking exercise for one hour and one period of recreation lasting an hour and a half in a week, and to confine him to a "dog box" for two hours or so each time he entered or left the prison was, in Scotland in 2001, *capable of attaining the minimum level of severity necessary to constitute degrading treatment and thus to infringe Article 3*." (Emphasis added) [para.75].

Lord Bonomy then went on to consider the application of that test to Mr. Napier's circumstances and held that a violation had occurred

HMP Peterhead – *Greens, Stanger & Wilson v Scottish Ministers* 2011 SLT 549

Some six years later Lady Dorrian presided over a proof about the Convention compatibility of conditions in Peterhead prison – where up until recently Scotland sex offender prisoners were housed. The conditions under scrutiny were markedly different from Barlinnie. There the triple vices of in-cell overcrowding, slopping out and poor regime coincided for Mr. Napier. In Peterhead, that fell to be contrasted with single cell confinement and a porta pottie or chemical toilet. Much was made of the different regime and practices with Peterhead. This contrast was of significance for Lady Dorrian:

> "[276] The difference between a system which relies on the use of buckets or chamber pots and one which relies on a chemical toilet should not be underestimated. Clearly both systems rely on "slopping out" but even that process is of a different order when comparing that exercise with a sealed chemical toilet or with a bucket or chamber pot.
> …
> A chemical toilet is a device intended for use as a toilet and with the benefits over a chamber pot which I have recorded above: as the respondents submitted it is a toilet of a different kind. Accordingly, I have concluded that to require the use of a chemical toilet in a single cell in circumstances where a sanitation work party is engaged to empty them does not involve an interference with the respect for the petitioners' private life. However, prior

> to the institution of the work party when individuals had to slop out the chemical toilet themselves, and queue to do so in the circumstances herein narrated it did in my view constitute such an interference. That goes entirely beyond a situation where, as the respondents put it, one type of lavatory is provided over another. I do not consider that recruiting someone to a sanitation work party for which they are paid and in respect of which they receive certain privileges, constitutes, with the use of the chemical toilet, an interference. Nor do I consider there to have been an interference when a person could have availed himself of the services of a work party but chose not to do so. But to be forced to queue in a line of others with a receptacle containing his own waste and to have to empty it in the presence of others queuing for the same purpose all in the circumstances outlined above does constitute and infringement of Article 8."

In dealing with the large volume of litigation that was commenced in the wake of Mr Napier's case, Scottish Ministers adopted a strategy of containment. In the first instance, they asserted that a one-year time bar had application. Actions raised timeously were compromised. That proposition failed in the case of *Somerville v. Scottish Ministers*. When the House of Lords came to rule upon it, by a bare 3 - 2 majority they held that the one year time bar could not be read into the Scotland Act or imported from the Human Rights Act. No time bar was in operation. In response, the Scottish Government sought authority from the UK Government to legislate about the matter. That request was eventually acceded to. The Westminster Parliament enacted An Order in Council under section 30 of the Scotland Act 1998 to give the Scottish Parliament legislative competence with respect to this issue: Scotland Act 1998 (Modification of Schedule 4) Order 2009 (SI 2009/1380 (S8). The Scottish Parliament enacted the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 as emergency legislation (in one day on 18th June 2009) to reverse the effect of the *Somerville* judgment

Prior to the time bar coming into operation on 1st November 2009 a further tranche of cases fell to be dealt with. Scottish Ministers asserted that the quinquennial prescriptive period had application, in terms of section 6, the Prescription and Limitation (Scotland) Act 1973. That initially was successful before the Sheriff at Glasgow. Upon appeal to the Inner House, however, the Scottish Ministers were unsuccessful. A scheme of compromising these actions was put into place. Generally speaking, detention in single cell slopping out conditions will attract a payment to the prisoner of £500.

Those subject to doubled up slopping out – sharing a cell – will generally receive an offer to compromise proceedings in the sum of £2,100. Rather than concentrating on the twists and turns of the progress of this body of litigation I want to look at the concepts – legal concepts - underpinning the awards, offers and prospective awards in the future

Delict

Scottish private lawyers learn early in their University careers that under the normal law of delict, redress for loss can only be sought when *damnum* and *injuria* coincide. The extent of the loss recoverable is ascertainable with reference to case law. Nothing other than that which is referable to the breach of duty can be recovered from an opponent. There is no provision, no amplitude, for anything other than restitution.

It is beyond doubt that exemplary damages are *not* available as a matter of private law. Damages are not enhanced by reference to the degree of culpability or negligence in the wrongdoing but by reference to, and only to, the extent to which the injured party has suffered loss therefrom: *Black v North British Railway* Co, 1908 SC 444.

In *Livingstone v Rawyards Coal Co*, (1880) 7R (HL) 1, Lord Blackburn said that the loss that a court should award following upon a breach of duty of care is:

> 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation'.

The greater the *culpa* or more flagrant the breach, matters not a jot for ordinary delictual recovery.

In *Watkins v Secretary of State for the Home Department* [2006] 2 WLR 807; [2006] 2 AC, HL Lord Hope of Craighead made the same point

> "The obligation arising from his wrongful act is to make reparation for loss, injury or damage suffered. Reparation is achieved either by restoring to the other party what he has lost or, where that cannot be done, by giving the like value, or that which is nearest, to make up the damage. *Stair, Institutions of the Law*

> *of Scotland* (1693), 1.9.4. The loss suffered is the basis for the assessment of damages. It is not the function of the law of delict to exact anything more, and certainly not anything by way of punishment. If no loss has been suffered, the wrongful act will not give rise to any liability."

Thus, under the normal law of delict it is not the function of the court to castigate for lamentable conduct. In this sphere of the law there is no punishment of wrongdoers and accordingly no place for punitive damages

Similarly there is no place for exemplary damages in Scots law to allow the court to mark in some way the reprehensible conduct or the court's displeasure at what the defender has done. When lawyers come to quantifying the value of a claim – they have tables and cases and principles – much tried and tested. Parties are never (or ought not to be) that far apart in valuations of loss

The law of delict categorises the various aspects (heads) of loss, which sound in damages and excludes some. For example, in general, psychological trauma – short of a recognisable psychiatric classification - will not result in recovery (*Rorrison v West Lothian College & Anor* 2000 SCLR 245). In our context this was taken up in a Northern Irish case on slopping out, *Martin v. Northern Ireland Prison Service* [2006] NIQB 1 per Girvan J:

> "[42]…. Having seen and heard the applicant I am satisfied that while he found the toileting arrangements during the period of incarceration to be demeaning and disgusting, those arrangements did not cause him anxiety or psychiatric or psychological consequences. They caused him annoyance and a sense of frustration. There is no evidence that he suffered from any ill health as a result of the lack of hygiene involved in the procedures adopted."

This would not have sounded, at common law anyway, in an award of damages. The personal injury aspect of a prisoner's claim – the duty of care and the losses recoverable – was an issue that arose in the conduct of the litigation in Scotland but – as we shall see - as the Convention law has developed, the need for a separate common law basis of action in domestic law withered.

Under the Scotland Act 1998 just satisfaction damages may be awarded against Scottish Minsters for their violation of convention rights. Such an award is something quite different from delictual loss

In *Regina (Greenfield) v Secretary of State for the Home Department* Lord Bingham of Cornhill made the point succinctly:

> "19. [T]he [Human Rights] 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted.

In Strasbourg the Court too has expressed a clear understanding of the different awards – and the different functions of awards before it and the domestic courts. In *Varnava v Turkey* (App 16064/90) (18 September 2009), the Grand Chamber stated:

> "Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned."

At a very basic level for those seeking to set out a valuation of a claim for just satisfaction there is – even conceptually – a difficulty in setting out the heads of loss. Traditionally for private lawyers these necessarily include matters which ordinarily would not be recoverable. This distinction was one grasped by the Inner House in *Docherty v Scottish Ministers,* [2011] CSIH 58; 2012 S.C. 150; 2011 S.L.T. 1181:

> "Damages awarded for an infringement of the Scotland Act, like remedies under other constitutional statutes, appear to be essentially vindicatory in character (*Att-Gen of Trinidad and Tobago* v *Romanoop* per Lord Nicholls at paras 18-19; *Simpson* v *Att-Gen (Baigent's Case)* [1994] 3 NZLR 667, especially per Cooke P at page 678; Beatson and Others - *Human Rights: Judicial Protection in the United Kingdom* para 7-169/-172),

> albeit restitution may be an important element in quantifying the award. The difference in emphasis is a further distinction between damages in reparation and damages under the Scotland Act."

So, looking at the sums paid out to prisoners for violations of Convention rights from the standpoint of the ordinary tax-payer, why was this the subject of individual award and pitched at the level of considerable value? Several factors were in play in determining the fact that an award had to be made, and had to be made at a significant enough level to hurt.

The fundamental importance of the right in question has to be borne in mind when discussing the range of damages to be awarded. The particular Convention right at issue in these cases was absolute. This was not a trifling or accidental breach. The CPT (The European Committee for the Prevention of Torture) makes plain in every report, and in its Annual Reports, that it deals with a fundamental aspect of the Convention. By way of illustration, in its 19th General Report, the CPT states:

> "15. The absolute prohibition of torture and inhuman or degrading treatment or punishment forms part of the bedrock of the societies that make up Europe. To challenge that prohibition is to challenge the very nature of those societies."

The significance of Article 3 was also recognised by the House of Lords in *R (Limbuela) v Secretary of State for the Home Department* [2006] AC 396. Lord Bingham described the application of Article 3:

> "It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in Sir Thomas More when they referred to "your mountainish inhumanity"."

Lord Hope of Craighead rejected any idea of 'relativising' breaches of Article 3:

> "55. So the exercise of judgment is required in order to determine whether in any given case the treatment or punishment has attained the necessary degree of severity. It is here that it is open to the court to consider whether, taking all the facts into account, this test has been satisfied. But it would be wrong to lend any encouragement to the idea that the test is more exacting where the treatment or

> punishment which would otherwise be found to be inhuman or degrading is the result of what Laws LJ refers to as legitimate government policy. That would be to introduce into the absolute prohibition, by the backdoor, considerations of proportionality. They are relevant when an obligation to do something is implied into the Convention. In that case the obligation of the state is not absolute and unqualified. But proportionality, which gives a margin of appreciation to states, has no part to play when conduct for which it is directly responsible results in inhuman or degrading treatment or punishment. The obligation to refrain from such conduct is absolute."

Strasbourg Principles

It has been said on many occasions that the principles for non-pecuniary awards by the European Court of Human Rights are difficult to divine. Clayton and Tomlinson, in their 2nd Edition of "The Law of Human Rights" at para. 21.30 describe vividly various heads scratching, recognising that for the purposes of assessing the basis of awards to be made by domestic court for just satisfaction damages that what one first must do is to identify the 'principles' applied by the European Court of Human Rights.

- One former judge of the Court has stated privately 'we have no principles';

- another judge says 'we have principles, we just do not apply them';

- Sir Robert Carnwath has described the assessment of damages by the Court of Human Rights as something of a jury exercise.

- Lester and Pannick argue that the principles of the Court are, in truth, little more than equitable assessments of the facts of the individual and the case law lacks coherence; advocates and judges are in danger of spending time attempting to identify principles which do not exist.

- Grosz, Beatson and Duffy suggest that courts and tribunals are likely to be frustrated in their search for the principles applied by the ECHR.

- Simor argues that the discretionary nature of the Court's powers under Article 41 and the fact that the Court has rarely given reasons for how it has exercised its discretion means that it is difficult to discern the principles on which such awards are granted or not granted.

Under Article 41 the European Court may award just satisfaction damages. There are several factors which may inform the European Court of Human Rights in assessing what, in the circumstances, amounts to just satisfaction.

The European Court has remarked that awards of just satisfaction damages may be made "as a rule" when there has been a violation of Article 3. In *Kostov v Bulgaria* (App 28674/03) (27 November 2008) the Court said:

> 57. In the case of a breach of Articles 3 of the Convention, which ranks among its most fundamental provisions, compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies. Indeed, when it finds a violation of that provision, the Court itself will as a rule award compensation for non-pecuniary damage, recognising pain, stress, anxiety and frustration (ibid., § 66).

The affluence of the economy in question has been held to be a factor, which is capable of being taken into account. There is an argument that those awards against the United Kingdom should be higher than awards against those states because of its greater cost of living (See Scorey & Eicke, Human Rights Damages Principles and Practice, at A4-053(2)). In *Kostandinov v Bulgaria* (App 55712/00) (7 February 2008) the Court made the point expressly:

> "102. The Court notes that the violations established fell under Articles 3 and 5 of the Convention (see paragraph 68, 72, 80, 86 and 89 above). It further notes the applicant's argument in respect of the alleged improvements in the standard of living in Bulgaria, which the Court finds unquantifiable on the basis of the information presented but at the same time relevant when determining its award under Article 41 of the Convention. In view of the above, the specific circumstances of the present case, its case-law in similar cases and deciding on an equitable basis, the Court awards EUR 5,000 under this head, plus any tax that may be chargeable on that amount."

Similar references can be found in *Alexov v Bulgaria* (App 54578/00) (22 May 2008) and *Dimitrov v Bulgaria* (App 55861/00) (7 February 2008).

Again in marked contrast with other types of cases before it the Strasbourg court will make awards made for violations of Article 3 even where no claim is made. In *Mayzit v Russia* (App 63378/00) (20 January 2005) the Court found it possible to award just satisfaction damages:

> 87. On 6 May 2003, after the present application had been declared admissible, the Court invited the applicant to submit his claims for just satisfaction. He did not submit any such claims within the required time-limits.
>
> 88. In such circumstances, the Court would usually make no award (see *Ryabykh v. Russia,* no. 52854/99, §§ 67–68, ECHR 2003-X, *Timofeyev v. Russia*, no. 58263/00, §§ 51–52, 23 October 2003). In the present case, however, the Court has found a violation of the applicant's right not to be subjected to degrading treatment. Since this right is of absolute character, the Court finds it possible to award the applicant 3,000 euros by way of non-pecuniary damage.

Unsurprisingly the court has regard to the length of time spent in conditions of detention, which it holds to have attained the minimum level of severity to amount to a violation of Article 3. Awards made by the ECtHR in relation to applicants' detention in identical prisons or prison conditions suggest that the longer the detention the greater the award. (See for example, in relation to conditions of detention in Moscow: *Ivanov v Russia* (App 34000/02) (7 June 2007) €5,000 for around 18 months' detention; *Benedictov v Russia* (App 106/02) (10 May 2007) €10,000 for around 23 months' detention and a violation of article 13; *Sudarkov v Russia* (App 3130/03) (10 Jul 2008) €12,000 for around 27 months' detention and a violation of article 13. And in relation to St Petersburg: *Frolov v Russia* (App 205/02) (29 March 2007 €15,000 for around 4 years' detention; *Seleznev v Russia* (App 15591/03) (26 June 2008) €5,000 for around 21 months' detention). The court said that it took account "in particular" the duration of detention in assessing just satisfaction.

This is some way from a traditional formulation of loss. The quantification of damages to be paid out in light of a breach of Convention rights can never be the subject of precise calculation and actuarial evaluation. A broad and equitable approach is adopted. That is a headache for lawyers – on both sides – having to tender advice.

The narrative provided by the 'slopping out' litigation is a salutary tale. However, for those minded to slice up the cake in austere times, to overlook or to actuarially assess the possibility of putting compliance with Convention rights to one side – or to a less prominent place – a clear message has been sent that it is a requirement to be respected. Breach will not go unremedied. Essentially this reinforcement has occurred in light of these cases because

of the grave nature of the breach – Article 3 is a non-derogable right. The violations affected many thousands of citizens. The fact that these citizens were prisoners does not detract from the importance of the right at issue. Individual awards were necessary. For a proper public law remedy the emphasis should be upon the future, encompassing the individual awards. Particular focus needs to be paid to bringing an end to the continuing violations as well as discouraging future breaches. (See Whitty, "*Rights as Risk Managing Human Rights and Risk in the UK Prison Sector"*)

A wider perspective

In *Somerville v. Scottish Ministers*, 2008 SC (HL) 45 Lord Scott of Foscote made the point that:

> "A chapter of public law still, however, largely unwritten relates to the ability of courts, in actions where public law challenges to administrative action have succeeded, to award compensation to those who have sustained loss as a consequence of the administrative action in question." para 77

I would suggest a chapter of law remains unwritten about the nature and purpose of public law damages to be awarded under the Scotland Act. It is beyond doubt that such a species of damages now exists. This is vouched for by *R v HM Advocate* [2004] 1 AC 462 where Lord Hope of Craighead said:

> "[T]he Scotland Act itself envisages that a person who would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the act were brought in the European Court of Human Rights is entitled to a remedy: see section 100(1). A power to award damages is clearly implied by section 100(3), as it prevents a court or tribunal from awarding any damages in respect of an act which is incompatible with any of the Convention rights which it could not award under section 8(3) and (4) of the Human Rights Act which requires the court to apply the principles which the European Court would apply. As Clayton and Tomlinson, The Law of Human Rights, p 1416, para 21.13 explain, the award of damages in these circumstances is regarded as a public law remedy." Para.37

Lord Rodger of Earlsferry agreed:

> "Convention rights and the remedies for vindicating them belong in the sphere of public rather than private law: *Maharaj v Attorney-General of Trinidad and Tobago* (No 2) at 396 per Lord Diplock; *Simpson v Attorney-General (Baigent's Case).* What particular form the remedy or reliance will take depends on the court or tribunal, and on the jurisdiction, in which the matter arises. In an appropriate court the person affected can seek damages under the Scotland Act in respect of an incompatible act."

These comment were affirmed by the House of Lords in *Somerville v Scottish Ministers* 2008 SC (HL) 45, 2007 SLT 1113 and in *Docherty v Scottish Ministers*, 2012 S.C. 150; 2011 [CSIH] 58, 2011 S.L.T. 1181,

The English Court of Appeal in *Anufrijeva v Southwark London BC* [2004] QB 1124 – affirmed by the House of Lords in *Greenfield* - has adopted a very conservative approach to HRA damages. Cautious of floodgates perhaps, the Courts have been reluctant to sanction large 'windfall' payments to victims of violations

By contrast, claims for constitutional damages such as in Caribbean countries developed in the Judicial Committee of the Privy Council. These have recently been canvassed in great detail by the Supreme Court in *R (on the application of WL (Congo)) and anr v Secretary of State for the Home Department sub nom Lumba and anr v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671; [2011] 4 All ER 1; [2011] UKHRR 437 and held not to have application to losses recoverable under the law of tort. Rather than detaining you with tales of woe from Antigua or Trinidad and Tobago, I want to turn to look at New Zealand and the way that it has treated claims for a breach of the rights guaranteed by the Bill of Rights Act (BORA).

New Zealand is fruitful ground for reviewing a different and more nuanced approach to the question of public law damages for constitutional wrongs. In New Zealand, the Bill of Rights Act incorporated into statute a series of what may generally be described as constitutional rights. Left out in the course of the passage of the legislation through Parliament were remedy provisions. This omission was remedied by the Court of Appeal in *Simpson v. Attorney General* [*Baigent's case*] [1994] 3 NZLR 667. In that case, police officers persisted in the search of a house when they knew that the property had been named erroneously in a search warrant granted in respect of a suspected

drug dealer. The Crown claimed certain immunities for police conduct. In a landmark decision the New Zealand Court of Appeal held that immunities could not apply where police officers were not acting in good faith. Relying on the Privy Council case of *Maharaj v. Attorney General of Trinidad and Tobago* [1979] AC 385, the Court of Appeal proceeded to read into the Bill of Rights Act remedy provisions enabling the court to make awards of public law damages for violations of the Bill of Rights Act

It is of some moment that this case was referred to by the Judicial Committee of the Privy Council in *R v HM Advocate* and the House of Lords in *Somerville v Scottish Ministers* when talking of the remedies provisions of the Scotland Act.

The New Zealand courts have been very much alive to what has been described as "a sea change in remedial jurisprudence in the 20th century that has been confronted in many jurisdictions." (Hammond J, *Manga v Attorney-General* [2000] 2NZLR 65 at paragraph 127). In *Manga* a prisoner complained about unlawful detention arising out of an (ultimately discredited) interpretation by officials of the length of time to be spent in custody by convicted offender. The court was asked to rule upon the principles applicable to such claims. In the High Court, Hammond J analysed the scope and nature of public law damages:

> "[119] The touchstone for a public law remedy must be that there should be effective and appropriate relief. That means that:
> - a distinct violation must be identified and publicly articulated - there must be a "public acknowledgement" that a violation has occurred;
> - the remedy should be such that the violation is ended;
> - the remedy should, so far as is practicable, compensate the victim(s) for the violation; and
> - the remedy should ensure that no further violations occur.
>
> …
>
> There are substantial differences between private law and public law remedies.
>
> [122] Private law remedies were hierarchical. Monetary relief was the primary relief; equitable remedies were awarded only if monetary relief was inadequate; and declaratory relief has historically ranked as a distant "poor cousin".
>
> …

> [123] In *Baigent's Case*, the Court of Appeal adopted a similar starting point. However, the sort of factors influencing remedial choice in a private law suit (which include plaintiff autonomy; economic efficiency; the relative severity of the remedy; the nature of the right to be supported; difficulties of calculation; the effect of a remedy on third parties; the practicability of enforcement; and the conduct of the parties) are not wide enough for a case involving a violation of a constitutional character.
>
> [124] Furthermore, the character of a public law claim differs substantially from that of a strictly private law claim.
>
> [125] The private law proceeding is bipolar (between two parties); it is retrospective (it looks to events which have already occurred); right and remedy have historically been seen as intertwined; the dispute is very much self-contained; and the whole case is still essentially party-initiated and controlled."

Hammond J goes on to plot starting considerations for the choice of remedy in public law litigation:

> [130] First, at the practical level, the old order of things reverses itself. A Court must first clearly declare something to be a violation of the right. There must be no doubt on that score. Whether a Court should move to monetary relief surely depends on whether there is anything which is not (appropriately) covered by an existing or collateral cause of action. And structural relief (possibly through affirmative equitable relief) is a difficult and quite unexplored proposition in New Zealand. Quite apart from the "political" dimension, directing Bill of Rights compliances would have a feasibility dimension. Any formal order for compliance would have to be specified, the costs quantified, and the money found, in appropriate cases.
>
> [131] Secondly, at a higher level of abstraction - that of the proper place of government and Courts - it has constantly to be borne in mind that structure and process are, as Alexander Bickel rightly put it, "the essence of the theory and practice of constitutionalism" (The Morality Of Consent (1975) at p 30). What Courts should look to, first and foremost, is voluntary compliance - not a confrontation with legislative, or Executive, power.

> [132] Thirdly, at the end of the day, the real power of a Court in this subject area is that of moral persuasion. A New Zealand Court cannot control the purse, and the lions' strike should generally be withheld, in favour of a legitimate judicial expectation that public confidence will be enlarged, public morality advanced, and democratic decision making improved, by the Courts clearly identifying breaches and exercising remedial powers with restraint. Judicial declarations of right are usually not in vain, even if they reach the recipient with a sound no more audible than the turning of a page."

Dunlea v Attorney General [2000] 3 NZLR 136 was an action concerning the conduct of police officers executing a search warrant. There was a clear error. The applicants complained of the police conduct in relation to assault, unlawful imprisonment, trespass including the training of rifles upon them, pat down searches and pocket searches. Awards were made under the Bill of Rights Act including exemplary damages. The applicants appealed on the basis that the awards should have been larger. The Crown cross-appealed. The Crown cross appeal was partially successful. There was discussion about the interplay between the law of tort and Bill of Rights Acts damages. The majority did not deal with the Crown submission about the difference between Bill of Rights Act damages and claims under the law of tort and their overlap. Thomas J. looked at the nature of constitutional damages:

> "[58] In enacting the New Zealand Bill of Rights Act 1990, Parliament deliberately affirmed the fundamental rights and freedoms of New Zealand citizens. Those rights, for the most part, had already existed at common law, but they were now given a constitutional significance. A generous interpretation was required sufficient to give individuals the full measure of the fundamental rights and freedoms referred to. (See Cooke P in *Ministry of Transport v Noort* [1992] 3 NZLR 260 at p 268, quoting Lord Wilberforce's famous dictum in *Minister of Home Affairs v Fisher* [1980] AC 319 at p 328; see also the dictum of Richardson J at p 277 to the same effect.) Hardie Boys J has observed that in contemporary New Zealand society the importance of human rights can go unappreciated. They may be taken for granted. They may be seen as irrelevant and other considerations, such as expediency or alarm or outrage may suggest they should be overridden. The learned Judge thought that, perhaps, it is only when the rights are abrogated that

their crucial role in ameliorating the human condition is truly appreciated. (See *Ministry of Transport v Noort* at p 286.)
…

[61] It is because of its constitutional significance that this Court has directed that the rights in the Bill of Rights must be vindicated. Richardson J first pointed out the need for a "rights-centred approach" in *R v Goodwin* [1993] 2 NZLR 153 at pp 193 - 194. The learned Judge held that such an approach to the Bill of Rights necessarily requires that "primacy be given to the vindication of human rights". (For a discussion on the rights-centred approach and the relationship of such an approach to remedies, see *R v Grayson and Taylor* [1997] 1 NZLR 399 at pp 411 - 412; and see also *Baigent's Case* at pp 702 - 703.)

[62] Rights will not be vindicated, however, unless a violation of them is met with a real and effective remedy, and this Court has accepted that it would be failing in its duty if it did not provide an effective remedy to a person whose legislatively affirmed rights have been infringed. (See *Baigent's Case* at pp 676 and 677.) This requirement reflects international treaties on human rights. The Universal Declaration of Human Rights (art 8); the International Covenant on Civil and Political Rights 1966 (art 2(3)(a)); and the European Convention for the Protection of Human Rights and Fundamental Freedoms (art 13) all contain express clauses requiring an "effective remedy" for breaches of human rights. The Canadian Charter of Rights and Freedoms contains in s 24(1) a requirement that there be an "appropriate remedy"."

[64] Compensation will not be effective to vindicate and affirm the right which has been violated, however, unless the quantum of the award recognises that a fundamental right possessed by the plaintiff has been denied. It follows that the award cannot be simply equated with damages for "equivalent" breaches of common law torts such as wrongful arrest, false imprisonment, or the like. The focus of the Court is wider and must embrace the impact of the state's violation of the citizen's fundamental rights."

Thomas J. pays tribute to the judgement of Hammond J. in *Manga.*

"[66] Damages for a private wrong do not ordinarily extend to the vindication of the right which has been violated. In a tortious claim the plaintiff claims damages for the breach of a duty owed to the plaintiff. It is in the nature of a private right to remedy a private wrong. In a claim under the Bill of Rights the plaintiff seeks compensation for the breach of a right of a different character. It is a public right in the sense that it is a right against the state possessed by all citizens, but the breach occurs to the plaintiff and it is the intrinsic value of that right to the plaintiff which then falls to be compensated. The plaintiff is compensated, not just as the victim as in the private law proceeding, but as a citizen possessing a thing of value in itself. (For a discussion of the economic inappropriateness of applying the instrumental analysis of private law damages to compensation for constitutional torts, see Daryl J Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs" (2000) 67 UCLR 345.)

[67] Compensation for a breach of the Bill of Rights therefore embraces the extra dimension of vindicating the plaintiff's right, a right which has been vested with an intrinsic value, and it is that intrinsic value to the plaintiff for which he or she must be compensated over and above the damages which the common law torts have traditionally attracted. Thus, the right has a real value to the recidivist offender as well as to the model citizen. As stated by the Law Commission in Crown Liability and Judicial Immunity: A response to Baigent's case and Harvey v Derrick ((1997) NZLC R37) at para 70, the availability of rights does not depend on the identity or the character of the plaintiff. But the damages may then vary. Not only may they vary because the loss, such as the extent of the distress, will vary as between plaintiffs but because the amount necessary to compensate the plaintiff for the violation of his or her right may differ depending on the nature of the right which is breached, the gravity of the breach, and such other matters as may be germane to the vindication of the right in the particular case.

[68] Understandably, in ascertaining damages for the equivalent tortious actions over the years the Courts, adopting a loss-centred approach to damages, focused on the compensatory function of the law. Having determined an amount to compensate the plaintiff

for his or her physical damage and mental distress, it could be said, if the question arose at all, that the breach of the right had been "vindicated". But as the Bill of Rights has necessitated a rights-centred approach based on an understanding of the importance of vindicating the right now vested in the plaintiff as a citizen, it may be appropriate in many cases to focus on the violation of the right, and even to begin with that violation, in order to ensure that the public law element is not submerged in the task of compensating the plaintiff for his or her physical damage and mental distress. No such approach has been adopted in this case.
…

[71] For myself, I would stop short of drawing an analogy with exemplary damages. I do not consider that any punitive element should enter into the calculation of the compensation. (See to this effect *Baigent's Case* per Hardie Boys J at p 703.) Nor do I think that the plaintiff should benefit from what might be described as a "windfall" resulting from the public interest in ensuring that fundamental rights are not violated. To my mind, the better analysis is to regard the damages as being essentially compensation to the plaintiff for the value to him or her of the right in issue. Certainly, in general terms it is the constitutional significance of the Bill of Rights and the community's interest in ensuring that those rights are heedfully respected by the state that provides the need to vindicate rights affirmed in the Bill. Once the right is breached, however, the right being vindicated is the plaintiff's right and the fact that the right is shared with all other citizens does not detract from this point. The right can only be vindicated by compensating the plaintiff for the value which has been vested in it. All the general considerations which make up the public dimension of the right are particularized in the person of the plaintiff. The focus of the Court's inquiry is not thereby narrowed. The gravity of the breach and the need to emphasise the importance of the affirmed rights and deter breaches are inherent in the plaintiff's right notwithstanding that it is shared with all other citizens. In other words, the community's interest in vindicating the Bill of Rights is the plaintiff's right writ large.

[72] As recommended in *Baigent's Case* the question of compensation under the Bill of Rights can be approached globally. Where the breach is both a tort and a breach of the Bill

> of Rights, however, compensation for the latter must include compensation for the intrinsic value to the plaintiff of a right having constitutional significance. There is no other effective method of vindicating and affirming that right."

In *Taunoa and Ors v Attorney General and Anor* [2007] 5 LRC 680, [2007] NZSC 70 (31 August 2007) the New Zealand Supreme Court revisited the cases of *Manga* and *Dunlea*. Mr. Taunoa complained about the repeated and arbitrary nature of segregation in prisons in New Zealand including the use of isolation and strip-searches. Elias CJ repeated the point that the principles in relation to damages for breaches of constitutional or fundamental rights are a fresh and fertile ground for all jurisdictions:

> "[108] The principles upon which damages for breaches of rights are to be assessed are not greatly developed in New Zealand or in comparable jurisdictions. I do not think this case calls for any elaborate discussion or prediction of developments. In particular, I do not think it appropriate to consider the usefulness of a dichotomy between "private law" and "public law" damages without further consideration how such a division fits within the New Zealand legal tradition."

Whilst the English authorities had set about dampening the prospect of a damages culture, Elias CJ was suspicious of the effect of this. In a footnote she records the English approach:

> "The language of "moderation" seems to have developed from its use by Lord Woolf in extrajudicial writing. There, however, it was used to draw a comparison with damages in torts, a comparison since rejected in *Anufrijeva v Southwark London BC* [2004] QB 1124 at para [73]. Despite the retreat from a comparison with damages in tort, the view that Human Rights damages should be "moderate" has been restated with reference to the scale of awards made by the European Court of Human Rights. In *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at para [19],"

She makes her view of that approach plain, having regard to the potential for damage to the vindication of fundamental rights breaches:

> [109] With respect to those who think that damages for vindication of right must be "moderate", I do not think the adjective assists.

> It can be readily accepted that awards of damages should not be "extravagant". No award of damages should exceed what fits the case. Where a plaintiff is compensated for injury under another cause of action, damages for vindication of the right should not result in a windfall to him. Bill of Rights Act damages in such cases should be limited to what is adequate to mark any additional wrong in the breach and, where appropriate, to deter future breaches. But where a plaintiff has suffered injury through denial of a right, he is entitled to Bill of Rights Act compensation for that injury, which may include distress and injured feelings, as well as physical damage. The amount of such damages must be adequate to provide an effective remedy. Without adequate compensation, the breach of right is not vindicated. As the Privy Council has made clear in *Merson v Cartwright*, affirming the approach taken in *Attorney-General of Trinidad and Tobago v Ramanoop*, substantial damages may be necessary in the particular circumstances. I do not understand *R (Greenfield) v Secretary of State for the Home Department* to suggest that damages, where appropriate, should provide less than an effective remedy for the breach and its consequences. The points there made were that English courts acting under the Human Rights Act 1998 (UK) are not free to depart from the remedies thought appropriate by the European Court of Human Rights and that the need for deterrence may be less important when a state is bound to comply with international obligations."

Tipping J points up the principle of vindication too, saying that this is used "in the sense of defending and upholding the value and importance of the right rather than exacting punishment for its breach". Vindication also includes ideas of denunciation and marking public disapproval. Any undertaking by the party in breach to repair or remedy the breach will obviously be relevant as to what action the Courts should take.

Tipping J assesses the question of whether a declaration will be sufficient to vindicate the breach as being based primarily on the following factors:

1. The nature of the right that has been breached.
2. The circumstances and seriousness of the breach.
3. The seriousness of the consequences of the breach.
4. The response of the defendant to the breach.
5. Any relief awarded on a related cause of action.

Tipping J refers to Lord Woolf's observations about the Convention being "about securing of civil liberties and not promoting a public law damages culture ("The Human Rights Act 1998 and Remedies" in Andenas and Fairgrieve (eds), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000) 429,p 433.)

After surveying the Judicial Committee of the Privy Council and English authority Tipping J's view is that both vindication and compensation have an equal claim for attention in order to provide an effective remedy for any breach. This is because a breach of human rights provides for two victims:

> "First there is an immediate victim. The interests of that victim require the court to consider what, if any, compensation is due. But, because the breach also tends to undermine the rule of law and societal norms, society as a whole becomes a victim too. Hence, the Court must also consider what is necessary by way of vindication in order to protect society's interests in the observance of fundamental rights and freedoms."

For Tipping J, the focus is not about what the plaintiff ought to receive:

> "The defendant must pay what, if anything, is necessary to vindicate the breach or denounce the conduct concerned or deter future breaches.

Blanchard J at paragraph 258 agrees:

> "[258] When, therefore, a court concludes that the plaintiff's right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances, taking into account any non-Bill of Rights damages which are concurrently being awarded to the plaintiff. It is only if the court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. When it does address them, it should not proceed on the basis of any equivalence with the quantum of awards in tort. In this respect I would adopt the approach in *Greenfield* and *Fose*. The sum chosen must, however, be enough to provide an

incentive to the defendant and other State agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach."

The comparisons between New Zealand and Scotland are striking. In both jurisdictions fundamental human rights have been affirmed (entrenched) in statute. In Scotland the constitutional statute also created the devolution settlement. Both for Scotland and the United Kingdom (Human Rights Act) the constitutional nature of the enactments – "constitutional instruments" – have been recognised, see paragraph 79 of the Inner House judgement in *Somerville v. Scottish Ministers* 2007 S.C. 140. Legislative competence of the Parliament and the conduct of Executive action are circumscribed by compatibility with Convention rights. The vindicatory character of damages awarded under the Scotland Act has been recognised in *Docherty, Philbin and Logan v. Scottish Ministers* 2012 S.C. 150. The recognition of one of the roles of damages as contributing towards the vindication of Convention rights links it to the question of a real and effective remedy for the violation of Convention rights. In Scotland the contrast with delictual damages is unambiguous. Actions for a breach of duty of care (delictual actions) are loss centred. Litigation about Convention rights is rights centred. Private law claims are about wrongs. Public law claims are about rights. Issues of exemplary or punitive damages do not arise (See *R (on the application of WL (Congo)) and anr v Secretary of State for the Home Department sub nom Lumba and anr v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671; [2011] 4 All ER 1; [2011] UKHRR 437). An award of public law damages is not about punishing the wrongdoer. To do so is to risk a disproportionate award resulting in a potential windfall to victims of violations. That is to detract from their vindicatory character. That said, however, the awards must be sufficient to disincentivise the State or other public authority from repeating the conduct.

The legacy of the slopping out litigation is that rights must be taken seriously; that risks cannot be taken with fundamental human rights compliance. Perhaps that message has permeated. If not there is another chapter waiting to be written about the nature, purpose and, perhaps, scale of the awards

I started out by accepting that there was a common misperception that human rights were no more than prisoners' rights. Unfortunately that is my area of expertise and I must accept some blame for that misperception. I cannot accept the inference that often goes along with that: somehow prisoners are undeserving of basic human rights; in some way there is a hierarchy of the

deserving. That is of course a wider debate and one for another day. In the meantime, however, with one nod to those wider questions I would like to conclude with an excerpt from Lord Bingham's view on the importance of compliance with – and protection of - human rights. I do hope that we can see beyond the misplaced rhetoric of undeserving pursuers and appreciate, as Lord Bingham clearly did, the importance for society as a whole of governmental respect for human rights:

> *"Over the past decade or so, the Human Rights Act and the Convention to which it gave effect in the UK have been attacked in some quarters, and of course there are court decisions, here and in the European Court, with which one may reasonably disagree. But most of the supposed weaknesses of the Convention scheme are attributable to misunderstanding of it, and critics must ultimately answer two questions. Which of the rights discussed above would you discard? Would you rather live in a country in which these rights were not protected by law? I repeat the contention with which this chapter opens: the rule of law requires that the law afford adequate protection of fundamental human rights. It is a good start for public authorities to observe the letter of the law, but not enough if the law in a particular country does not protect what are their regarded as the basic entitlements of a human being."* (Tom Bingham "The Rule of Law

Welfare and Rights at the Heart of the Children's Hearing System?

Presented by Carole Wilkinson
Chair, Scottish Children's Reporter Administration

Thank you for the invitation to address this distinguished audience on behalf of the Children's Reporter Administration; it's an honour to be here. I also welcome the opportunity to reflect upon the developments of the Children's Hearing System at such a crucial time in its history. When I was asked to talk on the topic of welfare and rights, I got the sense that perhaps those giving me that topic were not quite sure that these two concepts sat easily together in the Children's Hearing System. I hope by the end of my presentation you might view that a little differently if you are a doubter.

In the time allotted to me what I intend to do is firstly, to give you an overview of the System, to set the context for what I want to say. I then want to explore some of the changes that have taken place over the forty years since the Hearing System was established and in particular in relation to human rights legislation, and; finally, to highlight some of the challenges that lie ahead.

It is remarkable to consider the longevity of the Children's Hearing System. Designed to serve society in the 1960s, it has survived amendments in the 1990s, tinkering in 2004, and is now being modernised with legislation passed late last year. Apart from the 2004 changes, each of the legislative changes have been designed, I believe, to support the underlying philosophy, of what has become known as the Kilbrandon principles. In acknowledging the soundness of the original report and legislation, it is important to recognise that regarding it as untouchable is not helpful, or to see attempts to update it as attacks on the system, suggestive of a defensiveness that is not necessary. This is a System we have every right to be proud of.

Society in the 1960s was a very different society to society today and it makes no sense to have a System for dealing with children and their families that does not reflect their needs in the 21st century. It is particularly interesting to note that a System designed primarily to deal with children who offend now receives more referrals for children in need of care and protection. The vast majority of children and young people referred to the Reporter are because of concerns about their welfare. For example, in 2010/11, 33, 710 children

were referred for concerns about their welfare whilst 8,126 were referred on offence grounds. Perhaps more disturbing 12.4 per cent of all children referred were aged 2 years and under. The overall number of referrals is a reduction of 7.8 per cent from 2009/10, and is the fourth consecutive year referrals have fallen. This figure represents 4.3 percent of the Scottish child population, and whilst referrals have been falling; the cases coming to our attention are increasingly complex and challenging. If you are interested in statistics and in the picture that's emerging I would urge you to actually look at the SCRA Annual Report, which is on the SCRA website.

In order to set the context, I'll say something about the Kilbrandon principles. These are broadly described as four separate principles –welfare; the unitary nature of the system; the appropriateness of the forum, and informality. To start with the welfare principle. I was particularly struck when I moved from working in the public services in England in the mid-1990s to work in the public sector in Scotland by the commitment to and support for public service, the wide range of services still delivered by the public sector, and the focus upon welfare. The 1960s are often seen as the pinnacle of welfare and from the 1970s onwards we see the beginnings of a move towards a rights based approach, and I have to say more punitive attitudes towards young offenders. Scotland however, has for the most part held on to its welfare approach, seeing this as the best way to improve children's lives. Our approach aims to put children and young people at the centre, but this is not at the expense of ignoring others. This does of course create tensions which I will return to, and of course if we are not careful welfare can turn to paternalism. What I would describe as doing for and at people rather than with them, the 'we know best' approach, which assumes that professionals have all the answers.

Moving now to the unitary nature of the system, the Children's Hearing System deals with both children who have offended and those offended against. It sees them both as children who need help, they get treated in the same way with the same potential disposals. This gives the Scottish system its uniqueness, I have to say it leads to comments, questions, criticisms and accolades, and that depends who you are and where you sit. It would be naïve to think that the whole of Scotland or outside Scotland actually views this system as the best thing since sliced bread, even if we think it is. But our System recognises the impact of family background, poverty, social exclusion, poor school attainment, not as excuses but as factors in the child's experience. If any of you were fortunate enough to attend the recent Kilbrandon lecture and hear Sir Harry Burns, the Chief Medical Officer for Scotland, describe some of the work that he's been doing over the last few years, looking at some

of the biological influences upon children, and some of the impacts upon environments and upbringing in terms of children's ability to thrive, I think we can actually see some of the benefits of the System we have in Scotland.

Kilbrandon's starting point was that courts were not the best place to determine outcomes for children and young people. Judgements about good or bad parenting, how best to help children and their families, are best overseen by well-trained lay persons from the communities they serve, and this is about the appropriateness of the forum. Panel members come from a much wider spectrum than is the case for judges and sheriffs. In developing a System that's described as' informal' is not to confuse it with a lack of due process. When it works well, it allows for discussion, the involvement of the family and the child a young person, helps everyone in the room to identify the important issues, what help might be appropriate, and allows for the best decisions on the disposal and the best ways to help that child or young person. This I would argue is welfare at its best, not paternalism. Kilbrandon, then, is the bedrock of our Children's Hearing System, but as I said earlier it should not be, and has not been immune from change.

So let's now look at some of the changes to the Children's Hearing System. I want firstly to draw upon three particular changes influenced by human rights legislation, cases that I think challenge the welfare versus rights debate. But perhaps these cases also illustrate that at times we may have strayed more towards paternalism than welfare in our approach. The first case is *McMichael versus UK 1995*. This case put simply revolved around the parents right to have access to the papers being put before the panel. It's probably a bit surprising in 2011 to even think that these were debates that needed to be had; but in this case, Mr and Mrs M argued that their rights had been violated as they were unable to see panel papers, and this affected their ability to participate in the haring and influence the outcome. In summary they could not be given a fair hearing. The European Court had a view in this case that Mrs M had not had a fair hearing, and this particular case paved the way for parents having access to panel papers, and this is now common practice.

The second case I want to refer to is *S versus Miller 2001*. This was a test case in terms of Children's Hearings being compatible with ECHR. Again the issue was the right to a fair hearing and was raised both in terms of access to papers and to legal aid for children and young people. The outcome was to hold that access to legal aid and to panel papers supports the right to a fair hearing. I would argue that both these cases support the fundamental principles as enshrined in Kilbrandon. If we want panel hearings to involve in

a meaningful way, parents or carers, children and young people, so that they can participate in deliberations and decisions, then making sure they have all the relevant information is essential, and once the judgement had been made that a fair hearing for parents meant that they had to have access to papers, there is no justification for denying children and young people access to papers. The thinking that parents and children could not handle access to papers, for me, implies a paternalistic approach.

The third area of challenge centred around the issue of relevant person, and this was the case of *PR versus K and others December 2010*. K was an unmarried father and his challenge centred around the scope of family life, and the decision in this case broadened the definition of a relevant person, particularly a father, but also of grandparents, and it's interesting in terms of who is a relevant person, who has a right to be heard, a right to appear at panels and to be involved in the decision making, this is still very much a live debate. It was a live debate during the passage of the current legislation and is now being argued out through the drafting of the secondary legislation, and it does have some implications which I'll come back to in a moment.

And finally in terms of changes I just want to say something about the role of the reporter in the context of European Convention compliance, and to start by saying something about the role of the Reporter. He or she is there to support a fair process. They provide customer care by making sure that people are put at ease and that everyone in taking part of the panel hearing actually can do that to the best of their ability. They do have health and safety responsibilities in terms of identifying risks people who come to Panel Hearings are often very anxious, and stressed, and very worried about what is going to happen. Their levels of stress can actually have implications for how they behave in the Hearing, and it would be naïve not to assume that some parents are extremely difficult. The Reporter does therefore have a responsibility to help manage the Hearing, in terms of reducing some of those risks and working; to manage hearings to everyone's satisfaction; and to try and avoid, if at all possible, people being excluded from a Hearing. They also have a responsibility to provide a report on proceedings. What the Reporter must not do is act as an advisor to the panel. This doesn't mean that he or she can't give a view, but they not be seen in anyway to be influencing the outcome, and they must not have excessive contact out with the Hearing with panel members. Some people I know have had major concerns about what are seen as major changes to the role of the Reporter in Hearings. This, I think, is to over emphasise what has happened' essentially what SCRA has done has clarified the role of Reporters in order to ensure compliance with human rights. The Reporter

can offer advice or guidance to the Hearing, but this must be available to all parties and that seems to us to be appropriate, fair and proper.

Kilbrandon envisaged children and young people at the centre of the System and though, as I've tried to indicate, we have made some progress in giving children a voice, but we still have a lot of work to do. Over the past year, SCRA has been involved in a project to increase the engagement of children and young people in the Hearing System. We have taken onto our staff several young people who have direct experience of care, and that in itself is not without challenges. They are undertaking modern apprenticeships so that at the end of their period with us they will gain qualifications. As part of their role we have asked them to inspect our office premises including the Hearing rooms, to go and visit our offices and evaluate their friendliness towards children and young people; how evaluate how staff in our offices meet and greet them, and we've asked them to look at the information and literature we provide to see how child friendly it is. I must pay tribute to Glasgow City Council, to 'Who Cares?', and to Scottish Government for supporting us and helping us fund this work. I do not think it will surprise you to know that the report that the young people have done called '*Fit for us: making our system fit for children and young people'*, has come up with actions and recommendations for improvement, and in fact their action plan contains fifteen actions. What they tell us is that in some areas we are better at involving older children but in others better at how we deal with younger children, but we are not consistent – for instance if you go into our Hearing rooms you'll often find them equipped with lots of toys and things to play with but they, tend to be geared towards younger children and we haven't thought about how we cater for older children. As a result of the work we have produced a range of leaflets and a DVD aimed at different age groups to help explain the Children's Hearing System and to help them participate so it gives families and children and young people an opportunity before they come to a hearing to actually get an idea of what a hearing is like. Having seen that DVD I actually think they are materials that will be very helpful, not just to the families but to all the professionals involved, as I don't think we should make an assumption that professionals always come to the Hearings well prepared or focussed on the task in hand.

I now just briefly want to say something about the new legislation, the Act that was passed by the Scottish Parliament late last year. For me there are two key aspects to this new Act. Firstly I believe very strongly that it is designed to improve and protect a System that is seen as basically sound, that actually does recognise the welfare and the rights of children and young people.

Secondly and importantly it's designed to recognise and ensure compatibility with European legislation. Now it won't surprise you to hear that the Act does have some critics, who are concerned that perhaps we have increased within the system an adversarial approach by introducing legal representatives to parent and possibly an enhanced role for sheriffs. Those who seek to reassure the critics like Professor Norrie remind us that this doesn't necessarily mean a confrontational or court based approach. The essence is the right to a fair Hearing. He also suggests that it is utopian to think that all the people sitting in the hearing room are on the side of the family – parents, family carers and children can be at odds, professionals and families can be at odds, and at the very least there is the state versus the family. This I think takes us back to our earlier cases and the importance of no one party having access to more information and knowledge than another. In the new Act there is a role for the Scottish Legal Aid Board in quality-assuring legal representation, and I think this too is a positive move in terms of improving the quality of Hearings.

The second criticism is that the new Act is an attack upon localisation, firstly by decreasing the role of local authorities and secondly by the new power to allow panel members to sit in areas not their own. The central tenet I believe remains – community resolution of community problems. Whilst it's clearly helpful for panel members to know about local issues, local services, possible sources of help, Scotland is a small country and often sources of help are similar across Scotland and in some cases very specialist help may only be available outside the panel area. What is important is that families do not have to travel far and that Hearings are accessible, in the current financial climate it is helpful to have some flexibility in the system. So, in certain circumstances, Hearings are not delayed or postponed through lack of sufficient panel members. Surely dealing with cases promptly and minimising delay is a child-centred approach?

I also think there are issues about ensuring that local authorities actions are compliant with ECHR given that they are responsible for designing care plans for children and implementing panel decisions. They too must not be in a position to overly influence or undermine panel disposals. I am a supporter, as is SCRA of the new National Body, as we believe it will bring improvements to the Hearings System, in particular by the adoption of national standards for recruitment, training and support for panel members. It will bring a level of consistency not present in the current arrangements. This has to be a good thing and I believe again this strengthens not undermines the Children Hearing System.

Over the last forty years, as the System has developed, the challenge has been to marry the philosophy of welfare with the individual rights based culture of the European Convention, and to make a system designed in the 1960s fit for the 21st century. We have to acknowledge there are many conflicting and competing rights, we are not dealing with simple issues here. To be more child-centred and to give parents and family members a voice moves us from paternalism and recognises they can contribute and that their contribution is valuable and helpful, it actually recognises their rights. However, families in trouble are not necessarily in agreement over what the problems are or the solutions, the Hearing System has to balance these competing views and rights. We should not underestimate that getting the balance right is not easy. You may have listened to some of the recent debates in Scotland and perhaps more particularly in England about the need to make decisions about children more quickly, for me speed is not the issue but making the right decisions and ensuring that there are balanced debates about rights. Is it the parents and their right to look after their children? Or their children's rights to a family life if their parents can't look after them? You cannot boil these down to simple issues and I don't believe either you can always set very definitive timescales, it is never that simple. I would argue that the rights movement has pushed us in a positive direction and in doing so has not undermined but rather improved the system and that welfare and rights can sit side by side in the system.

Can I finally now say something about the future and the challenges ahead? My first challenge is our attitude to children and young people. Why in the UK do we dislike them so much? If you trawl through last week's papers and recent newspaper cuttings you'll see references to 'yobs' and to 'thugs', these terms are often used to describe very young children. You may have seen the recent research across the UK done by Barnardo's which asked adults about their attitudes to children, where over 50 per cent of adults interviewed referred to children as 'animals' and used terms like 'feral' to describe them, and generally held very negative views. Our neighbours in Europe and Scandinavia are really puzzled by our attitudes. We need to change our demonization of our children and young people if we are going to ensure that the most disadvantaged lives are improved, that they become productive citizens, and that that they have their rights recognised. This I acknowledge is not an easy or short term task

The second challenge is how we deal with our 16 and 17 year olds. We pride ourselves on our welfare approach, but increasingly we are pushing this group into the court system, and it is interesting that the current debates surrounding

the new children's rights legislation are talking about the adoption of the United Nations Charter for children and young people. This views childhood as up to 18 years. So is Scotland actually going to rise to the challenge and see children as children until they are 18?

The third challenge is retaining the Kilbrandon principles and philosophy, so as we extend the rights and the involvement of more adults, we ensure that we don't fill Panel Hearing rooms with lots of people, and become more adversarial. This is a real concern for those who work in the system. If you are dealing with complex situations with a large number of children, potentially with different parents and carers, the Hearing room can become very crowded and hearings can become very argumentative. This in a sense could take us away from the very principles on which the Hearings System is enshrined. The challenge for us all is to try and manage all those changes so that rights are recognised and children and young people's voices are heard. We are seeing an increase in appeals against decisions made by Panels, whilst we accept that appeals are healthy, we have begun to look at them more closely to try and understand what this increase in appeals tells us about our practice. We are clearly beginning to identify some issues which we all need to address. There are some challenges in the new Act in terms of extending the grounds for referral, particularly in relation to domestic abuse, and these will be new areas that we'll have to actually work with. Probably the biggest challenge of all is *truly* to involve children and young people. I have spoken about a number of steps along the way but I think we need to recognise that we have still a lot of work to do.

And my final challenge is about widening our influence and taking our system to others. You might well have heard some critics of the system say if it's so good why don't others adopt it? We've probably all got our views about why that is but I think there is a lot more that we can do to actually talk about the benefits of this system, we have had a bit of interest from our neighbours across the border, who in thinking about their juvenile justice systems have asked us to go and talk about what we are doing here in Scotland, so maybe there is some hope on the horizon.

So to conclude, I have tried in this brief presentation to argue that welfare and rights can indeed sit together and are at the heart of the Children's Hearing System, that changes to the system, through legislation, and ECHR challenges, have improved and modernised the System, and that what we have now is a Hearings System that allows the courts to focus on legal issues and leaves the Children's Panel, appropriately, to respond to welfare needs.

This is a System we do not need to be defensive about, we can be proud of, promote and support. It is a System that Scotland has much to offer to the rest of the world.

SASO Prize Winning Student Essay
Stop and search in Scotland and perceptions of police fairness

Kath Murray, University of Edinburgh

> *[Stop and search] was never in my years at HMIC Scotland raised as an issue, and that in itself is curious, given the fact that it is still continually raised South of the Border... the Scottish Human Rights Commission didn't raise it with me, the Scottish Government didn't raise it, there was no clarion call from the media for it, the police services themselves, perhaps understandably because nobody's asking them, didn't raise it. So it was a non-issue.*
> (Interview, May 2011)

Introduction

Police use of stop and search clearly raises issues of civil liberties and human rights – as the Scottish Police College advises its probationary officers, stop and search is 'an intrusive use of authority, which deprives a person of their liberty' (2010; 7). Given this sense of weight, it is curious that the use of police stop and search in Scotland has received negligible academic, policy or political attention, outwith a single short report commissioned by the Scottish Executive a decade ago in response to the Stephen Lawrence Inquiry (Reid Howie Associates, 2002). This absence is particularly striking given that in England and Wales the use, abuse and regulation of stop and search has been subject to ongoing policy attention and academic critique for over three decades (Hall *et al.* 1978; Smith and Grey, 1983; McLaughlin 1991; Rowe, 2004; Bowling and Philips, 2007). Conversely, most observers of policing in Scotland would probably struggle to describe stop and search as politically contested or even to define the practice. As the interviewee cited above remarks, stop and search in Scotland is simply a 'non-issue'.

This paper does not however set out to explain the *absence* of stop and search in Scottish policing dialogue, rather it addresses the very real and considerable *presence* of stop and search in Scottish society. The overarching aim of the paper is to examine whether stop and search encounters are likely

to affect public attitudes to the police, in particular, people's beliefs about police fairness – which are fundamental to effective policing (Tyler, 2005). Indeed, it is a firmly established truism that policing by consent depends upon public cooperation – which is in turn, facilitated or impeded by varying perceptions of police fairness. For example, perceived police fairness is variously associated with willingness to report crime, to act as witnesses, and voluntary compliance with the law (Lind and Tyler, 1992; Tyler and Huo, 2002; Sunshine and Tyler, 2003; Tyler and Fagan, 2006), whilst perceived unfairness and discrimination is considered the 'most potent threat' to legitimacy (Reiner, 2010; 159). As such, it seems reasonable to suggest that if people believe that stop and search encounters are conducted unfairly or if encounters fall disproportionately on certain sectors of the population, the likelihood of cooperation with the police will fall.

Structure of the paper

The paper is organized in five parts. Part one sets out the empirical background and critically examines some of the key characteristics of recorded stop and search in Scotland between 2005 and 2010. The data are drawn from Freedom of Information requests to the eight forces in Scotland and prior to this research project, have not been subject to academic analysis or publication. Part two sets out the theoretical background and considers the ways in which people make sense of police encounters. The key question here is whether we should analyse search encounters at an individual or at a societal level. In other words, should we put emphasis on the quality of search encounters, or should we take a broader societal perspective that accentuates the type of people that are more likely to be searched and asks whether there is evidence of cumulative bias. Part three applies this theoretical background and suggests that stop and search as currently practiced in Scotland resonates with a social discipline model of policing (Choongh, 1998). The analysis draws on a series of interviews conducted with active and retired senior police officers in 2010, and observes similarities between officers' understanding of search practices and a social disciplinary style of policing.

Part four tests whether being stopped and searched is likely to adversely impact on young people's overall perceptions of police fairness, using Scottish Crime Survey (SCS) data (1992-2002). By tapping into changes in stop search frequencies over a ten year period, the analysis tests whether people are responsive to the distribution of searches. The analysis also examines whether a person's neighbourhood and social class are likely to influence perceptions of police fairness. Part five draws together the preceding analyses and arguments, and contextualizes the findings with reference to developments in criminal justice and policing in Scotland since 1992. The

paper concludes that perceptions of police fairness are more likely to tell us about a person's own life and social status, and the experiences of policing that are likely to stem from this position, rather than that conduct of police officers at any given event, and draws out the implications of this conclusion for policy.

1. The Characteristics of Stop and Search in Scotland

This part of the paper details the key characteristics of stop and search in Scotland between 2005 and 2010. The aim is to broadly describe what the police in Scotland do in terms of recorded search activity. As noted, the analysis is drawn from data accessed by Freedom of Information requests to the eight police forces in Scotland, however the data quality varies between forces, for example, data are not available for all forces in some years. There is also a marked improvement in data quality between 2005 and 2010 with fewer unknown or unclassified data entries each year. Cross-sectional analyses in the paper are based on 2010 search records which have the least number of unclassified entries. Given the variation in data quality across the time frame, the trend data are less robust and should be treated more cautiously.

The use of stop and search in Scotland

Stop and search is broadly intended as a tool for tackling street crime, for example, the possession of illegal drugs, offensive weapons and stolen property. Given that officers may search people in a range of situations, there is no common definition of stop and search in Scotland, however for police training purposes, a stop and search is defined as 'any encounter between a police officer and a member of the public, which results in that individual being searched for the purpose of obtaining evidence' (Scottish Police College, 2010; 1).

The use of stop and search powers in Scotland is extensive. In 2010 over 457,000 stop searches were recorded by the police. To put this statistic in context, table 1 details the search rate per 1000 people in Scotland and Strathclyde police force, against comparable data for England and Wales, and London[74]. Unlike England and Wales, there is no evidence to suggest that police searches fall disproportionately on Black and Minority Ethnic populations (BME), rather the majority of searches are carried out on white males in their mid to late teens.

74 Incidence only: the extent to which the same individuals are searched repeatedly is unknown

Table 1. Rates of stop and search, per 1000 people: London, England and Wales, Glasgow and Scotland

	London 2009/10	England & Wales 2009/10	Strathclyde 2010	Scotland 2010
Rate per 1000 people	73.3	23.6	168.0	88.2

Source: Ministry of Justice; Scottish Police Force records

Recorded stop searches in Scotland increased by approximately 325% between 2005 and 2010, although this trajectory is not aligned with known offending patterns. Estimates of offending in Scotland based on Scottish Crime and Justice Survey data indicate a relatively stable trajectory since 1993 (TNS/BMRB, 2010: 24), whilst more recently the Scottish Government released statistics indicating that police recorded crime is at its lowest level since 1976 (Scottish Government, 2012; 1). This lack of congruity suggests that stop and search in Scotland may not wholly function as a response to offending, as it is formally intended ('for the purpose of obtaining evidence' ibid.), and thus raises questions as to its informal purpose.

Search powers: policing by consent?

There are sharp differences in the application of search powers across Scotland, in particular, whether searches are carried out on a statutory basis and based on 'reasonable suspicion'[75], or on a non-statutory 'consent' basis. For example, in 2010 10% of recorded searches in Northern Constabulary were carried out on a non-statutory basis, compared to 76% in the Strathclyde area. This discrepancy is important because statutory searches have a substantially higher threshold of accountability insofar as statutory searches are notionally based on robust suspicion and the account should be verifiable by a third party. Conversely, non-statutory searches[76] are premised on verbal consent – which is simply evidenced by an officer recording a search as 'voluntary' on the search record. At the national level, approximately 69% of recorded stop searches in 2010 were non-statutory. In short, the majority of stop searches were not based on reasonable suspicion and did not employ formal police powers.

The premise of consent is problematic on several counts. Whilst members of the public have the right to refuse a non-statutory search, there is no

75 Powers of search granted by statute most commonly apply to the possession of drugs, alcohol, stolen property, offensive weapons and firearms.

76 Non-statutory searches were abolished in 2003 in England and Wales

positive duty placed on the police to inform people of this fact. Research also suggests that refusal to give consent may be treated as suspicious in itself, and used as grounds for carrying out a statutory search (Delsol, 2006). Finally, a 'request' to search is more likely to be interpreted as a command when the power differential between the police and the policed is greater (Nadler and Trout, 2005; 11). This point is particularly relevant to Scotland given that 46% of recorded searches in 2010 were carried out on children and teenagers whose capacity to grasp the consent principle is more doubtful. Teenagers and children are also significantly more likely to be searched on a non-statutory basis: statistical modelling of factors associated with recorded non-statutory searches in Scotland between 2005 and 2010 indicates that age is significantly associated with the type of search power used, and that the odds of being searched on a non-statutory basis decrease with age. Put more simply, the odds of being searched on a non-statutory basis are greater for children and teenagers, and the odds of being searched on statutory grounds are greater for adults (see appendix for results).

In sum, non-statutory searches may be described as legally ambiguous (Mead, 2002; 803), uneven in their application across Scotland, and more likely to be carried out on young people. Moreover, as Reid Howie Associates note, there is 'a strong belief in some quarters that [the non-statutory search] has no place in Scottish policing, nor any basis in Scots law, both from a civil liberties and a legal standpoint' (2002; 94).

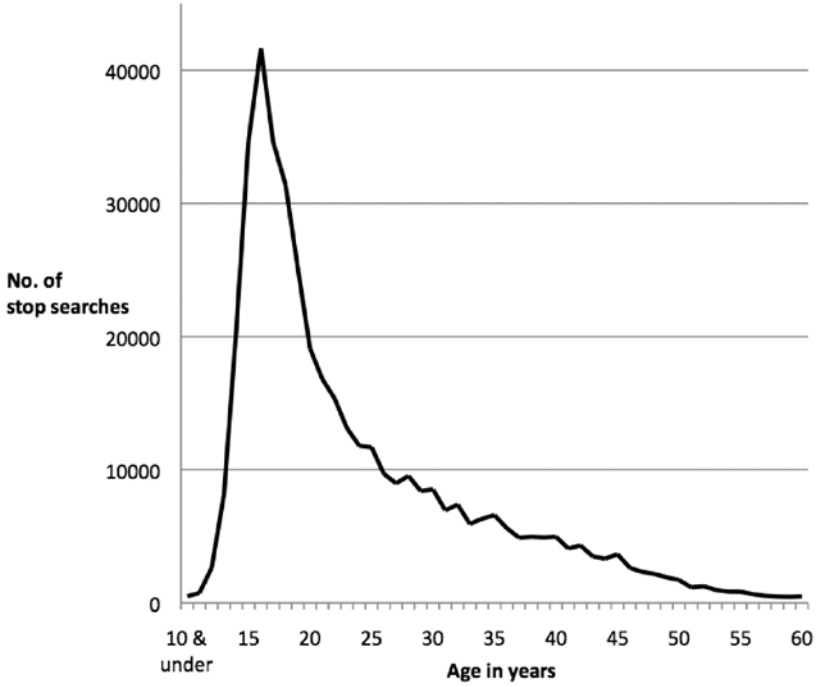
Age and gender

Following the gendered distribution of street crime, which is heavily weighted towards males (McAra and McVie, 2010; 79-80), stop searches are similarly gendered. In 2010 between 76% and 87% of recorded searches were carried out on males. The gender imbalance may also be exacerbated by search regulations in Scotland which state that searches should be carried out by the same sex officer as the person being searched. Given that around 28% of police officers in Scotland are female, the ability to search females (without calling for assistance) is clearly lower than that for males. Interestingly, in three forces (Lothian and Borders, Grampian and Northern) there is a statistically significant higher likelihood (χ^2) of detection when searching females, suggesting that greater caution and deliberation is directed towards females, compared to males.

A range of Scottish research findings suggest that being stopped and searched by the police is not an uncommon experience among young people. Scottish Crime Survey Youth data from 1992 to 2002 suggests that around 15.8% of 15

years olds were searched by police in the previous year. In a small Edinburgh study, Anderson *et al.* report a 13% stop and search rate amongst 11-15 year olds, concluding that young people's adversarial contact with the police is 'far higher than comparable levels of contact for adults living in the same area' (1994; 130). Self-reported panel data from the ESYTC[77] suggests 7.5% of 12 year olds respondents were searched by the police in 1998, rising to 17.7% at age 15. In 2010, approximately 500 stop searches were recorded on children aged ten and under, of whom 80 were aged seven or under and thus below the current age of criminal responsibility. Police records indicate that in 2010 stop searches peaked at age sixteen, with a sharp decline thereafter, as illustrated graphically in figure 1.

Figure 1. Recorded stop searches in Scotland by age, 2010

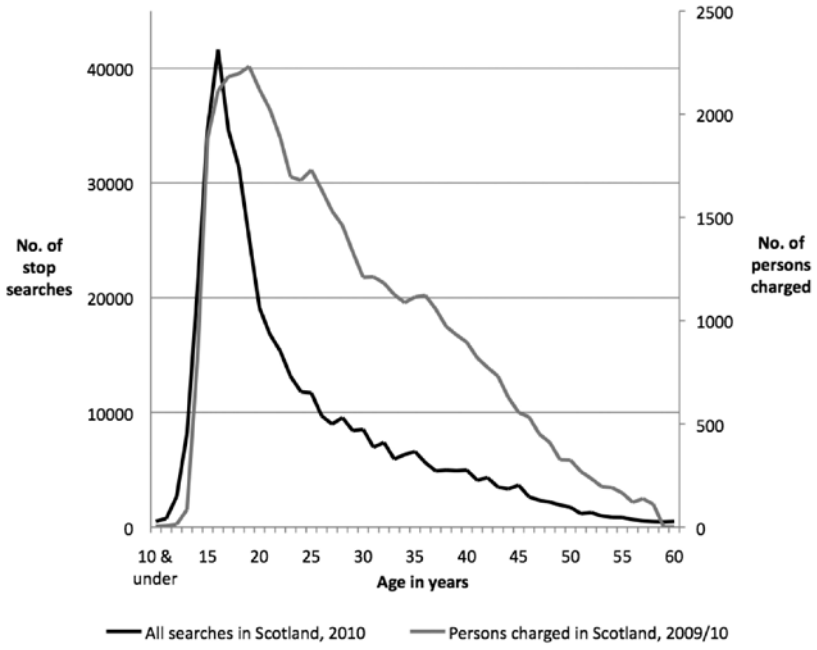


The stop and search age-curve depicted in figure one loosely follows the overall shape of the 'age-crime curve', with the sharpest increase (678%) between ages 12 and 14. Indeed, given that the age-crime curve is 'one of

77 Edinburgh Study of Youth Crime and Transitions

the least contended issues in criminology' (McVie, 2005; 1) it would seem wholly logical that searches are directed towards individuals in their mid to late teens, in other words, the age distribution of search activity is justified by offending variables. However the relationship between the age-crime curve and police practice is not entirely straightforward. Figure two also sets out persons charged by age and indicates that the rate at which searches decrease after age sixteen is substantially sharper than the more gradual decrease in recorded offending.

Figure 2. Recorded stop searches in Scotland by age, 2010



The apparent divergence between being searched and offending is also evident in the association between detection (securing evidence) and age: detection amongst those aged 20 and under is significantly lower than in older age groups on a χ^2 analysis.

The data in figure two raise the question as to why do searches tail off so sharply? In other words, why do the police seem less likely to stop and search older adults who continue to engage in offending behaviour and conversely, why are young people disproportionately targeted? More broadly, against a

sizeable background of search activity in Scotland, the majority of which is conducted on a non-statutory basis and tends to be directed towards young people, it also seems apposite to ask whether stop searches are likely to affect young people's attitudes towards the police. Here it is important to consider whether the quality of search encounters is likely to influence people's attitudes towards the police (for example, whether an officer is polite or confrontational), or whether the fact of being searched *in itself* is more influential. Each explanation carries different policy implications: if the quality of search encounters is the overriding concern, the main policy objective is to improve police conduct. However if people are more concerned with who is searched and how often, this raises more fundamental and complex concerns apropos the distribution of policing. The distinction between *how* people are searched (respectfully or otherwise), and *who* is searched (which types of people and how frequently) is discussed next.

2. Making sense of police encounters

This part of the paper examines ways in which people make sense of stop and search encounters and asks whether people are likely to assess events with reference to the quality of individual encounters, or whether people tend to view policing at a societal level, with reference to the distribution of encounters. The discussion compares procedural justice theory which accentuates the quality of police-public encounters, with theoretical perspectives that put emphasis on structural factors that are likely to shape attitudes towards the police, for example, a person's social class and neighbourhood, their own experiences of policing and those of preceding generations which stem from a particular structural position.

Procedural justice and public pragmatism

As noted, effective policing requires public support. It is thus concerning that evidence suggests confidence in the police across the UK has declined since the 1950s (Hough, 2007; McLaughlin, 2007; Reiner, 2010). The origins and significance of this decline have been debated extensively. Support has been variously described as 'surprisingly high' (Loader and Mulachy, 2003; 35) and 'haemorrhaging' (Reiner, 2010), and tied to a range of determinants, from societal conditions (for example, the partial incorporation of the working class in political and social institutions) to the organization of policing (Reiner, 2010; chapter. 4). Nonetheless, there seems to be broad agreement that *ideological* support for the quintessential benevolent local bobby no longer holds. In particular, it is assumed that the police can no longer secure support on the grounds of inclusive and stable social conditions (including a stable

crime rate), nor by symbolic appeals to national pride. This is important because it suggests that public support is tenuous and that we are more likely to assess the police on what they do and how they do it (Reiner, 2000; 162).

Consistent with this logic, a growing body of research premised on procedural justice theory argues that attitudes to the police are primarily driven by the quality of encounters, for example, whether officers treat people fairly, respectfully, explain their actions and listen to public concerns (Tyler, 1990, 2005). Procedural justice theory fits with the observed post-1950s decline in public confidence because it assumes that people judge the police pragmatically with reference to the quality of policing encounters. Importantly, this reading of public attitudes also infers a shift in the way that we evaluate different sources of information – that we have increased the weight attached to immediate events and lessened the weight attached to more nuanced beliefs about the police which may variously derive from societal conditions, our place in the social structure, the symbolism that policing holds for different social groups, and our cumulative experiences of policing and other social institutions (Warren, 2011; 357). In short, the shift to pragmatic assessment of the police thus infers a different *way of thinking* – which is a remarkably strong proposition.

Structural determinants of attitudes towards the police

On the other hand, it may be that the iconic 1950s representation of the police has been *replaced* by other representations and narratives, and that people continue to interpret police encounters through a broader lens than procedural justice theory suggests. A longstanding tradition of sociological theory and related inter-disciplinary work argues that people make sense of events with reference to social memories, namely the 'ideas, aspirations and feelings' which link together social groups (Goldmann, 1964; 17).

Social memory theory suggests that intersecting group memberships such as family, neighbourhood and social class, influence which memories are retained and may also give rise to 'memories' which an individual has taken no direct part in (Halbwach, 1992 [1925]). For example, Whitfield argues that ongoing mistrust between police and Black communities should be understood with reference to migration from the West Indies in the 1950s and police racism experienced by immigrants which adversely influenced and shaped police-community relationships thereafter. Whitfield argues that it is the *aggregate* experience of the Windrush generation, which two decades on, cumulated in direct confrontation at the Notting Hill Carnival riots in 1976 and Brixton riots in 1981 (2006; 2-3). An enduring sense of mistrust towards

the police is similarly evident in the cumulative and entrenched lack of local public confidence in the South Yorkshire police following the 1984-5 miner's strike and Hillsborough disaster in 1989 (Waddington, 2007; 43). These events, against a background of unpopular Thatcherist economic policies, gained a symbolic momentum and weight that adversely influenced public attitudes towards the police for years thereafter, and it is likely that police-public encounters in South Yorkshire ex-mining villages in successive years would be mediated through this representation of the police, rather than with reference to the quality of a given encounter.

The longevity of negative feeling towards the police within certain populations suggests that the symbolism attached to policing has not faded: rather that the narratives have changed and the referents may be drawn from diverse experiences and histories. Importantly, the examples of the post-Windrush generations and the South Yorkshire mining communities indicate that social identity (for example, a person's age, gender, social class and ethnicity) is associated with different experiences of policing. Put more bluntly, as Skogan notes, social identity is 'directly related to the extent to which people are stopped by the police [and] often linked to how deferentially or harshly they are treated' (2006; 101).

Skogan's observation refers to police discretionary decision-making. Given that it is impracticable to enforce against all violations of the law, officers must choose who to police, with which powers, and in what style. Here Reiner argues that discretionary decision-making broadly hinges on the categorization of people into the 'rough and respectable', with 'finer distinctions' between the two (2010; 123). A number of studies further suggest that policing of the former category – variously termed 'police property' (Lee, 1981; 53-54), 'dross' (Choongh, 1998), or 'the usual suspects' (McAra and McVie, 2005) – tends to be driven by 'social disciplinary' objectives and a concern to lay down police authority, over and above crime control objectives as based on 'legal or factual guilt' (Choongh, 1998; 25-26, also Smith and Grey, 1983; Skogan, 1990; McAra and McVie, 2005; Reiner, 2010), and that the police are facilitated in this aim by 'a battery of permissive and discretionary laws' which include the powers of stop and search (Reiner, 2010; 123-124). The next part of the paper examines the social disciplinary model with reference to search practices in Scotland and to officers' accounts and ways of thinking about stop and search.

3. Stop and search as social discipline

The distribution of stop and search in Scotland described in part one arguably resonates with a social disciplinary model of policing. In particular, the extensive use of non-statutory searches is difficult to reconcile with crime detection ('a lack of interest in legal or factual guilt' ibid.) whilst the analysis of age indicates that searches may be driven by a concern with youth in itself (most likely conflated with social class [Mooney and Young, 1999]), over and above the likelihood of offending and detection.

Social disciplinary themes are further evidenced in senior police officer's accounts of search practices. In this interview stop and search is described as a form of *communication*

> *"As you engage with people... then one thing to do with them is you search them .But it's not an intelligence-led search or recovery of stolen property. It's an engagement search. It's a bit like speaking to them and saying, "While you're here I'm going to search you just in case – I'm making you aware that knives aren't tolerated and any time you engage with the police you will get searched".*

The expression "*it's a bit like speaking to them*" infers that the policing message is conveyed through the act of searching rather than the substance of the encounter, and squares with Choongh's argument that social disciplinary policing acts 'to remind an individual or community that they are under constant surveillance' (1998; 626). Here an officer describes the function of stop and search as '*messaging to the peer group and others*' – in other words, an informal deterrent – and depicts the sense of public spectacle[78]:

> *"It's not going to be a tap on the shoulder: it's by professionals and they know what they are doing and what they're looking for: so you wouldn't take them up the side street and out of public view to do that – you're going to do it in full public view."*

Choongh also draws our attention to commonly held officer's beliefs that although events such as stop and search 'might cause distress to someone like you and me', these are 'everyday occurrences in the lives of 'these people' and did not bother them' (ibid. 632). Similarly Bittner remarks 'it is difficult to overestimate the skid-row patrolman's feeling of certainty that his coercive and disciplinary actions towards the inhabitants have but the most passing significance in their lives' (1967; 613). This sentiment is implied by officer's

78 Formal police training in Scotland states that searches should be 'carried out as discreetly as possible (e.g. in a doorway or an alleyway)' (Scottish Police College, 2010; 3)

descriptions of stop and search as a mundane routine activity that carries little consequence:

> *"If you get stopped by the police you get searched – if you get on a bus you get asked for a ticket!"*
>
> *"You know it's just like a teacher standing up in the classroom, that's what you do"*
>
> *"There's no great loss of dignity in a young person getting stopped and searched by the police – their pals are getting the same at the same time, you know"*

Interviewees also referred to a lack of resistance by young people, although this indicate that young people living in certain areas are most likely resigned to regular police searches, and understand that a confrontational or challenging response is likely to aggravate the police response (Choongh, 1998; 629).

More broadly, this way of thinking about stop and search as ordinary and inconsequential may be exacerbated in Scotland because the use of stop and search is not rigorously evaluated, nor is it politicized, and without a critical voice it seems unlikely that officers would regard stop searches as problematic. As the interviewee in the opening quote comments, "*nobody's asking"*. It also seems reasonable to suggest, given that that 'nobody's asking' and that most searches are premised on a rather slippery principle of 'consent', that police discretion around stop searches in Scotland is comparatively unfettered, and that officers are afforded greater freedom than their counterparts in England and Wales.

The use of stop and search in Scotland described thus far may be summed as problematic. Areas of concern include the extensive use of non-statutory searches which have a low threshold of accountability, a seemingly disproportionate focus on young people, and an apparent concern to communicate authority rather than to secure evidence. Against this background, the next part of the paper examines whether stop and search encounters in Scotland are likely to have a detrimental effect on attitudes towards the police. Using Scottish Crime Survey youth data the analysis tests whether being stop searched is likely to influence young people's perceptions of police fairness, whether the effect is cumulative, and identifies additional factors that are may influence young people's opinions of the police.

4. The Effects of stop and search on perceptions of police fairness

This analysis in this part of the paper draws on Scottish Crime Survey youth data collated between 1992 and 2002. The respondents are aged between 12 and 15 years old, and the data potentially taps into the sharp increase in searches between the ages of 12 and 14 as illustrated in figure 1. The data also afford fresh insights into a period in which stop searches were not recorded by the police in Scotland. To begin, table 2 details changing levels in three types of adversarial street-contact over the decade:

Table 2: Types of adversarial contact with the police, by sweep

Sweep	% respondents ever told off and asked to move on	% respondents stopped and questioned	% respondents stopped and searched	*N*
1992	33.3%	25.2%	4.8%	482
1995	38.1%	29.9%	6.6%	388
2002	38.8%	28.5%	11.3%	524

Weighted data

Between 1992 and 2002 the proportion of respondents that report being told off/asked to move on and being stopped/asked questions increases slightly, however the change for both types of encounter is statistically non-significant (X^2). In contrast, there is a statistically significant increase in the incidence of self-reported stop and search between the three sweeps (X^2 (2) = 15.7 $p \leq .001$). Importantly, the statistical association between being searched and perceived police unfairness also strengthens across the three sweeps. In 1992 the association between stop and search and perceptions of police unfairness is statistically non-significant, however by 2003 there is a significant association at the .001 level (Cramér's V = .302).

The Cramér's V statistic indicates that perceptions of overall police fairness may be tied to the frequency of stop searches: that as the level of search encounters rises, the likelihood that young people believe they are treated unfairly increases. This simple association is important because – unless the quality of encounters has seriously deteriorated between the sweeps – it suggests that young people assessments of overall police fairness are influenced by the volume of search activity and whether the use stop and search is deemed proportionate.

The next stage of the analysis tests the effect of adversarial contact on overall perceptions of police fairness alongside additional factors relevant to a young person's background (neighbourhood, age and parental control). The year is included in the model to retest the association between the changing frequency of searches across the three sweeps and perceived police fairness. The data are modelled using multinomial logistic regression to indicate the odds of agreeing that the police treat young people unfairly (compared to those who are unsure) *and* the odds of disagreeing that the police treat young people fairly (compared to those who are unsure). The dataset and variables in the analysis are described more fully in the appendix. Table 3 shows the results.

Table 3. Multinomial logistic regression predicting young people's perceptions of police fairness

Dependent variable: 'Do you agree or disagree that the police treat young people less fairly?'

Reference category: 'Not sure whether the police treat young people less fairly'

Do you think the police treat young people less fairly?	AGREE				DISAGREE			
	Wald	Odds Ratio	95% CI for OR		Wald	Odds Ratio	95% CI for OR	
Searched once (ref: never)	3.7	2.1 NS	1.0	4.4	0.4	.7 NS	.2	2.0
Searched more than once (ref: never)	7.8	3.2**	1.4	7.3	0.0	1.1 NS	.4	3.3
Age	28.2	1.4***	1.2	1.6	0.1	1.0 NS	.9	1.1
Council housing area (ref: non-council)	5.3	1.4*	1.1	1.8	1.3	.9 NS	.7	1.1
↓ parental control	11.0	1.2***	1.1	1.3	24.2	.8***	.7	.9
Year 1995 (ref: 1992)	4.4	1.4*	1.0	2.0	0.4	1.3 NS	.9	1.7
Year 2002 (ref: 1992)	6.3	1.5**	1.1	2.1	2.1	.9 NS	.6	1.3

*$p \leq .05$ **$p \leq .01$ ***$p \leq .001$ NS = non-significant

N = 1304 (merged sample from 3 datasets), 5.2% missing cases, unweighted data

Pearson goodness of fit $p = .089$

Model X^2 (14) 168.131 $p < .001$

R^2 .121 (Cox and Snell), .136 (Nagelkerke)

Results

The association between respondents who report being searched *once* and perceptions of police fairness is non-significant, however it is by a *very* small statistical margin (p = 0.56) and an association should not be discounted. Respondents who have been searched more than once (compared to those who have never been searched), have greater odds of agreeing that the police are unfair towards young people, than respondents who have been searched once. This suggests that repeated search encounters most likely have a cumulative adverse effect on a person's perception of general police fairness.

Age is a significant predictor within the sample age-range: a one year increase in age is associated with 1.4 times greater odds of agreeing that the police treat young people unfairly. This result may tap into a number of processes including the increased likelihood of being searched[79], the corresponding likelihood of vicarious experience, the loosening of familial control which might otherwise encourage trust in authorities, and an attendant increase in peer influences.

The effect of neighbourhood is significant. The neighbourhood variable describes whether or not a respondent lives in a council housing area – which in turn is significantly associated with occupational social class at the family household level[80] and may be read as a proxy. Respondents living in council housing areas have greater odds of agreeing that the police treat young people unfairly than respondents who do not, which again may tap into young people's judgements as to whether the social and geographic distribution of policing is fair, based on either their own experiences and/or those of their peers and families.

Parental control is a significant predictor of negative attitudes towards the police. As parental control decreases, the odds that young people will perceive the police as unfair increase. Parental control is the only significant predictor of *positive* attitudes towards the police: higher levels of parental control are associated with the view that the police *do not* treat young people less fairly, suggesting that parental control is likely to be associated with support for authorities

The year of the sweep is statistically significant: respondents in the 1995 and

79 There is a significant association between age and repeated stop search in the dataset $\chi 2$ (6, n = 1357) = 56.2, p < .001, Cramér's V = .144

80 Council housing area and social class correlation: $\chi 2$ (5, n = 1362) = 264.3, p < .001, Cramér's V = .440

2002 sweeps have greater odds of agreeing that the police treat young people unfairly, compared to those in the 1992 sweep. The strongest association is evident in the 2002 sweep, again suggesting that the increased use of stop and search across the time frame may have adversely affected young people's general opinion of the police.

Finally, outwith parental control, none of the factors in table 3 are significantly associated with the belief that the police do *not* treat young people unfairly, thus indicating an asymmetrical relationship between the factors in the model and young people's perceptions of police fairness.

5. Discussion

This part of the paper draws together and contextualizes the arguments and findings detailed thus far. The discussion is framed with reference to trends in criminal justice and Scottish policing which coincide with the survey period and aims to unpack both the apparent increase of stop and search between 1992 and 2002, and more contemporary forms of stop and search in Scotland.

Never mind the quality

The increase in self-reported stop search between 1992 and 2002, and the concomitant increase in perceptions of police unfairness suggest that young people are responsive to the *frequency* of stop searches and that the adverse effect of search encounters is cumulative. It is also likely that attitudes towards the police are influenced vicariously, whereby the effects of stop and search are disproportionately amplified by 'narratives about police mistreatment and harassment of citizens that [are] disseminated in communities' (Warren, 2011; 357). For example, Anderson *et al.* describe talk between young people about the police as 'cautionary tales' which 'appear to have little relation to policing as they themselves experience it' but mark out the distance between young people and the police (1994; 148). As search activity increases, vicarious effects are likely to increase over and above the rate of encounters as stories and anecdotes gather pace. The effect is also more likely to take hold if there is a sense of fit between tales recounted, and wider perceptions of trust or mistrust in authorities. Overall, the analyses indicate that young people do care about the quantity and distribution of police searches, and that it may be unwise to *overly* focus on the quality of police encounters.

Social identity matters

The results in part four also suggest that a young person's neighbourhood, age and experience of parental control are likely to colour their perceptions of

police fairness. This in turn suggests that when young people think about the police in general terms, they do not necessarily judge the police pragmatically – on what they do and how they do it. Rather their attitudes towards the police may draw on a range of background variables, including parental influence. For example, table 3 indicates that parental control has a *positive* influence on young people's overall perceptions of police fairness and it may be that if parents pass on favourable beliefs about the police to their children, these values may retain a certain weight, despite adversarial policing encounters to the contrary. This finding chimes with research on stop and search encounters by Reid Howie Associates (2002) which reports amongst those respondents who were 'satisfied' with a search encounter, 41% stated that the police were not polite and 53% were not satisfied with the explanation for the search! This counter-intuitive finding indicates that the way we think about the police is neither wholly logical nor pragmatic, and reiterates the point that although police conduct is clearly important, it should not be overplayed.

Overall, the analysis suggests that attitudes towards the police need to be set against a structural background which accounts for the type of people that are more likely to be policed. In other words, it seems that perceptions of police fairness are likely to be shaped by factors outwith actual search encounters and the more limited lens of procedural justice theory. This does not refute the procedural justice thesis, however it does suggest that the explanatory remit should be expanded.

Criminal justice and policing in Scotland 1992-2002

The analysis in part four clearly raises questions around the use of stop search between 1992 and 2002, and the apparent increase in stop searches over a period in which the recorded youth crime rate in Scotland was (and continues to be) relatively stable (McAra and McVie, 2010; 77). Here it seems likely that the increase in search rates partly reflected broader trends in criminal justice. In particular, the survey period coincided with a more managerialist and punitive turn in Scotland which converged with trends in England and Wales towards 'populist punitiveness and/or more actuarial forms of justice, predicated on risk management' (McAra, 2008; 19). As McAra notes, from the mid 1990s a 'major retreat from welfarist principles [was] evident in some areas of both juvenile and adult criminal justice' as demonstrated by increased managerialism and a punitive turn in criminal justice policy 'aimed at exclusion, dispersal and punishment' (ibid.; 8,9).

Managerial and punitive tendencies were similarly evident in Scottish policing with the introduction of 'new forms of financial management

and the development of a performance culture' (Fyfe, 2010; 180), and the use of 'sovereign' style crime control as exemplified by 'zero-tolerance policing' (ibid; 181). Whilst stop searches were not incorporated into formal police targets, interview data suggest that searches were implicitly tied to a managerialist performance culture, for example search records were (and continue to be) used as an informal measure of proactivity and 'keeping busy'. Here an officer comments that stop and searches were used as a proxy for meeting other policing targets:

> "*[stop and search] was certainly used more, I would say, late 80s, early 90s onwards because the performance measurement was: what are you pro-actively doing to address violent crime against the person? And stop and search is an easy thing to count*".

On more punitive styles of policing, zero tolerance style policing was evidenced in Operation Blade, launched by Strathclyde police[81] in 1993 as a response to knife carrying, followed by the Spotlight initiatives in 1996 which targeted various 'quality of life' crimes. Operation Spotlight – described as 'community policing with the gloves off' (Orr, 1998; 106) – drew explicitly on Wilson and Kelling's *Broken Windows* thesis (1982) and was premised on the view that 'minor crime is often simply the breeding ground and nursery that spawns and nurtures more serious and violent crime' (Orr, 1998; 114). Both campaigns were accompanied by high profile publicity campaigns and used stop searches extensively and pro-actively. Press reports at the time suggest around 30,000 people were searched over three months as part of Operation Blade (The Scotsman, 20/1/1997), whilst Orr's paper on Operation Spotlight reports that in a three month crackdown on knives and weapons 43,000 searches were recorded (Orr, 1998; 119). Interestingly, the search rates at the time were viewed as remarkable and newsworthy, both by Strathclyde police and the media: thus making a striking comparison with 2010 statistics for knives and offensive weapon searches in Strathclyde, which averaged around 111,600 over a three month period – and the attendant absence of public debate.

Against this operational and criminal justice policy background, it seems plausible that the use of stop search changed both quantitatively and qualitatively within the survey period. Evidence of differences in style is suggested in this interview in which an officer describes the stop search protocol circa 1991:

81 Given that around 43% of the Scottish population live within the Strathclyde police force area, police practices in Strathclyde has an extensive reach and impact.

Reflecting back, it was very much on a reactive basis: so it would be a question of an incident taking place, going to the scene or near the scene, and then stopping someone, a step at a time you know? So if it was fairly clear early on that this person had had nothing to do with what was going on then they'd be on their way

It is also likely, if not inevitable, that large-scale pro-active police campaigns such as Blade and Spotlight drove up the proportion non-statutory searches, and may have either set a precedent or strengthened a tendency towards their use in routine policing tool thereafter. This is important because *if* the increase in self-reported stop and search between 1992 and 2002 was driven by non-statutory search activity, it is likely that young people would be perceive this type of search – which is not accompanied by robust suspicion – as particularly unfair (Stone and Pettigrew, 2000).

Conclusion

This paper has examined stop and search practices in Scotland and explored whether search encounters are likely to influence young people's attitudes to the police. The results suggested that being stopped and search may be negatively associated with perceptions of overall police fairness, that there is evidence of a cumulative negative effect, and that judgements about overall police fairness are influenced by a person's neighbourhood and family. In sum, it seems that our judgments about the police may tell us about our own lives and our experiences of policing which are likely to partly stem from our place in society.

The paper carries important policy implications for Scottish policing. The key policy message is that the volume of stop and search matters: that young people are sensitive as to whether the level of search activity seems proportionate, and that negative attitudes towards the police are likely to deepen as search rates increase. We also should be clear that this type of policing seems to be increasing in Scotland, and that as noted, recorded stop searches rose by 325% between 2005 and 2010. The uncontested use of stop and search is part underpinned by the frequently cited argument that stop and searches function as an effective deterrent against crime. To cite a Scottish Government press release:

> "My Officers have focused on targeting both known knife carriers, and hot spot areas knife crime is prevalent. *Never before have Police Officers in Inverclyde carried out so many searches for*

> *weapons, yet at the same time found so few.* We will continue with this robust and firm style of Policing and continue to tackle all aspects of violence in Inverclyde" Chief Inspector Graeme MacDiarmid, Scottish Government news release, 7/11/10 (*my emphasis*)[82]

Yet to be clear, the deterrent effect is unproven (Bland *et al.* 2000; 61), nor is deterrence a lawful aim under statutory powers (EHRC, 2010; 16). More broadly, as Rawls (1999) cogently argues, the underlying utilitarian rationale of deterrence – that the inconvenience of a few justifies the overall good – is not reconcilable with principles of equal citizenship (1999). On this point, it is also important to note that the few in question are not arbitrary citizens, rather the findings in this paper suggest they are systematically more likely to be teenage boys, and, extrapolating from previous research, more likely to be from more socially and economically excluded backgrounds (Young and Mooney, 1999; Anderson *et al.* 1994). To conclude it seems that current stop and search practices in Scotland risk undermining public support for the police, particularly amongst populations upon whose support the police are more likely to depend. The use of stop and search in Scotland demands critical policy attention, in particular two issues should be prioritized: the pragmatic challenge of securing support for the police, and the deeper challenge of reconciling stop and search practice with principles of equal citizenship and human rights.

82 http://www.scotland.gov.uk/NewsReleases/2010/11/05144403

APPENDIX

PART I. THE CHARACTERISTICS OF STOP AND SEARCH IN SCOTLAND

Factors predicting a non-statutory search, 2005-2010

Variables in the analysis	Fife	Grampian	Lothian & Borders	Northern	Strathclyde	Tayside
	Odds	Odds	Odds	Odds	Odds	Odds
Age	.96 ***	.98 ***	.98 ***	1.01***	.98 ***	.98 ***
Male (ref. = female)	1.08 NS	.88 **	.64 ***	1.08 NS	.80 ***	1.3 ***
Year	.81 ***	.84 ***	1.15 ***	.99 NS	.99 *	1.11 ***
Constant	45.1 ***	2.91 ***	1.90 ***	9.16 ***	7.28 ***	.48 ***
N	5,619	26,936	127,200	24,153	1,299,600	22,628
Cut point	.772	.397	.597	.007	.776	.654
Nagelkerke R^2	.064	0.34	.036	.002	.015	.020

Dependent variable coding: statutory search = 0, non-statutory search = 1
*$p \leq .05$ **$p \leq .01$ ***$p \leq .001$ NS = non-significant

PART IV: THE EFFECTS OF STOP AND SEARCH ON PERCEPTIONS OF POLICE FAIRNESS

Dataset

The data in the analysis is taken from three sweeps of the Scottish Crime Survey youth supplements (1992, 1995 and 2003) which each surveyed between 400 and 500 12 to 15 year olds. Although slightly dated, these samples afford a unique opportunity to explore the association between stop and search and young people's perceptions of policing in Scotland using quantitative data and robust statistical techniques. As noted in the paper, the data allows original insights into policing practice at a time when stop searches were not formally recorded in Scotland. The time frame also coincides with major operational developments by Strathclyde police and broader shifts in criminal justice, which may be associated with the increase in reported stop and search across the three sweeps.

The youth samples are constructed from the respective adult frames, a stratified probability sample which aims 'to be representative of the adult Scottish population residing in private households' (Henderson et al. 1994; 2.). Adult respondents in the survey were asked if there were any children between the ages of 12 and 15 resident at the address, and when applicable, parental

permission was requested to administer a self-completion questionnaire. The construction of the youth sample is thus dependent on availability and opportunity rather than strict probability, nevertheless given the rigour of the adult sample from which it is derived, the sample may be broadly regarded as representative of young people in Scotland. Note that the results and subsequent discussion are applicable to the population from which the sample is drawn, that is, 12 to 15 year olds living in Scotland.

Variables in the analysis

Dependent Variable

The dependent variable is 'Do you agree or disagree that the police treat young people fairly?'. The three response categories are 'agree, disagree, and not sure'. The reference category in the model (coded 1) is 'not sure'.

Explanatory Variables

A. STOP SEARCHED (ONCE/MORE THAN ONCE)

This variable categorizes respondents into those who report being searched once and those who report being searched more than once.

B. NEIGHBOURHOOD

The neighbourhood variable is constructed from the 8 Scottish ACORN socio-demographic variables which describe housing types, for example, large houses/affluent owners and poorest council housing, and a range of other variables associated with area. In order to maximize the subpopulations, the ACORN classifications are grouped into binary categories: council and non-council housing areas. The council housing category includes privately owned ex-council houses.

C. AGE

Age is modelled as a scale variable and respondents in the dataset are aged between 12 and 15.

D. PARENTAL CONTROL

This composite variable is constructed from ordinal variables describing how often parents know where a respondent is, and who they are with. The variable aims to tell us about the strength of familial ties, and whether family or peer groups are more likely to influence a respondent's world view. The scale runs inversely from high to low control. Parental control is weakly associated with social class χ^2 (30, n = 1350) = 44.304, $p < .05$, Cramér's V = .045, and most probably should not be treated as a proxy.

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SASO – Objects, Membership, Office Bearers, Branch Secretaries and Chairman's Report

Objects

The formal objects of the SASO are: "to initiate, encourage and promote as an independent Scottish body, study and research by all means into the causes, prevention and treatment of delinquency and crime, and to co-ordinate and consolidate existing work of that and the like nature, and to give publicity to such work, and to secure co-operation between bodies, association or persons engaged in any research or work or activity having objects similar or akin to those of the Association".

The Association is managed by a Council. There are branches in Aberdeen, Dumfries, Dundee, Edinburgh, Fife, Perth, Glasgow, Lanarkshire, and in Orkney & Shetland. Each branch carries out its own programme of meetings and local conferences. The Association organises a residential conference each year on the third weekend in November. It is Scotland's main criminal justice conference and attracts distinguished speakers from both within and outwith Scotland.

The basic aim of the Association, both nationally and locally, is to create a common meeting ground for the many professional groups and individuals interested in the field of crime and criminology. The membership is drawn from the Judiciary, the Legal Profession, the Police, the Prison Service, Social Work Services, Administrators, Academics, Teachers, Reporters to Children's Panels, Children's Panel Members, Doctors, Clergy, Psychologists, Prison Visiting Committees, Community Justice Authorities, Central and Local Government. It provides an opportunity for an exchange of views by its members, enabling them to explain their own problems and to appreciate the problems of others engaged in related fields. SASO has no agenda other than to make possible and encourage purposeful dialogue within the Scottish criminal justice system in ways which will contribute to its improvement.

Through study groups and conferences, communication between the professional groups is encouraged and individual members gain the opportunity to meet experts in different fields of study, and to discuss with them matters of mutual interest. In the working parties it is possible for the

members to contribute their own specialist knowledge or experience. Among the most valuable results of membership are the opportunity to meet and know others with whom it may be necessary to make contact during the course of one's professional life, and the consequent building of trust and confidence between members.

Membership

SASO has around 400 members. Those wishing to join should contact the Administrator, Irene Cameron, Association Management Solutions, PO Box 2781, Glasgow, G61 3YL. 0141 560 4092 icameron@a-m-s-online.com. Website address: www.sastudyoffending.org.uk

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CHAIRMAN'S REPORT 2010-2011

Introduction

This is my fifth report to SASO. I am pleased to report that again it has been another very successful year. The work of the Council seems to be primarily that of organising the National Annual Conference, ensuring healthy finances and supporting where necessary the work of the Branches. No sooner is one conference over then we are already heavily engaged in planning and organising the next. That was the case this year while we developed the theme of the 'impact of Europe' and thought about speakers. If anything, the subject matter has become even more topical over the months since we first considered it.

Through our Branch activities and our national Annual Conference we bring together many of those involved in the justice system within Scotland. Our membership continues to remain strong, at just under the 400 mark, and as we know, many more individuals attend our meetings and conferences which are also open to non-members. Our Administrator, Irene Cameron, is working through the membership list, updating details and attempting to modernise the membership subscription system, and we are attempting to get the tax back through gift aid as well! We should perhaps consider how we can better use the successful branch meetings to enrich our membership.

National Conference

The theme of our 41st Annual Conference in November 2010 was "*Managing Risk and Reintegration*", which turned out to be a successful and informative event. Again, my thanks go to Niall Campbell, Alasdair McVitie, Dan Gunn, Elizabeth Carmichael, Margaret Small, Cyrus Tata, Sheriff Rita Rae and Fergus McNeill whose organizational skills and attention to detail proved so effective; and of course, to our administrator, Irene Cameron.

We decided to try a new venue and format. We held the conference at Dunblane Hydro Hotel, and the programme ran from Friday lunchtime to Saturday 5.00pm. The same 'quantity' of conference was packed into the two days, with the Conference Dinner being held on the Friday night. With only one night's accommodation, the Conference costs were able to be reduced.

The Rt Hon Lord Gill, Lord Justice Clerk (our Honorary President) chaired the conference. He introduced the opening keynote speaker, Professor Jill Peay who spoke on *Mental Disorder and Crime: Some Unresolved Questions*. Her talk was followed by a joint presentation from Dr Rajan Darjee (psychiatrist) and Dr Katharine Russell (psychologist) on *Managing challenging and sexual offenders in the community – what we should do and what we shouldn't.* These raised some practical issues for offender management.

There followed a Panel Led Discussion on *Housing and integrating the difficult into communities (offenders, sex offenders, domestic abuse perpetrators)*. The Panel was chaired by Tom Halpin (SACRO), and contributions were made by Janice Lockhart (Homeless, Dunbartonshire Council), Yvonne French (Housing SOLO, Renfrewshire Council) and Dot Fraser, (SW HMP Edinburgh). A lively and informative discussion ensued with the audience.

The evening saw a drinks reception hosted by Fife and Forth Valley CJA. This was followed by our Conference Dinner. We received a humorous talk from our After Dinner guest speaker Frank Mulholland QC, Solicitor General for Scotland. We also awarded our second SASO Student Essay Prize to Graham Bell for his dissertation: "*Can evidence about desistance influence penal policies and practices? Should it?"* The Judges were the three co-directors of the Scottish Centre for Crime and Justice Research, professors Burman, Mcivor and Sparks.

On Saturday, the second day our Chair Lord Gill was ably assisted by Niall Campbell, our Honorary Vice President. Our first keynote address which was also the SASO Memorial Lecture, was dedicated to honour the memory of Gordon Nicholson CBE QC (1935-2009), SASO Chairman and Honorary President. This was given by Professor David Cooke on the intriguing title of: *Violence Risk Assessment and the Illusion of Certainty*. It raised a number of interesting questions for discussion. He was followed by Professor Hazel Kemshall who presented on *Reducing Risk – Integration or Aversion? Risk assessment, management and use of IPP in England and Wales.* Yvonne Gailey then followed with a talk on *Scotland's Approach to Serious Violent and Sexual Offenders: Early Lessons*.

In the afternoon this was followed by an interactive workshop on the issue of "*Mental Health/Low Level Offending and Reintegration"*. Dr Andrew Fraser and Stuart Storrie led the workshop. The final session was on new developments in re-integration. The first presentation by Monica Wilson on *Challenges of trying to get a whole system approach for re-integration –*

working with domestic abuse offenders and their families – The Caledonian System. The final presentation was by Donald Findlater on *Getting the offender to pay*. Lord Gill then closed the conference.

The conference also contained a number of stalls/exhibitions by voluntary sector organisations and Community Justice Authorities.

General feedback was that this was a successful venue and format. Audio visual was much improved and the SASO website holds presentations and sound tracks from conference.

Branches

The national Conference is our single largest event, but throughout the year our local Branches provide a wide variety of lectures, debates and day conferences. These events provide an important local meeting place for those involved in the criminal justice system.

Glasgow's Branch continued to do exceptionally well, starting the year with an excellent debate on *The right to choose when to die* (with Margo MacDonald MSP) . Then holding a series of 4 lecture evenings on *Cobined Sentences, Community Payback, Shaken babies* and *legislative changes in the Children's Hearing System*. It concluded with an excellent one day conference on *Hidden Crime in a Globalised World* in May 2011. All these events are well attended and well organized and Sheriff Rita Rae, and her team are to be congratulated.

The Edinburgh Branch under Sheriff David Mackie has also met on a number of occasions, with well attended meetings. It now has new organisational support and has a full programme including topics on *Human Trafficking, Summary Justice Reform* (Solicitor General), *SPS Edinburgh Prison and Alcohol and Young Offenders*.

The Fife Branch has continued to be very active with the support of Bill Kinnear and Sheriff Peter Braid, starting with a presentation on *Multi Agency Risk Assessment Conference*.

In the south, the Dumfries and Galloway Branch also continued with an excellent programme of 8 meetings. Bill Milven and Amanda Armstrong run the Branch and arranged an interesting range of topics during the year this included: *Rathbone Service, Inclusion in Schools, Integrated Substance*

Service, Visit and speaker to Loreburn Street Police Station, Aberlour family outreach, visit and talk on Community Service workshops – Caledonian system, and People's Advocacy and Support. A further programme is underway.

The Dundee Branch is now operational and supported by Chairman Sheriff Alistair Duff, and Jane Martin. In Perth under new leadership of Chief Superintendent Matt Hamilton the branch continues to do well though it misses the work of its former secretary, Elidh Murray, who retired. The Lanarkshire Branch with new Chair Sheriff Shiona Waldron and Jim O'Neill are also active. Niall Campbell continued to work with members in Aberdeen to re-vitalise the Branch there.

All Branches are to be praised for the excellent work they undertake locally in providing events and a venue for those working in the criminal justice system to meet. I apologize for not listing all events.

Council

Since the last AGM Council met at Conference in November 2010, and on 3 occasions (February in Edinburgh, March in Glasgow, and in October in Edinburgh). Other pressures prevented us from getting together in the summer months. We used the meetings principally to plan for the 2011 Conference. I am grateful for the support I have received from council and its office bearers. Irene Cameron, our administrator attends council meetings. Our regular attendees are Niall Campbell, Dan Gunn, Alasdair McVitie, Margaret Small, Elizabeth Carmichael, Bill Milven and Cyrus Tata. Fergus McNeill and Sheriff Rita Rae.

Finance

Our finances continue to be healthy, and last year we were fortunate in covering our expenses. The conference is our principal source of income and we need to ensure that we cover the running costs of the organization. We were also fortunate to receive a small grant from the Scottish Government Justice Directorate which enabled us to help reduce costs for those wishing to attend conference who come from the voluntary sector or are involved with the CJS or SASO in a voluntary capacity (and not in full time employment). Without it we would have made a small loss. However, a similar arrangement will not be available this year (2011) and I have concerns that because I was keen to keep prices to a minimum the conference will make a loss. The organisation can afford such a situation on occasion, but it is not something

we can sustain in the long run. As ever, our Treasurer, Alasdair McVitie, manages our financial affairs and reports to Council on our accounts. I am very grateful to him for his prudent financial management.

Journal

Volume 17 of The Scottish Journal of Criminal Justice Studies was published by SASO in July 2011. It continues to be an excellent publication under the editorship of Professor Michele Burman. The Journal continues to gain in reputation and has an Editorial Board of Scottish academics to support its work and maintain standards. My thanks to the Editorial Board as well for their excellent work. The current volume contains the conference papers, It reproduces the winning student essay by Glasgow University MSc student Graham Bell and a book review. Our thanks go to the editor and her team.

Website

The website of SASO remains an important window through which others can find out about the organisation, its aims and the activities of Branches. It runs in collaboration with the CJScotland web site which we support. SASO welcomes ideas for the web site, and Branch Secretaries and Chairs can submit direct to Mary Munro and Irene Cameron items for inclusion. We are continuing to think about how we can improve the site – and our public image.

Sadly, one of our members, Jinty Kerr, died at the end of August this year. Jinty was a trail-blazing police woman, and held many firsts for women officers in Scottish Police forces. She was involved in the church, and was a golfer, but we particularly remember her for her support and work with SASO in Edinburgh. Jinty was vivacious and humorous and an efficient organizer, who always seemed to have the Edinburgh Branch meetings organized, and wine and refreshment ready for members, speakers and guests. She made a really positive contribution to our work, and we were all concerned when she became unwell. She will be sadly missed.

Finally, this is my last year as Chair of SASO Council. It has been an honour and privilege to serve the organisation and I hope that during my tenure the conferences have retained their unrivalled blend of quality, interest and relevance, and that the changes made will serve us well for the future. I also want to place on record my thanks to the various Council Members over the past years who have supported me. I am enormously pleased that David

Strang has agreed to stand for Chairmanship. I have confidence that under his leadership SASO will continue to play an important role in the Scottish Criminal Justice System.

Alec Spencer
Chair, SASO Council
15 November 2011

The objectives of SASO are:

- To encourage and promote **study and research** into the causes, prevention, effects and treatment of, and respond to delinquency and crime.
- To promote **co-operation** between bodies, or persons engaged in any research or work or activity having objects similar to those of the Association.
- To **create a common meeting ground** for all professional, statutory [and YOI] groups and individuals involved in crime and Criminal Justice.