

**Remarks made to introduce the Glasgow Bar Association Seminar
9 December 2011**

Lord Hope

**The role of the Supreme Court in protecting the rights of the individual in a
jurisdiction with no written constitution**

The title requires some analysis: we have no written constitution, but we do have two routes for the protection of the individual which are not unlike those that exist in States which do have written constitutions: HRA and SCA.

The individual's rights under ECHR are as extensive as could be expected in any written constitution. It is how they are to be protected that is the problem. By which institutions are they at risk of being violated? Public authorities, esp the executive, on the one hand; legislatures on the other.

Remedies under HRA – s 6 excludes the legislature; s 8 a discretion to the court as to the remedy. Remedies under SCA – s 57(2) re the executive including the LA, s 29 re the Parliament; if outwith power or competence, the result is a nullity.

The twin pillars of the protection that is given by the Scotland Act: 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*¹ 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.

The second pillar is to be found in Lord Justice General Rodger's declaration in *HM Advocate v Scottish Media Newspapers Ltd*² 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

¹ 2000 JC 127.

² 2000 SLT 331, p 333.

words “no power” are as absolute as they are uncompromising. 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.”

Note that these pillars were ‘discovered’ in Edinburgh. But they have provided the framework for the UK Supreme Court when dealing with devolution issues in regard to acts of the LA as a member of the executive.

The second pillar applies with equal force to the competence of the Scottish Parliament. But only three cases in the criminal field so far: *A v Scottish Ministers*, *Martin* and *DS* – in none of which was it held to be outside competence. There has also been, in the civil field, *Axa*. But that was concerned with the rights of insurers under Article 1 of Protocol 1. It was held that the interference with their ‘possessions’ by the 2009 Act pursued a legitimate aim and that the means chosen by the Scottish Parliament were reasonably proportionate to the aim sought to be realised.

In principle Acts of the Scottish Parliament are also amenable to the supervisory jurisdiction of the Court of Session at common law. In *Axa* we said that the dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country’s best interests as a whole.

A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances. But the rule of law requires that the judges must retain the power to insist that legislation of an extreme kind which attacks the rule of law itself is not law which the courts will recognise.