SCOTTISH CRIMINAL CASES IN THE SUPREME COURT: IS THE DEVOLUTION/COMPATIBILITY ISSUES JURISDICTION JUSTIFIABLE?

Middlesex Guildhall, London: The location of the Supreme Court of the United Kingdom (Image taken from: Smith, 'Exterior, Supreme Court of the United Kingdom' (Wikipedia, 2009), at https://commons.wikimedia.org/wiki/File:Middlesex_Guildhall.png (last visited 25/01/2019).)

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‘This thesis is the result of the author’s original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.’

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Abstract

Since 1999, the Judicial Committee of the Privy Council (JCPC) and subsequently the Supreme Court (SC) have had the ability to hear Scottish criminal cases raising devolution and (since 2013) compatibility issues. This jurisdiction is controversial because before 1999 there was a long tradition of Scots criminal law being allowed to develop in its own way without scrutiny from a UK-wide court. This thesis considers whether sending Scottish criminal cases to the JCPC/SC is justifiable. Chapter 1 considers how the jurisdiction developed and why it is controversial. Chapter 2 shows that arguments made by critics of the JCPC/SC's jurisdiction resemble those made by legal nationalists. It considers legal nationalism in Scotland, Quebec and South Africa to explore the relationship between law and national identity and to examine whether there is a need to accommodate differences between legal systems. Chapter 3 evaluates claims that Scots criminal law, procedure and evidence are distinctive when compared with English law. Chapter 4 analyses claims that the JCPC/SC's jurisdiction has an unwelcome impact on Scots law by importing human rights law into Scots law, producing decisions which fit uneasily with existing Scots law, harmonising Scots law with English law, causing confusion and prompting legislative intervention. It tests whether the JCPC/SC benefited Scots law by protecting human rights. Chapter 5 considers how courts in general, top courts and the JCPC/SC's jurisdiction might gain legitimacy and uses these findings to argue that the JCPC/SC's jurisdiction is legitimate and justifiable. It considers important questions including whether the JCPC/SC complies with limits on its powers, whether the JCPC/SC should sit with a majority of judges trained in Scots law and whether there is a need to protect human rights to the same level in each part of the UK. The thesis concludes that the jurisdiction needs little reform.

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Chapter 1: Introduction

1 Introduction

Since 1999, the Judicial Committee of the Privy Council (JCPC) and now the Supreme Court (SC) have been able to hear Scottish criminal cases as devolution issues and from 2013 compatibility issues. This has been a source of continued controversy because before 1999, the High Court of Justiciary (HCJ) was the final decision maker in Scottish criminal cases and, unlike in Scottish civil cases, there was no ability to appeal these cases to a UK-wide court. This lack of scrutiny by a UK-wide court was considered important in allowing Scots criminal law to develop in its own way.[1] The devolution and compatibility issue jurisdiction has led to political fallouts,[2] personal criticisms being made of Supreme Court judges,[3] emergency legislation being passed by the Scottish Parliament[4] and threats to withdraw funding for the Supreme Court.[5] It is, therefore, an issue which has caused divergence of opinion in both legal and political circles. This thesis will evaluate whether the JCPC/SC's jurisdiction over Scottish criminal cases is justifiable. This chapter explores why the jurisdiction was created and why it has attracted so much controversy before showing how this controversy influenced the development of the jurisdiction. The chapter finishes by outlining the scope of this thesis.

2 The Creation of the JCPC/SC's Devolution Issue Jurisdiction

The history of the HCJ as Scotland's highest criminal court predates the Treaty of Union 1707. The HCJ was founded in 1672 and was designed to try the "more serious" criminal cases and to hear appeals from the lower courts.[6] Before the Union, all decisions of the HCJ,

[1] Chapter 2 section 2.4 below
[2] Rhodes, 'The Eck's Factor' (Holyrood Magazine, 2011), 16-23 at http://content.yudu.com/Library/A1sk2g/HolyroodmagazineIssu/resources/index.htm?referrerUrl=http%3A%2F%2Fwww.holyrood.com%2Fe-magazine%2Fpage%2F11%2F (last visited 15/12/2018) and Scottish Parliament Official Report 27 October 2010 cols 29553-29582
[3] Rhodes *ibid*, 16-19
[4] Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
[5] Anonymous, 'MacAskill Plans to Cut Funding for "Ambulance Chasing" Supreme Court' (The Firm, 2011), at http://www.firmmagazine.com/macaskill-plans-to-cut-funding-for-ambulance-chasing-supreme-court/ (last visited 12/04/2014).
[6] Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: Cambridge University Press, 1997), 62-63

including its own first instance decisions, were final and could not be appealed to any other court.[7]

In 1707, the Treaty of Union maintained Scotland's legal system[8] and the Scottish courts.[9] Article 19 states that the "Court of Justiciary [would] remain in all time coming within Scotland ... and with the same Authority and Privileges as before the Union."[10] This was subject to any regulation made by the UK Parliament.[11] Consequently, Article 19 maintained the HCJ's jurisdiction over Scottish criminal cases. More significantly, Article 19 stated that:

> "no Causes in Scotland be cognoscible by … any other Court in Westminster-hall; And that the said Courts, or any other of the like nature after the Union, shall have no power to Cognosce, Review or Alter the Acts or Sentences of the Judicatures within Scotland."

The effect of this was to prevent Scottish cases being heard by or appealed to English courts. However, the Treaty of Union did not expressly state whether Scottish appeals could be taken to the Appellate Committee of the House of Lords (HOL). Since the HOL did not sit in Westminster Hall, it was not covered by the prohibition in Article 19.[12]

After the Union, a right of appeal to the HOL in civil cases was quickly established.[13] In contrast, criminal law decisions of the HCJ were not subjected to appeal by the HOL. Several attempts were made to appeal HCJ decisions to the HOL. Except in the earliest years of the Union,[14] the HOL refused to hear appeals from the HCJ.[15] For Scottish civil cases, there had been a right of appeal to the Parliament of Scotland before the Union and the Treaty of Union was interpreted as transferring this jurisdiction to the HOL which was part of the UK

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[7] *HMA* v *Murdison* (1773) MacLaurin 557, 584. An ability to appeal first instance decisions of the HCJ was introduced in 1926: Criminal Appeal (Scotland) Act 1926 s1
[8] Treaty of Union 1707 Article 18
[9] *ibid* Article 19
[10] *ibid*
[11] *ibid*
[12] Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (Edinburgh: Scottish Government, 2010), para 3.1
[13] *Rosebery* v *Inglis* (1708) 18 *House of Lords Journal* 555, 556
[14] Cf. *Magistrates of Elgin* v *Ministers of Elgin* (1713) Robertson 69 (The case was tried by both the Court of Session and the HCJ. The HOL reversed the decision of the Court of Session.)
[15] *Bywater* v *Crown* (1781) 2 Paton 563; *Mackintosh* v *HMA* (1876) 3 R (HL) 34; *Murdison,* n7 above

Parliament.[16] Since there had been no pre-Union right to appeal HCJ decisions to the Parliament of Scotland its decisions remained "final and conclusive."[17]

The Criminal Procedure (Scotland) Act 1995 s124 reiterated the lack of appeal from the HCJ to the HOL. It stated that "all interlocutors and sentences pronounced by the High Court of Justiciary under the authority of this Act shall be final and conclusive, and not subject to review by any court whatsoever." Section 124 has since been modified to allow the HCJ's decisions to be reviewed by the JCPC/SC in devolution and compatibility issue cases. Thus, from the Union until the advent of devolution, there was a long tradition of the HCJ being the final appellate court for Scottish criminal cases. As will be discussed further in Chapter 2,[18] this traditional lack of appeal to a UK-wide court is said to have been important in allowing Scots criminal law to develop in a distinctive way.

This position created two anomalies. First, it created an unequal treatment of Scottish civil and criminal cases because only the former could be appealed to a UK-wide court. Secondly, it created an anomaly in the treatment of appeals within the UK. Scottish civil cases did not need leave to appeal to the HOL/SC until 2015,[19] whereas English civil cases did.[20] Conversely, English criminal cases could be appealed to the HOL where leave was granted,[21] whereas Scottish criminal cases could not be appealed at all.[22]

Paradoxically devolution, which was designed to give Scotland greater autonomy by creating a Scottish Parliament,[23] removed the traditional inability for a UK-wide court to scrutinise HCJ decisions. The Scottish Parliament is a devolved parliament and, unlike the UK Parliament, restrictions were imposed on the powers of the Scottish Parliament and the Scottish Government.[24] The Scottish Parliament was given plenary legislative competence,[25] subject to a number of restrictions set down in section 29 of the Scotland Act 1998. In

[16] *Mackintosh ibid*, 37
[17] *ibid*
[18] Chapter 2 section 2.4 below
[19] Court of Session Act 1988 s40
[20] Administration of Justice (Appeals) Act 1934 s1; Constitutional Reform Act 2005 s40
[21] Criminal Appeal Act 1968 s33
[22] *Mackintosh,* n15 above, 37
[23] Lord Hope, 'Devolution and Human Rights' [1998] EHRLR 367, 369
[24] Scotland Act 1998 s29, s54 and s57
[25] *AXA General Insurance Limited* v *Lord Advocate* [2011] UKSC 46; *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, Re* [2018] UKSC 64

particular, the Scottish Parliament cannot legislate contrary to Convention rights and for now European Union (EU) law.[26] Convention rights are the rights guaranteed by the Human Rights Act 1998[27] which gives domestic effect to the European Convention on Human Rights 1950 (ECHR). They include the rights to liberty, to a fair trial and not to be subjected to punishment without law.[28] The Scottish Parliament is also prohibited from legislating on[29] or modifying existing legislation[30] relating to "reserved matters,"[31] which are listed in the Scotland Act 1998 schedule 5. Section 29(1) states that, "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament."[32] Consequently, an act of the Scottish Parliament which is outside its competence is unenforceable and void.

Restrictions were also imposed on the competence of the Scottish Government. It is not allowed to carry out functions which are outside the legislative competence of the Scottish Parliament[33] unless they have been executively devolved under section 63 or any other enactment. Section 57(2) of the Scotland Act 1998 provides that:

> "A member of the Scottish Government 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 EU law."

S57(3) provided an exception to this rule where the Lord Advocate (who is a member of the Scottish Government)[34] was prosecuting an offence or acting in their "capacity as head of the systems of criminal prosecution" where they acted in accordance with primary legislation which could not be interpreted in a way which is compatible with the ECHR.[35] The result of s57 is that the Scottish Government lacks the power to act contrary to Convention Rights or EU law.

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[26] *ibid* s29(2)(d) The European Union (Withdrawal) Act 2018 schedule 3 para 1(b) modifies the restriction on the Scottish Parliament legislating on EU law.
[27] Scotland Act 1998 s126(1)
[28] Human Rights Act 1998 schedule 1 para 1
[29] Scotland Act 1998 s29(2)(b)
[30] *ibid* schedule 4
[31] *ibid* s29(2)(b)
[32] *ibid* s29(1)
[33] *ibid* s54(3)
[34] *Montgomery* v *HMA* 2001 SC (PC) 1, at [1]
[35] Scotland Act 1998 s57(3); Human Rights Act 1998 s6(2)

Schedule 6 of the Scotland Act 1998 introduced devolution issues as a mechanism to ensure that the Scottish Government and the Scottish Parliament complied with the restrictions imposed on their competence. Devolution issues can be raised where it is claimed that the Scottish Government has acted outwith its devolved competence[36] or that an Act of the Scottish Parliament is outside the legislative competence of the Scottish Parliament.[37] Devolution issues also include a question "whether a purported or proposed exercise of a function by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights or EU law."[38] From 1999 to 2013, any of the above grounds could be used to raise a devolution issue in a Scottish criminal case.[39] However, as will be discussed below, since 2013 devolution issues can only be raised in Scottish criminal cases if they challenge the legislative competence of an Act of the Scottish Parliament or the devolved competence of the Scottish Government on grounds that they encroach upon matters reserved to the UK Parliament or Government which do not deal with Convention rights or EU law. Challenges alleging breaches of EU law or Convention rights must now be raised as compatibility issues.[40]

Devolution issues can be raised in any court.[41] Those raised in the lower Scottish criminal courts or in the HCJ sitting with one judge may be referred to a court of two or more judges of the HCJ for determination.[42] Between 1999 and 2009, "an appeal against a determination of a devolution issue by" the HCJ when sitting with "two or more judges" could be made to the JCPC, if the HCJ gave leave or the JCPC gave "special leave."[43] The HCJ when sitting with two or more judges could refer devolution issues directly to the JCPC as a reference.[44] The Lord Advocate and the Advocate General who are part of the Scottish and UK Governments respectively could refer devolution issue cases from any court to the

[36] *ibid* schedule 6 para 1
[37] *ibid*
[38] *ibid* schedule 6 para 1(d)
[39] *ibid*
[40] Scotland Act 2012 s36
[41] Scotland Act 1998 schedule 6
[42] *ibid* schedule 6 para 9
[43] *ibid* schedule 6 para 13
[44] *ibid* schedule 6 para 11

JCPC.[45] From 2009, this jurisdiction was transferred to the SC. No other changes were made to the devolution issue mechanism.[46]

This lack of change was controversial because problems had arisen with the devolution issue jurisdiction.[47] The jurisdiction was interpreted by the JCPC/SC in a way which was not anticipated. In *Montgomery* v *HMA,*[48] the majority of the JCPC held that an action or inaction of the Lord Advocate could be a devolution issue because the Lord Advocate is a member of the Scottish Government. Since members of the Scottish Government cannot act contrary to Convention rights, this imposed a duty on the Lord Advocate to ensure that the case was prosecuted fairly.[49] This was disputed by the minority in *Montgomery* who argued that the courts, not the Lord Advocate should be responsible for the trial's fairness.[50] The majority's decision increased scrutiny of actions of the Lord Advocate and represented a significant change from before devolution where there was little ability to scrutinise his actions in court.[51] Moreover, it was perhaps not appreciated that the jurisdiction would enable a broad range of actions of the Lord Advocate to be scrutinised.[52] Since the right to a fair trial raises questions about the failure to disclose evidence,[53] the right against self-incrimination,[54] the importance of legal representation during police questioning,[55] the failure to prosecute within a reasonable time[56] and prejudicial publicity for the accused,[57] there was a wide scope to challenge actions of the Lord Advocate on the ground that they were not Convention-compatible. This resulted in large numbers of

[45] *ibid* schedule 6 para 33
[46] Constitutional Reform Act 2005 schedule 9 paras 93-107
[47] Himsworth and Paterson, 'A Supreme Court for the United Kingdom: Views from the Northern Kingdom' (2004) 24(1) Legal Stud 99, 99-100; MacQueen, 'Scotland and a Supreme Court for the UK?' 2003 SLT (News) 279.
[48] [2003] 1 AC 641
[49] *Ibid* 660, 662
[50] *Ibid* 646 per Lord Nicholls, 647 per Lord Hoffmann
[51] Lord Hope, n23 above, 376
[52] Angiolini, 'Consultation Response: Lord Advocate' (Office of the Advocate General for Scotland, 2010), 1-2 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81686/Consultation_Response_-_Lord_Advocate.pdf (last visited 14/02/2019).
[53] *HMA* v *Murtagh* [2009] UKPC 36; *Holland* v *HMA* [2005] UKPC D 1; *Sinclair* v *HMA* [2005] UKPC D 2
[54] *Brown* v *Stott* [2001] UKPC D 1
[55] *Cadder* v *HMA* [2010] UKSC 43
[56] *Burns* v *HMA* [2008] UKPC 63; *Spiers* v *Ruddy* [2007] UKPC D2; *Mills* v *HMA* (No.2) [2002] UKPC D 2; *Dyer* v *Watson* [2002] UKPC D 1
[57] *Montgomery* v *HMA* [2003] 1 AC 641

devolution issues being raised as it was easy for lawyers to find "an act of the Lord Advocate" to challenge "just about any aspect of criminal proceedings."[58] This created delays to the hearing of cases and hindered the Lord Advocate's ability to prosecute Scottish criminal cases.[59] Section 57 was also criticised for putting the Lord Advocate at a disadvantage when compared with prosecutors in the other parts of the UK because only the Lord Advocate's actions would be rendered null if they breached Convention rights.[60]

It was also not appreciated how broadly this jurisdiction would be interpreted.[61] In *McDonald* v *HMA,* the JCPC held that the HCJ's refusal to allow the accused to raise a devolution issue meant that the HCJ had determined the devolution issue for the purposes of schedule 6 of the Scotland Act 1998.[62] This meant that the JCPC could hear the appeal against a devolution issue which the HCJ felt had barely been discussed during the HCJ appeal hearing.[63] In *Mills* v *HMA,* the JCPC held that it could hear a devolution issue about the correct remedy to be granted for a breach of the accused's Convention rights.[64] In *Allison* v *HMA,* the SC agreed to hear a devolution issue even though the procedural requirements for raising the devolution issue had not been complied with.[65]

Despite making significant changes to the appeals system for Scottish criminal cases, the devolution issue mechanism did not remove the asymmetries that existed in the ability to appeal Scottish cases to a UK-wide court before devolution. Criminal cases can only be appealed to a UK-wide court if they raise a compatibility issue or a devolution issue.[66] Conversely, Scottish civil cases and English cases can be appealed to a UK-wide court if they raise any "point of law of general public importance."[67]

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[58] Scotland Bill Committee Official Report 8th Feb 2011 col 476
[59] Lord Bonomy, 'The 2002 Review of the Practices and Procedure of the High Court of Justiciary' (2002), para 17.10-17.117 at http://www.scotland.gov.uk/Resource/Doc/46932/0025198.pdf (last visited 15/12/2018); Angiolini, n52 above, 1-2.
[60] *ibid* 3
[61] Angiolini, *ibid*, 1-2
[62] [2008] UKPC 46
[63] *McDonald* v *HMA* 2008 SLT 144, at [67]
[64] 2002 SLT 939
[65] [2010] UKSC 6
[66] Criminal Procedure (Scotland) Act 1995 s124
[67] Court of Session Act 1988 s40A(3); Criminal Appeal Act 1968 s33; Constitutional Reform Act 2005 s40

3 The Jurisdiction's Controversy

The JCPC/SC's devolution issue jurisdiction over Scottish criminal cases divided opinion among lawyers from the outset and this has generated a large amount of literature. This literature can be divided into three main categories although they are not intended to be exhaustive.[68] First, literature discusses the implications of individual cases for the Scottish legal system and whether the author considers that JCPC/SC cases were decided correctly in light of ECtHR case law.[69] This literature often focuses on small numbers of cases. Literature providing a more extensive survey of the devolution issue case law, such as the writings of Aidan O'Neill, are now outdated and do not consider every devolution and compatibility issue case reaching the JCPC/SC.[70] The second group of literature deals with reforms made to the jurisdiction and proposed reforms to the jurisdiction (discussed in

[68] Literature such as Himsworth, 'Human Rights at the Interface of State and Sub-State: The Case of Scotland' in Campbell, Ewing and Tomkins, *The Legal Protection of Human Rights Sceptical Essays* (Oxford: Oxford University Press, 2011), 66-86; Himsworth, 'Rights versus Devolution' in Campbell, Ewing and Tomkins, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), 145-162; Lord Hope, 'Scots Law Seen from South of the Border' (2012) 16(1) Edin LR 58; McCannell, 'Criminal Appeals to the Privy Council' 2000 SLT (News) 129; Lord Reed, 'Scotland's Devolved Settlement and the Role of the Courts' (Supreme Court, 2019), at https://www.supremecourt.uk/docs/speech-190227.pdf (last visited 10/03/2019) does not fit easily into these categories.

[69] Literature discussing individual cases includes: Anonymous, 'Case Comment: McLean v Hm Advocate' 2010 SCL 166; Callander, 'AB v HM Advocate: Rationalising Restrictions on the Use of the "Reasonable Belief" Defence' 2017 Jur Rev 179; Duff, 'Disclosure Appeals: McInnes v Hm Advocate' (2010) 14(3) Edin LR 483; Duff, 'Sinclair and Holland: A Revolution in "Disclosure"' 2005 SLT (News) 105; Ferguson, 'Repercussions of the Cadder Case: The ECHR's Fair Trial Provisions and Scottish Criminal Procedure' [2011] Crim LR 743; Himsworth, 'Jurisdictional Divergences Over the Reasonable Time Guarantee in Criminal Trials' (2004) 8(2) Edin LR 255; Jones, 'Splendid Isolation: Scottish Criminal Law, the Privy Council and the Supreme Court' [2004] Crim LR 96; Johnston, *'McInnes* v *HM Advocate*: Time for A(nother) Definitive Decision on Disclosure' (2009) 13(1) Edin LR 108; Kelly, 'Spiers v Ruddy: Delay Is Dead' 2008 SCL 1135; Leverick, 'The Supreme Court Strikes Back' (2011) 15(2) Edin LR 287; Leverick, 'To Rule Supreme?' (2011) Nov *Counsel* 19; McCluskey, 'Supreme Error' (2010) 15(2) Edin LR 276; O'Neill, 'Constitutional Reform and the United Kingdom Supreme Court - A View from Scotland' 2004 Jur Rev 216; Pillay, 'Self-incrimination and Article 6: The Decision of the Privy Council in Procurator Fiscal v. Brown' [2001] EHRLR 78; Shead, 'The Decision in Ambrose' 2011 SCL 863; Shead, 'The Decision in McDonald, Dixon & Blair: Part II - Disclosure' 2009 SCL 13; Shead, 'The Decision in Murtagh' 2009 SCL 1137; Shead, 'The Decision in Fraser' 2011 SCL 527; Shead, 'The Decision in the Fraser Appeal: Some Brief Observations' 2008 SCL 664; Shead, 'The Decision of the Supreme Court in Macklin v Hm Advocate' 2016 SCL 75; White and Ferguson, 'Sins of the Father? The "Sons of Cadder"' [2012] Crim LR 357.

[70] O'Neill, 'Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council' (2001) 64(4) MLR 603; O'Neill, 'The End of the Independent Scottish Criminal Legal System? The Constitutional Significance of Allison and McInnes' (UKSC Blog, 2010), at http://ukscblog.com/the-end-of-the-independent-scottish-criminal-legal-system-the-constitutional-significance-of-allison-and-mcinnes/ (last visited 10/03/2019).

section 4 below) which includes the move of the devolution issue jurisdiction to the SC and the creation of the compatibility issue jurisdiction.[71] This literature was often written before the reforms had been implemented and it does not provide information on how the reforms worked in practice. Third, there have been several reports considering the JCPC/SC's devolution and compatibility issue jurisdiction.[72] However, as will become apparent from sections 4.1 and 5.1 below, these reports sometimes did not focus specifically on the JCPC/SC's jurisdiction, many are outdated and/or were not implemented and in any event, do not consider how individual cases have impacted on Scots law. The remainder of this section will outline the main areas of controversy within this literature.

Supporters of the jurisdiction including the Scottish Human Rights Commission, the Faculty of Advocates and JUSTICE argue that the JCPC/SC plays an important role in ensuring that

[71] Literature discussing reforms to the jurisdiction includes: Chalmers, 'Scottish Appeals and the Proposed Supreme Court' (2004) 8(1) Edin LR 4; Faculty of Advocates, 'Submission from the Faculty of Advocates' (Scottish Parliament, 2011), para 7 at http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Inquiries/Faculty_of_Advocates_The.pdf (last visited 15/12/2018); Guite, 'He Who Pays the Piper: Shifting Scottish Legal Landscapes' (2013) 13(3) *Legal Information Management* 139; Himsworth, 'Jurisdictional Divergences Over the Reasonable Time Guarantee in Criminal Trials' (2004) 8(2) Edin LR 255; Himsworth and Paterson, 'A Supreme Court for the United Kingdom: Views from the Northern Kingdom' (2004) 24(1) Legal Stud 99; Himsworth 'A Supreme Court for the United Kingdom' (2003) (Oct) SCOLAG 178; Jamieson, 'Scottish Criminal Appeals and the Supreme Court: Quis Custodiet Ipsos Custodes?' (2012) 16(1) Edin LR 77; Judiciary of the Court of Session, 'Submission by the Judiciary in the Court of Session' (Calman Commission, 2008), at http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf (last visited 15/12/2018); JUSTICE, 'Response to the Informal Consultation on Devolution issues and Acts of the Lord Advocate' (Office of the Advocate General for Scotland, 2010), at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81684/Consultation_Response_-_Justice.pdf (last visited 15/12/2018); Kelly, 'Advocate General for Scotland: Informal Consultation on Devolution Jurisdiction' 2010 SLT (News) 211; Kelly, 'Supreme Court and Special Leave' 2011 SLT (News) 235; MacQueen, 'Scotland and a Supreme Court for the UK?' 2003 SLT (News) 279; Nicholson, 'Power Struggle' (JLSS, 2011), at http://www.journalonline.co.uk/Magazine/56-6/1009838.aspx (last visited 10/03/2019); O'Neill, 'Constitutional Reform and the United Kingdom Supreme Court - A View from Scotland' 2004 Jur Rev 216; O'Neill (2004), n69 above, *ibid*; O'Neill (2010) *ibid*; O'Neill, 'The Curtailment of Criminal Appeals to London' (2011) 15(1) Edin LR 88; O'Neill, 'The Walker Report and the Law That Dare Not Speak Its Name' (UKSC Blog, 2010), at http://ukscblog.com/the-walker-report-and-the-law-that-dare-not-speak-its-name/ (last visited 10/03/2019); Scottish Human Rights Commission, 'Submission to the Advocate General for Scotland: Devolution Issues and Acts of the Lord Advocate' (Office of the Advocate General for Scotland, 2010), at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81691/Consultation_Response_-_Scottish_Human_Rights_Commission.doc (last visited 15/12/2018)

[72] See literature cited in section 4.1 below.

Scots criminal law conforms to Convention rights.[73] They argue that it is useful to have an additional layer of appeal to a UK-wide court from the HCJ.[74] The SC's decisions in *Cadder* v *HMA*[75] (dealing with the right to legal advice during police questioning) and *Fraser* v *HMA*[76] (dealing with the prosecution failure to disclose evidence to the defence) are often cited as examples of cases where the HCJ did not uphold the rights of the accused and an appeal to the SC was needed to do this.[77]

Lords McCluskey and Hope, the Scottish Human Rights Commission and the Faculty of Advocates claim that there is a need for a UK-wide court such as the SC to ensure "coherence of approach" to the application of Convention rights.[79] The desire to take a UK-wide approach to human rights is controversial.[80] Himsworth notes that human rights have not been enforced in the same way in each part of the UK and argues that it is not inevitable that human rights decisions should be made at a UK-wide level.[81]

This debate on how the JCPC/SC should enforce human rights is part of a much larger legal and political debate about how human rights should be enforced in the UK. This debate encompasses issues including: 1) what powers should be devolved to the Scottish Parliament to increase its ability to take its own approach to human rights;[82] 2) whether there should be a Northern Irish Bill of Rights to create Northern Ireland specific rights[83]

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[73] Scottish Human Rights Commission, n71 above, 2; Faculty of Advocates, n71 above, para 7; JUSTICE, n71 above, para 21

[74] JUSTICE *ibid*, para 21

[75] *Cadder* v *HMA* [2010] UKSC 43

[76] *Fraser* v *HMA* [2011] UKSC 24

[77] Justice, n71 above, para 21 ; The Faculty of Advocates, n71 above, para 7; Kelly, 'Supreme Court and Special Leave', n71 above, 235; Reed, n68 above, 8.

[79] Lord McCluskey, 'Examination of the Relationship between the High Court of Justiciary and the Supreme Court in Criminal Cases' (Initial Report, 2011), para 37-39 at www.scotland.gov.uk/Resource/Doc/925/0118614.pdf (last visited 15/12/2018); Faculty of Advocates, n71 above, para 7; JUSTICE, n71 above, para 21; Scottish Human Rights Commission, n71 above, 1

[80] Himsworth (2001), n68 above, 145-162; Himsworth (2011), n68 above, 66-86. See also literature on the creation of a Northern Irish Bill of Rights cited at n83 below.

[81]Himsworth (2001) *ibid,* 148

[82] McHarg, 'A Powerhouse Parliament? An Enduring Settlement? The Scotland Act 2016' (2016) 20(3) Edin LR 360; Mullen, 'Devolution of Social Security' (2016) 20(3) Edin LR 382; Neal, 'Devolving Abortion Law' (2016) 20(3) Edin LR 399, 400; Calman, *Serving Scotland Better: Scotland And the United Kingdom in the 21st Century* (Edinburgh: Commission on Scottish Devolution, 2009), 12

[83] Harvey, 'Brexit, Human Rights and the Constitutional Future of These Islands' [2018] EHRLR 10; Harvey, 'Northern Ireland and A Bill of Rights for the United Kingdom' (British Academy for the Humanities and Social Science, 2016), at

and 3) whether the UK Parliament, as a UK-wide, institution should legalise abortion and same sex-marriage in Northern Ireland to ensure that each part of the UK meets a minimum standard of human rights protection despite local sensitivities towards these issues.[84]

Critics of the SC's jurisdiction point out that before devolution the HCJ "was the final arbiter in all matters of criminal procedure and evidence and was entrusted with the responsibility of ensuring that our criminal practice was in keeping with our obligations in international law."[85] Jones and the former Lord Advocate Elish Angiolini expressed concern that the JCPC/SC's scrutiny of devolution and compatibility issues cases may lead to a harmonisation of Scots and English law.[86] Critics of the SC's jurisdiction, such as the former Justice Secretary Kenny MacAskill, cite *Cadder* as an example of this.[87] Before *Cadder*, detained suspects in Scotland, unlike elsewhere in the UK, were not permitted to have legal advice during police questioning, although they had a number of other protections instead.[88] The SC in *Cadder* found this to be in breach of the accused's right to a fair trial and Scots law was required to adopt the position taken by the rest of the UK of normally allowing suspects to have legal advice during police detention.[89] The SC overruled the unanimous decisions of the HCJ in *HMA* v *McLean*[90] and two previous cases of *Paton* v *Ritchie*[91] and *Dickson* v *HMA*[92] which had upheld the Convention compatibility of the previous approach. The case resulted in emergency legislation,[93] threw large numbers of convictions and

https://pure.qub.ac.uk/portal/files/101686684/Harvey_NI_BOR_178.pdf (last visited 10/03/2019); Harvey, 'Taking the Next Step? Achieving Another Bill of Rights' [2011] EHRLR 24; Woodward, 'A Bill of Rights for Northern Ireland: Next Steps' (Northern Ireland Office, 2009), at https://cain.ulster.ac.uk/issues/law/bor/nio301109bor.pdf (last visited 24/03/2019).

[84] Amery, 'Abortion Law Reform in Northern Ireland: Celebrations and Cautions' (LSE, 2019), at https://blogs.lse.ac.uk/politicsandpolicy/abortion-law-reform-ni/ (last visited 17/07/2019).

[85] Lord Bonomy, 'The 2002 Review of the Practices and Procedure of the High Court of Justiciary' (2002), para 17.9 at http://www.scotland.gov.uk/Resource/Doc/46932/0025198.pdf (last visited 15/12/2018).

[86] Jones, n69 above, 104; Scotland Bill Committee Official Report 8th February 2011 cols 479-480

[87] Scottish Parliament Official Report 27 October 2010 col 29557 Kenny MacAskill

[88] *HMA* v *McLean* [2009] HCJAC 97, at [27]

[89] *Cadder*, n75 above, at [63]

[90] [2009] HCJAC 97

[91] 2000 SLT 239

[92] 2001 SLT 674

[93] Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

prosecutions into doubt[94] and resulted in a review of Scots criminal law.[95] Conversely, O'Neill and Kelly have welcomed the fact that Scots law is now subject to greater scrutiny.[96]

The JCPC/SC was also accused of "second-guessing Scotland's highest criminal court of appeal" by overturning the traditionally final decisions of the HCJ,[97] deciding the outcome of cases[98] and by interpreting its jurisdiction widely.[99] Consequently, there is a fear that the devolution/compatibility issue jurisdiction is undermining the traditional final appellate jurisdiction of the HCJ. Conversely, several authors have argued that the JCPC/SC shows sensitivity to the traditional finality of HCJ decisions.[101]

Finally, authors such as MacQueen have expressed concern that the JCPC/SC sits with a majority of judges who are not trained in Scots law.[102] There is a fear that the judges lack sufficient knowledge of Scots law to understand the claimed distinctive features of Scots law.[103] It is further argued that a court sitting with a minority of judges trained in Scots law should not be able to overrule the HCJ whose judges have "a lifetime of experience in" Scots law.[104] Conversely, Himsworth, Paterson and Chalmers have all argued that it is possible for non-Scottish judges to learn Scots law but have expressed concerns that the non-Scottish judges are overwilling to defer to the decisions of judges with greater knowledge of Scots law.[105]

Concerns about the potential harmonisation of Scots and English law and concerns about the use of non-Scottish judges in the JCPC/SC tie into a much larger debate about legal nationalism. Like the debate over the JCPC/SC's jurisdiction, legal nationalism is a debate about how much autonomy Scots law should be given to develop in its own way and

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[94] Scottish Parliament Official Report 23 February 2011 col 33332
[95] Lord Carloway, 'The Carloway Review Report and Recommendations' (Scottish Government, 2011), at http://www.scotland.gov.uk/About/Review/CarlowayReview (last visited 15/12/2018)
[96] Kelly, 'Supreme Court and Special Leave', n71 above, 214-215; O'Neill (2010), n70 above
[97] Anonymous, 'Salmond on the Attack Over Supreme Court Influence' (JLSS, 2011), at http://www.journalonline.co.uk/News/1009776.aspx#.XBVl8Fz7TIV (last visited 15/12/2018). See also McCannell, 'Criminal Appeals to the Privy Council' 2000 SLT (News) 129 which doubted whether the JCPC/SC's jurisdiction is compatible with the Treaty of Union 1707.
[98] Ferguson, 'Privy Council Criminal Appeals' 2008 SLT (News) 133, 137
[99] Angiolini, n52 above, 2
[101] Kelly, 'Expert Group ...', n71 above, 163; Faculty of Advocates, n71 above, para 7
[102] Scottish Parliament Official Report 27 October 2010 col 29568
[103] Rhodes, n2 above, 20
[104] *ibid*
[105] Himsworth and Paterson, n71 above, 103; Chalmers, n71 above, 26

encompasses debate about what role UK-wide institutions should play in developing Scots law. As will become apparent in Chapter 2, legal nationalists such as Gibb, Lord Cooper, Smith and Walker have argued that Scots law is distinctive and that it should be protected from unthinking importations of English law into Scots law.[106] Their writing frequently criticises the HOL's role in deciding Scottish civil cases. Making arguments similar to those made by critics of the JCPC/SC's jurisdiction, they argue that the HOL, due to it sitting with a minority of judges trained in Scots law and its position as a UK-wide court, has produced decisions which do not benefit Scots law, fit uneasily with existing Scots law and leave Scots law in a state of confusion.[107] This writing is controversial[108] and legal nationalists have been accused of being insular,[109] misrepresenting Scotland's legal history[110] and drawing on ethnic nationalism[111] and elitist ideas.[112]

The legal debate around the ability to appeal criminal cases to London has also generated significant political controversy. For most of the time when the JCPC had jurisdiction over devolution issues, the largest party in the Scottish Parliament was Labour. The Labour Party at Westminster created the devolution issue jurisdiction and the Scottish Government supported it. Thus, in response to a consultation on the proposal to create the SC, the Scottish Ministers stated that "the new UK Supreme Court is the appropriate forum for final determination" of devolution issues."[113] This meant that the JCPC's jurisdiction was less

[106] Chapter 2 section 2.1 below fn 6
[107] Chapter 2 sections 2.1 and 6 below
[108] Farmer, 'Under the Shadow of Parliament House the Strange Case of Legal Nationalism' in Farmer and Veitch, *The State of Scots Law: The Law and Government After the Devolution Settlement* (Edinburgh: Butterworths, 2001), 151-164; Lord Rodger, 'Thinking About Scots Law' (1996) 1(1) Edin LR 3; Willock, 'The Scottish Legal Heritage Revisited' in Grant, *Independence and Devolution* (Edinburgh: W Green, 1976), 1-14
[109] Reid, 'While One Hundred Remain: T B Smith and The Progress of Scots Law' in Reid and Miller, *A Mixed Legal System in Transition T. B. Smith and The Progress of Scots Law* (Edinburgh: Edinburgh University Press, 2005), 16
[110] Farmer, *Criminal Law, Tradition and Legal Order Crime and the Genius of Scots Law 1747 to the Present* (Cambridge: Cambridge University Press, 1997), 54; Willock, n108 above, 8
[111] Farmer, n108 above, 159
[112] Farmer, n108 above, 162; Willock, n108 above, 4
[113] Scottish Government, 'Constitutional Reform: Scottish Executive Response: Supreme Court for the United Kingdom' (Office of the Scottish Government, 2003), 1 at http://www.scotland.gov.uk/Resource/Doc/1097/0000924.pdf (last visited 15/05/2014).

politically controversial than it would be later on, although even during this time the Scottish National Party (SNP) was critical of the JCPC's jurisdiction.[114]

In 2007, the SNP became the largest party in the Scottish Parliament and remains in this position. Political nationalists are "by nature … resistant to any proposal to strengthen or raise the legitimacy of a UK institution at the cost of Scottish autonomy"[115] and are hostile to a UK-wide court. This is reflected in the views of the SNP. It wants Scotland to become an independent country and regardless of whether it achieves this, it wants to abolish appeals from the Scottish courts to UK-wide courts.[116] The SNP's dislike of the ability to appeal cases to London has been inflamed by two important factors. First, in 2009 the JCPC's jurisdiction was transferred to a new UK SC. Although no other changes were made to the devolution issue mechanism, "the establishment of an explicitly 'UK' court reinflamed sensitivities about the continued independence of Scots law."[117]

Secondly, the enforcement of human rights can often lead to controversial decisions because it often means upholding the rights of those accused of serious crimes and who are generally unpopular in society. In 2010 and 2011, the SNP's animosity towards the SC was increased when the SC issued its controversial judgments in *Cadder* v *HMA*[118] and *Fraser* v *HMA*.[119]

The SC's decision in *Cadder* caused political outcry. It was complained that the SC had undermined the traditional final appellate jurisdiction of the HCJ. The SNP's then Justice Secretary, Kenny MacAskill accused the SC of "undermining ... the centuries-old supremacy of [the HCJ as] the final court of appeal in criminal matters."[120] The Lord Advocate warned that "there is a real danger" of "not just harmonisation of our criminal law ... but, indeed, a

[114] HC Deb vol 312 cols 203-215 12 May 1998
[115] Himsworth, n47 above, 100
[116] The Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland* (Edinburgh: Scottish Government, 2013), Part 5 para 406; Scottish Parliament Official Report 27 October 2011 col 33333 Kenny MacAskill; Rhodes, n2 above, 16-22
[117] McHarg, 'Final Appeals in Scots Criminal Cases' (Constitutional Law Group, 2011), at http://ukconstitutionallaw.org/2011/10/04/aileen-mcharg-final-appeals-in-scots-criminal-cases/ (last visited 15/12/2018).
[118] *Cadder,* n75 above
[119] *Fraser,* n76 above
[120] Scottish Parliament Official Report 27 October 2010 col 29557

complete loss of identity for Scots law."[121] Thus, as with lawyers there was concern that the SC was using its human rights jurisdiction to harmonise the laws of Scotland and England.

Cadder was also criticised because it was perceived that the judges not trained in Scots law did not understand the additional protections given to the accused to compensate them for not being allowed legal advice during police detention. The SNP's Stewart Maxwell stated that he had "more confidence in the decision of seven judges" in *McLean,* "with a lifetime of experience in the law of Scotland than," he had "in a decision of the [SC] sitting in London with a majority of English judges."[122]

The second controversial decision was *Fraser* v *HMA*,[123] in which the SC ordered the HCJ to quash a murder conviction because the prosecution had not disclosed important evidence to the defence. The SC's decision to overturn a murder conviction after a murder trial which attracted significant media attention was always likely to be controversial and there was further political outcry. There were threats to withdraw SC funding,[124] a review group was set up to consider the SC's jurisdiction[125] and the SC was subjected to severe criticism by the Scottish Government.[126]

The complaints were similar to those made after *Cadder*. The then First Minister Alex Salmond argued that "Scotland has, for hundreds of years, been a distinct criminal jurisdiction" and that the SC was undermining this distinctiveness.[127] He also argued that "the increasing involvement of the [SC] in second-guessing [HCJ decisions] is totally unsatisfactory."[128] Thus, there were again fears that distinctive elements of the Scottish legal system were being lost and that the SC was failing to respect the HCJ's traditional final

[121] Scotland Bill Committee Official Report 8th February 2011 cols 479-480
[122] Scottish Parliament Official Report 27 October 2010 col 29568
[123] *Fraser,* n76 above, at [43]
[124] Anonymous, n5 above
[125] The review group headed by Lord McCluskey produced two reports: Lord McCluskey, 'Examination of the Relationship Between the High Court of Justiciary and the Supreme Court in Criminal Cases' (Scottish Government, Final Report, 2011), at http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf (last visited 08/01/2019) and Lord McCluskey (Initial Report), n78 above
[126] Rhodes, n2 above, 16
[127] Anonymous, n97 above
[128] *ibid*

appellate jurisdiction. The SC was again criticised for using judges not trained in Scots law.[129]

The Scottish Government are not opposed to the enforcement of human rights. If Scotland becomes independent, the SNP want Scotland to have a written constitution, which would serve to strengthen human rights protection in Scotland.[130] In 2018, the First Minister Nicola Sturgeon commissioned a report to strengthen human rights protection in Scotland under the current constitutional arrangements. It recommended significantly increasing human rights protection in Scotland.[131] Instead, the SNP's opposition to the JCPC/SC's jurisdiction stems from a belief that the JCPC/SC are unsuitable courts to be hearing Scottish human rights cases because they sit "in London with a majority of English judges … who do not have an exact knowledge of Scots law."[132] This is said to make the JCPC/SC insensitive to the claimed distinctiveness of Scots law and risk a loss of Scots law's independence.[133] The SNP would like to see the HCJ and the Court of Session as the final appellate courts in Scotland.[134] It believes that the only way to challenge decisions of these courts in human rights cases should be to make an application to the European Court of Human Rights (ECtHR),[135] which it sees[136] as being more sensitive than a UK-wide court to the technicalities of the Scottish legal system.[137]

The SNP's support for human rights contrasts with politics at a UK level, where the enforcement of human rights under the Human Rights Act 1998 and the ECHR is very controversial. Human rights have been criticised for hindering the fight against terrorism,[138]

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[129] Rhodes, n3 above, 20
[130] *Scotland's Future*, n116 above, 568
[131] Miller, 'Recommendations For A New Human Rights Framework to Improve People's Lives' (First Minister's Advisory Group on Human Rights Leadership, 2018), at http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf (last visited 11/02/2019).
[132] Rhodes, n3 above, 20
[133] Scottish Parliament Official Report 27 October 2010 col 29567
[134] *ibid* col 29571
[135] *ibid*
[136] Cf. Chapter 5 section 8
[137] Scottish Parliament Official Report 27 October 2010 col 29574
[138] Cameron, 'Balancing Freedom and Security - A Modern British Bill of Rights' (The Guardian, Speech to the Centre for Policy Studies, 2006), at http://www.theguardian.com/politics/2006/jun/26/conservatives.constitution (last visited 09/01/2019).

being too protective of criminals[139] and for imposing values on the UK which it does not agree with such as voting rights for prisoners.[140]

Unlike the SNP, unionist parties at Holyrood and Westminster are supportive of the ability to appeal Scottish cases to London. As these parties are in favour of maintaining the Union, they "have less of a problem with the general idea of" Scottish cases being appealed to a UK-wide court.[141] Thus, during a debate in the Scottish Parliament on the *Cadder* decision, Labour, Liberal Democrat and Conservative members were supportive of the SC's role. Their speeches emphasised the importance of protecting human rights,[142] the fact that the leading judgments in *Cadder* were given by judges trained in Scots law[143] and emphasised the fact that the SC's judgment was based on a ruling by the Grand Chamber of the ECtHR.[144] The UK Government is also supportive of the SC's ability to hear compatibility and devolution issues. As the next section will show, it has repeatedly rejected calls from the SNP to abolish this jurisdiction.[145] The UK Government has emphasised that the SC has widespread support,[146] is easier to take cases to than the ECtHR[147] and that Scots should "have their human rights protected in the same way as people in the rest of the UK."[148]

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[139] *ibid*
[140] Wintour and Sparrow, 'I Won't Give Prisoners the Vote, Says David Cameron' (The Guardian, 2012), at http://www.theguardian.com/society/2012/oct/24/prisoners-vote-david-cameron (last visited 08 January 2019).
[141] Himsworth and Paterson, 'A Supreme Court for the United Kingdom: Views from the Northern Kingdom' (2004) 24(1) Legal Stud 99, 101
[142] Scottish Parliament Official Report 27th October 2010 col 29565
[143] *ibid* col 29563 John Lamont (Conservative)
[144] *ibid* col 29565 Robert Brown (Liberal Democrat) and col 29562-3 Richard Baker (Labour)
[145] Anonymous, 'Scotland Office Statement on formation of Expert Group on the Supreme Court' (Scotland Office, 2011), at https://www.gov.uk/government/news/statement-on-formation-of-expert-group-on-the-supreme-court (last visited 08 January 2019)
[146] Organisations supporting the SC include the Faculty of Advocates, the Law Society and the Commission on Human Rights (Anonymous, 'Advocate General Lord Wallace defends Supreme Court' (BBC News, 2011), at http://www.bbc.co.uk/news/uk-scotland-13615979 (last visited 09/01/2019)
[147] Lord Wallace, quoted in Anonymous, n97 above
[148] Anonymous, 'Advocate General Lord Wallace Defends Supreme Court' (BBC, 2011), at http://www.bbc.co.uk/news/uk-scotland-13615979 (last visited 15/12/2018).

4 The Development of the JCPC/SC's Jurisdiction over Scottish Criminal Cases by the Scotland Act 2012

4.1 Background

The tensions between the SNP and the unionist UK Government over the JCPC/SC's devolution issue jurisdiction continued as the JCPC/SC's jurisdiction developed. The SNP's animosity towards having a UK-wide SC deciding Scottish cases has caused it to embark on a long and sustained campaign to have the SC's devolution issue jurisdiction abolished. To further its campaign, the SNP commissioned several reports in the hope that they would recommend abolishing the jurisdiction[149] and they have repeatedly pressured the UK Government to do this.[150]

Meanwhile, the UK Government was reviewing the workings of Scottish devolution through the Calman Commission.[151] In 2010, the Scotland Bill (now the Scotland Act 2012) was introduced into the UK Parliament to make changes to the devolution settlement. After long negotiations between the Scottish and UK Governments, a compromise was reached, and the devolution issue jurisdiction was partially replaced for Scottish criminal cases with a new compatibility issue mechanism.[152] The rest of this section will consider how this compromise was achieved and considers the differences between the compatibility and devolution issue mechanisms.

[149] Lord McCluskey (Initial Report), n78 above; Lord McCluskey, 'Examination of The Relationship Between The High Court of Justiciary And The Supreme Court In Criminal Cases' (Scottish Government, Final Report, 2011) at http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf (last visited 09/01/2019) and Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (Edinburgh: Scottish Government, 2010)

[150] MacAskill, 'Devolution Issues and Acts of the Lord Advocate' (Office of the Advocate General for Scotland, 2011), at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81679/Consultation_Response_-_Cabinet_Secretary_for_Justice.pdf (last visited 15/12/2018).

[151] Calman, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Edinburgh: Commission on Scottish Devolution, Final Report, 2009)

[152] Scotland Act 2012 s34

4.1.1 A National Conversation

As part of their 2007 election manifesto, the SNP promised to provide a referendum on Scottish independence.[153] In 2007, the minority SNP Government took the first steps to implement this pledge when it published *A National Conversation*, which was designed to encourage "a wide-ranging national conversation about the future of Scotland."[154] It proposed that if Scotland becomes independent there would a "cessation of appeals" to the JCPC/SC.[155]

The unionist parties did not support the complete abolition of the ability to appeal Scottish cases to London. For them, abolishing the jurisdiction when Scotland was part of the UK, would create an unusual situation where the Court of Session and the HCJ would have "final constitutional jurisdiction" to deal with issues affecting the whole of the UK but would not be able to hear cases from the whole of the UK.[156] Consequently, it was unlikely that the mostly unionist UK Parliament would agree to such a measure.[157]

4.1.2 The Calman Commission

In 2008, the Calman Commission on Devolution was set up to review the workings of the Scotland Act 1998.[158] It was set up as a unionist response to *A National Conversation*. The Commission arose from a motion of the Scottish Parliament in 2007, which supported "an independently chaired commission to review devolution in Scotland."[159] A majority in the Scottish Parliament, consisting mainly of the three main unionist parties, supported the motion.[160] The SNP minority Government opposed the motion. They supported discussion

[153] Scottish Executive, *Choosing Scotland's Future: A National Conversation: Independence and Responsibility in the Modern World* (Edinburgh: Scottish Executive, 2007) v.
[154] *ibid* viii
[155] *ibid* para 3.11
[156] Walker, n149 above, 64
[157] *ibid*
[158] Calman, n151 above, Executive Summary para 1
[159] Scottish Parliament Official Report 6 December 2007 col 4136
[160] *ibid* cols 4266-4268

about “more powers for Scotland” but “preferred” Scottish independence.[161] The Calman Commission was given the support of the UK Government.[162]

In its report, the Commission noted that there were significant concerns about the working of the devolution issue mechanism, particularly from Scottish judges.[163] The judges complained that the devolution issue mechanism made it possible to challenge “virtually any act of a prosecutor.”[164] This “led to a plethora of disputed issues, with consequential delays to the holding of trials and to the hearing and completion of appeals against conviction.”[165] There were also complaints that the JCPC was quashing convictions and using a different test from the HCJ to do this.[166] However, the Calman Commission did not make any recommendations on the issue because it felt it was beyond its remit.[167]

4.1.3 The Walker Report

Later in 2008, the SNP commissioned Professor Neil Walker to “conduct a review of final appellate jurisdiction in the Scottish legal system.”[168] The SNP had for a long time been concerned about the forthcoming SC. In a debate in 2004, Nicola Sturgeon expressed concern about the potential for a large number of cases to be sent to the SC, the fact that the SC would sit with judges not trained in Scots law and the possibility of the court feeling under “pressure to harmonise English and Scottish law.”[169] With the introduction of the SC scheduled for the following year, the Scottish Government wanted to ensure that “the implications of these changes for the distinctive Scottish legal system” were fully considered.[170] Consequently, it ordered that the report should “appraise the features,

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[161] *ibid*, col 4139
[162] Commission on Scottish Devolution, 'Frequently Asked Questions' (Calman Commission, Undated), at http://www.commissiononscottishdevolution.org.uk/about/faqs.php#q01 (last visited 06/04/2014).
[163] Calman, n151 above, para 5.29
[164] Judiciary in the Court of Session, 'Submission by the Judiciary in the Court of Session' (Calman Commission, 2008), para 13 at http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf (last visited 09/01/2019).
[165] *ibid*
[166] *ibid* para 11
[167] Calman, n151 above, para 5.37
[168] Anonymous, 'Review of Civil Appeal' (Scottish Government, 2008), at http://www.scotland.gov.uk/News/Releases/2008/12/15093413 (last visited 15/12/2018).
[169] Scottish Parliament Official Report 29 Jan 2004, col 5293-5294
[170] Anonymous, n168 above

benefits and disadvantages of the current Scottish arrangements" for appealing Scottish cases to London and asked Walker "to assess options for future developments."[171]

It seems likely that the SNP were hoping that the Walker Report would recommend abolishing the SC's jurisdiction over Scottish cases. They were to be disappointed. In 2010, Walker rejected maintaining the existing system because this would fail to "address the anomaly of the different treatment of civil and criminal appellate jurisdictions."[172] Instead, Walker proposed creating a "Quasi-Federal Supreme Court."[173] Walker recommended replacing the existing devolution issue mechanism "with the requirement for the case to 'raise matters common to more than one jurisdiction of the UK,' where the law has not yet been addressed by the Supreme Court itself" or remained "unsettled between these jurisdictions."[174] Cases which failed to meet this test "would have their final appeal restricted to" the HCJ and Court of Session.[175] This would have widened the jurisdiction for Scottish criminal cases but have narrowed its jurisdiction over civil cases.[176] Consequently, the SNP's attempts to have the SC's jurisdiction narrowed served to highlight the anomalies in the SC's jurisdiction and resulted in a recommendation that the jurisdiction be widened for Scottish criminal cases. This was "not the conclusion that" the SNP "had hoped for or expected."[177] The report was shelved.

4.1.4 The Expert Group

In 2010, a newly elected Conservative-Liberal Democrat coalition Government in Westminster committed itself to strengthening Scottish devolution by implementing the Calman Commission's recommendations that the Scottish Parliament should be given more powers.[178] It introduced the Scotland Bill (now the Scotland Act 2012) into Parliament to do this. The Government were considering using the Scotland Bill to amend the devolution

[171] Walker, n149 above, 9
[172] *ibid* 70
[173] *ibid* 72
[174] *ibid*
[175] *ibid*
[176] Chapter 6 section 2.1.2 below
[177] O'Neill, 'The Walker Report and the Law that Dare Not Speak its Name' (UKSC Blog, 2010), at http://ukscblog.com/the-walker-report-and-the-law-that-dare-not-speak-its-name/ (last visited 15/12/2018).
[178] HM Government, *Strengthening Scotland's Future* (CM 7973, 2010), 9

issues jurisdiction and wanted to consider the unresolved issues raised by Calman.[179] As a result, an Expert Group led by Sir David Edward was set up in 2010. It was asked "to assess the extent to which the application of section 57(2) to the Lord Advocate in her role as head of the system of prosecutions in Scotland causes problems in practice for the courts and the operation of the criminal justice system."[180]

The Expert Group reported in November 2010.[181] It decided that the SC's jurisdiction over Scottish criminal cases should be retained to ensure that Convention rights are protected "in a consistent manner" throughout the UK.[182] However, the Group felt that the devolution issue mechanism was "productive of delay."[183] It declared that it was "constitutionally inept to treat the acts of the Lord Advocate" when prosecuting criminal cases as devolution issues.[184] This was because the Lord Advocate had the power to prosecute before devolution and the power was not transferred to the Lord Advocate on devolution. Thus, it seemed odd to classify the Lord Advocate's actions as actions relating to devolution.[185] Moreover, the Expert Group noted that the devolution issue procedure was designed to deal with legislative competence and the competence of the Scottish Government. The focus of devolution issues on determining whether acts were *ultra vires* made them unsuitable for dealing with cases raising questions about compatibility with EU law and Convention rights because it frequently delayed cases.[186] It recommended that the Lord Advocate's actions in prosecuting cases should no longer constitute devolution issues and that the devolution issue mechanism should be "replaced by a self-standing provision defining the jurisdiction of the Supreme Court in relation to the criminal proceedings in Scotland."[187] It recommended allowing Scottish criminal cases dealing with Convention

[179] *ibid* 70
[180] *ibid* 69
[181] Expert Group, 'Section 57(2) and Schedule 6 of the Scotland Act 1998 and the Role of the Lord Advocate' (2010), 1 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81695/Expert_Group_report.doc (last visited 09/01/2019).
[182] *ibid* para 4.15
[183] *ibid* para 5.2
[184] *ibid* para 4.22
[185] *ibid* paras 4.20-4.22
[186] *Ibid* paras 4.30-4.32
[187] *ibid* para 5.4

rights to be appealed to the SC where the HCJ gave leave or with "special leave of the Supreme Court."[188]

4.1.5 McCluskey Reports

In 2011, the SC issued its controversial decision in *Fraser* v *HMA*[189] which was discussed in section 3 above. The political fallout from this resulted in the Scottish Government setting up its own review group chaired by Lord McCluskey. The Group produced an initial and final report in 2011.[190] The McCluskey Reports recommended the retention of the ability to take some Scottish criminal cases to the SC.[191] Since the McCluskey Reports were the third set of reports to recommend that the SC should continue to hear Scottish cases, the Scottish Government had to accept the reports' conclusions.[192]

Like the Expert Group, the McCluskey Report recommended that the Lord Advocate's actions in prosecuting criminal cases should not be devolution issues.[193] However, the McCluskey Report recommended a more restricted ability to take cases to the SC than had been recommended by the Expert Group. It proposed that Scottish criminal appeals to the SC should "be limited to cases where the 'local' court has certified points of law of general public importance."[194] Thus, the McCluskey Report recommended that a certification procedure should be used in Scottish criminal cases to establish whether the case was sufficiently important to be sent to the SC.[195] This method was designed to ensure that the HCJ "should not" for Convention right cases, "become more subject to interference from [the SC] than the courts of" the other UK legal systems.[196] Thus, it was a reform designed to protect the traditional final appellate jurisdiction of the HCJ while recognising the need for important Convention rights cases to be heard by the SC.

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[188] *ibid* para 5.5
[189] *Fraser* v *HMA*, n76 above
[190] Lord McCluskey (Final Report), n149 above and Lord McCluskey (Initial Report), n78 above
[191] Lord McCluskey (Final Report), n149 above, 1
[192] Anonymous, 'UK Supreme Court' (September 2011), at http://www.scotland.gov.uk/News/Releases/2011/09/14161449 (last visited 25/01/2019).
[193] Lord McCluskey (Final Report), n149 above, 1
[194] *ibid* para 43
[195] *ibid*
[196] *ibid* para 41

The report stated that an "anomaly" of the devolution issue scheme was that in Scottish criminal cases alleged breaches of Convention rights by the Lord Advocate or other Scottish ministers could be devolution issues but not acts of other bodies involved in the justice system, such as the courts and the police.[197] The report recommended expanding the range of bodies that could be subjected to Convention rights challenges as devolution issues.[198] As well as including breaches of Convention rights by the Scottish Government, the report recommended that breaches of Convention rights by the courts, the police and the Scottish Prison service should be challengeable under the new scheme.[199]

Lord McCluskey also differed from the Expert Group by recommending that when "disposing of an appeal ... the Supreme Court should be limited to declaring whether or not there has been a breach of a Convention right."[200] Consequently, he wanted to protect the traditional final appellate jurisdiction of the HCJ by ensuring that the SC could not decide the outcome of cases referred to it.

Although the McCluskey and Expert Group reports disagreed on some issues they did achieve some consensus in that they both agreed that Convention rights cases should be appealable to the SC and that the Lord Advocate's prosecutorial powers should not constitute devolution issues.[201] This consensus was used to introduce reforms to the SC's jurisdiction.

4.2 Changes under the Scotland Act 2012

The Scotland Act 2012 implemented some of the recommendations of the Expert Group and the McCluskey Report. Under the Sewel Convention, the UK Parliament will normally obtain the consent of the Scottish Parliament by asking it to pass a legislative consent motion before legislating on devolved matters.[202] Because of this, negotiations took place between the UK and Scottish Parliaments and the changes made were based on a compromise between the McCluskey Report, which was favoured by the Scottish

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[197] Lord McCluskey (Final Report), n149 above, para 29
[198] *ibid* para 28
[199] *ibid* para 27
[200] *ibid* para 8
[201] Sections 3.1.4 and 3.1.5 above
[202] Anonymous, 'The Sewel Convention: Key Features' (Scottish Government, 2008), at http://www.scotland.gov.uk/About/Government/Sewel/KeyFacts (last visited 16/12/2018).

Government,[203] and the Expert Group's report, which had been set up by the UK Government.

4.2.1 Compatibility Issues

The Scotland Act 2012 introduced compatibility issues as a new mechanism for taking Scottish criminal cases to the SC.[204] The definition of a devolution issue was amended so that challenges to legislation of the Scottish Parliament and challenges to the Scottish Government's actions and failures to act, no longer constitute devolution issues for Scottish criminal cases where they involve a question of Convention compatibility or compatibility with EU law.[205] Since the Lord Advocate is part of the Scottish Government, their acts or failures to act while prosecuting a case can no longer be challenged as devolution issues where the Lord Advocate is claimed to be in breach of the accused's Convention rights or EU law.[206] Devolution issues can still be raised in civil cases.[207] Criminal cases that challenge the legislative competency of Acts of the Scottish Parliament can be raised as devolution issues if they do not challenge the legislation on the ground that it violates Convention rights or EU law.[208]

Breaches of Convention rights and EU law in criminal proceedings are now dealt with as compatibility issues.[209] Compatibility issues include "question[s], arising in criminal proceedings, as to … whether a public authority has acted (or proposes to act) … in a way which is made unlawful by section 6(1) of the Human Rights Act" or "in a way which is incompatible with EU law."[210] A compatibility issue can also include a question "whether an Act of the Scottish Parliament … is incompatible with any of the Convention rights or with EU law."[211] An action is unlawful under the Human Rights Act 1998 s6 if it "is incompatible with a Convention right."[212] The result is that a failure of a public authority to comply with

[203] Scottish Parliament Official Report 27 October 2011 col 2872
[204] Scotland Act 2012 s34
[205] Scotland Act 1998 schedule 6 para 1
[206] Explanatory Notes to the Scotland Bill 2012 para 77
[207] *Kapri* v *Lord Advocate* [2013] UKSC 48, at [23]
[208] Anonymous, 'Compatibility: Devolution Issues Reborn' (JLSS, 2013), at http://www.journalonline.co.uk/Magazine/58-3/1012311.aspx (last visited 16/12/2018).
[209] Criminal Procedure (Scotland) Act 1995 s288ZA and s288B
[210] *ibid* s288ZA
[211] *ibid* s288ZA(2)(b)
[212] Human Rights Act 1998 s6(1)

the accused's Convention rights would raise a compatibility issue.[213] This change implements the recommendation of the Expert Group that the devolution issues mechanism was unsuitable for cases dealing with compatibility with EU law and the ECHR and that a separate jurisdiction should be created to deal with these issues.[214]

4.2.1.1 Public Authority

Under the compatibility issue mechanism, the actions of public authorities can be challenged on the ground that they do not comply with EU law or Convention rights.[215] This is broader than devolution issues, which scrutinise the actions of the Scottish Government and Parliament.[216] This reform implements the recommendation of the McCluskey Report that the range of bodies that could be subjected to Convention rights challenges should be expanded.

Under the compatibility issues scheme, "public authority" means "any person certain of whose functions are functions of a public nature."[217] The Lord Advocate is a public authority under this definition since a public authority would include the Scottish Government.[218] Consequently, as with the devolution issues scheme, the compatibility issues scheme allows scrutiny of the actions or inactions of the Lord Advocate for Convention rights compatibility. Following the devolution issue case law on what an act of the Lord Advocate is, acts of the Lord Advocate under compatibility issues should include failures to disclose evidence to the accused,[219] the right against self-incrimination,[220] the need for legal representation during police questioning[221] and the requirement that cases are prosecuted within a reasonable time.[222]

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[213] *O'Neill* v *HMA* [2013] UKSC 36
[214] Expert Group, n181 above, paras 4.30 to 4.32
[215] Criminal Procedure (Scotland) Act s288ZA(2)(a)
[216] Scotland Act 1998 schedule 6
[217] Criminal Procedure (Scotland) Act 1995 s288ZA(3)(a) and Human Rights Act 1998 s6(3)(b)
[218] Scotland Bill Committee, 'Scotland Bill Committee Report on the Scotland Bill' (Scottish Parliament, SP Paper 49 Volume 2, 2011), at http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Reports/sbr-11-01-vol2w.pdf (last visited 16/12/2018).
[219] *HMA* v *Murtagh* [2009] UKPC 35; *Holland* v *HMA* [2005] UKPC D1; *Sinclair* v *HMA* [2005] UKPC D2
[220] *Brown* v *Stott* [2001] UKPC D1
[221] *Cadder*, n75 above, at [11]-[12]
[222] *Burns* v *HMA* [2008] UKPC 63; *Spiers* v *Ruddy* [2007] UKPC D2; *Dyer* v *Watson* [2002] UKPC D1

A public authority under compatibility issues includes a court.[223] Thus, under the compatibility issue scheme, the accused in a criminal trial can argue that their Convention rights were breached by the court's actions or inactions.[224] This makes the definition of compatibility issues wider than the definition of devolution issues. It was sometimes possible to raise a devolution issue challenging an action of the courts by arguing that the Lord Advocate had breached the accused's rights by continuing to prosecute the case after the court had breached the accused's rights.[225] However, when the court has breached the accused's rights, it is not always possible to find an act of the Lord Advocate that led to the breach. For example, the court's decision to set aside a previous judgment could not be challenged as an act of the Lord Advocate.[226] Similarly, the court's interpretation of legislation in a way which was said to breach the accused's rights, could not be attributed to an action of the Lord Advocate.[227] Consequently, these actions could not have been raised as devolution issues.[228] However, since they involve actions of the courts they should be challengeable as compatibility issues. Since the trial court decides what evidence can be used at trial, there should be a wide scope for cases to be brought arguing that the court's decision or refusal to admit certain evidence breached the accused's rights.

The definition of "public authority" also includes actions of the police and prison services.[229] In a criminal investigation, there is a large scope for the police to breach the accused's rights. For example, they could obtain evidence in breach of the accused's Convention right to privacy,[230] or extract a confession in a way which breaches the accused's right to a fair trial[231] or the prohibition on inhuman or degrading treatment.[232] Some of these actions could be attributed to acts of the Lord Advocate by arguing that the Lord Advocate relied on evidence obtained in breach of the accused's rights.[233] However, this will not always be

[223] Human Rights Act 1998 s6(3)(a)
[224] *O'Neill,* n213 above, para 11
[225] *Clark* v *Kelly* [2003] UKPC D 1
[226] *Hoekstra* v *HMA* 2001 SLT 28, 31
[227] *ibid*
[228] *ibid*
[229] Hoffmann and Rowe, *Human Rights in the UK* (Harlow: Pearson, 4th ed, 2013), 84
[230] *Kinloch* v *HMA* [2012] UKSC 62
[231] European Convention on Human Rights Article 6
[232] *ibid* Article 3
[233] For example, in *Cadder*, n75 above, at [10] the accused argued that a confession which had been obtained by the police in breach of the accused's right to have legal assistance during police questioning should not have been used by the Lord Advocate.

possible. In *Kinloch* v *HMA*,[234] the accused wanted to argue that his right to a private life had been breached by unauthorised police surveillance. The SC held that the police were "not members of the Scottish Government" and that their actions could not be challenged as a devolution issue.[235] Had *Kinloch* been heard as a compatibility issue; the accused could have challenged the actions of the police.

Since acts of the Lord Advocate can still be challenged under the compatibility issue mechanism and since it includes a range of other public authorities, there is a wide scope to raise compatibility issues. Given that 14,002 compatibility issues had been raised in Scottish courts between their introduction in April 2013 and December 2017, it seems unlikely that the move from the use of devolution issues to compatibility issues will reduce the number of cases seeking to challenge acts and inactions on the ground that they breach Convention rights.[236]

4.2.1.2 Taking Cases to the SC

Like devolution issues, compatibility issues can be taken to the SC where the HCJ sitting with two or more judges has determined the issue and the HCJ has given permission to appeal to the SC or the SC has granted special leave to appeal.[237] In allowing cases to be appealed to the SC on this basis, the Scotland Act 2012 implements the recommendations of the Expert Group.[238] The Scottish courts have the same ability to refer cases as compatibility issues to a higher court as they had for devolution issues.[239] The Lord Advocate and Advocate General can only refer cases to the SC from proceedings where the HCJ is sitting with two or more judges.[240] If they want to raise a reference in proceedings before any other criminal court, the case must be referred to the HCJ.[241] The Lord Advocate and Advocate General can then appeal the HCJ's decision to the SC.[242] This differs from

[234] *Kinloch,* n230 above, 11
[235] *ibid* 11
[236] Lord Carloway, 'Review of Sections 34 to 37 of the Scotland Act 2012 Compatibility Issues' (Scottish Judiciary, 2018), para 4.7 at http://www.scotland-judiciary.org.uk/Upload/Documents/CompatibilityissuesconsultationpaperReviewofsections34to37oftheScotlandAct2012.pdf (last visited 26/11/2018).
[237] Criminal Procedure (Scotland) Act 1995 s288AA
[238] Expert Group, n181 above, para 5.5
[239] Criminal Procedure (Scotland) Act 1995 s288ZB(1) s288ZB(3)
[240] *ibid* s288ZB(5)
[241] *ibid* s288ZB(2)
[242] *ibid* s288A(6)

devolution issues where they can refer a case directly to the SC from any Scottish court.[243] This was designed to stop the Lord Advocate and Advocate General from "bypassing the role of the" HCJ.[244] Unlike with devolution issue cases, there is an automatic right of appeal from the HCJ to the SC for the Lord Advocate and Advocate General.[245] Thus, it will be easier for them to appeal cases from the HCJ to the SC but they can only take cases to the SC once the HCJ has had the opportunity to determine the compatibility issue.

As section 2 showed, the previous inclusion of the Lord Advocate under the s57 of the Scotland Act 1998 *ultra vires* control (which means that the Scottish Government has no power to act outwith devolved competence or contrary to Convention rights or EU law) had been criticised. Section 57 was amended to exclude the Lord Advocate from the *ultra vires* control where the Lord Advocate is "prosecuting any offence."[246] The result is that the Lord Advocate's decision to prosecute the accused in breach of their Convention rights would no longer be rendered null and incompetent by s57. Although the Lord Advocate can now prosecute a case in breach of the accused's rights, the Human Rights Act 1998 renders "it unlawful for a public authority to act in a way, which is incompatible with a Convention right"[247] and a compatibility issue can be raised if a public authority, including the Lord Advocate, is in breach of this.[248] This change gave effect to the recommendations of both the McCluskey Report and the Expert Group that acts and failures of the Lord Advocate when prosecuting a case should not be devolution issues where they raise questions of Convention compatibility or compatibility with EU law.[249]

A common complaint before the 2012 Act was that the SC was encroaching on the HCJ's final appellate jurisdiction by deciding the outcome of cases rather than just giving judgment on the Convention rights issue.[250] For compatibility issue cases, "the powers of the Supreme Court are exercisable only for the purpose of determining the compatibility issue"[251] and "when it has determined the compatibility issue the Supreme Court must

[243] Scotland Act 1998 schedule 6 para 33
[244] Scotland Bill Committee, n218 above, 430
[245] Criminal Procedure (Scotland) Act 1995 s288AA(6)
[246] Scotland Act 1998 s57(3)(a)
[247] Human Rights Act 1998 s6(1)
[248] Criminal Procedure (Scotland) Act 1995 s288ZA(2)(a)(i)
[249] Lord McCluskey (Final Report, 2011), n149 above, para 4 and Expert Group, n181 above, para 5.5
[250] Ferguson, n98 above, 138
[251] Criminal Procedure (Scotland) Act 1995 s288AA(2)(a)

remit the proceedings to the High Court."[252] This reflects the recommendation of the McCluskey Report that the SC should not be able to decide the outcome of the case.[253] This restriction does not apply to devolution issue cases.[254]

The Scotland Act 2012 did not implement the certification requirement proposed by the McCluskey Report despite the Scottish Government wanting this to be included in the Act.[255] Despite this, the above changes and the requirement that the compatibility issue jurisdiction, including the need for certification, be reviewed after three years,[256] meant that the Scottish Government felt able to support the legislative consent motion.[257]

5 Future Developments

5.1 Review of Compatibility Issues

The Scotland Act 2012 also included a requirement for the Secretary of State to order a review of the provisions relating to the SC three years after their coming into force.[258] The review was carried out in 2018 by Lord Carloway.[259] It considered whether 1) appeals to the SC should require certification;[260] 2) whether the definition of compatibility issues should be changed;[262] 3) the procedure for raising a compatibility issue;[263] 4) whether the SC should be able to grant leave to appeal to the SC when the HCJ has refused to hear the appeal[264] and 5) whether the time limits for bringing an appeal to the SC should be changed.[265] The report recommended that the procedure for raising devolution and

[252] *ibid s*288AA(3)
[253] Lord McCluskey (Final Report, 2011), n149 above, para 8
[254] Supreme Court Rules 2009 (SI 2009/1603) s29(1)
[255] Scottish Parliament Official Report 18 April 2012 col 8106
[256] *ibid* cols 8106-8107
[257] Crawford, 'Letter from the Scottish Government to Committee Convener' (Scottish Parliament, 2012), 3 at http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/General%20Documents/Letter_to_Linda_Fabiani.pdf (last visited 16/12/2018).
[258] Scotland Act 2012 s38
[259] Lord Carloway, 'Review of Sections 34 to 37 of the Scotland Act 2012 Compatibility Issues' (Scottish Judiciary, 2018), at http://www.scotland-judiciary.org.uk/Upload/Documents/ScotlandActReview2012CompatabilityissuesReportSeptember2018.pdf (last visited 26/11/2018).
[260] *ibid* para 3.1
[262] *ibid* para 3.8
[263] *ibid* para 3.12
[264] *ibid* para 3.15
[265] *ibid* para 3.19

compatibility issues should specify in more detail what counsel need to put in the document used to raise a devolution or compatibility issue. Beyond this, it did not recommend that any changes should be made to compatibility issues.[266] Thus, it seems unlikely that the report will result in large reforms being made to the law. It is notable that the review was specifically required to consider the issue of certification.[267] During the passage of the 2012 Act, the SNP failed to get certification introduced because the Advocate General for Scotland, who was in charge of the reforms, felt that the change was unnecessary.[268] This was despite it being supported by the Lord President of the Court of Session,[269] the Scottish Parliament's Scotland Bill Committee[270] and the McCluskey Reports.[271] However, now that the jurisdiction has been in force for several years the review found little evidence of the SC being flooded with large numbers of Scottish criminal appeals and rejected the need for certification.[272]

5.2 EU Withdrawal

The UK's decision to leave the EU may result in changes being made to the devolution and compatibility issue jurisdiction. The European Union (Withdrawal) Act 2018 implemented these changes. The Withdrawal Act was controversial because it was passed by the UK Parliament without the consent of the Scottish Parliament, which was asked to give its consent to the Bill under the Sewel Convention.[273] All political parties in the Scottish Parliament, apart from the Conservatives, rejected the legislative consent motion, fearing that the Bill was being used as a way to grab power from the Scottish Parliament.[274] Section 12, if brought into force, will alter the legislative competence of the Scottish Parliament so that instead of being prevented from legislating contrary to EU law, it will now be

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[266] *ibid* Chapter 4
[267] Scotland Act 2012 s38(3)(c)
[268] Lord Wallace, 'Untitled Letter from Lord Wallace to Linda Fabiani' (Scottish Parliament, 2012), at http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/General%20Documents/2012.01.20_Advocate_General_for_Scotland.pdf (last visited 16/12/2018).
[269] Lord Hamilton, 'Scotland Bill: Written Representations under the Constitutional Reform Act 2005' (Scottish Judiciary, 2012), at http://www.scotland-judiciary.org.uk/Upload/Documents/WrittenRepresentationsLPJan12.doc (last visited 16/12/2018).
[270] Scotland Bill Committee, *Report on the Scotland Bill* (SP Paper 49, Volume 1, 2011) 103
[271] Lord McCluskey (Final Report), n149 above, 43
[272] Lord Carloway, n259 above, para 3.1
[273] Scottish Parliament Official Report 15 May 2018 cols 74-76
[274] *ibid*, col 10 Michael Russell (SNP), col 23 Neil Findlay (Labour), cols 25-27 Patrick Harvie (Green), col 28 Tavish Scott (Liberal Democrats)

prevented from modifying retained EU law, which is law which will be kept should the UK leave the EU.[275] However, the Scottish Parliament can modify retained EU law if: 1) before the day of the UK's departure from the EU it would have been within the Scottish Parliament's competence or 2) under powers to make regulations provided for by the 2012 Act.[276] The Scottish Government will subject to these exceptions have "no power" to "make, confirm or approve any subordinate legislation" which modifies EU law.[277] Questions over whether the Scottish Government or Parliament having gone beyond their competence by legislating contrary to retained EU law will be compatibility issues for Scottish criminal cases.[278]

6 Scope of this Thesis

The above discussion has shown that although devolution and compatibility issues can be used for EU law and devolved competence, the most controversial issue about the JCPC/SC's jurisdiction is the question of which court should have the final say in Scottish Convention rights cases. On the one hand, there is a belief that there should be an additional tier of appeal beyond the HCJ to protect the accused when the HCJ has not protected the accused's Convention rights to the minimum standard. On the other hand, there is a belief, particularly from the SNP, that the HCJ and the Court of Session should be the final courts in Scottish cases and that it is inappropriate to have a UK-wide court making decisions about Scots law because such courts are seen as being insensitive to the claimed distinctiveness of Scots law.[279] This raises important questions about whether there is a need for an additional tier of appeal beyond the HCJ and whether a court, where most judges are not trained in Scots law like the JCPC/SC, can legitimately fulfil this function.

The debate encompasses important questions about the interrelationship between human rights and legal traditions. On the one hand, there is a desire to see some uniformity in the application of Convention rights in the UK and a desire to ensure that Convention rights are protected in Scotland.[280] On the other hand, there is a desire to protect the allegedly

[275] European Union (Withdrawal) Act 2018 schedule 3 part 1 para 1(b)
[276] Scotland Act 1998 s30A(2) s57(4)-(5)
[277] European Union (Withdrawal) Act 2018 schedule 3 part 1 para 1(b)
[278] *ibid* schedule 3 para 23(2)
[279] Section 3 above
[280] See Scottish Human Rights Commission, n73 above, 2

distinctive Scottish legal system from the claimed harmonising effects of the JCPC/SC's Convention rights judgments.[281] These two aims are not necessarily compatible with each other. The enforcement of Convention rights may require the Scottish legal system to make changes which affect the traditions of the Scottish legal system.[282] This raises several questions. First, does Scotland have a distinctive legal system? If it is found that it does, this raises the question of what level of Convention rights protection the JCPC/SC provides and whether by checking Scots law for Convention compatibility it has an unwelcome impact on Scots law, such as the harmonisation of Scots law with English law, the importation of law into Scots law which does not fit with existing law, a decrease in the clarity of Scots law or the need for legislative intervention. The second question raised relates to how much importance should be attached to the need to protect human rights and whether human rights are so important that they need to be enforced in Scotland even when this undermines the traditions of the Scottish legal system. Finally, it raises the question of whether human rights should be applied symmetrically throughout the UK or whether since the UK has an asymmetrical system of devolution, Scotland should be given autonomy to implement human rights in a way that reflects the traditions of its legal system. Thus, the debate over the JCPC/SC's devolution and compatibility issue jurisdiction raises important issues about the constitutional relationship between Scotland and the UK.

This thesis will make an important contribution to the existing literature. As section 3 showed, existing literature has focused on narrow issues relating to the JCPC/SC's jurisdiction, has normally only considered a small number of cases and is often outdated. This thesis aims to provide a comprehensive and systematic study of the JCPC/SC's jurisdiction, including an extensive analysis of its case law, to update our knowledge about the JCPC/SC's jurisdiction and to establish the advantages and disadvantages of the jurisdiction situated in a debate about the jurisdiction's legitimacy.

Chapter 2 will show that the arguments made for the autonomy of the Scottish legal system by critics of the JCPC/SC's jurisdiction are similar to those made by Scottish, Quebecois and South African legal nationalists. It will examine the arguments of these legal nationalists. It will argue that legal systems should have autonomy to develop in their own way and that

[281] Scotland Bill Committee Official Report 8th February 2011 cols 479-480
[282] Chapter 4 section 4 below

problems can arise if courts do not recognise differences between legal systems and/or the court lacks expertise in the legal system the case is from.

Chapter 3 will evaluate claims by the critics of the JCPC/SC's jurisdiction and Scottish legal nationalists that Scots criminal law is distinctive when compared with English law. Using criteria to evaluate the significance of differences between Scots and English criminal law, it will conduct a comparative analysis of criminal law, evidence and procedure in Scotland and England to establish whether Scots criminal law, evidence and procedure are distinctive. While there have been many comparative studies between Scots and English criminal law, many are outdated or focus on a small number of areas of law.[283] Chapter 3 will update our knowledge about differences between Scots and English law and provide an extensive study of Scots and English criminal law, evidence and procedure. It will argue that while there are many areas of similarity, there is evidence of Scots law taking a genuinely distinctive approach to areas of Scots criminal law, procedure and evidence.

Chapter 4 will test whether critics of the JCPC/SC's jurisdiction are correct to argue that it has an unwelcome effect on Scots law. It will devise criteria for evaluating the effect of the JCPC/SC's decisions on Scots law and then apply them to a sample of JCPC/SC cases. It will consider whether the JCPC/SC imported law into Scots law, whether it harmonised Scots and English law, affected the clarity of Scots law, produced decisions which did not fit with existing Scots law and/or required legislative intervention. It will be considered whether the JCPC/SC benefited Scots law by ensuring that Scots law complies with at least the minimum standard of Convention rights protection required by the ECtHR. The chapter will also analyse whether the JCPC/SC's judgments have been needed to correct Scots law when it has fallen below the minimum standard and whether having an additional tier of appeal to the JCPC/SC has allowed the JCPC/SC to act as a safety net for the accused when the HCJ has not upheld their Convention rights to the minimum standard. Chapter 4 will argue that some cases had a significant impact on Scots law when judged by the criteria for impact, but most did not. It will show that the JCPC/SC can benefit Scots law by ensuring that it is

[283] Blackie, 'Cross-Border Differences in the Law of Evidence - Scotland and England' 2014 Jur Rev 69; Farmer, 'Debatable Land: An Essay on the Relationship between English and Scottish Criminal Law' (1999) 3(1) Edin LR 32; Ferguson, 'Codifying Criminal Law (2): the Scots and English Draft Codes Compared' [2004] Crim LR 105; Smith, *British Justice the Scottish Contribution* (London: Stevens & Sons, 1961), 216.

Convention compatible and that the JCPC/SC acts as a safety net when the HCJ has failed to protect the accused's Convention rights to the minimum standard required by the ECtHR.

Chapter 5 will consider how courts in general and top courts like the JCPC/SC might gain legitimacy. This discussion will be used to develop criteria to assess the legitimacy of the JCPC/SC's devolution and compatibility issue jurisdiction. The chapter will answer important questions such as whether the JCPC/SC has exceeded its legally defined jurisdiction, whether JCPC/SC judges not trained in Scots law have sufficient expertise to decide Scottish cases, whether it can ever be legitimate to have a minority of judges trained in Scots law deciding Scottish cases and whether the JCPC/SC is sufficiently independent and impartial and accountable for its actions. The chapter then considers what level of Convention rights protection should be enforced in Scotland, whether Scots law should be given autonomy to develop its own approach to Convention rights protection and whether there is a need for a UK-wide approach to Convention rights protection.

Drawing on the findings of the first part of Chapter 5 and the previous chapters, the second part of Chapter 5 will consider whether: 1) there is a need for an additional tier of appeal beyond the HCJ; 2) whether the JCPC/SC should provide that tier of appeal if required and 3) whether the JCPC/SC can legitimately decide Scottish criminal devolution and compatibility issue cases. This will establish whether the jurisdiction is justifiable. This thesis concludes by arguing that the jurisdiction is legitimate and justifiable and beyond increasing the number of judges trained in Scots law to three, the SC's jurisdiction should remain unchanged.

The focus of this thesis will be on Scottish criminal cases raising questions about the compatibility with Convention rights. There are several reasons for this approach. First, very few Scottish criminal cases heard by the JCPC/SC have raised challenges to the legislative competence of an Act of the Scottish Parliament which does not relate to an issue of compatibility with Convention rights[284] and few raised an issue of EU law.[285] The lack of cases on these issues would make it difficult to draw accurate conclusions on the impact of

[284] *Martin* v *HM Advocate* [2010] UKSC 10

[285] Information obtained by considering cases listed in UKSC, 'Decided Cases' (UKSC, 2018), at https://www.supremecourt.uk/decided-cases/ (last visited 24/01/2019) and Privy Council Office, 'Judgments' (Privy Council Office, 2009), at http://privycouncil.independent.gov.uk/judicial-committee/judgments/ (last visited 24/01/2019).

the SC's devolution issue and compatibility issue jurisdiction. In contrast, there is a large body of Scottish criminal cases decided by the JCPC/SC which raise questions about Convention rights.[286] Focusing on Convention rights cases will give a greater sample of cases to consider. This will help to ensure the accuracy of the conclusions reached by making it easier to establish which judgments reflect the JCPC/SC's normal way of deciding cases and which are more anomalous and less useful to this thesis.

[286] *ibid*

Chapter 2: Legal Nationalism

1 Introduction

As Chapter 1 showed,[1] critics of the Judicial Committee of the Privy Council (JCPC) and the Supreme Court's (SC) jurisdiction assume that Scots law should have autonomy to develop in its own way, free from the influence of UK-wide courts using judges not trained in Scots law. Chapter 1 section 3 showed that these claims are similar to the arguments made by legal nationalists who assert that Scotland has a distinctive legal system, which needs to be protected from external interference. This chapter considers the merits of legal nationalism. It starts by examining the arguments made for preserving the autonomy of the Scottish legal system and accommodating differences between the Scottish and English legal systems. It draws upon comparable debates in Quebec and South Africa to identify broader arguments for legal systems having autonomy to develop in their own way. It then focuses more specifically on the arguments made to justify giving Scots criminal law autonomy to develop in its own way.

This chapter will examine claims that legal systems should have autonomy because law is important to national identity. It will test whether Scots law contributes to Scots national identity and whether this justifies giving Scots law some autonomy to develop in its own way. The final part of the chapter considers case law from Scotland, Quebec and South Africa to assess whether there is a need to recognise differences between legal systems, to give them autonomy to develop in their own way and whether problems arise from having judges who are not trained in the legal system they are deciding cases from.

The debate about legal nationalism is important to the JCPC/SC debate because it reveals reasons that have been put forward to justify Scots law taking its own approach and the problems that arise with such arguments. Legal nationalist literature on Scottish civil cases decided by the House of Lords (HOL) reveals the problems that might arise in Scottish criminal cases if as its critics allege the JCPC/SC is insensitive to the claimed distinctiveness of Scots law.

[1] Chapter 1 section 3 above

2 Legal Nationalism

Legal nationalism, although varying between legal jurisdictions, is the idea that a legal system is distinctive and that this distinctiveness needs to be preserved.[2] Legal nationalists often argue that the distinctiveness of the legal system in question is under threat because of an over-willingness by courts, legislatures and lawyers to harmonise the law of the legal system with another legal system and/or indifference by these lawyers and institutions to the distinctive nature of that legal system.[3] They argue that differences between legal systems should be recognised and that the distinctive nature of particular legal systems justifies allowing it to develop in their own way.[4]

The remainder of this section will outline the basic tenets of legal nationalism in Scotland, Quebec and South Africa before considering more specifically how legal nationalist arguments have been used in relation to Scots criminal law. Although there are differences between Scottish, Quebecois and South African legal nationalism, the arguments made in each jurisdiction have many similarities.[5] Thus, understanding South African and Quebecois legal nationalism will help inform the debate on Scottish legal nationalism.

2.1 Features of Scottish Legal Nationalism

Since the nineteenth century, there has been a body of writing arguing that Scots law is distinctive, especially when compared with English law, and that this distinctiveness should be protected against unwanted harmonisation with other legal systems.[6] The alleged

[2] Sections 2.1, 2.2 and 2.3 below
[3] Section 2.1 below
[4] Sections 2.1, 2.2 and 2.3 below
[5] Sections 2.1, 2.2 and 2.3 below
[6] Examples of legal nationalist literature include: Gibb, 'The Inter-relation of the Legal Systems of Scotland And England' (1937) 53(1) LQR 61; Gibb, Law from Over the Border: A Short Account of a Strange Jurisdiction (Edinburgh: W Green, 1950); Lord Cooper, 'The Common Law and The Civil Law - a Scots View' in Lord Cooper, *Selected Papers 1922-1954* (Edinburgh: Oliver and Boyd, 1957), 201-209; Lord Cooper, 'The Scottish Legal Tradition' in Meston, Sellar and Lord Cooper, *The Scottish Legal Tradition New Enlarged Edition* (Edinburgh: The Saltire Society, 1991) 65-89; Smith, *British Justice the Scottish Contribution* (London: Stevens and Sons, 1961); Smith, 'English Influences on the Law of Scotland' (1954) 3(4) *American Journal of Comparative* Law 522; Smith, 'Law Reform in A Mixed 'Civil Law' and 'Common Law' Jurisdiction' (1975) 35(2) *Louisiana Law Review* 927; Smith, 'Scots Law and Roman-Dutch Law' [1959] *Acta Juridica* 36; Smith, 'Legal Imperialism and Parochialism' 1965 Jur Rev 39; Smith, 'While One Hundred Remain' (1984) 50 *Aberdeen University Review* 229; Thomson, 'Scots

distinctiveness of Scots law[8] is said to result from it being in the unusual[9] position of having a mixed legal system, which derives elements from the English common law legal system and from civilian law, which is based on Roman law and is found in the legal systems of Continental Europe.[10]

Civilian legal systems are based on general principles, which are often found in a civil code and/or (as in the case of Scotland) in the works of institutional writers. When judges decide a case they use deductive reasoning. They apply general principles to the facts of the case to reach their decision. Civilian legal systems do not apply a system of binding precedent, although civilian lawyers will consider previous case law when reaching their decision.[11] Conversely, common law legal systems rely less heavily on codification and more heavily on case law. Judges rely on a system of precedent. Judges employ inductive reasoning whereby they seek to extract general rules from existing cases and interpret[12] and apply them to decide the current case.[13] Common law legal systems are less codified than civilian legal systems although legislation is increasingly used to codify some areas of law.[14] Admittedly, this description of common law and civilian legal systems represents general differences between two types of legal systems. The differences between actual legal systems may be far more complex and not all legal systems will fit easily into the one or other category.[15]

Law, National Identity and the European Union' (1995) 10 Scottish Affairs 25; Walker, 'Some Characteristics of Scots Law' (1955) 18(4) MLR 321.

[8] It is beyond the scope of this study to consider whether the civil law parts of Scots law are distinctive, although it is widely accepted that areas such property law, the law of succession and family law are distinctive: Lord Cooper (1991), n6 above, 71-84; Meston, 'Scots Law Today' in Meston and Sellar, *The Scottish Legal Tradition New Enlarged Edition* (Edinburgh: The Saltire Society, 1991), 1-28; Tetley, 'Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified) (Part I)' (1999) 4(3) Unif L Rev 591, 603; Thomson, 'Scots Law, National Identity and the European Union' (1995) 10 *Scottish Affairs* 25.

[9] Other mixed legal systems include South Africa, Quebec and Louisiana (Reid, 'The Idea of Mixed Legal Systems' (2003) 78(1) Tul L Rev 5, 6)

[10] Lord Cooper (1991), n6 above, 66; Walker, n6 above, 325; Smith (1959), n6 above, 44.

[11] Laidler, 'The Distinctive Character of the Quebec Legal System' in Paluszkiewicz-Misiaczek, Reczynska and Spiewak, *Place and Memory in Canada: Global Perspectives* (Krakow: Polska Akademia Umiejçtnosci, 2005), 280

[12] There is debate over the extent to which judges can simply apply the law. (See Chapter 5 section 2.1.1 below)

[13] Tetley, n7 above, 613

[14] Chapter 3 section 2.3 below

[15] See discussion of Egypt in Tetley, n7 above, 611

Legal nationalists argue that the distinctiveness of their legal system is endangered by borrowing law from other legal systems.[16] Scottish legal nationalists are particularly fearful that Scots law will become Anglicised.[17] This harmonisation is said to have several sources. First, it is correctly claimed that the UK Parliament has used legislation to harmonise Scots and English law.[18] Prior to the establishment of the Scottish Parliament, a lack of time and interest in Scots law from Westminster meant that legislation was often applied to both England and Scotland without considering how well it fitted with Scots law.[19] Nonetheless, Chapter 3 will show that there are examples of Westminster legislation taking a genuinely distinctive approach between Scotland and England.[20] Many of the prominent legal nationalists were writing before devolution. Devolution created greater opportunities to reform Scots law in devolved areas since Scots law now has a Parliament dedicated to legislating on Scottish issues.[21] This creates the potential for the Scottish Parliament to create new distinctive areas of Scots law when compared with English law. However, there were proposals by the Scottish Government to abolish corroboration and to remove the ability of the jury to convict by a simple majority and a Member's Bill in the Scottish Parliament sought to remove the not proven verdict; all of which represent genuinely distinctive differences between Scots and English law.[22] While these reforms were not implemented, they show that there is a danger that greater opportunities to reform Scots law can lead to the Scottish Parliament removing distinctive elements.

Second, legal nationalists argue that sending Scottish civil cases to UK-wide courts such as the HOL and SC risks the harmonisation of Scots and English law.[23] For legal nationalists, the use of judges not trained in Scots law results in cases being decided using English law because these judges do not understand Scots law and are over-willing to assume that

[16] Lord Cooper (1991), n6 above, 88; Gibb (1950), n6 above; Gibb (1937), n6 above, 67; Walker, n6 above, 33; Smith (1954), n6 above, 523
[17] *ibid*
[18] Walker, n6 above, 323-325; Gibb (1937), n6 above, 77-78; Smith (1954), n6 above, 525
[19] Jones, 'Criminal Justice and Devolution' 1997 Jur Rev 201, 201-203; MacDiarmid, 'Scots Law: The Turning of the Tide' 1999 Jur Rev 156, 159-161
[20] Chapter 3 sections 2.6, 3.2 and 4.2
[21] Smith, 'Scottish Nationalism, Law and Self Government' in MacCormick, *The Scottish Debate: Essays on Scottish Nationalism* (London: Oxford University Press, 1970), 51
[22] Chapter 3 sections 3.2.2 and 4.2.5 below
[23] Gibb (1950), n6 above; Walker, n6 above, 332-337; Smith (1954), n6 above, 528-531

Scots and English law are the same.[24] As Chapter 1 showed, similar concerns were raised about the JCPC/SC's jurisdiction over Scottish criminal cases.[25]

Finally, the Scottish legal profession was blamed for the harmonisation of Scots and English law. Lawyers were accused of being over-willing to cite English law and English textbooks in Scottish cases and being indifferent to the distinctive features of Scots law.[26] It was argued that these problems arose because of poor legal education.[27] In the past, there was a lack of resources for Scots lawyers such as reported case law, Scottish textbooks and academic writing about Scots law. Today partly due to the efforts of the legal nationalists, especially David Walker and TB Smith, there is a large range of resources on Scots law.[28] However, it is still common for law from other jurisdictions to be cited in Scottish courts.[29]

Legal nationalists argue that this importation of law from other jurisdictions into the Scottish legal system caused "confusion and frustration" because law was imported without considering the merits of doing this.[30] Thus, for legal nationalists there is a danger that imported laws might not fit with existing law. Additionally, legal nationalists argue that some of the laws being imported bring little benefit to the Scottish legal system. Accordingly, Smith complained that "there have also been quite numerous instances of the imposition on the Scottish system of unwelcome and retrograde English doctrine."[31] Thus, legal nationalists argue that Scots law needs to be protected against the harmonisation of law.

Like critics of the JCPC/SC's jurisdiction,[32] legal nationalists argue that Scots law is an important part of Scottish national identity. At the time when many legal nationalists were writing, Scotland did not have its own parliament and they considered the preservation of a distinctive Scottish legal system after the Treaty of Union 1707 as playing an important part

[24] Gibb (1937), n6 above, 67; Walker, n6 above, 333; Smith (1954), n6 above, 528
[25] Chapter 1 sections 2 and 3 above
[26] Gibb (1937), n6 above, 71
[27] Walker, 'Legal Education' (1968) 74 SLR 109.
[28] Reid, 'While One Hundred Remain: T B Smith and The Progress of Scots Law' in Reid and Miller, *A Mixed Legal System in Transition T. B. Smith and The Progress of Scots Law* (Edinburgh: Edinburgh University Press, 2005), 24-27
[29] Chapter 4 section 3.1 below
[30] Smith (1954), n6 above, 523
[31] *ibid*
[32] Chapter 1 section 3 above

in the survival of Scots national identity.[33] For Lord Cooper, the law is "the reflection of the spirit of a people."[34] T B Smith was more sceptical of the idea that "each country developed its own habits" through a national spirit.[35] For him, Scots law's connection with national identity arose from a belief that the survival of Scots law after the Union was instrumental in the maintenance of a separate Scottish national identity.[36]

2.2. Quebec

Many features of Scottish legal nationalism appear in Quebecois and South African legal nationalism. Starting with Quebecois legal nationalism before considering South African legal nationalism, the basic tenets of legal nationalism in these jurisdictions will be considered.

Quebec, like Scotland, has a mixed legal system. Quebec's law consists of a mixture of common law based on English-Canadian law and civil law based on the French Napoleonic Code.[37] Unlike Scotland, Quebec's civil law was codified in the Civil Code of Lower Canada 1866 which was replaced by the Civil Code of Quebec 1994. Quebec's civil law requires judges to interpret the law by considering the principles set down in the code and relying on institutional writings.[38] Although Quebecois judges also consider previous case law, Quebec has, except for decisions of the Supreme Court of Canada, not used a system of precedent.[39] Quebec's constitutional relationship with the rest of Canada differs from Scotland's relationship with the UK. The UK is normally considered to be a unitary state.[40] Quebec is a province of Canada in a federal relationship with the rest of Canada. The other Canadian Provinces use the common law which initially derived from English law and relies

[33] Smith (1961), n6 above, 216
[34] Lord Cooper (1991), n6 above, 88
[35] Palmer, 'Travelling the High Road with T B Smith: Nationalism and Internationalism in the Defence of the Civilian Tradition' in Reid and Miller, *A Mixed Legal System in Transition T. B. Smith and the Progress of Scots Law* (Edinburgh: Edinburgh University Press, 2005), 261
[36] Lord Cooper (1991), n6 above, 88
[37] L'Heureux-Dube, 'By Reason of Authority or By Authority of Reason' (1993) 27(1) U Brit Colum L Rev 1, 6
[38] Laidler, 'The Distinctive Character of The Quebec Legal System' in Paluszkiewicz-Misiaczek, Reczynska and Spiewak, *Place and Memory in Canada: Global Perspectives* (Krakow: Polska Akademia Umiejçtnosci, 2005), 277-287, 277
[39] L'Heureux-Dube, 'Bijuralism: A Supreme Court of Canada Justice's Perspective' (2002) 62(2) *Louisiana Law Review* 449, 465
[40] Chapter 5 section 2.2.1 below

more strongly on precedent. However, there are areas of similarity between Quebecois law and the law of the rest of Canada, including commercial law, criminal law (which has a Canada-wide code) and public law.[41]

By the 1950s, a strong legal nationalist movement was arguing for greater recognition of Quebec's civil law.[42] It claimed that Quebec's civil law is distinctive from the common law and this distinctiveness should be preserved to help Quebec maintain its historical connection to France.[43] For legal nationalists, the integrity of Quebec's civil law was endangered by an over-willingness by the legislature and the Supreme Court of Canada, especially in the past, to standardise laws throughout Canada.[44] The Supreme Court of Canada deals with cases from both Quebec and the common law parts of Canada. Like the JCPC/SC's jurisdiction over Scottish criminal cases, there were concerns that it used its position as a multi-jurisdictional court to harmonise Quebecois law with the common law and import the common law into Quebec's civil law.[45] Until 1933 for criminal cases and 1949 for civil cases, appeals from Canada could be sent to the JCPC. Unlike when the JCPC heard Scottish devolution issues, the JCPC hearing cases from Canada acted first as a colonial court and then as a court hearing appeals from Commonwealth countries. There were concerns that both the JCPC and Canadian Supreme Court[46] lacked sufficient expertise to decide cases from Quebec because most of their judges were common law judges.[47]

For Quebecois legal nationalists, Quebecois law is a cherished inheritance from the "motherland" of France[48] and an important way of maintaining a link to France. Quebecois law is praised for maintaining the customary laws of Paris and for its strong connection to

[41] L'Heureux-Dube, n37 above, 16
[42] Allard, 'The Supreme Court of Canada and Its Impact on the Expression of Bijuralism' (Department of Justice Canada, Undated), 12 at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b3-f3/bf3a.pdf (last visited 29/12/2018).
[43] Roy (1920), quoted in Normand, '*Un Thème dominant de la Pensée Juridique Traditionnelle au Québec: la Sauvegarde de L'intégrité du Droit Civil* [A Dominant Theme of Traditional Legal Thought in Quebec: Safeguarding the Integrity of Civil Law]' (1987) 32(3) *McGill Law Review* 559, 578-579
[44] *Pantel* v *Air Canada* [1975] 1 SCR 472, 478 per Pigeon J.; *Desrosiers* v *The King* [1920] 60 SCR 105, 26 per Mignault J.
[45] *ibid*
[46] The Supreme Court of Canada now sits with three judges trained in Quebecois law.
[47] Normand, n43 above, 581
[48] Nantal quoted in *ibid* 569

Catholicism.[49] Codification of this law in the Civil Code is often cited as an important reason why Quebecois law was preserved.[50]

2.3 South Africa

A similar legal purification movement developed in South Africa towards the end of the 19th Century. South African law consists of Roman-Dutch law, which was imported when the Dutch colonised it in 1652, and English law, which was imported into the existing law when South Africa was colonised by the British in 1806.[51] Like in Scotland, South African civilian law is found in case law and institutional writings rather than in a civil code. This civilian influence meant that South African law initially[52] used precedents "sparingly."[53] English law was imported into South African law by legislation[54] and by the South African courts including occasionally by the JCPC.[55] The influence of English law was prevalent in areas including commercial law, merchant law and some limited parts of criminal law.[56]

Purists aimed to rid the South African legal system of English law and return it to its Roman-Dutch roots by relying on 17th and 18th Century institutional writings,[57] although there was no agreement on which institutional writers should be relied on.[58] Using arguments similar to Scottish legal nationalists, purists argued that South Africa was too willingly abandoning its Roman-Dutch law,[59] that English law was imported into South African law without "the slightest regard to" Roman-Dutch law and that there was an over-willingness to assume that English law had replaced Roman-Dutch law.[60]

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[49] Normand *ibid,* 570
[50] Nantal quoted in Normand *ibid*, 569
[51] Erasmus, 'Roman Law in South Africa Today' (1989) 106(4) S African LJ 666, 667-669
[52] The English influence on South African law means it now uses precedents.
[53] Mulligan, 'Bellum Juridicum (3): Purists, Pollutionists and Pragmatists' (1952) 69(1) S African LJ 25.
[54] Schreiner, *The Contribution of English Law to South African Law; and The Rule of Law in South Africa* (London: Stevens & Sons, 1967), 10
[55] It was rare for the JCPC to hear cases from South Africa. (C J G, 'The Privy Council' (1935) 52(3) S African LJ 277, 279)
[56] Schreiner, n54 above, 10 and 88
[57] Proculus, 'Bellum Juridicum' (1951) 68(3) S African LJ 306
[58] Fagan, 'Roman-Dutch Law in its South African Historical Context' in Zimmermann and Visser, *Southern Cross: Civil Law and Common Law in South Africa* (Oxford: Oxford University Press, 1996), 42
[59] *Regal* v *African Superslate (Pty) Ltd* 1963 1 SA 102, 106; *Trust Bank van Afrika Bpk* v *Eksteen* 1964 3 SA 402, 410
[60] *ibid*

For purists and many South African lawyers, South African law is Roman-Dutch law and this law remained the main law of South Africa after the introduction of English law. The courts should apply Roman-Dutch law unless it has been overturned by legislation or has fallen into disuse. Legislation should be interpreted using Roman-Dutch law.[61] English law was never the law of South Africa despite being frequently applied after colonisation by the UK. English law was a pollutant which should be removed.[62] This is a controversial version of history because it denies that English law became a source of South African law despite it being applied frequently by the South African courts.[63]

2.4 Features of Scots Criminal Law

Having considered the basic tenets of legal nationalism in each jurisdiction, the next section focuses more specifically on the claims Scottish legal nationalists make about Scots criminal law. Unlike other areas of Scots law, Scots criminal law inherited little of the civilian law system championed by legal nationalists.[64] Despite this, legal nationalists believe that Scots criminal law is distinctive, particularly when compared with the English legal system.[65] There are several factors which are claimed to have contributed to this distinctiveness.

First, legal nationalists attach importance to the tradition of the High Court of Justiciary (HCJ) being the final appellate court for Scottish criminal cases and argue that this allowed Scots criminal law to develop in a distinctive way.[66] The lack of appeal to a UK-wide court before devolution, allegedly meant that Scots criminal law remained "completely self-contained"[67] and free from the potentially harmonising influence of the HOL.[68] This isolation before devolution should not be overstated. Scots law both contributed to English law and borrowed ideas from English law.[69] Scottish criminal decisions could be scrutinised

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[61] Cameron, 'Legal Chauvinism, Executive Mindedness and Justice L C Steyn's Impact on South African Law' (1982) 99(1) S African LJ 38, 43
[62] *Regal*, n59 above, 106
[63] Cameron, n61 above, 45
[64] Gane, 'Civilian and English Influences on Scots Criminal Law' in Reid and Miller (Eds), *A Mixed Legal System in Transition* (Edinburgh: Edinburgh University Press, 2005) 218-238.
[65] Lord Cooper (1991), n6 above, 85-86; Smith (1954), n6 above, 536; Walker, n6 above, 322
[66] Smith (1954), n6 above, 536; Meston, 'Scots Law Today' in Meston, Sellar and Lord Cooper, n6 above, 25-26
[67] Farmer, *Criminal Law, Tradition and Legal Order Crime and the Genius of Scots Law 1747 to the Present* (Cambridge: Cambridge University Press, 1997), 21
[68] Smith (1954), n6 above, 536
[69] Lord Hope, 'Scots Law Seen from South of the Border' (2012) 16(1) Edin LR 58, 66

by the European Court of Human Rights, although until 1999 there was no statutory obligation[70] for Scottish courts to consider its decisions.[71] Nonetheless, Scots criminal law was able to develop in its own way because legislative intervention by Westminster was rare.[72] Before devolution, Westminster tended to "concern itself with political, economic and social measures" and it had to legislate for all the different legal systems in the UK. This meant it often did not have time to amend technical aspects of Scots law.[73] Thus, reforms to Scots law tended to be delayed or "not take place at all."[74] This was not always beneficial to the Scottish legal system.

Second, Lord Cooper argued that Scots criminal law is mainly "the product of native custom" which was "elaborated and developed by" the HCJ.[76] Institutional writers such as Hume[77] are said to have laid down many important principles of Scots law which are still followed today.[78] For Lord Cooper, this enabled "an independent system of Scots criminal law" to emerge.[79] Certainly, institutional writers such as Hume are frequently cited in Scottish courts when there is doubt about how Scots criminal law should deal with an issue. However, his works are used selectively and are not applied where it is considered that his approach would not benefit the legal system.[80] Claims that Scots criminal law relies on principles should also not be overstated. In Scots law, there is no single definition of what a principle is, although it is often accepted that judges deciding Scottish criminal cases apply principles.[81] However, precedent is often applied by the Scottish courts and influences the development of the law.

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[70] *T, Petitioner* 1997 SLT 724 held that ECtHR case law could be used to interpret ambiguous legislation.
[71] Lord Hope, 'Devolution and Human Rights' [1998] EHRLR 367, 369; Grotrian, 'The European Convention: A Scottish Perspective' [1996] EHRLR 511; Home Office, *Rights Brought Home: The Human Rights Bill* (CM 3782, 1997), Chapter 1
[72] Farmer, n67 above, 21
[73] Ireland, 'Whither Scots Law' (1985) 30 (Oct) JLSS 403.
[74] Jones, n19 above, 202
[76] Lord Cooper (1991), n6 above, 84
[77] Hume, *Commentaries on the Law of Scotland: Respecting the Description and Punishment of Crimes* (Edinburgh: Bell & Bradfute, 1797)
[78] Lord Cooper (1991), n6 above, 84
[79] Smith (1961), n6 above, 21
[80] *Stallard* v *HMA* 1989 SLT 469, 473
[81] Farmer, 'The Idea of Principle in Scots Criminal Law' in Chalmers and Leverick, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), 101

Third, legal nationalists also praise Scots criminal law for its flexibility.[82] For legal nationalists, the lack of legislative codification of Scots criminal law resulted in many areas of Scots criminal law being set down in judge-made common law. For Smith, this helped Scots criminal law avoid the "rigidity" found in countries where the criminal law is set down in legislation, such as England, and gave the HCJ the "flexibility ... to review and develop" Scots criminal law.[83] Chapter 3 section 2.3 will question the extent to which it is accurate to describe Scots criminal law as mainly consisting of case law. It will test Smith's claim that English law is more codified and less flexible. However, Smith is correct to suggest that HCJ judges have been able to develop Scots criminal law. The HCJ had the power to declare new crimes.[84] Additionally, judge made crimes were often defined using vague terms and the courts were "adept at holding them to apply in hitherto unprecedented situations."[85] This allowed the courts to quickly adapt existing crimes to cover previously unthought-of wrongs without the need for legislative intervention. Thus, they were able to expand existing Scots criminal law to criminalise the supplying of glue-sniffing kits to children,[87] the clandestine taking of a car[88] and shamelessly indecent behaviour.[89] The flexibility of Scots criminal law allowed the HCJ to modernise areas of law when they became outdated, without waiting for Westminster to pass legislation.[90] However, there are limitations on the ability of courts to expand the law to criminalise new actions. Judicial law making is controversial because it leads to retrospective law making which contravenes the rule of law[91] and judges are unlikely to create new crimes or make large expansions to existing crimes given that Article 7 of the European Convention on Human Rights prohibits retrospective law making.[92] Moreover, there are several cases in which the HCJ was

[82] *Rachel Wright* (1811) 7 Burnett 29 per Lord Hope; Lord Cooper, n6 above, 65
[83] Smith, n6 above, 96
[84] *HMA* v *Greenhuff* (1838) 2 Swin 236
[85] Thomson, 'Scots Law, National Identity and the European Union' (1995) 10 *Scottish Affairs* 25.
[87] *Khaliq* v *HMA* 1984 JC 23
[88] *Strathern* v *Seaforth* 1926 SLT 445
[89] *Watt* v *Annan* 1978 SLT 198 (Shameless indecency was replaced with the crime of public indecency: *Webster* v *Dominick* 2005 1 JC 65)
[90] *Stallard* v *HMA* 1989 SLT 469
[91] For discussion of the declaratory power see: Elliot, *'Nulla Poena Sine Lege'* 1956 Jur Rev 22. Gordon, 'Crimes Without Laws' 1966 Jur Rev 214.; Willock, 'The Declaratory Power: An Untenable Position' (1989) 157 SCOLAG Bulletin 152.
[92] Jones and Taggart, *Criminal Law* (Edinburgh: W Green, 7th ed, 2018), sections 2-20 and 2-27

unwilling to expand or create new crimes because it was wary of encroaching on the role of the legislature.[93]

2.5 Problems with Legal Nationalism

Farmer has criticised legal nationalism for being inward-looking both in its desire to preserve Scots law and to prevent harmonisation with other legal systems.[94] He argues that there is often a romanticisation of Scotland's legal past. Legal nationalists refer to the 18th century as being a golden era for Scots criminal law because it was the era of the Scottish institutional writers.[95] These writers were said to have created an "admirably finished philosophical system well in advance of its times."[96] Legal nationalists like to portray this time as being one where the Scottish legal system was very fair, particularly when compared with English law.[97] This history of Scots law is not completely accurate because Scots criminal law developed significantly in the Victorian era[98] rather than – as claimed – mainly in the 18th Century. Moreover, the Scottish legal system could be very harsh. Crimes such as theft and mobbing and actions considered to be a threat to the political order were capital offences in both Scotland and England.[99]

Too much focus on history is problematic. It can create an unwillingness to reform laws even if they might benefit the legal system. In Quebec until the 1950s,[100] the focus on preserving the past created an almost paralysing fear of reforming the Civil Code to meet modern needs. Any changes made to the code were minor[101] and often avoided controversial issues such as women's rights. This was accompanied by a strong influence of the Catholic Church which also hindered law reform on complex moral issues.[102]

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[93] *HMA* v Dick (1901) 3 Adam 344; *HMA* v Semple 1937 JC 41; *Grant* v *Allan* 1987 JC 71
[94] Farmer, n67 above, 54
[95] Lord Cooper (1991), n6 above, 71
[96] *ibid* 71
[97] *ibid*
[98] Farmer, n67 above, 109
[99] *ibid*, 103
[100] A reduction in the power of the church after the Second World War would have made reform of moral issues easier.
[101] For a list of changes made to the Civil Code of Lower Canada 1866 see Tetley, n7 above, 608
[102] Keating, *Nations Against the State: The New Politics of Nationalism in Quebec, Catalonia and Scotland* (Basingstoke: Palgrave, 2001), 78

Legal nationalism can also create a tendency to assess modern laws based on their standing in tradition. For example, TB Smith wanted to restore civilian law to Scots law in place of parts[103] of the common law, despite the difficulties that would arise from removing centuries of common law which has become part of Scots law.[104] This caused him to sometimes be over-willing to assume that Roman law provided the best solution to a problem without critically examining whether the Roman law solution would benefit Scots law.[105] Thus, legal nationalists can be insular in the sense of being over-willing to focus on the past.

However, they are also outward-looking in their willingness to embrace comparative law. Despite fearing the unthinking importation of law into domestic law, legal nationalists in Scotland, South Africa and Quebec are not always hostile to the borrowing of ideas from other legal systems.[106] Moderate legal purists in South Africa such as De Wet were willing to use non-Roman-Dutch resources including English sources where "logic and principle" required this.[107] Similarly, some legal nationalists in Quebec such as Pigeon accepted the need for law reform.[108]

Scottish legal nationalists argue for "the autonomy of Scots law to *choose* what" laws are borrowed "from other legal systems, rather than having alien legal concepts thrust upon it."[109] For Lord Cooper, the genius of Scots law was its ability to carefully import ideas from both common law and civilian law jurisdictions to create a mixed legal system.[110] Legal nationalists vary in their tolerance for using law from other jurisdictions. TB Smith was the most open to borrowing law. His desire to restore civilian law in Scotland meant that he argued for the importation of civilian law into Scots law.[111] Walker criticised Smith for being

[103] He was willing to retain common laws that he considered beneficial to Scots law.
[104] Smith, *Studies Critical and Comparative* (Edinburgh: Green & Son, 1962), 61
[105] Walker et al, 'Reviews' (1963) 26(4) MLR 452, 466
[106] Lord Cooper, *Selected Papers, 1922-1954* (Edinburgh: Oliver and Boyd, 1957), 144; Smith (1961), n6 above, 2-3
[107] Niekerk, 'J C Noster: A Review and a Tribute to Professor J C De Wet' (1980) 97(2) S African LJ 183, 186
[108] Normand, n43 above, 569
[109] McHarg, 'Scots Law in the Changing Constitution: The Impact of Devolution and Human Rights Legislation' in Mulhern (Ed), *The Law, Scottish Life and Society: A Compendium of Scottish Ethnology* (Edinburgh: John Donald, 2012), 231-248.
[110] Lord Cooper (1991), n6 above, 67-71
[111] Smith, n104 above, 144

over-willing to import civilian law into Scots law, fearing that Smith was uncritical in his choice of laws that he wanted imported into Scots law.[112] Smith sought to develop stronger academic networks between different mixed legal systems by lecturing in these jurisdictions, holding conferences for their lawyers and by helping Scottish universities obtain civilian law books.[113] Despite his interest in Scots law's civilian past, his views were very outward-looking. He was not only ahead of his time in embracing comparative law between mixed legal systems[114] but sought to share this knowledge with other legal systems.

A common idea among Scottish legal nationalists is that the sharing of knowledge about the Scottish mixed legal system could help to create a system of law which could be applied to both civilian and common law legal systems.[115] However, as Farmer has noted, this sharing of ideas was about more than contributing to academic knowledge: it was also an assertion of Scottish identity at a more international level.[116] For Gibb, this role was a post-colonial one where Scotland would move away from influencing the world through the British Empire and instead export its law to other countries.[117] Gibb's glorification of Empire[118] shows another way in which legal nationalism can be backward-looking. As section 2.6 will show, legal nationalism sometimes draws on ideas of Scots being a superior race.

2.6 Legal Nationalism and Scottish Political Nationalism

Before testing some of the claims made by legal nationalists, it is useful to consider how Scottish legal nationalism interacts with Scottish political nationalism. This will give an insight into the political context in which the legal nationalist debate takes place and reveal several important features of Scottish legal nationalism.

Although there is debate about what nationalism means, it is generally considered to be a doctrine used by a group to justify or argue for self-determination within the existing state

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[112] Walker, n105 above, 466
[113] Reid, n28 above, 22-24
[114] *ibid* 19
[115] Copper, n106 above, 145; Walker, n6 above, 337 and Smith (1961), n6 above, 228
[116] Farmer, 'Under the Shadow of Parliament House the Strange Case of Legal Nationalism' in Farmer and Veitch, *The State of Scots Law: The Law and Government After the Devolution Settlement* (Edinburgh: Butterworths, 2001), 159
[117] *ibid*
[118] Cf. Smith (1961), n6 above, 228

or as an independent country.[119] There are several types of nationalism.[120] A distinction can be drawn between ethnic and civic nationalism. Although the terms have often proved difficult to define,[121] ethnic nationalism is based on the idea of nations or aspiring nations being made up of distinct ethnic groups which seek self-government.[122] Ethnicity is something which people are born with. It is difficult to define because ethnic groups may span multiple states. There may be multiple ethnic groups within a state. This means there is debate about how the boundaries of each group should be defined.[123] However, not all ethnic groups are intent on achieving nationhood; some want equal treatment or preferential treatment within an existing state.[124]

Civic nationalism occurs when there are shared institutions, values and "social ties" between a group of people.[125] Nations are defined as "a community of people sharing a particular territory."[126] It is more inclusive than ethnic nationalism because it does not require a person to have been born in the country nor to be from a certain ethnic group. To become part of the nation a person needs to embrace the nation's values and participate in society.[127] The sharing of a nation state and/or institutions and values is considered more important to national identity than ancestry and birthplace. There is some overlap between ethnic and civic nationalism. Scots often believe that birth is a factor (but not the only factor) suggesting that a person is Scottish despite believing that people from other jurisdictions can also become Scottish.[128]

Scottish political nationalism is based on the idea that Scotland should have greater autonomy to govern itself. It is motivated by a range of factors including 1) a belief that

[119] Keating, n102 above, 1
[120] *ibid* 3
[121] Brubaker, 'The Manichean Myth: Rethinking the Distinction Between Civic and Ethnic Nationalism' in Kriesi, Armingeon, Seigrist and Wimmer, *Nation and National Identity: The European Experience in Perspective* (Chur: Ruegger, 1999), 54-71
[122] Hild, 'Renegotiating Scottish Nationalism After the 2014 Independence Referendum' (2016) 18 *Études Écossaises* 151.
[123] Keating, n102 above, 5
[124] *ibid* 4-5
[125] *ibid* 6; Hild, n122 above, 153
[126] Hild, *ibid* 155
[127] *ibid* 153
[128] Kiely, Bechhofer, Stewart and McCrone, 'The Markers and Rules of Scottish National Identity' (2001) 49(1) *Sociological Review* 33, 43

Westminster does not act in Scottish interests;[129] 2) the fact that Scots often do not get the Westminster Governments they voted for[130] and 3) opposition to the Conservative party,[131] which has often been in power since the Second World War[132] and whose policies were often considered to be at odds with Scottish thinking.[133] Scottish nationalism can take the form of arguing for independence for Scotland within or outwith the European Union or for greater of devolution of power within the UK. Independence supporters often support measures which give Scotland greater autonomy within the UK. For those supporting greater devolution but not independence, their nationalism can be accompanied by unionism.[134] In modern times,[135] Scottish nationalism is normally considered to be a civic nationalism, which accepts that people can become Scottish through participation in Scottish society and embraces a diverse range of societal groups.[136] It focuses on shared territory and institutions rather than ethnicity and attaches little importance to culture,[137] meaning it can include a wide range of cultural identities.

Scottish legal nationalism contains both ethnic and civic strands. Legal nationalism is civic in that it takes pride in Scottish legal institutions.[138] It is ethnic because legal nationalists, such as Gibb and Lord Cooper, often refer to alleged racial differences between Scottish and English people to justify protecting the Scottish legal system. For example, Lord Cooper while complaining about an alleged assimilation of English and Scottish law and culture stated that: "The voice of the cockney is heard in the land. ... We shall soon be associated in the mind of the supercilious southerner with nothing more inspiring than the grouse [and]

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[129] Keating, n102 above, 213
[130] *ibid* 209
[131] Some forms of Scottish nationalism are conservative in origin Keating, n102 above, 221
[132] Keating *ibid*, 209
[133] *ibid* 201
[134] An example is the unionist Labour Party's campaign for a Scottish Parliament discussed in Tierney, 'Scotland and the Union State' in McHarg and Mullen, Public Law in Scotland (Edinburgh: Avizandum Publishing, 2006), 33-36 and Levy, 'The Scottish Constitutional Convention, Nationalism and the Union' (1992) *Government and Opposition* 222, 224
[135] Scots nationalism was a more ethnic form of nationalism in the past.
[136] Hild, n122 above, 154; Green, 'Scottish Nationalism Stands Apart From Other Secessionist Movements for Being Civic in Origin, Rather Than Ethnic' (LSE, 2014), at http://blogs.lse.ac.uk/politicsandpolicy/scottish-nationalism-stands-apart-from-other-secessionist-movements-for-being-civic-in-origin-rather-than-ethnic/ (last visited 29/12/2018); Keating, n102 above, 264
[137] Hild, n122 above, 155
[138] Section 2.1 above

the haggis."[139] Similarly, Gibb sought to stereotype the English as being less hardworking and less tolerant than Scots.[140] These racist views do not represent all legal nationalists. Smith stated that the "best interests of Scotland … are not best served by Anglophobia."[141]

Legal nationalism is distinct from political nationalism.[142] Many legal nationalists such as Lord Cooper were political unionists. Although they were willing to argue that the Scottish legal system should have autonomy within the UK, they opposed Scottish independence. Before devolution, the civil service through the Scottish Office played an important role in setting policy in Scotland, representing Scottish interests by lobbying the UK Government and in the administration of Scotland. Lawyers, especially the Lord Advocate, played an important role in running the Scottish Office and acted as mediators between the Scottish Office and MPs.[143] Thus, legal nationalists felt they had an interest in maintaining the status quo to allow them to continue in this influential role.[144] However, legal nationalists such as Smith and Gibb were supportive of creating a Scottish Parliament, although Smith was wary about the danger of the Scottish Parliament altering distinctive elements of Scots law.[145]

Nonetheless, legal nationalism can be connected with political nationalism. As Chapter 1 section 3 showed, the Scottish National Party (SNP) used arguments about the need to protect Scots law to further its political aims of removing appeals to the JCPC/SC. Gibb, who was the leader of the SNP between 1936 and 1940, was also a political nationalist. However, as Farmer has shown, his desire for Scottish political independence was based on a desire to create a Scottish Parliament where lawyers would influence societal change and play an important role in leading Scotland.[146] He hoped this increased role for lawyers in society would reduce "legal unemployment" and allow the legal profession to regain its

[139] Lord Cooper, 'Some Classics of Legal Literature' in Lord Cooper (Ed), *Selected Papers 1922-1954* (Edinburgh: Oliver and Boyd, 1957) 39.
[140] Gibb, *The Scottish Empire* (London: MacLehose, 1937), 308-309
[141] Smith (1984), n6 above, 241
[142] Kidd, *Union and Unionisms* (Cambridge: Cambridge University Press, 2008), 201
[143] Farmer, n116 above, 153
[144] *ibid*
[145] Smith, n21 above, 51; Farmer, n116 above, 161-162 (discussing Gibb's views)
[146] Farmer, n116 above, 161

past importance to society.[147] His interest was not in liberating the Scottish people nor creating democratic institutions for them.[148]

This reveals several aspects of legal nationalism. First, this again shows the backwards-looking nature of legal nationalism. Even Gibb who supported the radical constitutional change of Scottish independence did so to restore a vision of the past. Second, despite it embracing ideas about the spirit of the Scottish people, it can be elitist. Gibb was more interested in protecting the legal profession than acting in the interests of the Scottish people.

The link between political and legal nationalism is stronger in South Africa and Quebec. Although not all legal purists in South Africa were political nationalists,[149] there was a strong link between this type of legal nationalism and white Afrikaner ethnic political nationalism. Anger at the British role in the Boer Wars led to white Afrikaner nationalists invoking ideas of racial purity to justify segregation. They argued that white South Africans were a distinctive race and sought to purify South Africa from English influence. The Nationalist Party appointed LS Steyn to the role of Chief Justiceship because of his belief in legal purism.[150]

For legal nationalists in Quebec, the legal system along with the French language and the Catholic religion are considered pillars of Quebecois identity because they each assert a connection to France.[151] It was feared that any loss of distinctiveness of the Quebecois legal system would make it easier to erode other societal differences between Quebec and Canada. Like Quebecois political nationalism at the time,[152] its legal nationalism is an ethnic form of legal nationalism where the pillars of Quebecois identity are praised for showing Quebec's ethnic connection to France.

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[147] Gibb, *The Shadow on Parliament House: Has Scots Law A Future?* (Edinburgh: Porpoise Press, 1932), 30
[148] Farmer, n116 above, 161-162
[149] Niekerk, n107 above, 187
[150] Cameron, n61 above, 40
[151] Rivard (1928) quoted in Normand, n43 above, 571-572
[152] Keating, n102 above, 110, Quebec's political nationalism has become increasingly civic in nature.

3 Law and Scottish National Identity

This section tests claims that law can play an important part in national identity while the next section will consider Lord Cooper's claim that law reflects the spirit of the Scottish people.[153] Although such arguments are made by legal nationalists in Scotland, Quebec and South Africa, the focus of this section will be on Scottish national identity.

3.1 What is Scottish National Identity?

Studies have frequently shown that most Scots feel some form of Scottish national identity. A 2018 study found that 61% of people identified themselves as being "very strongly" Scottish while another 23% considered their Scottish identity to be "fairly" strong.[154] Some people feel that Scottishness is their only identity. Others feel identities in addition to being Scottish especially Britishness.[155] Scottish identity is wide enough to include people from many ethnic groups and this means it can be embraced by people who have identities in addition to being Scottish.[156] Some may feel more Scottish than their other identity. Some might consider their identities to be of equal importance, while for others their Scottishness will be the weaker of their identities.

There is a difference between how people construct their identity, how others perceive that person's identity and how others are likely to react to the person's claim to have a

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[153] Section 2.1 above

[154] Anonymous, 'How Strongly, if at All, Do You Identify Yourself as Being Scottish?' (What Scotland Thinks, 2018), at http://whatscotlandthinks.org/questions/how-strongly-if-at-all-do-you-identify-yourself-as-being-scottish (last visited 13/09/2018); Bechhofer and McCrone, 'Choosing National Identity' (2010) 15(3) *Sociological Research Online* 3, para 2.2; Bechhofer and McCrone, *National Identity, Nationalism and Constitutional Change* (Basingstoke: Palgrave Macmillan, 2009), 72; McCrone, 'Briefing Paper: National Identity In Scotland' (Institute of Governance, 2002), at http://www.institute-of-governance.org/publications/working_papers/briefing_paper_national_identity_in_scotland (last visited 12 July 2014); Simpson and Smith, 'Who Feels Scottish? National Identities and Ethnicity in Scotland' (Centre on Dynamics of Ethnicity, 2014), 2 at http://www.ethnicity.ac.uk/medialibrary/briefings/dynamicsofdiversity/code-census-briefing-national-identity-scotland.pdf (last visited 16/11/2014); What Scotland Thinks, ''Moreno' National Identity' (What Scotland Thinks, 2014), at http://whatscotlandthinks.org/questions/moreno-national-identity-5#table (last visited 11/12/2018); YouGov, ''Moreno' National Identity (YouGov)' (What Scotland Thinks, 2016), at http://whatscotlandthinks.org/questions/moreno-national-identity-yougov#bar (last visited 11/12/2018).

[155] What Scotland Thinks, n154 above; YouGov n154 above; Bechhofer and McCrone (2010), n154 above, para 1.9

[156] Kiely and Bechhofer, n128 above, 34

certain identity.[157] People attribute Scottish identity to themselves based on markers of identity such as birthplace, ancestry, where they grew up, their place of residence and the degree to which they embrace Scottish society.[158] Scottish culture also contributes to the feeling of being Scottish. Thus, a 2006 survey found that "nine out of ten" people considered that "cultural matters were very or quite important for being Scottish."[159] The survey found that Scots take pride in "the Scottish landscape" and "music and the arts."[160] Different people will be able to rely on different markers of identity to describe their identity. The more of these markers of identity that a person can claim, the more likely they are to feel Scottish.[161] Claims to Scottish identity are also limited by how people perceive that others will interpret their national identity. When people assess other people's identity, they prioritise birth, ancestry and place and length of residence.[162] However, they are reliant on what they know about the person and they often consider more obvious markers such as accent and dress.[163] This provides scope for people who were not born in Scotland and have no Scottish ancestry to become adopted Scots by having grown up in Scotland and/or by being resident there and embracing aspects of Scottish society. Thus, like Scottish nationalism, Scottish identity is civic rather than ethnic.

3.2 National Identity and Scots Law

There is little research on the relationship between Scots law and national identity. A 2010 study found that 94% of the respondents felt able to "identify with" Scotland's "education, law" and "community spirit."[164] The inclusion of other Scottish institutions in the question asked in the survey makes it difficult to assess precisely how much importance Scots attach to having a separate legal system. Nonetheless, the fact that Scots feel a strong sense of pride in Scottish institutions suggests that they feel pride in the Scottish legal system.

Lord Rodger questioned whether Scots law's contribution to national identity can be a strong one when most people have little knowledge about Scots law.[165] Recent research

[157] *ibid* 35-37
[158] *ibid* 41-47
[159] Bechhofer and McCrone (2009), n154 above, 76
[160] *ibid*
[161] Kiely, Bechhofer, n128 above, 41
[162] *ibid* 47-49
[163] *ibid* 47-49
[164] Bechhofer (2010), n154 above, para 4.3
[165] Lord Rodger, 'Thinking About Scots Law' (1996) 1(1) Edin LR 3, 8

found that 61% of adults did "not know very much about the criminal justice system" and "16% said they knew nothing at all."[166] This suggests that Scots criminal law plays a very small role in their consciousness and would seem to prevent it from playing an important role in defining their identity. However, there is a distinction between taking pride in individual laws and taking pride in the Scottish legal system as an institution. A person can know that an institution is distinctive without knowing why it is different.[167] The ability of Scottish institutions to take a distinctive approach when compared with the rest of the UK may help distinguish them from UK institutions. Institutions such as the Scottish legal system derive from before the Union[168] and this probably helps reinforce their Scottish nature. Thus, there are multiple ways for people to identify with the Scottish legal system as a Scottish institution without having detailed knowledge about individual laws.

3.3 Would the Loss of Scots Law Lead to the Loss of Scots National Identity?

Legal nationalists argue that Scots national identity would be lost if the distinctiveness of Scots law were diminished. Lord Cooper warned that if Scots do not "preserve their law … this would involve the swift annihilation of what is left of Scotland's independent life and culture."[169] Lord Cooper was writing before devolution when Scotland did not have its own parliament. At this time, having separate Scottish institutions from the UK such as the Scottish legal system, the Church and the Scottish education system helped differentiate Scotland from the rest of the UK.[170] Even before devolution, it was debatable whether the loss of distinctiveness of Scots law would have contributed to a loss of Scots national identity. Perceived threats to Scottish identity have often been met with strong resistance. From the 1970s to devolution in 1999 there was an increase in the number of people feeling Scottish national identity and Scottish nationalism partly fuelled by feelings that Scotland was not being given enough autonomy.[171]

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[166] National Statistics, 'Scottish Crime and Justice Survey 2016/17: Main Findings' (Scottish Government, 2018), 8 at https://www2.gov.scot/Resource/0053/00533870.pdf (last visited 10/01/2019).
[167] Smith (1975), n6 above, 933
[168] Keating, n102 above, 234
[169] Lord Cooper (1991), n6 above, 88
[170] Keating, n102 above, 203
[171] For other factors contributing to the rise of Scottish nationalism see Keating, n102 above, 207-225

Since devolution and particularly since the independence referendum in 2014, there has been a slight increase in people considering that they are "equally Scottish and British" or "wholly or mainly British."[172] Nonetheless, large numbers of people feel Scottish and Scotland now has its own devolved Parliament and devolved politics which should help emphasise differences between Scotland and the rest of the UK. Given that one of the purposes of having a devolved legislator is to allow Scotland to take a distinctive legal approach and the Scottish Parliament has often done this,[173] it seems unlikely that Scots law would lose its distinctiveness. Even if Scots law were to cease to be distinctive, Scots national identity now derives from a range of factors which would likely continue to exist.[174] Thus, although Scottish institutions such as the Scottish legal system still contribute to Scottish national identity,[175] they are perhaps less important to the maintenance of Scottish national identity than they were in the past.

4 Does Scots Law Reflect the Spirit of the Scottish People?

Having considered the interaction between Scots law and national identity, this section tests Lord Cooper's argument that Scots law reflects the spirit of the Scottish people. It is difficult to evaluate this claim because he does not indicate what that spirit of the Scottish people is nor how it became connected with Scots law. Unlike Savigny, who led the controversial[176] German Historical School and argued that law develops over time in accordance with the experiences of the people and that the law reflects the community's consciousness and moral judgment, Lord Cooper does not explain whether the Scottish spirit of people evolved through a shared history, culture and/or through shared values. He notes that "Scotland may justly take pride" in Scots criminal law before noting that the law

[172] What Scotland Thinks, n154 above; Park, Bryson, Clery, Curtice and Phillips, 'British Social Attitudes: The 30th Report' (NatCen Social Research, 2013), 144 at http://www.bsa.natcen.ac.uk/media/38458/bsa30_devolution_final.pdf (last visited 11/12/2018); Wright, 'How Shifts in Scottish Public Opinion Helped the Conservatives Reverse their Long-Term Decline' (LSE, 2017), at http://blogs.lse.ac.uk/politicsandpolicy/scottish-public-opinion-conservatives-ge2017/ (last visited 11/12/2018).

[173] Chapter 3 sections 2.6.4 and section 4.2.5

[174] Section 3.1 above

[175] Section 3.2 above

[176] For criticism of this argument see: Elliot, 'The Volksgeist and A Piece of Sulphur' (1963) 42(6) Tex L Rev 817; Gray, *Nature and Sources of the Law* (New York: Columbia University Press, 1909), Chapter 4; Rodes, 'On the Historical School of Jurisprudence' (2004) 49 Am J Juris 165; Willock, 'The Scottish Legal Heritage Revisited' in Grant, *Independence and Devolution* (Edinburgh: W Green, 1976), 4-5

is “indigenous” to Scotland and that it is mostly “the product of native custom … developed by judicial decision.”[177] This suggests that Scots law developed through the custom of the Scottish people and that this reflects their spirit.

This argument is problematic. First, during the development of Scots criminal law, there is little evidence of the public being involved, as Lord Cooper seems to acknowledge when he notes the role played by institutional writers and judges in making the law.[178] Judges are supposedto be independent from external influence[180] and remain politically neutral not seek to represent the ideas of the Scottish people.[181] Beyond hearing the representations of parties to the case, who may not reflect views accepted by a majority in society, judges have little way to find out public opinion on issues. Unlike elected politicians, Scottish judges cannot gain knowledge about the views of the public by meeting people during political campaigning and through meeting with constituents. Additionally, the composition of the HCJ does not reflect society in the sense of having a composition which is broadly similar to society.[182] There is a significant gender and racial inequality in the composition of the judiciary. Judges in Scottish courts tend to be white upper-class males. In 2017, only 25% of the Scottish judiciary were female and the gender composition of the judiciary would have been exclusively male at the time when Lord Cooper was writing.[183]

Additionally, the public does not feel that judges understand the spirit of the ordinary person. A 2001 study found that 70% of those surveyed believed that “most judges are out of touch with ordinary people’s lives.”[184] Since judges are considered to be out of touch with society, it seems unlikely that they will be able to identify the spirit of the Scottish people.

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[177] Lord Cooper (1991), n6 above, 84
[178] *ibid*
[180] It has been questioned whether judges are politically neutral. (Griffith, *The Politics of The Judiciary* (London: Fontana, 5th ed, 1997), Chapter 8)
[181] Chapter 5 section 2.1.2 below
[182] Chapter 5 section 2.1.3.2 below
[183]Anonymous, '2017 Judicial Diversity Statistics - Gender and Age' (Judiciary of Scotland, 2017), at http://www.scotland-judiciary.org.uk/Upload/Documents/DiversityStatsScotlandSept2017.pdf (last visited 29/12/2018).
[184] Genn and Paterson, *Paths to Justice Scotland What People do and Think about Going to Law* (Oxford: Hart Publishing, 2001), 233

However, there are cases where the HCJ has modified the law in a way that may reflect changing values in society. For example, in *Lord Advocate's Reference (No.1 of 2001)*,[185] the court reformed the law of rape to recognise that rape could be committed without the use of force. In *Stallard* v *HMA*,[186] it abolished the marital rape exemption. It seems that these decisions reflected a change in societal attitudes towards rape.

Another way that law might represent the spirit of the people is through legislation passed by elected politicians in the UK and Scottish Parliaments. In terms of democratic theory,[187] politicians should implement the will of the electorate, although in practice politicians sometimes ignore the electorate's wishes. One of the reasons for creating a Scottish Parliament was that it was alleged that a "democratic deficit" arose because the party in power at Westminster often differs from the party with the most Scottish MPs elected by the Scottish people.[188] Additionally, there were concerns that the need for Westminster to consider the interests of the whole of the UK means that it does not always act in Scottish interests.[189] Thus, it is debatable whether Westminster legislation always represents the spirit and wishes of the Scottish people. Moreover, while the Scottish Parliament is elected by and hence likely to be more representative of the Scottish people, like Westminster it is not under an obligation to legislate in accordance with the wishes of the electorate, although there may be political consequences from not doing this.

A second problem with Lord Cooper's argument arises because by arguing that the law reflects the native custom of the people, he underplays the role that borrowing of law plays in the development of law.[190] Both judges and institutional writers while contributing new ideas to Scots law often borrowed from other legal systems especially English law. [192] Third, Farmer has shown that Scots criminal law was often developed to further the maintenance of public order and the regulation of social interest instead of from a desire to reflect the

[185] 2002 SLT 466
[186] *Stallard* v *HMA* 1989 SLT 469
[187] Mill, *Considerations on Representative Government* (Sl: Dodo Press, 2007)
[188] Scottish Constitutional Convention, 'Scotland's Parliament: Scotland's Right' (Convention of Scottish Local Authorities, 1995), 9
[189] *ibid*
[190] Watson, *Legal Transplants* (Edinburgh: Scottish Academic Press, 1974), XI
[192] Hume, n78 above, 4

values of the Scottish people[193] - a feature which continues today as Chapter 3 section 2 will show.

5 Conclusions on Scots Law and National Identity

Therefore, while there is some evidence of Scots law being part of national identity, the connection between Scots law and national identity only occurs in the limited sense of Scots law representing a Scottish institution in which Scots can feel pride because of its Scottish nature. Claims that Scots law represents Scottish identity in the broader sense of being the spirit of the Scottish people are problematic. Thus, arguments for autonomy based on Scots law being part of national identity should not be overstated.

Attempts to strongly link law and national identity have a burdensome effect on Scots law where it is portrayed as being the main pillar of Scottish national identity. Any change to Scots law can be portrayed as an attack on Scottish national identity and a step towards Scots national identity being lost. For example, John Finnie MSP when talking about the SC's tendency to alter Scots law argued that:

> "A matter of Scots identity is at stake. The UK Supreme Court interferes in Scots criminal law and that impacts on the distinctive nature of Scots law."[194]

The problems of making such arguments are illustrated by the experience of Quebec where, as section 2.5 showed, the desire to maintain the strong ethnic connection to France created a fear of reforming the law. It also led to lawyers failing to think critically about the law.[195] Thus, arguments linking law and national identity should be used cautiously.

6 Accommodation of Difference

Tierney distinguished between three ways that a state can accommodate the needs of the sub-state within the state. They are autonomy, representation and recognition.[196] Arguments for autonomy within the state are made by sub-states to argue for

[193] Farmer, n67 above, 103
[194] Scottish Parliament Official Report 27 October 2011 col 2885
[195] Normand, n43 above, 585
[196] Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004), Chapter 6

decentralisation of power from the state to the sub-state to recognise "societal diversity."[197] These ideas often conflict with the state's ideas about whether there should be decentralisation. Even if the state does support decentralisation, it may be unwilling to devolve as much power as the sub-state wants and want devolution of power to increase efficiency rather than to recognise diversity.[198]

Representation deals with claims that the composition of state-wide institutions should reflect pluralism within the state. The aim of the sub-state is to be represented[199] in state-wide decision-making and to restrict the power of the state "to set the constitutional and political agenda for the state as a whole" without involving the sub-state.[200] Autonomy and representation are to an extent in tension. The more autonomy the sub-state has to run its own affairs, the harder it becomes to argue that the sub-state needs more representation at state level.[201]

Finally, the sub-state often wants constitutional recognition of difference and recognition that there are societal differences between the state and sub-state.[202] This recognition can either be symbolic or involve practical steps being taken to recognise the plural nationality of the state. Giving autonomy and providing representation can show the state's willingness to recognise pluralism.[203]

Tierney's focus is mostly[204] on political accommodation of sub-states not on the accommodation of differences between legal systems. The two are partially linked. If it is recognised by the state that there are political, economic and/or social differences between the sub-state and the state, it becomes easier for the state to accept that there may be a need for the sub-state to have different laws on some matters. This section will show that there are strong reasons to accommodate differences between legal systems by giving the legal system autonomy, representation and recognition.

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[197] *ibid* 189
[198] *ibid* 189-190
[199] For different ways that people can represent society see Chapter 5 section 2.1.3.2 below.
[200] Tierney, n196 above, 208
[201] *ibid*
[202] *ibid* 234
[203] *ibid*
[204] Cf. Tierney, *ibid*, Chapter 7

6.1 Recognition of Differences Between Legal Systems

Legal nationalists in each jurisdiction often argue that the distinctiveness of their legal system should be recognised. [205] Gibb has shown that in the early years of the HOL deciding Scottish civil cases, problems arose from a lack of recognition of differences between Scots and English law[206] partly because the HOL initially did not sit with judges trained in Scots law.[207] Over time, the introduction of judges trained in Scots law to the HOL meant that the HOL became more willing to recognise differences between Scots and English law.[208]

There are differences between the HOL's jurisdiction and the JCPC/SC's criminal devolution and compatibility issue jurisdiction. The HOL provided a general appeal court for Scottish civil cases dealing with any aspect of civil law. The JCPC/SC's jurisdiction is narrower because it focuses on devolved competence, Convention rights and EU law. It does not hear appeals on substantive issues of criminal law, evidence and procedure which do not fall into one of these categories. Nonetheless, like the JCPC/SC deciding Scottish criminal cases, the HOL was a UK-wide court[209] which normally sat with a minority of judges trained in Scots law when deciding Scottish cases. These similarities mean that the problems faced by the HOL as a UK-wide court deciding Scottish cases could occur for the JCPC/SC deciding Scottish criminal cases.

Several problems arose with the HOL's jurisdiction over civil cases. First, there was an over-willingness by the HOL to assume that Scots and English law were the same. Thus, in *Bartonshill Coal Co* v *Reid*, Lord Cranworth rhetorically asked: "if such be the law of England on what ground can it be argued not to be the law of Scotland?"[210] Similar comments were made in *Arbuthnott* v *Scott*,[211] where the HOL assumed that the Scottish and English laws on nuisance were the same despite there being large differences between this area of law in England and Scotland.[212] Second, there was a tendency to dismiss the Scottish approach as being of little value and to be very critical of Scots law. When judges wanted to

[205] Sections 2.1-2.3 above
[206] Gibb (1950), n6 above, Chapters 2-3
[207] Section 6.3 below
[208] Gibb (1950), n6 above, 116 and *R* v *Manchester Stipendiary Magistrate, ex parte Granada Television Ltd* [2001] 1 AC 300, 304
[209] The HOL did not have jurisdiction over Scottish criminal cases.
[210] *Bartonshill Coal Co* v *Reid* (1858) 3 MacQ 266, 285
[211] (1802) 4 Pat 337, 343
[212] Gibb (1950), n6 above, 59

harmonise Scots and English law, they normally decided that the English approach should be applied to both jurisdictions.[213] Considering law from other jurisdictions can show how well a legal rule has worked in a legal system and allow consideration of whether another legal system might benefit from the rule.[214] The HOL's approach hindered the ability to share useful ideas between Scots and English law since it was assumed that there was little that English law could learn from the Scottish approach.

A similar lack of recognition of the distinctive nature of Quebec's legal system was shown by the JCPC and the Supreme Court of Canada's early treatment of civil cases from Quebec. These courts often[215] argued that laws should be applied in the same way throughout Canada because the legislature would not want different rules applied to, and inconsistency between, different parts of Canada.[216] This showed a lack of recognition of civil law as having value when deciding cases from Quebec because the common law solution was almost always favoured over the civil law solution.[217] Thus, it hindered the sharing of ideas between Quebec's civil law and the common law because it was assumed that little could be gained from applying civil law. Over time, the Canadian Supreme Court gave greater recognition to the distinctive nature of Quebec's laws.[218] This change arose because of a sustained campaign by legal nationalist judges in the Supreme Court of Canada, such as Pigeon J. and Mignault J., who argued that the court should recognise the distinctive nature of Quebecois law.[219] Additionally, the abolition of appeals to the JCPC in 1949, enabled the Supreme Court of Canada to overturn JCPC precedents (discussed in section 6.2) which suggested that the Quebec Civil Code should be interpreted in light of English law.[220] Finally, the introduction of a requirement that three Quebecois judges should sit on the Supreme

[213] *ibid* 56-57
[214] Watson, n190 above, 17
[215] Cf. *Canadian Pacific Railway* v *Robinson* [1892] AC 481 (PC)
[216] *Canadian Pacific Railway* v *Robinson* [1887] 14 SCR 105; *Quebec Railway, Light, Heat and Power Co*. v *Vandry* [1931] SCR 113
[217] Allard, n42 above, 3
[218] *Pantel* v *Air Canada* [1975] 1 SCR 472, 478 per Pigeon J.; *Desrosiers* v *The King* [1920] 60 SCR 105, 26 per Mignault J.
[219] *Desrosiers* v *The King* [1920] 60 SCR 105, 126 per Mignault J. and *Pantel* v *Air Canada* [1975] 1 SCR 472, 478 per Pigeon J.
[220] Allard, n42 above, 7-11

Court of Canada meant that Quebecois cases are now normally decided by a majority of judges trained in Quebecois law.[221]

Again, in South Africa, there was often a lack of recognition of the importance of Roman-Dutch law to South Africa's legal system. Although Roman-Dutch law continued to be applied after British colonisation, English law was often applied without considering the position taken by Roman-Dutch law.[222] Thus, in *Letterstedt* v *Morgan,* Chief Justice Wylde stated:

> "Quote what Dutch or Roman books as you please … My Queen has sent me here to administer justice under the Royal Charter. I absolve myself from [the duty to apply Roman-Dutch law]."[223]

Since South African judges were required to train in England, they often lacked knowledge of and interest in Roman-Dutch law and the language skills to apply it. Roman-Dutch law was also difficult to learn because many of the essential texts were centuries old and were difficult to access.[224] As English law became more influential on South African law, it was deemed by some to have replaced elements of Roman-Dutch law, meaning there was no need to continue citing Roman-Dutch sources.[225] Nonetheless, to assume Roman-Dutch law was of little relevance to South African law, as Justice Wylde and some South African judges did, ignored the fact that Roman-Dutch law was the main basis of South African law.[226]

A court's failure to recognise differences between legal systems risks its decisions being perceived to lack legitimacy[227] and not being enforced. In Quebec, the Supreme Court of Canada's initial unwillingness to recognise the distinctive nature of Quebec's legal system led to the Quebec Court of Appeal frequently refusing to apply Supreme Court judgments in civil cases.[228] In South Africa, purists such as Steyn J sought to remove the authority of English law as a legal source in South Africa. When a lower court decided a case using

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[221] Section 6.2 below
[222] Fagan, n58 above, 56-57; *Trust Bank van Afrika Bpk* v *Eksteen* 1964 3 SA 402, 410
[223] *Letterstedt* v *Morgan* (1849) 5 Searle 373, 381
[224] Bodenstein, 'English Influences on the Common Law of South Africa' (1915) 32(4) S African LJ 337, 345-347
[225] *Trust Bank van Afrika Bpk*, n222 above, 410
[226] Cameron, n61 above, 48
[227] For different types of legitimacy see Chapter 5 section 2 above
[228] L'Heureux-Dube, n39 above, 461

English law, he would use his position as an appeal judge to decide the case using Roman-Dutch law while not mentioning the English law on the issue. When he was compelled to mention English law, he was very critical of it.[229] Although there is little evidence of this approach reducing the citation of English law, it again shows a danger of legal nationalists using the failure of some courts to recognise differences between legal systems to question the legitimacy of the court's decision-making.

6.2 Representation

As Chapter 5 section 2.1.3.2 will show, there are several different types of representation which can apply to the composition of courts. However, the main issue raised by critics of the JCPC/SC's jurisdiction is that the JCPC/SC normally sits with a minority of judges trained in Scots law (Scottish judges[230]). This allegedly risks the court not having enough expertise[231] in Scots law.[232]

As Chapter 5 section 2.3.2.2 will argue, the difficulty of a judge learning law from another legal system depends on the degree of difference between the legal systems and on how important the distinctive area of law is to the legal issue in question. Unlike the judges hearing South African and Quebecois cases, JCPC/SC judges hearing Scottish criminal cases do not need to contend with differences between the civilian and common law legal systems. Moreover, unlike the JCPC when it decided Quebecois cases when the JCPC/SC hears Scottish criminal cases there is a convention that there will be two judges trained in Scots law hearing the case.[233]

Nonetheless, the potential for problems to arise when Scottish cases are sent to a UK-wide court, sitting with a minority of Scottish judges, is shown by Gibb's study of civil cases being sent to the HOL.[234] First, especially in the early years of the HOL, when it rarely sat with Scottish judges, judges not trained in Scots law (non-Scottish judges) felt uncomfortable about deciding Scottish cases.[235] Thus, Lord Erskine, who was trained in English law, felt he

[229] Cameron, n61 above, 49
[230] This term is used to reflect the legal training of the judges not their birthplace.
[231] The meaning of the term is considered in Chapter 5 section 2.1.3.1 below.
[232] Gibb (1937), n3 above, 67; Walker, n3 above, 333; Smith (1954), n3 above, 528
[233] Lady Hale, 'Devolution and The Supreme Court – 20 Years On' (Scottish Public Law Group, 2018), 1 at https://www.supremecourt.uk/docs/speech-180614.pdf (last visited 29/12/2018).
[234] Gibb (1950), n6 above
[235] *ibid*, 42-49

knew as little about Scots law as he did about the law of Mexico.[236] This lack of knowledge led non-Scottish judges to avoid the difficulty of applying Scots law by applying English law which was easier for them to understand.[237] Judges would often consider how they would decide the case under English law before translating their decision into Scots law.[238] This created the tendency to harmonise Scots and English law[239] and to wrongly assume that Scots and English law were the same.[240] Second, it created the danger of judges making mistakes about the law. Thus, in *Tharsis Sulphur Co.* v *McElroy*,[241] Lord Blackman wrongly stated that "you are never liable to pay for goods unless you have expressly or impliedly agreed to pay for them."[242] This was an inaccurate description of Scots law because when a person is unjustly enriched by the goods they may be liable to compensate the owner of the goods.[243] In *Dunlop* v *Lambert*, the HOL held that the sender of goods could sue if the goods were lost in transit. They had title to sue without proving that they owned the goods because they had a contract with the ship-owner. This was an inaccurate statement of Scots law which had previously required that the owner of the goods should sue if the goods were lost in transit.[244] In *MacDonnell* v *Cameron's Representatives,*[245] the HOL through a misunderstanding of Scottish civil procedure made an order to the Court of Session which could not be enforced because it absolved the defender of liability but ordered the sheriff to enforce his order that the defender was liable to pay damages. There was a tendency for the HOL to make orders using English law terms which had no legal meaning under Scots law.[246]

Over time, the Law Lords became more aware of the need to recognise differences between Scots and English law.[247] This meant the problems identified above occurred less

[236] *ibid*, 49
[237] *Ibid,* 58
[238] *Sharpe* v *Sharpe* (1835) 2 S & M 594
[239] Section 6.3.2 below
[240] Section 6.3.2 below; *Irving* v *Houstoun* (1803) 4 Paton 521, 530-531; *Bartonshill Coal Co* v *Reid* (1858) 2 MacQ 266, 285
[241] (1878) 5 R (HL) 171
[242] *ibid*
[243] Gibb (1950), n6 above, 68
[244] *ibid* 86
[245] *MacDonnell* v *Cameron's Representatives* (1827) 6 S 85
[246] *ibid* 88
[247] Walker, n6 above, 334

frequently, although they continued to occur.[248] Another problem arose because the non-Scottish judges in the HOL became too willing to defer initially to the decisions of the Court of Session[249] and when Scottish judges were used in the HOL, to defer to the opinions of the Scottish judges.[250] A similar problem occurred in Quebec where JCPC judges were sometimes very deferential to the decisions of Quebecois courts with greater experience of deciding cases from Quebec.[251] Judges following the decisions of other judges is not in itself problematic. Clearly, a top court like the HOL or JCPC is entitled to agree with the lower court and its judges are entitled to agree with the judgments given by other judges. However, when it is considered alongside the wariness of the HOL judges about deciding issues of Scots law and the mistakes they made, it suggests that judges felt they lacked expertise to decide Scottish cases. The purpose of an appeal is to re-examine a legal issue. If the judge simply defers to the greater knowledge of another court or judge, then there is a risk that the legal issues will not be properly re-examined.

Similarly, concerns were raised that South African judges lacked sufficient expertise in Roman-Dutch law to decide these cases.[252] Judges often avoided the difficulties of applying Roman-Dutch law by applying English law which was easier to access and understand.[253] It created an over-willingness to assume that Roman-Dutch law and English law were the same and led to mistakes being made about the law. Thus, in *Holland* v *Scott*[254] and several cases following it, the English law of nuisance was applied because it was believed that it was consistent with Roman-Dutch law. This was a matter of debate and deserved more careful consideration.[255] In *Natal Land and Colonization Co., Ltd.* v *Pauline Colliery and Development Syndicate, Ltd*,[256] the JCPC sitting with no judges trained in Roman-Dutch law, held that a company could enter into a contract before the company was incorporated and could benefit from the contract after its incorporation. No South African case law was cited

[248] Gibb (1950), n6 above, Chapter 4
[249] *Fogo* v *Mathie* (1841) 2 Rob 440, 443; *McTavish* v *Scott* (1830) 4 W & S 410, 417; *Stewart* v *Porterfield* (1831) 5 W & S 515, 551
[250] Chalmers, 'Scottish Appeals and the Proposed Supreme Court' (2004) 8(1) Edin LR 4, 8-9
[251] *ibid*
[252] C J G, n55, 282 (The author refutes this claim.)
[253] Bodenstein, n253 above, 345
[254] (1882) 2 EDC 307
[255] Price, 'Nuisance: the Carnarvon Municipality Case' (1949) 66(4) S African LJ 377, 382 cf. *Allaclas Investments (Pty) Ltd* v *Milnerton Golf Club* 2007 2 SA 40, at [8]
[256] [1904] AC 120

in support of this judgment. The position under existing South African law was that a company could not enter into contracts before it is incorporated.[257] Having judges trained in South African law would have made it easier for the court to realise that they were changing the law.

Quebecois legal nationalists were also concerned that civil cases were being decided by judges with no training in civilian law. They mostly argued for the abolition of the JCPC's jurisdiction over Canadian cases largely because they believed that its judges lacked sufficient civil law expertise to decide cases from Quebec.[258] There were some factors which helped the JCPC judges to understand Quebec's civil law, including the ability of counsel to explain aspects of Quebec's laws during oral argument, the ability of judges to ask questions during this time and the fact that JCPC judges could be recruited from mixed jurisdictions such as Scotland, South Africa and from Quebec as part of Canada.

Nonetheless, there is evidence of the JCPC misunderstanding Quebec's laws. The JCPC was criticised for taking a literal interpretation of the Civil Code by considering its ordinary meaning. The JCPC noted in *Quebec Railway, Light, Heat and Power Co* v *Vandry* that "the first step [in interpreting the law] is to take the Code itself and to examine its words, and to ask whether their meaning is plain."[259] This is a common law method of statutory interpretation where common law judges start their interpretation of legislation by looking for the plain meaning of the text.[260] Civilian lawyers often take a more teleological approach to the interpretation of legislation where they consider the purpose of the legislation and its social and economic effects.[261] This reflects the fact that the code sets down general principles which can be applied to the rest of civilian law rather than specific rules to be applied. As Friesen notes, the JCPC may have taken the common law approach to avoid the more complicated teleological method of interpretation applied by civil law[262] and this suggests a lack of understanding about how civil cases are decided and/or an unwillingness to engage with civilian methods of interpretation. However, it meant that the code was interpreted more narrowly than it might have been by a civilian court and that

[257] Welsh, 'The Privy Council Appeals Act, 1950' (1950) 67(3) S African LJ 227, 228
[258] Normand, n43 above, 581
[259] *Quebec Railway, Light, Heat and Power Co*. v *Vandry* [1920] App Cas 662, 672
[260] *Duport Steels Ltd and others* v *Sirs and others* [1980] 1 All ER 529; *Fisher* v *Bell* [1960] 3 All ER 731
[261] Friesen, 'When Common Law Courts Interpret Civil Codes' (1996) 15(1) Wis Int'l LJ 1, 10
[262] *ibid* 19

JCPC judges did not need to consider how the code interacted with other parts of the code and civilian law.[263]

Thus, in each jurisdiction there is evidence that having judges not trained in the legal system the case is from can result in judges lacking the expertise needed to decide cases from that jurisdiction. However, this is not to suggest that judges cannot learn laws from a legal system in which they were not trained. The Supreme Court of Canada in modern times manages to apply civilian law in a way that is mostly acceptable to Quebec's judges and academics, despite judges trained in the common law being used alongside Quebecois judges.[264]

The HOL, JCPC and the Supreme Court of Canada are multi-jurisdictional courts where experience of the common law is needed to deal with cases from other jurisdictions. This issue was less relevant to South Africa where judges, except those hearing JCPC cases, did not hear cases from multiple jurisdictions. However, the issue arises for the JCPC/SC hearing Scottish criminal cases. The SC hears appeals from throughout the UK although its ability to hear criminal appeals is restricted to devolution and compatibility issues.[265] Thus, the difficulty arises of how to ensure that the JCPC/SC has sufficient legal knowledge of each jurisdiction from which it hears cases, to avoid it making errors about the law of each jurisdiction. The HOL, like the JCPC/SC, dealt with this issue by having a convention that Scottish cases should be heard with at least two judges trained in Scots law.[266] The Canadian Supreme Court addresses a similar difficulty by requiring that three out of the nine justices have training in Quebecois law and that all three sit on cases from Quebec.[267] Since the court now normally sits with five justices, it means that there is often[268] a majority of Quebecois judges deciding cases from Quebec. Chapter 5 section 5.1 and Chapter 6 section 2.2 will consider whether non-Scottish judges should hear Scottish cases and

[263] *ibid*
[264] L'Heureux-Dube, n37 above, 17
[265] Chapter 1 section 2 above
[266] Lady Hale, 'Devolution and The Supreme Court – 20 Years On' (Scottish Public Law Group, 2018), 1 at https://www.supremecourt.uk/docs/speech-180614.pdf (last visited 01/09/2018). For the SC there is a duty to ensure that the court has "knowledge of, and experience of practice in, the law of each part of the United Kingdom." (Constitutional Reform Act 2005 s27(8))
[267] Supreme Court Act 1985 s6 This rule has been applied since 1949.
[268] If the court sits with more than five justices, Quebecois judges will be in the minority.

whether there is a need to adopt an approach like the Canadian Supreme Court of having the JCPC/SC sitting with a majority of judges trained in Scots law in Scottish cases.

6.3 Autonomy

As section 2 showed, legal nationalists often argue that their legal system should have autonomy to develop in its own way. They raise concerns that a lack of autonomy will lead to law being unthinkingly imported into the legal system, that law will be harmonised with English law and that such decisions will impact on the clarity of the law.

6.3.1 Importation of Law

Like Scottish legal nationalists, legal nationalists in South Africa and Quebec are wary of English and Canadian common law rules being imported into their legal system. The Quebecois legal nationalist Mignault argued that it was "time to react against" the assumption that the common law and civil law are similar.[269] For him, civil law is a "complete system" and there was no need to interpret it in the same way as the common law.[270] The purist De Wet welcomed the use of comparative law in South Africa but argued that all law should be subjected to critical examination.[271] Steyn J was more cautious about the importation of law complaining that lower courts imported English law into South African law "without comprehensive investigation of our common law."[272] He normally[273] rejected any attempt to import English law into South African law.[274] However, with the exception of Steyn J, legal nationalists in Quebec and South Africa did not argue that law should hardly ever be imported into their legal system. Rather, like Scottish legal nationalists, they argued for their legal system to have autonomy to choose what rules were borrowed from other legal systems.

The impact of any importation of law varies. Sometimes the law relied on by the other jurisdiction will be the same or similar to existing law resulting in little change to the law.[275]

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[269] *Desrosiers* v *The King* [1920] 60 SCR 105, 126 per Mignault J. see also *Pantel* v *Air Canada* [1975] 1 SCR 472, 478 per Pigeon J.
[270] *ibid*
[271] Niekerk, n107 above, 186-187
[272] *Regal*, n59 above 32
[273] Van Blerk, 'The Irony of Labels' (1982) 99(3) S African LJ 365, 373
[274] Cameron, n61 above, 45
[275] Watson, n190 above, 97

Some importations will have a more long-term impact on the law than others. Whilst some importations may be quickly reversed or overruled by appeal courts or by legislation, others may remain for many years. For instance, a long-term importation of law occurred where the Supreme Court of Canada[276] and the JCPC[277] held that Quebec's Civil Code should be interpreted as ordinary legislation.[278] It took decades to overturn this approach because the Supreme Court of Canada felt unable to overturn the JCPC decision until the JCPC's jurisdiction was abolished.[279]

Gibb has shown that the HOL in civil cases, often used its position as the final court of appeal for Scottish and English civil cases to import English law into Scots law.[280] This led to decisions which arguably did not benefit Scots law,[281] fitted uneasily with existing law[282] and caused confusion in the law.[283] Thus, in *Bartonshill Coal Co* v *Reid*,[284] the HOL held that an employer was not liable when an employee was injured by the actions of another employee. It seems that Scots law had previously not recognised such a restriction on the liability of the employer.[285] Thus, the decision did not fit well with existing Scots law. The decision caused unfairness to victims of work-related injury because the victim was assumed to have accepted the risk that they might be injured by a co-worker. This meant that the victims were denied an action against their employer and were only able to sue the co-worker who was unlikely to have much money. Legislation was used to restore Scots law to its previous position although it took almost a century for this to happen.[286]

In *Cameron* v *Young,*[287] the HOL held that a landlord had no liability in delict to the wife of a tenant where both were living in a house where the insanitary conditions of the property made them ill. However, depending on the circumstances there might have been a

[276] *Town of Montreal West* v *Hough* [1931] SCR 113, 121
[277] *Quebec Railway, Light, Heat and Power Co*. v *Vandry* [1920] App Cas 662, 672
[278] Section 6.2-6.3 above
[279] Allard, n42 above, 10
[280] Gibb (1950), n6 above
[281] *Dumbreck* v *Robert Addie & Sons (Collieries) Limited* 1929 SLT 242
[282] *Jeffrey* v *Allan Stewart & Co*. (1790) 3 Paton 110; *Bartonshill Coal Co* v *Reid* (1858) 2 MacQ 266, 285
[283] *Dumbreck,* n281 above, 242
[284] *Bartonshill Coal*, n210 above
[285] *Gray* v *Brassey* (unreported) 1 December 1852, Court of Session; *Reid* v *Bartonshill Coal Co*. (1855) 17 D 1016
[286] Law Reform (Personal Injuries) Act 1948 s1
[287] [1908] AC 176

contractual obligation to the tenant to keep the house in a sanitary condition. It based its decision on the English case of *Cavalier* v *Pope*[288] while overturning a long line of Scottish case law, including the Court of Session decision in the case.[289] Thus, the decision did not fit well with existing law and there was an importation of law. It was also of debatable benefit to Scots law. It meant that landlords were entitled to let out property and "allow the house to fall to pieces."[290] Beyond the law of nuisance, there was little that someone living in the house, who did not have a contract with the landlord, could do to force the landlord to make the property habitable. The rule was overturned by the Occupiers' Liability (Scotland) Act 1960 s3 although it again took a long time for this to happen.

A more modern example is *Sharp* v *Thomson*,[291] which considered whether the ownership of property could change where the buyer entered into a contract to buy the property but before the buyer had registered the disposition. This was important because the seller had gone into receivership and the receiver had a floating charge (a security) over the seller's property. The previous Scottish position was that the disposition needed to be registered for ownership to pass. This was based on the Roman law rules which distinguish between real rights (having ownership of a thing) and personal rights (having a right to enforce an obligation such as a contract).[292] Under existing Scots law, by signing a contract for the house, the buyer had a personal right to the house but not a real right.[293] The HOL disagreed. Lord Jauncey held that the buyer by contracting to buy the property gained a "beneficial interest" in the property, which meant that the property no longer belonged to the seller.[294] This was based on the English approach of recognising different degrees of ownership.[295] Since Scots law did not make this distinction, it represented a legal importation which left "the law in disarray."[296] Moreover, since the decision fitted uneasily with existing Scots law, it was difficult to predict how the rule might be applied in other cases. The decision hindered legal certainty because Lord Clyde, although agreeing with the

[288] [1906] AC 428
[289] *Cleghorn* v *Taylor* (1856) 18 D 664; *Campbell* v *Kennedy* (1864) 3 M 121; M'Martin v *Hannay* (1872) 10 M 411; *Shields* v *Dalziel* (1897) 24 R 849; *Hall* v *Hubner* 24 R 875
[290] [1908] AC 176, 179
[291] 1997 SLT 636
[292] Reid, 'Equity Triumphant' (1997) 1(4) Edin LR 464, 464-465
[293] *ibid* 464-465
[294] 1997 SLT 636, 643
[295] Reid, n292 above, 468
[296] *ibid*, 469

outcome, argued that property law should be ignored. For him, the Companies Act 1985 s462(1), which deals with floating charges, should be interpreted narrowly so that where the seller has given the buyer a disposition for a property this property should not be deemed to be part of the seller's property subject to the floating charge.[297] The remaining judges confusingly agreed with both judges despite their different approaches.[298] Thus, the experience of the HOL deciding Scottish civil cases suggests that an importation of law can occur where, like the JCPC/SC deciding Scottish criminal cases, there is a UK-wide court[299] which normally sits with a minority of Scottish judges deciding Scottish cases.

In South Africa, the importation of English law often arose because judges in all courts lacked an understanding of Roman-Dutch law and relied on English law instead.[300] These decisions did not always benefit South African law. In a series of cases including *R* v *Adams*,[301] the Eastern District court held that, as in English law at the time, there was a presumption in South African law that if a woman acted dishonestly around her husband, that her husband had coerced her. The husband was presumed responsible for the wrongdoing. Before these cases, there was no evidence of such a presumption in South African law although, like England, South African law recognised a defence of coercion.[302] The rule was arguably not beneficial to South African law. It created a significant unfairness for the husband who "without any proof" was assumed to have coerced his wife and was solely responsible for the lawbreaking.[303] It was a change which affected large numbers of cases meaning that this unfairness had potential to affect large numbers of men. It took two Cape Supreme Court decisions to clarify that the rule did not apply in South African law.[304]

The Supreme Court of Canada often used its position as a multi-jurisdictional court to import common law into Quebec's civil law because its initial purpose was to unify Canada's laws.[305] In *Canadian Pacific Railway* v *Robinson*,[306] the Supreme Court of Canada

[297] *Sharp*, n8 above, 643-648
[298] Reid, n292 above, 465
[299] The HOL did not have jurisdiction over Scottish criminal cases.
[300] Section 6.3 above
[301] 3 EDC 216
[302] Bodenstein, n224 above, 348
[303] *ibid* 349
[304] *R* v *Barker* 2 SC 9; *R* v *Farley* 2 SC 227
[305] Allard, n42 above, 3
[306] *Canadian Pacific Railway*, n216 above

considered Article 156 of the Civil Code of Quebec which allowed damages to be claimed by relatives for the death of a person who was the victim of an offence. The court held that it did not include damages for emotional loss. This was because damages for emotional loss were not recognised by a similar rule in the rest of Canada. Thus, the SC imported the common law version of the rule on the awarding of damages into Quebec's law. The court imported the rule without thinking about whether the rule would benefit Quebecois law and about the policy issues raised by this approach. Just because the approach is adopted by the common law does not mean that it is appropriate for a civil law system. As the experience of the HOL showed, there is a danger that the imported law will fit uneasily with existing law and that the change could have unintended consequences.[307]

Laws can normally only be successfully transplanted into another legal system if the person or institution transplanting the law has sufficient legal knowledge of both legal systems, a willingness to recognise differences between them[308] and considers how the law will work in the recipient legal system.[309] This requires giving the legal system autonomy to decide whether a rule should be imported at all and to decide how it might need to be modified to work for the recipient legal system. Thus, the importation of law is linked to judges' knowledge of differences between legal systems. As section 6.3 showed, judges who are unfamiliar with the legal system they are hearing a case from may apply the law they are more familiar with. However, as *Sharp* showed it is equally possible for judges trained in the legal system the case is from to import law into the legal system in a way that does not work well for the legal system.

6.3.2 Harmonisation

The significance of the harmonisation of laws varies depending on whether the distinctive approach previously taken by the legal system was longstanding, doctrinally important to Scots law and whether it is important in practice for Scots law. When an area of law is still developing, this can reduce the effect of harmonisation on the legal system. The legal system has not taken a longstanding position on the issue and this means that there are

[307] See Whelan, 'On Uses and Misuses of Comparative Labour Law: A Case Study' (1982) 45(3) MLR 285; Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) MLR 1. Cf Watson, n190 above, Chapter 16
[308] Sections 6.2-6.3 above
[309] Whelan, n307 above, 300

unlikely to be a large number of cases which will have adopted the previous decision and need to be overturned by the change of law.

There are several reasons why legal systems should have some autonomy to develop in their own way and not have their laws harmonised. First, there is a need to meet local conditions. In Scotland, one of the purposes of devolution was to meet local needs by giving Scotland its own devolved legislator which is dedicated to legislating on Scottish issues.[310] In South Africa, although most of its commercial law was harmonised with English law, it retained aspects of Roman-Dutch law which were "good and useful" to commerce in South Africa.[311] Thus, different legal jurisdictions may find that different practices work for them better than the approach preferred by another jurisdiction. Social, cultural and identity differences between Quebec and the rest of Canada mean that social and economic problems can arise in one part of Canada that are less prevalent in others.[312] For example, different crimes are more prevalent in different parts of Canada.[313] If a problem is specific to Quebec, there might be a need to implement legislation for Quebec which can deal with any local issues causing this problem. Where a problem is more prevalent than in other parts of Canada, a Canada-wide approach would seem excessive. It would mean altering the law of the whole of Canada to deal with a local problem. Moreover, a more localised approach can help legislate for issues which are important to people in the sub-state. For example, the unwillingness to reform the Civil Code in Quebec was influenced by a desire to allow Catholic values to be maintained. These values were considered[314] to be important to Quebecois society. Chapter 5 will consider whether arguments for the need to respect local differences can be made for Scotland as part of the UK.

Second, there may be more than one solution to deal with a problem. As section 6.3.1 showed, Scots law has often dealt with problems in different ways to English law before the HOL harmonised the law. Many of these solutions worked well for Scots law despite being different from English law, while some of the solutions produced by the importation of the

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[310] Scottish Constitutional Convention, 'Scotland's Parliament: Scotland's Right' (Convention of Scottish Local Authorities, 1995), 15
[311] Bodenstein, n224 above, 353
[312] Anonymous, 'Incident-Based Crime Statistics, by Detailed Violations' (Statistics Canada, 2017), at https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701 (last visited 08/11/2018).
[313] *ibid*
[314] Quebec is less religious in modern times. (Keating, n102 above, 79)

English approach have been to the detriment of Scots law. An example is *Sharp* v *Thomson*[315] where before the HOL decision, Scots and English law took a different approach to the problem raised by the failure of the buyer to register a disposition.[316] The English approach, adopted by the HOL, of recognising different degrees of ownership had the advantage of helping prevent unfairness when a person had brought a property but had not registered the disposition. The Scottish approach had the advantage of being simpler because a person is either the owner of the property or not and there is no recognition of different degrees of ownership.

Harmonisation is linked to the importation of law since one of the main purposes of borrowing law is to make the laws the same. However, harmonisation can occur without an importation of law. For example, reinterpreting Scots law using Scottish case law might make it more like English law even though English law was not considered. Moreover, when a law is imported into the recipient legal system from the donor legal system, it may be modified to enable it to provide the best solution for the recipient legal system.[317] Thus, differences will remain between how the two legal systems deal with the area of law despite the importation of law. Nonetheless, the link between harmonisation of the law and importation of law means that many of the effects importing law can have on a legal system also apply to the harmonisation of the law.

For example, in *Duncan* v *Findlater*,[318] the HOL held that a trustee of a trust set up to maintain roads was not liable for the negligence of their employees who maintained the road. Several previous Scottish cases had allowed liability in these circumstances,[319] while in England liability had only been recognised where the trustee exceeded their statutory powers.[320] Thus, the HOL harmonised Scots and English law by importing the English approach into Scots law. Again, this was of debatable benefit to Scots law. It meant that

[315] 1997 SLT 636
[316] Reid, n292 above, 468
[317] Watson, n190 above, 27
[318] *Duncan* v *Findlater* (1839) 6 Clark & Finnelly 894
[319] *Innes* v *The Magistrates of the City of Edinburgh* (1798) 13 Morrison 189; *M'Laghlan* v *The Road Trustees of Wigton* (1820) 4 Murray 216; *Miller* v *The Road Trustees of Calder* (1827) 4 Murray 563; *Findlater* v *Duncan* (1838) 16 S 1150
[320] *Baker* v *Harris* 4 Maule and S 26

people who were injured on highways through the negligence of road workers were often left with no remedy when they would have previously been able to sue the trustee.[321]

In the South African case of *Pearl Assurance Company, Limited* v *Government of the Union of South Africa*,[322] the JCPC restricted the ability to use penalty clauses in contracts. It imported the English law rule that damages for a breach of a penalty clause could only be awarded when there was proof of actual damage or the contract contained a pre-estimate of what damage might occur. The longstanding previous position in South Africa was that when the penalty clause was invoked the claimant could obtain whatever amount of damages that was specified in the penalty clause. However, the courts recognised that the penalty clause could be set aside if it was "excessive and unconscionable."[323] Thus, there was a harmonisation of law which fitted uneasily with longstanding law.

In *Renaud* v *Lamothe,*[324] the Supreme Court of Canada held that a provision in a will which restricted the ability of the beneficiaries to marry in a ceremony not held by the Catholic Church was valid. The court relied on English law[325] which attached importance to the ability of the deceased to dispose of their property as they wanted.[326] Existing Quebecois law similarly attached importance to the freedom of the testator to dispose of their property as they want. However, it also attached importance to religious freedom.[327] There was civilian case law suggesting that a provision in a will was invalid if it restricted the beneficiary's ability to marry.[328] Thus, Quebecois law was harmonised with English law.[329] While following the will of the testator is important, it is debatable whether this approach benefited Quebec's law. It meant that if the beneficiary wanted to inherit, they had to comply with conditions which significantly affected the choices they could make in life, such as who they could marry and what religion they could practise. Thus, like the importation of law, the harmonisation of law can lead to decisions which do not fit with existing law, are of

[321] *Duncan*, n318 above, 903
[322] [1934] AC 570
[323] Aquilius, 'Immorality and Illegality in Contract' (1943) 60(1) S African LJ 468, 475
[324] *Renaud* v *Lamothe* (1902) 32 SCR 357
[325] Québécois and French law were also considered (*ibid,* 364)
[326] *ibid* 366
[327] *ibid* 359
[328] *Rouaserra* v *Rouaserra* (unreported) 2nd June 1828, Royal Court of Corsica
[329] Allard, n42 above, 4

doubtful benefit to the law and reduce the autonomy of the legal system to develop in its own way.

There are several reasons why courts harmonise law. In some cases, such as *Bartonshill Coal,* it is assumed that the law of each jurisdiction is the same without justifying the need to take the same approach in Scotland and England.[330] In other cases, a more detailed justification is given.

Courts sometimes argue that there should be consistency in the approach taken in each jurisdiction in the UK. For example, in *Duncan* v *Findlater* the HOL, although accepting that there may sometimes be a need to recognise differences between Scots and English law, argued that it "is a reproach to any system of law that there should be ... a different rule of construction applied in one part of the kingdom and in another."[331] As Chapter 5 section 6.2 will show, the constitutional relationship between a sub-state with its own legal system and the state impacts on expectations about when a state-wide approach is needed. In both the UK and Canada, for issues affecting everyone in the country, such as human rights, there may be an expectation that there should be some uniformity[332] in the approach taken by each part of the UK or Canada.[333] Allowing a right in one part of the state but not another can create a dissimilarity in treatment between people who will receive the right and those who will not. Chapter 5 section 6 will test claims that there is a need for a UK-wide approach to human rights enforcement in the UK as a unitary state. In a federal arrangement such as between Quebec and Canada and to a less extent in the devolved parts of the UK, sub-states have powers to make their own laws. This may create an expectation that these powers will be used sometimes to take a different approach to the rest of the state. Sub-states seeking autonomy from the state, often argue that the sub-state should have autonomy to take its own approach to recognise social, cultural and identity differences between parts of the state and that people in sub-states may have different needs. Since sub-states such as Scotland and Quebec have their own identity and

[330] *Bartonshill Coal*, n210 above, 285
[331] *Duncan*, n318 above, 902
[332] Devolved parts of the UK and the Canadian providences are given discretion in how they enforce human rights. (Chapter 5 section 6.2 below and Clarke, 'The Charter of Rights and A Margin of Appreciation for Federalism: Lessons from Europe' (The Canadian Political Science Association, 2006), 3 at https://www.cpsa-acsp.ca/papers-2006/Clarke.pdf (last visited 23/03/2018).)
[333] Chapter 5 section 6.2 below and Allard, n42 above, 20

culture,[334] this may increase the expectation that people in the sub-state will be treated differently on some issues. Thus, the need for autonomy is in tension with the potential need to take a state-wide approach for some issues.

It is often argued that harmonisation is needed to promote commercial efficiency because having the same laws in different jurisdictions makes trading easier. In the UK, many financial, economic and trade matters are reserved to Westminster and are outwith the competence of the Scottish Parliament to enable a UK-wide approach to be taken to promote commercial efficiency.[335] Similarly, it was argued that South African law benefited from adopting the same commercial law as England because this made trade between the two countries easier.[336] In Canada, Justice Ritchie in *Canadian Pacific Railway* justified holding that people could not sue for emotional loss in Quebec because the lack of recognition of the rule in the rest of Canada meant that it would be:

> "Regretted if we were compelled to hold that damages should be assessed by different rules in the different provinces through which the same railroad may run."[337]

In an increasingly globalised world companies often provide services and transport goods in a range of legal jurisdictions. They need to ensure that they do this in accordance with the law of each jurisdiction. If each jurisdiction has differing rules, then companies need to spend time and resources ensuring that they know the law of each jurisdiction and that they comply with these differences. However, many companies trade around the world despite different countries having differing laws. Moreover, as section 6.3.1 showed, having one law for multiple legal systems only makes the law easy to understand and apply if the law is carefully imported into the legal system. If the importation is not carefully done, there is a risk of confusion about the law which hinders the efficient running of business. Nonetheless, the careful harmonisation of laws so that they work for the recipient legal system may promote legal certainty and help efficiency of trade. Thus, while there are good reasons to give legal systems some autonomy to develop in their own way and to avoid

[334] Section 3.1 above and Keating, n102 above, Chapter 4
[335] Scotland Act 1998 schedule 5 part 2 head A and C and Scotland Act 1998 Explanatory Notes, 203
[336] Bodenstein, n224 above, 353
[337] *Canadian Pacific Railway*, n216 above, 111

harmonisation for its own sake, this must be balanced with competing interests which suggest a need for some areas of law to be harmonised throughout the country.

6.3.3 Clarity of the Law

Legal nationalists often argue that the uncritical harmonisation of law and importation of law into a legal system can reduce the clarity of the law by making it difficult for lawyers to predict how cases will be decided.[338] However, not all confusion arises from attempts to harmonise law. Confusion may arise because the courts failed to clarify an issue of domestic law.

Significant uncertainty can occur if laws from other jurisdictions are applied without considering how they fit with existing law.[339] The Scottish HOL case of *Dumbreck* v *Robert Addie & Sons (Collieries) Limited*[340] dealt with the liability of occupiers for people injured on their land. The HOL applied the English approach of deciding the liability of the occupier by considering what category of person had been injured. For example, an occupier would owe a lesser duty of care to a trespasser than to someone with a right to be on the land.[341] Before this judgment, Scots law did not recognise that there were different categories of victims.[342] As well as removing the simpler approach previously taken by Scots law, it left the law on this issue in a "confused state" because it was difficult to determine how different types of victim would be classified.[343]

In *IR* v *Glasgow Police Athletic Association*, the HOL interpreted the phrase "charitable purposes" under the Finance Act 1921 s30(1)(c) as having the same meaning as in English law. English law applied a highly technical definition of "charity" which had not been previously adopted in Scotland.[344] This created confusion. The Scottish courts had to

[338] Section 2 above
[339] Walker, n6 above, 335- 336
[340] 1929 SLT 242
[341] *ibid* 244
[342] *Shillinglaw* v *Turner* 1925 SC 807 The law has now reverted to this position by the Occupiers' Liability (Scotland) Act 1960.
[343] Walker, n6 above, 336
[344] Smith, n6 above 526

"predict, without the possibility of expert guidance on English law, how an English Chancery judge would construe" the phrase and then apply this to Scots law.[345]

Similar problems occurred in South Africa and Quebec. In South Africa, illegal contracts could not be enforced.[346] This raised the issue of whether relief could be awarded when a party had acted on an illegal contract. The rule under South African law, which derived from Roman law, was that since an illegal contract was void, the disadvantaged person had no remedy under contract law and had to rely on quasi-contractual remedies to recover damages.[347] However, in *Jajbhay* v *Cassim,*[348] Stratford CJ held that a remedy was also available under the English law of restitution which had an equivalent under Roman law.[349] The decision created significant uncertainty. First, the court was not unanimous on whether restitution applied in this situation. Watermeyer JA argued that only quasi-contractual remedies were relevant.[350] Two lines of cases developed, one applying Stratford CJ's approach, the other holding that there were no policy reasons to justify relief. The latter was applied more frequently, but it was difficult to be sure which approach the courts would apply.[351]

Similarly, the tendency of the JCPC and Supreme Court of Canada to interpret Quebec's Civil Code using common law and to replace civil law with the common law caused significant uncertainty.[352] Since many decisions were inconsistent with civil law, the lower courts in Quebec initially refused to apply them and doubted the approach of the JCPC and Supreme Court of Canada.[353] Thus, on the one hand, the JCPC and Supreme Court of Canada set precedents which these courts could be expected to follow. On the other hand, lawyers could not be sure whether the lower courts would follow the precedents and whether the precedents correctly represented Quebecois law. Accordingly, there was a conflict between two authoritative courts: the Quebec Court of Appeal, which had more

[345] *ibid*
[346] Trakman, 'The Effect of Illegality in South African Law - A Doctrinal and Comparative Study' (1977) 94(3) S African LJ 468, 477
[347] *ibid* 478
[348] *Jajbhay* v *Cassim* 1939 AD 537
[349] *ibid* 543 per Stratford CJ
[350] *ibid* 547-550 per Watermeyer JA
[351] Trakman, n346 above, 478-479
[352] Section 6.1.1 above and section 6.3 above
[353] L'Heureux-Dube, n39 above, 461

experience in deciding civil law cases than the Supreme Court of Canada; and the Supreme Court of Canada, which had the power to overrule the Quebec Court of Appeal but had less experience of deciding civil law cases.

Not every harmonisation of the law will lead to significant uncertainty. It is possible that if law is borrowed carefully, the borrowed law may provide a clearer solution to the problem than existing law.[354] However, the above findings show that significant uncertainty can occur if laws are harmonised without thinking about how the change will fit with existing law. This reinforces the argument that legal systems need some autonomy to choose what laws are imported into them. The experience of the HOL shows that UK-wide courts often try to harmonise areas of law and that this can cause significant uncertainty.[355] Chapter 4 section 3.4 will consider whether the JCPC/SC's jurisdiction over Scottish criminal cases has caused similar uncertainty.

7 Conclusion

This chapter has used the debate surrounding legal nationalism as a vehicle to examine claims made by critics of the JCPC/SC's jurisdiction that there is a need accommodate differences between legal systems by recognising differences between them and giving them autonomy to develop in their own way. In assessing what legal nationalism tells us about the JCPC/SC's jurisdiction, several caveats apply. First, it is yet to be established whether Scottish criminal law, procedure and evidence are distinctive from English law. Secondly, it also needs to be established whether the JCPC/SC's jurisdiction affects any distinctiveness in these areas of law, has imported law into Scots law, has produced decisions which did not fit with existing Scots law and/or affected the clarity of Scots law. Moreover, as was shown, there are several differences between the legal systems in Quebec and South Africa when compared to Scotland and between some of the legal nationalist arguments expressed in each jurisdiction. Thus, care must be used when applying the findings about South Africa and Quebec to Scotland. However, the three legal systems sometimes use judges not trained in the legal system the case is from. Each jurisdiction sends/sent cases to a multi-jurisdictional court. The arguments made in each jurisdiction for the accommodation of differences between legal systems are similar.

[354] Chapter 4 section 3.4 below
[355] Section 6.4.1 above

The study of legal nationalism provided useful information about the JCPC/SC debate. First, it identified some reasons why Scots criminal law might be distinctive when compared with English law: it is said to be based on principles, be very flexible, be exceptionally fair to the accused and reliant on institutional writers. These claims will be tested in Chapter 3. However, Scottish legal nationalism shows a tendency to overstate these features. Despite attaching importance to principles Scots law also relies heavily on precedent. Rather than having a long history of being fair to the accused, in the past, it could be very harsh to the accused.[356] This revealed a tendency to romanticise elements of Scots legal history. History can show why a legal system developed in a certain way. However, if it is relied on too heavily it can lead to a backwards-looking approach which hinders law reform. This illustrates that any argument that the JCPC/SC should accommodate differences between Scots and English law needs to be made with an accurate understanding of the level of difference between the two legal systems and of the history of the two legal systems.

The second part of this chapter considered whether there is a need to accommodate differences between legal systems. It found some evidence to support claims that Scots law reflects national identity because people feel pride in Scottish institutions such as the legal system. However, there was a tendency of legal nationalists to overstate this link, especially for arguments that the law reflects the spirit of the Scottish people and in claims that Scottish national identity would not survive without a distinctive Scottish legal system.

The linking of law and national identity places Scots law on a high pedestal where any removal of a distinctive element of Scots law can be portrayed as an attack on Scots national identity. Such arguments can hinder critical thinking about the law and can result in distinctive elements of the law being retained to preserve national identity rather than because they benefit the legal system. Moreover, it enables legal nationalist arguments to become linked to arguments about ethnicity. In Scotland, it was sometimes argued that there was something special about Scots as an ethnic race which enabled them to make superior laws to England. Such arguments fit uneasily with how Scots in modern times perceive their identity because their feelings of being Scottish (whether combined with a feeling of other identities) are a civic form of identity. The dangers of linking law and ethnic identity were highlighted in the extreme example of South Africa. The legal purist

[356] Section 2.5 above

movement was interlinked with the political purist movement using arguments about ethnicity to justify segregation. As the work of TB Smith showed, legal nationalist arguments can be made without using ethnic arguments. Thus, any argument that differences between Scots and English law should be accommodated needs to avoid making ethnic arguments.

Accordingly, national identity is not a strong ground on which to base arguments for accommodating Scots law. Nonetheless, arguments that Scots national identity is under attack by any harmonisation of Scots and English law may appeal to some people in society. Opponents of the JCPC/SC's jurisdiction may use such arguments to seek to undermine public support for the jurisdiction.

A stronger argument for accommodating differences between legal systems is that the failure to recognise difference and to give Scots law autonomy to develop in its own way can create problems for Scots law. A court which does not recognise differences between legal systems risks negatively affecting the legitimacy of their decision-making.[357]

The composition of courts raises a range of issues, although the focus here was on the representation of legal knowledge. It was shown that judges not trained in the legal system the case was from sometimes made mistakes about the law, decided cases using the law that they were familiar with to avoid dealing with legal issues that they did not understand and deferred to the opinion of those more knowledgeable about the issue. Nonetheless, judges from other legal systems can become proficient in a legal system in which they are not trained. They can also help share ideas between legal systems. There is a need to ensure that the court has sufficient expertise to deal with cases from all the jurisdictions that it hears cases from.

There are also strong reasons to give legal systems some autonomy to develop in their own way. Granting autonomy can help meet local needs and enable different legal systems to test different solutions to a problem. Excessive willingness to import law into the legal system from another legal system and to harmonise the law can result in decisions which fit uneasily with longstanding existing law, do not benefit the legal system and cause significant uncertainty. Not every harmonisation or importation of law will have a

[357] For a discussion of sociological legitimacy see Chapter 5 section 2

significant impact on the legal system. However, the findings of this chapter suggest that, if the JCPC/SC does harmonise Scots law with English law and ECHR law and import law into Scots law, problems will arise if this is not done with care. The use of foreign judges and the use of multi-jurisdictional courts can increase the likelihood of harmonisation and importation of law occurring, although they can occur without these factors being present. These findings do not prove that the harmonisation and importation of law will occur for the JCPC/SC's criminal jurisdiction. However, the experience of the HOL in civil cases shows that a UK-wide court deciding Scottish cases, normally with a minority of Scottish judges, can result in a harmonisation of Scots and English law and the importation of English law into Scots law. Since the JCPC/SC are both UK-wide courts and use a minority of Scottish judges, it will be examined in Chapter 4 whether the JCPC/SC has shown a tendency to import law into Scots law and to harmonise it with ECHR law and English law in a way which creates significant uncertainty.

Too much focus on keeping a legal system autonomous from other legal systems can hinder the sharing of ideas between legal systems which might benefit the recipient legal system. It can also result in isolationism because comparative law is a useful way to see whether an approach is increasingly becoming rejected in other jurisdictions. Moreover, in states with multiple legal systems such as the UK, there may be issues affecting the whole of the state and this may lead to arguments for a state-wide approach. The merits of such arguments depend on the issue being considered and on the extent to which the state's constitutional arrangement creates an expectation of uniformity. This shows that there is a tension between giving a legal system autonomy to develop in its own way and the need to avoid isolationism. Thus, there are strong reasons for arguing that legal systems should have autonomy, but they need to be made carefully.

Overall, there is a lot that can be learnt from Scottish, Quebecois and South African legal nationalists. However, this study of legal nationalism provides an important warning. Care is needed to avoid using arguments for the accommodation of differences between legal systems to justify approaches which are backwards-looking, isolationist and/or draw on ethnic nationalism.

Chapter 3: Is Scots Criminal Law Distinctive?

1 Introduction

Chapter 1 section 3 showed that critics of the Supreme Court (SC) and Judicial Committee of the Privy Council's (JCPC) compatibility and devolution issue jurisdiction claim that: 1) Scots criminal law, procedure and evidence are distinctive and 2) the JCPC/SC undermines this distinctiveness. This chapter will test the first claim by comparing Scots criminal law, procedure and evidence (the Scottish criminal process) to English law to establish the level of difference between the two jurisdictions. However, the vast amount of law relating to the criminal process in each jurisdiction means that limits must be placed on the scope of this study. Moreover, not every difference will be significant. Thus, the chapter starts by defining the scope of the study and how it will differentiate between genuinely distinctive differences and less significant differences. Since one of the differences between legal systems are the values they promote, this chapter then considers different legal theories which are applied in Western systems of criminal law. The criteria for defining difference will then be applied to: 1) substantive criminal law to establish how it is decided what behaviour should be criminalised and, when something is criminalised, the scope of this criminalisation; 2) criminal evidence law dealing with how it can be proven that a crime was committed and 3) the criminal procedure from the investigation of the crime to the court's verdict. The aim is to establish whether any differences produce materially different outcomes, are underpinned by different policy approaches or legal theories and were deliberate. The chapter concludes by assessing the overall impact of any differences identified.

1.1 Methodology

Before assessing these issues, it is necessary to define the scope of this chapter and distinguish between genuinely distinctive differences and less significant differences.

1.1.1 The Scope of this Chapter

This study will compare the Scottish and English criminal process. The focus will be on comparing Scots and English law since legal nationalists and critics of the JCPC/SC's jurisdiction allege that Scots law is distinctive when compared with English law.[1] Thus, this study will not consider the extent to which Scots law differs or is similar to Northern Irish and Welsh law.

The areas of criminal law selected for evaluation were chosen for several reasons. First, it is necessary to consider the rules which determine what amounts to a criminal act. Since these rules are applied to a range of defences and offences, they represent rules which have a wide impact on the criminal law. It is also necessary to consider specific offences and defences to test frequently made claims that they contain distinctive elements.[2] Thus, this chapter considers a sample of significant offences, defences and rules of criminalisation against the criteria below to establish what type of difference each area of law has when compared with English law. The focus will mostly be on crimes, defences and rules of criminalisation which emanate from the Scottish common law because the debate surrounding the SC focuses on a fear that allegedly distinctive Scottish common law rules are being eroded by the SC.[3] This will exclude areas such as sexual offences, which are mainly[4] or exclusively statutory offences in Scotland.[5]

For criminal evidence law, the aim is to provide a sample of common law rules of evidence which are frequently used during the criminal trial. Thus, if differences are found they will impact on large numbers of cases. The sample is designed to be broad enough to cover a wide range of different topics within evidence law such as the sufficiency of evidence, character evidence, unfairly obtained evidence, confessions and hearsay evidence.

For criminal procedure, there will be no discussion of sentencing or the appeals process. Although there may be differences in these areas of law, claims that the Scottish criminal process is distinctive focus on the investigation and prosecution of crime rather than

[1] Chapter 1 section 3 and Chapter 2 section 2.4 above
[2] Chapter 2 section 2.4 above
[3] Chapter 1 section 3 above
[4] Common law sexual offences remain for historic offences (Sexual Offences (Scotland) Act 2009 s52)
[5] Misuse of Drugs Act 1971

sentencing.[6] Instead, a selection of the main stages of the criminal process from the investigation of the crime to the court's verdict will be considered.

Each sample is designed to be broad enough to find areas of law representing a range of different types of difference when compared with the criteria. The sample should be broad enough that if claims that Scots criminal law, evidence and procedure are distinctive are correct this study should find areas of genuinely distinctive difference.

1.1.2 Criteria to Define Difference

Having outlined the focus of this chapter, it is now necessary to define the criteria for evaluating difference. Aileen McHarg developed criteria to classify "constitutional difference" between Scottish and English law.[7] It will be shown that her criteria, subject to some modifications, are applicable to this comparative study.

1.1.2.1 "Trivial Difference"

McHarg's first category is "trivial difference,"[8] which occurs where "particular rules or institutional arrangements ... vary" but "these are not intended to alter fundamentally the underlying [policy] objectives being pursued."[9] Thus, trivial differences are not distinctive because they show no evidence of Scots law seeking to take a different policy approach from English law.

Before devolution, Westminster did not have time to legislate frequently on technical aspects of Scots criminal law.[10] This controversially led to legislation which applied the same policies and rules throughout the UK.[11] Devolution may encourage legislation which has different policy aims to English law.[12] However, the category remains relevant as the

[6] Chapter 2 section 2.4 above
[7] McHarg, 'Public Law in Scotland: Difference and Distinction' in McHarg and Mullen (Eds), *Public Law in Scotland* (Edinburgh: Avizandum, 2006), 9-15
[8] *ibid* 10
[9] *ibid*
[10] Jones, 'Criminal Justice and Devolution' 1997 Jur Rev 201, 202; MacDiarmid, 'Scots Law: The Turning of the Tide' 1999 Jur Rev 156, 159-161
[11] Jones *ibid* 202-203; MacDiarmid, *ibid* 159-161
[12] McHarg, n7 above, 10

Scottish and UK Parliaments continue to create offences which implement the same policy objectives as in England.[13]

1.1.2.2 "Contextual Difference"

"Contextual differences"[14] occur where laws are adapted to fit with the allegedly "distinctive nature of the Scottish legal system."[15] Rather than representing an attempt to develop Scots law in a different way, these differences represent an attempt to make a single law fit with existing Scots and English law. There is some overlap with the first category since UK-wide legislation often implements a UK-wide policy while its provisions should[16] account for any differences in Scots criminal law, evidence and procedure.[17] Nonetheless, the category recognises that there will be some laws, particularly UK-wide laws, which create the same offences for both jurisdictions but where the rules are modified to take into account differences between the two jurisdictions.[18]

1.1.2.3 "Difference through Conservatism"

The category "difference through conservatism" encompasses differences arising "not from positive or defensible decisions to be different but merely from inertia or a conservative attitude to change."[19] This type of difference was prevalent before devolution due to a lack of legislative intervention.[20] The courts can controversially reform the law but this risks retrospective law making.[21] Moreover, this relies on an appropriate case coming before the court and courts being willing to reform the law.[22] Therefore, reforms have been piecemeal.[23] This led to areas of law being widely considered to be unfit for purpose.[24]

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[13] E.g. Children and Young Persons Act 1933 s7 amended by the Children and Young Persons (Sale of Tobacco etc.) Order 2007/767 article 2(a); Tobacco and Primary Medical Services (Scotland) Act 2010 s4. Both prevent tobacco products being sold to under 18's.
[14] McHarg, n7 above, 10-11
[15] *ibid* 11
[16] This did not always happen see Jones, n10 above, 203-204
[17] E.g. Corporate Manslaughter and Corporate Homicide Act 2007 (Discussed in section 2.2 below)
[18] *ibid*
[19] McHarg, n7 above, 11
[20] *ibid* 12
[21] Chapter 2 section 2.4 above
[22] *HMA* v *Semple* 1937 SLT 48, 52
[23] *Stallard* v *HMA* 1989 SLT 469; *Lord Advocate's Reference (No.1 of 2001)* 2002 SLT 466
[24] Ferguson and Raitt, 'Reforming the Scots Law of Rape: Redefining the Offence' (2006) 10(2) Edin LR 185, 193

Devolution has allowed some outdated areas of criminal law to be reformed.[25] Nonetheless, as section 2.4.1 will show this the category remains relevant, as there are still laws which have not been reformed due to a lack of legislative time.

1.1.2.4 "Symbolic Difference"

"Symbolic Difference" encompasses differences based on "'folklore' or rhetoric – rather than having any major practical effects on the" outcome of cases.[26] Every area of law has its own myths and as Chapter 2 section 2.5 showed Scots criminal law is no different. Therefore, it is important to recognise that some claimed differences have little basis and do not directly contribute[27] to the distinctiveness of Scots law.

1.1.2.5 "Genuine Distinctiveness"

"Genuine distinctiveness" requires the "adoption of a genuinely different answer" to a legal problem and a decision which is "consciously chosen or defended."[28] The difference should be consciously chosen because this represents a deliberate attempt by Scots law to achieve its own policy aims or consciously defended because this represents a desire to keep the area of law different from English law. The difference must have "real practical significance."[29] A difference is more significant when it impacts on the outcome of cases because it represents a different solution to the problem. Thus, it has a very real impact on what is deemed to be criminal and on the court's decision.

Problems arise with this criterion. Some people may defend a difference while others criticise it.[30] McHarg does not state who must make the conscious choice or defend the difference. To resolve this difficulty, it will be considered whether a choice was made by the Scottish courts or the Scottish or UK Governments to keep Scots law different. The focus will be on these institutions because they have the greatest influence over the policies adopted into law. If the choices of the courts and a government conflict, importance will be attached to the most recent policy choice.

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[25] Sexual Offences (Scotland) Act 2009 s1
[26] McHarg, n7 above, 13
[27] Beyond creating a belief that Scots law is distinctive.
[28] McHarg, n7 above, 14
[29] *ibid*
[30] *ibid* 9

If a different approach is deliberately taken but is not widely defended, importance should be attached to the deliberate choice to be different. This indicates a rejection of the English approach and a desire to take a different approach. Although debates about whether a law should be defended may indicate whether a law is supported and whether the law works in practice, they are debates about what the law should be not what the law is or why an approach was chosen. To establish whether a measure is defended, the opinions of the legal profession, academia and the judiciary will be considered by referring to consultation responses, judgments and academic writing.

One category missing from McHarg's analysis is where one jurisdiction takes a different approach but reaches a similar outcome. Although these differences will not impact on the outcome of cases, significant differences may arise from attaching importance to different values, policy needs or legal theories. This can result in the two jurisdictions reaching similar outcomes while approaching the problem in a completely different way. Thus, an additional category will be used in this chapter called "Different Approach Similar Outcome" to recognise this type of difference.

The application of the criteria involves subjectivity.[31] However, the categories are clear enough that it is possible, with reasoned argument, to apply a category to alleged differences. Although not everyone will agree with the categorisations made, the use of criteria will allow them to see the thought process behind the categorisation. For these reasons, this chapter adopts McHarg's criteria subject to the modifications just mentioned.

1.2 Theoretical Approaches to Criminal Law

As was just shown, one of the key markers of difference relates to the values that criminal law, evidence and procedure seek to promote. The comparison of Scots and English law in this chapter will show that a number of approaches to the values of criminal law recur. This section introduces the major theoretical approaches underpinning criminal law in the Scottish and English legal systems.

[31] *ibid*

1.2.1 Liberalism

Western legal systems are modelled on liberalism, although as will become apparent there are many other legal theories which influence Scottish and English criminal law. Liberalism sees adults[32] as autonomous individuals who require freedom to lead their lives with minimal state interference.[33] It argues for minimal criminalisation to limit the state's impact on individual freedom.[34] It places an onus on the state to justify any departure from this principle.[35] However, liberals are divided about what freedom means. Definitions of freedom include 1) freedom from state coercion;[36] and/or 2) the autonomy of a person to influence the direction of their life by being free from coercion from others and by being free from compulsions which make it irresistible for the person to perform an action.[37] Liberals recognise that humans often encroach on the freedom of others and allow actions to be criminalised when they cause harm to others.[38] Although liberals accept that the state can criminalise physical harm and harm to property, there are debates about whether the harm principle justifies criminalising consensual harms or self-harm.[39] Liberals generally argue against criminalising adults who willingly undertake risky activities or consent to others putting them at risk because the person risks harm to themselves, not to others.[40] Controversially,[41] liberals are unwilling to criminalise acts which take place in private because they consider that what happens in private is normally "not the law's business."[42] They argue for a separation of law and morality and that the immoral nature of an act does not justify its criminalisation.[43]

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[32] These ideas do not apply to children. (Mill, On Liberty (Ontario: Batoche Books, 2001), 13-14)
[33] *ibid* 70
[34] Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974)
[35] Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (Oxford: Oxford University Press, 1988), 9; Rawls, *Justice as Fairness: A Restatement* (New York: Columbia University Press, 2001), 44, 112
[36] Berlin, 'Two Concepts of Liberty' in Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969), 122
[37] Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988); Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986)
[38] Mill, n32 above, 13
[39] Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 45; Mill *ibid* 147
[40] Mill *ibid*; Feinberg, n35 above, xx
[41] Ferguson, n32 above, para 1.18.1
[42] Lord Wolfenden, *The Report of The Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957), para 9-10
[43] Hart, *Punishment and Responsibility* (Oxford, Clarendon Press, 1968), 37; Lord Wolfenden *ibid*

The legal theories of paternalism, communitarianism and moralism have challenged aspects of the liberal approach to deciding what acts should be criminal. Each of these theories has proved influential to both courts and legislators when they are seeking to develop Scots and English criminal law. They will be considered in turn.

1.2.2 Paternalism

Paternalism is often used to justify criminalising risky activities which may cause a person to harm themselves such as the failure to wear a seatbelt, the use of dangerous drugs and restrictions on smoking.[44] It challenges the liberal belief that the state should only intervene in adult's lives when there is harm to others. It argues that the state can restrict a person's freedom, against their will, for a person's own good or for the good of others.[45] Some paternalists define "good" as promoting wellbeing while others argue that the intervention should promote moral welfare.[46] There is an overlap with liberalism. Liberals such as John Stuart Mill argue that adults can be prevented from engaging in a risky activity until they have been fully informed about the risks associated with the activity.[47] Some softer forms of paternalism also argue that state intervention should be restricted to giving information about the risks associated with an activity. However, unlike liberalism, paternalism can be used to advocate preventing people from performing an activity which risks harm to themselves even when the person is aware of the dangers of the activity.[48]

Justifications for paternalism include arguments that the good done to the individual outweighs the harm caused by interfering with their autonomy.[49] Alternatively, it is argued that the intervention promotes individual autonomy in the long term by preventing people from doing something in the short term which might harm their future autonomy.[50]

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[44] Dworkin (1971), n45 above, 182
[45] Dworkin, 'Paternalism' (The Stanford Encyclopaedia of Philosophy, 2017), at http://plato.stanford.edu/archives/win2016/entries/paternalism/ (last visited 24/01/2019); Dworkin, 'Liberty and Paternalism' in Wasserstrom, Morality and the Law (Belmont: Wadsworth Publishing Company, 1971), 181
[46] Ferguson, n32 above, para 3.5.1; Dworkin, n45 above, section 2.5
[47] Mill, n32 above, 88 cf. Dworkin (1971), n45 above, 185 who argues that Mill sometimes states his opposition to paternalism in more absolute terms.
[48] Dworkin (2017), n45 above, section 2.1
[49] *ibid*, section 3
[50] *ibid*

1.2.3 Communitarianism

Communitarianism argues that an individual has a responsibility to the community they live within. It challenges the liberal notion that people are autonomous individuals arguing that they are also community members.[51] Strengthening community ties is considered[52] to promote individuals' wellbeing by helping to meet their needs.[53] There are many different ways of defining different societal groups and this makes it difficult to define what community means.[54] Communitarians consider that the community's rights are more important than the rights of an individual in the community.[55] However, communitarians are not opposed to individuals having rights. Rather they consider that rights are best protected by protecting the community.[56] Judges often deploy communitarian arguments to argue that an act should be criminalised to protect the community from violence and anti-social behaviour[57] or to argue that an approach is in the public interest.[58] However, some communitarians may argue that certain acts should not be criminalised because community-based projects may be more effective in dealing with the problem than criminal sanctions.[59]

1.2.4 Moralism

Moralism is the belief that one[60] of the law's purposes is to enforce morality.[61] It rejects the liberal idea that there should be a separation of law and morals. It is argued that society will degenerate if morality is not enforced.[62] Unlike liberals, it rejects the idea that private immoral acts should be legalised. These acts, if repeated in private by many people, are

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[51] MacIntyre, *After Virtue a Study in Moral Theory* (London: Duckworth, 1981); Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1992) For criticism of this approach see Ferguson, n32 above, para 3.5.4

[52] There is a danger of majoritarian rule where individual rights are forfeited where they are not in the community's interest.

[53] Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1992)

[54] Ferguson, n32 above, para 1.8.1

[55] Bell, 'A communitarian Critique of Liberalism' (2005) 27(2) *Analyse and Critique* 215, 227

[56] Braithwaite, *Crime, Shame and Re-Integration* (Oxford: Oxford University Press, 1989), 158

[57] *Brennan* v *HMA* 1977 SLT 151, 153

[58] *Ibid; Cochrane* v *HMA* 2001 SCCR 655; *Drury* v *HMA* 2001 SLT 655

[59] Hughes, 'Communitarianism and Law and Order' (1996) 16 *Critical Social Policy* 17, 30

[60] There is debate about whether moralism should be the only ground for criminalisation.

[61] Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 2009)

[62] *ibid* 22

claimed to endanger the "principles on which society is based."[63] Authors advocating moralism differ about what immoral acts should be criminalised. Devlin argues that immoral acts should only be punished where they are "injurious to society" in the sense that they harm others or the coherence of society.[64] Thus, there is a link to communitarianism because the aim of criminalising immoral acts is to protect the community. Nonetheless, the two theories differ because communitarians are also concerned with threats to the community which are not caused by immorality. For Devlin, juries which allegedly[65] represent the common morality of society, should through their verdicts decide whether a certain action is sufficiently immoral to deserve criminal sanction.[66] Alternatively, moralism is used to justify punishing immoral acts even where they do not have one of the societal impacts identified by Devlin.[67] Moralism can be linked to paternalism because it can be used to justify encroaching on a person's freedom for their own moral good even if the immoral act did not endanger society.[68] However, paternalism can be used to criminalise acts not involving morality but which threaten the actor's wellbeing such as the failure to wear a seat belt.

Judges and legislators often use morality as a justification for criminalising acts where the action attracts moral disapproval.[69] Moreover, many common law and non-regulatory crimes such a murder, theft and crimes of dishonesty could be described as reflecting moral values.[70] However, not all acts which might be viewed as immoral are crimes and many crimes, such as the failure to wear a seatbelt, have no obvious connection to morality.[71]

1.2.5 Due Process and Crime Control

In addition to being influenced by different theoretical approaches, an important indicator of genuinely distinctive differences is that Scots and English law have adopted different policy approaches to the problem.[72] In assessing whether Scots law has taken a different

[63] *ibid*
[64] *ibid* 17, 18
[65] A jury may not represent all the commonly held views in the society since it is selected at random.
[66] Devlin, n61 above, 15
[67] Feinberg, n35 above, xx
[68] Dworkin (2017), n45 above, section 2.5
[69] *McLaughlin* v *Boyd* 1934 JC 19, 23; *Shaw* v *DPP* [1962] AC 220
[70] Ferguson, n32 above, para 2.6.1
[71] *ibid*
[72] Section 1.1.2.5 above

approach, this chapter considers different approaches that criminal justice systems can take to balance the accused's need for a fair trial with the need for an efficient justice system. Packer defined two analytical tools that can be used to describe criminal justice systems: crime control and due process.[73]

Crime control centres on the belief that the main function of the criminal law is to fight crime because the failure to do this endangers the public and their property. Using the criminal law to prevent crime can help protect public order and freedom.[74] The criminal process is seen as a conveyer belt where the aim is to treat cases in a standardised way and to get the case to its conclusion as quickly as possible.[75] This requires a person's guilt or innocence to be determined as quickly as possible, preferably in the early stages of the criminal investigation by the police and/or the prosecutor before a criminal trial takes place.[76] Thus, there is a focus on informal procedures over the more formal criminal process. It provides little scope to challenge the decision-making in the criminal process.[77] Legal technicalities such as rules excluding unfairly obtained evidence are considered to place unnecessary barriers in the way of prosecutions.[78]

Conversely, a due process approach places barriers in front of successful prosecutions because it considers that the police and prosecutor's assessments of the accused's guilt are unreliable and that witnesses are poor at recalling events. Thus, it rejects the "informal fact-finding" processes advocated by crime control and argues that decisions about what happened should be made by a court or tribunal.[79] There is a focus on ensuring that innocent people are not wrongly convicted of offences because this may result in them losing their liberty and suffering the stigmas associated with a criminal conviction.[80] Due process focuses on the need to protect the accused from abuses of state power. It argues that the accused should only be found guilty if the trial is conducted in a "procedurally regular fashion."[81] This includes providing safeguards for the accused such as ensuring that

[73] Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968)
[74] *ibid* 158
[75] *ibid* 159
[76] *ibid* 160
[77] *ibid* 159
[78] *ibid* 158-163
[79] *ibid* 163-164
[80] *ibid* 165-166
[81] *ibid* 166

the court has jurisdiction to hear the case, that the accused is prosecuted in accordance with any time limits in place and that the accused had the capacity required to be held criminally responsible for their actions. Where these procedures are not followed, the accused's conviction should be overturned or unfairly obtained evidence excluded, regardless of whether the state thinks the person committed the offence.[82] Procedural fairness is prioritised over the efficiency of the criminal process.[83]

Crime control and due process are in tension because increasing the protections for the accused requires time and resources which can reduce the efficiency of the legal system.[84] Accordingly, legal systems normally seek a compromise between the two needs by balancing different interests and most legal systems do not and likely could not fully adopt either model.

2 Criminal Law

Having defined the methodology and the legal theories used in Western legal systems, this chapter will now consider whether Scots criminal law, evidence and procedure are distinctive when compared with English law and what legal theories each jurisdiction applies. Table 1 below lists the areas of criminal law considered and how they were categorised.

[82] *ibid* 167-168
[83] *ibid* 165
[84] *ibid* 165

Difference	Type of Criminal Law	Importance
Intention	Process of criminalisation	Trivial
Diminished responsibility	Defence to murder	
Coercion/ duress	Defence	
Necessity/ duress of circumstances	Defence	
Automatism	Process of criminalisation	
Causing serious injury by dangerous driving	Offence	Contextual difference
Corporate manslaughter and corporate homicide	Offence	
Sources of Scots and English criminal law	Process of criminalisation	Symbolic difference
Provocation and loss of control	Defence to murder	Difference through conservatism
Non-fatal offences against the person	Offence	Different approach similar outcome
Murder	Offence	
Voluntary intoxication	Process of criminalisation	Genuinely distinctive
Recklessness	Process of criminalisation	
Causation	Process of criminalisation	
Prosecuting children	Process of criminalisation	
Self-defence	Defence	
Consent to bodily injury	Defence	
Culpable homicide/ manslaughter	Offence	

Table 1: Areas of criminal law and their categorisation

Starting with trivial differences, the remainder of this section will explain why the areas of law in Table 1 were categorised as having certain levels of difference.[85]

[85] This section draws on the following sources of Scots criminal law: Gordon, Whitty and Black, *Stair Memorial Encyclopaedia* (London: LexisNexis, 2005); Christie, *Introduction to Scots Criminal Law* (Dundee: Dundee University Press, 2009); Connelly, *Law Basics Criminal* (Edinburgh: W Green, 2013); Cubie, *Scots Criminal Law* (Haywards Heath: Bloomsbury Professional, 4th ed, 2016); Ferguson and McDiarmid, *Scots Criminal Law: A Critical Analysis* (Edinburgh: Edinburgh University Press, 2nd ed, 2014); Gordon and Christie, *Criminal Law* (Edinburgh: W Green, 3rd ed, 2009); Jones and Taggart,

2.1 Trivial Differences

The trivial differences were categorised in this way because they did not take a different policy approach nor reach a significantly different outcome. The rules applied in each jurisdiction were either the same or very similar. Thus, the law on intention was placed in this category because both jurisdictions define intention as a person making it their purpose to bring an act about (direct intention).[87] English law allows the jury to conclude that the accused intended the outcome where the accused foresees a virtual certainty of an outcome happening (oblique intention).[88] Although it has been suggested by Lord Gill that Scots law might adopt oblique intention for the law of murder, it has not been confirmed whether this approach applies to Scots law.[89] This difference arises because Scots law has not considered whether oblique intention should be applied to offences rather than due to a desire to take a different policy approach.

Both jurisdictions allow the defence of automatism. English law requires that the accused suffered "total destruction of voluntary control."[90] Similarly, Scotland requires that there is "a total alienation of reason amounting to a total loss of control."[91] It must be caused by a

Criminal Law (Edinburgh: W Green, 6th ed, 2015); Jones and Taggart, *Criminal Law* (Edinburgh: W Green, 7th ed, 2018); McDiarmid, *Criminal Law* (Dundee: Dundee University Press, 2010); McDiarmid, *Scottish Criminal Law Essentials* (Edinburgh: Edinburgh University Press, 2018); McDonald, *A Practical Treatise on the Criminal Law of Scotland* (Edinburgh: W Green, 5th ed, 1948); Smith and Sheldon, *Scots Criminal Law* (Edinburgh: Butterworths, 2nd ed, 1997) The following sources were used for the discussion of English criminal law: Allen, *Textbook on Criminal Law* (Oxford: Oxford University Press, 13th ed, 2015); Ashworth and Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 6th ed, 2009); Child and Ormerod, *Smith and Hogan's Essentials of Criminal Law* (Oxford: Oxford University Press, 2nd ed, 2017); Keating, Cunningham, Elliot and Walters, *Clarkson and Keating: Criminal Law* (London: Sweet and Maxwell, 8th ed, 2014); McAlhone and Wortley, *Criminal Law the Fundamentals* (London: Sweet and Maxwell, 3rd ed, 2013); Williams, *Textbook of Criminal Law* (London: Stevens & Sons Ltd, 2nd ed, 1983)

[87] Jones *ibid* 3-26; *R* v *Moloney* [1985] AC 905

[88] *R* v *Woolin* [1999] 1 AC 82, 95

[89] *Petto* v *HMA* 2012 JC 105, at [13], [20]

[90] *Attorney General's Reference (No.2 of 1992)* [1994] QB 91, 105

[91] *Ross* v *HMA* 1991 SLT 564, 568

factor external to the accused including a reaction to prescription drugs, a diabetic attack or a head injury.[93] The automatism must be unforeseeable and not be self-induced.[94]

In both jurisdictions, diminished responsibility is a partial defence which reduces a murder charge to culpable homicide or manslaughter.[95] Both jurisdictions allow the defence where the accused has a mental abnormality which substantially impacts on their ability to control their actions or understand what they are doing.[96] The defence can be used where the accused suffered domestic violence, post-natal depression[97] and personality disorders.[98]

The defences of coercion (Scotland)/ duress (England) both allow for the acquittal of an accused who believed they were forced to commit a crime due to a person threatening them with serious injury or death.[99] In England, the belief in the threat must be reasonable, although there is debate about whether the belief must be reasonable given the characteristics of the accused.[100] In Scotland, it has not been clarified whether the belief in the threat must be reasonable although it has been suggested that it must be "justifiable."[101] Both jurisdictions consider[102] whether a "sober person of reasonable firmness" who has the accused's characteristics would have acted in the same way.[103] The similarities in outcome and approach for each of these areas of law mean that they represent trivial differences.

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[93] In Scotland, internal factors are dealt with under the defence of mental disorder or by convicting the accused and then using the sentencing procedure to make an order which protects the public. (Criminal Justice and Licensing (Scotland) Act 2010 s168; Jones, n85 above, paras 4-36 - 4-46) In England, insanity can be used to deal with internal factors. (*R* v *Sullivan* 1984 AC 156; *R* v *Burgess* [1991] 2 QB 92).

[94] *Ross ibid*, 568; *Farrell* v *Stirling* 1975 SLT ShCt 71; *MacLeod* v *Mathieson* 1993 SCCR 488 ShCt (Scotland) *Bratty* v *Attorney General for Northern Ireland* [1963] AC 386; *R* v *Quick* [1973] 3 WLR 26 (England)

[95] Criminal Procedure (Scotland) Act 1995 s51B; Homicide Act 1957 s2

[96] Criminal Procedure (Scotland) Act 1995 s51B, s51B(1); Homicide Act 1957 s2

[97] Gordon, n85 above, para 25.02; Keating, n85 above, 761

[98] *HMA* v *Riggi* 2011 GWD 14-329 (Scotland), *R* v *Martin* [2001] EWCA Crim 2245 (England)

[99] *Thomson* v *HMA* 1983 JC 69, 74-80 (Scotland); *R* v *Radford* [2004] EWCA Crim 2878; Allen, n85 above, paras 6.2.4.2 (England)

[100] Allen, n97 above, section 6.2.4.2

[101] *HMA* v *Raiker* 1989 SCCR 147, at [154]

[102] English law also considers whether the accused reasonably believed that they faced death or serious injury. (*R* v *Martin* (1989) 88 Cr App R 343*,* 345)

[103] *Cochrane* v *HMA* 2001 SCCR 655, at [29] (Scotland); *R* v *Howe* [1987] 1 AC 417, 426 (England)

2.2 Contextual Differences

The laws fitting into this category represented legislation which created a single offence for Scotland and England while outlining the different legal terminology to be used when the offence is prosecuted in Scotland. For example, the Corporate Manslaughter and Corporate Homicide Act 2007 creates an offence to punish corporate killings which is called corporate culpable homicide in Scotland and corporate manslaughter in England to reflect the different homicide laws in Scotland and England.[104] Despite this, it enforces the same policy and rules for enabling companies to be prosecuted for a homicide offence when their actions result in death.

The offence of causing serious injury by dangerous driving applies to both England and Scotland[105] and applies the same policy of punishing those who drive dangerously and cause serious injury.[106] However, a different definition of "serious injury" is used in each jurisdiction to reflect the fact that English law already uses the term in relation to offences against the person.[107]

2.3 Symbolic Difference

As Chapter 2 section 2.4 showed, Scottish legal nationalists argue that Scots criminal law relies more on judge made law, while English criminal law mainly uses legislation and that this enables Scots law to be more easily adapted to new situations. Although there are many Scottish common law offences,[108] there are large numbers of statutory offences.[109] In England, despite having large numbers of statutory offences, there are many common law crimes.[110] Thus, the common law nature of Scots criminal law and the statutory nature of English criminal law should not be overstated. The English courts are as capable as the

[104] Corporate Manslaughter and Corporate Homicide Act 2007 s1(1) and 1(5)
[105] Road Traffic Act 1988 s1A
[106] *ibid*
[107] *ibid* s1A(2)
[108] Examples of Scottish common law offences include: murder, assault, theft, breach of the peace and culpable homicide.
[109] Chalmers and Leverick, 'Tracking the Creation of Criminal Offences' [2013] Crim LR 543
[110] *Ibid;* Examples of English common law offences include: assault, battery, murder and manslaughter.

Scottish courts[111] of controversially[112] expanding old crimes to fit new circumstances[113] and in the past[114] creating new crimes.[115] Thus, claims that Scots law is more flexible than English law do not withstand scrutiny.

2.4 Difference through Conservatism

The remainder of this section considers the more significant differences found between Scots and English law. It will become apparent that these areas of Scots law generally take a more crime control centred approach and produce different outcomes to English law. Differences through conservatism will be considered first.

2.4.1 Provocation and Loss of Control

Both jurisdictions provide a partial defence of provocation (Scotland) or loss of control (England) which result in an acquittal for murder, which carries a life sentence, and a conviction for culpable homicide or manslaughter, which does not have a minimum sentence.[116] In Scotland, the provoking act must be violence or the discovery of sexual infidelity occurring immediately before the accused loses control.[117] If the accused was provoked by violence, they must respond in a way which is not grossly disproportionate to the provoking act.[118] In England, the loss of control must be caused by a "fear of serious violence" or by "things done or said" by any person causing a "justifiable sense of being wronged."[119] It must be shown that a person with a "normal degree of tolerance and self restraint ... might have reacted … in a similar way."[120] The loss of control need not be immediate.[121] This was designed to help female domestic violence victims who often kill their abusive partner when he is asleep.[122] Conversely, the Scottish approach is a male-

[111] Chapter 2 section 2.4 above
[112] Smith, 'Judicial Law Making in the Criminal Law' (1984) 100(1) LQR 46 For debate about judicial law making in Scotland see Chapter 2 section 2.4 above
[113] *R* v *R* [1992] 1 AC 599
[114] *Knuller (Publishing, Printing and Promotions) Ltd* v *DPP* [1973] AC 435
[115] *R* v *Curl* (1727) 2 STR 788; *King* v *Manley* [1933] 1 KB 529; *Shaw* v *DPP* [1962] AC 220
[116] *Drury* v *HMA* 2001 SLT 1013, at [18]; Coroners and Justice Act 2009 s54
[117] *Thomson* v *HMA* 1986 SLT 281
[118] *Gillion* v *HMA* [2006] HCJAC 61
[119] Coroners and Justice Act 2009 s55(3)-(4)
[120] *ibid* s54(1)(c)
[121] *ibid* s54(2)
[122] *R* v *Ahluwalia* [1992] 4 All ER 889; Law Commission, *Murder, Manslaughter and Infanticide* (London: TSO, 2006), para 5.24

centred one which envisages situations where a man is provoked by immediate violence.[123] Scots law's requirement that the response to the violence is immediate, leaves female domestic violence victims who killed their partner in his sleep, reliant on the discretion of prosecutors and jurors to acquit them of murder.[124] While this discretion is often exercised,[125] if Scots law is applied correctly, the defence of provocation does not allow an acquittal for murder in these circumstances[126] while the English defence of loss of control allows an acquittal for murder.[127]

English law also allows a loss of control caused by words.[130] Although it attaches some importance to the need to protect life,[131] it defines the defence broadly to recognise that people are provoked by non-violent acts. Conversely, Scots law restricts provocation by words to situations conveying sexual infidelity[132] because those who are not provoked by violence or sexual infidelity should control themselves.[133] Consequently, Scots law attaches more importance to the protection of life and crime control by restricting the use of the defence when there has been provocation by words.

Both jurisdictions recognise that sexual infidelity provokes violent responses.[134] However, Scots law uses this policy approach to justify offering the defence of provocation for any discovery of sexual infidelity.[135] In England, sexual infidelity will not in itself provide a defence of loss of control, but it can be used to establish that the "things said or done by

[123] Cairns, '"Feminising" Provocation in Scotland: The Expansion Dilemma' 2014 Jur Rev 237, 241
[124] *HMA* v *Greig* (unreported) May 1979, High Court of Justiciary; *HMA* v *Burns* (unreported) 2nd November 1981, High Court of Justiciary; *HMA* v *Paterson* (unreported) 28th October 1984, High Court of Justiciary; *HMA* v *Clark* (unreported) 1st November 1994, High Court of Justiciary. These cases are discussed in Connelly, 'Women Who Kill Violent Men' 1996 Jur Rev 215, 216.
[125] *ibid*
[126] *HMA* v *Greig* (unreported) May 1979, High Court of Justiciary per Lord Dunpark who directed the jury that Greig could not rely on the defence of provocation after stabbing her violent husband while he was sleeping. The jury acquitted her of murder. This case is discussed in Connelly, n124 above, 215.
[127] It is difficult for women to prove that they lost control. (Cairns, n123 above, 250-251)
[130] *R* v *Clinton* [2012] EWCA Crim 2
[131] There must be a "justifiable sense of being wronged." (Coroners and Justice Act 2009 s55(4))
[132] *Stobbs* v *HMA* 1983 SCCR 190
[133] *Drury*, n116 above, at [25]
[134] *Ibid,* at [16]; Clinton, n130 above, at [16]
[135] *Drury ibid,* at [25]; *Clinton ibid,* at [16]

the victim" were grave enough to invoke the defence.[136] Thus, in England it is more difficult to use sexual infidelity to obtain a defence to murder.

These differences are significant. Sexual infidelity,[137] provoking words[138] and fear of domestic violence[139] are common reasons why people kill. Thus, the differences apply to large numbers of cases. The ability to rely on provocation/ loss of control in different circumstances in each jurisdiction creates the possibility of the accused in one jurisdiction being convicted of culpable homicide or manslaughter, while an accused in the other jurisdiction would be convicted of murder because they could not rely on the defence and the prosecutor and jury were unwilling to exercise discretion.

These differences are not widely defended and the defence of provocation is being considered by the Scottish Law Commission as part of a review of the law of homicide in Scotland.[140] In *Drury* v *HMA*, Lord Rodger stated that Scots law had rejected the English approach "as a matter of policy."[141] He noted that "male possessiveness and jealousy should not today be an acceptable reason" for killing,[142] before stating that "whatever the policy arguments may be … they must be for consideration by the legislature"[143] and that he must apply the present law.[144] This suggests that he wanted the law reformed. Similar comments were made by Lord Nimmo Smith.[145] Thus, despite there being a deliberate choice in the past to avoid the English approach, the lack of support for provocation means that the difference is no longer defended and is a difference through conservatism.

2.5 Different Approach Similar Outcome

There were two different areas of law that took a similar approach but reached a different outcome: non-fatal offences against the person and murder.

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[136] *Clinton ibid*, at [77]
[137] *Berry* v *HMA* 1976 SCCR Supp 156; *Cosgrove* v *HMA* 1990 JC 333
[138] *Thomson* n117 above; *R* v *Dawes* [2013] EWCA Crim 322
[139] Connelly, n124 above, 215; Cairns, n123 above, 249
[140] McGlashan, 'Homicide' (Scottish Law Commission, 2018), at https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/ (last visited 08/07/2019).
[141] *Drury*, n116 above, at [25]
[142] *R* v *Smith* [2000] 3 WLR 654, 674
[143] *Drury*, n116 above, at [27]
[144] *ibid*
[145] *Ibid,* at [9]

2.5.1 Non-Fatal Offences Against the Person

In Scotland, the main non-fatal offences against the person are assault and causing reckless injury. Assault requires an attack on the victim[146] or an act causing the victim to reasonably believe that force will be used.[147] This must be accompanied by an (evil)[148] intention.[149]

Conversely, English law has five main non-fatal offences against the person: assault, battery, assault occasioning actual bodily harm (ABH),[150] wounding or inflicting grievous bodily harm (GBH) (s20 offence)[151] and wounding or causing GBH with intent (s18 offence).[152] Each offence, except the last, can be committed recklessly or intentionally. They represent a scale of offences with the offences listed first requiring a less serious *actus reus* and lesser degrees of intention and foresight than the ones listed later. This approach ensures that English law better meets the requirement of fair labelling (the idea that "the label applied to an offence ought fairly to represent the offender's wrongdoing"[153]) since the defendant is convicted of an offence which reflects the level of injury caused and their *mens rea*. Scots law to an extent meets this requirement by separating those who commit intentional harm from those who cause reckless harm. However, beyond recognising aggravating factors on the indictment or in a complaint,[154] it does not differentiate between the severity of attacks until sentencing.

Unlike Scots law, English assault includes, depending on the context,[155] using threatening words towards the victim.[156] However, Scots law is equally capable of punishing people who use threatening words by criminalising them under the crime of threatening and abusive behaviour.[157]

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[146] Gordon, n97 above, para 29.01
[147] *Atkinson* v *HMA* 1987 SCCR 534, 535
[148] There is debate about whether the intention must be evil (Jones, n85 above, para 9-15)
[149] *ibid*
[150] Offences Against the Person Act 1861 s47
[151] *ibid* s20
[152] *ibid* s18
[153] Ashworth, 'The Elasticity of Mens Rea' in Tapper, *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981), 45, 53
[154] *Kerr* v *HMA* 1986 SCCR 91
[155] *Tuberville* v *Savag*e (1669) 1 Mod Rep 3
[156] *Read* v *Coker* (1853) 13 CB 850
[157] Criminal Justice and Licensing (Scotland) Act 2010 s38

Scots law punishes those who cause or risk reckless injury under the crime of causing reckless injury, which has a *mens rea* involving objective recklessness[158] while English offences against the person can only be committed with subjective recklessness.[159] Subjective recklessness, unlike objective recklessness, requires that the accused foresaw the risk that their actions posed.[160] The significance of this difference is reduced because England's offences against the person require different levels of foresight. Thus, a person who does not satisfy the recklessness *mens rea* for the s20 offence may satisfy the lesser *mens rea* required for battery or ABH. However, if the defendant does not satisfy the *mens rea* for these offences because of a lack of foresight and a lack of intention they would be acquitted in a situation where, assuming they were objectively reckless, they would be convicted in Scotland.

Despite the different approaches similar outcomes occur. In both jurisdictions, it is an offence against the person to kick, bite, punch, push, stab, spit or throw something at a person and each jurisdiction punishes attacks ranging from slight contact to severe injury.[161] Overall, the two jurisdictions take different approaches to offences against the person but reach similar outcomes.

2.5.2 Murder

Murder is often argued to be a distinctive area of Scots law that produces different outcomes to English law because of its ability to convict people who are wickedly reckless.[162] However, it will be shown that this area of law is best categorised as a different approach but similar outcome.

In Scotland, murder requires the intentional or wickedly reckless "destruction of life."[163] The dividing line between murder and culpable homicide "depends on a moral

[158] Barton, 'Recklessness in Scots Criminal Law: Subjective or Objective?' 2011 Jur Rev 143, 153; *HMA* v *Harris* 1993 JC 150
[159] *R* v *Lamb* [1967] 2 QB 981 (The English s18 offence cannot be committed recklessly.)
[160] *ibid*
[161] Jones (2015), n85 above, para 9-07; McAlhone, n85 above, 157-163
[162] Hume, Commentaries on the Law of Scotland: Respecting the Description and Punishment of Crimes (Edinburgh: Bell & Bradfute, 1844), 24-25; Lord Goff, 'The Mental Element in the Crime of Murder' (1988) 104 (Jan) LQR 30, 54-58; Lord Cooper (1950) quoted in Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: Cambridge University Press, 1997), 162
[163] *Drury,* n116 above, at [11]

judgment."[164] The jury must decide whether the accused intentionally killed without a defence or displayed a level of wicked recklessness which morally deserves the life sentence associated with murder.[165] Where the death was not intended, murder requires greater risk-taking and moral blameworthiness than culpable homicide. To commit murder recklessly, the accused must act "in such a way that he [/she] didn't really care whether the victim lived or died,"[166] accompanied by an intention to injure.[167] Conversely, to commit culpable homicide recklessly the accused must show indifference to the consequences of their actions which requires a lower level of recklessness.[169] This approach gives discretion to the jury to decide whether the accused should be convicted of murder or culpable homicide.

English law provides a clearer boundary between murder and manslaughter. It defines murder as the unlawful killing of a person with an intention to cause death or GBH.[170] Foresight of a virtual certainty of either of these, when either outcome objectively was virtually certain, will mean that the jury is entitled to hold that the defendant intended the outcome.[171] The accused's intentions define the boundary between murder and manslaughter which punishes deaths where the accused did not intend to kill or cause GBH or had a defence to murder. Although English judges have made moral decisions about what types of *mens rea* are suitable for murder, unlike Scotland the dividing line between murder and manslaughter contains no reference to morality.

English law considers that causing GBH "can be so unpredictable that anyone prepared to act so wickedly" cannot complain if "death results."[172] This policy differs from Scotland where a non-intentional killer is deemed to deserve a murder conviction only where they show wicked recklessness and intended to injure. Although both jurisdictions recognise the crime control need to punish some non-intentional killings as murder,[173] in Scotland the extra element in the *mens rea* imposes an additional check to ensure that the accused is

[164] Cf. Gordon, n97 above, para 23.21
[165] *Cowie* v *HMA* 2010 JC 51
[166] *Ibid,* at [21]
[167] *Petto*, n88 above, at [13] and [28] For criticism of the definition of murder see McDiarmid, '"Something Wicked this Way Comes": The Mens Rea of Murder in Scots Law' 2012 Jur Rev 283
[169] *Transco* v *HMA* 2004 JC 29
[170] Child, n85 above, 146
[171] *R* v *Woolin*, n88 above
[172] *R* v *Cunningham* [1982] AC 566, 583
[173] *Cawthorne* v *HMA* 1986 JC 32, 35-36 and *ibid*

blameworthy enough to deserve a murder conviction and should help protect the accused's due process rights. It will be considered whether this additional element produces different outcomes between Scots and English law. To do this, it will be considered how Scots and English law deals with problematic murder cases where the death arose without the accused intending to kill and often not intending to injure.

The first difficult case involves a man setting fire to a densely populated block of flats using such a large amount of petrol that an explosion occurred. His intention is to dispose of a body. A woman dies in the fire. There is no intention to kill or direct intention to injure the fire victim, but it seems that the accused knew that the building was densely occupied. In *Petto* v *HMA,*[174] the HCJ rejected the accused's argument that these facts did not show that he had the intention to injure required to commit murder under Scots law and refused to allow him to withdraw his guilty plea to the murder of the fire victim. Setting fire to a busy tenement where people living on the upper floors relied on a single staircase to escape any fire resulted in the "the inevitable conclusion" that the accused acted "in the certain knowledge that those who are in the building [were] at a grave risk of being killed or seriously injured in consequence of the fire."[175] English law has recognised that the act of setting fire to a building will not always create a virtual certainty of death or GBH.[176] However, on the facts here, the fact that the tenement was densely populated, the limited escape routes for those living on the top floor and the fact that so much petrol was used that an explosion occurred suggest it was virtually certain that death or really serious injury would occur. If the accused foresaw this, the jury would be entitled to conclude that he obliquely intended GBH and could convict the accused of murder.

The second difficult case involves a man driving a car at high speed through a set of red traffic lights on the wrong side of the road, killing a boy who was crossing the road. The person's intention is to avoid police capture and he has no intention to injure or kill the boy.[177] The HCJ in *HMA* v *Purcell*[178] held that, under Scots law, the accused lacked the *mens rea* to commit murder because he did not intend to injure. Under English law, there would

[174] *Petto*, n88 above, at [13]
[175] *ibid*
[176] *R* v *Nedrick* (1986) 8 Crim App R 179
[177] Facts taken from the sentencing hearing in *HMA* v *Purcell* (unreported) 5th October 2007, High Court of Justiciary
[178] *HMA* v *Purcell* 2008 JC 131

be no direct intention to kill or cause GBH because the accused did not intend to injure or kill anyone. There was no oblique intention to injure because it was not virtually certain that someone would cross the road in front of the accused's car and suffer death or GBH. Thus, in neither jurisdiction could the accused be convicted of murder although it would be open for the jury to convict the accused of culpable homicide in Scotland or manslaughter in England.[179]

The third difficult scenario involves a fictional person placing a bomb on a plane causing the plane to explode in mid-air and killing everyone on board. They intend to claim insurance money for goods being carried by the plane which they hope will be destroyed by the explosion. They have no direct intention of injuring or killing anyone on the plane.[180] Under English law, this would be murder. Given that mid-air explosions normally result in death or really serious injury, there is a virtual certainty of death or GBH and it is likely that the defendant would foresee a virtual certainty of this.[181] Thus, the jury would be entitled to find that the accused obliquely intended the outcome. It is unclear how Scots law would deal with this scenario. One approach would be to hold that the accused's lack of intention to injure or kill meant that they lacked the *mens rea* for murder. Alternatively, in *Petto*, Lord Gill suggested that oblique intention might be used to hold that the accused obliquely intended the injury required for the wicked recklessness *mens rea*.[182] However, he later emphasised that he was not seeking to reform the *mens rea* of murder.[183] Bombing a plane shows indifference to whether the passengers live or die because the likely outcome is that people will die. Although the accused did not intend to injure, for the reasons just given they would likely foresee a virtual certainty of serious injury occurring. Thus, were oblique intention applied, it would allow Scots law to convict the plane bomber of murder under the wicked recklessness *mens rea*. Despite the uncertainty, it seems likely that Scots law would allow a murder conviction in these circumstances. In *Petto,* the HCJ's reasoning was heavily influenced by the fact that causing death by setting fire to a densely populated tenement seemed intuitively to be an act which should constitute murder.[184] This suggests that the HCJ would likely be influenced by the intuition that someone who blows up a plane

[179] *Purcell ibid,* at [4]; *R* v *Ballard* [2004] EWCA Crim 3305
[180] Law Commission, *Imputed Criminal Intent* (Law Com No 10, 1967), para 18
[181] Child, n85 above, 97-98
[182] *Petto*, n88 above, at [13]
[183] *Ibid,* at [20]
[184] McDiarmid, n167 above, 295

and causes mass loss of life deserves a murder conviction regardless of whether the bomber directly intended to injure.

The final difficult scenario considered here involves a one punch killer who did not intend to kill but intended to break the victim's nose. A broken nose is a really serious injury as required for there to be GBH under English law. Since the person intended this injury, they intended GBH and would be guilty of murder under English law.[185] In Scotland, the accused would meet the intention to injure part of the wicked recklessness *mens rea*. However, punching someone once does not normally[186] indicate indifference to whether the person lives or dies as is required to meet the recklessness element of the wicked recklessness *mens rea*. Since they did not intend to kill, they would not meet either *mens rea* for murder and could not be convicted of this offence. This is a rare example of where the two elements for the wicked recklessness *mens rea* result in a different outcome to English law.

The examples above show that contrary to what is sometimes suggested, in many difficult cases where the accused did not intend to kill and sometimes did not intend to injure, Scots and English law would reach the same outcome. This is despite Scots law, unlike English law, requiring two elements to be met before a non-intentional killer can have the *mens rea* for murder.

2.6 Genuine Distinctiveness

The genuinely distinctive differences can be categorised into three groups: rules determining what acts and omissions should be criminalised, offences and defences. Starting with the rules of criminalisation before considering the other groups of genuinely distinctive differences, it will be shown why they were categorised as being genuinely distinctive.

2.6.1 Voluntary Intoxication

Scots law takes a genuinely distinctive approach when compared with English law by denying a defence where the accused becomes voluntarily intoxicated on dangerous drugs

[185] Law Commission, *Murder, Manslaughter and Infanticide* (London: TSO, 2006), para 1.17
[186] It might if the accused knew that the victim was badly injured.

or alcohol.[187] The reasoning for this is crime control based and communitarian.[188] In *Brennan* v *HMA,* the HCJ reasoned that "self-induced intoxication has been increasingly a factor in crimes of violence."[189] The emphasis on the potential for "crimes of violence" illustrates the harm caused to the community by intoxicated people and emphasises that allowing a defence of intoxication would hinder the fight against crime and endanger the community by allowing this violent behaviour to continue unchecked.

No importance is attached to the fact that the accused may be so intoxicated that they struggled to form the *mens rea* of the offence. *HMA* v *McDonald*[190] stated that "it would be … dangerous [if] a man was not responsible for his actions because he had brought himself to a state like that of a madman by pouring … alcohol down his throat."[191] The words "brought himself to a state" emphasises that the accused made a choice[192] to become intoxicated and acted recklessly. Focusing on the accused's earlier state of mind allows the courts to find a blameworthy state of mind in the accused's decision to get intoxicated since the accused should have been aware of what they were doing when they made that decision.

Conversely, English law partially recognises that due process demands that the accused should have a blameworthy state of mind and that some people will be so intoxicated that they lack this while recognising the crime control need to protect the community from dangerously intoxicated people.[193] A person who is voluntarily intoxicated[194] and is charged with a crime of specific intent will have a defence of intoxication where they lacked the required *mens rea*.[195] Crimes of specific intent are normally[196] considered to require intention and differ from crimes of basic intent which require recklessness.[197] There is no

[187] *Brennan* v *HMA* 1977 SLT 151, 158 Cf. *Ebsworth* v *HMA* 1992 SLT 1161 (non-dangerous drugs)
[188] *Brennan ibid*
[189] *ibid* 153
[190] 1890 2 White 517
[191] *ibid*
[192] Some people are so addicted to drugs or alcohol that they have little choice to consume more.
[193] *DPP* v *Majewski* [1977] AC 443, 474-475, 479-480
[194] Cf. *R* v *Hardie* [1985] 1 WLR 64 (non-dangerous drugs)
[195] *Majewski*, n193 above, 476; *R* v *Kingston* [1995] 2 AC 355
[196] For criticism of this approach see Child, n85 above, para 13.2.3.1
[197] Child, n85 above, para 13.2.3.1

defence of voluntary intoxication for crimes of basic intent.[198] For these offences, the outcome will be the same as Scotland.

The different approaches produce significantly different outcomes. An intoxicated killer in Scotland may face a murder conviction and a life sentence.[199] In England, they could be acquitted of murder (a crime of specific intent) if their intoxication caused them to lack *mens rea* and be convicted of manslaughter which is a crime of basic intent.[200] The difference in outcome is more pronounced for theft in England, which is a crime of specific intent.[201] If the defence succeeds, there is no offence of basic intent to convict the accused of and they would go free. In Scotland, a person can be convicted of theft if they were intoxicated.[202]

These differences were deliberately chosen. The HCJ in *Brennan* v *HMA* noted that, unlike English law, Scots law has "never recognised a distinction between "specific" and "basic" intent."[203] Thus, the requirements for genuine distinctiveness are met.

2.6.2 Recklessness

The Scots law of recklessness represents another genuinely distinctive approach. Generally,[204] two approaches can be taken towards recklessness: an objective approach (which considers whether a reasonable person would have taken the risk) and a subjective approach (which considers whether the accused foresaw the risk).

English law considers the accused's subjective mind.[205] The accused must be aware that they were taking a risk or have the risk at the back of their mind[206] and it must be objectively unreasonable for the person to take the risk.[207] English law considers that it is immoral "to convict a defendant … on the strength of what someone else would have

[198] *R* v *Heard* [2007] EWCA Crim 125
[199] *Brennan,* n188 above, 51
[200] *R* v *Lipman* [1970] 1 QB 152
[201] Child, n170 above, 525
[202] *Brennan,* n188 above, 51
[203] *ibid*
[204] Cf. Stark, 'Rethinking Recklessness' 2011 Jur Rev 163.
[205] *R* v *G* [2003] UKHL 50, at [41]
[206] *R* v *Parker* (1976) 63 CAS 211
[207] *G,* n205 above, at [41]

apprehended if the defendant himself had no such apprehension."[208] This is a liberal approach. It recognises that people need autonomy to lead their lives. People can avoid state interference by choosing not to commit criminal acts. Children or people with learning difficulties may be unaware of the risk and be unable to choose to avoid state sanctions. Punishing them would violate their due process rights by ignoring the fundamental principle that criminal law should normally only punish blameworthy conduct.[209]

In Scotland, there are many tests for recklessness applied by Scots law and different tests are applied for murder,[210] culpable homicide,[211] causing reckless injury[212] and statutory offences.[213] However, it seems[214] that Scots law, with the possible exception of lawful act culpable homicide,[215] requires objective recklessness.[216] The test used to commit murder was discussed in section 2.5.2 while culpable homicide will be considered separately in section 2.6.5.

The main test applied to non-fatal common law crimes of recklessness is set down in *Quinn* v *Cunningham*.[217] The accused must show "utter disregard" for what the "consequences" of their actions "may be so far as the public are concerned."[218] In *Cochrane* v *HMA,* the HCJ argued for an objective approach because it is thought to create consistency[219] in the law by ensuring that if two cases with similar facts occur the courts will treat them similarly.[220] This allegedly makes prosecutions more efficient since the courts can apply the same rule to everyone without considering what the accused was actually thinking. Scots and English law have a long history of regulating risk by attaching little importance to the accused's state of mind. In Victorian times, increased industrialisation meant that they regulated risk

[208] *Ibid,* at [33]
[209] Packer, n73 above, Chapter 6
[210] *Cowie*, n165 above, at [21]
[211] *Transco* v *HMA* 2004 JC 29, 34
[212] *HMA* v *Harris* 1993 JC 150, 156
[213] *Allan* v *Patterson* 1980 JC 57
[214] The position is not completely clear: (Barton, n158 above, 158-161; McDiarmid (2018), n85 above, 80; Ferguson, n85 above, para 6.15)
[215] *Transco* v *HMA* 2004 JC 29, 34
[216] Jones, n161 above para 3-30; Gordon, n97 above, para 7.61; Gordon (2005), n85 above, section 81; Christie (2009), n85 above, 40; Connelly, n85 above, 12; Cubie, n85 above, para 2.25; Barton, n158 above, 161
[217] 1956 SLT 55
[218] *Quinn* v *Cunningham* 1956 SLT 55; Jones, n161 above, para 3-31
[219] Different triers of fact may have different views about what is objectively unreasonable.
[220] *Cochrane* v *HMA* 2001 SCCR 655, at [19]

using strict liability offences or by attaching limited importance to the accused's intention to facilitate convictions.[221] Modern Scots law engages in similar risk management by using objective recklessness to facilitate the prosecution of crimes by disregarding the accused's state of mind. Conversely, English law has moved further away from the Victorian desire for risk management by considering the accused's foresight.

Often the accused will foresee the risk and will be deemed reckless in both jurisdictions. However, significant differences in outcome occur. The English approach benefits children or adults lacking the capacity to understand the dangers of risk-taking. There have been several English cases where the accused has been acquitted after recklessly setting a fire and/or damaging property after failing to foresee the risk.[222] In Scotland, it seems that[223] a person who recklessly damages property (malicious mischief[224] or vandalism[225]) or recklessly sets a fire (culpable and reckless fire-raising)[226] without being aware of the risk can be objectively reckless and commit an offence when they would be acquitted in England.

The HCJ has not expressly rejected the English approach. However, it has given several policy reasons for avoiding subjectivism in cases not involving culpable homicide.[227] If the HCJ were to continue to apply the objective approach to cases not involving culpable homicide, then the Scottish courts would be likely to make a deliberate choice to reject the English approach. Thus, the requirements of genuine distinctiveness are met.

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[221] Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: Cambridge University Press, 1997), 125

[222] *R* v *Stephenson* [1979] QB 695; *R v Spratt* [1990]1 WLR 1073*; G* n205 above, at [33]

[223] *HMA* v *S* (unreported) 5th October 1999, High Court of Justicary

[224] Barton, n214 above, 157 and *Ward* v *Robertson* 1938 JC 32, 36

[225] The test for recklessness draws on the test set down in *Allan* v *Patterson,* n213 above (Black v *Allan* 1985 SCCR 11, at [12]) which is considered to use objective recklessness. (Barton, n214 above, 153)

[226] *Carr* v *HMA* 1995 JC 203, 208 The court applied part of the test used in *Allan* v *Patterson,* n213 above which is considered to be an objective test. (Barton, n214 above, 151 cf. Ferguson, n32 above, paras 13.6.2-13.6.3) At p206 of *Carr* the Appeal Court decision did not contradict a statement by the trial judge that an objective test was applied. It is not sufficient for the accused to accidentally create a fire. (*McCue* v *Currie* 2004 JC 73)

[227] *Cochrane*, n220 above, at [19]

2.6.3 Causation

Causation represents another rule of criminalisation which is genuinely distinctive. However, there are several areas of overlap between the jurisdictions. Both will not normally find a break in the chain of causation where the accused has attacked the victim and the victim's life support is turned off,[228] the victim dies from poor medical treatment[229] or where the victim has a medical condition which makes them more susceptible to dying.[230]

A genuinely distinctive difference occurs where an accused supplies drugs and a person is harmed by voluntarily consuming them. In England, the voluntary act of "a fully-informed and responsible adult" in consuming drugs normally[231] breaks the chain of causation and the supplier is not responsible for the victim's harm.[232]

In Scotland, it seems that, except possibly where the drugs are supplied to assist a suicide,[233] the victim's voluntary ingestion of drugs "will not necessarily break the chain of causation" where the accused's actions in recklessly supplying the drugs directly caused the victim's harm.[234]

English law "generally assumes the existence of free will."[235] This liberal approach perceives adults as autonomous individuals who should be allowed to consume dangerous drugs. Conversely, Scots law considers that the victim's consent "is of no importance"[236] and that "there is no material distinction between the supply of the [drugs] and the direct

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[228] *Finlayson* v *HMA* 1979 JC 33; *R* v *Malcherek* (1981) 1 WLR 690
[229] *Williamson* (1866) 5 Irv 326, 328; *R* v *Smith* [1959] 2 QB 35, 42 cf. *R* v *Jordan* (1956) 40 Cr App R 152
[230] *Bird* v *HMA* 1952 JC 23; *R* v *Hayward* (1908) 21 Cox 692
[231] Cf. *R* v *Burgess* [2008] EWCA Crim 516, at [12]; *R* v *Evans* [2009] EWCA Crim 650, at [31]
[232] *R* v *Kennedy* [2007] UKHL 38, at [25]
[233] There is a possible exception to this rule in cases involving the supply of drugs intended to assist a person wanting to commit suicide. (*Ross* v *Lord Advocate* [2016] CSIH 12, at [30] per Lord Carloway; Jones and Taggart, *Criminal Law* (Edinburgh: W Green, 7th ed, 2018), section 5-18 and 5-33 For discussion of *Ross* see Chalmers, 'Clarifying the Law on Assisted Suicide? Ross v Lord Advocate' (2017) 21(1) Edin LR 93.)
[234] *MacAngus* v *HMA* [2009] HCJAC 8, at [30], [42], [48]; Farmer, 'MacAngus (Kevin) v Hm Advocate: "Practical, But Nonetheless Principled"?' (2009) 13(3) Edin LR 502.
[235] *Ibid,* at [14]
[236] *Khaliq* v *HMA* 1984 JC 23, 32–34

administration of [them into the victim]."[237] Thus, it adopts a moralistic approach where drug suppliers are considered as blameworthy as someone who directly administered the drug into the victim. This significantly different approach was deliberately chosen. The Scottish courts discussed the English approach in detail and rejected it because they saw "no reason" not to follow existing Scottish case law on the issue.[238]

Exceptions to the English rule reduce the number of cases where a different outcome will occur. Both jurisdictions hold the accused liable where a child is harmed by the supply of drugs or where they directly administer the drug into the victim.[239] English law is also willing to find liability where the defendant's action in supplying the drugs has created a state of affairs which the defendant "knows, or ought reasonably to know, has become life threatening" and they failed to get help.[240] In Scotland, since the chain of causation is not normally broken by the victim voluntarily consuming drugs, Scots law can find liability for an offence against the person without basing liability on the accused's failure to get help.[241] However, most cases involve adults who voluntarily consume supplied drugs and in many of these cases a different outcome will be achieved.[242] In Scotland, if the victim dies, the accused could be convicted of culpable homicide while in England they would be acquitted. Where the victim survives, the accused could be convicted of an offence against the person in Scotland and acquitted in England.

2.6.4 Prosecuting Children

An important part of the process of criminalisation involves determining which people should be held criminally responsible for their actions. It will be considered how each jurisdiction determines the age of criminal responsibility and when children should be prosecuted and show that Scots law takes a genuinely distinctive approach.

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[237] *MacAngus*, n234 above, at [34]
[238] *ibid*, at [43]-[48]
[239] *Kennedy* n232 above, at [14]; *Burgess,* n231 above, at [12]; *Kane* v *HMA* [2009] HCJAC 8; *Khaliq*, n236 above, 32-34.
[240] *R* v *Evans* [2009] EWCA Crim 650, at [30]
[241] *MacAngus* v *HMA* [2009] HCJAC 8, at [30], [42], [48]
[242] *Kennedy ibid*; *Lord Advocate's Reference (No.1 of 1994)* 1996 JC 76; *Ulhaq* v *HMA* 1991 SLT 614

Scotland currently separates the age of criminal responsibility from the age where a child can be prosecuted.[243] Children over eight are criminally responsible for their actions, but only children over twelve can be prosecuted in an adult court.[244] Children between eight and twelve can commit criminal offences and obtain a criminal record. Children in this age group suspected of committing an offence are sent to a Children's Hearing. If the child accepts that they committed the alleged offence or a Sheriff finds this beyond reasonable doubt, then the Rehabilitation of Offenders Act 1974 s3 states that the child obtains a criminal conviction and record. The Children's Hearing cannot punish[247] the child.[248] Instead, it makes orders to enhance the child's welfare. Children over twelve can be tried in the adult courts for serious crimes or sent to the Children's Hearing. For the former to occur, the Lord Advocate's consent is needed if the child is under 16 and this is rarely given.[249] The age of criminal responsibility will be raised to twelve.[250] When implemented, children under twelve will no longer be sent to Children's Hearings on the ground that they committed an offence.[251] Instead, other grounds for referral to the Children's Hearing will be relied on to ensure that children who commit an act which would be criminal if the child was above the age of criminal responsibility can have their welfare considered.[252] In England, the age of criminal responsibility and the minimum age for prosecuting children is ten.[253]

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[243] Criminal Procedure (Scotland) Act 1995 s41-41A
[244] *ibid*
[247] Beyond giving them a criminal record.
[248] Children's Hearings (Scotland) Act 2011 s37(3)
[249] Criminal Procedure (Scotland) Act 1995 s42(1); Lord Gill, *Report on Age of Criminal Responsibility* (Scot Law Com No 185, 2002), para 3.6; McCallum, 'SPICe Briefing Children and the Scottish Criminal Justice System' (Scottish Parliament, 2016), 8 at http://www.parliament.scot/ResearchBriefingsandFactsheets/S5/SB_16-54_Children_and_the_Scottish_Criminal_Justice_System.pdf (last visited 08/12/2018). Prosecutions of children between 16 and 18 years old are more common. (Vaswani, Dyer and Lightowler, 'What Is Youth Justice?: Reflections on the 1968 Act' (Social Work Scotland, 2018), 18 at https://socialworkscotland.org/wp-content/uploads/2018/12/SWS-Youth-Justice-.pdf (last visited 08/12/2018).)
[250] Age of Criminal Responsibility (Scotland) Act 2019 s1
[251] *ibid* s3
[252] Ross, 'SPICe Briefing Age of Criminal Responsibility (Scotland) Bill' (Scottish Parliament, 2018), 7 at https://sp-bpr-en-prod-cdnep.azureedge.net/published/2018/8/15/Age-of-Criminal-Responsibility--Scotland--Bill/SB18-49.pdf (last visited 08/12/2018).
[253] Children and Young Persons Act 1933 s50

This has significant practical consequences. In Scotland, unlike in England, an eight or nine-year-old who commits an offence will obtain a criminal record. Although convictions normally become spent within a year, there are many jobs where spent convictions must be disclosed to potential employers.[254] The child has the opportunity to challenge the disclosure of the conviction by arguing that it is irrelevant to the type of job for which they are applying.[255] However, if in later life the child fails to challenge the disclosure of the conviction, it may impact on the child's future job prospects.

In England, a child of ten or eleven years can be prosecuted and subjected to punishment, while in Scotland they cannot be prosecuted. The prosecution of children risks that the child may lack the capacity to engage in the proceedings.[256] Children may struggle to understand the consequences of their actions and that they acted wrongly.[257] By prosecuting younger children than in Scotland, England increases the danger of these problems arising. Since large numbers of children commit offences, these differences affect large numbers of cases.[258]

There is a significant policy difference. Scotland's approach is welfare and due process based. Before 2011, the age of criminal responsibility and the age that child could be

[254] Scottish Government, 'Age of Criminal Responsibility (Scotland) Bill Policy Memorandum' (Scottish Parliament, 2018), para 15 at http://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20(Scotland)%20Bill/SPBill29PMS052018.pdf (last visited 20/11/2018); Anonymous, 'Offences Which Must Always Be Disclosed' (Disclosure Scotland, 2016), at http://www.disclosurescotland.co.uk/documents/HigherLevelDisclsoure--revisedAlwaysDiscloseList--8February2016.pdf (last visited 10/12/2016).

[255] Protection of Vulnerable Groups (Scotland) Act 2007 s52A

[256] Jacobson and Talbot, 'Vulnerable Defendants in the Criminal Courts: A Review of Provision for Adults and Children' (Prison Reform Trust, 2009), 43 at http://www.prisonreformtrust.org.uk/uploads/documents/courtreport.pdf (last visited 13/01/2019); Taylor, *Review of The Youth Justice System in England And Wales* (Cm 9298, 2016), para 91

[257] *T* v *UK* (2000) 30 EHRR 121

[258] Youth Justice Board, 'Youth Justice Statistics 2016/17 England and Wales' (Ministry of Justice, 2018), 2 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/676072/youth_justice_statistics_2016-17.pdf (last visited 08/12/2018); Robinson, Leishman and Lightowler, 'Children and Young People in Custody in Scotland Looking Behind the Data' (Youth Justice Improvement Board, 2017), 10 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/676072/youth_justice_statistics_2016-17.pdf (last visited 08/12/2018).

prosecuted with the Lord Advocate's consent was eight.[259] The Scottish Parliament altered this approach and imposed a higher age for prosecuting children to comply with international human rights law,[260] which emphasises the need only to prosecute children who can understand right from wrong.[261] Despite this, Scots law recognises the need to intervene at an early age when a child offends. It for now, maintains a low age of criminal responsibility to ensure that child offenders over eight can be sent to Children's Hearings to enable their welfare to be considered.[262]

English law also recognises the need for early intervention by using mechanisms such as community based methods to help child offenders and more rarely criminal prosecutions.[263] Unlike Scotland, it considers[264] that it is in the child offender's welfare to prosecute them at an earlier age to alter their behaviour through punishment or welfare based orders.[265] Although efforts are made to ensure that trials involving young children are fair,[266] less emphasis than in Scotland is put on protecting the child's human rights by preventing young children from being prosecuted.[267] There is a focus on crime control and a fear that increasing the age of criminal responsibility would allow young children to commit horrific crimes and go unpunished.[268]

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[259] Morton, *Report of Departmental Committee Appointed by The Secretary of State for Scotland* (HMSO, 1928), 48

[260] United Nations Convention on the Rights of the Child 1989 Article 40(3)(a)

[261] Anonymous, 'Criminal Justice and Licensing (Scotland) Bill Policy Memorandum' (Scottish Government, 2009), 190 at http://www.parliament.scot/S3_Bills/Criminal%20Justice%20and%20Licensing%20(Scotland)%20Bill/b24s3-introd-pm.pdf (last visited 13/01/2019).

[262] Scot Law Com No 185, n249 above, paras 2.23 2.26

[263] HL Deb vol 783 cols 2209-2210 08 September 2017 (Baroness Vere)

[264] It is unclear whether punishment prevents reoffending. (Anonymous, 'Criminal Damage: Why We Should Lock up Fewer Children' (Prison Reform Trust, 2008), at http://www.prisonreformtrust.org.uk/Portals/0/Documents/CriminalDamage.pdf (last visited 17/10/2016).

[265] HL Deb vol 763 col 816 20 December 2010 Lord McNally; Field, 'Practice Cultures and the 'New' Youth Justice in (England and) Wales' (2007) 47 BRIT J CRIMINOL 311.

[266] English law has not always achieved this (*T,* n257 above).

[267] Adjustments are made to the court procedures to consider the child's age (Criminal Procedure Rules 2015/1490 3.9 and section 3.1 below)

[268] Anonymous, 'Calls to Raise Age of Criminal Responsibility Rejected' (BBC, 2010), at http://news.bbc.co.uk/1/hi/uk/8565619.stm(last visited 13/10/2016).

There was a deliberate rejection of the English approach. The Scottish Law Commission considered the English approach.[269] For the policy reasons given, the Scottish Government followed the Scottish Law Commission's recommendation that only children over twelve should be prosecuted.[270] Thus, the requirements of genuine distinctiveness are met.

2.6.5 Culpable Homicide/ Manslaughter

Starting with culpable homicide and manslaughter substantive offences which are genuinely distinctive will be considered. The term "culpable homicide" takes its terminology from Roman law and represents one of the few areas of Scots criminal law to have some connection (at least in terminology) to civilian law. There are three main types of culpable homicide/manslaughter in Scotland and England: voluntary act culpable homicide/manslaughter, unlawful act culpable homicide/manslaughter and lawful act culpable homicide/gross negligence manslaughter. They will be considered in turn before considering why the offence of culpable homicide is genuinely distinctive.

2.6.5.1 Voluntary Act Culpable Homicide/ Manslaughter

Where the accused successfully invokes a partial defence to murder such as diminished responsibility or provocation/loss of control, they are convicted of voluntary act culpable homicide/ manslaughter. The partial defences of diminished responsibility and provocation/loss of control were considered in sections 2.1 and 2.4.1 respectively.

2.6.5.2 Unlawful Act Culpable Homicide/Manslaughter

Both jurisdictions punish unlawful acts resulting in death.[271] In Scotland, unlawful acts include an "assault or analogous cases, [where] the conduct is directed … against the victim."[272] The death need not be foreseeable.[273] This represents a crime control approach. It is considered that "it would never do for" those who "lay violent hands on [the vulnerable to] say that [the victim] would never had died if they had not been [vulnerable]."[274] If the accused commits an unlawful act, Scots law imposes constructive liability on the basis that

[269] Scot Law Com No 185, n249 above, paras 5 and 21-22
[270] Anonymous, n261 above, para 192
[271] *MacAngus*, n234 above, at [29]; *R* v *Church* [1966] 1 QB 59, 70
[272] *ibid*
[273] *HMA* v *Hartley* 1989 SLT 135, 136
[274] *HMA* v *Robertson* (unreported) August 1945, High Court of Justicary

the accused's blameworthy act makes them responsible for all the consequences of their actions even if they are unforeseeable.

In England, the defendant must commit an unlawful act which foreseeably causes death. Unlawful acts are defined more broadly than Scots law and include any criminal act[275] but not omissions.[276] The unlawful act must be one which "all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm."[277] This focuses more on the defendant's due process rights by not punishing objectively unforeseeable deaths.[278] However, the English foreseeability test is easily met. The sober reasonable person need not foresee the actual harm caused so long as they foresee some harm.[279] Thus, in most cases, the foreseeability requirement will not result in a different outcome because it will be possible to prove that harm was foreseeable.[280] However, when it cannot be met the consequences are significant. In Scotland, a person who spits on the victim or turns over their hand causing them to fall and die commits the unlawful act of assault and would be guilty of culpable homicide.[281] In England, the accused would be acquitted of manslaughter because the harm was unforeseeable.

After considering English case law, the HCJ in *Lord Advocate's Reference (No.1 of 1994)* rejected the important requirement in English law that the outcome must be objectively foreseeable.[282] Thus, the difference was deliberately chosen.

2.6.5.3 Gross Negligence Manslaughter/ Lawful Act Culpable Homicide

Both jurisdictions punish reckless killings (although this type of manslaughter is rarely used in England)[283] and English law punishes negligent deaths.[284] Scots law punishes deaths caused by recklessness showing "gross or wicked or criminal negligence, something

[275] *R* v *Kennedy* [2007] UKHL 38
[276] *R* v *Lowe* [1973] QB 702
[277] Church, n271 above, 70
[278] *ibid*
[279] *ibid*
[280] *R* v *Ball* [1989] Crim LR 730
[281] *Gardiner* v *HMA* [2007] HCJAC 14; *Hartley*, n273 above, 136
[282] *Lord Advocate's Reference (No.1 of* 1994*)* 1996 JC 76, 81-82 which considered the English case of *R* v *Dalby* [1982] 1 WLR 621
[283] *Transco*, n169 above; Child, n170 above, para 6.3.3
[284] *R* v *Adomako* [1994] 3 ALL ER 79

amounting to … a criminal indifference as to consequences."[285] It seems[286] that Scots law focuses on due process and considers that the accused should not be punished where they were unaware of the risk posed by their actions.[287] Conversely, English law for gross negligence manslaughter considers whether the accused had a duty of care, whether they breached it by acting objectively unreasonably and whether the breach was severe enough to be criminal.[288] There is a sliding scale of liability from intention to recklessness to negligence. Intention is the most difficult for the prosecutor to prove. Recklessness is easier to prove, although in England it requires that the accused foresaw the risk. Negligence is the easiest to prove because it requires no foresight of the risk. English law considers that a person who negligently causes death deserves a manslaughter conviction. The defendant does not need to foresee the possibility of death although their "age and experience" are considered to determine whether they acted objectively unreasonably.[289] Consequently, English law takes a crime control approach which deems that the need to punish negligent deaths justifies attaching little importance to the defendant's awareness of the risk. This different approach is deliberate. In *Transco* v *HMA,* the HCJ rejected the English approach for failing to attach importance to the accused's awareness of the risk.[290]

The differences create significant practical differences. It is easy to imagine that some people will not foresee the risk they were taking.[291] The accused's lack of awareness would mean they would be acquitted in Scotland while they could be convicted of manslaughter in England. However, where the accused is aware of the risk a similar outcome would be reached in both jurisdictions.[292]

2.6.5.4 Categorisation

Scots law generally[293] seeks to protect human lives and implement crime control by punishing unforeseeable deaths resulting from unlawful acts and by restricting the defence

[285] *Transco*, n169 above, at [36]
[286] Barton, n214 above, 160
[287] *Transco*, n169 above, at [63]
[288] *Adomako*, n284 above, 187
[289] *R* v *S* [2015] EWCA Crim 558, at [20]
[290] *Transco*, n169 above, at [6]
[291] *R* v S [2015] EWCA Crim 558; *R* v *Misra and Srivastava* [2004] EWCA Crim 2375
[292] *HMA* v *Purcell* [2007] HCJ 13; *R* v *Ballard* [2004] EWCA Crim 3305
[293] Cf. lawful act culpable homicide

of provocation.[294] Conversely, English law although attaching importance to the protection of life,[295] focuses more on imposing barriers to prosecutions and protecting the defendant by only punishing unlawful acts which foreseeably resulted in death and by defining the defence of loss of control broadly.[296]

The HCJ deliberately chose a different approach for lawful act culpable homicide, unlawful act culpable homicide and provocation.

Significant practical differences exist. These differences create the possibility of a person being convicted of culpable homicide/manslaughter in one jurisdiction and acquitted in the other jurisdiction. Differences between provocation and loss of control create situations where a person in one jurisdiction would be convicted of murder, while in the other they would be convicted of a lesser homicide offence. The broad range of differences found within culpable homicide and manslaughter means that many cases will be affected by the differences between the two offences. Accordingly, the requirements of genuine distinctiveness are met.

2.6.6 Self-Defence

The genuinely distinctive defences of self-defence and consent to bodily injury will now be considered. In both jurisdictions, people can use force to protect themselves or others from violence.[298] Both jurisdictions require that the person being defended is in immediate danger[299] and allow self-defence where the accused mistakenly believes that force is needed.[300] Unlike English law,[301] in Scots law this belief must be reasonable.[302] Its policy focuses on preservation of life and protecting the victim from injury. A person should not use force without considering whether it was reasonable to subject the victim to this.[303] In England, the accused's belief in the need to use force need not be reasonable but the

[294] Provocation and unlawful act culpable homicide.
[295] By punishing negligent deaths
[296] Loss of control and unlawful act manslaughter
[298] *HMA* v *Doherty* 1954 JC 1, 4-5; *R* v *Duffy* [1967] 1 QB 63
[299] *Doherty ibid*, 4 (Scotland) *Evans* v *Hughes* [1972] 3 All ER 412, cf. *Attorney General's Reference (No.2 of 1983)* [1984] QB 456 (England)
[300] *Lieser* v *HMA* 2008 SLT 866; *R* v *Williams* (1984) 78 Cr App R 276
[301] *Williams ibid*
[302] *Lieser*, n300 above, at [10]
[303] *ibid*

accused's response to what they believed to be the threat must be reasonable.[304] English law although recognising the need to protect life,[305] considers it unfair to punish someone who unreasonably assumes that force was needed.[306]

Scots law further protects the victim's wellbeing by holding that force may only be used where the accused could not retreat.[307] England attaches importance to the need for people to be able to defend themselves and allows a person to strike first in response to an imminent danger[308] even if they could have retreated.[309] However, the failure to retreat is considered when deciding whether the defendant's response to the threat is reasonable.[310] There is a danger that a defendant who could easily have retreated may be deemed to have responded to the threat unreasonably and like in Scotland be denied the defence.[311] Nonetheless, a difference arises because unlike in Scotland, the English approach leaves open the possibility that the accused might be able to use self-defence and be acquitted where they could have easily retreated.[312]

These differences have significant practical consequences. There are large numbers of Scottish cases where the accused was unable to rely on self-defence because they could have run away or they unreasonably believed that self-defence was needed.[313] They can be convicted of an offence against the person and, where the victim dies, murder. In England, the defendant may be able to rely on self-defence in these situations and be acquitted.

The HCJ has not expressly chosen a different approach to England. However, it has been presented with cases where it could have accepted an unreasonable belief in the need to use self-defence or allowed the defence when the accused could have run away.[314] Thus, it

[304] Child, n85 above, 589
[305] The force used must be reasonable based on the accused's perception of the danger. (Criminal Justice and Immigration Act 2008 s76)
[306] *Williams,* n301 above, 281
[307] *McBrearty* v *HMA* 1999 SLT 1333, 1334
[308] *Devlin* v *Armstrong* [1971] NI 13
[309] *Beckford* v *R* [1988] AC 130
[310] *R* v *Bird* [1985] 1 WLR 816, 819
[311] Leverick, *Killing in Self-Defence* (Oxford: Oxford University Press, 2006), section 4.2.3
[312] *ibid*
[313] *McInally* v *HMA* [2006] HCJAC 48; *Owens* v *HMA* 1946 JC 119; *Jones* v *HMA* 1990 JC 160
[314] *ibid*

has deliberately rejected aspects of the English approach. Consequently, the requirements of genuine distinctiveness are met.

2.6.7 Consent to Bodily Injury

English law recognises a defence for "rough and undisciplined sport or play where there is … no intention to cause bodily harm."[315] The English courts are unwilling to interfere with people's autonomy to engage in horseplay that results in serious injury.[316] For example, in *R* v *Aitken,* which involved the defendant setting the victim's clothing alight as a prank, the court noted that the victim's actions showed "acceptance ... that horseplay … might well take place."[317] Thus, emphasis is placed on the victim's knowledge that by continuing to stay they would be subjected to horseplay and by failing to leave they accepted this risk. This is a liberal argument. For liberals such as Feinberg, a person who is injured during a dangerous consensual activity suffers "perfectly real harms [but] insofar as [the victim] undertook the dangerous activity … voluntarily, they were not wronged by anyone."[318]

Conversely, Scots law does not recognise this defence. In *Stewart* v *Nisbet*,[319] the accused handcuffed the complainer and restricted her breathing allegedly with her consent. The HCJ stated that: "It is doubtful whether [consent] would have amounted to a defence. [W]hether the appellant thought he was engaging in "banter" or "horseplay" … his actions … constitute ... assault."[320] This suggests that even if the court had not doubted whether the victim consented, it would be unwilling to provide a defence of consent. The court took a paternalistic approach, which unlike England, attached little importance to the need for individual autonomy. It emphasised the harm suffered by the victim noting that she suffered "pain and distress."[321] This was designed to show that regardless of whether the

[315] *R* v *Donovan* [1934] 2 KB 498, 508
[316] The English courts are sometimes less willing to protect sexual autonomy by recognising a defence of consent to bodily injury caused by consensual sexual practices. (*R* v *Brown* [1994] 1 AC 212) However, there are several cases where such a defence has been allowed. (*R* v *Mechen* [2006] EWCA Crim 2414; *R* v *Emmett* [1999] EWCA Crim 1710). The case law on injuries caused by consensual body modifications is mixed. (*R* v *BM* [2018] EWCA Crim 560; *R* v *Wilson* [1996] Crim LR 573)
[317] *R* v *Aitken* [1992] 1 WLR 1006
[318] Feinberg, n35 above, 32-33
[319] [2012] HCJAC 167
[320] *ibid,* at [38]
[321] *ibid,* at [40]

victim consented she suffered significant injury. Encapsulated in this is moral disapproval of the behaviour. The court states that: "It is perhaps difficult to grasp just how the complainer could ever [consent to this] bizarre behaviour."[322] Thus, by not allowing consent to horseplay, the court considered themselves to be protecting people from an unusual, injurious and immoral practice.

Few cases deal with horseplay and this reduces the practical significance of the difference. However, when a case does arise, the different approaches have significant consequences. In England, the defendant who injures another during consensual horseplay can be acquitted, even if the injuries are severe.[323] In Scotland, the accused could be convicted of an offence against the person.[324]

Although the Scottish courts have not expressly considered English case law, their differing policy decisions mean that they have rejected the policy ideas given importance in England. Thus, the courts have deliberately taken a different approach, which achieves different outcomes and the difference is genuinely distinctive.

2.7 Summary of Findings

Type of Difference	**Does the Difference in Outcome Impact on Large Numbers of Cases?**	
	Yes	**No**
Genuinely distinctive	Voluntary intoxication, recklessness, causation, prosecuting children, culpable homicide	Consent to bodily injury, self-defence
Difference through conservatism	Provocation/loss of control	

Table 2: Areas of difference between Scots and English criminal law impacting on large numbers of cases

These findings provide evidence of Scots law taking a distinctive approach although there were several areas of similarity. These areas of similarity were represented by the five trivial differences, two contextual differences and one symbolic difference identified above. There were also several significant differences including seven genuinely distinctive areas of

[322] *ibid,* at [38]
[323] *R* v *Jones* (1986) 83 Cr App R 375
[324] *Stewart*, n319 above, at [40]

criminal law, two areas which took a significantly different approach but reached a similar outcome and one difference through conservatism. These areas showed significantly different policy and theoretical approaches being taken and/or displayed significant differences in outcome. Table 2 shows that for the genuinely distinctive differences and differences through conservatism, most had differences in outcome which applied to large numbers of cases. Scots law attaches more importance to crime control, moralism and communitarianism than England. Although the study considered a finite sample of criminal law rules these findings suggest that, regardless of whether the areas not considered are similar or different to English law, there are many significant differences which could be undermined by the SC.

3 Criminal Evidence Law

This section assesses differences occurring between Scots and English criminal evidence law to establish whether it also contains genuinely distinctive differences which could be affected by the JCPC/SC's jurisdiction.[325] Table 3 below shows the areas of criminal evidence law considered and the type of difference they display.

[325] This section draws on the following sources of Scots evidence law: Auchie, *Evidence* (Edinburgh: W Green, 5th ed, 2018); Brown, *Criminal Evidence and Procedure: An Introduction* (Edinburgh: Avizandum Publishing, 3rd ed, 2010); Raitt, Keane and Davidson, *Evidence: Principles, Policy and Practice* (Edinburgh: W Green, 3rd ed, 2018); Ross and Chalmers, *Walker and Walker the Law of Evidence in Scotland* (Hayward's Heath: Bloomsbury, 4th ed, 2015). The following sources were used for the discussion of English evidence law: Lucraft et al, *Archbold: Criminal Pleading, Evidence and Practice 2019* (London: Sweet & Maxwell, 67th ed, 2018); Malek, Auburn and Bagshaw, *Phipson on Evidence* (London: Sweet & Maxwell, 19th ed, 2017); Tapper, *Cross and Tapper on Evidence* (Oxford: Oxford University Press, 12th ed, 2010); Taylor, *Evidence* (Harlow: Pearson Education, 3rd ed, 2015)

Type of Evidence	Type of Difference
Confessions	Trivial
Unfairly obtained evidence	
Burdens of proof	
Presumptions	
Who can be a witness?	
Vulnerable witnesses	
Expert witnesses	
Hearsay	Genuinely distinctive
Dock identification	
Corroboration	
The right to silence	
Bad character evidence	

Table 3: Areas of criminal evidence law and their categorisation

3.1 Trivial Differences

Table 3 shows that although there were many areas of similarity, there were several genuinely distinctive differences.

The trivial differences lacked different policy approaches or outcomes between Scots and English law. Thus, confessions were categorised as trivial differences because both jurisdictions normally reach the same outcomes. In England, confessions are admissible unless they were obtained by oppression, are unreliable, or it would be unfair to admit the evidence.[326] Conversely, Scots law only allows confessions to be excluded where they were unfairly obtained.[327] English law considers a confession oppressive where there was severe bullying[328] and unreliable where the accused is threatened, offered inducements to confess[329] or is vulnerable.[330] Scots law can exclude this evidence on the grounds of unfairness.[331] A difference arises because in Scotland a confession obtained in breach of the

[326] Police and Criminal Evidence Act 1984 s76(2), s78
[327] *Chalmers* v *HMA* 1954 JC 66
[328] *R* v *Paris* (1992) 97 Cr App R 99
[329] *R* v *Northam* (1968) 52 Cr App R 97
[330] *R* v *Delaney* (1989) 88 Cr App R 338
[331] *Black* v *Annan* 1996 SLT 284; *Codona* v *HMA* 1996 SLT 1100; *HMA* v *McSwiggan* 1937 JC 50; *Chalmers* v H*MA* 1954 JC 66, 82

right to legal advice, when there was no waiver of the right, is always inadmissible.[332] English law has sometimes been willing to admit confessions obtained without legal advice where the right was not waived providing none of the grounds for excluding the evidence were met.[333]

In deciding whether to admit improperly obtained evidence both jurisdictions consider whether admitting the evidence would be unfair.[334] Since decisions rely heavily on judicial discretion, it is difficult to predict what outcome courts will reach. However, both jurisdictions generally[335] reach similar outcomes. Both jurisdictions do not automatically exclude evidence obtained in breach of the accused's right to privacy,[336] obtained in the form of fruits of the poisoned tree evidence[337] or evidence obtained by unlawful surveillance.[338] The courts consider the circumstances in which the evidence was obtained and its impact on the trial's fairness when deciding whether to admit it.[339]

In both jurisdictions, the prosecution has a persuasive burden of proof to prove the accused's guilt beyond reasonable doubt.[340] In both jurisdictions, defences such as self-defence and duress/coercion place an evidential burden on the accused to provide enough evidence to enable the court to consider the defence.[341] In interpreting legislation which seems to reverse the persuasive burden of proof, both jurisdictions weigh the benefit to society from reversing the burden against the impact on the accused's right to a fair trial.[342]

In each jurisdiction, a person can give evidence if they are capable of giving intelligible evidence and understanding the questions put to them.[343] This includes children, although those under the age of 14 cannot give evidence under oath in England and are unlikely to do so in Scotland.[344] In each jurisdiction, there are groups of people who can give evidence

[332] *Cadder* v *HMA* [2010] UKSC 43, at [55]
[333] *R* v *Alladice* (1988) 87 Cr App R 380; cf. *R* v *McGovern* (1991) 92 Cr App R 228
[334] *Lawrie* v *Muir* 1950 JC 19; Police and Criminal Evidence Act 1984 s78
[335] Cf. *R* v *Fox* [1986] AC 281; *McGovern* v *HMA* 1950 JC 33 (bodily samples)
[336] *Kinloch* v *HMA* [2012] UKSC 62
[337] *HMA* v *P* [2011] UKSC 44; Police and Criminal Evidence Act 1984 s19(2)
[338] *Kinloch* v *HMA* [2012] UKSC 62
[339] *Lawrie,* n334 above, 27-28; Police and Criminal Evidence Act 1984 s78
[340] Raitt, n325 above, para 5-02; Malek*,* n325 above, para 6-02
[341] *Lambie* v *HMA* 1973 JC 53, 58; Phipson, n325 above, para 6-12
[342] *Glancey* v *HMA* [2011] HCJAC 104; *R* v *Johnstone* [2003] UKHL 28
[343] Raitt, n325 above, para 3-06; Youth Justice and Criminal Evidence Act 1999 s53(1)
[344] Youth Justice and Criminal Evidence Act 1999 s55; Raitt, n325 above, para 3-06

but are not compelled to do so. In both jurisdictions, this includes the accused during their trial.[345] However, there is a difference in relation to the compellability of witnesses because in Scotland a spouse or civil partner of the accused can be compelled to testify at their partner's trial for either the defence or the prosecution, except where they are a co-defendant.[346] In England, spouses and civil partners can only be compelled by the prosecution to testify in their partner's trial when the defendant is on trial for certain specified offences.[347] Like in Scotland, they can be compelled to testify for the defence unless they are a co-accused.[348] Nonetheless, both jurisdictions take the policy approach that witnesses should normally be compelled to testify for the prosecution.[349]

Both jurisdictions make provision to help vulnerable witnesses give evidence. In both jurisdictions, a child is a vulnerable witness.[350] Adult witnesses can be deemed vulnerable if they suffer from a mental disorder which would impair their ability to give evidence or they face fear or distress about giving evidence.[351] It also includes those who are victims of serious offences such as sexual offences, stalking and human trafficking.[352]

Each jurisdiction has similar mechanisms to help vulnerable witnesses give evidence including the use of screens to hide the accused from the witness, allowing the witness to give evidence by TV link, having a person to support the witness and clearing the public from the court.[353] In Scotland, use can be made of previous statements given by the vulnerable witness.[354]

Each jurisdiction allows expert witnesses to give an opinion about an issue outwith the knowledge of the jury.[355] In both jurisdictions, the expert must have sufficient expertise on

[345] Raitt, n325 above, para 3-22; Youth Justice and Criminal Evidence Act 1999 s53(4)
[346] Raitt, n325 above, para 3-05
[347] Police and Criminal Evidence Act 1984 s80(2A)
[348] *ibid*
[349] Raitt, n325 above, para 3-05; Criminal Procedure (Attendance of Witnesses) Act 1965 s2
[350] Criminal Procedure (Scotland) Act 1995 s271(1)(a); Youth Justice and Criminal Evidence Act 1999 s16(1)(a)
[351] Criminal Procedure (Scotland) Act 1995 s271; Youth Justice and Criminal Evidence Act 1999 s16
[352] Criminal Procedure (Scotland) Act 1995 s271(2); Youth Justice and Criminal Evidence Act 1999 s17(4)
[353] Criminal Procedure (Scotland) Act 1995 s271A(14); Youth Justice and Criminal Evidence Act 1999 s23-30
[354] Criminal Procedure (Scotland) Act 1995 s259
[355] Raitt, n325 above, para 4-03; *R* v *Turner* [1975] QB 834

the issue either through formal qualifications or through long experience of dealing with the issue.[356] The duty of the expert witness is to inform the court not to give their opinion about how the case should be decided.[357] Normally they cannot give an opinion about the credibility of a witness although both jurisdictions allow evidence of psychiatric conditions which might influence the reliability of the witnesses' testimony.[358]

3.2 Genuine Distinctiveness

Despite these similarities, Table 3 above shows several genuinely distinctive areas of Scots evidence law which could be encroached upon by the JCPC/SC's jurisdiction.

3.2.1 Hearsay

Scots law takes a genuinely distinctive approach to hearsay evidence although there are also similarities in the grounds which can be used to admit hearsay evidence. In both jurisdictions, hearsay evidence is normally inadmissible although exceptions are provided in a range of circumstances including a confession made by the accused; where the witness is dead, missing or unfit to testify, not in the UK or the person refuses to give evidence. (In England the latter must be because they are fearful.)[360] A difference arises because English law gives the court discretion to admit hearsay evidence where it is in the "interests of justice."[361] There is no equivalent statutory provision in Scotland. The importance of this difference is reduced because English courts have noted the need to apply this ground for admitting hearsay evidence cautiously and in recent times there has some unwillingness to allow evidence to be admitted on this ground.[362]

In Scotland, a genuinely distinctive approach occurs for one of the exceptions to the hearsay rule namely that involving *res gestae* evidence.[363] *Res gestae* evidence is speech relating to "the whole circumstances immediately and directly connected with an

[356] Raitt *ibid* 410-413
[357] *Hopes* v *HMA* 1960 JC 104; *Turner*, n355 above, 842
[358] Raitt, n325 above, 4-17 Scots law also allows an expert witness to explain the actions of a victim of sexual offences. (Criminal Procedure (Scotland) Act 1995 s275C)
[360] Criminal Justice Act 2003 s116(2); Criminal Procedure (Scotland) Act 1995 s259(2)
[361] Criminal Justice Act 2003 s114(1)(d)
[362] Lucraft, n325 above, para 11-3e
[363] Blackie, 'Cross-Border Differences in the Law of Evidence - Scotland and England' 2014 Jur Rev 69, 74

occurrence which is part of the facts in issue."[364] In Scotland, *res gestae* evidence is admissible for things said during the commission of the *actus reus* of the offence.[365] Things said after the completion of the *actus reus* are admissible as *de recenti* evidence to enhance the witness's credibility but can only be used if the utterer of the statement does not testify.[366] However, unlike *res gestae* evidence it cannot be used as proof of fact.[367] Conversely, English law often allows *res gestae* evidence of things said after the completion of the *actus reus* provided the statement was spontaneous so as to exclude "the possibility of concoction or distortion."[368]

Scots law attaches importance to legal certainty. It is considered easier to tell when the *actus reus* of the offence has been completed than it is to have a rule allowing some events which occur after the *actus reus* to form part of the *res gestae*.[369] English law favours crime control by making it easier for the prosecutor to admit evidence of things said in the aftermath of the event.[370]

This has significant practical consequences. By giving the prosecutor the ability to use evidence of things said shortly after the crime as proof, English law gives them an additional tool to prove their case. For instance, for sexual offences it is difficult to prove a lack of consent. The ability to lead evidence of what the victim said after the attack provides the prosecutor with additional evidence to prove the lack of consent.[371] The Scottish prosecutor is denied this tool. Since England has frequently applied its different approach, it is a difference which impacts on large numbers of cases.[372]

These differences were deliberately chosen. In *Cinci* v *HMA*, Lord Gill noted that it "may be that the law on [*res gestae*] does not rest on a uniform basis in" England and Scotland and

[364] Raitt, *Evidence: Principles, Policy and Practice* (Edinburgh: W Green, 2013), para 11-16
[365] *Cinci* v *HMA* 2004 JC 103
[366] *ibid*, at [8] and [12]
[367] *ibid*
[368] *R* v *Andrews* [1987] AC 281, 301
[369] *Cinci,* n365 above, at [12]
[370] *Ibid,* at [13]
[371] *R* v *Christie* [1914] AC 545
[372] *R* v *Carnall* [1995] Crim LR 944; *Howe* v *Malkin* (1878) 40 LT 196; *Christie*, n371 above, 560

decided to deviate from the English approach.[373] Accordingly, the Scottish approach to *res gestae* is genuinely distinctive.

3.2.2 Dock Identification

Scots law takes a genuinely distinctive approach by being more willing to allow dock identification evidence than English law. Dock identification occurs where a witness is asked to identify the perpetrator of the crime in court. In Scotland, dock identification can normally[374] be used where the witness has not previously been asked to identify the accused[375] or where the witness picked the wrong person at an identification parade.[376] In England, dock identification evidence is admissible at the judge's discretion. Unlike Scotland, the failure to hold an identification parade will normally[377] make the dock identification evidence inadmissible.[378]

This difference in approach is deliberate. In 1976, the Devlin Committee recommended that dock identification evidence should be restricted in England due to its unreliability.[379] Thus, English law mainly[380] focuses on due process by making it difficult for the prosecutor to obtain a conviction using unreliable evidence. Following the publication of the Devlin Report, a working group was formed in Scotland to consider dock identification.[381] Although it accepted the Devlin Report's finding that dock identification evidence is unreliable,[382] it rejected restricting its use. It noted the need for witnesses who have previously failed to identify the accused "to change [their] mind at the time of the trial" and "the jury's right to have such evidence placed before it."[383] Thus, unlike England, Scotland allows free proof of dock identification evidence where the evidence is rarely excluded and it is for the jury,

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[373] *Cinci*, n365 above, at [13]
[374] Its admission must be fair. (*Lawrie*, n334 above, 27)
[375] *Brodie* v *HMA* 2013 SCCR 23
[376] *Holland* v *HMA* 2005 SC(PC) 3
[377] *Neilly* v *R* [2012] UKPC 12, at [32]; *Queen* v *Lawrence* [2014] UKPC 2
[378] *ibid*, at [34]
[379] Lord Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (London: Stationery Office, 1976), paras 4.107-4.108
[380] It recognises a crime control need to allow dock identification in summary cases. (*Barnes* v *Chief Constable of Durham* [1997] 2 Cr App R 505)
[381] Bryden, *Report of the Working Group on the Identification Procedure Under Scottish Criminal Law* (Cmnd 7096, 1978)
[382] *ibid*, para 5.12
[383] *ibid*, para 5.16

normally with the help of judicial directions,[384] to decide the usefulness of the evidence. Consequently, it focuses more than England on the crime control need to make it easier for the prosecutor to use dock identification evidence. Scots law relies more heavily than English law on other safeguards such as corroboration and cross-examination, rather than restrictions on the use of dock identification, to ensure that the accused is not incorrectly identified as the perpetrator.[385]

This difference in approach has significant practical consequences. Juries attach importance to identification evidence given by witnesses[386] despite witnesses being poor at identifying people they see committing crimes.[387] A study found that witness identification evidence is "taken by the [jury] as absolute proof" of the defendant's guilt.[388] Thus, allowing witnesses to identify the accused in court gives the Scottish prosecutor a powerful tool to increase the likelihood of a conviction. Conversely, in England, despite the ability to use other forms of witness identification,[389] the prosecutor can rarely rely on this tool in cases tried on indictment and may find it harder to prove the perpetrator's identity. These practical differences impact on large numbers of cases because of dock identification's frequent use in Scotland and its rare use in England except in summary cases.[390] Thus, dock identification is genuinely distinctive.

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[384] *Macklin* v *HMA* 2013 SCCR 616, at [40]
[385] Chalmers, Leverick and Shaw, 'Post Corroboration Safeguards: Report of the Academic Expert Group' (Academic Expert Group, 2014), section 5.4 at http://www.gov.scot/Resource/0046/00460650.pdf (last visited 22/01/2019)
[386] *ibid* 47
[387] Nicolson, *Evidence and Proof in Scotland Context and* Critique (Edinburgh: Edinburgh University Press, 2019), section 3.4.2 and *ibid* section 5.3
[388] Baxter, 'Identification Evidence in Canada: Problems and a Potential Solution' (2007) 52 Crim LQ 175, 177-178
[389] *Tido* v *Queen* [2011] UKPC 16, at [26]-[27]
[390] Ferguson, 'Eyewitness Identification Evidence and its Problems: Recommendations for Change' in Duff and Ferguson*, Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh: Edinburgh University Press, 2018), 139-160, 143; *Holland,* n376 above, at [3]; Lucraft, n325 above, para 14-59

3.2.3 Corroboration

Scots law normally,[391] albeit controversially,[392] requires two sources of evidence proving that the accused committed the crime and that the *actus reus* and *mens rea* of the offence are satisfied.[393] English law does not normally[394] require corroboration.

Scots law "is averse to rely[ing] on [one source of evidence and] rather than run the risk of" convicting an innocent person "it is willing that the guilty should escape."[395] This recognises that a conviction will have significant consequences for the accused including the possibility of imprisonment for offences for which they are innocent. Corroboration allegedly reduces the risk of a wrongful conviction by recognising that evidence can be unreliable or interpreted wrongly and requiring that two sources of evidence are used to prove the main issues of the case.[396] The focus on due process is such that the courts are willing to compromise the need for crime control by risking that a guilty person might be acquitted.

Conversely, English law focuses on crime control by avoiding the complex rules of corroboration which allegedly hinder prosecutions.[397] This places heavier reliance on the jury's common sense, even though jurors are poor at identifying when a person is truthful[398] and on other procedural and evidential rules to prevent wrongful convictions.

The practical impact of corroboration is difficult to assess. Although English law does not generally require corroboration, it is normally in the prosecutor's interest to lead corroborative evidence where it is available. In these cases, the practical difference

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[391] There are some statutory exceptions to the requirement of corroboration. See Gordon and Gane, *Renton & Brown: Criminal Procedure* (Edinburgh: Sweet & Maxwell, 6th ed, 2018), section 24-88 fn 1
[392] Rape Crisis Scotland, 'Corroboration Briefing' (Rape Crisis Scotland, 2014), at http://www.rapecrisisscotland.org.uk/news/corroboration-briefing (last visited 22/01/2019) and Lord Carloway, 'Carloway Review Report and Recommendations' (Scottish Government, 2011), para 7.2 at http://www.gov.scot/Resource/Doc/925/0122808.pdf (last visited 22/01/2019). Cf. Auchie, 'Corroboration Abolition in Scotland: The Value of Confirmation by Coincidence' 2015 Jur Rev 1; Nicolson and Blackie, 'Corroboration in Scots Law: "Archaic Rule" or "Invaluable Safeguard"?' (2013) 17(2) Edin LR 152.
[393] *Morton* v *HMA* 1938 JC 50
[394] Cf. Road Traffic Regulation Act 1984 s9
[395] Hume, *Commentaries on the Law of Scotland: Respecting the Description and Punishment of Crimes* (Edinburgh: Bell & Bradfute, 1797), 383.
[396] Nicolson and Blackie, n392 above, 155
[397] Law Commission, *Corroboration of Evidence in Criminal Trials* (Cmnd 1620, 1991), para 2.9
[398] Nicolson, n392 above, 155

between the two jurisdictions will be less significant. However, there will be cases in England where it is impossible to provide corroborative evidence and unlike in Scotland, this will not prevent a conviction. Assessment of the practical impact of corroboration is further complicated because there are several rules which help the prosecutor in Scotland to corroborate the essential facts.[399]

Corroboration allegedly produces the greatest practical differences in rape cases since often the only witnesses to what happened are the accused and the complainer.[400] In 2011, Lord Carloway conducted an examination of Scottish rape cases from 2010 marked for no further action by the prosecutor. Although this methodology has been criticised,[401] he found that 67% of these cases could have been prosecuted in England.[402] However, many variables impact upon a prosecution's chance of success including different rape laws and the strength of the case against the accused. Thus, care must be taken in assuming that all these cases would have succeeded in England. Despite this, the study suggests that corroboration does affect the conviction rate in Scotland as compared with England.

Common sense suggests that corroboration in Scotland should hinder successful prosecutions since there will be cases where this requirement cannot be met and the prosecution will fail. [403] There are large numbers of Scottish cases where convictions have been overturned due to a lack of corroboration, especially in sexual offence cases.[404] English prosecutors do not have this barrier to a successful prosecution although the prosecution levels for rape cases are still low.[405] Since large numbers of cases in Scotland

[399] *Smith* v *Less* 1997 JC 73; *Ferguson* v *HMA* [2019] HCJAC 1, at [14] (corroboration using distress); *Moorov* v *HMA* 1930 JC 68 (corroboration of factually similar crimes); *Manuel* v *HMA* 1958 JC 41 (special knowledge as corroboration) For a discussion of these see: Duff, 'The Requirement for Corroboration in Scottish Criminal Cases: One Argument Against Retention' [2012] Crim LR 513.
[400] Rape Crisis, n392 above
[401] Chalmers and Leverick, 'Substantial and Radical Change': A New Dawn for Scottish Criminal Procedure?' (2012) 75(5) MLR 837, 851
[402] Lord Carloway, n392 above, para 7.2.33 cf. Lindhorst and Merk, 'Corroboration Revisited' 2013 SLT (News) 147, 151
[403] *Morton* v *HMA* 1938 JC 50; *Bruce* v *HMA* 1936 HC 93; *P* v *Williams* 2005 SLT 508; *Smith* v *Lees* 1997 JC 73
[404] *ibid*
[405] Topping and Barr, 'Rape Prosecutions Plummet Despite Rise in Police Reports' (Guardian, 2018), at https://www.theguardian.com/law/2018/sep/26/rape-prosecutions-plummet-crown-prosecution-service-police (last visited 22/01/2019).

are abandoned due to insufficient evidence, the difference impacts on large numbers of cases.[406]

The differences in approach and outcome were deliberately chosen. The Scottish Government in full knowledge of the English position which was laid out in the Carloway Review,[407] made a deliberate although reluctant decision to retain corroboration for now.[408] Thus, corroboration represents a genuinely distinctive approach.

3.2.4 Adverse Inferences from the Accused's Silence

Scots law's unwillingness to draw inferences from the accused's silence again shows Scots law taking a more due process based approach than English law. In England, adverse inferences can be drawn from the accused's failure to: 1) mention something important during police questioning or when the defendant is charged; 2) to explain objects which implicate the defendant in the crime; 3) to give evidence during the trial; 4) to account for objects, marks or substances found at the crime scene and 5) to explain why they were at a certain place.[409] This was designed to put the accused into a situation where they would feel compelled to confess, thus reducing the number of criminal trials and making it easier to obtain convictions.[410] Thus, English law mainly[411] focuses on crime control.

Conversely, in Scotland inferences cannot be drawn from the accused's silence during a police interview.[412] The accused is deemed to be "entitled to reserve his defence."[413] Thus, the focus is on due process and the courts have expressed a fear that drawing inferences

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[406] Crown Office and Procurator Fiscal Service, 'Corporate information – Cases in Which No Action was Taken' (Crown Office and Procurator Fiscal Service, 2018), at http://www.copfs.gov.uk/images/Documents/Statistics/COPFS%20Performance%2004.2017%20to%2003.2018/No%20Action%20cases%20Reported%20to%20COPFS%202013-18.pdf (last visited 07/01/2019).
[407] Lord Carloway, n392 above, para 7.2.24
[408] Anonymous, 'Corroboration Abolition Removed from Bill' (Scottish Government, 2015), at https://news.gov.scot/news/corroboration-abolition-removed-from-bill (last visited 07/01/2019).
[409] Criminal Justice and Public Order Act 1994 s34-38
[410] O'Reilly, 'England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice' (1994) 85(2) J Crim L & Criminology 402, 404-405
[411] There is some recognition of due process. Inferences can only be drawn from silence during police questioning where the accused has been given legal advice and where they were told what offence they are suspected of committing. (*R* v *Argent* [1997] 2 Cr App R 27; Criminal Justice and Public Order Act 1994 s34(2A))
[412] *Robertson* v *Maxwell* 1951 JC 11, 14
[413] *ibid*

from the accused's silence would compromise the defence case by encouraging the accused to incriminate themselves. This represents a different policy to England which normally considers that a person should express their defence as soon as possible and that if they do not, this undermines the credibility of the defence case.

However, adverse inferences can be made from the accused's silence in Scotland where the accused does not give evidence[414] or where the prosecution leads evidence which "cried out" to be explained by the accused.[415] Thus, like England, there is some emphasis on making prosecutions easier by drawing inferences where the accused fails to explain something in their knowledge or to give evidence.[416] However, a policy difference arises because in England the need for crime control is considered to justify making adverse inferences frequently, while in Scotland it is rare to draw inferences from the accused's failure to explain an issue and exceptional to draw adverse inferences from the failure to give evidence.[417]

Despite the unwillingness to draw adverse inferences in Scotland, if the accused could say something which might create reasonable doubt, doing so may benefit the defence. Thus, having a right to silence does not guarantee that the accused will rely on the right.[418] It is unclear how much importance jurors attach to the defendant's silence in England.[419] However, it would be expected that juries would attach importance to it since intuitively people consider that a person who keeps quiet about something is hiding something. Scots law imposes a barrier to successful prosecutions by making it difficult for the prosecutor to rely on this useful evidence. In England, although there are some restrictions on drawing adverse inferences, this barrier is less strong. Since drawing inferences from the accused's silence is rare in Scotland and common in England,[420] the difference impacts on a large number of cases.

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[414] Lord Carloway, n392 above, para 7.5.9
[415] *Donaghy* v *Normand* 1992 SLT 666, 668
[416] *HMA* v *Hardy* 1938 JC 144, 146
[417] Lord Carloway, n392 above, paras 7.5.8-7.5.9
[418] McBarnet*, Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981)
[419] Buke, Street and Brown, 'The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994' (Home office, 2000), 63 at http://library.college.police.uk/docs/hors/hors199.pdf (last visited 22/01/2019).
[420] Lord Carloway, n392 above, paras 7.5.8-7.5.9

The Carloway Review recommended retaining the current approach in Scotland[421] and the Scottish Government agreed.[422] Since the Carloway Review outlined the English approach,[423] the Scottish Government made this decision in the knowledge that by maintaining the current law they were rejecting the English approach. Thus, the different approach and difference in outcome were deliberately chosen, meaning that the requirements for genuine distinctiveness are met.

3.2.5 Bad Character Evidence

Scots law takes a genuinely distinctive approach to the use of evidence showing that the accused is of bad character by imposing more restrictions than in England. In both jurisdictions, bad character evidence is normally inadmissible[424] but there are exceptions to this rule. In both jurisdictions, bad character evidence can be admissible on grounds including:[425] where it is revealed by the accused;[426] where a previous conviction is needed to show that the accused committed the offence;[427] and where the accused attacks the character of a prosecution witness[428] or suggests that they (the accused) are of good character.[429] In English law, there are additional grounds for admitting bad character evidence including where it is "an important matter in issue between the defendant and the prosecution" or "to correct a false impression given by the defendant."[430]

In England, admissible bad character evidence includes the accused's previous convictions,[431] acquittals for similar offences[432] or similar allegations of wrongdoing which

[421] *ibid* para 7.5
[422] Anonymous, 'Response from the Scottish Government to the Committee's Stage 1 Report' (Justice Committee, Undated), 9 at http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CJ_Bill_Stage_1_Report_-_response_from_SG.pdf (last visited 22/01/2019).
[423] Lord Carloway, n392 above, paras 7.5.13-7.5.16.
[424] Raitt, n325 above, para 12-02
[425] More grounds for exclusion exist in England (Criminal Justice Act 2003 s101(1))
[426] *Carberry* v *HMA* 1975 JC 40; Criminal Justice Act 2003 S101(1)(b)
[427] Criminal Procedure (Scotland) Act 1995 s101(2)(b), s166(8)(b), 266(4)(b); Criminal Justice Act 2003 s98(a)
[428] Criminal Procedure (Scotland) Act 1995 s266(4)(b); Criminal Justice Act 2003 s106
[429] Criminal Procedure (Scotland) Act 1995 s266(4)(b); Criminal Justice Act 2003 s101(1)(f)
[430] Criminal Justice Act 2003 s101(1)(d)-(f)
[431] Criminal Justice Act 2003 s98
[432] *R* v *Z* [2000] 2 AC 483

were not prosecuted and which display similarities in fact and time to the current offence.[433]

Conversely, Scots law refuses to allow evidence of previous acquittals.[434] However, it allows evidence of previous convictions to be admitted where one of the grounds for admissibility listed above is met.[435] Evidence suggesting that the accused committed a crime that they have not been charged with is admissible if it helps the prosecution prove that the accused committed the crimes they are charged with.[436] However, where the criminal act is so "different in time, place or character from the crime charged" that the accused did not have fair notice that it would be used by the prosecutor, the prosecutor should not seek to prove that the accused committed the act. [437]

These differences have significant practical consequences. English courts have frequently accepted evidence of prior acquittals or similar unprosecuted acts.[438] Had these cases been heard in Scotland, the evidence of prior acquittals would be inadmissible and it is unusual for unprosecuted past wrongdoing to be admitted into evidence.[439] Many of the English cases which use evidence of acquittals relate to sexual offences.[440] The English rule provides the prosecutor with the ability to lead evidence which can show that although the defendant has not been successfully prosecuted in the past, similar allegations have been made against them. In sexual offence cases, this can enhance the credibility of the complainer's claims that the sex was non-consensual by showing that the accused tends to have sex without people's consent. It would be expected that the jury would be more willing to convict where the complainer's evidence is supported by that of other victims of the defendant. Thus, the Scottish prosecutor is placed at a disadvantage because they cannot normally use this tool.

[433] *R* v *Ngyuen* [2008] EWCA Crim 585; *R* v *Edwards* [2006] 1 WLR 1524
[434] *HMA* v *Hemphill* 2002 SLT 754
[435] Criminal Procedure (Scotland) Act 1995 s266(4)
[436] *Nelson* v *HMA* 1994 SLT 389, 396
[437] *ibid*
[438] *Z,* n432 above; *R* v *A* [2008] EWCA Crim 2908; *R* v *Hamidi* [2010] EWCA Crim 66; *R* v *Boulton* [2007] EWCA Crim 942
[439] Raitt, n340 above, para 12-14
[440] *R,* n432 above; *Ngyuen,* n433 above; *Edwards*, n433 above

Scots law seeks to protect the accused's due process rights. There is a fear that leading evidence of previous wrongdoing creates a danger that the jury will assume that "if the accused would do the one thing [t]he[y] might do the other."[441] Despite this, Scots law recognises the crime control argument that bad character evidence can show that the accused has a propensity to commit a type of crime. Therefore, it admits evidence of previous convictions and unprosecuted wrongdoing on the grounds listed above.[442]

English law although recognising the dangers of leading evidence of past acquittals,[443] attaches more importance to crime control by defining bad character evidence more broadly. It considers that "when evidence is given of [several] similar incidents … [t]he evidence of the defendant's guilt may become overwhelming."[444] Thus, the failure to allow such evidence could lead to the exclusion of evidence which is useful to the prosecution. Although there is no evidence of Scots law specifically rejecting the English approach, this difference in opinion about the usefulness of bad character evidence suggests that the Scottish courts would reject the English approach. Thus, the requirements of genuine distinctiveness are met.

3.3 Summary of Findings

Type of Difference	**Does the Difference in Outcome Impact on Large Numbers of Cases?**
	Yes
Genuine distinctiveness	Hearsay, dock identification, corroboration, inferences from the accused's silence and bad character evidence

Table 4: Areas of difference between Scots and English criminal evidence law impacting on large numbers of cases

Of the evidence law considered, five areas were genuinely distinctive, while seven areas had trivial differences. The genuinely distinctive areas derive from many different topics within evidence law including identification evidence, sufficiency of evidence and evidence attacking the accused's character. Table 4 shows that all the genuinely distinctive differences were likely to impact on the outcomes of large numbers of cases. There were

[441] *Nelson*, n437 above, 395
[442] *Gallagher* v *Paton* 1909 SC(J) 50
[443] *Z*, n432 above, 508
[444] *ibid*

differences in the legal theories being applied by each jurisdiction. Scots law generally sought to protect the accused's due process rights. English law although frequently attaching importance to this need by restricting the use of dock identification evidence, often attaches importance to crime control. These findings provide strong evidence of Scots evidence law containing distinctive elements which could be encroached on by the JCPC/SC, but also show that in a significant minority of the areas of evidence law considered Scots and English law took a similar approach.

4 Criminal Procedure

The remaining part of this chapter considers whether Scots criminal procedure also contains genuinely distinctive elements which could be encroached on by the JCPC/SC's jurisdiction.[445] Table 5 shows the different areas of criminal procedure considered and their categorisation.

Difference	**Importance**
Bail	Trivial
The structure of the trial	
Time limits for questioning suspects	Genuinely distinctive
Private prosecutions	
Children's Hearings	
Jury size	
Simple majority verdict	
Opening statements	
Not proven verdict	

Table 5: Areas of criminal procedure law and their categorisation

[445] This section draws on the following sources of Scottish criminal procedure: Gordon and Gane, *Renton & Brown: Criminal Procedure* (Edinburgh: Sweet & Maxwell, 6th ed, 2018) The following sources were used for the discussion of English criminal procedure: Lucraft, n325 above; Leake et al, *Archbold Magistrates' Courts Criminal Practice 2019* (London: Sweet & Maxwell, 15th ed, 2018); Perry and Ormerod, *Blackstone's Criminal Practice 2019* (Oxford: Oxford University Press, 2018)

4.1 Trivial Differences

In both jurisdictions, the court process starts[446] with a preliminary hearing which is used to determine whether the accused should receive bail, to give the accused an opportunity[447] to enter a plea and make a declaration and to make arrangements (subject to prosecutorial approval in Scotland[448]) for the trial.[449]

Both jurisdictions normally start from the assumption that the accused should get court bail[450] but list offences where bail can only be granted exceptionally.[451] Both jurisdictions consider the accused's previous convictions, the nature of the alleged offence and the likelihood of the accused re-offending when deciding whether bail should be granted.[452]

Although section 4.2 will show that elements of the criminal trial in Scotland are genuinely distinctive, the trial in each jurisdiction follows the same basic structure. In both jurisdictions, the leading of evidence starts with the prosecution presenting their case by calling witnesses and asking them questions. (In England, each side makes an opening statement first which as section 4.2.3 below will argue is a genuinely distinctive approach.) Each witness can be cross-examined by the defence and re-examined by the prosecutor. The defence can then argue that the prosecutor has not discharged its burden of proof and that the defendant should be acquitted. If this fails, the defence can[453] present their case by questioning defence witnesses who can be cross-examined by the prosecution and re-examined by the defence. Each side then makes a closing statement. The judge will direct the jury, where this is required, and the court will retire to reach its verdict.[454] Thus, subject

[446] As will become apparent from the discussion in section 4.2 below the criminal process starts long before the start of the trial.
[447] In Scotland, it is unusual for the accused to make a declaration at this stage.
[448] In solemn proceedings, the Lord Advocate can commit the accused for further examination when they are unready to commit to trial and then commit them to trial later. (Gordon, n445 above, para 12-34)
[449] Leake, n445 above, para 7-1 to 7-4
[450] Criminal Procedure (Scotland) Act 1995 S23(1); Bail Act 1976 s4
[451] Criminal Procedure (Scotland) Act 1995 S23D; Criminal Justice and Public Order Act 1994 s25(2); Coroners and Justice Act 2009 s114(2)
[452] Criminal Procedure (Scotland) Act 1995 s23C; Bail Act 1976 Schedule 1 paras 2, 9
[453] There is no obligation on the defence to give evidence.
[454] Gordon, n445 above, paras 18-46 to 18-79.47; Archbold, n390 above, Chapter 4.

to the differences discussed in section 4.2, each of these areas of law takes a similar approach and represent trivial differences.

4.2 Genuine Distinctiveness

Table 5 above shows that there are several genuinely distinctive differences from many parts of the criminal process which could be encroached on by the JCPC/SC's jurisdiction.

4.2 .1 Time Limits for Questioning Suspects

Both jurisdictions limit the amount of time that a suspect can be kept in custody for questioning. In England, a person can normally[455] be kept in custody without charge for 24 hours with the possibility of extension to 96 hours.[456] In Scotland, a suspect can be held in police custody for questioning normally[457] for 12 hours with the possibility of extension to 24 hours.[458]

The two jurisdictions take a different approach by balancing the need to interview suspects and the need not to encroach unnecessarily on the suspect's liberty in different ways. The Scottish approach, although recognising the need to give police time to question suspects,[459] is more protective of the suspect's liberty because the suspect is held for less time than in England. The English approach focuses more on the crime control need to give the police time to question suspects.[460]

The impact of this is difficult to assess. The times given represent maximum times and not everyone being questioned by the police is kept in custody for this time. The suspect will not be questioned for the whole time they are in custody. Nonetheless, the different approach creates significant practical differences. When the suspect is questioned, they are

[455] Cf. Terrorism Act 2000 schedule 8 para 2(b)(i)
[456] Police and Criminal Evidence 1984 s41(1), s42-44
[457] Cf. Terrorism Act 2000 Schedule 8 para 2(b)(i)
[458] Criminal Justice (Scotland) Act 2016 s9(1), s11(1)
[459] Donnelley, 'Criminal Procedure (Legal Assistance, Detention And Appeals (Scotland) Bill Policy Memorandum' (Scottish Parliament, 2010), para 22 at http://www.parliament.scot/S3_Bills/Criminal%20Procedure%20(Legal%20Assistance%20Detention%20and%20Appeals)%20(Scotland)%20Bill/b60s3-introd-pm.pdf
[460] Zander, *The Police and Criminal Evidence Act 1984* (UK: Sweet & Maxwell, 7th ed, 2015), 446

in an intimidating and stressful situation.[461] They may feel a desire to speak in the hope of ending their stay in custody.[462] Although legal advice helps the accused decide whether it is in their interests to speak, lots of suspects incriminate themselves during police questioning.[463] In England, there is more time for the suspect to reach the point where they feel they must confess to end their stay in custody and for the police to ask questions which might elicit an incriminating response. Thus, it would be expected that by having significantly longer time limits than Scotland, English law increases the likelihood of the accused incriminating themselves. Since most suspects are questioned by the police, the difference has the potential to impact on large numbers of cases.

When the Scottish Government increased the time limits for police questioning after *Cadder* v *HMA,*[464] in order to ensure that there was time to provide the accused with legal advice, they considered the English position but concluded that a normal 24-hour time limit was not needed in Scotland.[465] Consequently, the practical differences in outcome and approach were deliberately chosen meaning Scotland has taken a genuinely distinctive approach.

4.2.2 The Jury

4.2.2.1 Jury Size:

Scottish juries sit with 15 jurors, but where jurors are unable to continue participating in the trial, a quorum of 12 or more jurors is sufficient for a valid verdict.[466] English juries start with 12 jurors although a quorum of nine or more is sufficient for a valid verdict.[467]

The impact of this is difficult to assess because many factors impact on the jury's verdict. Both the not proven verdict and the ability to convict by a simple majority in Scotland will

[461] McBarnet*, Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981); Carlen, *Magistrates' Justice* (Oxford: Martin Robertson, 1974)
[462] *Cadder*, n332 above, at [92]
[463] Gudjonsson, *The Psychology of Interrogations and Confessions* (Chichester: Wiley, 2003), 136
[464] *Cadder*, n332 above
[465] *Donnelley*, n459 above, para 22
[466] Criminal Procedure (Scotland) Act 1995 s90
[467] Juries Act 1974 s16(1)

impact on the jury's decision.[468] Research suggests that larger juries deliberate for longer,[469] are more willing to take a critical approach[470] and achieve better group deliberation.[471] This suggests that having a jury of 15 rather than 12 may encourage the jury to discuss the case more thoroughly. Research has compared jury sizes of 6 and 12 and found that juries of 12 are more likely to represent minority groups in the community.[472] Consequently, the larger jury found in Scotland should[473] increase the likelihood of people with different ideas and experiences being selected to sit on a jury. These ideas and experiences may prove influential and impact on the decision reached by the jury.[474] Thus, it would be expected that having 15 jurors in Scotland instead of the 12 used in England will alter the dynamics of the jury's decision-making process and sometimes lead to different outcomes in the two jurisdictions.

In 2009, the Scottish Government decided against reducing the number of jurors because they considered that the Scottish approach was "uniquely right."[475] The position in England was highlighted in a report commissioned by the Scottish Government, so the decision was taken with knowledge of the English approach.[476] Thus, the different approach and practical differences were deliberately chosen. Accordingly, Scotland's different jury size is genuinely distinctive.

4.2.2.2 The Simple Majority Verdict

In Scotland, a jury of 15 can convict by a simple majority of eight.[477] When the jury size falls to between 14 and 12 jurors, eight jurors must want to convict before a guilty verdict can

[468] Sections 4.2.2.2 and 4.2.4 below
[469] Saks and Marti, 'A Meta-Analysis of the Effects of Jury Size' (1997) 21 *Law and Human Behaviour* 451.
[470] Faust, 'Group Versus Individual Problem-Solving' (1959) 59(1) *Journal of Abnormal and Social Psychology* 68, 71
[471] Thomas and Flink, 'Effects of Group Size' (1963) 60(4) *Psychological Bulletin* 371, 373
[472] Saks, n469 above, 465
[473] Since jury selection is random there is no guarantee that different groups of people will be represented.
[474] Saks, n469 above, 461-462, 465-466
[475] Anonymous, 'Scotland's Unique 15-Strong Juries will Not be Abolished' (Scotsman, 2009), at http://www.scotsman.com/news/politics/scotland-s-unique-15-strong-juries-will-not-be-abolished-1-1037747 (last visited 28/12/2018).
[476] Scottish Government, 'The Modern Scottish Jury in Criminal Trials' (Scottish Government, 2008), para 7.9 at http://www.gov.scot/resource/doc/238536/0065469.pdf (last visited 22/01/2019).
[477] *ibid* s90

be returned.[478] The policy reason for this is a desire to avoid "the expense in time and money of retrials" by making it easier for the jury to make their decision and by making it impossible for there to be a hung jury.[479] Thus, it is a crime control approach which attaches importance to the need for efficiency. However, Scots law does not ignore the due process need to make it difficult for a guilty verdict to be returned. It considers that corroboration and the not proven verdict adequately compensate the accused for being able to be convicted by a simple majority.[480]

Conversely, English law protects the accused's due process rights by starting from the position that the jury's verdict should be unanimous but allowing a qualified majority verdict after two hours of deliberation by the jury. A guilty verdict can be returned where two people dissent if the jury has 12 jurors or if one person dissents and the jury has 10 or 11 jurors. A jury of nine must return a unanimous verdict.[481] The desire for a unanimous verdict limits the jury's ability to find the accused guilty by ensuring that "the verdict is one of the jury as whole."[482] This is balanced with some recognition of the need for crime control. The qualified majority verdict enables the jury to convict where a juror has been intimidated or has prejudices which prevent them from convicting the defendant.[483] However, less importance is attached to crime control than in Scotland because this need is only given importance if a qualified majority of the jury want to convict.

The simple majority verdict in Scotland can have significant practical consequences for the accused when compared with English law. Tables 6 and 7 show the different combinations of jurors wanting to convict and acquit which can result in a guilty verdict in each jurisdiction. To enable comparison of the different outcomes resulting from different jury sizes, the percentage of the jury required to convict is given for each outcome. Combinations where the jury can convict in Scotland on a smaller percentage majority than England are underlined.

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[478] Criminal Procedure (Scotland) Act 1995 s90
[479] Anonymous, n475 above
[480] Chalmers, Leverick and Shaw, 'Post-Corroboration Safeguards Report of the Academic Group' (Scottish Government, 2014), 141 at http://www.gov.scot/Resource/0046/00460650.pdf (last visited 13/10/2016).
[481] Juries Act 1974 s17
[482] Chalmers, n480 above, 150
[483] *ibid* 143

Combinations Resulting in A Guilty Verdict in Scotland			
Jurors for Convicting	**Jurors Against Convicting (Jurors wanting to return not guilty or not proven verdicts)**	**Total Jurors**	**Percentage of Jury Convicting**
15	0	15	100%
14	1		93%
13	2		87%
12	3		80%
11	4		73%
10	5		67%
9	6		60%
8	7		53%
14	0	14	100%
13	1		93%
12	2		86%
11	3		79%
10	4		71%
9	5		64%
8	6		57%
13	0	13	100%
12	1		92%
11	2		85%
10	3		77%
9	4		69%
8	5		62%
12	0	12	100%
11	1		92%
10	2		83%
9	3		75%
8	4		67%

Table 6: Combinations of jurors wanting a guilty verdict that result in a conviction in Scotland

Combinations Resulting in A Guilty Verdict in England			
Jurors for Convicting	**Jurors Against Convicting**	**Total Jurors**	**Percentage of Jury Convicting**
12	0	12	100%
11	1		92%
10	2		83%
11	0	11	100%
10	1		91%
10	0	10	100%
9	1		90%
9	0	9	100%

Table 7: Combinations of jurors wanting a guilty verdict that result in a conviction in England

The percentage of jurors needed to convict varies depending on the number of jurors deciding the case and the rules each country applies to the number of jurors required to return a guilty verdict. Tables 6 and 7 show that in Scotland the accused can at worst be convicted where 53% of the jury want to convict. In England, the defendant can at worst be convicted where 83% of the jury want to convict. There are 14 combinations in Scotland where the jury can convict with a smaller percentage in favour of a guilty verdict than in England. Although most criminal trials do not use juries,[484] there are still large numbers of jury trials where the accused in Scotland can be potentially convicted by a smaller majority than would be allowed in England. Thus, the difference impacts on large numbers of cases.

The Scottish Government introduced a provision into the Criminal Justice (Scotland) Bill 2013 to require a qualified majority verdict.[485] It was designed to increase the protection given to the accused if corroboration was abolished.[486] When the decision was made to retain corroboration this provision was removed from the Bill. Thus, the difference in

[484] Duff, 'The Scottish Criminal Jury: A Very Peculiar Institution' (1999) 62(2) *Law and Contemporary Problems* 173, 175

[485] Criminal Justice (Scotland) Bill 2013 clause 70(2)

[486] Scottish Government, 'Criminal Justice (Scotland) Bill Policy Memorandum' (Scottish Government, 2013), 176 at http://www.parliament.scot/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd-pm.pdf (last visited 22/01/2019).

approach and outcome was deliberately chosen and represents a genuinely distinctive approach.

4.2.3 Opening Statements

A genuinely distinctive difference arises because English law, unlike Scots law, allows the prosecution and defence to make an opening statement before the leading of evidence.[487] This different approach can have significant practical consequences. Psychological studies show that opening statements affect how jurors react to evidence and witnesses, although there is debate about the extent of this impact.[488] Whether this benefits the defence depends on the strength and length of the defence's opening statement when compared with the prosecution's opening statement. A good opening statement by the defence may encourage the jury to interpret the evidence in a way which favours the defence although the defence has the disadvantage that the prosecution makes their opening statement first.[489] Not having opening statements in Scotland removes a factor which potentially influences the jury's interpretation of evidence and it should mean that the jury hears the evidence with a more[490] neutral state of mind. Thus, Scots law protects the accused's due process rights by avoiding opening statements which could prejudice the jury against the accused. This difference will apply to a wide range of cases because opening statements are widely used in England.

There is no evidence of a deliberate rejection of the English approach. However, the Scottish approach has been consciously defended. Lord Cooper claimed that this approach

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[487] Criminal Procedure Act 1865 s2

[488] Frederick, 'Persuasion at Trial: Opening Statements' (National Legal Research Group, Undated), at http://www.nlrg.com/our-services/jury-research-division/our-services/case-preparation/persuasion-at-trial--opening-statements (last visited 08/12/2018); Lind and Ke, 'Opening and Closing Statements' in Kassin and Wrightsman, *The Psychology of Evidence and Trial Procedure* (Beverly Hills: SAGE Publications, 1985), 229-252; Pyszczynski and Wrightsman, 'The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial' (1981) 11(4) *Journal of Applied Social Psychology* 301; Pyszczynski, et al, 'Opening Statements in a Jury Trial: The Effect of Promising More Than the Evidence Can Show' (1981) 11(5) *Journal of Applied Social Psychology* 434. Cf. Burke, Poulson and Brondino, 'Fact or Fiction: The Effect of the Opening Statement' (1992) 18(2) J Contemp L 195, 209

[489] Pyszczynski, et al, 'Opening Statements in a Jury Trial: The Effect of Promising More Than the Evidence Can Show' (1981) 11(5) *Journal of Applied Social Psychology* 434; Frederick, 'Persuasion at Trial: Opening Statements' (National Legal Research Group, Undated), at http://www.nlrg.com/our-services/jury-research-division/our-services/case-preparation/persuasion-at-trial--opening-statements (last visited 08/12/2018).

[490] Jurors are likely to have preconceptions about the accused's guilt.

was a "notable instance" of Scots law "guaranteeing fairness to the accused."[491] Meston notes that Scotland's approach focuses the jury on "what is actually proved" rather than what the prosecution "thinks it can prove."[492] He cites this as an example of the "very substantial protection for an accused" provided by Scots law.[493] Since there is a different approach and outcome which is consciously defended the difference is genuinely distinctive.

4.2.4 The Not Proven Verdict

The final genuinely distinctive difference in the trial arises from the verdicts the court can return. Scots law has three verdicts: "not guilty," "not proven" and "guilty."[494] Like the not guilty verdict, the not proven verdict leads to an acquittal. The not proven verdict is controversial because, amongst other things,[495] it endangers the presumption of innocence. It is often used to suggest that the accused is morally guilty of the offence in situations where there is insufficient evidence to convict.[496] English courts can only find the defendant "guilty" or "not guilty."

It is claimed that the not proven verdict encourages acquittals, by providing a verdict for situations where the jury think the accused is guilty but feel that the prosecution failed to prove its case beyond reasonable doubt.[497] This assumes that without the not proven verdict the jury might convict because they feel that the accused is morally guilty despite the Crown not proving its case beyond reasonable doubt. This should not happen since the law does not allow the jury to convict in this situation. However, mock jury trials show that the not proven verdict does encourage acquittals.[498] This increased likelihood of acquittals

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[491] Lord Cooper, 'The Scottish Legal Tradition' in Meston and Sellar, *The Scottish Legal Tradition New Enlarged Edition* (Edinburgh: The Saltire Society, 1991), 84, 85
[492] Meston, 'Scots Law Today' in Meston and Sellar *ibid*, 26
[493] *ibid*
[494] *McNicol* v *HMA* 1964 JC 25
[495] Mulholland and Fawcett, 'Reforming Scots Criminal Law And Practice: Additional Safeguards Following The Removal of the Requirement for Corroboration Analysis of Consultation Responses' (Scottish Government, 2013), 16 at http://www.gov.scot/Resource/0042/00425488.pdf (last visited 22/01/2019); Harper, 'Not Proven - A Unique Verdict' (1988) 13(2) *International Legal Practitioner* 49, 50
[496] Mulholland *ibid*, 16
[497] *ibid* 16
[498] Hope, Greene et al, 'A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making' (2008) 32(3) Law Hum Behav 241.

has significant consequences for the accused. It makes it more difficult for the prosecution to achieve a guilty verdict. It alleviates some of the power imbalance between the accused and the state by giving the accused the advantage of having two out of the three available verdicts leading to acquittal. Thus, to an extent,[499] it protects the accused's due process rights. English law relies on using other safeguards such as a qualified majority verdict to protect the accused's due process rights.

In England, if the mock jury trials are correct, it would be expected that the inability to use the not proven verdict to leave a stain on the defendant's character might encourage the jury to convict. If this is the case, the difference in outcome is significant because the accused in Scotland will be acquitted while their counterpart in England would be convicted. Since many Scottish cases return not proven verdicts, the difference impacts on large numbers of cases.[500]

This difference was deliberately chosen. In 2016, the Scottish Government refused to support the Criminal Verdicts (Scotland) Bill, a Member's Bill which sought to abolish the not proven verdict. It felt more research was needed into the impact of this.[501] Since it is well known that English law does not have this verdict, the decision was made in awareness that this meant rejecting the English approach.

4.2.5 Children's Hearings and Youth Courts

Section 2.6.4 showed that Scots and English law use different ages of criminal responsibility and different ages for prosecuting children. Additionally, the two systems differ as regards to proceedings in that Scotland relies mainly on Children's Hearings rather than the courts to deal with child offenders. Conversely, England uses court proceedings to deal with youth offenders when it is deemed necessary to prosecute the child. Youth Courts are used for

[499] It undermines the presumption of innocence.
[500] McCallum, 'SPICe Briefing Criminal Verdicts (Scotland) Bill' (Scottish Parliament, 2014), 8-9 at http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_14-47.pdf (last visited 22/01/2019).
[501] McMahon, 'Justice Secretary Michael Matheson Claims Research Needed Before 'Not Proven' Verdict is Dropped' (Holyrood Magazine, 2016), at https://www.holyrood.com/articles/news/justice-secretary-michael-matheson-claims-research-needed-not-proven-verdict-dropped (last visited 22/01/2019).

children between 10 and 17 years old although some offences can or must be tried in the Crown Court.[505]

Scots law considers that addressing the child's welfare is the best way to prevent re-offending.[506] When the Children's Hearing makes an order to promote the child's welfare, it will review the child's progress and can modify the order where necessary.[507] English Youth Courts can also make welfare-based orders,[508] but they often struggle to identify the needs of the child and lack the resources needed to consider how the welfare measures imposed are working.[509] A significant difference in approach arises because the child can be subjected to punishments such as fines, detention or reparation orders[510] in an attempt[511] to prevent them from re-offending.[512] Scots law only attaches importance to the need to punish offenders and incarcerate them where the child is tried in an adult court.[513]

These differences have significant practical consequences. In Scotland, a child under 16 is very unlikely to be incarcerated. This normally[514] only occurs where they are convicted by an adult court.[515] Although custodial sentences for children are rare in England, English law's greater focus on punishment means that a proportionately higher number of children are incarcerated than in Scotland.[516]

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[505] Magistrates' Courts Act 1980 s24

[506] *Report on Children and Young Persons* (Cmd 2306, 1964) paras 12-15. For criticism of youth justice in Scotland see: Vaswani, Dyer and Lightowler, 'What Is Youth Justice? Reflections on the 1968 Act' (Social Work Scotland, 2018), 18 at https://socialworkscotland.org/wp-content/uploads/2018/12/SWS-Youth-Justice-.pdf (last visited 08/12/2018).

[507] Taylor, n256 above, para 96

[508] Criminal Justice and Immigration Act 2008 s1

[509] Taylor, n256 above, para 94

[510] Powers of Criminal Courts (Sentencing) Act 2000 s100-106, s130-138

[511] It is unclear whether punishment prevents reoffending. (Anonymous, 'Criminal Damage: Why We Should Lock up Fewer Children' (Prison Reform Trust, 2008), at http://www.prisonreformtrust.org.uk/Portals/0/Documents/CriminalDamage.pdf (last visited 22/01/2019).

[512] Crime and Disorder Act 1998 s37(2)

[513] Scot Law Com No 185, n249 above, para 3.8

[514] Cf. Children's Hearings (Scotland) Act 2011 s83(2)(e), s83(6)

[515] Criminal Procedure (Scotland) Act 1995 s42(1)

[516] Anonymous, 'Children and Young People' (Howard League for Penal Reform, 2018), at https://howardleague.org/what-you-can-do/transform-prisons/children-and-young-people/ (last visited 08/12/2018); Allison, 'Prison is no Place for Children' (The Guardian, 2009), at http://www.theguardian.com/society/2009/feb/09/children-youth-prison (last visited 22/01/2019); Her Majesty's Prison and Probation Service, 'Youth Custody Data' (UK Government, 2018), at https://www.gov.uk/government/statistics/youth-custody-data (last visited 08/12/2018); Scottish

By separating the decision about the child's guilt from decisions about the child's welfare, Scotland ensures that the child's welfare can be discussed in the more informal setting[517] of the Children's Hearing. English Youth Courts are designed to try the child in an informal court setting by referring to the child by their first name and excluding the public.[518] However, Youth Court proceedings are still a criminal trial in a court building and the process is still relatively formal.[519] This increased formality, when compared with the Children's Hearing, means that the child may find the proceedings intimidating and struggle to participate in them.[520] This may hinder their ability to interact with their legal advisor and present the strongest defence case possible. It also reduces the chance of finding out what would improve the child's welfare.[521]

Many children commit offences which means that large numbers of children in Scotland will avoid the more punishment-based approach used in England and be part of a process which focuses more strongly on engaging with the child and fixing the child's welfare.[522]

The Children's Hearing system was set up because the Kilbrandon Review, published in 1964, considered the approach taken by England but recommended a more welfare-based approach for Scotland.[523] Subsequently, the significant differences in approach and outcome were deliberately chosen, meaning that the difference is genuinely distinctive.

Prisons Service, 'SPS Prison Population' (Scottish Prisons Service, 2018), at http://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx (last visited 08/12/2018).

[517] Some formality will be required during the Children's Hearing to ensure that the rights of the child are protected.

[518] Allison, 'A Day at the Manchester Youth Court' (The Guardian, 2009), at https://www.theguardian.com/society/2009/feb/09/youth-justice-court-manchester (last visited 22/01/2019).

[519] Jacobson, n256 above, 43; Taylor, n256 above, para 91

[520] *ibid*

[521] Norrie, *Children's Hearings in Scotland* (Edinburgh: W Green, 3rd ed, 2013), para 1-05

[522] Youth Justice Board, 'Youth Justice Statistics 2016/17 England and Wales' (Ministry of Justice, 2018), 2 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/676072/youth_justice_statistics_2016-17.pdf (last visited 08/12/2018);
Robinson, Leishman and Lightowler, 'Children and Young People in Custody in Scotland Looking Behind the Data' (Youth Justice Improvement Board, 2017), 10 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/676072/youth_justice_statistics_2016-17.pdf (last visited 08/12/2018).

[523] Lord Kilbrandon, *The Kilbrandon Report* (Cm 2306, 1964), paras 60-61

4.2.6 Private Prosecutions

Although both jurisdictions allow private prosecutions, Scots law takes a genuinely distinctive approach by imposing greater restrictions on their use. Private prosecutions in Scotland must be for solemn offences which personally wronged the prosecutor. The Lord Advocate's permission is normally required although the HCJ can exceptionally grant permission to bring a private prosecution without the Lord Advocate's consent.[524] These restrictions mean that private prosecutions are rarely brought and rarely succeed. Between 1909 and February 2019, there were only eleven applications to bring a private prosecution in Scotland[525] and only two applications to bring a private prosecution were successful.[526]

The Scottish courts consider that the Lord Advocate should normally "decide whether [he or she] will prosecute in the public interest" and the courts cannot "order him to concur in a private prosecution."[527] Consequently, the courts consider the Lord Advocate to be a good judge of the public interest and are unwilling to encroach on his or her decision not to prosecute. The Lord Advocate's lack of support for a private prosecution normally protects the accused from a private prosecution.[528] Ensuring that almost everyone is prosecuted by the state increases the chance of the accused's due process rights being followed[529] since state prosecutors have more experience of ensuring that cases are prosecuted fairly.[530] It also prevents vexatious prosecutions.

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[524] *Stewart* v *Payne* [2016] HCJAC 122, at [17], [85] and [91]; *X* v *Sweeney* 1982 JC 70; *J* & *P Coats* v *Brown* (1909) 6 Adam 19

[525] Applications to bring a private prosecution which were successful: *X* v *Sweeney* 1982 JC 70; *J & P Coats* v *Brown* (1909) 6 Adam 19. Applications to bring a private prosecution which were unsuccessful: *Stewart* v *Payne* and *McQuade* v *Clarke* [2016] HCJAC 122; *C* v *Forsyth* 1995 SLT 905; *Fishmongers Co* v *Bruce* 1980 SLT (Notes) 35; *Meehan* v *Inglis* 1975 JC 9; *Trapp* v *G* 1972 SLT (Notes) 46; *Trapp* v *M* 1971 SLT (Notes) 30; *Haddon* v *Craig* 1967 SLT (Sh Ct) 25; *M'Bain* v *Crichton* 1961 JC 25. Cases were found by searching Westlaw (Westlaw, 'Westlaw UK Signon' (Westlaw, 2019), at https://login.westlaw.co.uk/ (last visited 27/02/2019).) using the search terms "Scotland" and "private prosecutions".

[526] *X* v *Sweeney* 1982 JC 70; *J* & *P Coats* v *Brown* (1909) 6 Adam 19

[527] *M'Bain* v *Crichton* 1961 JC 25, 29

[528] *Stewart*, n524 above, at [89]

[529] As an agent of the state the Procurator Fiscal has a significant power advantage over the accused.

[530] Boyce and Gokani, 'Private Prosecutions' (Law Society Gazette, 2014), at http://www.lawgazette.co.uk/law/practice-points/private-prosecutions/5043028.fullarticle (last visited 20/02/2019).

In England, private prosecutors have an "unlimited right to institute a prosecution."[531] Unlike in Scotland, a private prosecution can be brought for any offence and the consent of the prosecutor is not normally required.[532] England also attaches importance to the need to protect the defendant from private prosecutions which are vexatious, against the public interest or unlikely to succeed by allowing the prosecutor to take over the case and abandon it.[533] Unlike Scotland, England seeks to balance this with the crime control need for people to bring private prosecutions, which are seen as "a valuable constitutional safeguard against" the state's failure to prosecute.[534] Thus, English law protects victims from state inaction by holding that generally (rather than exceptionally in Scotland[535]) people should be allowed to bring private prosecutions.

This difference in approach has significant practical consequences. There are no statistics about the amount of English private prosecutions. However, there is evidence of private prosecutions being used for a wide range of issues including animal cruelty,[536] ticketing offences for public transport,[537] fraud[538] and to enforce intellectual property rights.[539] In 2017, the animal charity the RSPCA achieved 1,492 convictions in the English Magistrate's Court after bringing private prosecutions, which suggests that private prosecutions are being used frequently.[540] This represents more private prosecutions than there have been in a century in Scotland. This has significant consequences for the defendant. In England, a person who offends and is not prosecuted by the state is in danger of being subjected to a private prosecution and potentially being convicted. Although factors such as the expense to the private prosecutor of bringing the case reduce the likelihood of this happening, there

[531] *R (Gujra)* v *CPS* [2012] UKSC 52, at [21]
[532] Prosecution of Offences Act 1985 s6(2)
[533] *Gujra*, n531 above, at [109]
[534] *Gouriet* v *Union of Post Office Workers* [1978] AC 435, 477
[535] *Sweeney*, n524 above,70
[536] RSPCA, 'Prosecutions Annual Report 2017' (RSPCA, 2017), 32 at https://www.rspca.org.uk/ImageLocator/LocateAsset?asset=document&assetId=1232742382922&mode=prd (last visited 20/02/2019)
[537] Boyce and Gokani, 'Private Prosecutions' (Law Society Gazette, 2014), at http://www.lawgazette.co.uk/law/practice-points/private-prosecutions/5043028.fullarticle (last visited 20/02/2019).
[538] *R* v *Somaia* (unreported) 22nd July 2014, Crown Court
[539] *R (Virgin Media Ltd)* v *Zinga* [2014] EWCA Crim 1823
[540] RSPCA, 'Prosecutions Annual Report 2017' (RSPCA, 2017), 32 at https://www.rspca.org.uk/ImageLocator/LocateAsset?asset=document&assetId=1232742382922&mode=prd (last visited 20/02/2019).

is a greater risk of a successful private prosecution than in Scotland. In Scotland, the same person has a negligible chance of being subjected to a private prosecution.

Although the Scottish courts have not explicitly chosen a different approach, their desire to limit the ability to bring a private prosecution suggests that they would reject the broader approach taken by England. Accordingly, all the requirements of genuine distinctiveness are met.

4.3 Summary of Findings

Type of Difference	**Does the Difference in Outcome Impact on Large Numbers of Cases?**	
	Yes	**No**
Genuine distinctiveness	Times for questioning suspects, private prosecutions, Children's Hearings, simple majority verdict, opening statements, the not proven verdict	Jury size

Table 8: Areas of difference between Scots and English criminal procedure impacting on large numbers of cases

There were seven areas of genuine distinctiveness and two areas of trivial difference. As Table 8 shows, most of the genuinely distinctive differences applied to large numbers of cases. Genuinely distinctive differences arose throughout the criminal process from police questioning to decisions about who should prosecute, to the trial including the jury size and the court's verdict. Thus, the sample certainly provides evidence of Scots criminal procedure taking a distinctive approach. Therefore, regardless of whether Scots criminal procedure in the areas not considered takes a distinctive approach, the number of differences found means that it can be said to be distinctive.

4 Conclusion

This chapter tested claims that the Scottish and English criminal processes are distinctive from each other to establish whether there are distinctive areas of Scots law which might be undermined by the JCPC/SC's jurisdiction. The areas of law considered represent a moderately sized sample of Scottish and English criminal, procedure and evidence law. Further study is needed to establish whether the areas not covered are genuinely

distinctive. However, within the areas of law sampled there is evidence of the Scottish criminal process containing genuinely distinctive elements.

This chapter found five trivial differences and two contextual differences and one symbolic difference in the areas of criminal law discussed.[541] This indicates that within the sample many areas of Scots criminal law have adopted similar policies to English law, and they result in similar outcomes.

Crimes which might have been expected to produce the biggest differences did not produce genuinely distinctive differences. Murder and non-fatal offences against the person were examples of this. Despite the different approaches taken by each jurisdiction, similar outcomes were reached. Although these differences were not genuinely distinctive, they were significant because they showed the two jurisdictions approaching the problem using different policy aims and different legal theories. There was one difference through conservatism namely the defence of provocation which was significantly different from the English defence of loss of control, as regards both the policy decisions taken and in the outcomes produced. Thus, despite the Scottish approach no longer being defended, it represents a significant difference to English law.

There was a need to look more widely to find genuinely distinctive criminal laws. Seven areas of criminal law were genuinely distinctive. They represent areas of law which produced significantly different outcomes and adopted significantly different policy approaches. They created situations where a person would be convicted of murder in one jurisdiction and culpable homicide/manslaughter in the other or where a person would be convicted in one jurisdiction and acquitted in the other. Most of these differences were likely to impact on large numbers of cases.

Within the sample of areas of law, Scotland generally[542] attached importance to crime control, the protection of the community[543] and the protection of lives.[544] The Scottish courts take a paternalistic and moralistic approach.[545] Additionally, Scots criminal law

[541] Tables 1 and 2 above
[542] Cf. lawful act culpable homicide
[543] Consent to assault and voluntary intoxication
[544] Self-defence and provocation
[545] Consent to assault

defines its defences narrowly and its offences broadly and generally[546] seeks to reduce barriers to successful prosecutions. Conversely, English criminal law, while recognising the need for crime control,[547] generally[548] defines defences broadly and offences narrowly to make successful prosecutions difficult.[549] It generally adopts a liberal approach,[550] which unlike Scotland, champions individual autonomy and limits the state's ability to impose criminal sanctions on the defendant.

Accordingly, the argument that Scots criminal law is distinctive is correct but requires modification. A more accurate claim would be that Scots criminal law has several genuinely distinctive areas and often takes a distinctive policy approach but there are many areas of similarity.

The examination of criminal evidence identified five genuinely distinctive differences and seven trivial differences. Generally,[551] these differences give the prosecutor in England a practical advantage over their Scottish counterpart because they are provided with additional tools to use to prove their case. Scots criminal evidence generally[552] focuses less on crime control and more on due process. Its approach is generally a liberal one which limits state interference,[553] protects the rights of the accused[554] and makes successful prosecutions difficult.[555] In contrast, English law although recognising these needs and the need for due process, has generally[556] been more willing to compromise them to ensure efficient justice. It removes barriers to successful prosecutions by not normally requiring corroboration, by making it easier to draw inferences from the accused's silence and to admit hearsay evidence. Thus, despite there being some areas of similarity, claims that Scotland takes a different approach to criminal evidence are correct.

[546] *ibid,* self-defence
[547] For example, the restriction of the defence of intoxication to crimes of specific intent.
[548] Cf. gross negligence manslaughter
[549] Loss of control and self-defence.
[550] Cf. gross negligence manslaughter
[551] Cf. dock identification
[552] *ibid*
[553] Corroboration and the right to silence.
[554] Corroboration, the right to silence, private prosecutions
[555] Corroboration, the right to silence, the not proven verdict
[556] Cf. dock identification

There were two trivial differences within the areas of criminal procedure considered. However, there were seven areas of genuine distinctiveness.[557] Thus, those arguing that Scots criminal procedure is distinctive are correct.

Scots criminal procedure generally[558] focused on protecting the accused's due process rights,[559] welfare[560] and liberty.[561] English law also recognises the need for due process but has shown greater willingness than Scots criminal procedure to embrace crime control arguments, particularly in relation to its greater willingness to allow private prosecutions and its time limits for questioning suspects. This reveals that claims by legal nationalists that Scots law is fairer to the accused than English law require qualification. Scots and English law balance the needs of the accused with crime control in different ways. Scots law focuses more on the accused's due process rights for criminal evidence and procedure while English substantive criminal law is more protective of the accused's due process rights. Moreover, as this chapter has shown, both jurisdictions despite sometimes focusing on crime control, have a wide range of due process measures to help protect the accused during the criminal trial.

Overall, arguments that the Scottish criminal process is distinctive are correct although they require qualification. This chapter found many areas of genuinely distinctive differences, differences in approach but similar outcome and differences through inertia between the Scottish and English criminal process. These areas of law could be encroached on by the SC, if as is alleged,[562] it fails to respect the distinctiveness of Scots law. However, there are also many trivial differences, contextual differences and purely symbolic differences. Thus, a more nuanced claim would be that regardless of whether the areas not considered contain areas of difference or similarity, there are sufficient areas of genuine distinctiveness to say that the Scottish criminal process is distinctive. However, it also contains many areas of similarity.

[557] Table 8 above
[558] Cf. the simple majority verdict
[559] Private prosecutions, the prosecution of children, the prohibition on opening statements, the not proven verdict
[560] Children's Hearings
[561] Time limits for police questioning
[562] Chapter 1 section 3 above

Chapter 4: The Supreme Court's Effect on Scots Law and Human Rights Protection

1 Introduction

As Chapter 1 section 5 showed, it is claimed that the Judicial Committee of the Privy Council and Supreme Court (JCPC/SC), when testing Scots law for compatibility with the European Convention on Human Rights (ECHR) is insensitive to the distinctiveness of Scots law and that this results in inappropriate importations of ECHR law into Scots law. This allegedly results in decisions fitting uneasily with existing law and creates confusion about the law. This chapter tests these claims. It also considers how the JCPC/SC fulfils its function of checking Scots criminal law for Convention compatibility to establish whether the JCPC/SC has used its jurisdiction to correct any HCJ decisions which are not Convention-compatible. This chapter examines whether the JCPC/SC's decisions were necessary to protect the accused's Convention rights and whether they provided protection beyond or below what the Convention requires.

This chapter begins by outlining the methodology and criteria used to 1) determine whether the JCPC/SC affected the distinctiveness of Scots criminal law, evidence and/or procedure and/or impacted on the coherence and clarity of Scots law and 2) to establish what level of Convention rights protection the JCPC/SC provided. The chapter concludes by assessing whether the JCPC/SC's scrutiny of Scots law for Convention compatibility has had an unwelcome effect on Scots law.

2 Methodology

2.1 Scope

This chapter considers Scottish devolution and compatibility issue cases dealing with criminal law, evidence or procedure, decided by the JCPC/SC which considered whether the accused's Convention rights were breached. Some cases only discussed whether the JCPC/SC had jurisdiction to hear the case or dealt with an issue of EU law or a devolved competence not relating to Convention rights. Since they do not discuss Convention rights

they will not be considered. Sentencing cases will not be considered because although there is potential for the JCPC/SC to affect this area of law, allegations that the JCPC/SC's jurisdiction impacts on Scots law focus on its effect on the trial and pre-trial. These exclusions[1] leave a sample of 26 cases listed in Table 9 below.

[1] *Hoekstra* v *HMA* 2001 SLT 28; Follen v *HMA* [2001] UKPC D2; *Martin* v *HMA* [2010] UKSC 10; *Mills* v *HMA* [2002] UKPC D2; *Flynn* v *HMA* [2004] UKPC D1

The Right to Legal Advice	Right to be Prosecuted Within a Reasonable Time	Right to an Independent and Impartial Tribunal	Prosecution Failure to Disclose Evidence	Right Against Self-Incrimination	Right to Privacy	Right to Question a Witness
Cadder v *HMA*[2]	*O'Neill* v *HMA*[3]		*Holland* v *HMA*[4]		*Kinloch* v *HMA*[5]	*DS* v *HMA*[6]
Ambrose v *Harris*[7]	*Dyer* v *Watson*[8]	*Montgomery* v *HMA*[9]	Sinclair v *HMA*[10]	*Brown* v *Stott*[11]	*AB* v *HMA*[12]	
HMA v *P*[13]	*HMA* v *R*[14]	*Millar* v *Dickson*[15]	*McDonald* v *HMA*[16]			
McGowan v *B*[17]	*Speirs* v *Ruddy*[18]	*Clark* v *Kelly*[19]	*HMA* v *Murtagh*[20]			
Birnie v *HMA*[21]	*Burns* v *HMA*[22]	*Ruddy* v *Procurator Fiscal*[23]	*McInnes* v *HMA*[24]			
			Allison v *HMA*[25]			
			Fraser v *HMA*[26]			
			Macklin v *HMA*[27]			

Table 9: Sample of cases and area(s) of law considered

[2] [2010] UKSC 43
[3] [2013] UKSC 35
[4] [2005] UKPC D1
[5] [2012] UKSC 62
[6] [2007] UKPC D1
[7] [2011] UKSC 43
[8] [2002] UKPC D1
[9] 2001 SLT 37
[10] [2005] UKPC D2
[11] [2001] UKPC D1
[12] [2017] UKSC 25
[13] [2011] UKSC 44
[14] [2002] UKPC D3
[15] [2001] UKPC D4
[16] [2008] UKPC 48
[17] [2011] UKSC 54
[18] [2007] UKPC D2
[19] [2003] UKPC D1
[20] [2009] UKPC 35
[21] [2011] UKSC 55
[22] [2008] UKPC 63
[23] [2006] UKPC D2
[24] [2010] UKSC 7
[25] [2010] UKSC 6
[26] [2011] UKSC 24
[27] [2015] UKSC 77

2.2 Criteria

2.2.1 The Effect on Scots Law

As already noted, the sample of cases will be assessed against two sets of criteria. The first assesses the JCPC/SC's effect on Scots law. The second set of criteria are designed to test what level of Convention rights protection the JCPC/SC provided and whether this represented an alteration in the level of Convention rights protection provided by Scots law.

The first set of criteria test frequently made claims about the impact of the JCPC/SC's jurisdiction. Drawing upon the analysis in Chapter 2 section 6, the following criteria will be used to establish whether the JCPC/SC impacted on Scots law:

- *Was law imported from other jurisdictions?* In Chapter 2 section 6.4.1, it was argued that importing law into a legal system may result in the imported law fitting uneasily with existing law, which can create confusion about the law. There are two main types of law which might be imported into Scots law. First, since the JCPC/SC's jurisdiction over Scottish criminal cases mostly deals with Convention rights cases, European Court of Human Rights (ECtHR) case law might be imported into Scots law. Second, the presence of judges trained in English law allegedly creates potential for English law being imported into Scots law.[28] It will be considered whether the JCPC/SC's judgments refer to law from other jurisdictions. This does not always lead to an importation of law. The law may be consistent with existing Scots law or the JCPC/SC may not rely on the law. It is only where the law is inconsistent with existing Scots law and is relied on that an importation occurs.

- *Did the decision fit with existing law?* There is some overlap with the importation of law criterion because as Chapter 2 section 6.3.1 showed, the importation of law can result in decisions which fit uneasily with existing law. However, decisions may not fit well despite there being no importation of law. Judges may decide to take a new interpretation of existing Scots law which creates confusion about the law. It will be considered whether the rules laid down in each JCPC/SC judgment are consistent with existing case law and the UK and Scottish Parliament's legislation. If existing

[28] Chapter 1 section 5.1 above

case law is unclear or contradictory, it will be established whether the judgment is consistent with any of the approaches taken previously by Scots law.

- *Did the decision impact on differences between Scots and English law?* The position taken by Scots and English law before the JCPC/SC's judgment will be compared and any differences and similarities noted. It will be considered whether any differences or similarities remained after the JCPC/SC's decision. This will establish whether the level of difference between Scots and English law was altered by the decision. The effect of harmonisation on the distinctiveness of Scots law depends on the degree of change made. Changes applying to narrow legal issues might make Scots law more or less like English law but without affecting large numbers of cases.

- *Did the decision affect the clarity of Scots law?* Legal certainty ensures that the law is predictable for the parties relying on it. Chapter 2 section 6.3.3 showed that the tendency of top courts to make significant changes to the law can affect the law's clarity if they fail to consider how the new rule fits with existing law. To assess whether the JCPC/SC had this impact, the degree of uncertainty in the law before and after the JCPC/SC's decision will be compared.

- *Was legislation required*? There are several situations where a court judgment may result in legislative intervention. First, the court might refer the issue to the legislature either through a declaration of incompatibility;[29] or where the JCPC/SC deems legislation to be outwith devolved competence and gives the devolved legislator the opportunity to amend the legislation to bring it within devolved competence.[30] Second, legislation can be used to remedy problems created by a decision. This could include clarifying an area of uncertainty created by a judgment, using legislation to overturn a court decision which is not considered to benefit Scots law[31] or making changes to Scots law to ensure that it complies with the JCPC/SC's judgment.[32]

[29] Human Rights Act 1998 s4
[30] Scotland Act 1998 s102; *Christian Institute* v *Lord Advocate* [2016] UKSC 51, at [109]
[31] Chapter 2 section 6.3.3 above
[32] Section 3.5.1 below

The first three criterion can be met to varying degrees because some cases might make small modifications to Scots law while others might require completely new rules to be applied. Not all cases will modify longstanding law. Some cases might result in an earlier decision in the case or a single decision from another case being overruled. The case might be the first to deal with an issue and the JCPC/SC, with the help of the HCJ decision in the case, must decide how to develop the law. In this situation, the area of law is in flux rather than one taking a longstanding position on the matter. This lessens the impact on Scots law because there will be little time for Scots law to adopt the decision in lots of cases before it is overruled. An impact is more significant where it alters a longstanding approach. This means the rule was applied in a large number of cases and is likely to have become an important part of police and prosecutorial practice. Altering this case law may throw large numbers of current cases into doubt.

2.2.2 Convention Compatibility

Convention rights are relevant to the criminal process including the right to a fair trial (Article 6), a prohibition on retrospective law making (Article 7) and rights to liberty (Article 5), privacy (Article 8), free speech (Article 10) and freedom of association (Article 11). To establish how effectively the JCPC/SC protects these rights, this chapter will consider what level of human rights protection each judgment provides when compared with the ECHR, as interpreted by the ECtHR. It will then be considered what level of Convention rights protection was previously provided by Scots law. The level of protection before and after the JCPC/SC's decision will be compared to establish whether the decision increased, decreased or did not alter the level of Convention rights protection.

Several approaches can be taken to the enforcement of Convention rights.[33] One is the mirror approach which considers that "the duty of national courts is to keep pace with Strasbourg jurisprudence ... no more and no less."[34] It seeks to "follow any clear and

[33] Bjorge, 'The Courts and the ECHR: A Principled Approach to Strasbourg Jurisprudence' (2013) 72(2) CLJ 289; Klug and Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' [2010] EHRLR 621; Metcalfe, ''Free to Lead As Well as to Be Led': Section 2 of the Human Rights Act and the Relationship Between the United Kingdom Courts and Strasbourg' (2010) 7(1) *JUSTICE Journal* 22

[34] *R (Ullah)* v *Secretary of State for the Home Department* [2004] UKHL 26, at [20]

constant jurisprudence of the" ECHR.[35] The mirror approach considers the ECtHR to provide authoritative rulings on the ECHR and since the UK courts must "take into account" ECtHR case law,[36] they should be wary of diluting this jurisprudence by allowing domestic law to go below the standard set by the ECtHR.[37] Where it seems that consensus has developed amongst Council of Europe members about the approach to be taken, domestic courts applying the mirroring approach should seek to ensure that the UK takes the same approach.[38] When the ECtHR jurisprudence is unclear, the courts will be cautious about going beyond the ECtHR. They consider that if they go beyond the ECtHR, the UK state has no remedy against the decision, but if they unintentionally provide weaker Convention rights protection than the ECtHR requires the pursuer can take their case to the ECtHR.[39] Thus, this approach is interpreted as preventing the SC from normally going beyond or below the level of Convention rights protection required by the ECtHR.[40]

Courts sometimes depart from the mirror approach by going beyond what Strasbourg requires. This is the "dynamic approach."[41] It is often taken where the ECtHR has given states a margin of appreciation about how to decide the issue. Since the ECtHR lets states decide what approach to take, the courts feel able to form their "own judgment."[42] If there is no Strasbourg case law dealing directly with the issue, the courts consider what principles can be drawn from this case law.[43] In doing this, they have sometimes been willing to go beyond what has been clearly established by the ECtHR.[44] This approach achieves consistency with the minimum standards required by Strasbourg but means that the JCPC/SC would be making changes to Scots law which were, strictly speaking, unnecessary to achieve Convention rights compliance.

Unlike the first two approaches, the "municipal approach" represents an approach in which ECtHR case law is not followed either because the state has a wide margin of appreciation

[35] *R (Alconbury)* v *Secretary of State for Environment, Transport and the Regions* [2001] UKHL 23, at [26]
[36] Human Rights Act 1998 s3
[37] *Ullah*, n34 above, at [20]
[38] Klug, n33 above, 625
[39] *R (Al-Skeini)* v *Secretary of State for Defence* [2007] UKHL 26, at [106]
[40] Bjorge, n33 above, 292
[41] Klug, n33 above, 626
[42] *Re P* [2008] UKHL 38
[43] Klug, n33 above, 627
[44] *EM* v *Secretary of State for the Home Department* [2008] UKHL 64

or where the courts consider that the ECtHR misunderstood domestic law and want to engage in a dialogue with the ECtHR.[45] If the latter situation occurs, the decision is likely to fall below the level required by Strasbourg.[46] This approach is likely[47] to have the least effect on Scots law since it involves the JCPC/SC arguing against using the ECHR to change Scots law.

2.2.3 Limitations

The criteria for impact (regarding the effect on Scots law and the JCPC/SC's approach to the enforcement of Convention Rights) require subjective judgement. Different people may have different opinions about whether cases meet the criteria above and the extent of the change made. A similar problem arises for the Convention-compatibility criteria. ECtHR case law may be unclear or have not dealt with the issue and can often be interpreted in different ways. This chapter deals with this problem of subjectivity by justifying in detail why cases were categorised in a particular way. The criteria provide a framework to explain why categorisations were made. Although others may disagree with the categorisations made, this enables the reader to see the reasoning behind the author's categorisation.

3 The Impact of the JCPC/SC

This section considers the impact the JCPC/SC's enforcement of Convention rights has had on Scots law when judged against the first set of criteria. Table 10 below lists cases with each type of impact. For each criterion for impact, it will be considered why certain cases did not have that impact before analysing why some cases met the criterion.

[45] *ibid*, 628-629
[46] *ibid*
[47] Provided it is consistent with existing Scots law.

Cases Importing Law	Cases Fitting Uneasily with Existing Law	Effect on the Level of Difference Between Scots And English Law		Cases Altering Scots Law's Clarity			Cases Requiring Legislation
		Increase	Decrease	Same	Decrease	Increase	
Cadder v *HMA*	*Cadder* v *HMA*	*HMA* v *R*	*Cadder* v *HMA*	*Macklin* v *HMA*	*Cadder* v *HMA*	All other cases	*Cadder* v *HMA*
McGowan v *B*	*HMA* v *R*		*McGowan* v *B*	*Montgomery* v *HMA*	*HMA* v *R*		
Sinclair v *HMA*	*Speirs* v *Ruddy*		*Speirs* v *Ruddy*				
Brown v *Stott*	*Burns* v *HMA*		*Sinclair* v *HMA*				
Holland v *HMA*	*Sinclair* v *HMA*		*Fraser* v *HMA*				
	Fraser v *HMA*		*Holland* v *HMA*				
	Brown v *Stott*		*AB* v *HMA*				
	Holland v *HMA*						
	Millar v *Dickson*						
	AB v *HMA*						

Table 10: Type of impact each case had on Scots law

3.1 The Importation of Law

Table 11 lists JCPC/SC cases citing law from other jurisdictions and whether this resulted in an importation of law.

Case	Jurisdictions Cited				Imported Law
	ECtHR	England	Commonwealth Jurisdictions	Other	
Montgomery v *HMA*	Yes	Yes	Australia, Canada, Ireland, Trinidad and Tobago	Bermuda, Ireland	
Brown v *Stott*	Yes	Yes	Canada	US	ECtHR
Millar v *Dickson*	Yes	Yes			
Dyer v *Watson*	Yes	Yes	Canada, Jamaica, Mauritius		
HMA v *R*	Yes	Yes	Canada, New Zealand, South Africa, Trinidad and Tobago		
Clark v *Kelly*	Yes	Yes			
Sinclair v *HMA*	Yes				ECtHR
Holland v *HMA*	Yes	Yes			ECtHR
Ruddy v *Procurator Fiscal*		Yes			
DS v *HMA*	Yes	Yes	Canada		
Speirs v *Ruddy*	Yes	Yes			ECtHR
McDonald v *HMA*		Yes			
Burns v *HMA*	Yes	Yes			
HMA v *Murtagh*	Yes	Yes			
McInnes v *HMA*		Yes	New Zealand, Trinidad and Tobago		
Allison v *HMA*		Yes			
Cadder v *HMA*	Yes	Yes		Ireland	ECtHR
Fraser v *HMA*	Yes	Yes	Trinidad and Tobago		
Ambrose v *Harris*	Yes	Yes	Canada	US	
HMA v *P*	Yes	Yes	Canada		
Birnie v *HMA*		Yes		US	
Kinloch v *HMA*	Yes				
O'Neill v *HMA*	Yes	Yes			
Macklin v *HMA*	Yes				
McGowan v *B*	Yes	Yes			ECtHR
AB v *HMA*	Yes	Yes			

Table 11: Law from other jurisdictions cited by the JCPC/SC and whether there was an importation of law

Every case considered law from other jurisdictions. ECtHR case law was cited most frequently and was the only type of law which was imported into Scots law.

There was frequent reference to English law and law from other common law jurisdictions.[48] There was usually no importation of law because the non-Scottish law was rejected,[49] was not essential in deciding the case[50] or was consistent with Scots law. This law was cited in all but two cases to show how the other jurisdiction dealt with problems[51] and how Convention rights should be enforced in the UK under the Human Rights Act 1998.[52] Although Convention rights enforcement in Scotland is more complicated due to the Scotland Act 1998, Scots law like English law, needs to consider issues such as how much deference should be shown to legislators and the extent to which the UK should follow the ECtHR. English law was considered to be useful for this purpose.[53]

Case law from Commonwealth jurisdictions can be used as an interpretive aid to the ECHR by showing how similar rights were applied in common law regimes.[54] Although the UK helped draft the ECHR,[55] since most Council of Europe members have civilian legal systems, the ECHR has often been interpreted with these legal systems in mind.[56] Accordingly, it is sometimes difficult to apply ECtHR case law to regimes with common law elements like Scots law.

Despite many cases not importing law into Scots law, Table 11 shows that six cases imported ECtHR case law into Scots law. In three cases this importation did not alter longstanding Scots law. This section focuses on cases which imported law and altered longstanding case law because they best illustrate the problems that arise when law is imported into Scots law.

[48] Table 3 above
[49] *R*, n14 above, at [65]
[50] *Ambrose*, n7 above, at [50]-[54]; *Holland*, n4 above, at [45] per Lord Rodger
[51] *Ambrose*, n7 above, at [96]-[79] per Lord Brown; *Holland*, n4 above, at [45] per Lord Rodger; *AB*, n12 above, at [7] per Lord Hodge
[52] *Cadder*, n2 above, at [45]; *Ambrose*, n7 above, at [16]-[17] and [50] per Lord Hope; *Brown*, n11 above, 710 per Lord Steyn
[53] *ibid*
[54] *Ambrose*, n7 above, at [50] and [60] per Lord Hope (US law, Canadian law); *Cadder*, n2 above, at [62] per Lord Hope and [100] per Lord Rodger (Irish law)
[55] Lord Hope, 'Devolution and Human Rights' [1998] EHRLR 367, 369
[56] White and Ferguson, 'Sins of the Father? The "Sons of *Cadder*"' [2012] Crim LR 357, 361

3.1.1 *Cadder* v *HMA*

Cadder v *HMA* held that accused detained for police questioning had a right to legal advice. Before *Cadder*, a person detained for police questioning had no right to consult with a lawyer.[57] This helped the police to obtain information from suspects. It was feared that "this purpose might be defeated by the participation of [the accused's] solicitor" during police questioning.[58] This crime control[59] desire to help the police obtain information from the accused was offset, although in the SC's opinion insufficiently,[61] by safeguards including corroboration and the almost absolute right to silence.[62]

Under the ECHR Article 6(3)(c), the accused has a "minimum right" to "legal assistance." In *Salduz* v *Turkey*,[63] the ECtHR held that "the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."[64]

In *HMA* v *McLean,*[65] the HCJ upheld its decisions in *Paton* v *Ritchie*[66] and *Dickson* v *HMA*[67] that the Scottish approach did not violate Article 6(3)(c) because the absence of legal advice during police questioning was balanced against a number of safeguards which protected the accused from wrongful conviction and in the HCJ's opinion made the trial fair. The HCJ examined the ECtHR's statement in *Salduz* that "as a rule" legal advice should be provided during police questioning and interpreted it as giving domestic courts discretion to decide how to implement this right, provided the trial could be fair.

The HCJ in *McLean* defended Scots law. It extolled the benefits of the Scottish approach by listing safeguards such as corroboration, the absolute right to silence, the then existing inability to question the accused after they have been charged and the then short

[57] Criminal Procedure (Scotland) Act 1995 s15(1)
[58] Lord Thomson, *Criminal Procedure in Scotland* (Cmnd 6218, 1975), para 7.16
[59] The term was defined in Chapter 3 section 1.2.5 above.
[61] *Cadder*, n2 above, at [50]
[62] *HMA* v *McLean* [2009] HCJAC 97, at [31]
[63] *Salduz* v *Turkey* (2009) 49 EHHR 19
[64] *Ibid,* at [55]
[65] *McLean*, n62 above
[66] 2000 JC 271
[67] 2001 JC 203

detention time of 6 hours.[68] Thus, the HCJ inferred that despite Scots law not adopting the more normal approach among European countries of providing the accused with legal advice during police questioning, it was equally capable of protecting the accused.

The HCJ's approach placed greater emphasis than the SC on the ability of the Scots common law to protect the accused. It recognised the need to protect human rights.[69] However, it considered that Scottish case law provided sufficient protection because it is allegedly "particularly jealous to protect" the accused.[70] Thus, Scots law had its own human rights regime and this was sufficient to compensate the accused for the lack of legal advice. This approach made the HCJ unwilling to countenance the possibility that Scots law was Convention-incompatible. The HCJ noted that even if *Salduz* were interpreted as requiring legal advice during police questioning, it "should not be applied without qualification in" Scotland because of the safeguards Scots law provided.[71]

Conversely, the SC in *Cadder* relied on *Salduz* to hold that it is incompatible with Article 6(3) ECHR to deny legal advice during police questioning. Lord Hope noted that the phrase "as a rule" in *Salduz* suggested that although there was "room for a certain flexibility" in how the right to legal advice was implemented, there could not be a "systematic departure from it."[72] He noted that the ECtHR considered the right to be important to prevent the accused from incriminating themselves. Applying this to Scots law, he concluded that the provision of other safeguards was insufficient to comply with Article 6 because they did not prevent self-incrimination.[73]

Unlike the HCJ in *McLean*, Lords Hope and Rodger went beyond considering how the lack of legal advice might be offset by safeguards and considered whether the safeguards helped prevent the accused from incriminating themselves. They considered the origin of the safeguards and their practical effect in preventing the accused from saying something incriminating. Both judges agreed that the safeguards were "commendable" and were

[68] *ibid*, at [27]
[69] *McLean*, n62 above, at [31]
[70] *ibid*, at [27]
[71] *Ibid,* at [31]
[72] *Cadder*, n2 above, at [41]
[73] *Ibid,* at [50]

unwilling to completely reject the HCJ's argument for not changing Scots law.[74] However, their more critical examination of the Scots common law meant that they concluded that the safeguards were "incapable of removing the disadvantage that a detainee will suffer" and were insufficient to achieve Convention compatibility.[75]

This reliance on *Salduz* produced a decision which fitted uneasily with existing Scots law. The longstanding policy of denying legal advice during police questioning to promote crime control but providing other safeguards to protect the accused's due process rights, had to be abandoned in favour of an approach which rebalanced the need for due process and crime control in a way which ensured that the accused would normally receive legal advice during police questioning. The result was that as of February 2011, 867 cases had been abandoned due to *Cadder*.[76] As section 3.5.1 will show, *Cadder* also resulted in significant legislative reforms being made to Scots law and resulted in a new approach to Convention rights protection in Scots law. Thus, the SC's importation of the ECtHR's *Salduz* decision into Scots law had significant consequences for Scots law.

3.1.2 *Holland* v *HMA*

Holland v *HMA* dealt with the prosecution's failure to disclose to the defence that a prosecution witness had outstanding criminal charges against her. Before *Holland, McLeod* v *HMA* had held that the prosecution should disclose evidence tending "to exculpate the accused"[77] but in practice the courts, including the HCJ in *Holland* v *HMA*,[78] were reluctant to force the prosecutor to disclose Crown witnesses' convictions and charges.[79] The HCJ in *Holland* reasoned that the undisclosed convictions and charges were unhelpful to the defence because the evidence that the witness was charged with drug dealing did not undermine her credibility. Moreover, revealing the witness's bad character would enable the accused's character to be questioned as well.[80]

[74] *Cadder*, n2 above, at [50]
[75] *ibid*
[76] Scottish Parliament Official Report 23 February 2011 col 33340 Kenny MacAskill
[77] 1998 JC 67
[78] 2004 SLT 762, at [41]
[79] *Holland,* n4 above, at [65]
[80] *Holland,* n78 above, at [41]

The HCJ's approach was mostly common law based although Lord Hamilton showed a willingness to consider ECtHR case law.[81] Lord Gill noted that the *McLeod* test was "securely established in Scottish criminal procedure before the incorporation of the Convention."[82] This echoes the legal nationalist claim that Scots law has a long history of protecting the accused. He noted that Article 6 ECHR "adds nothing" to the appeal.[83] There is an assumption that Scots law should be allowed to deal with human rights in its own way because Scots law's approach can protect the accused as well as the approach taken by the ECtHR.

The JCPC relied on ECtHR case law to argue that convictions and charges should be disclosed.[84] Lord Rodger noted that they are material evidence which "help in assessing the strengths and weaknesses of the witness."[85] This meant that Scots law was moved from normally withholding charges and convictions from the defence to a position where the accused normally had a right to this evidence and its disclosure would become normal practice.[86] As will be argued in section 4.2.1.4, the accused was now given information which might undermine the prosecution case. *Holland* reduced the power imbalance between the accused and the prosecutor because the prosecutor could no longer withhold this useful information from the defence. Accordingly, the new approach did not fit well with existing law and represented an importation of law.

3.1.3 *Sinclair* v *HMA*

Before *Sinclair* v *HMA*,[87] there was increasing recognition that prosecutors should proactively disclose material evidence.[88] When disclosure did not happen, the courts normally held that the defence should have requested the information.[89] The HCJ in *Sinclair* noted that Scottish case law did not support suggestions that the prosecutor was under an obligation to disclose witness statements before the trial. The defence's failure to request

[81] *Ibid,* at [56]
[82] *Ibid,* at [40]
[83] *ibid*
[84] *Holland,* n4 above, at [72]
[85] *ibid*
[86] *Murtagh*, n20 above, at [36] This took time: see *McDonald*, n17 above, at [29]-[31]
[87] *Sinclair,* n10 above
[88] *McLeod,* n77 above, 79
[89] *Smith* v *HMA* 1952 SLT 286, 289

the information meant that the prosecution did not breach the duty of disclosure.[90] The HCJ did not refer to any ECtHR case law. This does not necessarily mean that the HCJ made no attempt to ensure that the Scots common law was Convention-compatible. Thus, *McLeod* v *HMA*, which was followed in *Sinclair*, sought to create a Convention-compatible common law test.[91] However, it again shows the HCJ preferring to use the common law to decide human rights cases.

The JCPC imported ECtHR case law into Scots law when it held that the onus was on the prosecution to disclose evidence. Lord Hope relied on *Edwards* v *UK*,[92] which emphasised that the prosecution must normally disclose material evidence to avoid gaining an unfair advantage over the defence.[93] He held that the non-disclosure of witness statements violated Article 6 because the statements could have helped the defence to "undermine" the witness's "credibility."[94] Thus, the JCPC's approach was more Convention rights focused. This meant that the JCPC realised that the ECtHR did not allow Scots law to place the onus on the defence to seek out material evidence.[95]

Lord Hope noted that the common law approach recognised a duty to disclose material evidence and that this was "important," but for the reasons just given he considered that the common law approach was insufficient to protect the accused.[96] Thus, Lord Hope was willing to recognise that the Scottish common law might be important in protecting Convention rights whilst also criticising it when he considered that it was not Convention-compatible.

The previous approach favoured the prosecution. If the defence was unaware of what evidence the prosecution had, it was difficult for them to know what information to request. It relied on the defence discovering from a source other than the prosecutor, that the evidence existed. The new approach protected the accused more. It meant that the defence's failure to realise that evidence existed or was important did not remove the

[90] 2004 SLT 794, at [15]-[16]
[91] *McLeod,* n77 above, 74
[92] [1992] 15 EHRR 417
[93] *Sinclair,* n10 above, at [30]-[32]
[94] *Ibid,* at [34]
[95] Section 4.2.1.3 below
[96] *Sinclair,* n10 above, at [27]

prosecution's duty to disclose material evidence. Thus, *Sinclair* fitted uneasily with existing Scots law and involved an importation of law.

3.1.4 Summary of Findings

20 out of 26 cases did not result in an importation of law despite referring to law from at least one other jurisdiction. Where law was imported into Scots law three out of six cases altered longstanding law. Consequently, while the JCPC/SC's critics are correct to warn that it can lead to an importation of law, few cases had this impact. However, when law was imported the consequences were significant often resulting in Scots law rebalancing due process and crime control objectives by increasing the accused's due process rights.

Two important themes can be seen in the discussion in this section. First, both the HCJ and the JCPC/SC have been willing to defend the approach taken by Scots law although the JCPC/SC has been unwilling to leave Scots law unchanged where it is not Convention-compatible. Second, the HCJ has sometimes assumed that the safeguards provided by the Scots common law are sufficient to protect the accused's Convention rights. The HCJ's willingness to sometimes rely on Scots common law to protect Convention rights resulted in the JCPC/SC importing ECtHR case law into Scots law to update the common law.

3.2 Fit with Existing Law

The second criterion for impact considers fit with existing law. The JCPC/SC decisions in 13 out of 26 cases fitted well with existing law. Table 12 below lists these cases and why they were categorised in this way. Many cases did not change Scots law. In other cases, the JCPC/SC's judgment was consistent with some existing Scottish case law but not all of it. The consistency arose in two ways. Sometimes there were two lines of case law and the JCPC/SC preferred one line over the other. Alternatively, there was a dominant line of case law but some cases which contradicted it and the JCPC/SC's decision fitted with the majority of cases.

Reason for Fitting with Scots Law		
The Expansion was Limited	**Scots Law was Not Changed**	**The Decision was Mostly Consistent with Existing Scots Law**
Ambrose v *Harris*	*HMA* v *P*	*Birnie* v *HMA*
	O'Neill v *HMA*	*Dyer* v *Watson*
	McDonald v *HMA*	*McInnes* v *HMA*
	HMA v *Murtagh*	
	Clark v *Kelly*	
	Ruddy v *Procurator Fiscal*	
	DS v *HMA*	
	Montgomery v *HMA*	
	Allison v *HMA*	

Table 12: Reasons why cases fitted with existing law

Five cases (*Brown, Speirs*, *McGowan*, *R* and *Burns*) fitted uneasily with existing Scots law but only altered the law as set down by the HCJ decision in the case or a recent HCJ case. Thus, there was no evidence of Scots law having taken a longstanding approach to the issue. It has already been established that *Cadder*, *Holland* and Sinclair fitted uneasily with longstanding law because law was imported into Scots law. *Fraser* and *AB* did not fit with longstanding case law but did not import law into Scots law.

3.2.1 *Fraser* v *HMA*

Fraser v *HMA* dealt with the prosecutor's failure to disclose a witness statement which contradicted the prosecution case. The HCJ applied[97] a test laid down in *Cameron* v *HMA*[98] and in the Criminal Procedure (Scotland) Act 1995 s106 to establish whether the non-disclosure created a miscarriage of justice. This test depends on "the existence and significance of" the new evidence;[99] there must be a "reasonable explanation" why the evidence was not heard;[100] the undisclosed evidence must be "important and reliable evidence which would have been bound, or at least likely to" materially impact upon the jury's decision and "a conviction returned in ignorance of the existence of that evidence

[97] [2008] HCJAC 26, at [132]
[98] [1991] JC 251
[99] Criminal Procedure (Scotland) Act 1995 s106(3)(a)
[100] *ibid* S106(3A)

represents a miscarriage of justice."[101] The HCJ concluded that there was no miscarriage of justice because the defence should have sought out the undisclosed evidence, the witness statement could not be considered reliable and there was a strong circumstantial case supporting the prosecution case.[102]

On appeal, the SC applied a test which it created in *McInnes* v *HMA*[104] after the HCJ's decision in *Fraser*.[105] It considers whether the undisclosed evidence "materially weakened the Crown case or materially strengthened the" defence case and whether "taking full account of all the circumstances of the trial, including the non-disclosure … the jury's verdict should be allowed to stand.[106] That question will be answered in the negative if there was a real possibility of a different outcome."[107] The SC held that the *Cameron* test was not Convention-compatible for reasons to be discussed later and that the non-disclosure made the trial unfair.[108]

Both tests assess the importance of the evidence. The *Cameron* test considers whether the evidence materially impacted on the jury's decision while the *McInnes* test considers the evidence's materiality to the defence or prosecution case. However, the tests have important differences. The *Cameron* test, unlike the *McInnes* test, considers whether there was a reasonable explanation for the defence not leading the evidence.[109] For example, in *Fraser,* the prosecution argued that the accused murdered his wife then took rings from his wife's body and returned them to their house. An undisclosed statement by a police officer suggested that the rings were in the house earlier than was thought. Applying the *Cameron* test, the HCJ considered that there was no reasonable explanation why the statement was not led at trial. For Lord Osborne, the mention of the rings on the indictment should have told the defence that they should question the police officer who found the rings.[110] This

[101] *Cameron*, n98 above, 262
[102] *Fraser,* n97 above, at [229]-[230]
[104] *McInnes*, n24 above
[105] *Fraser*, n26 above, at [13]
[106] *McInnes*, n24 above, at [19] and [24]
[107] *ibid*
[108] *Fraser*, n26 above, at [32]-[33], [37]
[109] Criminal Procedure (Scotland) Act 1995 s106(3A)
[110] *Fraser,* n97 above, at [229]

approach emphasises the need for the defence to find evidence. Conversely, under the *McInnes* test it was the prosecution's duty to disclose this evidence.[111]

Both tests consider the safety of the conviction. The *McInnes* test is designed to be Convention-compatible and considers the fairness of the trial.[112] The *Cameron* test was created before the Human Rights Act 1998 and did not consider ECtHR case law. The HCJ in *Fraser* held that it should not consider the fairness of the trial.[113] This was because counsel did not initially ask the court to consider this.[114]

Applying the *Cameron* test, Lord Gill speculated that the accused might have removed the rings and brought them back to the house later.[115] He considered that the circumstantial "evidence alone was sufficient to entitle the jury to convict."[116] Consequently, he speculated about what could have happened during the trial rather than focusing on what actually happened. Such speculation is not allowed under the *McInnes* test which considers "what actually happened at the trial."[117] Thus, there are important differences between the two tests and the move towards the *McInnes* test represented a significant change to the law.

The *McInnes* test was consistent with some existing JCPC and HCJ decisions.[118] Nonetheless, before *Fraser,* the *Cameron* test was frequently applied in Scotland.[119] Since *Fraser,* the *Cameron* test has rarely been used[120] while the *McInnes* test is applied frequently.[121] Thus, a lack of fit arose from the SC reducing the use of the *Cameron* test and moving Scots law towards using the *McInnes* test. The *Cameron* test was designed to assess whether the conviction is safe where new evidence is discovered after trial. It can still be used for this purpose if the accused does not seek to challenge the fairness of the trial. However, in

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[111] *Fraser*, n26 above, at [33]
[112] *Ibid,* at [27]
[113] *Fraser,* n97 above, at [220]
[114] *Fraser* v *HMA* 2009 SLT 441, at [2]
[115] *Fraser,* n97 above, at [177]
[116] *Ibid,* at [161]
[117] *McInnes*, n24 above, at [20]
[118] *Kelly* v *HMA* [2005] HCJAC 126, at [33]; *Sinclair,* n10 above, at [33]
[119] *Johnston* v *HM*A [2006] HCJAC 30; *Tolmie* v HMA 1998 SLT 508; *Megrahi* v *HMA* 2002 JC 99
[120] *WB* v *HMA* [2014] HCJAC 52
[121] *McGrory* v *HMA* [2011] HCJAC 126; *O'Donnell* v *HM*A [2011] HCJAC 84; *Hay* v *HMA* [2010] HCJAC 125 (For discussion of the latter decision see Stark, 'The Court, Coherence and Criminal Appeals' (2011) SLT (News) 51)

many fresh evidence cases, the accused will argue that the lack of the newly found evidence made the trial unfair, meaning the *McInnes* test would need to be applied.

The HCJ defended the common law-based approach taken in *Cameron*. Lord Gill emphasised the longstanding nature of the *Cameron* test when he noted that it was applied for "20 years."[122] All three judges expressed concern that the JCPC's approach in *Holland* v *HMA* and *Sinclair* v *HMA* would hinder police investigations by allowing witness statements to be disclosed to the defence.[123] The SC did not dispute that Scots law should be allowed to develop its own test to protect the accused. Lord Hope noted that if the *Cameron* test were Convention-compatible, like the *McInnes* test, that would "be an end to the case."[124]

3.2.2 *AB* v *HMA*

AB v *HMA*[125] dealt with a challenge to s39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009. S39(1)(a) provided a defence for sexual offences against older children (children between 13 and 15 years old) where the accused "reasonably believed that [the complainer] had attained the age of 16 years." S39(2)(a)(i) restricted use of the defence where the accused "has previously been charged by the police with a relevant sexual offence." AB had in the past been charged with exposing his genitals to a child and showing pornography to children.[126] This was used to deny him use of the s39 defence. The SC held that the use of previous charges against the accused engaged his right to privacy under Article 8 ECHR and that the restriction on the right could not be justified.[127]

s39(2)(a)(i) was designed to protect older children by preventing people from preying on children by repeatedly having sexual activity with older children, then escaping conviction by arguing that they reasonably believed the child was over 16.[128] This prioritised crime control by defining the defence narrowly so that the accused could not use the defence twice and so that it could not be used by someone who had previously been charged with

[122] *Fraser,* n97 above, at [193]
[123] *ibid,* at [188], [238]
[124] *Fraser*, n26 above, at [16]
[125] *AB*, n12 above
[126] *ibid,* at [13]
[127] *ibid,* at [47]
[128] Subordinate Legislation Committee Official Report 28 October 2008 col 392

an offence even if they then were not prosecuted.[129] Nonetheless, it protected the accused's due process rights by providing a defence to a person who was reasonably mistaken about a child's age. The approach was a longstanding one which had been in force in its current form for seven years between 2010 and the SC's decision in 2017. The previous law had also restricted the defence where the accused had been charged with a sexual offence, but this was defined more narrowly than s39(2)(a)(i) and only included previous charges that were brought to trial.[130]

The HCJ in *O'Rourke* v *HMA*[131] defended this approach arguing that the use of the accused's previous charges to deny him use of the defence did not engage the right to privacy under Article 8 and even if it did, any encroachment on the right to privacy could be justified by the need to protect children from sexual exploitation.

On appeal in *AB,* the SC held that since s39(2)(a)(i) violated Article 8, it was invalid under s29(2)(d) of the Scotland Act 1998.[132] The SC reasoned that s39(2)(a)(i) was not a proportionate way of meeting the Scottish Government's aims of protecting children and of warning people charged with sexual offences that if they had sex with an older child in future, they would unable to rely on the s39 defence.[133] The list of previous sexual offences, which were sufficient to deny use of the defence, included many offences which were unrelated to sexual contact with a child and would not have warned the accused that this was prohibited. Moreover, AB was not warned by the police when he was charged with the previous sexual offences that this would deny him use of the s39 defence in future.[134]

The SC's decision fitted uneasily with existing Scots law. Since subsection (2)(a)(i) is not law, it cannot be used to restrict the scope of the s39 defence.[135] Although the implications of

[129] Scottish Government, 'Sexual Offences (Scotland) Bill Policy Memorandum' (Scottish Parliament, 2008), para 135 at http://www.parliament.scot/S3_Bills/Sexual%20Offences%20(Scotland)%20Bill/b11s3-intro-pm.pdf (last visited 18/11/2018).
[130] Criminal Law (Consolidation) (Scotland) Act 1995 s5(5); *AB*, n12 above, at [6]
[131] *O'Rourke* v *HMA* [2017] HCJAC 70, at [21]-[25]
[132] *ibid,* at [47]-[50]
[133] *AB*, n12 above, at [42]-[44]
[134] *Ibid,* at [30]-[37]
[135] *Ibid,* at [66]

the *AB* decision remain unclear,[136] it seems that s39 in its current form[137] and in the absence of subsection (2)(a)(i), does not prevent the accused from using the defence when they have previously been charged but not prosecuted for a relevant sexual offence. Accordingly, the SC's decision has increased the accused's due process rights by making it easier to use the defence. This change has potential to impact on large numbers of cases because there were "likely [to be] many other cases" where a previous sexual offence charge had not sufficiently warned the accused that they would no longer be able to rely on the s39 defence.[138]

3.2.3 Summary of Findings

The above has shown that the JCPC/SC normally produces decisions which fit with existing Scots law. Nonetheless, ten cases (which represents a significant minority of the 26 cases considered) fitted uneasily with Scots law and five altered longstanding case law. Most of the decisions not fitting easily with existing law did not alter a longstanding approach taken by Scots law. Where longstanding law was altered, this normally occurred despite the HCJ defending the previous approach. However, the JCPC/SC frequently defended Scots law and showed some[139] reluctance to alter it when it was Convention-compatible. Thus, while critics of the SC correctly suggest that the SC is willing to alter Scots law when the court considers that it is not Convention-compatible, its willingness to change Scots law should not be overstated.

3.3 Impact on Differences Between Scots and English law

The third criterion considers whether cases altered differences between Scots and English law. Table 13 shows which cases increased, decreased or did not alter differences between Scots and English law.

[136] Callander, 'AB v HM Advocate: Rationalising Restrictions on the Use of the "Reasonable Belief" Defence' 2017 Jur Rev 179, 185
[137] It is possible that the Scottish Government will seek to alter the provision using legislation.
[138] *AB*, n12 above, at [45]
[139] The JCPC/SC is unwilling to allow Scots law to go beyond the ECtHR.

Increase	Same	Decrease
HMA v *R*	*HMA* v *P*	*Cadder* v *HMA*
	Birnie v *HMA*	*McGowan* v *B*
	Dyer v *Watson*	*Speirs* v *Ruddy*
	Burns v *HMA*	*Sinclair* v *HMA*
	McDonald v *HMA*	*Fraser* v *HMA*
	HMA v *Murtagh*	*Holland* v HMA
	McInnes v *HMA*	*AB* v *HMA*
	Allison v *HMA*	
	Macklin v *HMA*	
	Brown v *Stott*	
	Millar v *Dickson*	
	Clark v *Kelly*	
	Ruddy v *Procurator Fiscal*	
	O'Neill v *HMA*	
	Kinloch v *HMA*	
	Ambrose v *Harris*	
	Montgomery v *HMA*	
	DS v *HMA*	

Table 13: The impact of cases on differences between Scots and English law

Scots Law Was Not Changed	Scots Law Was Mostly Not Changed	English Law Had Not Dealt with the Issue	Both Jurisdictions Changed Their Approach Around the Same Time
O'Neill v *HMA*[140]	*Montgomery* v *HMA*[141]	*Millar* v *Dickson*	*Brown* v *Stott*[142]
Ruddy v *Procurator Fiscal*[143]	*Dyer* v *Watson*[144]	*Clark* v *Kelly*	
McDonald v *HMA*[145]		*Burns* v *HMA*	
HMA v *Murtagh*[146]			
McInnes v *HMA*[147]			
Allison v *HMA*[148]			
Macklin v *HMA*[149]			
HMA v *P*[150]			
Montgomery v *HMA*[151]			
DS v *HMA*[152]			

Table 14: Reason why Scots law was unaltered when compared with English law

Most cases did not alter differences between the two jurisdictions. Table 14 lists these cases and the reasons why the level of difference between the jurisdictions was not altered. Often there was a clear line of case law establishing the approach recently taken by Scots law, but a small number of cases contradicting this approach. Although some case law was doubted by the JCPC/SC, most existing cases took the same approach as the JCPC/SC

[140] *O'Neill* v *HMA* [2012] HCJAC 20, at [26]
[141] *Montgomery* v *HMA* 2000 JC 111 Comments in *X* v *Sweeney* 1982 JC 70 doubted
[142] *R* v *Chauhan* (unreported) 13th July 2000, Crown Court at Birmingham; *DPP* v *Wilson* [2001] EWHC Admin 198
[143] *Robertson* v *Frame* 2005 SLT 131
[144] *HMA* v *Little* 1999 SLT 1145 Cf. *McFadyen* v *Annan* 1992 JC 53
[145] *Sinclair,* n10 above, at [33]
[146] *McDonald*, n16 above, at [33]
[147] *J*ohnston v *HM*A [2006] HCJAC 30; *Tolmie* v HMA 1998 SLT 508; *Megrahi* v *HMA* 2002 JC 99
[148] *McInnes*, n24 above, at [19]-[20]
[149] *ibid,* at [18]
[150] *Lawrie* v *Muir* 1950 JC 19
[151] *Montgomery* v *HMA* 2000 JC 111
[152] *DS* v *HMA* [2005] HCJAC 90

meaning that Scots law was not significantly changed. A lack of change can also occur where the two jurisdictions take the same approach, but then both change their approach around the same time. Occasionally, the Scottish courts considered an issue on which there was no relevant English authority and therefore it is unclear how English law would deal with the problem.

The next part considers cases which harmonised longstanding differences between Scots and English law before considering the case of *R* which took a distinctive approach.

3.3.1 *Cadder* v *HMA*

Cadder v *HMA* harmonised Scots and English law on the right to legal advice during police questioning.[153] In 1975, it was decided that Scots law should deny legal advice when a suspect was detained for police questioning but provide other safeguards.[154] In 1981, the Phillips Report concluded that English law should normally provide legal advice to reduce the power imbalance between the accused and the state.[155] The English approach prioritised the protection of the accused's due process rights while Scots law, subject to safeguards for the accused, sought to make it easier for the accused to incriminate themselves.[156] *Cadder* made Scots law more like English law because Scots law now has to balance crime control and due process in a way which normally gives the accused the right to legal advice during police questioning. However, it is important not to overstate the extent of this harmonisation. Chapter 3 section 4.4.1 showed that Scots law still takes a genuinely distinctive approach to the time limits for questioning the accused.

Despite the SC reducing the level of difference between Scots and English law, both the SC and HCJ defended the autonomy of Scots law to develop in its own way. The HCJ in *McLean* quoted Lord Rodger in *Cullen* v *Chief Constable of the Royal Ulster Constabulary*[157] who

[153] *Cadder*, n2 above
[154] Thomson Committee, n58 above, para 7.16
[155] Lord Phillips, *Royal Commission on Criminal Procedure* (Cmnd 8092, 1981), para 4.89; Police and Criminal Evidence 1984 s58 Cf. Police and Criminal Evidence Act 1984 s58(6)-(8); Terrorism Act 2000 schedule 8 para 8
[156] Section 3.1.1 above
[157] [2003] UKHL 39

stated that: "[a]s it is entitled to do, Parliament has thus struck the balance differently and established two distinct systems of powers and rights."[158]

Similarly, Lords Hope and Rodger in the SC noted that "Parliament was entitled to establish two different systems" for police questioning.[159] Lord Hope was aware that overruling *McLean* would have "profound consequences" but this should not be avoided because it would be expedient.[160] Thus, he considered that his duty was to produce a decision on whether *McLean* was Convention-compatible, not to avoid disrupting the legal system or to preserve distinctive features of Scots law. Accordingly, for the SC the protection of Convention rights had priority over protecting distinctive elements of Scots law but when a law was Convention-compatible the SC was open to allowing Scots law to take a distinctive approach. Conversely, the HCJ was willing to defend the Scottish approach even if it was inconsistent with *Salduz*.[161] Thus, the greater importance attached to Convention rights protection by the SC resulted in it altering a difference between Scots and English law.

3.3.2 *Fraser* v *HMA*

By moving the Scots law on the disclosure of evidence from the *Cameron* test to the *McInnes* test, *Fraser* also harmonised Scots and English law because the *McInnes* test is more like English law than the *Cameron* test. The *Cameron* test considers whether the undisclosed evidence was "bound or at least likely [to affect a] critical issue" of the case,[162] while English law considers whether the evidence "weaken[s] the prosecution case or strengthen[s]" the defence case.[163] The two tests attach different emphasis on the need for the prosecution to proactively disclose material evidence. The *Cameron* test places emphasis on whether there was a reasonable explanation why the evidence was not led at trial. The defence's lack of knowledge about the existence of the evidence will not be a reasonable explanation for their failure to lead it during the trial, where the defence could

[158] *McLean*, n62 above, at [28]
[159] *Cadder*, n2 above, at [55] per Lord Hope and [90] per Lord Rodger
[160] *ibid,* at [4]
[161] *McLean*, n62 above, at [31]
[162] *Cameron*, n98 above, 262
[163] *R* v *H* [2004] UKHL 3, at [36]

have sought the evidence.[164] Conversely, English law emphasises the need for the prosecution to proactively disclose material evidence.[165]

Both tests consider the safety of the conviction. The *Cameron* test considers whether there was a miscarriage of justice, while English law considers whether the non-disclosure created reasonable doubt about the conviction's safety.[166] English law, unlike the *Cameron* test, considers the fairness of the trial and is designed to be Convention-compatible.[167] Under the *Cameron* test, an unfair trial and a miscarriage of justice were not considered to be synonymous.[168] As the SC's decision in *Fraser* shows, the non-disclosure of evidence was not considered to be a miscarriage of justice by the HCJ where there was other evidence supporting the accused's conviction,[169] but in the SC's opinion it made the trial unfair where the evidence would have altered the way the trial was conducted.[170] Thus, there are many differences between the *Cameron* test and English law.

Like English law, the *McInnes* test considers the importance of the evidence to the defence or prosecution case.[171] English law considers whether the evidence "weaken[s] the prosecution case or strengthen[s]" the defence case, while the *McInnes* test considers whether the evidence "materially weakened the Crown case or materially strengthened the case for the defence."[172] Thus, in both tests the prosecution must seek out material evidence. English law then decides whether the conviction is safe by considering whether the undisclosed evidence created reasonable doubt, whereas Scots law considers "all the circumstances of the trial" to establish whether "the jury's verdict should" stand.[173] In Scotland, the likelihood of the jury reaching a different verdict is perhaps[174] given more prominence[175] than in England.[176] Nonetheless, both consider the consequences of the non-

[164] *Fraser,* n97 above, at [229]
[165] *H*, n163 above, at [36]
[166] *Cameron*, n98 above, 262; *McInnes*, n24 above, at [37]
[167] *H*, n163 above, at [36]; *Fraser,* n97 above, at [220]
[168] *Fraser,* n97 above, at [219] A miscarriage of justice now makes the trial unfair. (*McInnes*, n24 above, at [23])
[169] *ibid,* at [234]
[170] *Fraser*, n26 above, at [40]
[171] *H*, n163 above, at [36]; *McInnes*, n24 above, at [19]
[172] *ibid*
[173] *McInnes ibid,* at [24]
[174] Cf. *Taylor* v *Queen* [2013] UKPC 8
[175] *McInnes*, n24 above, at [24]
[176] *R* v *Pendleton* [2002] 1 WLR 72

disclosure on the conviction's safety and the fairness of the trial.[177] By moving Scots law towards the *McInnes* test and reducing the use of the different *Cameron* test the SC made Scots law more like English law.

3.3.3 *AB* v *HMA*

AB represents the only case in the sample where the striking down of legislation resulted in a harmonisation of Scots and English law. Like Scots law, English law recognises that people may make a mistake about the age of their sexual partner and provides a defence where there was a reasonable belief that the child was over 16.[178] Unlike Scots law before *AB*, English law does not prevent someone who has been charged with a sexual offence in the past from relying on the defence that they reasonably believed the child to be over 16.[179] This protects the defendant's due process rights in England by allowing them to use the defence and potentially obtain an acquittal multiple times regardless of whether they have been charged with a sexual offence before. The difference was a longstanding one which had been in place since 2004.[180] The effect of the SC's decision was to harmonise Scots and English law because the defence could now be used in either jurisdiction by a person who had previously been charged with a sexual offence.

3.3.4 *HMA* v *R* and *Speirs* v *Ruddy*

In HMA v *R,* the majority of the JCPC took a distinctive approach by holding that when a trial[181] is unreasonably delayed, in breach of the ECHR Article 6(1) duty to try the accused "within a reasonable time," it must be abandoned. The JCPC reasoned that once the reasonable time requirement starts, it "continues until the charge has been determined."[182] Thus, if the trial becomes unreasonably delayed, continuing it will continue to breach the accused's Article 6(1) rights. Under the Scotland Act 1998 s57(2), which subjected[183] the

[177] *H*, n113 above, at [33]; *McInnes*, n24 above, at [20]
[178] Sexual Offences Act 2003 s9(1)(c)(i)
[179] *AB*, n12 above, at [7]
[180] Sexual Offences Act 1956 s6
[181] Cf. *Mills* v HMA [2002] UKPC D2, at [23]
[182] *R*, n14 above, at [75]
[183] The requirement was removed for criminal cases: Scotland Act 2012 s36(4)

Lord Advocate to a requirement to act compatibility with Convention rights, the Lord Advocate had no power to continue the trial.[184]

The JCPC overturned the HCJ decision in *HMA v R*.[185] The HCJ in *R* accepted that a continuing breach of the accused's rights occurred if the trial was continued, but considered that ECtHR case law recognised that remedies other than abandoning the trial were available to the court.[186] An appropriate remedy could be found by balancing the interest of the accused in having a trial within a reasonable time and the state's interest in seeing wrongdoers prosecuted.[187] In deciding whether s57(2) can be invoked, the question to be considered was whether "what is done is incompatible with Convention rights."[188] Since it would not breach the accused's Convention rights to continue the trial, there was no breach of s57(2).[189]

English law similarly does not require an unreasonably delayed trial to be abandoned, if it can be fair and the delay is remedied.[190] After *R* was decided, this approach was upheld by the House of Lords (HOL) in *Attorney General's Reference (No.2 of 2001)*.[191] The majority of the court considered that where there is a breach of the reasonable time requirement, the accused is entitled to a *proportionate* remedy. It will not be proportionate to abandon the trial if it can still be fair because the state has an interest in prosecuting suspects.[192]

The JCPC's decision created significant differences between Scots and English law. 39% of devolution issue cases before the judgment in *R* involved allegations of unreasonable delay.[193] Not all these cases resulted in a court accepting that the trial was unreasonably delayed. Scots law has stricter time limits for prosecuting the accused than England, which is likely to have reduced the number of unreasonably delayed cases.[194] However, the large number of cases involved created potential for cases to be abandoned due to unreasonable

[184] *R*, n14 above, at [74]-[80], [101], [150], [155]
[185] 2002 SLT 834
[186] *ibid,* at [19]
[187] *ibid,* at [20]
[188] *ibid,* at [23]
[189] *ibid*
[190] *Attorney General's Reference (No.2 of 2001)* [2001] EWCA Crim 1568
[191] *Attorney General's Reference (No.2 of 2001)* [2003] UKHL 68
[192] *ibid,* at [24]
[193] *R*, n14 above, at [17]
[194] *ibid,* at [82]

delay. Had these cases been heard in England, the prosecutor could have continued prosecuting if the delay was remedied and the trial could be fair.

The majority of the JCPC in *R* defended this distinctive approach. Lord Hope noted that the minority was concerned that *R* might have an unwelcome effect on English law by hindering the prosecution of suspects. He was cautious about applying *R* to English law, indicating that he would need to hear arguments on the issue.[195] Thus, he was unwilling to assume that Scots and English law should take the same approach. For him, Scots law benefited from having "far more onerous" time limits for prosecuting the accused than English law because this approach reinforced that "delays are contrary to the public interest."[196] Thus, he felt that regardless of whether the Scottish approach would work in England, the difference benefits accused in Scotland by imposing strict checks on the prosecutor to ensure that they prosecute within a reasonable time.

This defence of the distinctiveness of the Scottish approach continued when the HOL heard the English case of *Attorney General's Reference (No.2 of 2001)*. Lord Hope (dissenting) defended his argument in *R,* arguing that under the Human Rights Act 1998 s8, the courts can choose what remedy to provide. The normal remedy for unreasonable delay would be to stop the prosecution. He spent several paragraphs describing the Scottish approach and the strict time limits used to prevent unreasonable delays.[197] The majority's failure to move English law towards a stricter approach was a "lost opportunity."[198] Consequently, Lord Hope tried to influence English law by extolling the virtues of the Scottish approach. Although he was unsuccessful, it shows that the sharing of judges between Scotland and England's top courts may allow English law to be influenced by Scottish cases.

R was overturned five years after the JCPC's decision by the JCPC in *Speirs* v *Ruddy*[199] which held that, in the light of new ECtHR case law, a continuing breach of the accused's Convention rights could be prevented by speeding up the delayed prosecution and by providing compensation for the delay. English law also takes this approach, meaning *Speirs* harmonised Scots and English law.

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[195] *ibid,* at [81]
[196] *ibid,* at [82]
[197] *Attorney General's Reference (No.2 of 2001)*, n191 above, at [61]-[66]
[198] *ibid,* at [65]
[199] *Spiers*, n18 above, at [23]

3.3.5 Summary of Findings

In 18 out of 26 cases, the JCPC/SC did not harmonise Scots and English law. Eight cases altered the level of difference between Scots and English law and three altered longstanding differences. Subsequently, the JCPC/SC has in most cases checked Scots law for Convention compatibility without significantly impacting on the level of difference.

Critics of the JCPC/SC correctly note that it sometimes harmonises Scots and English law. However, the JCPC/SC has often defended distinctive elements of Scots law where they are Convention-compatible. Nonetheless, where Scots law goes beyond what the ECtHR requires, the JCPC/SC has been less willing to allow Scots law to develop its own approach. Accordingly, in *Speirs* v *Ruddy*, Lord Bingham noted that *Attorney General's Reference (No.2 of 2001)* "gives better effect than [*R*] to the Strasbourg jurisprudence" and should be followed even though this reduced the protection given to the accused.[200] Lord Bingham also sat on *Attorney General's Reference (No.2 of 2001)* where he sided with the majority in holding that an unreasonably delayed trial need not normally be abandoned. This sharing of judges between the HOL, JCPC and SC makes it difficult for judges to allow Scots and English law to take a different approach to Convention rights. Unless the judge can find reasons to distinguish the approach they took for one jurisdiction, they have to contradict their previous decision, if they allow the second jurisdiction to take a different approach. Lord Bingham seems to have felt a desire to harmonise the approaches taken by Scotland and England. He noted that "the same principles should apply on both sides of the border."[201] Similarly, Lord Hope although defending the Scottish approach and in *R* defending the ability of Scots law to take a different approach, showed a desire to have both jurisdictions using the Scottish approach.[202] Thus, critics of the JCPC/SC are correct to fear that judges may feel pressured to harmonise Scots and English law. However, as Lord Hope's comments in *R* show, it needs to be recognised that the JCPC/SC will also defend the ability of Scots law to take a different approach.

[200] *ibid*, at [17]
[201] *ibid*
[202] *Attorney General's Reference (No.2 of 2001)*, n191 above, at [65]

Sharing judges between the UK's top courts creates potential for a sharing of ideas between the two jurisdictions.[203] This can benefit Scots law by allowing it to borrow ideas from other legal systems which may deal with a problem in a clearer way or reduce the accused's vulnerability during the trial.[204] This sharing does not always harmonise Scots and English law. In *McGowan* v *B*,[205] the SC held that the accused could waive their right to legal advice, where the police had not found out why the accused wanted to waive this right. However, the SC recommended that Scots law adopt the English practice of asking the accused this question. The SC felt unable to compel Scots law to adopt this approach because this was not required by the Convention.[206] As Chapter 2 section 6.3 discussed, there are dangers in transplanting law from one jurisdiction to another. This makes the JCPC/SC's ability to sometimes share ideas without compelling Scots law to adopt the approach important. The Scottish courts can decide whether the recommended English practice would benefit the Scottish criminal process and decide whether to adopt it.

3.4 Effect on the Clarity of Scots Law

The fourth criterion considers the impact of the JCPC/SC's jurisdiction on Scots law's clarity. Table 15 shows whether cases increased, decreased or left unaltered the clarity of Scots law.

[203] The JCPC decision in *Brown*, n11 above, that the Road Traffic Act 1988 s172(2)(a) did not violate the right against self-incrimination influenced the English case of *Chauhan,* n142 above
[204] Chapter 2 section 6.3.2 above
[205] *McGowan*, n17 above, at [50]
[206] *ibid*

Decrease	Same	Increase
Cadder v *HMA*	*Macklin* v *HMA*	*Ambrose* v *Harris*
HMA v *R*	*Montgomery* v *HMA*	*HMA* v *P*
Holland v *HMA*		*McGowan* v *B*
		Birnie v *HMA*
		Dyer v *Watson*
		Burns v *HMA*
		Sinclair v *HMA*
		McDonald v *HMA*
		HMA v *Murtagh*
		McInnes v *HMA*
		Fraser v *HMA*
		Brown v *Stott*
		Speirs v *Ruddy*
		Allison v *HMA*
		Millar v *Dickson*
		Clark v *Kelly*
		Ruddy v *Procurator Fiscal*
		O'Neill v *HMA*
		Kinloch v *HMA*
		DS v *HMA*
		AB v *HMA*

Table 15: Impact of decisions on the clarity of Scots Law

Most cases clarified Scots law. Many cases dealt with areas of law where there was significant uncertainty before the JCPC/SC's decision, often because there was no relevant authority. For example, before *Brown* v *Stott*[207] uncertainty arose because Scots law had not considered whether forcing the accused to say who was driving a vehicle violated the right against self-incrimination. The JCPC/SC's devolution and compatibility issue case law has helped clarify what level of Convention rights protection is required to ensure that the trial is fair, particularly in relation to the reasonable time requirement,[208] the right to legal advice[209] and the disclosure of evidence.[210] Other cases clarified whether a practice was

[207] *Brown*, n11 above
[208] See section 3.4.2
[209] See section 3.4.1
[210] *McInnes*, n24 above, at [19] and [24] and section 3.2.1 above

Convention-compatible. The JCPC/SC clarified that using dock identification and District Court Clerks are Convention-compatible.[211]

This ability to clarify the issues raised by Scots law should not be overstated. Some cases – for example, *McInnes* and *Cadder* - clarified issues but this then created new issues of uncertainty. Even when areas of law were clarified by the JCPC/SC, it often took several cases for the JCPC/SC to clarify all the main issues of uncertainty. For example, the JCPC/SC clarified the law on the non-disclosure of evidence over several cases. The JCPC started by clarifying that witness statements and charges against witnesses must be disclosed. Both *Holland* and *Sinclair* created tests to assess the impact of the non-disclosure on the safety of the conviction.[212] Despite these cases being decided at the same time, the *Holland* test seemed less stringent than the one in *Sinclair.*[213] *McInnes* clarified the correct test to be applied for the non-disclosure of evidence.[214] However, it did not clarify how this test interacted with the *Cameron* test.[215] *Fraser* clarified this but left open the issue of whether the *McInnes* test should be applied to issues other than the non-disclosure of evidence which might make the trial unfair.[216] Thus, it has sometimes been the JCPC/SC's decisions which caused uncertainty in the law in the first place. Other JCPC/SC decisions which caused uncertainty were *Cadder* and *R*. They will be considered next.

3.4.1 *Cadder* v *HMA*

Before *Cadder*, there was uncertainty about the implications of *Salduz* v *Turkey* for access to legal advice during police questioning in Scots law.[217] On one hand, an expanded HCJ bench in *McLean* v *HMA* had ruled that the Scottish approach was Convention-compatible.[218] The unanimous decision and its approval of the HCJ's decisions in *Paton* v

[211] *Holland,* n4 above; *Clark,* n19 above
[212] Section 3.1.2-3.1.3 above; Duff, 'Sinclair and Holland: A Revolution in "Disclosure"' 2005 SLT (News) 105, 110
[213] Johnston, *'McInnes* v *HM Advocate*: Time for A(nother) Definitive Decision on Disclosure' (2009) 13(1) Edin LR 108.
[214] *McInnes*, n24 above, at [19] and [24]; Duff, 'Disclosure Appeals: McInnes v Hm Advocate' (2010) 14(3) Edin LR 483.
[215] Shead, 'The Protection of the Right to A Fair Trial on Appeal' 2013 SCL 1.
[216] Section 3.2.1 above; Stark, 'The Court, Coherence and Criminal Appeals' 2011 SLT (News) 51; Shead, 'The Decision in Fraser' 2011 SCL 527.
[217] *Salduz*, n63 above
[218] *McLean*, n62 above

Ritchie[219] and *Dickson* v *HMA*[220] meant that there was a clear precedent for the lower courts to follow and practitioners would have been aware that it was unlikely that the HCJ would overturn its decision.[221] On the other hand, there were persistent doubts about whether the precedent was correct.[222] *McLean* was argued to be inconsistent with *Salduz* because it attached little importance to the statement that denying legal advice would "irretrievably" prejudice the trial and it overstated the ability of existing safeguards to protect the accused.[223] This uncertainty had a significant practical impact. Large numbers of cases were delayed until the SC gave its decision.[224]

Cadder clarified that accused normally have a right to legal advice during police questioning at a police station. The unanimous decision, the inability to appeal it (beyond taking another case to the SC to argue that *Cadder* should be overruled) meant that lawyers could be certain that the accused had this right when the accused was in police custody, even if they did not agree with the SC's decision.[225] This increased certainty about the position taken by Scots law and allowed the Lord Advocate to make decisions about whether the cases delayed by *Cadder* should be abandoned.[226]

However, for other cases significant uncertainty remained. The creation of the new right to legal advice created several new legal issues including: 1) whether the accused has a right to legal advice when they are questioned outwith police custody; 2) whether the right could be waived and 3) whether physical evidence obtained from a confession obtained without legal advice was admissible. It is understandable that the SC focused mostly[227] on whether legal advice was required during questioning at a police station. This was the issue required

[219] *Patton*, 66 above, 276
[220] *Dickson*, n67 above, 216-18
[221] Ferguson, 'The Status of Salduz v Turkey in Scotland' 2010 SCL 215, 218
[222] Leverick, 'The Right to Legal Advice during Detention: *Hm Advocate* v *Mclean*' (2010) 14(2) Edin LR 300, 303; McDonald 'The Scots Law of Confession - Irretrievably Prejudicing the Rights of Suspects?' (2010) 49 SHRJ 1 cf. Ferguson 'The Right of Access to A Lawyer' 2009 SLT (News) 107, 113.
[223] Leverick *ibid*, 303
[224] Scottish Parliament Official Report 23 February 2011 col 33332 Kenny MacAskill
[225] McCluskey, 'Supreme Error' (2010) 15(2) Edin LR 276
[226] Scottish Parliament Official Report 23 February 2011 col 33332 Kenny MacAskill
[227] Lord Rodger noted that some of these issues were raised by the decision in *Cadder,* n2 above, at [96]

to decide the case. The issues left undecided were complex and could have significant consequences for the criminal justice system.[228]

The SC subsequently removed some[229] uncertainty by clarifying the above issues in a series of cases known as the "Sons of *Cadder*."[230] In *Ambrose* v *Harris,*[231] the majority of the SC clarified that the right to legal advice starts where there has been a charge against the accused (meaning their position is "substantially affected") and "a significant curtailment of [the accused's] freedom of action."[232] Applying this test the SC held that accused can be asked preliminary questions at their home or at the roadside without legal advice but if they are questioned at home and are handcuffed they are entitled to legal advice.[233] The cases of *Birnie* v *HMA*[234] and *McGowan* v *B*[235] held that nothing in ECtHR jurisprudence prevented the accused from waiving the right to legal advice, but the waiver should be "voluntary, informed and unequivocal."[236] There is no need for legal advice before the right can be waived.[237] The SC in *HMA* v *P*[238] held that nothing in ECtHR case law suggests that it is always unfair to admit evidence obtained from a confession obtained without legal advice.

Ferguson has argued that the SC decision in *Cadder* and the ECtHR decision in *Salduz* at times seem to suggest that any self-incrimination (from which the right to legal advice is derived) by the accused is unacceptable and that the right against self-incrimination is absolute.[239] The Sons of *Cadder* clarified that it is the right against "coerced self-incrimination" which is objectionable and that restrictions can be imposed on the right against self-incrimination by restricting the right to legal advice in the circumstances

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[228] Scottish Parliament Official Report 23 February 2011 col 33340 Kenny MacAskill
[229] White and Ferguson, 'Sins of the Father? The "Sons of *Cadder*"' [2012] Crim LR 357, 365-366
[230] *Ambrose*, n7 above, at [61]-[66]; *P,* n13 above, at [28]; *McGowan*, n17 above, at [54]; *Birnie*, n21 above, at [32]
[231] *Ambrose*, n7 above, at [67]-[72]
[232] *Ambrose*, n7 above, at [62] and [161]. This test derives from *Zaichenko* v *Russia* (unreported) ECtHR 18th February 2010.
[233] *Ambrose*, n7 above, at [67]-[72]
[234] *Birnie*, n21 above, at [33]
[235] *McGowan*, n17 above, at [49]
[236] *McGowan ibid*, at [49]; *Birnie*, n21 above, at [33]
[237] *McGowan ibid*, at [46]
[238] *P*, n13 above, at [27]
[239] Ferguson, "Repercussions of the *Cadder* Case: The ECHR's Fair Trial Provisions and Scottish Criminal Procedure" [2011] Crim LR 743, 749 cf. *Cadder,* n2 above, at [96] where Lord Rodger notes that it might be possible for the accused to waive their right to legal advice.

outlined in the previous paragraph.[240] Lord Kerr, who dissented in *Ambrose*, *Birnie* and *McGowan*,[241] argued that a more absolute interpretation of the right against self-incrimination would ensure that the accused understood the consequences of waiving their right and give the accused a right to legal advice from when they are first questioned by the police. While it seems unlikely that the Scottish courts will apply Lord Kerr's approach, given that the majority of the SC rejected it, his approach highlights an area of continuing tension within Scottish and ECtHR case law about the importance that should be attached to the right against self-incrimination.[242] For the moment, this tension has been resolved in favour of having a right against self-incrimination which is not absolute.

As with *Cadder*, the clarification of the law in the Sons of *Cadder* raised new issues of uncertainty. It is possible to imagine a range of other circumstances where a person might be asked questions outwith a police station which have not been covered by the Sons of *Cadder* cases and which may need to be dealt with in future cases.[243]

3.4.2 *HMA* v *R*

The JCPC decision in *HMA* v *R*[244] created uncertainty because it was unclear whether it was correctly decided. Lords Steyn and Walker dissented. They argued that unreasonable delays did not require the proceedings to be stayed if the trial could be fair and a remedy was provided.[245] Unlike many other Article 6 rights, the ECtHR had not held that a breach of the reasonable time requirement made the trial automatically unfair.[246] Staying the proceedings after a breach of the reasonable time requirement would hinder crime control by requiring trials to be abandoned where a fair trial was still possible and where an alternative remedy could prevent a continuing breach of the accused's Convention rights.[247]

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[240] Ferguson, n239 above, 362; *McGowan*, n17 above, at [104].
[241] *McGowan*, n17 above, at [107]; *Birnie*, n21 above, at [60]; *Ambrose*, n7 above, at [172]-[175]
[242] *ibid*, *Salduz* (2009) 49 EHRR 19, at [55]; *Cadder,* n2 above, at [35], [43] and [93]; *Ibrahim* v *UK* (2015) 61 EHRR 9, at [OI-1]-[OI7] per Judge Kalaydjieva (dissenting)
[243] Ferguson, n239 above, 365
[244] *R*, n14 above
[245] *ibid,* at [20] and [166]
[246] *ibid,* at [14]
[247] *ibid,* at [18]

The dissents of Lords Steyn and Walker created uncertainty for several reasons. First, the minority decision was consistent with the HCJ judgment in *R*.[248] Thus, there was strong Scottish authority supporting the minority approach. However, there was also older Scottish authority supporting the majority approach in *R*,[249] meaning both sides could claim to be consistent with existing Scots law.

Secondly in the English case of *Attorney General's Reference (No.2 of 2001)*, the HOL sided with the minority in *R*. Lord Nicholls stated that *R* "was wrongly decided," while Lord Bingham expressed a preference for the minority decision in *R*.[250] By adopting similar arguments to the minority in *R* and by strongly criticising *R,* the majority strengthened doubts about *R's* correctness.

The different approaches taken by the judges in *Attorney General's Reference (No.2 of 2001)* increased the confusion. Lord Rodger accepted that but for s57(2) of the Scotland Act 1998, which does not apply to prosecutions in England, there was no obligation to abandon the trial. However, he criticised the majority for blurring the distinction between rights and remedies.[251] Lord Hope argued that unreasonably delayed trials in England ought, in any case, to be abandoned because this was the most appropriate remedy.[252] Thus, there was uncertainty about whether s57(2) required Scots law to take a different approach, whether abandoning the trial was the correct approach for English law and - for those judges who accepted that an unreasonable delay did not require the trial to be abandoned - the reasons why the trial could continue. Thus, having the same judges sitting in top UK courts for Scottish and English cases can result in the level of certainty in Scots law being decreased by English cases. Equally, decisions in Scottish cases can cause confusion for English law. The HOL in *Attorney General's Reference (No.2 of 2001)*, sat with an enlarged bench because the diverging approaches taken by the JCPC in *R* and the English Court of Appeal in *Attorney General's Reference (No.2 of 2001)* resulted in confusion about whether the latter decision was correct in light of *R*.[253]

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[248] *HMA* v *R* 2002 SLT 834
[249] *HMA* v *Little* 1999 SLT 1145; *HMA* v *H* 2000 JC 552
[250] *Attorney General's Reference (No.2 of 2001)*, n191 above, at [30], [42]
[251] *ibid,* at [141]-[179]
[252] *ibid,* at [109]-[110]
[253] Himsworth, 'Jurisdictional Divergences Over the Reasonable Time Guarantee in Criminal Trials' (2004) 8(2) Edin LR 255, 256

Despite, the confusion caused by the different approaches taken by Scots and English law, several of the judges in *Attorney General's Reference (No.2 of 2001)* acknowledged that the HOL could not overturn *R*.[254] Thus, *R* remained a precedent which was normally[255] binding on the HCJ. Lawyers would be aware that until a decision was successfully challenged in the JCPC, it was unlikely that the law would change.

Although *R* shows that the sharing of judges between the Scottish and English legal systems can create confusion for each legal system, it is possible that English cases could help clarify Scots law if a judge discussed how Scots law would deal with a problem that has arisen in an English case or if the English case considers what the ECHR requires in an issue not considered by the Scottish Courts. Whether this helps clarify the law will depend on whether the judge's view on the position taken by Scots law is contradicted by other judges in the case and whether the suggested approach is consistent with existing Scots law.

3.4.3 Summary of Findings

As regards the impact of the JCPC/SC's jurisdiction on the clarity of Scots law, the picture is once again more complicated than critics suggest because the JCPC/SC has both helped clarify Scots law *and* created legal uncertainty. Three cases decreased the clarity of Scots law although the amount of uncertainty created varied. *Cadder* showed that giving the accused a new right can create significant uncertainty until the scope of the right and its practical application are clarified. This uncertainty can have significant practical consequences by delaying cases and making it difficult to assess whether a practice is Convention-compatible. However, 21 cases increased the clarity of Scots law, although it often took several cases to clarify all the issues raised. This benefited Scots law by allowing delayed cases to proceed and by making it easier for lawyers to predict how cases would be decided. Like with the harmonisation of Scots and English law, it was found that the two legal systems influence each other. A decision by one jurisdiction may create uncertainty in the other.

[254] *Attorney General's Reference (No.2 of 2001)*, n191 above, at [30], [107], [179]
[255] The HCJ can distinguish the current case from the JCPC case.

3.5 Decisions Requiring Legislation

The final criterion for impact is whether the decision required legislation. Some legislative changes are essential to securing compliance with the JCPC/SC's decision because Scots law would be unable to achieve Convention compatibility without them. These have the greatest connection to the JCPC/SC's decision. Others are useful to help enforce the JCPC/SC's decision. There is some connection to the JCPC/SC's decision because they introduce changes which make it easier to comply with the decision, but the change is not needed to achieve Convention compatibility. Some changes are not needed to comply with the JCPC/SC's decision. They do not make it easier to comply with the JCPC/SC's decision and their only connection to the decision was that it made the legislator want to pre-empt future challenges. *Cadder* was the only case where legislation can be directly linked to the JCPC/SC's decision.[256] It will be assessed whether the legislative changes made as a result of *Cadder* were essential, useful or unnecessary to achieve Convention compatibility.

3.5.1 *Cadder* v *HMA*

After *Cadder,* the Scottish Parliament passed the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, as emergency legislation, to provide a right to legal advice during police detention.[257] Before *Cadder,* the Lord Advocate issued guidelines recommending that accused be given legal advice during police questioning.[258] One disadvantage of soft law, like guidelines, is that they have less force in ensuring compliance than legislation and are less accessible. Nonetheless, the guidelines seemed to work "reasonably well" in ensuring that accused received legal advice during police questioning.[259] Moreover, the ECtHR has held that soft law, as well as hard law, can be considered when deciding whether an approach is Convention-compatible.[260] Thus, guidelines can be used to ensure that the accused's Convention rights are met. This

[256] Legislation clarified the law on the disclosure of evidence. No specific JCPC/SC decision caused this change. (Criminal Justice and Licensing (Scotland) Act 2010 part 6)
[257] Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s1
[258] Lord Advocate, 'Lord Advocate Guidelines - Interim Guidelines on Access to Solicitors.' (COPFS, 2010), at http://www.copfs.gov.uk/Publications/2010/06/LAGuidelines (website not available).
[259] Nicholson, 'The Society's Criminal Law Committee's Response to the 2010 Act' (JLSS, 2010), at http://www.journalonline.co.uk/Magazine/55-11/1008872.aspx (last visited 23/12/2018).There were initial difficulties with the provision of legal aid.
[260] *Sunday Times* v *UK* (1979) 2 EHRR 245, at [47]

suggests that legislation was useful rather than essential to ensuring that the accused had legal advice during police questioning.

The 2010 Act also made several other changes to address problems raised by the accused's new right to legal advice. Some of the main changes will now be considered. Section 2 of the 2010 Act made provision for the creation of regulations to amend the provision of legal aid. Under the existing rule, legal aid was only available to those who met certain financial eligibility requirements. The introduction of a right to legal advice during police questioning created problems for lawyers because it was difficult for them to ascertain which people being questioned by the police met the financial eligibility requirements for legal aid. There was a risk that they would advise a client and then discover that the client was ineligible for legal aid.[261] Consequently, the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011 disapplies the financial eligibility requirements for legal aid when the accused is questioned in a police station about an offence.[262] Again, this change was useful rather than essential in ensuring Convention compatibility. The Scottish Government stated that the change would "make it easier to provide advice to suspects in certain circumstances" but did not suggest that the change was essential to ensure Convention compatibility.[263]

The 2010 Act also controversially[264] increased the time limit for detaining the accused to 12 hours with the ability to extend this time by a further 12 hours.[265] The longer time limits were designed to ensure that the police had sufficient time to provide the accused with legal advice.[266] However, it also favoured crime control by giving the police longer to

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[261] Anonymous, 'Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Bill Policy Memorandum' (Scottish Government, 2010), para 29 at http://www.parliament.scot/S3_Bills/Criminal%20Procedure%20(Legal%20Assistance%20Detention%20and%20Appeals)%20(Scotland)%20Bill/b60s3-introd-pm.pdf (last visited 06/01/2019).
[262] Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011 (SI 2011/217) regulation 8
[263] Scottish Government, 'The Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011 Executive Note' (Scottish Government, 2011), 1 at http://www.legislation.gov.uk/ssi/2011/217/pdfs/ssien_20110217_en.pdf (last visited 15/01/2019).
[264] Scottish Parliament Official Report 27 October 2010 col 29562 Richard Baker
[265] Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s3 (Time limits for holding accused who have not been charged in police custody are now dealt with under the Criminal Justice (Scotland) Act 2016 s9(1) and s11(1).)
[266] Donnelley, 'Criminal Procedure (Legal Assistance, Detention And Appeals (Scotland) Bill Policy Memorandum' (Scottish Parliament, 2010), para 19 at

interrogate the suspect.[267] Thus, the result of the SC increasing the accused's due process rights, by providing a right to legal advice during police questioning, was the introduction of longer time limits for questioning the accused which benefited crime control. When legal advice was provided under the guidelines, it seems that it was normally possible to provide advice within the previous six hour detention time.[268] Consequently, in most cases the new time limit was useful rather than essential in ensuring that there was time to obtain legal assistance for the accused and then question them.

Cadder resulted in the Scottish Government commissioning a review of Scots criminal law (the Carloway Review) to consider "the rights of the suspect … while maintaining an efficient and effective system for the investigation and prosecution of crime."[269] Thus, there was a desire to rebalance Scots law. Most of Lord Carloway's recommendations, but notably not that relating to the abolition of corroboration, were implemented by the Criminal Justice (Scotland) Act 2016. Before *Cadder*, both the courts[270] and legislators[271] had sought to ensure that Scots law was Convention-compatible but there was perhaps a feeling that Scots law was at the "forefront of thinking... on what is fair" and was unlikely[272] to be subjected to successful human rights challenges.[273] This was because the common law was designed to protect the accused's rights during the trial.[274] *Cadder* moved Scots law towards[275] a new approach of trying to pre-empt human rights challenges. The Act implements Lord Carloway's recommendation[276] that it should be easier to liberate the accused from police custody[277] and outlaws the use of controversial consensual stop and

http://www.parliament.scot/S3_Bills/Criminal%20Procedure%20(Legal%20Assistance%20Detention%20and%20Appeals)%20(Scotland)%20Bill/b60s3-introd-pm.pdf (last visited 15/01/2019).

[267] *ibid*

[268] Nicholson, 'The Society's Criminal Law Committee's Response to the 2010 Act' (JLSS, 2010), at http://www.journalonline.co.uk/Magazine/55-11/1008872.aspx (last visited 15/01/2019).

[269] Lord Carloway, 'Carloway Review Report and Recommendations' (Scottish Government, 2011), 14 at http://www.gov.scot/Resource/Doc/925/0122808.pdf (last visited 15/01/2019).

[270] *Starrs* v *Ruxton* 2000 JC 208

[271] Convention Rights (Compliance) (Scotland) Act 2001

[272] Cf. *Somerville* v *Scottish Ministers* [2007] UKHL 44

[273] Anonymous, 'Lord Carloway's Statement' (Scottish Government, 2011), at http://www.gov.scot/About/Review/CarlowayReview/Mediastatement (last visited 30/07/2016).

[274] *ibid*

[275] For areas of potential convention incompatibility see section 5.

[276] Carloway, n269 above, 133-34

[277] Criminal Justice (Scotland) Act 2016 s16-17

searches.[278] However, the Carloway Report also contained crime control measures such as the removal of corroboration (which was not implemented) and the introduction of an ability to question the accused after charge, subject to judicial approval (which was implemented by s35 of the 2016 Act). Thus, the 2016 Act also shows a desire to rebalance the law. The Scottish Government wanted to find "the appropriate balance of protecting the rights of accused persons with victims of crime."[279]

The changes made by the Carloway Review were designed to pre-empt future challenges to the criminal process rather than to comply with *Cadder*. Nonetheless, these changes show the far-reaching impact of *Cadder*. It influenced legislation produced six years after the decision.

3.5.2 Summary of Findings

In the sample of cases being discussed in this chapter, it is rare for a JCPC/SC decision to have required legislative intervention.[280] However, when it occurs this can significantly affect Scots law by requiring it to be rebalanced. When changes are made to one area of law to achieve Convention compatibility, other areas may need alteration to achieve the desired balance. The now abandoned plans to abolish corroboration (discussed in Chapter 3 section 3.2.3) illustrates this. Had the plans been implemented, it would have been harder to justify convicting the accused by a simple majority verdict or using dock identification evidence.[281] Thus, removing corroboration might have required these areas of law to be changed to achieve a suitable balance between crime control and due process. *Cadder* demonstrates that JCPC/SC decisions can have far-reaching implications for Scots law, requiring changes not only to the specific area of law the case deals with but also to interconnected areas of law.

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[278] *ibid* s65

[279] Scottish Government, 'Criminal Justice (Scotland) Bill Policy Memorandum' (Scottish Parliament, 2013), para 6 at http://www.parliament.scot/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd-pm.pdf (last visited 15/01/2019).

[280] Legislative intervention was required after the SC decision in the civil case of *Salvesen* v *Riddell* [2013] UKSC 22 which resulted in the Scottish Parliament passing the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014/98.

[281] Lord Bonomy, 'The Post-Corroboration Safeguards Review' (Scottish Government, 2015), at http://www.gov.scot/Resource/0047/00475400.pdf (last visited 15/01/2019).

4 Convention Rights Enforcement

The remainder of this chapter considers whether the impacts identified above are offset by some benefit to the protection of Convention rights. It will establish what approach the JCPC/SC sought to take to the enforcement of Convention rights, before considering what approach it actually took and whether it altered the level of Convention rights protection provided by Scots law.

4.1 The JCPC/SC's Approach to the Enforcement of Convention Rights

Cases Seeking to		
Mirror the ECtHR	**Go Beyond the ECtHR**	**Apply the Municipal Approach**
Cadder v *HMA*	*HMA* v *R*	
Ambrose v *Harris*[282]		
McGowan v *B*		
Birnie v *HMA*		
Speirs v *Ruddy*		
HMA v *Murtagh*		
Clark v *Kelly*		
DS v *HMA*		

Table 16: The approaches the JCPC/SC considered it was taking to the enforcement of Convention rights

In 17 out of 26 cases, the JCPC/SC did not state what level of Convention rights protection it wanted to provide. Table 16 shows that eight out of the nine cases, which considered this, sought to mirror the ECtHR. In some cases, the JCPC/SC expressly stated that it was adopting the mirroring principle,[283] while in others this can be implied from judges stating that there is a need to provide a minimum standard and that they should not go beyond the ECtHR.[284] There was no evidence within this sample of judges applying the municipal approach.

[282] Cf. *Ambrose*, n7 above, at [128] per Lord Kerr (dissenting)
[283] *DS*, n6 above, at [91]-[92]
[284] *Birnie*, n21 above, at [29]*; McGowan*, n17 above, at [5]; *Cadder*, n2 above, at [45]; *Clark,* n19 above, at [70] per Lord Hope cf. at [103] per Lord Rodger; *Spiers*, n18 above, at [17]; *Murtagh*, n20 above, at [14]

The JCPC/SC has adopted the mirror approach because it is wary of making unnecessary changes to Scots law. For example, in *Ambrose* v *Harris,* the majority of the SC was unwilling to go beyond the ECtHR by holding that the accused had a right to legal advice when they were asked preliminary questions by the police at the roadside. This would have had "far-reaching consequences" because it would have prevented the police from asking questions of the accused in these circumstances.[285]

However, the JCPC in *HMA* v *R* deliberately went beyond the Convention. Lord Rodger noted that the ECtHR normally allows states to provide a "less drastic remedy" than quashing the conviction for breaches of the reasonable time requirement, but that Parliament had enacted the Scotland Act 1998 s57(2) which left the Lord Advocate with "no power to continue" unreasonably delayed prosecutions.[286] Parliament's intention to subject the Scottish Government to an *ultra vires* control removed the majority's inhibitions about going beyond Strasbourg. However, legislation can also have the opposite effect. In *McGowan* v *B,* Lord Hope argued against requiring legal advice to be provided to accused wanting to waive this right because s57(2) imposed a "tight fetter on the powers of the Lord Advocate" and there was a danger that this might hinder the prosecution of crimes.[287] Even in *R,* the JCPC was wary of going beyond Strasbourg. Lord Rodger noted that the approach he felt compelled to take involved using an "axe rather than a scalpel" to deal with the problem and recognised that there were attractions to the approach advocated by the minority.[288] This suggests that in the absence of s57(2) he would have been willing to mirror Strasbourg. A frequent complaint about the JCPC/SC's jurisdiction is that decisions have significant practical consequences for Scots law.[289] However, these cases show that the JCPC/SC is aware of these practical difficulties. Accordingly, it is usually unwilling to go beyond what the ECtHR requires and, as will be shown, it sometimes reduces Convention rights protection when existing Scots law goes beyond the Convention.

4.2 The JCPC/SC's Enforcement of Convention rights

Table 17 lists the level of Convention rights protection each case provided. This section justifies this categorisation before exploring what consequences this has for the argument

[285] *Ambrose*, n7 above, at [15]
[286] *R*, n14 above, at [154]-[155]
[287] *McGowan*, n17 above, at [6]
[288] *R*, n14 above, at [155]
[289] Chapter 1 sections 2 and 3 above

that the JCPC/SC benefits Scots law by protecting the accused's Convention rights. It starts with cases mirroring the ECtHR before considering those going beyond and below the ECtHR.

Went Below What the ECtHR Required	**Mirrored the ECtHR**	**Went Beyond What the ECtHR Required**
O'Neill v *HMA*	*Cadder* v *HMA*	*HMA* v *R*
	Ambrose v *Harris*	*Clark* v *Kelly*
	HMA v *P*	*HMA* v *Murtagh*
	McGowan v *B*	
	Birnie v *HMA*	
	Dyer v *Watson*	
	Speirs v *Ruddy*	
	Burns v *HMA*	
	Sinclair v *HMA*	
	Holland v *HMA*	
	McDonald v *HMA*	
	McInnes v *HMA*	
	Allison v *HMA*	
	Fraser v *HMA*	
	Macklin v *HMA*	
	Brown v *Stott*	
	Montgomery v *HMA*	
	Millar v *Dickson*	
	Ruddy v *Procurator Fiscal*	
	DS v *HMA*	
	Kinloch v *HMA*	
	AB v *HMA*	

Table 17: Level of Convention rights protection

The findings show that in three cases there was disparity between the level of Convention rights protection that the JCPC/SC thought it was providing and the level it actually provided. In *Clark* v *Kelly*[290] and *HMA* v *Murtagh*[291] the JCPC/SC thought it was mirroring the Convention but actually went beyond it. In *O'Neill* v *HMA,*[292] the SC did not state what level

[290] *Clark,* n19 above
[291] *Murtagh*, n20 above
[292] O'*Neill*, n3 above

of Convention rights protection it sought to provide but presumably believed that it had protected the accused's rights to at least the level required by the ECtHR.

4.2.1 Cases Mirroring the ECtHR

22 out of 26 cases mirrored the ECtHR. Due to the large number of cases mirroring the ECtHR, time and space constraints mean it is impossible to examine every case in detail. Two criteria were used to select cases:

1. Cases where the ECtHR subsequently approved the JCPC/SC's judgment (listed in Table 18). These cases show that the JCPC/SC's decision was consistent with the ECtHR's approach.

2. Cases significantly impacting on Scots law by meeting one of the criteria for impact used in section 3 by either altering longstanding law or producing a decision likely to affect large numbers of future cases. Since these cases had the greatest effect on Scots law, it is important to explore the level of Convention rights protection they provided to establish whether this impact is offset by benefit to the protection of Convention rights.

4.2.1.1 Decisions Approved by the ECtHR

Cases	**Issue**	**ECtHR Case Approving the Decision**
O'Neill v *HMA*	When the reasonable time requirement starts. The SC went below what the Convention requires on the issue of the right to an independent and impartial tribunal (see section 4.2.3.1.)	*O'Neill* v *UK*[293]
Brown v *Stott*	Whether the Road Traffic Act 1988 s172(2)(a) violated the right against self-incrimination.	*O'Halloran* v *UK*[294]
Montgomery v *HMA*	Whether pre-trial publicity meant that the trial court could not be an impartial tribunal.	*Mustafa* v *UK*[295]

Table 18: JCPC/SC decisions which were approved by the ECtHR

[293] *O'Neill* v *UK* (unreported) ECtHR 28th June 2016, at [82]
[294] *O'Halloran* v *UK* (2008) 46 EHRR 21
[295] *Mustafa* v *UK* (unreported) ECtHR 18th January 2011, at [38]

4.2.1.2 *Cadder* v *HMA*

In *Cadder*, Lord Hope noted that the start of the *Salduz* v *Turkey* judgment "appear[ed] to be in line" with the HCJ's argument in *McLean* v *HMA* that providing other safeguards absolves the state of a duty to provide legal advice during police questioning.[296] The ECtHR in *Salduz* indicated that the right is "not absolute [and that states have] the choice of the means of ensuring that [this right is] secured."[297] This ability to choose the approach to take might suggest that Scotland can provide other safeguards instead of legal advice. However, emphasis is placed on the importance of legal advice, which the ECtHR describes as a "fundamental feature" of a fair trial.[298]

Salduz stated that "national laws may attach consequences to the [accused's] attitude [during] police interrogation which are decisive" to the defence case[299] and that Article 6(3) ECHR "normally require[s] that the accused [can] benefit from" legal advice.[300] Since Scots law does not attach consequences to the accused's silence during police questioning,[301] this might suggest that legal assistance was not required to prevent the accused from harming their defence.

However, as Lord Hope noted, the next few paragraphs of *Salduz* do not support this.[302] For the ECtHR, the failure to provide legal advice is important in deciding whether "a procedure has extinguished the very essence of the privilege against self-incrimination."[303] As the SC acknowledged in the Sons of *Cadder* cases, the rights to legal advice and against self-incrimination are not absolute.[304] Thus, the ECtHR in *Yoldas* v *Turkey* held that the right to legal advice can be waived when the "waiver is established in a [voluntary][305] unequivocal manner."[306] *Zaichenko* v *Russia* held that there is no right to legal advice where the accused is questioned at the roadside and there is "no significant curtailment of the [suspect's]

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[296] *ibid*, at [32]
[297] *Salduz*, n63 above, at [51]
[298] *ibid*
[299] *ibid,* at [52]
[300] *ibid,* at [52]
[301] Chapter 3 section 3.2.4
[302] *Cadder*, n2 above, at [33]
[303] *Salduz*, n63 above, at [54]
[304] Section 3.4.1 above
[305] *Deweer* v *Belgium* (1980) 2 EHRR 439
[306] *Yoldas* v *Turkey* (unreported) ECtHR 23 February 2010; *Pishchalnikov* v *Russia* (unreported) ECtHR 24th September 2009, at [77]

freedom of action." [307] Nonetheless, for the ECtHR, the right to legal advice is important to the protection of the right against self-incrimination. Thus, in *Salduz* the ECtHR stated that it considers whether the accused had legal advice in deciding whether the "very essence" of the right against self-incrimination has been undermined.[308] It states that "in most cases" the accused's vulnerability during questioning "*can only* be properly compensated for by the assistance of a lawyer" (emphasis added).[309]

Lords Hope and Rodger correctly argued that the safeguards offered by Scots law failed to protect the accused from incriminating themselves.[310] The ECtHR in *Salduz* considered the approach taken in Turkey where the prohibition on legal advice during police questioning only applied to terrorism cases.[311] There are differences between the safeguards provided by Scots and Turkish law. Unlike in Turkey, in Scotland the restriction on legal advice during police questioning applied to all offences. Scots law provided safeguards not found in Turkish law such as an absolute right to silence and corroboration. Despite these differences, the safeguards provided by Scots law did not prevent self-incrimination. Accused were left in the intimidating situation of being without legal advice during police questioning. [313] Despite the right to silence, this would make some accused feel pressured into making incriminating statements.[314] A lawyer can check that the accused is not making a statement due to a misunderstanding of the law and support them if they feel pressured into confessing. Corroboration may[315] help an accused who confessed by requiring other evidence supporting the confession's accuracy. However, despite the existence of corroborative evidence in *Salduz,* the ECtHR still found a violation of Article 6(3).[316]

Salduz states that, "exception[s] to the enjoyment of [Article 6(3)] should be clearly circumscribed and … strictly limited in time."[317] "Clearly circumscribed" emphasises that the law restricting legal advice should be able to "guide operational decision-making" by those

[307] *Zaichenko* v *Russia* (unreported) ECtHR 18th February 2010, at [48]
[308] *Salduz*, n63 above, at [54]
[309] *ibid*
[310] *Cadder*, n2 above, at [50], [73]; McDonald 'The Scots Law of Confession - Irretrievably Prejudicing the Rights of Suspects?'(2010) 49 SHRJ 1; cf. Ferguson, n222 above, 111.
[311] *Salduz*, n63 above, at [31]
[313] *Ambrose*, n7 above, at [53]
[314] McBarnet*, Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981)
[315] Little evidence is required to corroborate a confession. (*Manuel* v *HMA* 1958 JC 41)
[316] *Salduz*, n63 above, at [57]
[317] *ibid,* at [54]

applying the law.[318] Applying this to Scotland, the lack of mention in legislation of a right to legal advice during police questioning made it clear before *Cadder* that Scots law did not provide a right to legal advice during police questioning in any circumstances. However, the restriction was not limited in time because the whole duration of the accused's police questioning took place without legal advice.

Salduz held that "as a rule, access to a lawyer should be provided" from the suspect's "first interrogation" but that "compelling reasons may exceptionally justify" denying legal advice.[319] Compelling reasons include the prevention of terrorism.[320] Applying this to Scotland, the power to detain suspects in police custody for questioning was designed to allow the police to obtain information from the accused.[321] Thus, as Lord Rodger noted the accused was denied legal advice "in the hope [that they would] incriminate themselves."[322] When compared with the prevention of terrorism, the Scottish aim is not compelling.

The ECtHR in *Salduz* stated that the accused's rights will "in principle be irretrievably prejudiced when incriminating statements made … without … a lawyer are used for a conviction."[323] As Lord Hope notes, this sentence "could hardly be more clearly expressed."[324] The phrase "irretrievably prejudiced" suggests that denying legal advice and the use of confessions obtained during police questioning at a police station normally irretrievably damages the fairness of the trial. The Grand Chamber in *Ibrahim* v *UK*[325] (decided after *Cadder*) clarified that the trial is not automatically unfair if the accused was questioned without legal advice and this evidence was used against them but that the rule in *Salduz* should be interpreted strictly.[326] If there are no compelling reasons for questioning the accused without legal advice, this is strongly suggestive that there has been

[318] *Ibrahim* v *United Kingdom* (unreported) ECtHR 13th September 2016, at [258]
[319] *Salduz*, n63 above, at [55]
[320] *Ibrahim* v *United Kingdom* (unreported) ECtHR 13th September 2016, at [259]
[321] Thomson Committee, n58 above, para 7.16.
[322] *Cadder*, n2 above, at [91]
[323] *Salduz*, n63 above, at [55]
[324] *Cadder*, n2 above, at [35]; Leverick, n222 above, 303.
[325] *Ibrahim*, n320 above, at [260]. For discussion of the case see Convery, 'Delay in Access to Legal Assistance at Interview' (2018) Crim LB 5; Scott, 'A Lift in a Burning Building? – Grand Chamber Rules on Terrorist Article 6 Claims' (UK Human Rights Blog, 2016), at https://ukhumanrightsblog.com/2016/09/19/a-lift-in-a-burning-building-grand-chamber-rules-on-terrorist-article-6-claims/ (last visited 10/03/2019).
[326] *Ibrahim*, n320 above, at [265]

a violation of the accused's Convention rights and only "exceptionally" will it be possible for the state to successfully argue that the trial was fair.[327] This reinforces that the failure to provide legal advice during police questioning in the absence of compelling reasons, as was the practice in Scotland, is normally such a serious failure that it violates Article 6(3). Consequently, the SC mirrored Strasbourg. The HCJ fell below the level of protection required by the ECtHR by arguing that other safeguards could protect the accused.

4.2.1.3 *Sinclair* v *HMA*

In *Sinclair* v *HMA*,[328] a witness made a statement to the police which contradicted her previous statement and trial testimony. The JCPC in *Sinclair* mirrored the ECtHR by holding that the need for equality of arms between the prosecution and the defence meant that there is an onus on the prosecutor to disclose material evidence.[329] The ECtHR in *Rowe* v *UK* held that criminal trials require "equality of arms between the prosecution and the defence" because the "defence must [have] the opportunity to have knowledge of [the prosecution's] evidence."[330] It is difficult for there to be an equality of arms where the accused must search for evidence, as was required by Scots law[331] because as was argued in section 3.1.3, it puts the accused at a disadvantage. Moreover, the ECtHR held that "prosecution authorities should disclose … all material evidence in their possession for or against the accused."[332] This reinforces that the duty of disclosure falls on the prosecution and that it is not Convention-compatible to require the defence to proactively search for material evidence. By holding that there was an onus on the defence to seek out material evidence, the HCJ provided weaker Convention rights protection than the standard set by the ECtHR.

Edwards v *UK*[333] held that evidence undermining the testimony of two prosecution witnesses should have been disclosed because there was an obligation to disclose "material evidence."[334] When applying the law to the facts of *Sinclair*, it is important to note that not every undisclosed police statement undermines the defence or prosecution case.

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[327] *ibid*, at [265]
[328] *Sinclair,* n10 above, at [3]–[12]
[329] *Sinclair,* n10 above, at [33]
[330] (2000) 30 EHRR 1, at [60]
[331] *Smith* v *HMA* 1952 SLT 286, 289
[332] *Rowe*, n330 above, at [60]
[333] (1993) 15 EHRR 417
[334] *ibid,* at [36]

Sometimes the undisclosed statement will be consistent with the statements already disclosed. However, in *Sinclair*, like in *Edwards,* the statement would have undermined the witness's testimony and should have been disclosed. The witness gave different accounts about the number of weapons used in an attack. The defence could have used this inconsistency to argue that the witness was unreliable and confused. The defence might have significantly weakened the prosecution case had the evidence been disclosed. Thus, the JCPC mirrored the ECtHR by holding that witness statements should have been disclosed, while by reaching the opposite conclusion the HCJ went below what the ECtHR requires.[335]

4.2.1.4 *Holland* v *HMA*

Holland v *HMA*[336] dealt with the prosecution's failure to disclose that a prosecution witness was charged with offences. In the JCPC decision, Lord Rodger relied on the ECtHR decision in *Rowe* v *UK*, where English law was criticised for giving the prosecutor a wide discretion "to assess the importance of" material evidence.[337] He noted that the Lord Advocate was in "the invidious position of having to judge the relevance of" evidence to the defence and this left Scots law "open to the [same] kind of criticism" as English law.[338] Previous convictions and charges against prosecution witnesses were material evidence because they are important in helping the accused prepare their defence.[339] Conversely, for reasons discussed in section 3.1.2, the HCJ argued that there was no duty to disclose this evidence.

The JCPC mirrored Strasbourg. The ECtHR in *Rowe* stated that "a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence cannot comply with … Article 6."[340] Consequently, the prosecution cannot have a wide discretion to decide what evidence to disclose. The ECtHR noted that national courts must decide whether disclosure can be avoided on public interest grounds.[341] Thus, the ECtHR expects the prosecutor's refusal to disclose evidence to be scrutinised by domestic courts. Applying this to Scotland, the Lord Advocate decided whether undisclosed evidence

[335] *Sinclair*, n90 above, at [16]
[336] *Holland*, n4 above
[337] *Rowe*, n330 above, at [63]
[338] *Holland*, n4 above, at [71]
[339] *ibid*, at [72]
[340] *Rowe*, n330 above, at [63]
[341] *ibid,* at [62]-[63]

was relevant and assessed whether there were public interest grounds for withholding it. Although the defence could ask the court to disclose information, this relied on them realising that the undisclosed evidence existed and that it would be useful. Otherwise, there was no judicial scrutiny of the decision.[342] Applying *Rowe*, this lack of judicial scrutiny and the wide discretion given to the prosecutor meant that Scots law breached Article 6.

The JCPC also correctly argues that the charges against one of the prosecution witnesses should have been disclosed to the defence. Charges differ from convictions because people merely charged with an offence are entitled to be presumed innocent.[343] The fact that a prosecution witness has previous convictions is more useful to the defence because they prove that the witness is of bad character, while the fact that a prosecution witness has been charged with an offence only suggests that the witness *might* be of bad character. The usefulness varies depending on the nature of the offence for which the witness was convicted or charged. As the HCJ noted, consequences arise from attacking the witnesses' character and it is not always in the accused's interests to rely on such evidence.[344] Nonetheless, both convictions and charges relating to crimes of dishonesty suggest that the witness is likely to lie during their testimony. Charges against a witness suggest that the witness might lie to help the prosecutor in the hope of getting charges against them dropped or a more favourable plea bargain. Thus, as the JCPC noted[345] charges and convictions are material evidence which can undermine the prosecution case and should normally be disclosed. The HCJ fell below the ECtHR's standard by not recognising this.

4.2.1.5 *Fraser* v *HMA* and *McInnes* v *HMA*

In *Fraser* v *HMA,*[346] the SC held that the *Cameron* test was not Convention-compatible because it imposed a duty on the defence to search for evidence, failed to recognise that witness statements are material evidence and speculated about how the trial would have been decided if the evidence was disclosed. Instead, it applied the *McInnes* test. It will be considered whether the *McInnes* and *Cameron* tests are Convention-compatible.

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[342] *Holland*, n4 above, at [72]
[343] This does not prevent the charges being used to attack a witness's credibility. (see Chapter 3 section 3.2.5)
[344] Criminal Procedure (Scotland) Act 1995 s266(4)(b)
[345] *Holland*, n4 above, at [75]
[346] *Fraser*, n26 above, at [32]-[33], [37]

Both tests consider the importance of the undisclosed evidence. The *Cameron* test was interpreted by the HCJ as requiring the accused to proactively seek out useful evidence.[347] Under the *McInnes* test the SC held that "it is no answer" to the failure to disclose "to say that the defence had the opportunity to" question a witness.[348] As was shown in section 4.2.1.3, the ECtHR has held that the duty to disclose evidence rests on the prosecutor, not the defence.[349]

The *Cameron* test considers whether the evidence not heard at trial had a "material part to play [in the] jury's determination of a critical issue at the trial." [350] Like the ECtHR case law,[351] the *Cameron* test considers the materiality of the evidence, although it differs from the ECtHR's approach by considering the effect on the jury's decision. However, the HCJ's application of the test in *Fraser* was problematic. Lord Gill held that the undisclosed statement would not have affected the jury's decision because the evidence was unreliable and the prosecutor "would not have committed" themselves to the theory that Fraser had placed rings in the house, were they aware of the undisclosed statement by a police officer.[352] It is difficult to reconcile this with the requirement that material evidence be disclosed.[353] As Lord Hope notes, it was "plain that" the evidence "might materially have weakened the Crown case."[354] The rings became an important part of the prosecution's case and the jury was told they could not convict unless they believed the ring theory.[355] The undisclosed statement showed inconsistency in the prosecution case because it suggested the rings were in the house earlier than was thought. Thus, the statement might have undermined the prosecution case and was material evidence.

Both *McInnes* and the ECtHR require the disclosure of material evidence impacting on the defence or prosecution case. The evidence must "materially" affect the Crown or defence

[347] *Fraser*, n97 above, at [142]
[348] *Fraser*, n26 above, at [33]
[349] See also Shead, 'The Decision in the Fraser Appeal: Some Brief Observations' 2008 SCL 664-665
[350] *Cameron*, n98 above, 260
[351] *Edwards,* n333 above, at [36]
[352] *Fraser*, n97 above, at [147], [150]
[353] *Edwards,* n333 above, at [36]
[354] *Fraser*, n26 above, at [32]
[355] *Ibid,* at [2]

case under the *McInnes* test[356] or be "material evidence for or against the accused" under the ECtHR's test.[357]

Each test then assesses the consequences of the non-disclosure on the conviction's safety. Unlike the *McInnes* test, the ECtHR does not consider "the relevance of the evidence" to the accused's guilt or innocence.[358] The ECtHR considers that this is for "national courts to assess."[359] Thus, the SC correctly considered it. The ECtHR's considers "whether the proceedings in their entirety … were fair,"[360] while *McInnes* assesses the fairness of the trial and considers what "happened at the trial" and "all the circumstances of the trial."[361] Thus, both look at the whole trial to decide whether the non-disclosure of evidence made it unfair.

Unlike the *McInnes* test, the *Cameron* test considers whether the non-disclosure created a "miscarriage of justice."[362] The HCJ speculated about what might have happened during the trial had the evidence been disclosed.[363] Lord Hope in the SC decision in *Fraser* correctly criticised this for not considering "what actually happened at the trial."[364] *Edwards* v *UK* held that "the proceedings as a whole" should be considered when assessing the fairness of the trial.[365] "Proceedings," when used in the past tense, as it is here, has connotations of an event that actually happened and suggests that the court should focus on this. "[A]s a whole" links to the word "proceedings" and suggests that we must consider everything that happened during the actual proceedings. The *McInnes* test recognises this by focusing on the "case as presented at the trial."[366] Unlike the ECtHR, the *Cameron* test does not consider the fairness of the proceedings.[367] Consequently, several aspects of the *Cameron* test applied by the HCJ were not Convention-compatible. The *McInnes* test applied by the SC mirrors the Convention.

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[356] *McInnes*, n24 above, at [19]
[357] *Edwards,* n333 above, at [36]
[358] *Vidal* v *Belgium* (unreported) ECtHR 28th October 1992, at [33]
[359] *ibid*
[360] *Edwards,* n333 above, at [33]
[361] *McInnes*, n24 above, at [20]
[362] *Cameron*, n98 above, 261
[363] *Fraser*, n97 above, at [177]
[364] *Fraser*, n26 above, at [37]
[365] *Edwards,* n333 above, at [34]
[366] *McInnes*, n24 above, at [38]
[367] *Fraser*, n97 above, at [220]

4.2.1.6 *AB* v *HMA*

The right to privacy under ECHR Article 8(1) can be restricted if the restriction is in "accordance with the law and is necessary in a democratic society in the interests of … public safety or … for the prevention of disorder or crime [or] for the protection of health or morals."[368]

In *AB* v *HMA* (dealing with the use of previous charges against the accused to deny him a defence), the HCJ distinguished between the storing of previous charges against the accused and the revealing of the previous charges. For the HCJ, only the revealing of the charge invoked Article 8 meaning there was "no interference with" Article 8 by recording and storing the charges against the accused.[369] This distinction is unconvincing. *Gardel* v *France* held that:

> "The storing by a public authority of information relating to an individual's private life amounts to an interference [with] Article 8. The subsequent use of the stored information has no bearing on that finding."[370]

Thus, the storing of information about the accused is sufficient to invoke the accused's right to privacy regardless of how it is used. Moreover, it seems odd to suggest, as the HCJ did, that the stored charges were not released when they were revealed to the prosecutor and the court to deny the accused the ability to use the defence.

In *Rotaru* v *Romania*,[371] the ECtHR held that the storing of previous convictions or cautions against the accused can engage the right to a private life. Although stored information about allegations of past offending might have been public knowledge, the storing of this information means the information can be accessed when the public have forgotten about it. If details of the previous incident were not made public, it allows information to be used against the accused which people were not likely to have known about or had forgotten.[372]

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[368] Article 8(3)
[369] *O'Rourke*, n131 above, at [21]
[370] *Gardel* v *France* (unreported) ECtHR 17th December 2009, at [58]
[371] *Rotaru* v *Romania* (unreported) ECtHR 4th May 2000, at [44]; *MM* v *UK* (unreported) ECtHR 13th November 2012, at [188]
[372] *MM ibid,* at [188]

For the reasons given in section 4.2.1.4, charges differ from convictions. Nonetheless, both contain sensitive information about the accused's past which if revealed could significantly affect their reputation. Thus, the storing of criminal charges against the accused is likely to engage Article 8. In *AB,* information was stored about charges made against the accused which was used by the prosecutor to deny him a defence. This was sensitive information about AB which suggested that he had previously been charged with sexual offences. The storing of the information and the use of the information against the accused, suggests that AB's right to privacy was invoked.

Both the HCJ and the SC accepted that the Sexual Offences Act 2009 s39(2)(a)(i) was in accordance with the law and that the provision had a legitimate aim in seeking to prevent the sexual exploitation of children.[373]

An issue of contention between the HCJ and SC was whether it was proportionate to rely on the accused's conviction to deny the use of the defence. For the HCJ, when the accused is charged with a relevant sexual offence, this acts as a warning that further sexual activity with an older child will not be tolerated.[374] Thus, although the HCJ did not accept that the accused's Article 8 right was engaged, it felt that any interference with it was proportionate. For the SC, the interference with the accused's Article 8 right was disproportionate for the reasons discussed in section 3.2.2 above. This dispute about proportionality related more to a dispute about the application of the law to the facts rather than a dispute about the law.

Nonetheless, the SC's approach is more convincing.[375] Although the accused's previous charges related to sexual offences against children, they did not involve sexual activity with an older child. Thus, there was a disconnect between the previous charges and the offence in which the charges were used against the accused. Moreover, when the accused was charged with the previous offences, he was not warned that the previous offences would deny him a defence. The accused was a child at the time of the previous offences, who without being warned about the fact that he could no longer use the s39 defence, would have been unlikely to have sufficient legal knowledge to realise this. It was disproportionate to use previous charges against the accused to deny him a defence, when he had no

[373] *O'Rourke*, n131 above, at [25] and *AB*, n12 above, at [25] and [30]
[374] *O'Rourke*, *ibid,* at [25]
[375] Callander, n136 above, 182

warning that this would happen, had not previously used the defence and was denied a defence which could help him obtain an acquittal. Accordingly, the SC mirrored the ECtHR by holding that s39(2)(a)(i) breached the right to privacy while the HCJ fell below what the ECtHR required.

4.2.2 Cases Going Beyond the ECtHR

4.2.2.1 *HMA* v *R*

In the first of three cases going beyond the Convention, the majority of the JCPC in *HMA* v *R*[376] reasoned that unreasonably delayed trials must be abandoned to avoid the Lord Advocate continuing to breach the accused's Convention rights. The ECtHR in *Eckle* v *Germany* held that when considering the amount of time that has passed for the purposes of the reasonable time requirement, "the period governed by Article 6(1) covers the whole of the proceedings."[377] In other words, once the obligation to prosecute within a reasonable time starts, it continues until the proceedings conclude. When this is applied to *R,* it suggests that when an unreasonable delay occurs, the Lord Advocate by continuing the prosecution continues contributing towards the delay by increasing the length of the proceedings. This breach of the accused's Convention rights was prohibited under s57(2). To this extent the majority in *R* were correct.

However, other ECtHR case law suggests that breaches of the reasonable time requirement can be remedied without abandoning the trial. *Bunkate* v *Netherlands* held that it was "incorrect" to suggest that a breach of the reasonable time requirement "automatically results in the extinction of the right to execute the sentence."[378] Since there is no "extinction of the right" to pass sentence, the proceedings can continue to sentencing despite a breach of the reasonable time requirement. Although *Bunkate* dealt with a delay in sentencing, the rule is applicable to delays during trial. The time taken for the trial and sentencing is considered together to see whether there was an unreasonable delay.[379] This makes it unlikely that the ECtHR would consider them separately to decide what remedy to

[376] *R*, n14 above
[377] (1982) 5 EHHR 1, at [76]
[378] (1995) 19 EHRR 477, at [25]
[379] *Eckle*, n377 above, at [76]

apply and hold that a delay during trial requires proceedings to be abandoned but that a delay during sentencing does not.

Kudla v *Poland*[380] held that remedies for breaching the reasonable time requirement must be "'effective' in the sense either of preventing the alleged violation or its continuation."[381] Thus, the provision of an effective remedy can stop the continuing violation of the accused's Convention rights. Speeding up the trial[382] and a reduction in sentence[383] or compensation[384] are all effective remedies. By ending the continuing breach, the Lord Advocate can finish prosecuting without breaching the accused's Convention rights and falling under s57(2). As the majority in *R* acknowledged, *R* went beyond the ECtHR by holding that unreasonably delayed trials must be abandoned. However, they failed to recognise that the provision of a remedy to the accused could allow the trial to continue.

In *Speirs* v *Ruddy*, which doubted *R*, Lord Bingham held that a "breach of the reasonable time requirement does not give rise to a continuing breach" because it is possible to remedy the breach.[385] This differs slightly from the ECtHR's approach which considers that there is a continuing breach, which can be halted by providing a remedy. Nonetheless, the JCPC in *Speirs* mirrored the ECtHR by recognising that unreasonably delayed trials normally need not be abandoned.

4.2.2.2 *Clark* v *Kelly*

Clark v *Kelly*[386] was one of several cases[387] dealing with the implications of the HCJ decision in *Starrs* v *Ruxton*,[388] which held that the right to an independent and impartial tribunal was violated by the use of temporary sheriffs who lacked security of tenure because they were appointed on short term contracts by the Scottish Executive. This raised the issue of whether the use of District Court Clerks, who despite advising the lay Justices on legal matters similarly lacked security of tenure, meant that the District Court was not an

[380] (2000) 35 EHRR 198
[381] *ibid,* at [158]
[382] *Cocchiarella* v *Italy* (unreported) ECtHR 29th March 2006
[383] *Beck* v *Norway* (unreported) ECtHR 26th June 2001
[384] *Kudla* v *Poland* (unreported) ECtHR 26th October 2000
[385] *Speirs*, n18 above, at [17]
[386] *Clark,* n19 above
[387] *Millar* n15 above; *Ruddy* n23 above
[388] *Starrs*, n270 above, 231

independent and impartial tribunal. Lords Hope and Hoffmann[389] considered the structure of the District Court[390] to establish whether it had sufficient independence including the method of appointing Clerks, the ability to appeal the decision and the professional nature of the Clerk's role. Similarly, the ECtHR considers:

> "The manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and … whether the body presents an appearance of independence."[391]

The JCPC reasoned that the Clerks were sufficiently independent because they are professionals with a code of conduct, they do not decide the outcome of cases and their decisions are appealable.[392] The JCPC's reasoning mirrored the ECtHR. Clerks were appointed as council employees who could be dismissed like any other employee.[393] The Clerk might fear giving legal advice which the council would disapprove of. Insecurity of tenure is a factor suggesting that the tribunal lacked independence.[394] However, as the JCPC noted,[395] the risk of this influencing the Clerk was mitigated because they could not make any unpopular decision to acquit the accused. For the ECtHR, this reduces the likelihood of the official lacking sufficient independence.[396] The JCPC was correct to consider the ability to appeal the District Court's decision. Although it is difficult to appeal findings of fact, the Clerk could not advise on this.[397] Where the court official being challenged is not a judge, the right of appeal is a factor suggesting there was no violation of Article 6(1).[398] The Clerk was a professional lawyer who had to follow a code of practice and avoid conflicts of interest.[399] In *Bryan* v *UK,*[400] the ECtHR attached importance to the fact that a planning inspector had a professional code of practice requiring him to act

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[389] *Clark,* n19 above, at [29]
[390] *ibid*, at [55]
[391] *Findlay* v *UK* (1997) 24 EHRR 221, at [73]
[392] *Clark,* n19 above, at [30]-[36], [56]-[62], [94]-[95]
[393] *ibid,* at [11]. Clerks in the Justice of Peace Courts, which replaced the District Courts, are appointed by the Scottish Courts Service (Criminal Proceedings etc. (Reform) (Scotland) Act 2007 schedule 1 para 1(c))
[394] *Bryan* v *UK* (1996) 21 EHRR 342, at [38]
[395] *Clark,* n19 above, at [31], [61], [88]
[396] *Mort* v *UK* (unreported) ECtHR 6th September 2001, 12
[397] *Clark,* n19 above, at [61]
[398] *Bryan*, n394 above, at [46]
[399] *Clark,* n19 above, at [94]
[400] *Bryan*, n394 above, at [46]

impartially. This, along with safeguards such as a right to appeal, meant that the inspector's lack of security of tenure did not breach Article 6(1). Similarly, safeguards were in place to ensure that the Clerk did not violate the right to an independent and impartial tribunal despite their insecurity of tenure. Accordingly, the JCPC mirrored the ECtHR on this issue.

The JCPC also considered whether the right to a public hearing was breached by the Clerk giving private legal advice to the Justices and not repeating it in open court. For Lord Hope (with whom Lords Hutton and Bingham agreed), private legal advice should be repeated in open court to enable the defence to challenge it.[401] Legal advice could be given in private because the giving of legal advice would be hindered if the accused could hear everything being said. However, he found it "objectionable" that the accused was not told the contents of this advice.[402] Lord Hope's conclusion that if "these steps [were] taken" then Scots law would be Convention-compatible suggests that he considered these steps necessary to mirror the ECtHR.[403] For Lords Rodger and Hoffmann this went "further than Article 6(1) requires"[404] because *Mort* v *UK* held that providing legal advice in private could be Convention-compatible where the Clerk cannot influence the outcome of the case.[405]

In *Mort*, the ECtHR held that legal advice given by court officials should be disclosed to the defence where the court official could influence the case's outcome. The accused must "have knowledge of and comment on all evidence adduced or observations filed."[406] Lord Hope used similar reasoning. However, as he acknowledged, there is a difference between a court advisor who can influence the judge's decision and one only providing legal advice.[407] *Mort* recognised this difference. *Mort* involved a Clerk advising lay Magistrates in England. The ECtHR noted that the Clerk did not have a separate role in the proceedings from the Justice and that they could not influence the Justices' decision.[408] Thus, "no problem arises … if a justices' clerk retires with the justices and it is not known what assistance" they provided.[409] Similarly, the District Court Clerk could not influence the

[401] *Clark,* n19 above, at [69]
[402] *ibid,* at [65]
[403] *ibid,* at [70]
[404] *ibid,* at [103]
[405] *Mort*, n396 above, at [90]
[406] *Clark,* n19 above, at [74]
[407] *ibid,* at [64]
[408] *Mort*, n396 above, at [12]
[409] *ibid*

court's decision. Applying *Mort*, there was no obligation to disclose the legal advice in open court and the majority in *Clark* went beyond Strasbourg.

4.2.2.3 *HMA* v *Murtagh*

In *HMA* v *Murtagh,*[410] the JCPC considered whether a witness's previous convictions could be withheld from the defence to protect the witness's privacy. Lords Rodger and Hope argued that witnesses may have convictions which could embarrass them if revealed and this could damage their relationship with others. Disclosure of all convictions was unnecessary to ensure the fairness of the trial and could violate the witness's right to privacy.[411] However, material convictions should be disclosed, even if they are embarrassing because of their usefulness in undermining the prosecution case and the JCPC recommended that the prosecutor should be generous when deciding which convictions should be disclosed to the defence.[412]

Jasper v *UK*[413] held that the need for equality of arms means that "material evidence" should be disclosed to the defence. Nonetheless, it also held that there is no "absolute right" to the disclosure of evidence and "competing interests," including the need to "protect witnesses [from] reprisals … must be weighed against" the accused's rights.[414] This suggests that the ability to avoid disclosing evidence in the public interest is an exception to the rule that material evidence should be disclosed. Leading evidence of embarrassing convictions can subject witnesses to reprisals because it creates the danger that others will disassociate themselves from the witness.

Article 8 of the ECHR allows the witness's right to privacy to be restricted where it is "necessary in a democratic society … for the protection of the rights and freedoms of others."[415] Applying this rule to the disclosure of witness convictions, there is a legitimate aim in disclosing witnesses' convictions to ensure the fairness of the trial. However, it is difficult to argue that disclosing convictions which have little relevance to the case and which, due to their embarrassing nature, will significantly affect the witnesses' private life,

[410] *Murtagh*, n20 above, at [37]
[411] *ibid,* at [66] per Lord Rodger and at [29]-[34] per Lord Hope
[412] *ibid,* at [61]
[413] (2000) 30 EHRR 441, at [52]
[414] *ibid*
[415] ECHR Article 8(2)

is necessary in a democratic society. Thus, as the JCPC indicates, the prosecutor can refuse to disclose these convictions.[416] However, the JCPC goes beyond Strasbourg by requiring that all material convictions be disclosed even if this encroaches on the witness's private life.[417] Restrictions on disclosure are justifiable where they are "strictly necessary" and do not jeopardise the fairness of the trial.[418] The prosecutor can take measures to counterbalance the disadvantage faced by the accused not having the evidence.[419] When this is applied to witnesses' convictions, sometimes disclosing the material convictions will be the only way to ensure that the trial is fair. However, there may be other evidence which could be disclosed to show that the witness is unreliable, inconsistent or inaccurate. This would make the previous convictions less important to ensuring the fairness of the trial and allow them to be withheld from the defence.

4.2.3 Cases Falling Below the ECtHR's Minimum Standard

4.2.3.1 O'*Neill* v *HMA*

O'Neill v *HMA*[420] represents the only case providing less protection than Strasbourg. However, as Table 18 showed, the SC mirrored the ECtHR by holding that the time for the duty to prosecute within a reasonable time started when the accused was charged not when they were questioned by the police.[421] The accused complained that after being convicted of sexual offences, the trial judge commented on their character before presiding over their murder trial. The HCJ and SC held that these comments did not mean that the murder trial violated the right to an independent and impartial tribunal.[422]

For the ECtHR, a lack of impartiality arises where judges show actual signs of bias (subjective bias) and when the judge did not offer "sufficient guarantees to exclude any legitimate doubt" about this (objective impartiality).[423] As Lord Hope noted, there is no evidence suggesting that the trial judge displayed subjective bias.[424] He held that a "fair-

[416] *Murtagh*, n20 above, at [67]
[417] *ibid,* at [68]-[69]
[418] *Jasper*, n414 above, at [52]
[419] *ibid*
[420] O'*Neill*, n3 above
[421] Table 11 above
[422] O'*Neill*, n3 above, at [57]; *O'Neill* v *HMA* [2012] HCJAC 20, at [40]
[423] *Olujić* v *Croatia* (unreported) ECtHR 5th February 2009, at [57]
[424] O'*Neill*, n3 above, at [53]

minded and informed observer" would realise that the judge made the comments at the end of the first trial while performing "his duty as a judge" for that trial.[425] It is normal after the conclusion of a trial for the judge to comment on the case because this is when sentencing starts. As Lord Hope noted, an informed observer would realise that the trial judge was a professional who would act impartially.[426] However, using the same judge for both trials is problematic because it meant that the judge went into the second trial with a detailed knowledge about the accused. This was not considered by Lord Hope nor by the HCJ, which argued that the informed observer would not have doubts about the impartiality of the judge because the second trial "concerned crimes of a radically different nature."[427]

Although, the ECtHR has not considered situations where a judge hears two trials involving the same accused, in *Hauschildt* v *Denmark*[428] it considered a situation where a judge was involved in multiple stages of proceedings against the accused. For the ECtHR, this is only problematic where the judge gains a "particularly detailed knowledge" of the case from being involved in earlier proceedings.[429] Applying this to the facts of *O'Neill*, using the same judge for two trials risks the judge developing knowledge about the accused. Whether this knowledge becomes problematic depends on the amount of knowledge the judge gains about the second proceedings.[430]

The trial judge in *O'Neill* lacked a detailed knowledge of the murder charge because the first trial involved sexual offences. However, the two trials were linked because it was alleged that the murder was committed to prevent a witness from testifying against the accused in another sexual offence trial.[431] This might create legitimate doubt about the objective impartiality of the murder trial because it meant that the judge had heard detailed evidence about the accused's actions and character before the murder trial which might confirm the prosecution's case that the accused had a motive[432] to commit the murder. The detailed knowledge of the accused's past offending might confirm whether

[425] *ibid*
[426] *ibid*
[427] *Lauchlan* v *HMA* [2012] HCJAC 20, at [86]
[428] *Hauschildt* v *Denmark* (unreported) ECtHR 16th July 1987
[429] *ibid,* at [99]
[430] *ibid*
[431] O'*Neill*, n3 above, at [10]
[432] The prosecution need not prove the accused's motive.

they had a disposition towards violence, which might make them likely to murder. Thus, although the trial judge did not display actual bias, the decision to use the same judge for the second trial seems inconsistent with Article 6(1).

4.2.4 Summary of Findings

In every case other than *O'Neill*, the JCPC/SC protected the accused by providing them with at least the level of Convention rights protection they would likely have received in the ECtHR. The JCPC/SC rarely misinterprets the ECHR. When the JCPC/SC misinterprets the Convention, it usually provides greater Convention rights protection than the ECtHR requires. When the JCPC/SC stated the level of Convention rights protection it wanted to provide, in seven out of nine cases it succeeded in providing that level of protection. However, as *Clark* and *Murtagh* show, it will not always achieve the level of protection it hoped to achieve. Thus, the JCPC/SC has normally provided an accurate ruling about whether practices are likely to violate the accused's Convention rights. This protects the UK from liability before the ECtHR by reducing the likelihood of the accused successfully taking their case to Strasbourg.

Although this supports claims that the JCPC/SC protects Convention rights, this should not be overstated. The mirror approach limits the JCPC/SC's ability to protect Convention rights because it is unlikely to create rights in circumstances not yet recognised by the ECtHR. For example, in *Ambrose* v *Harris*,[433] Lord Kerr (dissenting) argued that accused would benefit from a rule allowing them to have legal advice if they were asked preliminary questions outwith police custody but the majority rejected this approach because ECtHR jurisprudence does not require this.[434] Additionally, the JCPC/SC's approach reduces the ability of the JCPC/SC to prevent future violations of the Convention by examining how the ECtHR's jurisprudence is likely to develop and using this to pre-empt challenges to Scots law.[435]

[433] *Ambrose*, n7 above, at [126]
[434] *ibid,* at [67]-[72]
[435] *ibid,* at [126]

4.3 Alteration of Convention Rights Protection

Since the JCPC/SC is unwilling to go beyond the ECtHR, mirroring will normally only increase Convention rights protection if Scots law previously provided a level below that required by the ECtHR. Where Scots law previously mirrored or went beyond the ECtHR, the JCPC/SC if it applies the mirroring approach, should not alter or decrease Convention rights protection. This section assesses whether cases altered the level of Convention rights protection in this way.

A distinction can be drawn between cases altering Scots law before the case was heard at first instance (This law will hereafter be referred to as "existing Scots law.") and those where the JCPC/SC only overturned the HCJ decision in the case. The former cases show that Scots law took a longstanding position on the issue which was unlikely to change without the JCPC/SC's intervention, while the latter cases show an area of law in flux where the HCJ might have reached the same decision as the JCPC/SC in a later case.

Case	The JCPC/SC's Alteration of the Level of Convention Rights Protection when Compared to:	
	Existing Law	**The HCJ's Decision in the Current Case**
Montgomery v *HMA*	None	None
Brown v *Stott*	None	Decrease
Millar v *Dickson*	No other cases before this one dealt with the issue.	Increase
Dyer v *Watson*	None	Decrease
HMA v *R*	Increase	Increase
Clark v *Kelly*	No other cases before this one dealt with the issue.	None
Sinclair v *HMA*	Increase	Increase
Holland v *HMA*	Increase	Increase
Ruddy v *Procurator Fiscal*	None	None
DS v *HMA*	None	None
Speirs v *Ruddy*	Decrease	Decrease
McDonald v *HMA*	None	Increase
Burns v *HMA*	No other cases before this one dealt with the issue.	Increase
HMA v *Murtagh*	No other cases before this one dealt with the issue.	The case was referred to the JCPC without the HCJ considering the case.
McInnes v *HMA*	None	None
Allison v *HMA*	None	Increase
Cadder v *HMA*	Increase	Increase
Fraser v *HMA*	Increase	Increase
Ambrose v *Harris*	No other cases before this one dealt with the issue.	The case was referred to the SC without the HCJ considering the case.
HMA v *P*	None	The case was referred to the SC without the HCJ considering the case.
McGowan v *B*	Decrease	The case was referred to the SC without the HCJ considering the case.
Birnie v *HMA*	Decrease	Decrease
Kinloch v *HMA*	None	None
O'Neill v *HMA*	No other cases before this one dealt with the issue.	None
AB v *HMA*	Increase	Increase

Table 19: The level of Convention rights protection compared to existing Scots law and the HCJ decision

Table 19 shows whether each case altered the level of Convention rights protection when compared with the HCJ's decision and existing Scots law. Existing Scots law and the HCJ will not always have dealt with the issue where the legal issue has not been considered before or where the case was sent directly to the JCPC/SC as a reference. Starting with cases which increased Convention rights before considering those reducing it these findings will be justified.

4.3.1 Cases Increasing Convention Rights Protection by Altering Existing Scots Law

Six cases increased Convention rights protection when compared with existing law. They are divisible into those where the increase was necessary and those where it was unnecessary to achieve Convention compatibility. The former occurs where the JCPC/SC did not make changes beyond those required for Convention compatibility. Unnecessary changes occur where the accused is given new rights which are not required for Convention compatibility. This change is harder to justify because the UK would be unlikely to be successfully challenged before the ECtHR were the right not granted. Although this approach helps protect the accused, it risks making unnecessary changes to Scots law which might have significant practical or doctrinal consequences.[436] Starting with *Cadder,* it will be shown why each case increased Convention rights protection and that five out of six cases made necessary changes to Scots law.

4.3.1.1 *Cadder* v *HMA*

Cadder v *HMA* increased Convention rights protection by giving the accused a right to legal advice during police questioning.[437] Despite this, several factors limit the ability of this to protect the accused. Scots law allows the accused to waive the right to legal advice[438] and the right will not protect a person who is asked preliminary questions outwith a police station.[439] However, without legal advice there is an inequality of arms between the accused and the state. State officials are familiar with the criminal process while the accused is unlikely to be. The accused may feel pressured to confess due to the intimidating nature of police custody. Before *Cadder*, provided the questioning was fair, confessions

[436] Section 3.3.4 above
[437] *Cadder*, n2 above
[438] *McGowan*, n17 above, at [17]
[439] *Zaichenko* v *Russia* (unreported) ECtHR 18th February 2010, at [48]

obtained without legal advice were admissible evidence against the accused.[440] *Cadder* reduced the inequality between the accused and the state. Having a lawyer means that accused have someone to advise them of their rights, check they understood the law, provide support if they feel intimidated and advise them whether they should confess.

4.3.1.2 Other Cases

Sinclair, *Holland, Fraser* and *AB* made necessary increases to Convention rights protection. It was explained why they changed Scots law in sections 3.1 and 3.2 and shown in section 4.2.1 that Scots law was moved from the HCJ's Convention incompatible decision to the JCPC/SC's Convention-compatible one.

4.3.1.3 *HMA* v *R*

Before *R,*[441] unreasonably delayed trials could normally be continued even though delays could result in evidence being lost or witnesses' memories becoming less accurate.[442] This met the crime control need to see wrong-doers prosecuted by normally allowing the trial to continue, while meeting the due process need to ensure the fairness of the trial by requiring trials which could not be fair due to the delay to be abandoned. This is the approach taken by *Spiers* v *Ruddy* which, it was shown, mirrors the Convention.[443]

R focused more on due process. If a breach occurred, the accused was given complete protection against evidence becoming unreliable because the trial had to be abandoned. After having potentially spent time worrying about their fate, once the trial was unreasonably delayed, the accused knew that the state could no longer prosecute them for that offence. Before *R*, the prosecution could continue putting the accused in a state of uncertainty by continuing the prosecution. Thus, *R* provided a significant human rights benefit to the accused, but one that was unnecessary to meet the minimum standard set down by the ECtHR.[444]

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[440] *Mclean*, n55 above, at [34]
[441] *R*, n185 above, at [19]
[442] Nicolson and Blackie, 'Corroboration in Scots Law: "Archaic Rule" or "Invaluable Safeguard"?' (2013) 17(2) Edin LR 152, 156
[443] *Speirs*, n18 above, at [17]; section 4.2.2.1 above
[444] Section 4.2.2.1 above

4.3.2 Cases Acting as a Safety Net

The JCPC/SC's supporters argue that the JCPC/SC acts as a safety net by upholding the accused's Convention rights to the level required by the ECtHR when the HCJ has not done this.[445] Table 19 shows that in ten cases the JCPC/SC acted as a safety net. However, it is important not to overstate the extent of this. Most cases did not alter the level of Convention rights protection when compared with the HCJ or there was no HCJ decision in the case. Indeed, four cases decreased Convention rights protection when compared with the HCJ decision.[446] They will be examined later, but they demonstrate that having an additional tier of appeal from the HCJ to the JCPC/SC does not always benefit the accused. However, when the JCPC/SC does act as a safety net this can benefit the accused in several ways.

First, the JCPC/SC can give the accused a right not recognised by the HCJ. For example, *Cadder* v *HMA*[447] provided the accused with a right to legal advice. When Cadder sought to appeal his conviction to the HCJ, it twice refused to let the case progress to an appeal hearing because his case was "not arguable" in the light of *McLean* v *HMA*.[448] The SC's decision resulted in the HCJ finding his confession inadmissible and quashing his conviction because there was insufficient other evidence to make the conviction safe.[449]

Secondly, the JCPC/SC can provide a Convention-compatible interpretation of the law. In *Fraser* v *HMA,*[450] the accused was convicted despite not receiving evidence which might have undermined an important part of the prosecution case. The HCJ applied the Convention-incompatible *Cameron* test.[451] The SC used the Convention-compatible *McInnes* test to examine whether the trial was fair and after concluding that it was not, quashed

[445] Chapter 1 section 3 above
[446] Table 19 above
[447] *Cadder*, n2 above
[448] *Cadder*, n2 above, at [9]
[449] Anonymous, 'Man Who Changed Scots Legal System Peter Cadder Free' (BBC, 2012), at http://www.bbc.co.uk/news/uk-scotland-glasgow-west-18105538 (last visited 01/09/2017).
[450] *Fraser*, n26 above, at [43]
[451] *Fraser,* n97 above, at [132]

Fraser's conviction.[452] This enabled Fraser to be retried in a trial where he had access to the undisclosed evidence.[453]

Third, the JCPC/SC can assess whether the trial was fair and whether a practice is Convention-compatible. In *Holland* v *HMA*, the HCJ considered the fairness of the trial, but it was difficult for it to consider the trial's overall fairness because the use of dock identification evidence and the non-disclosure of evidence were considered separately.[454] The JCPC protected the accused by confirming that dock identification does not make the trial unfair, holding that prosecution witnesses' convictions should be disclosed and by considering the whole trial to conclude that it was unfair and quashing the conviction.[455]

The JCPC/SC provided several different remedies to the accused when the HCJ failed to uphold their Convention rights. The most useful remedy to the accused was the controversial[456] quashing of the conviction.[457] This enabled the accused to go free although a retrial might be granted. Second, the JCPC/SC can declare evidence inadmissible.[458] This does not automatically lead to the quashing of the accused's conviction, but it can if there is insufficient other evidence to uphold the conviction.[459] Finally, the JCPC/SC might agree that the trial was fair but recognise that the accused's Convention rights were breached.[460] This is the least useful for the accused because their conviction remains intact although they may be entitled to a remedy for the breach of their Convention rights such as a reduction in sentence or compensation.[461] The JCPC/SC can only provide these remedies in devolution issue cases because for compatibility issues the SC must determine the issue of law then let the HCJ decide how to dispose of the case.[462]

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[452] *Fraser*, n26 above, at [43]
[453] Anonymous, 'Nat Fraser Sentenced To 17 Years for Murder of His Wife' (Guardian, 2012), at https://www.theguardian.com/uk/2012/may/30/nat-fraser-sentenced-murder-wife (last visited 01/09/2017).
[454] *Holland* v *HMA*, n78 above and 2003 SLT 1119
[455] *Holland*, n4 above, at [77]-[86]
[456] Chapter 5 section 3.1.3 below
[457] *Holland*, n4 above, at [86]
[458] *Cadder*, n2 above, at [64]
[459] Ferguson, 'Privy Council Criminal Appeals' (2008) SLT (News) 133, 135
[460] *Speirs,* n18 above, at [23]
[461] Section 4.2.2.1 above
[462] Criminal Procedure (Scotland) Act 1995 *s*288AA(3)

4.3.3 Cases Decreasing Convention Rights Protection

Five cases reduced Convention rights protection. Four cases reduced protection compared with the HCJ decision in the case.[463] For example, the SC in *McGowan* v *B* altered the existing HCJ decision of *Birnie* v *HMA,*[464] but Scots law had not taken a longstanding position on the issue. This reduces the significance of the changes. In each case, it was felt that decreasing Convention rights protection would enable Scots law to better mirror the ECtHR.[465] Decreasing Convention rights protection can promote crime control. By going beyond the Convention, *HMA* v *R*[466] imposed a significant barrier to the prosecution of wrong-doers by giving them immunity from prosecution when their trial was unreasonably delayed. By reducing Convention rights protection to the level required by Strasbourg, *Speirs* v *Ruddy*[467] promoted crime control by allowing these prosecutions normally to continue. However, this reverted Scots law to the position before *R* which is less protective of the accused.

The SC decisions in *McGowan* and *Birnie* show how this weakening of Convention rights protection impacts on the accused. They dealt with the waiver of the right to legal advice. The HCJ in *Birnie* reasoned that a "valid waiver" could occur when the accused makes an informed decision and since the accused "had not had access to legal advice" when deciding to make a waiver, it was invalid.[468] The SC held that nothing in the ECtHR's case law required the accused to have legal advice before making the waiver and it was not necessary for the police to establish why the accused wanted to waive their right.[469] The SC's approach provides safeguards for the accused. The waiver is only valid if it is "informed, voluntary and unequivocal."[470] If the waiver is invalid, the *Cadder* principle that confessions obtained without legal advice are normally inadmissible would apply.[471] Confessions can be excluded if they are unfairly obtained.[472] The police must advise the

[463] Table 11 above
[464] [2011] HCJAC 46
[465] *Speirs*, n19 above, at [17]; *McGowan*, n18 above, at [46]; *Birnie*, n22 above, at [29]; *Brown*, n11 above, 712
[466] *R*, n14 above
[467] *Speirs*, n19 above, at [17]
[468] *Birnie*, n464 above
[469] *Birnie*, n22 above, at [28]-[29]; *McGowan*, n17 above, at [46]
[470] *McGowan*, n17 above, at [4], [21], [73]
[471] *Cadder*, n2 above, at [63]
[472] *Chalmers* v *HMA* 1954 JC 66

accused of their rights to legal advice and to remain silent.[473] However, evidence suggests that accused tell the police that they understand this when they do not.[474] A lawyer can talk to the accused to establish that they understand the consequences of making a waiver. They can support the accused if they feel pressured into waiving the right due to a desire to end the questioning. This might prevent them waiving their right and incriminating themselves. Thus, the SC's removal of the right to legal advice before a waiver is made increases the likelihood of the accused waiving their right and confessing.

4.3.4 Rights versus Impact on Scots Law

As we have seen, critics of the JCPC/SC's jurisdiction argue that the enforcement of Convention rights has had an unwelcome effect on Scots law. Table 20 lists the different ways that the JCPC/SC can alter Convention rights protection and shows how each case was categorised. It shows whether each case had a significant impact when compared with the criteria used in section 3 by altering longstanding law.

[473] Criminal Procedure (Scotland) Act 1995 s15A(6)
[474] *McGowan*, n17 above, at [110]

	Significantly Impacting on Scots Law	Not Significantly Impacting on Scots Law
Increased Convention Rights Protection when Compared with Existing Law	*Fraser* v *HMA, Sinclair* v *HMA*, *Holland* v *HMA, HMA* v *R*, *Cadder* v *HMA, AB* v *HMA*	
Increased Convention Rights Protection when Compared with the HCJ Only		*Allison* v *HMA, Burns* v *HMA, Millar* v *Dickson*
Level of Convention Rights Protection Unaltered		*Ambrose* v *Harris*, *HMA* v *P*, *McGowan* v *B*, *Dyer* v *Watson*, *HMA* v *Murtagh*, *McInnes* v *HMA*, *Macklin* v *HMA*, *Clark* v *Kelly*, *Ruddy* v *Procurator Fiscal*, *DS* v *HMA*, *Kinloch* v *HMA*, *O'Neill* v *HMA*, *Montgomery* v *HMA*
Reduced Convention Rights Protection when Compared with the HCJ Only		*Brown* v *Stott*, *Birnie* v *HMA*
Reduced Convention Rights Protection when compared with Existing Law	*Speirs* v *Ruddy*	*McGowan* v *B*

Table 20: Level of Convention rights protection provided by the JCPC/SC and the effect of the decision on Scots law.

Eight cases significantly altered Convention rights protection, when compared with existing Scots law by altering longstanding law. Seven of these significantly impacted on Scots law by altering longstanding Scots law in accordance with the criteria in section 3. Thus, the cases which made the largest changes to Convention rights protection generally had the greatest impact on Scots law.

Three cases increased Convention rights protection but did not significantly alter Scots law because they only altered the HCJ decision in the case. 13 cases neither altered Convention rights protection nor significantly affected Scots law. Accordingly, the JCPC/SC can often scrutinise Scots law for Convention compatibility and sometimes make small changes to it

without significantly impacting on Scots law. Consequently, although critics of the SC are correct to link the JCPC/SC's impact on Scots law to its Convention rights enforcement, the picture is more complicated than they suggest.

4.4 Summary of Findings

The argument that the JCPC/SC protects the accused by increasing Convention rights protection requires modification. There is evidence of the JCPC/SC increasing Convention rights by altering existing Scots law. In most of these cases, the change was necessary to move Scots law into compliance with the ECHR. However, this increase can significantly affect Scots law if a longstanding approach is altered. The JCPC/SC sometimes gives the accused more protection than they would receive in the ECtHR. However, as *R* shows, making unnecessary changes can significantly affect Scots law. The mirroring approach avoids unnecessary changes by deterring the JCPC/SC from going beyond the Convention. However, as *Clark* and *Murtagh* show, the JCPC/SC can sometimes go beyond the ECtHR without having a significant impact. In ten cases, the JCPC/SC acted as a safety net where the HCJ failed to protect the accused's Convention rights. Thus, supporters of the jurisdiction correctly suggest that it can protect the accused by increasing Convention rights protection.

However, the rights-protective impact of JCPC/SC appeals should not be overstated. Most cases had no effect on Convention rights protection. Four cases reduced Convention protection to mirror the ECtHR. These changes were unnecessary to achieve Convention compliance. If the JCPC/SC had not altered the law, they would not be exposing the UK to the risk of a successful challenge in the ECtHR. *Speirs* shows the potential for decisions to significantly affect Scots law while reducing Convention rights protection. This approach is inconsistent with statements by the JCPC/SC that Scots law should develop in its own way where it is Convention-compatible.[475] This ability has been restricted by the JCPC/SC's unwillingness to allow Scots law to go beyond or below what the Convention requires. However, Scots law has been able to maintain its approach of requiring corroboration and an absolute right to silence despite these not being required by Strasbourg.[476]

[475] Sections 3.1.3, 3.2.1 and 3.3.1 above
[476] Chapter 3 sections 3.2.3 and 3.24

Where changes were made to the level of Convention rights protection, this normally involved Scots law moving from being below or beyond the required level to mirroring the ECtHR.[477] Thus, there has been a convergence of ECtHR jurisprudence and Scots law. This can contribute to a loss of distinctiveness for Scots law. For example, before *Cadder*, Scotland was one of very few jurisdictions in the Council of Europe to deny legal advice during police questioning.[478] However, it is important not to overstate the extent of this harmonisation. There are often several ways of meeting the minimum standards required by the ECtHR. Scots law took a distinctive approach when compared with France and Belgium by not restricting the role of the solicitor during police questioning to a "passive, non-adversarial role" and it does not restrict the amount of time the accused can consult with their lawyer in private.[479] Moreover, *Cadder* allowed Scots law to influence the law of other Council of Europe states which still did not provide legal advice during police questioning. In *DPP* v *Gormley,*[480] the Supreme Court of Ireland referred to *Cadder* in its decision that accused could not be interrogated by the police without legal advice when they had requested legal advice. Thus, mirroring the ECtHR creates the opportunity for Scots law to share ideas with other legal systems. However, the unwillingness to let Scots law go beyond the Convention reduces this sharing of ideas. In *Brown* v *Stott,*[481] the JCPC argued that the right against self-incrimination could be restricted in the public interest. ECtHR case law before this suggested that states could never restrict this right in the public interest.[482] In *O'Halloran* v *UK,* the ECtHR was influenced by *Brown* when it held that restrictions on the right could be justified by the need to prevent road traffic offences.[483] Had Scots law not taken an approach which differed from some ECtHR case law, it would have been unable to change Convention law.

This reinforces that the JCPC/SC both takes laws from other jurisdictions and influences other jurisdictions. The JCPC/SC's influence shows that its decisions are held in high regard

[477] Sections 4.2 and 4.3 above
[478] *Cadder*, n2 above, at [49]
[479] Giannoulopoulos, 'Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of The Right to Custodial Legal Assistance in Five Countries' (2016) 16(1) HR LRev 103, 118
[480] *DPP* v *Gormley* [2014] IESC 17, at [6.6]
[481] *Brown*, n11 above, at [704]
[482] *Saunders* v *UK* (1996) 23 EHRR 313; O'Neill, 'Judicial Politics and The Judicial Committee: The Devolution Jurisprudence of The Privy Council' (2001) 64(4) MLR 603, 610
[483] *O'Halloran,* n294 above, at [57]

by these courts and it would be expected that this would increase the prestige of Scots law since these decisions form part of it. Since JCPC/SC cases often describe Scots law in detail, it provides an opportunity for other jurisdictions to learn about Scots law. Thus, there are benefits to Scots law when other jurisdictions rely on the JCPC/SC's decisions. This exportation of law is consistent with legal nationalist thinking which often expresses a desire for Scots law to influence other jurisdictions.[484]

5 Conclusion

Contrary to complaints by critics of the JCPC/SC's jurisdiction,[485] when analysed against the criteria above most cases did not significantly affect Scots law. Some cases had no effect on Scots law. For each criterion, the impacts being tested for were only found in a minority of cases. However, the JCPC/SC's critics correctly suggest that the JCPC/SC impacts on Scots law. Scots law was often required to rebalance the needs for due process and crime control. Several cases resulted in longstanding case law being overruled,[486] confusion about the law[487] and in *Cadder* legislative intervention. There was a danger of the JCPC/SC producing decisions which fitted uneasily with existing Scots law. This often resulted from the transplantation of ECtHR case law into Scots law,[488] which created confusion about Scots law and required further decisions to clarify the law.[489] The JCPC/SC impacted on distinctive elements of Scots law. Several cases moved Scots law away from a distinctive approach, although *R* increased the distinctiveness of Scots law.[490] These changes often occurred despite the HCJ seeking to defend the previous Scottish approach. These impacts are best illustrated by *Cadder* where, despite the HCJ seeking to defend the longstanding approach taken by Scots law, the SC's decision had all the impacts listed above. It resulted in a rebalancing of the needs for crime control and due process in Scots law which was still occurring six years after the decision. However, while *Cadder* was not the only case to impact on Scots law when judged by the criteria, it was unusual because the majority of

[484] Chapter 2 section 2.5 above
[485] Chapter 1 section 3 above
[486] *Cadder,* n2 above; *Fraser,* n26 above; *R,* n14 above; *Sinclair*, n10 above
[487] *Cadder ibid; R ibid; Sinclair ibid; Holland*, n4 above
[488] Table 10 above
[489] Sections 3.1 and 3.4 above
[490] *Cadder,* n2 above; *Holland* n4 above; *Sinclair*, n10 above; *Fraser,* n26 above*; Speirs*, n18 above

cases within the sample had a less significant effect on Scots law when judged by the criteria.

Since only three compatibility issues cases have reached the SC (*O'Neill*, *Macklin* and *AB*), it is difficult to assess how the SC's compatibility issue jurisdiction will impact on Scots law. However, as with devolution issues, the compatibility issue jurisdiction allows the SC to check Scots law for Convention compatibility and to overturn the approach taken by Scots law where it is not Convention-compatible. As *AB* showed, this can result in longstanding law being struck down and the Scottish approach being harmonised with English law.[491] Conversely, beyond helping to clarify the law, the other compatibility issue cases of *Macklin* and *O'Neill* did not impact on Scots law when judged by the criteria.[492] This suggests that the compatibility issue jurisdiction will continue the pattern found for devolution issues of some cases significantly affecting Scots law when judged by the criteria and others having little impact on Scots law.

The JCPC/SC brought several benefits to Scots law. It helped clarify Scots law although it has also contributed to some confusion in the law.[493] There has also been a sharing of ideas between Scots law and ECtHR jurisprudence and English law where Scots law both influenced and was influenced by these jurisdictions. Critics of the JCPC/SC's jurisdiction often object to Scots law being influenced by law from other jurisdictions[494] but ignore its ability to influence other legal systems. Moreover, the JCPC/SC showed some sensitivity to the distinctiveness of Scots law and the practical impact of making far-reaching changes to it. In many cases, the JCPC/SC was unwilling to change Scots law and willing to allow Scots law to develop in its own way particularly where it mirrored the ECtHR.[495]

The number of Scottish criminal cases being decided by the JCPC/SC has decreased since 2011, when the SC heard five cases in a year, and these cases are now rare.[496] The

[491] Sections 3.2.2 and 3.3.3 above
[492] Section 3 above
[493] Section 3.4 above
[494] Chapter 1 section 3 above
[495] Section 4.1 above
[496] The number of cases, within the sample used by this chapter, heard by the JCPC/SC each year was the following (expressed as year: number of cases): 2001: 3; 2002: 2; 2003: 1; 2004: 0; 2005: 2; 2006: 1; 2007: 2; 2008: 2; 2009: 1; 2010: 3; 2011: 5; 2012: 1; 2013: 1; 2014: 0; 2015: 1; 2016: 0; 2017: 1; 2018: 0.

introduction of the compatibility issue jurisdiction, despite creating a broader jurisdiction than devolution issues,[497] has not reversed this trend. There are several possible reasons for this. First, when a new jurisdiction is created lawyers will seek to test its limitations, but these limits become clearer over time and this clarification has occurred for the limitations of the devolution and compatibility issue jurisdictions. Secondly, the Scottish Parliament has sought to pre-empt Convention rights challenges by removing non-Convention-compatible practices.[498] Thirdly, the most obvious grounds for challenging Scots law on Convention grounds have now been considered by the JCPC/SC.[499] However, there are still areas of procedural law which might be challenged in future, including the not proven verdict, which sits uneasily with the presumption of innocence. Substantive criminal law may provide grounds for challenging offences which restrict freedom of speech or association, while evidence law may provide grounds for challenging evidence obtained in breach of the accused's right to privacy. Thus, it is likely that the SC will hear Scottish compatibility issue challenges in the future which may affect Scots law in the ways identified above.

In the cases decided to date, the JCPC/SC has normally sought to mirror the ECtHR. It has been unwilling to let Scots law exceed or fall below the level of Convention rights protection provided by the ECtHR. It has been more likely to depart from its unwillingness to change Scots law where Scots law has not mirrored the ECtHR. Most cases succeeded in mirroring the ECtHR. However, three decisions (*R*, *Murtagh* and *Clark*) either deliberately or unintentionally went beyond Strasbourg. These changes were unnecessary to achieve Convention compatibility and, as *R* showed, they have the potential to significantly impact on Scots law. *O'Neill* did not meet the minimum standard required by Strasbourg. Thus, the JCPC/SC protected the accused's rights by generally providing the level of Convention rights protection required by Strasbourg.

There is evidence, at least in the minority of cases, of the JCPC/SC increasing the accused's Convention rights protection, either by increasing protection when compared with existing Scots law or by acting as a safety net when the HCJ had not upheld the accused's Convention rights.[500] Nonetheless, the JCPC/SC's role in the protection of Convention rights

[497] Chapter 1 section 3.2 above
[498] Section 3.5 above
[499] Table 8 above
[500] Table 19 above

should not be exaggerated. In most cases, the JCPC/SC did not increase the accused's Convention rights protection. Five cases (*Brown*, *Speirs*, *Dyer*, *McGowan* and *Birnie*) decreased the level of Convention rights protection where Scots law had gone beyond the ECtHR. Thus, the JCPC/SC's mirroring does not always benefit the accused.

There is a tentative link between the JCPC/SC protecting Convention rights and the decision impacting on Scots law. Decisions making changes to a longstanding level of Convention rights protection in Scots law were more likely than cases not doing this to have a significant impact on Scots law. The JCPC/SC often did not increase the level of Convention rights protection but still achieved a Convention-compatible decision. 18 cases achieved a Convention-compatible decision, without significantly impacting on Scots law. Thus, the JCPC/SC often scrutinises Scots law for Convention compatibility without significantly impacting on Scots law.

The argument that the JCPC/SC's protection of Convention rights significantly impacts on Scots law must be revised. A more accurate claim is that the JCPC/SC's scrutiny of Scots law for Convention compatibility can normally be implemented without significantly impacting on Scots law. However, on the rare occasions when the JCPC/SC feels that the level of Convention rights protection should be increased or decreased, this can significantly affect the coherence, clarity and distinctiveness of Scots law.

Chapter 5: The Legitimacy of the Supreme Court's Jurisdiction

1 Introduction

As Chapter 1 showed, critics of the JCPC/SC's jurisdiction allege that JCPC/SC judges lack sufficient understanding of Scots law to decide Scottish criminal cases because many of them are not trained in Scots law. Despite this lack of understanding, the JCPC/SC judges are allegedly over-willing to interpret their jurisdiction broadly, overturn High Court of Justiciary (HCJ) decisions and decide the outcome of the case. It is claimed that this reduces the traditional ability of the HCJ to make final decisions on Scottish criminal cases.[1] Consequently, critics argue that the JCPC/SC is an unsuitable court to hear Scottish criminal cases and question the legitimacy of its jurisdiction.[2] Conversely, supporters of the jurisdiction argue that having a UK-wide top court, like the SC, creates potential for a sharing of ideas between the different UK legal systems and enables a uniform interpretation of human rights throughout the UK.[3] This chapter tests these claims to establish whether there is a need for a tier of appeal beyond the HCJ for devolution and compatibility issues and whether the JCPC/SC can legitimately hear appeals and references raising devolution and compatibility issues. This will establish whether the JCPC/SC's jurisdiction is justifiable.

Accordingly, this chapter first considers how courts in general, top courts in particular and the JCPC/SC's jurisdiction specifically might gain legitimacy. This analysis will then be used to create criteria to test the legitimacy of the JCPC/SC's jurisdiction and whether it fulfils the functions required of a top court. The HCJ's ability to perform these functions will be compared with the JCPC/SC's ability in this regard in order to evaluate whether there is a need for the JCPC/SC to provide an additional tier of appeal beyond the HCJ. This chapter seeks to answer important questions about the JCPC/SC, including whether it should seek

[1] Chapter 1 section 3
[2] *ibid*
[3] Edward, 'Section 57(2) and Schedule 6 of the Scotland Act 1998 and the Role of the Lord Advocate' (Expert Group, 2010), para 5.3 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81695/Expert_Group_report.doc (last visited 16/01/2019).

to take a UK-wide approach on issues such as human rights, the extent to which Scots law should be allowed to develop in its own way and the extent to which each part of the UK should be represented in the SC's composition.

2 Legitimacy Defined

Legitimacy involves the justification of the use of power.[4] There are two main[5] ways of establishing whether a court has legitimate power: normatively and sociologically. Normative legitimacy considers whether there are theoretical reasons why something should be considered legitimate. It can be divided into input and output legitimacy. For present purposes,[6] input legitimacy relates to whether a court system is structured in a way which enhances its legitimacy by offering safeguards against inappropriate influence. Inputs to the institution include the appointments process and the separation of powers between the court and the other parts of the state. Output legitimacy focuses on how well the institution performs its functions and the contribution its outputs, such as judgments, make to its legitimacy.[7]

Normative legitimacy can also be divided into functional, discursive and institutional legitimacy.[8] Institutional legitimacy is a type of input legitimacy which considers whether the structure of the institution enhances its legitimacy by protecting the court from undue influence. Functional legitimacy considers how an institution performs the functions assigned to it. It is a form of output legitimacy often assessed by outputs such as judgments. Discursive legitimacy, which is also a form of output legitimacy, focuses on how the courts justify their use of power. There is an overlap between the latter two forms of legitimacy because outputs such as court judgments are used to both give decisions and explain why the court chose to exercise their power.[9] However, they differ because

[4] Loth, 'Courts in Quest for Legitimacy' (Erasmus University Repository, 2007), 2 at https://repub.eur.nl/pub/11005/Courts%20in%20quest%20for%20legitimacy2-2.pdf (last visited 16/01/2019); Beetham, *The Legitimation of Power* (Basingstoke: Palgrave, 1991), 64

[5] For other types of legitimacy see Dahlberg, 'Do You Know It When You See It? A Study on the Judicial Legitimacy of the European Court of Human Rights' (University of Eastern Finland, 2015), 34-36 at http://epublications.uef.fi/pub/urn_isbn_978-952-61-1770-6/urn_isbn_978-952-61-1770-6.pdf (last visited 16/01/2019).

[6] Cf. Loth, n4 above, 2

[7] *ibid* 2

[8] *ibid* 3

[9] *Cadder* v *HMA* [2010] UKSC 43, at [11]-[14]; *Montgomery* v *HMA* [2003] 1 AC 641, 651-665

institutions can use press releases, evidence to parliamentary committees, annual reports and speeches by judges to achieve discursive legitimacy while relying on the institution's main outputs such as judgments to create functional legitimacy.

Sociological legitimacy occurs when people consider an institution to be legitimate.[10] Legitimacy assessments can be influenced by people's politics, their interaction with the institution in question and their awareness of it.[11] There are two types of sociological legitimacy: specific support and diffuse support.[12] Specific support occurs when people agree with the decisions the court makes. This is increased by producing popular decisions and/or by increasing awareness of the court. Diffuse support occurs when people's support for the court remains even though they might disagree with some decisions. A separation of powers, judicial impartiality and symbols such as the wearing of robes and court etiquette help increase diffuse support. These symbols portray judges as neutral decision makers, who are separate from politics and have a special ability to make decisions on the law.[13] This makes people willing to accept decisions with which they disagree.[14]

Sociological and normative legitimacy are partly linked. When there are strong normative reasons for something to be legitimate, this should make it easier for people to recognise the legitimacy of the jurisdiction and create sociological legitimacy. This depends on people's awareness of the normative reasons and their willingness to accept them. However, a person may reject the legitimacy of an institution even if there are normative reasons for accepting its legitimacy or consider a jurisdiction legitimate where its normative justification is questionable.

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[10] This section draws on: Çalı, Koch and Bruch, 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (UCL, 2011), at https://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf (last visited 16/01/2019); Gibson, Caldeira and Baird, 'On the Legitimacy of National High Courts' (1998) 92(2) *American Political Science Review* 343, 344; Gibson and Caldeira, 'Confirmation Politics and the Legitimacy of the US Supreme Court' (2009) 53(2) *American Journal of Political Science* 139, 140; Gibson and Caldeira, 'Defenders of Democracy, Legitimacy, Popular Acceptance and the South African Constitutional Court' (2003) 65(1) *Journal of Politics* 1.

[11] Çalı, *ibid* section 6

[12] Lupu, 'International Judicial Legitimacy: Lessons from National Courts' (2013) 14(2) *Theoretical Inquiries in Law* 437, 440-441

[13] Cf. section 2.1.1 below

[14] Gibson (2009), n10 above, 142

Several factors influence how normative and sociological legitimacy are assessed. First, the sociological and normative legitimacy of the jurisdiction depends on the institution whose legitimacy is being examined. For example, parliaments might[15] justify their use of power by relying on the democratic idea that their members are wholly or partially elected by the people and that these members should[16] implement the will of the electorate.[17] Conversely, as will be shown, in the UK courts are expected[18] to consist of politically neutral judges who make decisions based on the law, rather than on what is considered popular with the electorate. International courts because of their inability to benefit from the legitimacy of a nation state, gain legitimacy in different ways to domestic courts.[19] Moreover, there may be differences in how domestic courts from different jurisdictions gain legitimacy. For example, in the US, unlike the UK, some judges stand for election while the political views of US Supreme Court justices play an important role in their appointment.[20] Even within a legal jurisdiction, different courts perform different functions. For example, appeal courts[21] play a different role in the legal system to trial courts and there may be different normative and sociological expectations about their legitimacy. A single court may perform multiple roles and the legitimacy of each role may vary. For example, the JCPC's ability to hear appeals against professional disciplinary proceeding decisions is perhaps[22] less controversial than its ability to hear appeals from independent Commonwealth countries. Nationalists in Commonwealth countries using the JCPC have argued that sending cases to the JCPC is incompatible with their country's independence from the UK.[23] Finally, perceptions of

[15] For different types of democracy see Christiano, 'Democracy' (Stanford Encyclopaedia of Philosophy, 2006), para 1 at https://plato.stanford.edu/entries/democracy/ (last visited 26/02/2018).
[16] Politicians may decide to legislate contrary to the will of the electorate although there may be political consequences from doing this.
[17] Mill, *Considerations on Representative Government* (Sl: Dodo Press, 2007)
[18] Section 2.1.2 below
[19] Gibson and Caldeira, 'The Legitimacy of the Court of Justice in the European Union' (1995) 89(2) *American Political Science Review* 356.
[20] Meko *et al*, 'Everything You Need to Know about Appointing a Supreme Court Justice' (Washington Post, 2016), at https://www.washingtonpost.com/graphics/politics/scotus-nominees/??noredirect=on (last visited 16/01/2019).
[21] Some courts like the HCJ are both first instance and appeal courts.
[22] Le Sueur, 'What is the Future for the Judicial Committee of the Privy Council?' (Constitution Unit, 2000), 10 at http://www.ucl.ac.uk/political-science/publications/unit-publications/72.pdf (last visited 16/01/2019).
[23] For debate on the role of the JCPC in Commonwealth countries see: Davila, 'Replacing the Privy Council with the Caribbean Court of Justice in the OECS Countries' (Undated), at http://ufdcimages.uflib.ufl.edu/CA/00/40/02/34/00001/PDF.pdf (last visited 16/01/2019);

legitimacy can change over time if perceptions about the role of the institution change over time. Since different courts gain legitimacy in different ways, this chapter will examine how courts and top courts in the UK, like the JCPC/SC, gain legitimacy. This will allow an assessment of how the JCPC/SC exercising the devolution and compatibility issue jurisdiction could gain legitimacy.

2.1 The Legitimacy of Courts

2.1.1 Legality

Legality is often cited as being an important criterion for legitimacy.[24] For some legal theorists, it is the only relevant criterion.[25] Although definitions vary, legality centres on the idea that power should be exercised in a way which complies with a sovereign command,[26] a norm in a hierarchy of norms[27] or a legal rule.[28] As Beetham notes, legal rules are an important mechanism for regulating society, although conventions and custom provide other ways. Legal rules are difficult to challenge. They invoke compliance because of the rituals associated with the legal system and the stigma and consequences associated with law breaking.[29] There are qualifications to this. Thus, there is a debate about whether immoral rules must be obeyed.[30] Additionally, some rules are easier to challenge than others. For example, Acts of the Scottish Parliament are easier to challenge than Acts of the

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Dayle, 'Casting Away the Colonial Privy Council is a Fitting Gesture for Jamaica' (Guardian, 2012), at https://www.theguardian.com/law/2012/jan/06/jamaica-privy-council-colonial-simpson-miller?commentpage=1 (last visited 16/01/2019); Reid, 'The Legacy of Colonialism: A Hindrance to Self-Determination' (2000) 10 Touro Int'l L Rev 277; Rowe, 'Op-Ed: the Privy Council Conundrum' (Caribbean Journal, 2013), at https://www.caribjournal.com/2013/03/12/op-ed-the-privy-council-conundrum/# (last visited 16/01/2019). In 2018, Grenada and Antigua and Barbuda both voted to retain the JCPC (Parliamentary Elections Office, 'National Results Register' (GND Referendum, 2018), at http://referendum2018.gd/National (last visited 16/01/2019); Anonymous, 'Antiguans and Barbudans Reject Efforts to Adopt CCJ' (Caribbean News Service, 2018), at https://caribbeannewsservice.com/now/antiguans-and-barbudans-reject-efforts-to-adopt-the-ccj-as-final-court/ (last visited 16/01/2019).)

[24] Austin, *The Province of Jurisprudence Determined* (London: Murray, 1861), 5; Kelson, *Pure Theory of Law* (London: University of California, 1967), 217

[25] Austin *ibid*

[26] Austin, *ibid*

[27] Kelson, n24 above, 217

[28] Beetham, n4 above, 65-66

[29] *ibid*

[30] Bix, *Jurisprudence : Theory and Context* (London: Sweet and Maxwell, 2015), Chapter 16; Pennner and Melissaris, *Jurisprudence: Theory and Context* (Oxford: Oxford University Press, 5th ed, 2012), section 8.3; Austin, n24 above, 6; Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 186

UK Parliament because the former must be within devolved competence.[31] Nonetheless, since legal rules generally demand obedience, a court whose power is given by legal rules can gain legitimacy because it can point to the authority of the law to justify its power. To disobey the court is to challenge the law's authority to give power to the court.[32]

Legality is important for sociological legitimacy. In a study of attitudes towards the European Court of Human Rights (ECtHR), 93% of people cited legality as being important to legitimacy.[33] However, since the ECtHR is a supra-national court, legality was taken to mean that states consent to the jurisdiction of the court.[34] Conversely, for domestic courts, the focus is on whether the court has the power to perform actions. However, the study is still relevant to the legitimacy of domestic courts because both types of legality consider whether the court has the power to do something either because a state has consented to its jurisdiction or the court has a legal power to perform a function.

Several types of legality apply to courts. One is whether the court has jurisdiction to hear the case. If a court goes beyond what can reasonably be considered to be its legally-defined jurisdiction, this may involve it defining its own powers.[35] Since a court's legal basis increases its legitimacy, the further it moves from the powers conferred by the law, the harder it becomes to use the law to justify the hearing of the case.

Next, courts need to accurately determine what the relevant law is and to apply it to the facts of the case. As will be shown shortly, this is more difficult than simply "applying" the law. The court's determination of what the law is, is closely linked to a judge's expertise since determining what the law is an important role for a judge. If a court repeatedly makes decisions which do not reasonably accord with existing law because they have misunderstood the position taken by existing law,[36] it becomes harder for people to trust the court to perform one of its main functions.

The courts enforce legality by scrutinising legislation, the common law and conduct of public authorities for compatibility with rules limiting their power. These restrictions

[31] Scotland Act 1998 s29
[32] Beetham, n4 above, 67-68
[33] Cali, n10 above, 11
[34] *ibid*, 8
[35] Fuller*, The Morality of Law* (New Haven: Yale University Press, 1964), 40
[36] Judges may deliberately decide to develop the law and alter existing case law.

include the restriction on devolved competence (for Scottish Parliament legislation and devolved actors) and requirements to comply with EU law and Convention rights.[37] Enforcing restrictions on a public authority's power can enhance the court's legitimacy by ensuring that the public authority does not exceed the powers given to them. This enables them to act as a check on the power of the state by ensuring that an institution has the legal power needed to perform an action. It helps courts gain legitimacy because they become upholders and protectors of the law. Since the UK does not have a constitutional court, these constitutional issues are dealt with by all courts in the legal system, but reference procedures can be used to refer issues to a higher court.[38]

Assessing whether a decision complies with the legality criterion is difficult. Traditionally, it was considered that judges applied the law in a way which ignored political, economic, social and policy considerations.[39] When judges apply the law, they can gain legitimacy by relying on the authority of existing law to justify their decision. Applying legislation precisely may increase the court's democratic legitimacy because Parliament creates legislation which is supposed to reflect the will of the electorate. The courts in applying and enforcing this legislation can give effect to Parliament's interpretation of the will of the people.[40] This assumes that judges mechanically apply the law and that the legislature creates legislation which reflects the electorate's wishes.

However, judicial decision-making is more complicated than simply applying the law.[41] Legislation is often ambiguous and cannot provide for every eventuality.[42] Accordingly, there may be several interpretations of legislative intent. Similarly, the common law

[37] For the differences between the enforcement of human rights for the Scottish and UK Parliaments see Chapter 1.
[38] Scotland Act 1998 schedule 6 para 9 and 33; Criminal Procedure (Scotland) Act 1995 s288ZB(3) and s288ZB(5)
[39] Langdell (1887) quoted in Twining, *Karl Llewellyn and the Realist Movement* (Oklahoma: University of Oklahoma, 1985) 11-12; Schauer, 'Formalism' (1988) 97 Yale LJ 509. For discussion of this belief see Bix, *Jurisprudence: Theory and Context* (London: Sweet and Maxwell, 2015) para 17-4; Griffith, *The Politics of The Judiciary* (London: Fontana, 5th ed, 1997), 281
[40] Griffith *ibid,* 50
[41] Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); Dworkin, *Law's Empire* (London: Fontana, 1986), Chapter 7; Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed, 1994); Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593; Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630
[42] Hart (1958) *ibid;* Fuller *ibid*

consists of cases which can conflict with other cases.[43] Cases may contain multiple judgments which, despite reaching the same outcome, do not always agree with each other on the reasons for that outcome.[44] Courts often decide narrow legal issues without elaborating on how the decision might apply to other cases.[45] This complexity means that judges may need to choose between different interpretations of the law and exercise discretion.

Moreover, it is debatable whether judges apply the law without considering social, policy and economic issues. American Legal Realists have controversially[46] expressed scepticism about the extent that cases are decided by judges applying the legal rules in a scientific way.[47] Although there are many strands of realist thought,[48] Realists argue that the law is uncertain and constantly changing and that judges develop the law. Realists argue that the experience of judges including their life experiences, prevailing political thought and policy considerations influence judicial decision-making.[49] In the UK, Griffith has argued that in exercising discretion, judges often make political choices, tend to favour authority and in criminal cases seek to preserve law and order.[50] Such theories are controversial because among other things they challenge traditional thinking of judges as neutral adjudicators who apply legal rules in a scientific way.[51] It is beyond the scope of this study to address this issue since it has not become an important area of debate about the SC's devolution and compatibility issue jurisdiction. Nonetheless, if Griffith is correct, this makes it harder for judges to gain legitimacy by applying the letter of the law since they are exercising discretion and considering a range of non-legal issues when making their decision.

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[43] An example is the *McInnes* and *Cameron* tests for the disclosure of evidence. (Chapter 4 section 3.2.1 above)
[44] Chapter 4 section 3.4.2 above
[45] For example, *Cadder* v *HMA* [2010] UKSC 43 does not elaborate on the point during the police investigation that the right to legal advice crystallises.
[46] Schauer, 'Easy Cases' (1985) 58(1) *Southern California Law Review* 399; Hart, n41 above, 64.
[47] Holmes, *The Common Law* (Mineola: Dover Publications, 1991), 1; Cardozo, *Selected Writings of Benjamin Nathan Cardozo* (New York: Fallon Publications, 1931), 176; Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: Chicago University Press, 1962), 55-57
[48] Riddall, *Jurisprudence* (London: Butterworths, 2nd ed, 1999) Chapter 16
[49] Holmes, n47 above, 1; Cardozo, n47 above, 176; Llewellyn, n47 above, 55-57
[50] Griffith, n39 above, Chapter 8; see also Oliver, 'The Politics of The Judiciary' (1986) 6(2) Legal Stud 232, 234
[51] Hunt, 'Politics of the Judiciary' (1998) 17 (Jul) CJQ 346; Gee, 'The Political Constitutionalism of JAG Griffith' (2008) 28(1) Legal Stud 20, 21

The extent to which judges can rely on legality as a source of legitimacy depends on the amount of interpretation carried out and, for legislation, on how closely the chosen approach coincides with the legislature's intentions. If the law is either mostly clear and requires little interpretation or requires interpretation but the approach chosen seems a reasonable interpretation of the legislature's intent, then it is easier for the courts to argue that they simply applied the law and to claim legitimacy from legality. In the UK,[52] legislatures[53] can change the law if they consider that the courts have misunderstood the legislature's intention or they dislike an element of the common law.

2.1.1.1 Is Legality Sufficient for Legitimacy?

Legitimacy needs to be broader than legality. Focusing on legality deems decisions legitimate when they comply with the law irrespective of the defensibility of those decisions in substance or their practical consequences. For example, in the debate over the JCPC/SC's Scottish criminal jurisdiction, the challenges to its legitimacy relate to the ability of judges not trained in Scots law to decide issues of Scots law and whether the JCPC/SC is over-willing to overturn HCJ decisions.[54] Although both raise issues of legality, they also raise issues about the practical working of the jurisdiction. Considering whether the court reached a decision which was a reasonable interpretation of the law does not indicate whether all the judges understood Scots law, rather than deferring to those who did nor whether the SC's approach achieves a good balance between correcting errors of lower courts and promoting legal certainty by ensuring that HCJ decisions are normally final. It will now be shown that other factors influence the legitimacy of courts.

2.1.2 Independence and Impartiality

2.1.2.1 Independence

In Western constitutionalism, it is a basic accepted standard that courts must be independent and impartial.[55] Judicial independence considers whether there are

[52] For a discussion of the different ways in which judges can alter legislation see Gamper, 'Constitutional Courts and Judicial Law-Making' (2015) 4(2) CJICL 423.
[53] Devolved legislators can only correct issues within their powers.
[54] See Chapter 1 sections 2 and 3
[55] Masterman, 'A Supreme Court for the United Kingdom: Two Steps Forward, But One Step Back on Judicial Independence' [2004] PL 48, 51-53; Lord Hodge, 'Upholding the Rule of Law: How We Preserve Judicial Independence in the United Kingdom' (Supreme Court, 2016), paras 3 and 4 at

institutional arrangements in place to ensure that the judiciary is free from inappropriate influence by the legislature and executive. However, the courts also need to be independent from influence by the media,[56] the public and other judges not involved in the case.

There is a danger of the legislature or executive trying to remove or discipline judges for making decisions it dislikes. There should be some mechanism to remove judges for misconduct or incapacity, but this should not be used to punish judges for making a decision that the Government dislikes.[57] The purpose of an adversarial trial is to decide disputes between two parties fairly and attempt to find the truth.[58] This requires judges to show an equal willingness to listen to and accept the arguments of both sides. If judges feel that ruling against the Government might lead to them being disciplined or sacked, they have an incentive to abandon their neutrality and favour the Government. This creates an unfairness to the other party because the court has already decided how they will rule before both sides have had the chance to present their case.

Judicial independence can be compromised if the legislature or executive alters or threatens to alter funding for the courts to encourage the courts to rule in their favour.[59] If the courts are starved of money this reduces the number of cases they can hear which means there will be fewer cases where they might rule against the Government. If judges believe that their pay will be reduced if they make a controversial decision or increased when they make a decision the Government likes, they have an incentive to abandon their neutrality.

The separation of powers is important to ensure the court's political neutrality. In the UK, it is now accepted that this can be compromised by judges sitting in the legislature or being

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https://www.supremecourt.uk/docs/speech-161107.pdf (last visited 16/01/2019); Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom Consultation Paper* (CP 11/03, 2003) paras 2 and 3

[56] Nicol, '"Enemies of the People", Judicial Independence and Free Speech' (Judicial Power Project, 2016), at https://judicialpowerproject.org.uk/danny-nicol-enemies-of-the-people-judicial-independence-and-free-speech (last visited 16/01/2019).

[57] Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015), 10

[58] Nicolson, *Evidence and Proof in Scotland Context and Critique* (Edinburgh: Edinburgh University Press, 2019), Chapters 3 and 4

[59] Gee, n57 above, 10

appointed for their political views.[60] However, in the past these actions were considered acceptable.[61] There was a greater reliance on informal mechanisms such as conventions to promote judicial independence rather than formal mechanisms such as preventing active judges from sitting in the legislature.[62] Although there is debate about the extent to which judges are politically neutral,[63] there are several reasons why they should appear to be. Judges often[64] resolve disputes between the legislature and the public. If a judge sits in the legislature, this creates a conflict of interest which might encourage them to rule in favour of the legislature. They would be involved in political debates where they would express political opinions about legislation. If they decided cases involving this legislation, this would create the perception that the judge was entering the trial with strong conceptions about how they will decide the case.[65] If judges are appointed because of their political views this creates the danger of the Government filling the court with politically-sympathetic judges.[66] Thus, too closer a relationship between judges and the legislature creates a perception of a lack of structural independence because it offers insufficient guarantees of judicial neutrality.

There cannot be complete judicial independence. In the UK, the move from using informal mechanisms to ensure judicial independence to a more formal separation of powers did not completely remove interactions between the judiciary and the Government. Rather, it led to formal procedures to allow judges and the executive to be involved in judicial appointments, the running of the courts and judicial discipline.[67] If politicians are not

[60] Chapter 1 section 2 above.
[61] Griffith, n39 above, 253
[62] *ibid*
[63] Section 2.1.1 above
[64] They also resolve disputes between non-state parties and between legislators where there are questions about whether a devolved parliament exceeded its competence.
[65] Masterman, 'A Supreme Court for the United Kingdom: Two Steps Forward, But One Step Back on Judicial Independence' [2004] PL 48, 50
[66] Smith, 'Trump Set to Name Supreme Court Pick in Biggest Decision of His Presidency' (Guardian, 2018), at https://www.theguardian.com/law/2018/jul/09/donald-trump-supreme-court-nomination (last visited 21/07/2018). There is debate about whether judges appointed for their political beliefs always decide cases in a way which accords with those beliefs. (see Gibson, 'Judicial Institutions' in Binder, Rhodes and Rockman, *The Oxford Handbook of Political Institutions* (Oxford: Oxford University Press, 2008), 514-534, section 2-3)
[67] Gee, n57 above, 253, 255, 262

involved in the decision-making process, there is a risk of them being unconcerned about defending judicial independence.[68]

2.1.2.2 Impartiality

Impartiality differs from independence. While independence focuses on the court's relationship with the state, impartiality focuses on the institutional and personal factors in place to ensure that individual judges are neutral. These issues overlap because it is easier to trust the neutrality of individual judges if the court is independent. However, even if the court is independent an individual judge may have biases which prevent them from deciding the case neutrally.[69]

Factors such as expressing an opinion on issues during the trial before the parties to the cases have presented their arguments on the issue, or in Parliament,[70] the media[71] or in academic journals may suggest that the judge does not have an open mind on the issue. However, this is a question of degree.[72] Impartiality requires judges to avoid conflicts of interest. Conflicts of interest include the judge knowing a party involved in the case, having been involved in a previous case involving the accused or having a financial or other personal interest in the outcome of the case.[73] These factors decrease the legitimacy of the court because it becomes harder to trust the judge's ability to decide the case fairly.

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[68] Lord Hodge, 'Upholding the Rule of Law: How We Preserve Judicial Independence in the United Kingdom' (Supreme Court, 2016), para 44 at https://www.supremecourt.uk/docs/speech-161107.pdf (last visited 16/01/2019).

[69] Styles, 'The Scottish Judiciary' in McHarg and Mullen, *Public Law in Scotland* (Edinburgh: Avizandum Publishing, 2007), 177-178

[70] Active judges can no longer sit in Parliament, but some judges may have expressed opinions in Parliament before this change was introduced by the Constitutional Reform Act 2005 s137

[71] *Hoekstra* v *HMA* 2000 JC 391

[72] Gee, 'A Tale of Two Constitutional Duties: Liz Truss, Lady Hale, And Miller' (Policy Exchange, 2016), at https://policyexchange.org.uk/a-tale-of-two-constitutional-duties-liz-truss-lady-hale-and-miller/ (last visited 16/01/2019) (Arguing that Baroness Hale did not need to recuse herself after discussing an aspect of a case in a talk. Gee notes that several lawyers defended Baroness Hale's actions and none of the parties to the case considered that she should have recused herself.); *Hoekstra* v *HMA* 2000 JC 391 (A decision that Lord McCluskey should have recused himself from a human rights case due to writing newspaper articles criticising human rights.)

[73] Anonymous, 'Judicial Recusals 2017' (Judicial Office for Scotland, 2017), at http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialRecusals2017_1.pdf (last visited 16/01/2019); Lord Osborne, 'Statement of Principles of Judicial Ethics for the Scottish Judiciary' (Judicial Office for Scotland, 2010), paras 5.2-5.3 at http://www.scotland-judiciary.org.uk/Upload/Documents/Principles.pdf (last visited 16/01/2019).

Judges must avoid actual conflicts of interest and threats to their impartiality and actions which might create the perception that they are partial (apparent bias) or that the court lacks independence. Even if the judge displays no signs of bias, conflicts of interest or statements made before the trial may suggest to a "fair-minded and informed observer ... that there was a real possibility that the tribunal was biased."[74]

2.1.3 Composition

The composition of the court raises two interrelated issues of legitimacy. First what criteria should be used to appoint judges and second whether the composition of the judiciary should be representative of society. Since cases are rarely heard by all the judges in a court, these issues relate both to how judges should be appointed and to which judges from the court should be assigned to an individual case.

2.1.3.1 Expertise

The giving of power is justified where the person receiving the power has some quality "lacking in those" denied the power which enables the power holder to perform the job assigned to them.[75] If the beneficiary of the power lacks expertise in completing the tasks assigned to them, it is more difficult for them to exercise the power in a way that the power-giver intended and correspondingly difficult to justify assigning the power to them.

In the past, there were no formal criteria defining how judges should be appointed, although merit,[76] in the sense of having a long experience practising law, was considered the most important factor.[77] Nowadays it is widely accepted that judges should be appointed on merit[78] although there are debates about what types of expertise a person needs to be a meritorious judge. First, there are concerns that people see merit in those who conform to the traditional view of what a judge should be. This is a white upper-class

[74] *Porter* v *Magill* [2001] UKHL 67, at [103]
[75] Beetham, n4 above, 77
[76] Wallace, *Judicial Appointments: An Inclusive Approach* (Edinburgh: Scottish Executive, 2000), para 3.2
[77] Baroness Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' [2001] PL 489, 494
[78] House of Lords Select Committee on the Constitution, *Judicial Appointments* (HL Paper 272, 2012), 83; Wallace, *Judicial Appointments: An Inclusive Approach* (Edinburgh: Scottish Executive, 2000), para 3.2; Himsworth and Paterson, 'A Supreme Court for the United Kingdom: Views from the Northern Kingdom' (2004) 24(1) Legal Stud 99, 110

male with a long experience practising law. Thus, there are concerns that merit is defined in a masculine, classist and racist way which may exclude equally capable candidates from other groups in society.[79] Second, there is debate over whether academic lawyers have enough expertise to be judges.[80] Finally, there is debate over whether positive discrimination should be used to benefit female or minority group candidates when there are two equally meritorious candidates applying for a judicial post.[81]

The expertise needed by judges varies depending on which court they sit in. For example, a trial judge for Scottish criminal cases[82] should understand as a minimum[83] Scots criminal law, evidence and procedure, devolution and compatibility issues and EU and European Convention of Human Rights (ECHR) law. An appeal judge needs this information, but also needs awareness of the procedure for granting leave to appeal, determining the safety of the conviction and where required quashing the conviction. If a judge lacks this understanding, they may produce a judgment which is unintentionally inconsistent with existing law. All judges require the ability to communicate with others, act professionally, a willingness to decide cases fairly and impartially and increasingly in modern times,[84] an ability to "manage [their] caseload efficiently and effectively."[85] If judges repeatedly fail to perform their duties well, this risks reducing public trust in the courts[86] especially if the mistakes are widely publicised.[87] Thus, a court risks reducing its sociological legitimacy if judges do not perform their duties effectively. For trial courts and for appeal courts from

[79] McLachlin, 'Promoting Gender Equality in the Judiciary' (Unpublished, 2003) quoted in Paterson, n78 above, 110 fn 54
[80] Hale, n77 above, 493-496; HOL, n78 above, 19
[81] There is debate over whether positive discrimination should be used to consider the applicant's gender or membership of a minority group: Kentridge, 'The Highest Court: Selecting the Judges' (2003) 62(1) CLJUK 55, 62 (opposing affirmative action); HOL, n78 above, para 101 (advocating prioritising a candidate from an underrepresented group when there are two equally meritorious candidates but rejects the use of quotas.)
[82] Judges are appointed to sit both in criminal and civil trials and need expertise in civil law.
[83] Judges may also benefit from a knowledge of witness psychology and of scientific evidence. (Nicolson, n58 above, Chapter 7)
[84] There has been a move towards judges running the court system.
[85] Anonymous, 'Senator Criteria' (Judicial Appointments Board for Scotland, Undated), 2 at https://www.judicialappointments.scot/sites/default/files/files/information_pages/Senator%20Criteria_0.docx (last visited 22/07/2018).
[86] The media may be critical of decisions even where from a legal perspective judges have acted reasonably.
[87] Loth, n4 above, 1

which there is a further tier of appeal, the mistake may be corrected by an appeal court. However, this uses court resources including money, staff and time.

2.1.3.2 Diversity

Traditionally, the question of how reflective the composition of the judiciary was of society, in terms of gender, race, social class, religion and sexuality, was considered of little relevance to the legitimacy of courts.[88] Since judges were considered to apply the law in an almost formulaic way, judicial background was assumed not to influence decision-making. In modern times, a debate has arisen over whether the composition of the judiciary should be representative of society.[89] The UK courts have not achieved this although there has been improvement on this issue.[90] There are several ways that courts can be representative of society. Judges can act as delegates where they promote the views of a group of people.[91] This is more appropriate for legal systems in which judges are elected, rather than the Scottish legal system which attaches importance to the political independence of judges.

Judges might also represent a group by forming part of that group. This is called mirror representation.[92] Having judges from different groups can allow new ideas to be brought into judicial discussions.[93] However, within a societal group there may be varying opinions about issues. For example, women may disagree on whether the criminalisation of pornography promotes women's rights. Thus, one representative from the group may not represent the views of everyone in the group. Second, arguments for this type of representation assume that judges are activist (willing to argue for law change) in

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[88] Styles, n69 above, 183
[89] Hale, n77 above, 489; Paterson, n78 above, 110; Kentridge, n81 above, 60-61
[90] Anonymous, '2017 Judicial Diversity Statistics - Gender and Age' (Judiciary of Scotland, 2017), at http://www.scotland-judiciary.org.uk/Upload/Documents/DiversityStatsScotlandSept2017.pdf (last visited 23/07/2018); Lord Thomas, 'Judicial Diversity Statistics 2017' (Courts and Tribunals Judiciary, 2017), at https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2017/ (last visited 25/07/2018).
[91] Styles, n69 above, 183-184
[92] *ibid* 184
[93] Coontz, 'Gender and Judicial Decisions: Do Female Judges Decide Cases Differently Than Male Judges?' (2000) 18(4) *Gender Issues* 59, 68; Thomas, 'Judicial Diversity in the United Kingdom and Other Jurisdictions' (The Commission for Judicial Appointments, 2005), 59 at http://www.cnmd.ac.uk/laws/judicial-institute/files/Judicial_Diversity_in_the_UK_and_other_jurisdictions.pdf (last visited 01/05/2018).

promoting new ideas. Many judges are not activist[94] and even when a judge is willing to promote new ideas, this does not mean they can do so in every case.[95]

Several factors deter judges from promoting new ideas. First, judges from non-traditional backgrounds may want to conform to the stereotypical ideal of a judge, which gives them an incentive to avoid challenging the accepted order.[96] Second, judges are supposed[97] to apply and interpret the law in a neutral way rather than using their position to promote the causes of certain groups. Thirdly, judges are constrained by the need to follow precedent.[98] This argument should not be overstated. For some judges, applying precedent is important to legality and they are less likely to promote their own ideas of justice. However, other judges consider the promotion of justice to be more important than following precedent.[99] Moreover, precedents sometimes give judges discretion to apply their own values. There may be conflicting precedents to choose from, the existing precedent may be unclear or there may be factual differences between the previous case and the current one.

Nonetheless, research from the US shows judges from traditionally underrepresented groups influencing the court's decision-making with their ideas. One US study found that a judge's gender altered the likelihood of them convicting, perceptions about whether a female defendant could rely on self-defence and the sentence provided.[100] Another study found that in a panel of three judges, having a "non-white" judge increased the court's likelihood of supporting affirmative action.[101] Thus, the ethnic minority judge used their experience of racial equality to influence the other decision makers.[102] Accordingly, having a more diverse court may lead to[103] a wider range of issues being debated by the court.[104]

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[94] Hale, n77 above, 498
[95] Gibson, n66 above, 520
[96] Hale, n77 above, 498
[97] There is debate about how far judges should deal with political issues and about whether judges make law.
[98] Gibson, n66 above, 518
[99] *ibid* 519
[100] Coontz, 'Gender and Judicial Decisions: Do Female Judges Decide Cases Differently Than Male Judges?' (2000) *Gender Issues* 59, 68
[101] Thomas, 'Judicial Diversity in the United Kingdom and Other Jurisdictions' (The Commission for Judicial Appointments, 2005), 59 at http://www.cnmd.ac.uk/laws/judicial-institute/files/Judicial_Diversity_in_the_UK_and_other_jurisdictions.pdf (last visited 01/05/2018).
[102] *ibid*
[103] The range of ideas heard by the court also depends on the arguments made by counsel.
[104] Thomas, n101 above, 57-58

This can improve the court's expertise and legitimacy by giving the court greater knowledge of different issues which the case raises.[105] Since judges may exercise discretion, it is important that courts have a diverse range of views. It allows them to consider "competing interests, individual, governmental and social."[106] When a court makes decisions without having this information, it risks having insufficient information to appreciate how the needs of different groups interact. This creates the risk that decisions will be made which do not work well for particular sections of society.

A representative[107] court also increases sociological legitimacy. Studies from England and Wales show that ethnic minorities distrust the courts because of their lack of representation of ethnic minority groups in the judiciary.[108] Thus, despite UK judges not being delegates who implement the wishes of the group they are from, the public like their group to be represented in the composition of the judiciary.

2.1.4 Accountability

In modern times, it is increasingly accepted that judges and courts need to be accountable for the power they exercise.[109] Although there is debate about what accountability means,[110] it is often considered to entail an institution or person being answerable for the way it exercises power.[111] Judicial accountability is in tension with judicial independence because some forms of accountability could be used as a mechanism to punish judges for their decision-making. Thus, in the past there was an unwillingness to accept the need for judicial accountability.[112] Even among those that argue that courts should have some accountability, there are claims that actions that are traditionally performed by the courts

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[105] Lady Hale, 'Women in the Judiciary' (Supreme Court, 2014), 21 at https://www.supremecourt.uk/docs/speech-140627.pdf (last visited 17/01/2019)
[106] Kentridge, n78 above, 61
[107] There is a difference between a diverse court and a representative one. A court can be diverse by being made up of judges from different countries or groups within society, but this does not mean that the composition of the judiciary is reflective of society. Dziedzic, 'Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary' (SSRN, 2018), 18 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089449 (last visited 17/01/2019).
[108] See Thomas, n101 above, 56-57 for a summary of these studies.
[109] Styles, n69 above, 178; Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2006) 24(1) Legal Stud 73; Sengupta, 'Judicial Accountability: A Taxonomy' [2014] PL 245.
[110] *ibid*
[111] Le Sueur *ibid* 74; Sengupta *ibid* 250
[112] Cooke, 'Empowerment and Accountability: The Quest for Administrative Justice' (1992) 18 *Commonwealth Law Bulletin* 1326.

such as sitting in public, producing a judgment and the ability to appeal are sufficient for judicial accountability.[113]

Judicial accountability is important to the sociological legitimacy of courts. The courts are increasingly involved in running the court service which involves making decisions about how resources such as money, staff and buildings are used.[114] Without accountability mechanisms, unelected court staff would be making financial decisions, which impact on state resources and making policy decisions about the running of a major public body without a formal mechanism to scrutinise this. It would be undemocratic because important decisions about how a major public body is run would be made without the scrutiny of an elected legislature. Moreover, at a time when there is scepticism about the trustworthiness of public bodies, having an institution which is mostly[115] accountable to itself would make it difficult for people to trust the courts.

There is a difference between the accountability of individual judges and that of the courts as an institution. Individual judges are accountable for their decision-making, misconduct and for their role in the efficient and effective running of the courts.[116] Courts are accountable for their case management and their financial and policy decisions associated with running the court systems.[117] There is also a difference between formal and informal mechanisms of accountability. Formal mechanisms use formal procedures such as appeals to other courts, giving reasons for decisions and obligations to produce annual reports.[118] Informal mechanisms involve the court's actions being scrutinised by "civil society" such as academics, the media and lawyers.[119] However, there is an overlap between the two because non-state actors may give publicity to the state's formal accountability process.

Accountability takes several forms. The traditional type is called sacrificial accountability and involves people facing sanctions or being sacked for misconduct.[120] Although there

[113] Abdullah, 'Judicial Accountability Workshop' (Unpublished, 2002) quoted in Le Sueur, n109 above, 76
[114] Gee, n57 above, 256
[115] The media may provide accountability where there are no formal accountability mechanisms.
[116] Sengupta, n109 above, 256
[117] *ibid*
[118] Le Sueur, n109 above, 79-81
[119] *ibid*
[120] Styles, n69 above, 190

must be some mechanism to remove judges from power if they do not perform their job correctly, this type of accountability risks undermining judicial independence if the removal of judges is made too easy.

A second type is content accountability, which requires judges and courts to explain why they reached certain decisions.[121] Some forms of content accountability, such as being accountable to Parliament or the Government for the way they decided cases would undermine judicial independence. A more acceptable type of formal content accountability relates to the ability for appeal courts to scrutinise the lower courts' decisions. This gives lower courts an incentive to produce well-reasoned decisions, which accord with the law and comply with their duty to act impartially. Both increase the court's legitimacy.

The media and academic writing provide informal content accountability. Media criticism is normally less nuanced but can be more accessible to non-lawyers.[122] Although some media criticism can be excessive,[123] more nuanced criticism can stimulate public debate about the workings of the judiciary and legal issues. This and judges' decisions being made public allows the public to scrutinise and question judges' decisions. It is easier to trust a decision if the reasons for the decision are made clear. However, it is difficult and problematic for the public to influence judicial decision-making. There is a need to avoid criticism which overly pressures judges to make certain decisions and compromises judicial independence. The line between encouraging criticism and protecting judicial independence is difficult to define.[124] Academic criticism can help propose different ways to reform the law and reveal defects in the judges' reasoning. Assuming judges take an interest in what is written in academic work, the desire to avoid this criticism may encourage judges to ensure that their judgments are well reasoned.

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[121] Bogdanor, 'Accountability and the Media: "Parliament and the Judiciary: The Problem of Accountability"' (UK Public Administration Consortium, 2006), at https://ukpac.wordpress.com/bogdanor-speech/ (last visited 17/01/2019).
[122] Gee, n72 above.
[123] Slack, 'Enemies of the People' (Daily Mail, 2016), at http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html (last visited 17/01/2019).
[124] Nicol, '"Enemies of The People", Judicial Independence and Free Speech' (Judicial Power Project, 2016), at https://judicialpowerproject.org.uk/danny-nicol-enemies-of-the-people-judicial-independence-and-free-speech/ (last visited 17/01/2019).

Since the judiciary help run the court service, courts and judges are increasingly expected to provide reports detailing how they spend money, how the caseload of the court is managed, how the court service is being run and whether there were delays in hearing cases.[125] Judges appear before parliamentary committees to discuss these issues.[126] This scrutiny by the legislature could endanger judicial independence if the reports were used as an excuse to punish judges for unpopular decisions. However, there was no evidence of this happening.[127] Reporting gives courts and judges an incentive to ensure that they perform the duties assigned to them. By increasing transparency about how the court is being run, reporting and questioning in committees enable the public to scrutinise the running of the courts. This may increase trust in the courts[128] since it is difficult to trust a public body which keeps its spending and policy decisions secret.

2.2 Legitimacy of Top Courts

Top courts raise distinctive legitimacy issues compared with other courts but there is some overlap. For the purposes of this chapter, a top court is one which makes a final decision on the law which cannot be appealed to another domestic court. It does not include international courts such as the ECtHR which, although they can contradict domestic courts' decisions, cannot overturn them. Scots criminal law has two top courts because the HCJ makes final decisions on issues not raising devolution and compatibility issues and the JCPC/SC makes final decisions on devolution and compatibility issues although for compatibility issues it cannot determine the outcome of the case.[129]

Legality, independence, impartiality, expertise, diversity and accountability are all important to the legitimacy of top courts because they apply to all courts. However, each raises some legitimacy issues which are specific to top courts. The last section showed that the expertise required varies between different courts in the legal system.[130]

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[125] Judiciary and Courts (Scotland) Act 2008 s66, s67
[126] O'Brien, 'Judges and Select Committees: A Developing Accountability Culture' (Constitution Unit, 2015), at https://constitution-unit.com/2015/09/22/judges-and-select-committees-a-developing-accountability-culture/ (last visited 13/03/2019).
[127] *ibid*
[128] This depends on what the disclosed information reveals about how the court is being run.
[129] Criminal Procedure (Scotland) Act 1995 s288AA(3)
[130] Section 2.1.3.1 above

Top courts play a greater role than lower courts in scrutinising the actions of other courts and correcting errors made by them. Top courts provide formal content accountability for lower courts and in modern times[131] can question the content of their own previous decisions. Beyond this, their decisions can only be scrutinised by international courts,[132] by lower courts criticising the decision and/or legislative override. This imposes an additional legitimacy challenge for top courts because there are limited mechanisms to formally[133] hold the court accountable for the content of its decisions.

Top courts and other appeal courts enforce legality by ensuring that lower courts acted within their powers and interpreted the law correctly and by correcting any errors. The normal finality of top courts' decisions means that it is more important than lower courts that top courts reach a decision which is a reasonable interpretation of the law. This enables them to gain legitimacy by ensuring that lower courts comply with the law and are accountable for the content of their decision-making.

2.2.1 Composition

The composition of courts is more important for top courts than courts generally. Their ability to overturn their own precedents and the fact that they are not bound by precedents of another court gives them more discretion to develop the law. This strengthens the argument for having judges from a range of societal groups to bring knowledge about the needs of different societal groups when exercising this discretion.

Top courts are more likely than courts generally to deal with cases from multiple jurisdictions although many such as the HCJ hear cases from a single legal system. Having UK-wide courts creates the ability to take a UK-wide approach, although doing this is controversial. This issue will be considered later.[134] In the UK, the House of Lords (HOL), JCPC and SC use judges from multiple jurisdictions and this has led to debate over the courts' expertise to decide Scottish cases.[135] While expertise is important for all courts, it is especially important for top courts due to the normal finality of their decisions and their

[131] The House of Lords initially did not have a mechanism to overturn its own precedent.
[132] International courts do not have the power to overturn the decision of a domestic court.
[133] The media, academics and the public may provide informal content accountability mechanisms.
[134] Section 2.3.2.5 below
[135] Chapter 1 sections 2 and 3 above

role in setting precedent. This issue will be discussed in relation to the JCPC/SC's criminal jurisdiction in section 2.3.2.2 below.

A second issue is whether Scottish cases reaching UK-wide courts should use judges from the other UK legal systems to ensure that there is a representation of knowledge of all the UK legal systems. The ease of justifying having non-Scottish judges deciding Scottish cases varies depending on what jurisdiction the court has within the UK. Normally, it would be difficult to argue that having judges from another jurisdiction enhances legitimacy. Usually, the decision will not directly affect other legal systems. For example, HCJ decisions only set precedents for Scots law. Its decisions may influence English courts (especially where Scots and English law are similar), but changes to English law can only occur where an English Court, UK-wide court or the UK Parliament changes English law.[136] Thus, beyond providing a comparative perspective, there is little need for judges from a court dealing with one legal system to have knowledge about the legal systems in other parts of the UK.

Other parts of the UK may be affected by decisions of UK-wide top courts. The UK is a unitary state[137] and this creates similarities in areas of law such as a sharing of the same human rights regime under the Human Rights Act 1998[138] and some shared criminal law including UK-wide statutory offences.[139] A UK-wide top court has a greater ability to influence the other legal systems of the UK.[140] If a judge in a Scottish case expresses doubts about the correctness of the English approach or interprets areas of similarity between Scots and English law, this is more likely to cause uncertainty for English law if it is made by a UK-wide court which hears English cases than a court like the HCJ the main role of which is to decide Scottish cases.

A court dealing with multiple jurisdictions needs to consider the impact of its decisions on all the jurisdictions its serves.[141] It acts as an intermediary between the different legal

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[136] For devolution and compatibility issues the reference procedure can be used to send important cases to the JCPC/SC.
[137] Tierney, 'Scotland And the Union State' in McHarg and Mullen, *Public Law in Scotland* (Edinburgh: Avizandum Publishing, 2006), 33-36; Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution?' [2000] PL 384.
[138] Human rights are also enforced under the Scotland Act 1998 s57(2),
[139] Chapter 3 section 2.2 above
[140] Chapter 4 section 3.4 above
[141] Le Sueur and Cornes, 'What Do the Top Courts Do?' (UCL, 2000), 25 at https://www.ucl.ac.uk/political-science/publications/unit-publications/59.pdf (last visited 17/01/2019).

systems because it can decide what ideas are shared between them and whether there are strong reasons for the different legal systems to take a similar or differing approach. Unlike a court dealing with one jurisdiction, it can use its ability to hear cases from each part of the UK to manage the approaches taken by different legal systems. Having judges from each legal system in the UK may help ensure that there are judges who understand the legal consequences of the change for the other UK legal systems. This may reduce the likelihood of a decision for one part of the UK having unintended legal consequences for other parts of the UK.

A more representative judiciary may bring greater knowledge of how the decision might affect different parts of society. The different countries in the UK and parts of these countries can have different needs. For example, sectarianism is arguably[142] a greater problem in Scotland than it is in England, although it is not as severe problem as in Northern Ireland. Having judges from each legal system in the UK may increase the ability of the court to consider the decision's social and economic consequences for each part of the UK. The same caveats about judges not always being willing to represent the ideas of their group (assuming the group has a widely accepted idea about their needs) apply here. Additionally, judges will only become aware of local social and economic issues if they take an interest in them or the issue is raised by counsel. Nonetheless, if a judge has served as a judge in one jurisdiction, this may give them some knowledge of issues specific to that part of the UK.[143] When a UK-wide court makes decisions without having information on local issues, it risks not having sufficient information to appreciate how the decision will impact on different parts of the UK. This creates the risk that decisions will be made which do not work well for parts of the UK.

2.3 Legitimacy of the JCPC/SC's Jurisdiction

2.3.1 Walker's Criteria

Having considered how courts generally and top courts gain legitimacy, this analysis will be used to create criteria to test the JCPC/SC's legitimacy. Here we can start with the criteria suggested by Neil Walker who in 2010 examined the final appellate jurisdiction of Scotland's top courts, including the JCPC/SC's final appellate jurisdiction. In order to

[142] Parts of England also have problems with sectarianism.
[143] *Scotch Whisky Association* v *Lord Advocate* [2016] CSIH 77, at [178]

examine the "nature, strengths and weakness" of the final appellate jurisdiction, he set out the following criteria:[144] democracy, fair treatment, coherence and integrity, richness of resources, expertise, detachment, operational effectiveness and the economy.[145]

There are differences between the scope of Walker's report and this chapter. Walker's scope is broader because he examines the final appellate jurisdiction for Scottish civil and criminal cases including criminal cases not raising criminal devolution and compatibility issues. Walker's criteria also focus on the strengths and weaknesses of the final appellate system, rather than on the legitimacy of the jurisdiction,[146] although there is overlap between the two. If a jurisdiction has many strengths, this may increase its legitimacy by increasing its operational effectiveness. It suggests that the court is using its power in a way that secures the intended outcome and makes it easier to justify continuing to grant power to the court. The opposite is also true. However, people's perceptions of the jurisdiction's sociological legitimacy do not need to be based on a rational analysis of the strengths and weaknesses of the jurisdiction. Moreover, the fact that something is a strength or weakness of the jurisdiction does not always mean that it has a large effect on the jurisdiction's legitimacy. For example, Walker uses the sharing of resources between Scots and English law as one of his criteria. It might benefit Scots law (which deals with fewer cases than England) to consider how English law deals with problems that Scots law has not considered before. If law is carefully imported into Scots law, there may be a legitimacy gain by finding more effective solutions to problems which increases the operational effectiveness of Scots law. However, a court can avoid using law from other parts of the UK and still be legitimate provided it provides effective solutions to legal problems.

For Walker, judges can promote democracy by applying and interpreting legislation in a neutral way that represents the will of the democratically elected legislature.[147] This requires a "disinterested" application of the law where judges are responsive to the law, not the people.[148] There is a need to consider how the JCPC/SC applies and interprets the

[144] Walker, *Final Appellate Jurisdiction in The Scottish Legal System* (Edinburgh: Scottish Government, 2010), 5
[145] *ibid* Chapter 5
[146] *ibid* 5
[147] *ibid* 50
[148] *ibid*

law because there are concerns about it interpreting its jurisdiction over broadly.[149] There is an overlap between Walker's definition of democracy and legality. Both look at the ability of courts to apply the law. Legality is broader because it can include compliance with the common law or sovereign commands or with legislation where the intention of the legislature is unclear. Walker defines democracy narrowly. For him, courts by being faithful to the law can enforce the will of the legislature assuming the legislature's intention is clear.[150] While legislation may reflect the will of the people, it does not have to. Walker's focus on courts applying and interpreting the law and the indirect connection between the courts applying the law and the enforcement of the will of the people, suggest that issues about how the JCPC/SC exercised its powers are better dealt with as issues of legality.

Nonetheless, there is overlap between the issues that Walker considers and the legitimacy of the JCPC/SC's jurisdiction. Issues such as expertise (the need for the court to be "sufficiently expert in the law of" the jurisdiction the case is from),[151] the need for judicial detachment from "commitments or interests that might compromise their fair and neutral application of the law,"[152] and the need for the court to be operationally effective are issues which will be considered below.[153] Walker shows the tension between ensuring that SC judges have sufficient expertise of Scots law to decide Scottish cases and the knowledge of other legal systems which non-Scottish judges might bring. His operational effectiveness criterion raises issues such as the ability of the court to set precedents and to correct errors. The fair treatment[154] criterion relates to the idea that some issues, such as human rights, are so important to human wellbeing that they should be applied to multiple legal jurisdictions. However, as Walker recognises, too much universality between legal systems makes it difficult to recognise different "local circumstances and cultural backgrounds."[155]

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[149] O'Neill, 'The End of the Independent Scottish Criminal Legal System? The Constitutional Significance of Allison and McInnes' (UKSC Blog, 2010), at http://ukscblog.com/the-end-of-the-independent-scottish-criminal-legal-system-the-constitutional-significance-of-allison-and-mcinnes/ (last visited 10/03/2019).
[150] *Walker,* n144 above, section 5.2
[151] *ibid* section 5.6
[152] *ibid* 59
[153] Operational effectiveness will be considered under the expertise, human rights and accountability criterion.
[154] Fair treatment has several meanings. It can mean procedural fairness such as a fair trial, equal treatment between accused within a single legal system and in the sense Walker uses it where it requires similar treatment of people throughout the UK.
[155] Walker*,* n144 above, section 5.3

Walker defines coherence and integrity as meaning coherence between rules within part of a legal system or a whole legal system or between legal systems.[156] Coherence can promote legitimacy by creating law which is clear and comprehensible. This makes it easier for the public to know the law and for members of the public to understand the decision. As Walker notes, there is a tension between seeking coherence between laws throughout the UK and maintaining distinctive areas of Scots law.[157] It will be argued in section 2.3.2.5 below that fairness and coherence apply to the enforcement of Convention rights in the UK.

2.3.2 The Criteria

Building on the issues raised by Walker and the legitimacy issues raised for courts and top courts, the next section defines the criteria used in this chapter. The legitimacy of the JCPC/SC as courts is relevant to the legitimacy of the jurisdiction they exercise. However, legitimacy problems with a specific jurisdiction the court exercises might mean the jurisdiction struggles to gain legitimacy despite the court having general legitimacy. Accordingly, there is some overlap between factors which could give legitimacy to the JCPC/SC as top courts and factors influencing the legitimacy of their devolution/compatibility issue jurisdiction. Since the exercising of a jurisdiction is part of the functioning of a court, the court needs to perform similar legitimacy-enhancing actions to those identified above when it exercises a particular jurisdiction. Thus, like all courts, the JCPC/SC's devolution/compatibility issue jurisdiction should comply with legality and cases should be decided by judges who are independent, impartial and accountable, have the required expertise and the SC should aspire to have a composition which is reflective of society. However, the legitimacy of the JCPC/SC's jurisdiction raises specific issues within these broad legitimacy categories which will be discussed below.

2.3.2.1 Legality

Several types of legality apply to the JCPC/SC's jurisdiction. First, when the devolution issue jurisdiction was created there was debate over whether it was intended to confer an ability to appeal Scottish criminal cases to the JCPC.[158] This uncertainty was remedied by the Scotland Act 2012 s36 which expressly allows Scottish criminal cases to be appealed and

[156] *ibid* section 5.4
[157] *ibid* 57
[158] Lord Hope, 'Devolution and Human Rights' [1998] EHRLR 367, 372

referred to the SC as compatibility issues. Since most of the JCPC/SC's Scottish criminal cases were decided before this, it will be considered whether the JCPC/SC was correct to interpret the Scotland Act 1998 as allowing devolution issue appeals.

The second issue is whether the JCPC/SC complied with the rules determining the breadth of its jurisdiction. The more widely it interprets its jurisdiction, the harder it becomes to connect the exercise of the jurisdiction with the law and the legislature's intentions. There are concerns that the JCPC/SC is over-willing to expand its jurisdiction and its own power by deciding the outcome of cases, hearing cases in which the HCJ has held that no devolution issue was raised and by interpreting acts of the Lord Advocate broadly to increase the range of devolution cases it can hear.[159] This allegedly affects the traditional final appellate jurisdiction of the HCJ.[160] To test concerns that the JCPC/SC has interpreted its jurisdiction over broadly, it will be considered whether the JCPC/SC has interpreted its jurisdiction in a way which represents a reasonable interpretation of the law.

Third, the devolution and compatibility issue jurisdictions enable the JCPC/SC to examine whether public authorities complied with EU and ECHR law and whether the Scottish Parliament and Government have acted within their devolved competence. Where the case is a reference, the JCPC/SC can provide a first instance ruling on this. Where the case is an appeal, it might correct errors of law made by the lower courts. Since the JCPC/SC's jurisdiction mainly deals with Convention rights cases, the main type of error correction it can perform is correcting lower court decisions which are inconsistent with the ECHR as interpreted by the ECtHR. By policing these institutions, the JCPC/SC can enforce legality by ensuring that these institutions comply with limitations on their power and that lower courts provide an accurate ruling on the law.

2.3.2.2 Expertise

The expertise of JCPC/SC judges will be considered to address concerns that the non-Scottish judges lack the expertise needed to decided Scottish criminal cases. If true, this might undermine the legitimacy of the JCPC/SC's jurisdiction by making it more difficult for

[159] O'Neill, 'The End of the Independent Scottish Criminal Legal System? The Constitutional Significance of *Allison* and *McInnes*' (UKSC Blog, 2010), at http://ukscblog.com/the-end-of-the-independent-scottish-criminal-legal-system-the-constitutional-significance-of-allison-and-mcinnes/ (last visited 17/01/2019).
[160] Scottish Parliament Official Report 27 October 2010 col 29555 Kenny MacAskill

it to perform its assigned duties and reducing its operational effectiveness. It also risks decreasing sociological legitimacy by reducing trust in the court, if it is perceived that the non-Scottish judges lack the skills required to decide Scottish cases.

A lack of formal training in Scots law does not mean that judges lack expertise to decide devolution and compatibility issues. Some areas of law, such as Convention rights, apply to the whole of the UK although there is a possibility for the right to be interpreted differently and judges from other UK legal systems can be expected to be familiar with them. Even in areas where the judges have no formal training in Scots law, there are varying degrees of difficulty in learning law from another legal system. First, there are differences in the type of legal system. As Chapter 2 section 6.2 showed, the differences between civilian and common law legal systems make it difficult[161] for judges to decide cases from a jurisdiction using the other type of legal system.[162]

Second, judges deal with areas of law which exist in one legal system but not in another. An example is the English law of equity which has no equivalent in Scots law. This is easier to learn than the first type of difference because it does not require learning a different type of legal system. However, it is still difficult. Judges from the legal system not containing the area of law must learn an area of law for which their previous legal training can provide little help. Judges from the legal system containing the area of law must learn to deal with problems without referring to that law.

Finally, there are different concepts and rules. The difficulty of learning these differences varies. Trivial differences are the easiest to learn while genuinely distinctive differences are hardest to learn because they require a different way of thinking about the problem and produce different outcomes.[163]

The above categorisations will be used to gauge the difficulty faced by non-Scottish judges when they decide devolution and compatibility issues. It will then be established whether non-Scottish judges make mistakes about Scots law and/or are over-willing to defer to the Scottish-trained judges. It will be considered whether it would be better to have the HCJ,

[161] The ECtHR's judges must understand both types of legal system.
[162] Chapter 2 section 6.2 above
[163] Chapter 3 section 1.1.2 above

where all the judges are trained in Scots law, making final decisions on Scottish criminal cases.

2.3.2.3 Composition

There is debate over whether there is a need for non-Scottish judges to be included in the composition of the JCPC/SC when it decides Scottish criminal cases. Supporters of using non-Scottish judges argue that it enables the court to "benefit from access to [a] larger pool of ideas."[164] Since the SC is a UK-wide court and the same Convention rights apply to each part of the UK (although Scotland has additional enforcement mechanisms), a Scottish JCPC/SC decision may have consequences for English law. This may suggest having judges from each part of the UK to ensure that the legal, and to a lesser extent,[165] social and policy impacts on all the UK legal systems can be considered when deciding Convention rights cases. This would also enable the JCPC/SC to take a UK-wide approach. Whether the JCPC/SC should take a UK-wide approach to the enforcement of Convention rights will be considered in section 6.

It will be questioned whether non-Scottish judges should be used at all in Scottish criminal cases and if so whether there is a need for the JCPC/SC to sit with a majority of Scottish-trained judges. Any argument for using non-Scottish judges must show that they have sufficient expertise to decide Scottish criminal cases. This will be addressed under the expertise criterion. It will then be established whether the non-Scottish judges use their ability to sit on Scottish cases to share their knowledge of the other UK legal systems and issues affecting these parts of the UK. Finally, it will be considered whether normally having a minority of Scottish judges deciding Scottish cases is likely to create enough sociological legitimacy for people in Scotland to trust the courts' decisions.

2.3.2.4 Independence and Impartiality

Since all courts need to show independence and impartiality,[166] the JCPC/SC should also do so when exercising its devolution and compatibility issue jurisdictions. There are no

[164] Le Sueur and Cornes, 'The Future of the United Kingdom's Highest Courts' (Constitution Unit, 2001), 69 at https://www.ucl.ac.uk/political-science/publications/unit-publications/76.pdf (last visited 17/01/2019).
[165] This assumes that judges from each part of the UK will be aware of different social issues in their part of the UK.
[166] Sections 2.1.2 and 2.2 above

suggestions that the JCPC/SC judges display bias when exercising these jurisdictions. In the past, the UK's top courts did not offer sufficient guarantees of a separation of powers because the JCPC sat in Downing Street while the HOL sat in the UK Parliament. While in theory this might have given grounds to doubt the impartiality of these courts, in practice there was no evidence of these courts showing bias.[167] It will be examined whether this affected the legitimacy of the JCPC's jurisdiction. This problem was resolved by having the SC sitting separately from the legislature and preventing judges from sitting in the legislature.[168]

It is sometimes suggested that a top court in London deciding Scottish cases will be more detached from local Scottish issues and this may give them greater objectivity than courts located in Scotland like the HCJ.[169] The accuracy of this claim will be examined in section 4.

2.3.2.5 Human Rights

It is accepted by all in the JCPC/SC debate that protecting human rights is beneficial.[170] Although the benefits of human rights are sometimes controversial,[171] the lack of controversy about them in the JCPC/SC debate means that it will be assumed that there is a benefit in protecting the accused's rights under the ECHR. Rather, the debate focuses on how Convention rights should be enforced. Accused in Scotland and England face similar vulnerabilities during the criminal trial.[172] Accused are disadvantaged because they often lack knowledge of the criminal process and rely on their lawyer to address this power imbalance. This makes the process intimidating for accused and increases the likelihood of them incriminating themselves.[173] Enforcing the accused's Convention rights may increase

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[167] Lord Bingham, 'A New Supreme Court for the United Kingdom' (Constitution Unit, 2002), 4 at http://www.ucl.ac.uk/spp/publications/unit-publications/90.pdf (last visited 17/01/2019).
[168] Constitutional Reform Act 2005 s137
[169] Le Sueur, n141 above, 26
[170] Chapter 1 section 3 above
[171] Bentham, 'Anarchical Fallacies' in Bentham (Ed), Selected Writings on Utilitarianism (Hertfordshire: Wordsworth, 2000), 381-459; Dembour, *Who Believes in Human Rights?* (Cambridge: Cambridge University Press, 2006), Chapter 3; Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980); Nickel, *Making Sense of Human Rights* (Oxford: Blackwell, 2007), 37
[172] The arguments on how Convention rights should be enforced apply to a wide range of rights, but the focus here will be on the right to a fair trial since this is the main right raised in Scottish criminal devolution and compatibility issue cases.
[173] McBarnet*, Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981); Carlen, *Magistrates' Justice* (Oxford: Martin Robertson, 1974)

the legitimacy of the JCPC/SC's jurisdiction (and of all courts) by protecting accused from the power of the state. It allows unfairness in the criminal trial to be avoided or corrected. If procedural unfairness during the trial is not prevented or corrected, this risks innocent people being wrongly convicted of a criminal offence. If this happens too often or there is a widely reported incidence of this happening, it may reduce trust in the judiciary.[174] If a safeguard alleviates the danger of wrongful conviction, it seems unfair to offer it to accused in one part of the UK but not in another. A UK-wide approach would be consistent with the UK as a unitary state where common standards are often used in areas of commercial law, road traffic law and terrorism laws.[175] For these areas, it is considered simpler and more effective to take a UK-wide approach.[176] However, there is a danger of failing to recognise that different parts of the UK may have different needs. Section 6 will examine whether the enforcement of Convention rights requires a UK-wide approach or whether Scotland should be given autonomy to take its own interpretation of Convention rights. It will also be examined whether the JCPC/SC's approach of requiring that Scots law mirror the Convention, even when this requires reducing Convention rights protection,[177] should be continued or whether Scots law should be allowed to go beyond or below the level of rights protection provided by the Convention.

2.3.2.6 Accountability

Some issues of accountability legitimacy pertain to the running of the JCPC/SC and do not directly affect the accountability of the JCPC/SC's jurisdiction. For example, transparency over how these courts spend their money and the publication of annual reports increase transparency but do not directly impact on the accountability of the JCPC/SC's jurisdiction. The main purpose of the jurisdiction is to decide cases not to make financial decisions or reports. Nonetheless, issues pertaining to the accountability of the JCPC/SC as courts may impact on the perceived legitimacy of a jurisdiction exercised by them.

[174] Loth, n4 above, 1
[175] Tierney, 'Scotland and the Union State' in McHarg and Mullen, *Public Law in Scotland* (Edinburgh: Avizandum Publishing, 2006), 33-36; Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution?' [2000] PL 384; *Walker,* n144 above, 53
[176] Scotland Act 1998 Explanatory Notes, 203
[177] Chapter 4 section 4 above

The JCPC/SC's jurisdiction can gain legitimacy through content accountability. First, judges and the court exercising the jurisdiction might explain their decisions to lawyers and lower courts by setting down a clear precedent. However, there cannot be absolute certainty about how appeals will be decided because precedents can be overruled or re-interpreted in ways not anticipated. As the highest criminal court for devolution and compatibility issues, the JCPC/SC normally has the final say on what approach the law should take for these issues.[178]

The JCPC/SC can also hold the HCJ and lower Scottish courts to account by correcting errors about the interpretation of devolution legislation, Convention rights and EU law and, for devolution issues, the safety of the conviction. The ability of the JCPC/SC to use its jurisdiction to correct errors was considered in Chapter 4 section 4.3.

Content accountability might also involve the JCPC/SC ensuring that decisions are well publicised, easily accessible and communicated to the media and the public. This might include the use of press releases, the publishing of judgments online, using social media to tell the public about judgments and upcoming cases and ensuring that people can watch the judgment either in person at the court or online. This ensures that the public are aware of the decisions and allows the public and media (assuming they are willing to use the resources) to provide informal content accountability for the JCPC/SC's jurisdiction. Section 7 will consider whether there are differences in the JCPC/SC and HCJ's willingness to provide accountability and in the resources they have at their disposal to provide accountability.

2.4 Limitations

The criteria discussed above have limitations. First, it may be found that the JCPC/SC's jurisdiction meets some of the criteria for legitimacy while not meeting some of the other criteria as strongly. To overcome this, it will be considered whether there are more criterion pointing towards the jurisdiction being legitimate than not and how strongly each criterion points towards the jurisdiction being legitimate or illegitimate. Second, the application of the criteria involves subjectivity. However, the criteria will help structure the argument and show the reasoning behind the conclusions reached.

[178] For compatibility issue cases the SC cannot decide the outcome of the case.

3 Legality

The next section assesses whether the JCPC/SC gains legitimacy through legality. It first addresses concerns that the JCPC/SC lacked the legal power to decide Scottish criminal devolution issue cases where it was alleged that the Lord Advocate had breached the accused's Convention rights. It then considers whether the JCPC/SC interpreted the breadth of its jurisdiction in a way which exceeded its legal powers.

3.1 The JCPC/SC's Interpretation of its Jurisdiction

3.1.1 The Ability to Hear Scottish Criminal Cases

The Scotland Act 1998 s57(2) states that: "A member of the Scottish Government has no power … to do any … act [which is] incompatible with any [of] the Convention rights." Devolution issues included "a question whether a failure to act by a member of the Scottish Government is incompatible with any of the Convention rights."[179]

In *Montgomery* v *HMA*,[180] the JCPC considered whether the Lord Advocate's act in prosecuting the accused was a devolution issue. Although the JCPC was divided on the issue, all the judges accepted that the Lord Advocate was a member of the Scottish Government and accordingly that the Lord Advocate's conduct fell within the scope of s57(2).[181] There was debate about whether the Lord Advocate was responsible for unfairness in the trial that he did not directly cause but which was perpetuated by his decision to continue prosecuting the case. The majority held that the decision to continue prosecuting was an act of the Lord Advocate.

Lord Hoffmann (dissenting) argued that under the ECHR Article 6 accused have a right to have "charges determined."[182] It is normally the courts, not the Lord Advocate which determine charges. Thus, although some acts of the Lord Advocate might breach the accused's Convention rights, "this cannot be said of the right to a fair trial."[183] This interpretation has some merit. The trial judge decides whether charges are relevant and

[179] Scotland Act 1998 schedule 6 para 1(e)
[180] [2003] 1 AC 641
[181] *ibid* 660
[182] *ibid* 648
[183] *ibid* 649

evidence is admissible and acts as an umpire between the opposing sides to ensure the trial's fairness. The court determines the charges by deciding whether the accused should be convicted or acquitted. However, in an adversarial criminal law system, it is not possible for the charges to be determined without a prosecutor presenting the prosecution case. In Scotland, there is a tradition of relying on the Lord Advocate to ensure the trial's fairness.[184] The Lord Advocate's actions affect the trial's fairness. His or her failure to disclose evidence to the accused can affect how the trial is conducted. The leading of unfairly obtained evidence may prejudice the accused's trial by causing the trier of facts to focus on irrelevant considerations. In each case, the unfairness could not have occurred without an act of the Lord Advocate, although the defects in the trial could be remedied by the courts.[185]

For Lord Hope (for the majority), s57(2) embraced "the entire spectrum of" members of the Scottish Government's power to act.[186] The power of the Lord Advocate is not only restricted in situations where the Convention directly imposes an obligation on him or her. It also includes acts of the Lord Advocate which conflict with the state's Convention rights obligations. Thus, for Lord Hope it was "appropriate" that the Lord Advocate should share responsibility with the courts for the fairness of the trial.[187] This fits more easily with s57(2) than Lord Hoffmann's approach. S57 states that "a member of the Scottish Government has no power … to do any … act" which is incompatible with Convention rights. The phrase "any ... act" suggests that all acts of the Scottish Government and the Lord Advocate must be Convention-compatible. If Lord Hoffmann's approach was adopted, the meaning of this phrase would become strained. "Any act" would mean any act of the Lord Advocate, except one where the courts are also responsible for protecting the accused's Convention rights. A more normal meaning would be that every act of the Lord Advocate falls within this section. This is supported by s57(3) which provided an exception to s57(2) where the Lord Advocate was "prosecuting any offence" under primary legislation.[188] This shows that the legislature contemplated that acts of the Lord Advocate in prosecuting an offence could be

[184] *Holland* v *HMA* [2005] UKPC D1, at [68]
[185] Human Rights Act 1998 s6
[186] *Montgomery,* n180 above, 660
[187] *Ibid* 662
[188] Scotland Act 1998 s57(3)(a); Human Rights Act 1998 s6(2)

devolution issues. If there was a desire to restrict acts of the Lord Advocate further there would have been a second exception to s57(2).[189]

3.1.2 The Breadth of the Jurisdiction

The next section tests claims that the JCPC/SC has interpreted its jurisdiction over broadly when deciding whether to hear appeals from the HCJ. Table 21 below shows how each case reached the JCPC/SC.

[189] The Scotland Act 1998 s57(3) now precludes acts of the Lord Advocate in Scottish criminal cases from being devolution issues.

HCJ Granted Leave to Appeal	JCPC/SC Granted Leave to Appeal	The HCJ was Required to Refer the Case to the JCPC/SC	Case Referred to the JCPC/SC and Leapfrogged the HCJ
Montgomery v *HMA*[190]	*Allison* v *HMA*[191]	*HMA* v *Murtagh*[192]	*Spiers* v *Ruddy*[193]
Brown v *Stott*[194]	*Cadder* v *HMA*[195]	*Ambrose* v *Harris*[196]	*HMA* v *P*[197]
Millar v *Dickson*[198]	*Fraser* v *HMA*[199]	*Clark* v *Kelly*[200]	*McGowan* v *B*[201]
HMA v *R*[202]	*McDonald* v *HMA*[203]		
Ruddy v *Procurator Fiscal*[204]	*Burns* v *HMA*[205]		
McInnes v *HMA*[206]	*DS* v *HMA*[207]		
Birnie v *HMA*[208]	*Sinclair* v *HMA*[209]		
O'Neill v *HMA*[210]	*Holland* v *HMA*[211]		
Macklin v *HMA*[212]	*Dyer* v *Watson*[213]		
Kinloch v *HMA*[214]			
AB v *HMA*[215]			

Table 21: How cases reached the JCPC/SC

[190] *Montgomery,* n180 above
[191] [2010] UKSC 6
[192] [2009] UKPC 35
[193] [2007] UKPC D2
[194] [2001] UKPC D1
[195] [2010] UKSC 43
[196] [2011] UKSC 43
[197] [2011] UKSC 44
[198] [2001] UKPC D4
[199] [2011] UKSC 24
[200] [2003] UKPC D1
[201] [2011] UKSC 54
[202] [2002] UKPC D3
[203] [2008] UKPC 48
[204] [2006] UKPC D2
[205] [2008] UKPC 63
[206] [2010] UKSC 7
[207] [2007] UKPC D1

Unless a reference is made, the JCPC/SC can hear appeals against "a determination of a devolution issue by" the HCJ sitting with "two or more judges."[216] The JCPC/SC interpreted this broadly. In *McDonald* v *HMA*,[217] the JCPC held that the HCJ's refusal to allow the accused to raise a devolution issue meant that the HCJ had determined the devolution issue which meant that the JCPC could hear an appeal against the HCJ's decision. However, the JCPC's interpretation was defensible. A distinction can be drawn between determining whether a devolution issue exists and determining the merits of the devolution issue. The former considers whether the accused had legal grounds to raise a devolution issue. The latter determines whether a validly raised devolution issue was meritorious. These questions overlap because it is difficult to assess whether there was an act of the Lord Advocate without considering the case's merits. At first glance, this distinction seems attractive. If the HCJ considers that there are no grounds for raising a devolution issue or that the correct procedure for raising the devolution issue has not been complied with, this reduces its ability to determine whether the issue raised by the devolution issue has merit.[218] However, requiring a determination of both whether there is a devolution issue and its merits is problematic. It means that an accused who fails to convince the HCJ that they raised a valid devolution issue has no ability to appeal this decision to the JCPC/SC. However, if the HCJ rejects the devolution issue on its merits the accused has an ability to appeal. Given that the HCJ could make mistakes in law at both stages it would seem illogical to apply this distinction. Rejection at either stage means that the ground of appeal is rejected and that the HCJ will not consider the issue further. Accordingly, when the HCJ sitting as an appeal court rejects the devolution issue as invalid, it determines it in the sense of disposing of it.

[208] [2011] UKSC 55
[209] [2005] UKPC D2
[210] [2013] UKSC 35
[211] [2005] UKPC D1
[212] [2015] UKSC 77
[213] [2002] UKPC D1
[214] [2012] UKSC 62
[215] [2017] UKSC 25
[216] Scotland Act 1998 schedule 6 para 13
[217] *McDonald* v *HMA* [2008] UKPC 48
[218] It may be able to consider the issue as an ordinary ground for appeal.

In *Allison* v *HMA*,[219] the HCJ rejected a devolution issue because the accused had not notified the Advocate General that he intended to raise a devolution issue. Since the HCJ considered the merits of the accused's argument, the SC held that the HCJ had determined a devolution issue despite the procedural defect.[220] Again, there is no evidence of the SC exceeding its jurisdiction. The HCJ determined the devolution issue by rejecting it. The requirement that the Advocate General be notified is designed to ensure that he or she can participate in the proceedings.[221] However, nothing in the Scotland Act 1998 suggests that a devolution issue is invalid if this procedure is not complied with. Schedule 6 paragraph 1 defines devolution issues but does not mention the requirement to notify the Advocate General. Since this paragraph defines the essential requirements for a devolution issue, it might be expected that the notification rule would be mentioned here if a devolution issue was invalid without the notification. Instead, the rule is mentioned in paragraph 5 which states that the Advocate General "shall be" notified about the devolution issue. The words "shall be" suggest that notification is important, but it would be expected that if notification were essential that the words "must be" would have been used instead.

The HCJ can give leave to appeal to the JCPC/SC when it has determined a devolution issue, sits with "two or more judges" and gives permission.[222] In most of the cases reaching the JCPC/SC through this mechanism, there was no suggestion that these requirements were not complied with. However, in *Kinloch* v *HMA*,[223] the accused raised a devolution issue arguing that unauthorised police surveillance and the seizure of evidence violated his right to privacy under the ECHR Article 8. The SC allowed the devolution issue because: 1) the HCJ allowed the case to be appealed and 2) the Lord Advocate did not object to the SC hearing the appeal. However, the legislation does not give a right of appeal to the JCPC/SC where all the parties want it. Devolution issues do not arise for acts of public authorities such as the police because they only apply to acts of the Scottish Government and Scottish Parliament.[224] The SC argued that the issue could be reframed as a devolution issue if it was argued that the Lord Advocate in leading the evidence would breach the accused's Article 8

[219] *Allison* v *HMA* 2009 SLT 550, at [7]
[220] *Allison*, n191 above, at [6]
[221] *Allison*, n219 above, at [7]
[222] Scotland Act 1998 schedule 6 para 13
[223] *Kinloch*, n214 above, at [14]
[224] Scotland Act 1998 schedule 6 para 1

rights. However, as Lord Hope accepted, it "does not appear" that the HCJ considered "whether the act of the Lord Advocate in leading the evidence was incompatible with the" accused's rights.[225] Thus, the HCJ did not consider whether the argument could be reframed. Accordingly, there was no devolution issue because the alleged devolution issue, as argued in the HCJ, complained about the actions of the police, not the Lord Advocate or another member of the Scottish Government. The HCJ had no power to send it to the SC since it was not a valid devolution issue and the SC had no jurisdiction to hear the case.

The JCPC/SC has also heard cases as references sent to it by the HCJ or at the request of the Lord Advocate or Advocate General. The legality of the JCPC/SC hearing cases as references is not in doubt. The legislation provides that "two or more judges of the [HCJ] may refer any devolution issue" to the JCPC/SC[226] and that "the Lord Advocate and the Advocate General … may require any Court or tribunal to refer to the Supreme Court any devolution issue."[227]

3.1.3 Deciding the Outcome of the Case

The ability of the JCPC/SC to determine the outcome of a devolution issue case by quashing or upholding the conviction is controversial because of its effect on the HCJ's traditional final appellate jurisdiction and because doubts have been expressed about the legality of this.[228]

Peter Ferguson argues that the main constitutional role of the JCPC/SC in devolution cases is to determine the devolution issue but not to determine the remedy for a breach of the accused's Convention rights.[229] Since HCJ decisions are final, except those raising devolution and compatibility issues, he argues that it should not be implied into the Scotland Act 1998 that the JCPC/SC has a power, not expressly mentioned in the legislation, to decide the outcome of the case.

[225] *Kinloch*, n214 above, at [13]
[226] Scotland Act 1998 schedule 6 para 11
[227] *ibid* schedule 6 para 33
[228] Ferguson, 'Privy Council Criminal Appeals' (2008) SLT (News) 133, 137
[229] *ibid*

The JCPC/SC can hear an "appeal against a determination of a devolution issue."[230] When an appeal court hears a criminal appeal against a conviction[231] it is normal[232] for it to determine the safety of the conviction and decide whether to quash the conviction. Appeals are different from references. In reference cases, a higher court determines an issue of law before referring the case back to the lower court for disposal of the case. If the word "appeal" were given the more unusual meaning of appealing an issue of law to the JCPC/SC and then asking the HCJ in light of the ruling to dispose of the case, it would be expected that the Scotland Act 1998 would mention this restriction on the JCPC/SC's power. The compatibility issue appeal mechanism restricts appeals in this way.[233] Conversely, the JCPC/SC in "devolution proceedings [was given] all the powers, rights, privileges and authority" of the HCJ.[234] One of the HCJ's powers is the ability to quash a conviction when there is a miscarriage of justice.[235] To say that the JCPC should have all powers, except the ability to quash the conviction, stretches the meaning of the phrase. Ideally, constitutional changes would be expressly made in legislation and not have to be implied. However, Parliament chose to create the potential for traditionally final HCJ decisions to be appealed as devolution issues to the JCPC/SC.[236] An obvious implication of creating a new tier of appeal for some Scottish criminal cases was that the HCJ's traditionally final decisions on the outcome of the case could be overturned since this is normally an important function of appeal proceedings.

3.2 Discussion

The decisions mostly show a pattern of compliance with legality both in deciding whether the JCPC/SC had jurisdiction over Scottish criminal cases and in the breadth of the jurisdiction. The JCPC/SC interpreted the former issue reasonably. Given that the law was unclear it cannot be expected that the JCPC would produce a decision in *Montgomery* v

[230] Scotland Act 1998 schedule 6 para 13(a)
[231] Issues of law may be appealed before the criminal trial has concluded where the appeal court will deal with the point of law only.
[232] Cf. Criminal Procedure (Scotland) Act 1995 s288AA(2) which prevents the SC determining the outcome of compatibility issue cases.
[233] Criminal Procedure (Scotland) Act 1995 s288AA(2)
[234] Judicial Committee (Powers in Devolution Cases) Order 1999 (SI 1999 1320) Article 4(1)(a)
[235] Criminal Procedure (Scotland) Act 1995 s106(3)
[236] *ibid* s124(2) and Scotland Act 1998 (Consequential Modifications) (No.1) Order 1999 (SI 1999/1042) schedule 1 para13(6)(a)

HMA[237] that everyone can accept. All it can do is to exercise its powers in a way which is within a reasonable range of interpretations of the law and rely on the authority of this law to gain legitimacy. When a case is decided, it becomes part of the law until it is overturned by another case or legislation. Thus, with each case that follows the original case, the body of law that judges can rely on to support the legality of their exercise of power increases. Thus, although there were initial doubts about the correctness of the way the JCPC defined its jurisdiction in *Montgomery*, the repeated application of this decision[238] by the JCPC/SC and by a range of different judges created an increasingly large body of law which could be relied on to argue that the JCPC/SC had the power to hear devolution issues arising from the Lord Advocate's prosecutorial decisions. This and the JCPC's reasonable interpretation of the law suggests that any initial doubts about the legality of the JCPC/SC exercising this jurisdiction were unlikely to have a long-term negative effect on the legitimacy of the jurisdiction.

Although the JCPC/SC interpreted the breadth of its jurisdiction broadly,[239] it has mostly interpreted the meaning of "determination of a devolution issue" reasonably. When *McDonald* v *HMA*[240] was followed by *Cadder* v *HMA*[241] and *Fraser* v *HMA*,[242] the JCPC/SC could rely on this line of cases as authority that the JCPC/SC could hear a devolution issue when the HCJ considered that there was no devolution issue. This adds to the jurisdiction's legitimacy because it means that the JCPC/SC has complied with the requirement of legality.

Kinloch v *HMA*[243] is the only case where the SC's exercise of its jurisdiction could not be reasonably defended. When the case is considered in isolation, it detracts from the legitimacy of the JCPC/SC's jurisdiction. The SC exercised its power on dubious legal grounds and was aware of this.[244] However, the decision has not been applied in other cases. Thus, it should not be taken as reflecting the overall legitimacy of the jurisdiction. Courts cannot be expected to always make the correct decisions. There will always be some

[237] *Montgomery,* n180 above
[238] Almost all the devolution issues cases in Table 21 challenged acts of the Lord Advocate.
[239] Chapter 1 section 3
[240] [2008] UKPC 48
[241] [2010] UKSC 43
[242] [2011] UKSC 24
[243] *Kinloch*, n214 above, at [14]
[244] *ibid*

cases where it applies the law in a way which is difficult to reasonably justify. Accordingly, it is important to consider all the devolution/compatibility issue cases the JCPC/SC decided in order to establish whether there is a pattern of breaching legality which might reduce the JCPC/SC's legitimacy. For the JCPC/SC's jurisdiction, there is an overall pattern of compliance with legality. Thus, legality is a factor suggesting that the jurisdiction is legitimate.

4 Judicial Independence and Impartiality

Claims that JCPC/SC judges are more detached from local Scottish issues than HCJ judges are unconvincing. In the past, it was sometimes suggested that HCJ judges were more likely than a London court to be "implicated in the kind of local affairs ... or subjected to the kind of local pressures that might compromise its ability to reach decisions in a dispassionate and disinterested manner."[245] In modern times, there is little evidence suggesting that HCJ judges are being subjected to these pressures, nor is there any evidence suggesting that they respond to any pressures in a way that might compromise their independence and impartiality.[246]

Three problems arose with the independence and impartiality of the JCPC. First, the Lord Chancellor could sit on the JCPC. He was simultaneously a member of the legislature, the Government and the judiciary and because of his political role lacked the security of tenure required by judges.[247] This was "not consistent with even the weakest principle of separation of powers."[248] However, in practice the Lord Chancellor did not sit on any JCPC devolution cases.

Second, the JCPC was a UK Government department sitting in Downing Street.[249] The UK Government had an interest in the outcome of devolution issue cases and often intervened in these cases by making legal arguments before the JCPC.[250] The geographical closeness of

[245] *Walker,* n144 above, para 5.7
[246] *ibid*
[247] Steyn, 'The Case for a Supreme Court' (2002) 188 (July) LQR 382, 389
[248] *ibid*, 388; Hale, 'A Supreme Court for the United Kingdom?' (2004) 24(1) Legal Stud 36, 40
[249] Le Sueur, n22 above, 6
[250] *Brown* v *Stott* [2001] UKPC D1; *Burns* v *HMA* [2008] UKPC 63; *DS* v *HMA* [2007] UKPC 36; *HMA* v *R* [2002] UKPC D3; *HMA* v *Murtagh* [2009] UKPC 35; *McDonald* v *HMA* [2008] UKPC 48; *Montgomery* v *HMA* 2001 SLT 37; *Speirs* v *Ruddy* [2007] UKPC D2

the JCPC to the Government might create the perception that it would be easy for the Government to subject the judges to inappropriate influence. These perceptions of the closeness between the judiciary and other organs of the state are important to legitimacy. This was recognised by the UK Parliament when it was decided that the JCPC and not the HOL should hear devolution issues because using the HOL would have resulted in that part of the UK Parliament adjudicating on disputes involving the UK Parliament.[251] For the Appellate Committee of the HOL, sitting in Westminster created confusion in the media about whether the Government was involved in giving judgments.[252] It is easy to imagine judges giving judgments from Downing Street creating similar confusion. Moreover, in 1998 when the devolution issue mechanism was being debated in the legislative chamber of the HOL, the Liberal Democrats expressed concern about the independence of the JCPC given that cases would raise politically controversial issues which would require it to determine the balance of power between the Scottish and UK Parliaments. Although the Liberal Democrats were mostly concerned about the possibility that the Lord Chancellor sitting on the JCPC could create a perception that the JCPC was not independent, it shows that even during the creation of the devolution issue jurisdiction, importance was attached to whether the JCPC would be perceived to be independent.[253]

Finally, the involvement of JCPC judges in Parliamentary business was problematic. Although they made an important contribution to legislative debate,[254] there was a danger of judges having said something in Parliament which might suggest that they had made up their mind on an issue. In *Davidson* v *Scottish Ministers*,[255] the HOL held that Lord Hardie's involvement in promoting an amendment to legislation in Westminster and his subsequent hearing of a case involving that legislation in the Court of Session created a risk of apparent bias. While some of the judges in *Davidson* attached importance to Lord Hardie being part of the Government,[256] arguably the hearing of cases where a judge has spoken on the issue in the legislator is problematic regardless of whether they are associated with the Government. When a judge has already given an opinion on an issue in a non-judicial role, it creates the perception that they might be unwilling to change it when they decide a case

[251] Le Sueur, n22 above, 11-12
[252] Steyn, n247 above, 382
[253] HL Deb vol 593 cols 1968-1973 28 October 1998 Lord Lester
[254] Cooke, 'The Law Lords: An Endangered Heritage' (2003) 19 (Jan) LQR 49, 57
[255] *Davidson* v *Scottish Ministers* [2004] UKHL 34
[256] *ibid,* at [20] per Lord Woolf and [81] per Lord Cullen

on the issue. As has already been shown, these perceptions can be important to the legitimacy of the jurisdiction.

The use of the Law Lords in the JCPC and as the first SC judges meant there was a danger of JCPC/SC judges having previously sat in Parliament. However, several factors reduced this risk. First, after 2000, a Practice Direction was issued to Law Lords advising them to avoid participating in legislative debates on politically controversial issues and issues which might arise in cases.[257] This meant that from 2000, it was rare for judges to speak in legislative debates.[258] It became practice for judges to recuse themselves if they had said something which might have compromised their impartiality although this is something they should have done regardless of the existence of a practice direction.[259] Nonetheless, judges still occasionally attended or even spoke in Parliament,[260] creating a danger that a judge might sit on a case despite having debated the issue in the legislature.[261]

Overall, there was no evidence of the weak separation between the judiciary, legislature and Executive influencing the JCPC's decision-making. However, courts also need to appear to be independent.[262] The JCPC lacked this appearance because, despite informal mechanisms in place, it left the impression that it would be easy to exert undue influence on the JCPC judges.

However, it is important to consider the different constitutional context at the time when the JCPC was deciding devolution issue cases. The UK relied on informal mechanisms to enforce a separation of powers[263] with the overlaps between the functions of the judiciary and the Executive and legislature already outlined. The use of Law Lords by both the JCPC[264] and HOL meant that both routinely used judges who also sat in the legislature.[265] Moreover,

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[257] Masterman, 'A Supreme Court for the United Kingdom: Two Steps Forward, But One Step Back on Judicial Independence' [2004] PL 48, 55
[258] Steyn, n247 above, 383- 384
[259] Cooke, n254 above, 58
[260] *ibid*
[261] Judges have not always recused themselves when conflicts arose from sources other than sitting on the legislator. (*Hoekstra* v *HMA* 2000 JC 391; *R* v *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* [2001] 1 AC 61)
[262] Section 2.1.2.1 above
[263] Griffith, n39, 25; Lord Wakeham, *A House for the Future* (Cm 4534, 2000), para 9.
[264] The JCPC also uses judges from Commonwealth countries.
[265] *Davidson* v *Scottish Ministers* [2004] UKHL 34

both the UK's top courts at the time suffered from a lack of separation of the powers.[266] The time when the JCPC heard devolution cases was a time of transition when this old approach was being increasingly criticised,[267] although some were still willing to defend it.[268] Nonetheless, large numbers of litigants used the JCPC[269] and there is no suggestion that people considered the JCPC's lack of a formal separation of powers to make its decisions illegitimate. Thus, the JCPC seemed to have sociological legitimacy.

Unlike the JCPC, the SC was designed to be institutionally and geographically separate from the Government and the legislature. Thus, the SC's independence and impartiality are factors increasing its legitimacy.

[266] Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom Consultation Paper* (CP 11/03, 2003) para 2.
[267] Steyn, n251 above; Hale, n248 above; *Department* for Constitutional Affairs*, ibid*, para 20
[268] Cooke, n254 above, 65; Wakeham, n263 above, 6 para 9
[269] BAILII, 'The Judicial Committee of the Privy Council Decisions' (BAILII, 2019), at http://www.bailii.org/uk/cases/UKPC/ (last visited 12/03/2019).

The JCPC/SC's Composition (Expressed as Number of Scottish Judges: Number of Non-Scottish Judges)			
2:3	**2:5**	**1:4**	**3:2**
Kinloch v *HMA*	*Macklin* v *HMA*	*O'Neill* v *HMA*	*Burns* v *HMA*
Birnie v *HMA*	*Cadder* v *HMA*	*HMA* v *P*	*HMA* v *R*
McGowan v *B*		*Ambrose* v *Harris*	*Brown* v *Stott*
Fraser v *HMA*			
Allison v *HMA*			
McInnes v *HMA*			
HMA v *Murtagh*			
McDonald v *HMA*			
Spiers v *Ruddy*			
DS v *HMA*			
Ruddy v *Procurator Fiscal*			
Holland v *HMA*			
Sinclair v *HMA*			
Clark v *Kelly*			
Dyer v *Watson*			
Millar v *Dickson*			
Montgomery v *HMA*			
AB v *HMA*			

Table 22: Number of judges trained in Scots law

Table 22 shows that in 23 out of 26 cases the majority of judges hearing the JCPC/SC case were not trained in Scots law. Generally, the JCPC/SC sits with five judges, two of whom are trained in Scots law. It is convention that the JCPC/SC sits with two Scottish judges in Scottish cases, although this is not always possible.[270] In three cases, the JCPC/SC sat with a majority of Scottish judges. In two of these, a judge from the Scottish Senators of the College of Justice sat on the bench as an acting judge. In *R*, a retired Scottish judge was used. It is unclear why a majority of Scottish judges were used in these cases. Although the powers to use retired judges or judges from the Senators of the College of Justice have not been used in a Scottish criminal case since 2008,[271] it creates future potential for some

[270] Lady Hale, 'Devolution and the Supreme Court – 20 Years On' (Scottish Public Law Group, 2018), 1 at https://www.supremecourt.uk/docs/speech-180614.pdf (last visited 01/09/2018).
[271] *Burns*, n205 above

cases to be decided with a Scottish majority.[272] However, the rarity of cases with a majority of Scottish judges suggests this will not happen often. The JCPC/SC sat with an enlarged bench of seven judges in two cases. This increased the extent to which the Scottish judges were outnumbered. Subsequently, critics of the JCPC/SC's jurisdiction are correct to suggest that it normally sits with a minority of Scottish judges although the picture is more complicated than is suggested.

5.1 Expertise

5.1.1 What Skills do SC Judges Need?

The use of a majority of non-Scottish judges raises the issue of whether the non-Scottish JCPC/SC judges have the skills needed to decide Scottish criminal devolution and compatibility issues. All JCPC/SC judges should be familiar with the ECHR and ECtHR case law since they must take this "into account."[273] Chapter 4 section 4 showed no evidence of JCPC/SC judges frequently misinterpreting the Convention.

In deciding whether Convention rights were breached, judges must assess whether the Scottish criminal process breaches the Convention. Both the English and Scottish criminal processes consist of a mixture of statute and common law[274] and use an adversarial trial system.[275] Although genuinely distinctive differences occur,[276] they do not require judges to learn a different type of legal system.[277] Rather, the judges need to learn different concepts and rules.

Judges need to understand what protection Scots law gives to the accused and how this might impact on the trial's fairness. This does not always require an extensive understanding of substantive Scots criminal law. In some cases, the position taken by

[272] Constitutional Reform Act 2005 s38
[273] Human Rights Act 1998 s2(1)
[274] Chapter 3 section 2.3 above
[275] Chapter 3 section 4.1 above
[276] Chapter 3 above
[277] Scots civil law has a greater civilian influence than is found in English law.

existing Scots law will be clear.[278] Conversely, in *HMA* v *P*,[279] *McGowan* v *B*[280] and *Birnie* v *HMA*[281] there was no Scots law on the issues being considered.

Where knowledge of Scots law is required, several factors help the non-Scottish judges. Judges are often required to learn new legal rules within a single legal system. Laws are constantly being changed by legislation and by court judgments. This makes it easier for them to quickly learn Scottish rules of criminal law, procedure and evidence that they are unfamiliar with. This should help non-Scottish judges learn aspects of Scots law which are genuinely distinctive from English law. Moreover, the JCPC/SC holds an appeal hearing where the judges receive oral arguments from counsel on the law and can ask questions if they do not understand an issue of Scots law. They have a discussion with the other judges and often collaborate with other judges when writing judgments.[282] If a judge has misunderstood Scots law, these discussions create potential for the error to be corrected by the Scottish JCPC/SC judges.

5.1.2 Errors of Law

Critics of the jurisdiction argue that JCPC/SC judges might make two types of mistake about Scots law. First, they might make a statement about Scots law which is obviously inaccurate. Accuracy is not entirely objective because different people may interpret laws in different ways when there is room for vagueness or ambiguity. Thus, for statements about Scots law to be "wrong", they need to be so inaccurate that the interpretation of Scots law cannot be reasonably defended. Moreover, the significance of errors varies depending on whether the error influenced the judge's decision and/or other judges' decisions. Second, judges might underestimate the importance of the safeguards provided by Scots law to protect the accused.[283] The case law sample was examined to establish whether either of these types of errors occurred.

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[278] *Cadder*, n195 above, at [20] (It was clear that Scots law did not recognise a right to legal advice during police questioning.)
[279] [2011] UKSC 44
[280] [2011] UKSC 54
[281] [2011] UKSC 55
[282] Paterson, *Final Judgment* (Oxford: Hart Publishing, 2013), Chapter 3
[283] McCluskey, 'Supreme Error' (2010) Edin LR 276, 280.

There was one example of a non-Scottish judge making an inaccurate statement about Scots law. In *Clark* v *Kelly*,[284] Lord Hoffmann repeatedly refers to the appeal being from the Inner House of the Court of Session. Scottish criminal appeals sent to the JCPC/SC cannot derive from this court. This shows a lack of understanding of the fact that Scotland has different appeal courts for criminal and civil cases. Since it was a misunderstanding about the history of the case, it did not influence the case's outcome.

Within the sample of cases considered here, there were no other examples of JCPC/SC judges making mistakes about Scots law. The lack of mistakes being made by the non-Scottish judges suggests that they have sufficient knowledge of the Scottish criminal process to decide devolution/compatibility issue cases and that any misunderstandings about Scots law are being corrected before the final judgment.

There is no evidence of non-Scottish judges underestimating the safeguards provided by Scots law, despite critics of the SC citing *Cadder* v *HMA*[285] as an example of this problem occurring.[286] In *Cadder,* the only non-Scottish judge to give a judgment was Lord Brown.[287] He did not expressly discuss the safeguards provided by Scots law. He noted that after *Salduz* v *Turkey,*[288] the right against self-incrimination could not be protected just by giving the accused a right to silence and by protecting the accused from threats by taping the interview.[289] This shows awareness of some safeguards provided by Scots law. Lord Hope stated that the right to silence is "absolute" and lists other safeguards such as "tape recording interviews," corroboration and the exclusion of unfairly obtained evidence.[290] Since Lord Brown read Lord Hope's judgment, he must have been aware of the importance of these safeguards in protecting the accused.[291]

Non-Scottish judges used safeguards provided by Scots law to uphold Scots law's Convention compatibility. In *Brown* v *Stott*,[292] the ability to exclude unfairly obtained

[284] *Clark*, n200 above, 12
[285] *Cadder*, n195 above
[286] McCluskey, n283 above, 270
[287] *Cadder*, n195 above, at [108]
[288] (2009) 49 EHRR 19
[289] *Cadder*, n195 above, at [108]
[290] *ibid*, at [27]
[291] *ibid*, at [108]
[292] *Brown*, n194 above, 705

evidence was used by Lords Steyn and Bingham to uphold the Convention compatibility of the Road Traffic Act 1988 s172. In *Clark* v *Kelly,*[293] Lords Bingham and Hoffmann relied on the fact that District Court Clerks were professional lawyers, bound by a code of practice to argue that the Clerk's insecurity of tenure did not violate the right to an independent and impartial tribunal.

5.1.3 Deference

Non-Scottish judges are alleged to defer to Scottish judges because they lack expertise in Scots law.[294] Their participation in decision-making can be tested by examining how often they write a judgment when compared with Scottish judges. The term "judgment" will be taken to mean a substantive analysis of issues going beyond a mere statement of agreement or disagreement with other judges. This methodology has limitations. A judge's decision not to write a judgment does not mean that they did not participate in the decision-making. As already noted, judges discuss cases with each other and often influence each other's judgments.[295] Sometimes one judge will produce a judgment for the whole court and multiple judges will influence the judgment's wording. Nonetheless, writing a separate judgment shows participation in decision-making.

[293] *Clark*, n200 above, at [5], [32]
[294] Chalmers, 'Scottish Appeals and the Proposed Supreme Court' (2004) 8(1) Edin LR 4, 8-10
[295] Paterson, n282 above, 85

Case	Judges Trained in Scots Law Giving a Judgment for the:		Judges Not Trained in Scots Law Giving a Judgment for the:	
	Majority	**Minority**	**Majority**	**Minority**
Macklin v *HMA*	2			
O'Neill v *HMA*	1			
Kinloch v *HMA*	1			
Birnie v *HMA*	2			1
McGowan v *B*	1		2	1
HMA v *P*	1		1	
Ambrose v *Harris*	1		3	1
Fraser v *HMA*	1		1	
Cadder v *HMA*	2		1	
Allison v *HMA*	2			
McInnes v *HMA*	2		1	
HMA v *Murtagh*	2		3	
Burns v *HMA*	2			
McDonald v *HMA*	2			
Spiers v *Ruddy*	2		1	
DS v *HMA*	2		2	
Ruddy v *Procurator Fiscal*	2		2	
Holland v *HMA*	2			
Sinclair v *HMA*	2			
Clark v *Kelly*	2		3	
HMA v *R*	3			2
Dyer v *Watson*	2		3	
Millar v *Dickson*	2		1	
Brown v *Stott*	3		2	
Montgomery v *HMA*	2		2	1
AB v *HMA*	2			

Table 23: Judges giving a judgment by training in Scots law.

Table 23 shows that 48 judgments were delivered by Scottish judges, while 34 were delivered by non-Scottish judges. Although Scottish judges are more likely to write a judgment, non-Scottish judges often participate in the decision-making.

If non-Scottish judges defer to the Scottish judges, they would be unwilling to dissent. Dissents show judges critically examining other judges' arguments. Table 23 shows that there were six dissents in five cases. All were by non-Scottish judges. These dissents indicate that non-Scottish judges are participating in judgments by critically examining the

decisions of their colleagues. Most dissents relate to human rights issues where non-Scottish judges could be expected to be proficient and might be more willing to contradict the Scottish judges. However, there is evidence of non-Scottish judges contradicting the Scottish judges on an issue of Scots law. In *HMA* v *R,*[296] Lords Steyn and Walker contradicted a Scottish majority of judges by arguing that the Scotland Act 1998 s57(2) and the ECtHR did not require an unreasonably delayed trial to be abandoned. However, this example relates to statutory interpretation which is a skill which is transferable between jurisdictions. There were no dissents on issues relating to Scots criminal law, evidence and procedure. Paterson found that on issues of Scots law, the non-Scottish judges are more deferential to the Scottish judges.[297] This suggests that the JCPC/SC judges may be wary of delving into issues of Scots law possibly because they feel they lack sufficient understanding of it.

5.2 Knowledge of Other UK Legal Systems

Arguments that UK-wide courts should consider the impact of the decision on all the legal systems they serve are pertinent to the JCPC/SC's jurisdiction. The transfer of the jurisdiction from the JCPC to the SC was designed to create a UK-wide court which could remove conflicts in Convention rights case law arising from different parts of the UK.[298] Devolution issues are considered part of UK law[299] because unlike in other proceedings, the JCPC/SC sits as a UK court rather than a Scottish court.[300] Conversely, compatibility issues are issues of Scots law. Although it appears that this difference arose from oversight, it may help address concerns that the SC is over-willing to harmonise Scots and English law. However, the decision to retain appeals to London when the compatibility issue jurisdiction was created in 2012 was made in order to allow the SC to take a UK-wide approach. Thus, managing differences between the different UK legal systems is an important part of the SC's intended purpose and its ability to hear devolution and compatibility issues is intended to further this purpose by creating potential for a UK-wide interpretation of Convention rights.[301] This is consistent with a unitary state as it prioritises the interpretation of

[296] *R,* n202 above, at [1], [157]
[297] Paterson, n282 above, 241
[298] Department for Constitutional Affairs, n266 above, para 20
[299] McCorkindale, McHarg and Scott, 'The Courts, Devolution and Constitutional Review' (2017) 36(2) UQLJ 289, 294-296
[300] Constitutional Reform Act 2005 s41(2)
[301] Edward, n3 above, para 4.15

constitutional law at a UK-wide level rather than at a sub-state level. This fits uncomfortably with Scottish political thinking on the purpose of devolution which sees devolution as a way for Scotland to have autonomy to take its own approach and which argues that there is a distinctively "Scottish constitutional tradition."[302] This tension between giving Scotland autonomy and taking a UK-wide approach will be returned to in section 6.

The JCPC/SC needs to be aware that a Scottish decision by a UK-wide court[303] may have implications for the other UK legal systems. Since the UK is a unitary state, lawyers will sometimes consider how the other UK legal systems deal with problems and cite case law from other parts of the UK especially when decisions on English and Scots law are made by the same judges sitting on the JCPC/HOL and the SC.[304] Chapter 4 section 3.4 showed that the similarity in approaches taken by Scotland and England for some areas of law and the similarity in the Convention rights being applied (although not always in their interpretation),[305] meant that Scottish JCPC/SC decisions in Convention rights cases sometimes created uncertainty about English law. This interconnectedness between the legal systems means there is a need to consider whether a Scottish case will impact on the other UK legal systems.

There are several ways that non-Scottish judges might provide knowledge about how the decision will affect the other UK legal systems. First, they may make the court aware of whether a Scottish case is likely to create uncertainty for English law. Second, they may use knowledge of another UK legal system to clarify how the other legal system would deal with the problem. While the English courts do not need to follow comments made about English law in a Scottish case, comments made by a judge trained in English law would be highly persuasive. Third, having knowledge about all the UK legal systems makes it easier to share ideas and regulate the level of difference between Scots and English law.

Some information about other UK legal systems may be readily accessible to Scottish judges without the help of non-Scottish judges. In modern times, case law, legislation, books and

[302] McCorkindale, McHarg and Scott, n299 above, 294-295; Lord Hope, 'Devolution and Human Rights' [1998] EHRLR 367, 372
[303] Section 2.2.1 above
[304] Chapter 2 section 2.2 above
[305] *R,* n202 above

journals are online. This helps make them more accessible to judges from other jurisdictions.[307] Scottish JCPC/SC judges are likely to have some experience of deciding criminal cases from other parts of the UK due to sitting as judges in English HOL/SC cases. These factors reduce the need for non-Scottish judges to educate the court on the other UK legal systems.

In 19 out of 26 cases, there was little evidence of non-Scottish judges providing a detailed[308] discussion of English law. In nine cases, only Scottish judges gave a judgment.[309] In ten cases, English law was either not cited or there was no attempt to show how English law might deal with the problem.[310] There was little evidence of non-Scottish judges providing knowledge of economic or social considerations in other parts of the UK.

In seven cases, a non-Scottish judge provided a detailed description of English law.[311] In six of these, the information provided was easily obtainable by a court consisting only of Scottish judges. The English approach had either been cited by the HCJ or was available in a widely published English Court of Appeal, HOL or JCPC decision.

In *Clark* v *Kelly*,[312] Lord Bingham compared the use of Clerks in the Scottish District Courts and the English Magistrate's Court. He provided a detailed discussion of the history of the Magistrate's Court. He showed that the similarities between the two approaches meant that any finding that the Scottish approach was Convention incompatible would also leave doubts about the Convention compatibility of English law. A Scottish judge could be expected to have some knowledge of the workings of the Magistrate's Court if they had experience of hearing English cases in the HOL/SC. However, it is unlikely that they could provide such a detailed account of the English Magistrate's Court without significant research.

[307] Before the digitalisation of law resources, English law was still accessible to Scottish lawyers. (Smith, 'English Influences on the Law of Scotland' (1954) 3(4) *American Journal of Comparative Law* 522, 531)
[308] The judge spent more than a paragraph discussing English law.
[309] Table 2 above
[310] Chapter 4 Section 3.1, Table 2 above
[311] *Millar*, n198 above, at [17] per Lord Bingham; *Dyer,* n213 above, at [25]; *R*, n202 above, at [15] per Lord Steyn; *Clark,* n200 above, at [1]-[2] per Lord Bingham; *McInnes*, n206 above, at [36] per Lord Brown; *Ambrose*, n196 above, at [75]-[79]; *P*, n197 above, at [30] to [33] per Lord Brown
[312] *Clark*, n200 above, at [1]-[2]

These findings indicate that the non-Scottish judges use their position to describe how other UK legal systems deal with the problem, although the information could often have been easily obtained by the Scottish judges. Moreover, the information provided by the non-Scottish judges was about English law. They have not provided information about Northern Irish law and in 12 out of 26 cases there was no Northern Irish judge sitting on the case. There is debate about whether the SC should have a Welsh judge. The SC currently has two Welsh judges, but there is no requirement that it does so and no guarantee that they will sit on Scottish criminal cases raising issues of importance to the whole of the UK.[313] This reduces the ability of the SC to have legal knowledge from throughout the UK. However, having non-Scottish judges creates potential for the Scottish judges to ask the non-Scottish judges for advice on the law in other parts of the UK.

5.3 Implications for the Legitimacy of the JCPC/SC's Composition

Non-Scottish judges can gain legitimacy from their expertise in ECtHR jurisprudence, their skills at interpreting case law and legislation and their ability to mostly apply Scots law correctly. The mistake in *Clark* v *Kelly*[314] showed a fundamental misunderstanding of the Scottish criminal process which if repeated might suggest that non-Scottish judges lacked the expertise to legitimately decide Scottish criminal cases. However, the mistake did not alter the outcome of the case, it was made by one judge and was not repeated. This suggests that the mistake is not representative of the expertise of non-Scottish judges and does not significantly detract from the JCPC/SC's decision-making. When the JCPC/SC's decision-making is considered as a whole, there is a pattern of issues of Scots criminal law, procedure and evidence being applied accurately and little evidence to support claims of a lack of legitimacy on expertise grounds.

The issue of whether the JCPC/SC needs to sit with a majority of judges trained in Scots law to be legitimate can be considered from a UK or Scottish perspective. From a UK perspective, having a minority of Scottish judges is a characteristic of the JCPC/SC as generalist multi-jurisdictional courts. Judges are expected to deal with a range of legal issues from different jurisdictions. Although they are expected to be knowledgeable enough to decide cases without frequently making errors of law, they are not expected to be

[313] Lady Hale, 'Devolution and the Supreme Court – 20 Years On' (Scottish Public Law Group, 2018), 1 at https://www.supremecourt.uk/docs/speech-180614.pdf (last visited 18/01/2019).
[314] *Clark*, n200 above, at [1]-[2]

experts on every legal issue. Nonetheless, during the appointment of SC judges there is a duty on the Judicial Appointments Commission to "ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom."[315] Since the majority of cases reaching the SC are from England,[316] an argument can be made for prioritising expertise in English law. From this perspective having a minority of Scottish judges prioritises the knowledge most frequently needed by SC judges.

From a Scottish perspective, prioritising knowledge of English law is more problematic. It is accepted that there is a need for non-Scottish judges to enable consideration of the interrelationship between the UK legal systems. However, putting them in the majority prioritises knowledge of non-Scottish law in a case which is about the compatibility of Scots law with the ECHR. In these cases, knowledge of Scots law is more important than knowledge of the other UK legal systems. It is difficult to answer the legal issue before the JCPC/SC without some knowledge of what position Scots law has taken. The case could be answered without knowledge of English law, although this would risk the decision having unintended consequences for English law.

Despite the problems with the JCPC/SC sitting with a minority of Scottish judges, it cannot be said that this approach is illegitimate. Since the JCPC/SC judges mostly applied Scots law correctly and showed proficiency in the other areas of law required to decide devolution/compatibility issues, the JCPC/SC should be considered to gain legitimacy from its expertise despite having a minority of Scottish judges.

There are no sociological studies about public perceptions of the JCPC/SC's composition. It seems unlikely that many non-lawyers will be aware that the jurisdiction exists. Nonetheless, having a minority of Scottish judges gives critics of the jurisdiction fertile ground to question the legitimacy of the court.[317] It has made it easy to portray the JCPC/SC as a foreign court which has little knowledge about Scotland.[318] To the public, it might seem odd that Scottish cases are decided by courts where Scottish judges are in the minority[319]

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[315] Constitutional Reform Act 2005 s27(8)
[316] Anonymous, 'Decided Cases' (Supreme Court, 2017), at https://www.supremecourt.uk/decided-cases/index.html (last visited 18/01/2019).
[317] Currie, 'MacAskill in New Attack on Supreme Court Rulings' (Herald, 2011), at https://www.heraldscotland.com/news/13030822.MacAskill_in_new_attack_on_Supreme_Court_rulings/ (last visited 18/01/2019).
[318] *ibid*
[319] Scottish Parliament Official Report 27 October 2011 col 2888-2889 George Adam

especially since an English lawyer cannot practise Scots law without retraining and given that Scots law is distinctive from English law. They are unlikely to appreciate the nuances of how the jurisdiction works in practice. They may not realise that the non-Scottish judges are mostly proficient in deciding Scottish cases and assume that it is difficult for non-Scottish judges to apply Scots law correctly. If this view is widely held, it would reduce the sociological legitimacy of the court. However, sociological research is needed to reach conclusions on this issue.

5.4 Comparison with the HCJ

The HCJ normally sits with three judges who are all trained in Scots law.[320] The JCPC/SC usually sits with five judges but normally has fewer judges trained in Scots law.[321] Having more judges hearing each case might benefit the JCPC/SC. Each judge has their own experience and ideas that they can bring to the decision-making. This might increase the quality of the decision produced. However, the quality of decision-making is subjective. Different people find different reasoning more persuasive. It is difficult to measure and varies between different judges. Moreover, even if it were proven that better decisions arise from larger courts, the HCJ can sit with an enlarged bench and can benefit from the advantages of a larger court.[322]

Since the JCPC/SC's jurisdiction often operates as a second tier of appeal, this creates potential for arguments to be refined during the appeal process. Thus, the JCPC/SC may benefit from having the trial court and/or HCJ's judgment on the issue. However, six out of 26 cases were references, where the JCPC/SC heard the case without the benefit of previous argument in the lower courts about the issue.[323] Nonetheless, it would be expected that if counsel had presented their argument to another court, they would use this opportunity to consider the issues raised by the judge(s) and opposing counsel to refine their argument for the JCPC/SC.

JCPC/SC judges' achievement of becoming judges in one of the UK's highest courts suggests that they perform their job well. However, the skill and experience of HCJ judges should not

[320] Criminal Procedure (Scotland) Act 1995 s103
[321] Table 2 above
[322] Criminal Procedure (Scotland) Act 1995 s1(2)
[323] Table 21 above

be underestimated.[324] Of the judges most likely to hear appeals in the HCJ (those who sit in the Inner House) each has over ten years' experience as a judge.[325] Before this, they must have been a Sheriff, Sheriff Principal or a solicitor or advocate.[326] Additionally, HCJ judges can be recruited as acting or full-time SC judges.[327] Although this depends on their ability, it shows that some HCJ judges are considered to have a similar level of skill to a JCPC/SC judge.

The HCJ only sits with Scottish-trained judges. It would be expected that Scottish-trained judges would be more confident in ruling on issues of the Scottish criminal process. However, this advantage should not be overstated. There was little evidence of non-Scottish JCPC/SC judges not understanding Scots law.

It is easier for a UK-wide court to consider the interaction between UK legal systems than it is for the HCJ which only hears Scottish cases. Nonetheless, the HCJ often considers English cases.[328] Although the HCJ can harmonise or differentiate Scots and English law by adopting or refusing to adopt the English approach in Scotland, unlike the JCPC/SC it cannot alter the position taken by English law.

Overall, the cases analysed do not support claims that the JCPC/SC's use of non-Scottish judges means that the final appeals for Scottish criminal devolution and compatibility issues should be decided finally by the HCJ. One error – and a small one at that - about Scots law in 26 cases decided by non-Scottish judges sitting in the JCPC/SC does not suggest that there is a pressing expertise need to return final decision-making to the HCJ.

6 Human Rights

The debate about how Convention rights should be enforced in the UK centres on a conflict between the desire to take a UK-wide approach and the desire to accommodate Scottish ideas about how Convention rights should be protected. The UK has recognised differences

[324] Anonymous, 'Consultation Response from Anonymous' (Scottish Government, 2011), at https://www.gov.scot/Resource/Doc/254431/0120832.doc (last visited 24/08/2018).
[325] Anonymous, 'Senators of the College of Justice' (Judiciary of Scotland, Undated), at http://www.scotland-judiciary.org.uk/34/0/Senators-of-the-College-of-Justice (last visited 12/07/2017).
[326] Judiciary and Courts (Scotland) Act 2008 s20A
[327] Constitutional Reform Act 2005 s38
[328] Smith, n306 above, 531

between parts of the UK by devolving some power to Scotland, Wales and Northern Ireland.[329] The devolution settlements are asymmetrical allowing each devolved settlement to be tailored to the needs of the relevant part of the UK.[330] However, restrictions are imposed on the powers of these Parliaments[331] to ensure that "matters in which the UK as a whole has an interest should continue to be the responsibility of the UK Parliament."[332] Moreover, there has been a move towards a more harmonised approach to devolution by moving the Welsh Assembly to a reserved model of powers[333] and increasing similarity in how the devolution legislation for each legislature has been interpreted by the SC.[334] Thus, the UK seeks to leave open the ability for taking a UK-wide approach while seeking to accommodate differences between parts of the UK by granting them a degree of autonomy. The SC plays an important role in defining the boundaries between these aims by determining what actions are within devolved competence and by deciding whether a UK-wide approach should be taken towards Convention rights compliance.[335]

6.1 The UK's International Obligations

A common argument for taking a UK-wide approach is to ensure that the UK meets its international obligations.[336] The main international obligations enforced by the JCPC/SC through devolution and compatibility issues are the ECHR[337] and for now EU law.[338]

The ECHR requires states to meet minimum human rights standards.[339] Thus, there is no obligation on the JCPC/SC to reduce, as it has done in Scottish criminal cases,[340] Convention rights protection when Scots law has gone beyond the Convention. The ECtHR held in *Handyside* v *UK* that "the Convention leaves to each Contracting State … the task of

[329] Scotland Act 1998; Northern Ireland Act 1998; Wales Act 2017
[330] *ibid*
[331] Lady Hale, n313 above, 1-3
[332] *Imperial Tobacco* v *Lord Advocate* [2012] UKSC 61, at [29]
[333] Wales Act 2017 s3
[334] McCorkindale, McHarg and Scott, n299 above, section C; Lord Reed, 'Scotland's Devolved Settlement and the Role of the Courts' (Supreme Court, 2019), 18 at https://www.supremecourt.uk/docs/speech-190227.pdf (last visited 11/03/2019).
[335] Chapter 4 section 4 3.3.4 above
[336] *Imperial Tobacco* v *Lord Advocate* [2012] UKSC 61; 29 Expert Group, n3 above, para 4.10.
[337] Enforcing ECHR rights may help the UK meet other international human rights obligations.
[338] This may be modified by the European Union (Withdrawal) Act 2018 s12
[339] ECHR Article 53
[340] Chapter 4 section 4.3.3 above

securing the rights and freedoms it enshrines."[341] Thus, states can choose how to meet the required minimum standard. The Convention does not prevent the JCPC/SC from allowing Scots law to protect rights in its own way where it has met the minimum standard.

Although the current UK Government is sceptical about the ECHR,[342] whilst it is a signatory to the Convention, it is normally[343] in its interests to meet the minimum standards required by the ECtHR; otherwise it risks a successful human rights challenge. This may require the UK to pay damages and if it happens too frequently, harm the UK's international reputation.

Without some minimum standard, it becomes difficult to define an acceptable level of human rights protection. A state could claim to protect the right to a fair trial by recognising the right to an independent and impartial tribunal while denying other widely recognised rights such as the right against self-incrimination, legal advice and the right of the accused to access the evidence being used against them. These restrictions would render meaningless claims that the trial is fair since more than an impartial tribunal is needed to protect the accused. Complying with the ECtHR's minimum standard shows that the UK has taken meaningful measures to address the accused's vulnerability during the trial and protected the accused to an internationally recognised standard.

Concerns have been raised that having different levels of Convention rights protection in different parts of the UK might violate the right against discrimination by treating people in different parts of the UK differently.[344] Article 14 requires that Convention rights:

> "Shall be secured without discrimination on any ground such as … national or social origin, [or] association with a national minority."

A decision to give more rights to the accused in England than in Scotland would put Scots, as a national minority group within the UK, at a disadvantage. A denial of a right in Scotland is more likely to disadvantage those living in Scotland (who are mostly Scots) because they

[341] *Handyside* v *UK* (1979-80) 1 EHRR 737, at [48]
[342] Chapter 1 above section 3
[343] UK courts sometimes decide not to follow ECtHR judgments where they consider that the ECtHR has misunderstood domestic law in the hope of fostering a dialogue with the ECtHR and getting the adverse decision overturned. (*R* v *Horncastle* [2009] UKSC 14)
[344] Jones, 'Splendid Isolation: Scottish Criminal Law, The Privy Council and The Supreme Court' [2004] Crim LR 96, 100

are more likely to commit a crime within the jurisdiction of the Scottish courts than someone who does not live in Scotland. However, this overstates the importance of nationality in deciding the accused's rights. If Scots law provided weaker Convention rights protection than English law, all people who were tried in Scotland, whether resident there or not, would normally be denied the right. Accordingly, it is the jurisdiction in which the accused is prosecuted which determines what safeguards they receive, although where they are from indirectly affects this. Thus, having different human rights protection in different parts of the UK will not normally[345] violate Article 14, where the difference arises because one of the UK legal systems has taken a different approach.[346]

6.2 Similar Treatment

It has been suggested that a UK-wide approach would protect Convention rights "in a consistent manner" for everyone in the UK.[347] Although minimum standards of human rights are applied between Council of Europe members, they can decide how to meet these rights and whether to go beyond them.[348] Council of Europe legal systems include common law, civilian and mixed legal systems[349] and as Chapter 3 section 4 showed there are several ways to balance the needs for due process and crime control. Thus, there can be little expectation that each member state will protect Convention rights to the exact same level beyond normally meeting the abstract minimum standard defined by the ECtHR. However, the Scottish and English legal systems, although distinctive,[350] are interlinked because they share a common top court and legislature. This may increase expectations among people in the UK that each part of the UK should protect Convention rights to a similar level. Since accused in the UK have similar vulnerabilities during the criminal trial, it might seem unfair for the SC or the UK Parliament to give a safeguard to accused in one part of the UK, but despite having the ability to apply the right throughout the UK, deny it to the other parts of the UK.

[345] Cf. *Carson* v *UK* (2010) 51 EHRR 1
[346] *Magee* v *UK* (2001) 31 EHRR 35, at [50]
[347] Edward, n336 above, para 4.15
[348] Section 6.1 above
[349] For a description of these terms see Chapter 2 section 2.1.
[350] *ibid*

However, UK constitutional law leaves open the possibility of different parts of the UK protecting Convention rights to different degrees. The devolved jurisdictions have additional enforcement mechanisms for Convention rights to those found under the Human Rights Act 1998.[351] Moreover, the Human Rights Act 1998 was envisaged as providing a basic standard of rights protection for the UK which could be built upon by later human rights documents. It was expected that a Northern Irish Bill of Rights would be created to provide rights not recognised by the ECHR, but which were important to a post-conflict society.[352] Nothing in the devolution legislation for Scotland prevents the Scottish Parliament from going beyond the Convention provided it remains within its legislative competence. The Scottish Parliament created a Scottish Human Rights Commission despite this not being required by the Human Rights Act 1998. Moreover, the Scottish Government is considering expanding human rights protection in Scotland to include rights not provided for under the Human Rights Act 1998.[353] For the JCPC/SC to reduce Convention rights protection when Scots law has gone beyond the Convention risks not reflecting this constitutional reality.

There is debate about whether there is a universal moral standard of human rights which can and should be applied to all legal systems and whether any desire for universal rights must be aspirational rather than something which can be quickly achieved.[354] For some, morality is linked to local culture, religion and politics. Accordingly, they advocate a more localised approach to the enforcement of human rights and sometimes argue that it is not possible to have a universal set of moral human rights standards.[355] It is beyond the scope

[351] Scotland Act 1998 schedule 6
[352] Harvey, 'Northern Ireland and a Bill of Rights for the United Kingdom' (British Academy for the Humanities and Social Science, 2016), 8 at https://pure.qub.ac.uk/portal/files/101686684/Harvey_NI_BOR_178.pdf (last visited 18/01/2019).
[353] Scottish Commission for Human Rights Act 2006; Miller, 'Recommendations For A New Human Rights Framework To Improve People's Lives' (First Minister's Advisory Group on Human Rights Leadership, 2018), at http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf (last visited 10/03/2019).
[354] n171 above
[355] Lord Hoffmann, 'The Universality of Human Rights' (Judicial Studies Board Annual Lecture, 2009), at https://www.judiciary.gov.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf (last visited 21/01/2019); Ingiyimbere, *Domesticating Human Rights* (Cham: Springer, 2017), section 2.4; Otto, 'Rethinking the Universality of Human Rights Law' (1997) 29(29) Colum Hum Rts L Rev 1; Preis, 'Human Rights As Cultural Practice: An Anthropological Critique' (1996) 18(2) *Human Rights*

of this chapter to discuss these issues. In the JCPC/SC debate, it is accepted that the whole of the UK should apply standards set down in the ECHR.[356] There is no claim that differences between the parts of the UK are so severe that Scotland cannot apply Western conceptions of human rights. Different parts of the UK share aspects of their history and culture and social problems such as alcohol abuse.[357]

Nonetheless, Scotland has its own institutions including the legal system and devolved Parliament, identity, culture and history.[358] This creates potential for social and economic problems to arise in Scotland that do not affect the rest of the UK or affect it less severely. This can impact on the ability of each jurisdiction to introduce Convention-compatible legislation to restrict the rights. Rights such as freedom of thought, expression and assembly under the ECHR can be restricted.[359] It would be more difficult to argue in England than it would be in Scotland that such a restriction is necessary to prevent sectarianism because the problem is less prevalent in England. Thus, taking a UK-wide approach to human rights risks not considering jurisdictional differences which might under the Convention allow different parts of the UK to restrict rights in different ways to respond to isolated problems.

Chapter 3 showed that there are different ways to balance the needs for crime control and due process. Given the importance of both to the criminal process, it becomes difficult to conclusively say that one part of the UK has chosen a better solution to a problem by favouring one of these needs. A person favouring crime control might favour the approach taken by a jurisdiction prioritising this, while a person favouring due process might argue for a due process based solution. An excessive willingness to harmonise Scots and English law in order to treat all UK citizens equally, risks the JCPC/SC making a value judgment that it can balance interests better than Scotland's democratically elected legislatures[360] and the

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Quarterly 286; Pollis, 'Cultural Relativism Revisited' (1996) 18(2) *Human Rights Quarterly* 316, 318; Steiner, Alston and Goodman, *International Human Rights in Context Law Politics and Morals* (Oxford: Oxford University Press, 3rd ed, 2007), Chapter 7; Tesón, 'International Human Rights and Cultural Relativism' (1985) 25(4) Va J Int'l L 869

[356] Chapter 1 above section 3

[357] NHS, 'Statistics on Alcohol, England, 2018' (NHS, 2018), at http://digital.nhs.uk/pubs/alcohol18 (last visited 12/10/2018); *Scotch Whisky Association,* n143 above, at [178]

[358] Chapter 2 above section 3

[359] European Convention on Human Rights 1950 Articles 9-12

[360] *A* v *Secretary of State for Health* [2017] UKSC 41

HCJ. Legislators have a greater ability than courts to engage with the public and to commission research on the potential impact of changing the crime control-due process balance. HCJ judges deal with Scottish criminal trials daily and this may give them a greater awareness of social problems which lead to crime and of how the existing crime control-due process balance protects the accused.[361] Top courts such as the JCPC/SC often rely on the lower courts for such information.[362]

However, there is a danger that arguments for localism could be used to justify weakening Convention rights protection. The need to protect local sensitivities might be used to argue for part of the UK opting out of or not applying fully, certain Convention rights, or for giving the rights a localised meaning which undermines their ability to protect the accused. However, it was argued that each part of the UK must meet a minimum standard of Convention rights protection. Subsequently, under the approach argued for here, local sensitivities cannot justify[363] failing to meet the minimum standard required.

6.3 The Legitimacy of the JCPC/SC's Approach to Human Rights

The next section considers which institution should have the final say on how on Convention rights are interpreted and enforced. There is a debate among judges and academics about the extent to which the legislature and the courts should have the final say on the enforcement of human rights.[364] For the devolution and compatibility issues debate, the main area of contention is whether the HCJ or the JCPC/SC should have the final say on the enforcement of Convention rights.

6.3.1 Minimum Standard

The ability of the JCPC/SC and HCJ to meet the minimum standard of Convention rights protection will be considered first. As Chapter 4 section 4.3 showed, the JCPC/SC altered

[361] *Scotch Whisky Association* v *Lord Advocate,* n143 above, at [178]
[362] Lady Hale, n313 above, 6
[363] Local sensitivities could be used to avoid applying the same standard as the rest of the UK if the rest of the UK went beyond the Convention.
[364] Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65(3) *Cambridge Law Review* 671; Keene, 'Principles of Deference Under the Human Rights Act' in Fenwick, Phillipson and Masterman, *Judicial Reasoning Under The Human Rights Act* (Cambridge: Cambridge University Press, 2007), 206-212; Lord Hoffmann, 'Separation of Powers' (2001) 7(3) Jud Rev 137; Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346.

existing Scots law set down by the HCJ in ten cases to ensure that Scots law complied with the minimum standard. These findings must be treated cautiously. Large numbers of devolution and compatibility issues cases were not sent to the JCPC/SC and these HCJ cases are not covered in the sample. The HCJ and Court of Session (which uses the same judges as the HCJ) played an important role in identifying several potentially Convention-incompatible aspects of Scots law.[365] The HCJ cannot be expected to interpret the minimum standard required by the Convention correctly in every case. Nonetheless, the cases where the HCJ did not meet this standard were problematic. Several dealt with issues with potential to affect large numbers of cases including legal advice during police questioning and the prosecution duty to disclose evidence.[366] Thus, without the JCPC/SC correcting Scots law there was a danger of large numbers of cases being taken to the ECtHR.

The HCJ might have corrected some of these errors without the JCPC/SC's help, either by using a later case to overturn the precedent or by the original case being referred back to the HCJ through the Scottish Criminal Cases Review Commission. However, several cases dealt with longstanding approaches taken by Scots law where the HCJ had several opportunities to ensure that Scots law met the minimum standard but failed to do this.[367] Moreover, it is rare for cases from the Scottish Criminal Cases Review Commission to be referred to the HCJ and result in the appeal being allowed.[368] These factors point towards a need for an additional tier of appeal beyond the HCJ.

The JCPC/SC's ability to mirror the ECtHR and protect the accused's Convention rights to at least the minimum standard is a factor suggesting that it is an appropriate court to provide the second tier of appeal. Courts need to perform the functions assigned to them. It becomes difficult to justify spending money, time and using staff when the main function of the jurisdiction is not being fulfilled. The fact that the SC normally mirrors the ECtHR and rarely misinterprets the Convention increases the court's legitimacy. It allows the court to

[365] *Starrs* v *Ruxton* 2000 JC 208; *Cameron* v *Cottam* [2012] HCJAC 19; *Webster* v *Dominick* 2005 1 JC 65

[366] *Cadder,* n195 above*; Fraser,* n199 above*; AB,* n215 above*; Sinclair*, n209 above*; Holland*, n211 above. See discussion in Chapter 4 sections 3.1, 3.2, 4.2.1 and 4.3.1.1 above.

[367] Chapter 4 section 4.3.1 above

[368] Around 3% of the cases dealt with by the Scottish Criminal Cases Review Commission result in the conviction being overturned. (Anonymous, 'Case Statistics' (Scottish Criminal Cases Review Commission, 2018), at http:/www.sccrc.co.uk/case-statistics (last visited 19/09/2018).

fulfil its function of ensuring that public authorities, the Scottish Government and the Scottish Parliament comply with the ECHR.[369] The legitimacy of the jurisdiction is further enhanced when the JCPC/SC ensures that the trial is fair because it helps reduce the vulnerability of the accused during the criminal trial and helps protect innocent people from conviction.[370] Therefore, it helps protect important due process needs.

Sociologically, it is unclear whether the public in the UK and Scotland consider the protection of Convention rights to increase legitimacy. There is increasing scepticism about human rights especially at a UK-wide level.[371] Thus, the JCPC/SC's jurisdiction, which has increased the rights of people accused of murder[372] and sexual offences,[373] may suffer a sociological decrease in its legitimacy from protecting Convention rights. However, a 2017 study found that many Scots consider that "human rights are relevant to people in everyday life" and 52% would be worried if Convention rights protection was reduced.[374] Thus, in Scotland there may be a sociological legitimacy benefit from enhanced protection of Convention rights.

6.3.2 Autonomy

Giving Scots law autonomy to choose its own interpretation of Convention rights is important to legitimacy. This autonomy could be an ability to go beyond what the ECHR requires or an ability to interpret the Convention in a new way or an ability to take a different approach to English law. The creation of the Human Rights Act 1998 and proposals for a UK-wide Bill of Rights were projects designed[375] to increase British national identity by encouraging British people to feel ownership of their human rights.[376] Although the JCPC/SC

[369] Expert Group, n4 above, para 4.15
[370] Section 2.3.2.5 above
[371] Chapter 1 section 3 above
[372] *Fraser*, n199 above
[373] *AB*, n125 above and *DS*, n207 above
[374] Anonymous, 'YouGov/ Scottish Human Rights Commission (SHRC) Survey Results' (YouGov, 2017), 5, 11 at https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/lshdujy9nw/SHRCResults_HumanRights_Scotland_170418_client_w.pdf (last visited 19/01/2019).
[375] This aim was not achieved because there has been significant hostility to human rights in the media and politics at a UK level. A 2012 study found that 50% of those surveyed were not sure how the Human Rights Act 1998 benefits them and that many people did not understand how the Human Rights Act 1998 works. (Joint Committee on Human Rights, *Enforcing Human Rights* (HC 669 HL Paper 171, 2018), paras 137-148)
[376] Harvey, 'Taking the Next Step? Achieving Another Bill of Rights' [2011] EHRLR 24, 26

does not describe Convention rights in these terms, its requirement that Scots law normally mirror the Convention, even if this means reducing Convention rights protection, and its harmonisation of the human rights approach in the UK, shows a tendency to create British or UK-wide interpretations of rights. The JCPC/SC risks not engaging with devolved parts of the UK because there has at times been an unwillingness to recognise a distinctively Scottish approach to Convention rights. As the political row after *Cadder* v *HMA*[377] showed, a perceived[378] unwillingness to recognise the autonomy of Scots law to take its own approach to protecting the accused can lead to significant tensions between the Scottish Government on one hand and the SC and UK Government on the other hand. It is unclear what effect this had on public opinion about the JCPC/SC's jurisdiction. Occurring at a time when Scottish independence was starting to be debated, it might be expected that the *Cadder* row would cause arguments about Scotland not having enough autonomy in the UK to resonate with some of the public. This is especially the case since devolution was designed to increase the autonomy of Scotland, and by extension Scots law, to take its own approach. Thus, an unwillingness to give Scots law autonomy to develop its own approach to Convention rights is a factor with potential to impact negatively on the sociological legitimacy of the JCPC/SC's jurisdiction.

This need for autonomy must be balanced with a need to ensure that Scots law can borrow ideas from other jurisdictions. As Chapter 2 section 6.1 showed, an isolationist approach risks missing the opportunity to borrow ideas from other legal systems, which if carefully imported into Scots law might benefit it. Comparative law also allows critical scrutiny of Scots law by enabling judges to consider how well Scots law protects the accused when compared with other jurisdictions.

7 Accountability

The accountability mechanisms adopted by the JCPC, SC and HCJ differ. The SC is more accountable than the JCPC and the HCJ. However, as will be shown the HCJ could adopt many of the accountability mechanisms adopted by the SC.

[377] *Cadder*, n195 above
[378] It was argued that the SC was correct to hold that the Scottish approach of denying legal advice during police questioning but providing other safeguards was incompatible with Article 6 ECHR. (Chapter 4 section 4.2.1.2 above)

The SC has taken several steps to increase the accountability of its decisions. First, people can attend the SC hearings in person. However, for people in Scotland this normally[379] involves travelling to London which is time-consuming and expensive. Conversely, HCJ appeals are heard in Edinburgh which is easier for Scots to attend. This means people can follow the legal debate in the case, but only if they can physically attend. However, unlike the HCJ, SC hearings are livestreamed and recordings are available online.[380] Livestreaming carries risks such as the disruption of proceedings, lawyers playing to the cameras and confidential details being revealed about parties involved in the case.[381] Nevertheless, there is no evidence of livestreaming causing these problems for the SC and the SC President can prevent filming if it would hinder the "administration of justice."[382]

Livestreaming increases informal content accountability by allowing academics, the media and the public to appreciate the legal issues and arguments being made and to debate them. This gives SC judges an incentive to produce well-reasoned judgments. It increases the SC's transparency. People can see how cases are argued and judgments delivered. This may increase trust in the court. However, for people with no legal training, the proceedings may be difficult to follow where they involve complex issues of law and it may take several days of legal debate to cover the issues. This is unavoidable. The SC exists to decide complex issues of law which are difficult to deal with in a short session and require nuanced legal arguments. The SC makes it easier for people without legal training to understand what each case is about by producing summaries of the cases being heard each day and summaries of the SC's judgments.[383] For legal academics, the complexity of the law is less problematic. Being able to appreciate how the case was argued may help them understand

[379] In 2017 the SC sat in Edinburgh: Anonymous, 'Supreme Court to Sit in Scotland' (Supreme Court, 2017), at https://www.supremecourt.uk/news/supreme-court-to-sit-in-scotland.html (last visited 19/01/2019).
[380] Anonymous, 'Video on Demand' (Supreme Court, Undated), at https://www.supremecourt.uk/watch/video-on-demand.html (last visited 19/01/2019); Anonymous, 'Supreme Court Live' (Supreme Court, Undated), at https://www.supremecourt.uk/live/court-01.html (last visited 19/01/2019).
[381] Lady Dorrian, 'Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and Use of Live Text-Based Communications From Court' (Judiciary of Scotland, 2015), para 5.1.2 at http://www.scotland-judiciary.org.uk/Upload/Documents/MediareviewreportbyLadyDorrianJanuary2015.doc (last visited 19/01/2019).
[382] Practice Direction 8 para 8.17.1
[383] Cornes, 'A Constitutional Disaster in the Making? The Communications Challenge Facing the United Kingdom's Supreme Court' [2013] PL 266, 276

why the court reached its conclusion and give additional depth to their legal writing. This makes it easier for them to fulfil their role of highlighting defects in the judges' reasoning and suggesting ways that the law could be reformed.

The SC uses Twitter and e-mail updates to inform people of upcoming hearings and judgments.[384] Its website lists upcoming cases and provides a description of the issues raised by the case.[385] This may increase awareness of what the SC is doing. The use of popular social media platforms may help the SC engage with non-lawyers who want to learn about the SC.[386] Thus, the SC has a wide range of mechanisms to increase its accountability by enabling the media, the public and academics to provide content accountability of decisions.

There is widespread reporting of SC cases in the media. However, the mainstream media are often only interested in cases which raise interesting human stories or issues causing political controversy.[387] This means they will not cover every SC case in detail. Academic blogs and journals help fill this gap in media coverage, but these appeal to fewer people and journals may be difficult to access.[388] Relations between the SC and the media require a balancing act. The SC wants the media to inform people about SC judgments and it wants to influence what the media publishes. On the other hand, the SC cannot compromise its own neutrality and needs to respect the fact that the media have their own agenda and may criticise decisions even if they are legally sound.[389] The SC manages this balance well. Its communications team informs the media about upcoming cases, deals with enquires and monitors press coverage. It influences the media by asking journalists to correct errors, correcting misconceptions about the court in annual reports and by holding press

[384] UK Supreme Court, 'UK Supreme Court' (Twitter, 2011), at https://twitter.com/uksupremecourt (last visited 19/01/2019).
[385] Anonymous, 'Decided Cases' (Supreme Court, 2017), at https://www.supremecourt.uk/decided-cases/index.html (last visited 19/01/2019); Anonymous, 'Current Cases' (Supreme Court, 2017), at https://www.supremecourt.uk/current-cases/index.html (last visited 19/01/2019).
[386] UK Supreme Court, 'UK Supreme Court' (YouTube, 2012), at https://www.youtube.com/user/UKSupremeCourt (last visited 19/01/2019); UK Supreme Court, 'UK Supreme Court' (Instagram, 2018), at https://www.instagram.com/uksupremecourt/ (last visited 19/01/2019).
[387] Cornes, n383 above, 288
[388] Tench et al, 'UK Supreme Court Blog' (UK Supreme Court Blog, 2018), at http://ukscblog.com/ (last visited 19/01/2019).
[389] Cornes, n383 above, 276-277

conferences. It uses these communications to clarify the SC's role, but avoids directly responding to criticism of decisions and risking its neutrality.[390]

Additionally, as Chapter 4 section 4.3 showed, the JCPC/SC is good at enforcing content accountability by correcting the decisions of lower courts when they fall below the minimum standard required by the Convention. Although pertaining more to the legitimacy of the SC than its devolution and compatibility issue jurisdiction, the SC ensures explanatory accountability through annual reporting.[391]

Conversely, the JCPC was less effective at ensuring accountability.[392] Like the SC, it is a final appeal court and is not formally accountable to another court for the content of its decisions. Although the public could attend JCPC hearings in Downing Street,[393] proceedings were not broadcast, making it difficult for people to follow them and reducing the transparency of the court process. The JCPC did not engage with social media because social media use was less prevalent at the time when it heard devolution issues. This made it difficult for people to engage with the court and be aware of its decisions. This is problematic for a court which is relatively obscure and until devolution decided few cases from Scotland. However, at the time when the JCPC heard devolution issues, UK courts placed less emphasis on engagement with the press than the SC does in modern times.[394] Accountability for courts is an issue which is still new. Ideas adopted by the SC of livestreaming cases, engaging with social media and making an extensive effort to engage with the press were "novel" in the UK.[395] The time when the JCPC heard devolution issue cases was one where the transparency of the court system was being given increasing importance, but judicial accountability was still lacking. Thus, the JCPC's lack of accountability is best seen as a sign of the times rather than something which at the time was illegitimate.

[390] Cornes, n383 above, 285
[391] Lady Hale, *The Supreme Court Annual Report and Accounts 2017–2018* (HC 1032, 2018). For discussion of reporting see Cornes, n383 above, 277-278.
[392] Since 2009, the JCPC has adopted the same accountability mechanisms as the SC.
[393] Le Sueur, n22 above, 6
[394] Cornes, n383 above, 291
[395] Cornes *ibid*, 291

The HCJ has fewer accountability mechanisms than the SC although it could adopt some of the accountability mechanisms used by the SC. It was rare for HCJ decisions to be recorded for media use[396] or to be livestreamed.[397] However, in 2018 the Judicial Office for Scotland issued new guidance on the broadcasting of HCJ proceedings. The guidance states that "the guiding principle is that broadcast of court proceedings is in the interests of open justice and for the information and education of the public."[398] There are some barriers to introducing livestreaming for the HCJ. The HCJ is both a trial court and an appeal court. Livestreaming trials raises problems that do not arise in appeal hearings.[399] Thus, the livestreaming of HCJ proceedings is only allowed in appeal and sentencing proceedings[400] provided that safeguards are in place to ensure that it does not interfere with the "interests of justice."[401] The guidance allows the recording of parts of some criminal trials in the HCJ but not their livestreaming.[402] However, livestreaming will only be used where there is a "substantial level of public interest" in the case.[403] There are no plans to livestream all appeal hearing cases like the SC does, even though the SC's experience shows that it would be possible to normally stream HCJ appeals without problems occurring.

Upcoming and decided cases are listed on the Scottish Courts website. For upcoming cases, there is no information about what the case is about. For decided cases, this information can only be obtained by reading the judgment.[404] Moreover, unlike the SC, only some

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[396] The trial may be recorded for the use of the court service if there is an appeal.
[397] Holt, 'The Murder Trial' (Channel 4, 2013), at http://www.channel4.com/info/press/programme-information/murder-trial-w-t (last visited 26/09/2018) (recorded murder trial); Anonymous, 'High Court Allows Sentencing of Suzanne Pilley's Killer David Gilroy to Be Filmed - Video' (Guardian, 2012), at https://www.theguardian.com/law/video/2012/apr/18/high-court-sentencing-killer-filmed-video (last visited 26/09/2018) (live sentencing broadcast)
[398] Protocol on Recording and Broadcasting of Proceedings in the High Court of Justiciary and the Court of Session, and the Use of Live Text Based Communications from Court 2018 para 1.2
[399] Lady Dorrian, n381 above, para 5.2.1
[400] Protocol on Recording and Broadcasting of Proceedings in the High Court of Justiciary and the Court of Session, and the Use of Live Text Based Communications from Court 2018 paras 2.1 and 3.1
[401] *ibid* para 2.4
[402] *ibid* para 4.1
[403] *ibid* para 2.1
[404] Anonymous, 'Criminal Appeals' (Scottish Courts and Tribunals, 2018), at https://www.scotcourts.gov.uk/current-business/criminal-appeals/high-court (last visited 27/09/2018); Anonymous, 'High Court Opinions' (Scottish Courts and Tribunals, 2018), at https://www.scotcourts.gov.uk/search-judgments/high-court (last visited 27/09/2018). Summaries of some cases can be found at Anonymous, 'Summaries of Court Opinions' (Judiciary of Scotland, 2018), at http://www.scotland-judiciary.org.uk/9/0/2/Summaries-of-Court-Opinions (last visited 27/09/2018).

judgments are published on the Scottish Courts website. The ability to know what the HCJ is doing is hindered by not having its own social media accounts[405] and the lack of its own website. This reduces the ability of the HCJ to educate the public about what it does and makes it more difficult for the public, academics and the media to find out if there are any interesting cases and fulfil their differing informal content accountability roles in discussing and debating them. However, HCJ decisions are often discussed by the media and academics. Moreover, the experience of the SC shows that it is possible for an appeal court like the HCJ to create a user-friendly website and engage with social media if barriers such as the cost and the time required to create and maintain these features could be overcome.

The HCJ is not unusual in attaching less importance to accountability than the SC. Accountability mechanisms such as social media engagement and livestreaming of all cases have not been adopted by any of the Scottish courts.

The HCJ has several other accountability mechanisms. The ability to take devolution and compatibility issues cases to the JCPC/SC means the HCJ is accountable to the JCPC/SC for the content of some of its decisions. However, for most areas of law, it is not accountable to another UK court. The Scottish Courts Service produces an annual report which includes information about the workings of the HCJ.[406] The HCJ has a communications team to fulfil a similar function to the SC's communication team.[407]

Overall, the SC has a range of accountability mechanisms to increase its accountability legitimacy and help it overcome the fact that it is not formally accountable to another court for its decision-making. The JCPC and HCJ was/are less effective in ensuring accountability but many of the differences are contingent differences where it would be possible for the HCJ to adopt the accountability mechanisms used by the SC. The SC's greater accountability

[405] The Scottish Judiciary uses Twitter to inform people about upcoming cases. However, this does not seem an obvious place to find tweets about HCJ cases. (Judges Scotland, 'Judges Scotland' (Twitter, 2018), at https://twitter.com/judgesscotland?lang=en (last visited 27/09/2018).) The Scottish Courts service also uses Twitter, but this is not advertised on the Scottish Courts Website and it does not normally provide updates about cases. (Scottish Courts and Tribunals, 'Courts and Tribunals' (Twitter, 2018), at https://twitter.com/SCTScourtstribs (last visited 27/09/2018)

[406] Lord Carloway, 'Annual Report & Accounts 2017-18' (Scottish Courts and Tribunals Service, 2018), at http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/publications/scts-annual-report-accounts-2017-18---final.pdf?sfvrsn=2 (last visited 13/10/2018).

[407] Anonymous, 'Media Guide' (Scottish Courts and Tribunals Service, 2015), at https://www.scotcourts.gov.uk/docs/default-source/aboutscs/contact-us/media-guide-13-10-2015-website-version.pdf?sfvrsn=6 (last visited 27/09/2018).

does not in itself justify a second tier of appeal since the HCJ has several accountability mechanisms. It does not show that there is any failure in the HCJ's decision-making which requires an additional tier of appeal. Rather it is a factor suggesting that the SC might be a legitimate court to exercise this right of appeal.

8 Conclusion

This chapter examined whether there is a need for a tier of appeal beyond the HCJ in devolution and compatibility issue cases and whether the JCPC/SC can legitimately provide this. It rejected the argument that an additional tier of appeal is needed because HCJ judges are less objective due to being situated in Scotland.

The strongest argument for an additional tier of appeal is that the HCJ has sometimes failed to ensure that Scots law meets the minimum Convention rights standards. While the number of cases where this occurred is small, several cases in which the HCJ did not enforce the minimum standard raised issues affecting large numbers of cases.[408] It was argued that the likelihood of the HCJ overturning these decisions was small. This created an unfairness to accused and risked the UK not meeting its ECHR obligations.

The SC is also more accountable than the HCJ because it engages with the media and has worked to increase public awareness about the workings of the SC and its proceedings are easier to access. However, the SC's greater accountability does not in itself justify a second tier of appeal. The approach taken by the SC is unusual in the UK and there is no evidence to suggest that the HCJ is considered illegitimate because of its more limited accountability.

Several arguments have been advanced against having an additional tier of appeal beyond the HCJ. One is that it breaks a long tradition of the HCJ being the final appeal court for Scots criminal law.[409] While longevity may suggest that a practice works well, as Chapter 2 section 2.5 showed, it is dangerous to maintain practices simply because they are traditional. There is a need to revaluate practices to establish whether they are still suitable for modern times.

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[408] *Cadder,* n195 above*; Fraser,* n199 above*; AB,* n215 above*; Sinclair*, n209 above*; Holland*, n211 above. See discussion in Chapter 4 sections 3.1, 3.2, 4.2.1 and 4.3.1.1 above.
[409] Scottish Parliament Official Report 27 October 2010 col 29555 Kenny MacAskill

Clearly, any appeal beyond the HCJ is inconsistent with the traditional finality of HCJ decisions. The JCPC/SC's jurisdiction has restricted this traditional power because the JCPC/SC can grant permission to appeal to the JCPC/SC when the HCJ has denied this permission and wanted its decision to remain final.[410] Moreover, the JCPC/SC can overturn HCJ decisions and for devolution issues decide the outcome of the case.[411] In three cases, the HCJ was required by the Lord Advocate or Advocate General to send the case to the JCPC/SC as a reference.[412] The HCJ was unable to rule on the issue of law and was required to send it to the JCPC/SC without having a say on whether the JCPC/SC should decide the case. However, the HCJ could decide how to dispose of the case once the reference had been answered. Three devolution issue cases were references sent by trial courts to the JCPC/SC at the Lord Advocate's request.[413] The HCJ sitting as an appeal court was leapfrogged and was unable to influence the determination of the devolution issue. Under the compatibility issues procedure, a reference from a lower court must be sent to the HCJ, meaning that the problem of leapfrogging should occur less often.[414]

Several factors reduce the effect of the JCPC/SC's jurisdiction on the traditional finality of the HCJ. There is no appeal beyond the HCJ for cases not raising devolution or compatibility issues, although in areas of law covering devolution and compatibility issues the HCJ is expected to follow JCPC/SC decisions. Only 26 out of the thousands of criminal cases decided by the HCJ since devolution have been heard by the JCPC/SC.[415] It is rare for the SC[416] to grant permission to appeal. Between 2010 and 2017 in 24 out 27 cases where the SC was asked for permission to appeal, it refused[417] and within the sample of JCPC/SC cases considered in this thesis, permission to appeal has only been granted eight times. Moreover, 11 cases reached the JCPC/SC because the HCJ gave permission to appeal.[418] The HCJ exercised autonomy over how the case was decided by agreeing to pass its traditional final decision-making ability to the JCPC/SC. Additionally, it is rare for the JCPC/SC to decide

[410] Section 3.1.2 above
[411] Section 3.1.3 above
[412] *Murtagh,* n192 above*; Ambrose,* n196 above*; Clark,* n200 above
[413] *Spiers*, n193 above; *P*, n197 above; *McGowan*, n201 above
[414] Criminal Procedure (Scotland) Act 1995 s288ZB
[415] Chapter 4 section 4.4 above
[416] There is no data for how often the JCPC was asked for permission to appeal.
[417] Anonymous, 'Permission to Appeal' (Supreme Court, 2017), at https://www.supremecourt.uk/news/permission-to-appeal.html (last visited 11/10/2017).
[418] Table 21 above

the outcome of the case and this only happened in four cases.[419] For compatibility issues, the SC is prevented from doing this and there is no evidence of this rule being breached.[420]

A second argument made by critics of an additional tier of appeal from the HCJ is that where the HCJ fails to protect accused's Convention rights to the minimum standard, the ECtHR should be left to remedy this rather than having an additional tier of appeal in the UK.[421] However, taking cases to the ECtHR is expensive and time-consuming.[422] The ECtHR, unlike the HCJ and the JCPC/SC in devolution issues cases, cannot quash the accused's conviction nor order their release if they are imprisoned.[423] Thus, the ECtHR is less useful to the accused. Although there is a UK judge on the ECtHR, there are often no judges trained in Scots law.[424] Since there has been significant criticism of the JCPC/SC sitting with a minority of Scottish judges, this suggests that relying more heavily on the ECtHR to remedy Convention incompatibilities would also be controversial.

Third, it is objected that an additional tier of appeal to a court where Scottish judges are in the minority, risks the judges not having sufficient expertise to decide Scottish cases. However, this is more an argument against a tier of appeal to a UK-wide court rather than an argument against another tier of appeal. The additional tier of appeal does not need to be to a UK-wide court.[425] Moreover, this chapter found little evidence of the non-Scottish JCPC/SC judges misunderstanding Scots law, underestimating the safeguards provided by Scots law or being over-willing to defer to the Scottish judges. Thus, the objections to having an additional tier of appeal from the HCJ for devolution and compatibility issues are unconvincing and there is a need for an additional tier of appeal to ensure that the UK meets its international human rights obligations.

This chapter tested whether the JCPC/SC could legitimately provide an additional tier of appeal for Scottish criminal devolution and compatibility issue cases. The JCPC/SC's decision that it could hear criminal cases raising acts of the Lord Advocate, its interpretation

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[419] *ibid*
[420] Criminal Procedure (Scotland) Act 1995 s288AA(3)
[421] Scottish Parliament Official Report 27 October 2010 col 29571 Alex Salmond
[422] Home Office, *Rights Brought Home: The Human Rights Bill* (CM 3782, 1997), para 1.14
[423] For some this is a good thing: Rhodes, 'The Eck's Factor' (Holyrood Magazine, 2011), 20 at http://content.yudu.com/Library/A1sk2g/HolyroodmagazineIssu/resources/index.htm?referrerUrl=http%3A%2F%2Fwww.holyrood.com%2Fe-magazine%2Fpage%2F11%2F (last visited 03/03/2017).
[424] Expert Group, n3 above, para 4.12
[425] Chapter 6 section 2.1.4.1

of when the HCJ has determined a devolution issue and its decision that it could decide the outcome of devolution issue cases were mostly reasonable interpretations of the law. Although some decisions were controversial, it could rely on an increasing body of case law and the reasonableness of its decisions to exercise its power legally.

The ability of the SC to act as an independent and impartial tribunal, while ensuring that it is accountable, increases its legitimacy. These were issues that the JCPC was less able to meet because it lacked the perception of independence and attached less importance to accountability. However, sociological legitimacy changes over time. Thus, these problems were less severe between 1999 and 2009 when the JCPC exercised the jurisdiction than they would be in modern times.

As Chapter 2 section 6 argued, there is a need to accommodate distinctive legal systems within a state to recognise differences between the legal systems, to ensure that sub-states have representation in state-wide institutions and to give autonomy to the sub-state legal systems.[426] As Chapter 4 showed, the JCPC/SC has repeatedly recognised that Scotland has a distinctive legal system when compared with English law.

It was argued that the interconnectedness of the Scottish and English legal systems created by sharing a top court meant that, under the current constitutional arrangement, non-Scottish judges were needed in the JCPC/SC to help ensure that decisions in Scottish cases were taken with knowledge about how they might impact on the other UK legal systems. There was little evidence of non-Scottish judges providing information that would not be easily obtainable to Scottish judges and several cases were heard without judges from all the UK legal systems. Nonetheless, having non-Scottish judges enables the sharing of information between the Scottish and English legal systems and likely makes it easier for Scottish judges to obtain information about the other UK legal systems. In addition to providing expertise about the other UK legal systems, the non-Scottish judges had sufficient knowledge of Scots law. It was contended that having Scottish judges in the minority provided the court with sufficient expertise in Scots law for the JCPC/SC's composition to be normatively legitimate. However, it is unclear whether there is enough representation of

[426] Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004), Chapter 6

Scottish judges to make people trust the JCPC/SC's decision-making and consider the jurisdiction sociologically legitimate.

The main factor detracting from the legitimacy of the JCPC/SC's jurisdiction arose from Scots law not always being given autonomy to take its own approach to Convention rights enforcement. The JCPC/SC has normally required Scots law to mirror the Convention even where this meant reducing Convention rights protection. These changes affected Scots law by importing ECtHR case law into Scots law, producing decisions which did not fit with existing Scots law, occasionally reducing the clarity of Scots law and requiring legislative intervention. However, as Chapter 4 argued, most cases did not significantly affect Scots law when judged by this criterion. The Scottish criminal process retains large numbers of distinctive elements.[427] Even when Scots law has been required to abandon a distinctive approach to enforce Convention rights, there may be scope to implement the right in a different way from the rest of the UK.[428]

Chapter 4 showed that some changes were unnecessary to comply with the Convention. Most problematic were cases reducing Convention rights protection where Scots law's interpretation of the Convention was changed despite it going beyond the Convention. For these cases, the JCPC/SC could not gain legitimacy by arguing that it gave Scots law autonomy. The fact that the JCPC/SC met the minimum standard of Convention rights protection helped legitimise these decisions. However, by denying Scots law the ability to interpret the Convention in a way that increased protection for the accused and by reducing the accused's Convention rights, the JCPC/SC reduced its ability to rely on the protection of the accused as a source of legitimacy. Cases where Scots law was required by the JCPC/SC to go beyond the Convention also reduced the autonomy of Scots law but could gain legitimacy by giving the accused Convention rights beyond what the Convention required. However, cases reducing Convention rights or going beyond the Convention were rare.

Since the main function of the JCPC/SC's jurisdiction is to hear appeals and references from the other Scottish courts on devolution and compatibility issues, it must be expected that it will sometimes change the law. Without this ability, its judgments would have no legal

[427] Chapter 3 above
[428] Chapter 3 section 4.4.1 above

force. An approach which refused to recognise that Scots law is distinctive and always denied it autonomy to develop in its own way would struggle to gain legitimacy. However, most courts borrow ideas from other legal systems or change their law to meet international law such as human rights law. Thus, the loss of autonomy of legal systems to take a distinctive approach does not render the court's decision-making illegitimate, so long as it does not occur in every case.

Most JCPC/SC cases which changed Scots law did so to achieve the minimum standard required by the Convention. Failing to protect Convention rights in Scotland to the minimum standard, would be a significant factor *decreasing* the jurisdiction's legitimacy. It would mean its decisions were failing to enforce an internationally recognised standard of human rights protection, leaving accused in Scotland vulnerable to abuses of state power and the possibility of wrongful conviction. It would also mean that the jurisdiction had failed to meet one of its main purposes. Thus, given the importance that those in the SC debate attach to the need for the JCPC/SC to protect Convention rights, it would be very difficult for the JCPC/SC's jurisdiction to be legitimate since its main purpose would not be achieved. Conversely, the loss of autonomy of Scots law from the JCPC/SC enforcing Convention rights is a factor reducing the legitimacy of the jurisdiction not removing it. Thus, the importance of protecting Convention rights to the legitimacy of the jurisdiction outweighs the importance of giving complete autonomy to Scots law over how to enforce Convention rights.

Overall, there is a need for a tier of appeal beyond the HCJ for Convention rights cases because the HCJ has left Scots law vulnerable to challenges in the ECtHR. The legitimacy factors considered all point towards the JCPC/SC being a legitimate court to exercise this appeal. It has mostly complied with the requirements of legality, has sufficient expertise, is an independent and impartial tribunal, has fulfilled its main function of enforcing Convention rights to the minimum standard and it is accountable. Its main legitimacy problems are that its decisions sometimes affect Scots law in the ways described in Chapter 4 and it does not always give Scots law autonomy to develop its own approach to Convention rights. However, these problems were outweighed by the legitimacy gain from protecting Convention rights. The jurisdiction is good at accommodating the distinctive nature of Scots criminal law by recognising the need for autonomy, providing Scottish representation in the JCPC/SC's composition and by giving Scots law a lot of autonomy to

develop in its own way.[429] The jurisdiction benefited Scots law by providing external scrutiny of Scots law, ensuring that it is Convention-compatible and ending practices that were not Convention-compatible. It helped Scots law borrow beneficial ideas from other legal systems while allowing it to influence other legal systems. Thus, the JCPC/SC's jurisdiction over Scottish criminal cases is necessary, legitimate and justifiable.

[429] Chapter 3 section 3.3.3 above

Chapter 6: Conclusion

1 The Story so Far

This thesis made several findings which have consequences for both the JCPC/SC's jurisdiction and for the Scottish legal system more generally.

Chapter 2 showed that among some lawyers and politicians there is a tendency to place Scots law on a high pedestal where it is linked to Scottish national identity.[1] It might have been expected that devolution would have reduced the prevalence of such legal nationalist arguments because Scotland gained its own Parliament which can make distinctive laws on issues within its devolved competence and help promote Scottish national identity.[2] However, legal nationalist arguments are still made after devolution.[3] The creation of the JCPC/SC's jurisdiction over Scottish criminal cases created an additional source of potential harmonisation between Scots and English law by sending cases to UK-wide courts which normally sit with a minority of Scottish judges. This encouraged critics of the JCPC/SC's jurisdiction to use legal nationalistic arguments to defend the distinctive nature of Scots criminal law.[4]

Several other potential sources of harmonisation between Scots and English law have remained after devolution. As some legal nationalists before devolution feared,[5] the Scottish Parliament has at times sought to remove differences between Scots and English law, although it has produced many distinctive areas of criminal law.[6] As Chapter 4 showed, since Scotland is part of the unitary state of the UK, there is an interconnection between the Scottish and English legal systems. Between 1999 and 2009, Scottish criminal devolution cases were sent to the JCPC which shared judges with the House of Lords (HOL) which heard English cases. Since 2009, they have shared the SC which is a UK-wide court. They continue to share a legislature, in the form of the UK Parliament, although Scotland has its own devolved legislature. The sharing of these institutions and law between

[1] Chapter 2 section 3 above
[2] Chapter 2 section 3.3 above
[3] Chapter 1 section 3 above
[4] Chapters 1 and 2 above
[5] Chapter 2 section 2.6 above
[6] Chapter 2 sections 2.1 and 2.6 above and Chapter 4 sections 2.6.4 and 4.4.5 above

Scotland and England and the fact that English law is a larger jurisdiction with a greater body of case law means that there will inevitably be a borrowing of ideas from English law in future. However, as Chapter 4 showed, having a UK-wide court also creates potential for Scots law to influence English law.[7] This pressure towards harmonisation suggests that there will continue to be lawyers and politicians using legal nationalist arguments to defend the autonomy of Scots law.

This is not to suggest that Scots law will cease to become distinctive in future. Chapter 3 confirmed claims made by legal nationalists[8] that Scots criminal law, procedure and evidence have large numbers of distinctive elements when compared with English law although the chapter also found several areas of similarity. Moreover, despite its tendency at times to harmonise aspects of the Scottish and English criminal process, the JCPC/SC has often defended the autonomy of Scots law to develop in its own way and its decisions in many cases had no significant impact on Scots law.[9]

Linked to the fear that Scots and English law might be harmonised is the fear among legal nationalists and critics of the JCPC/SC's jurisdiction that laws might be transplanted into the Scottish legal system without considering whether they would benefit Scots law.[10] Chapters 2 and 4 contributed to the debate on the use of legal transplants by considering cases from the HOL in Scottish civil cases, the JCPC/SC in Scottish criminal cases and South African and Quebecois case law. It confirmed the argument made in legal nationalist literature that attempts to transplant law from one jurisdiction to another can lead to decisions which fit uneasily with existing law, affect the clarity of the law and result in distinctive elements of the recipient legal system being lost.[11] Thus, legal transplants must be made cautiously. However, Chapter 4 showed that they can benefit the recipient legal system if they are used carefully to provide a better solution to a problem and/or to ensure that the recipient legal system complies with Convention rights.[12] Given the already noted pressures towards

[7] Chapter 4 section 4.4 above
[8] Lord Cooper, 'The Scottish Legal Tradition' in Meston and Sellar, *The Scottish Legal Tradition New Enlarged Edition* (Edinburgh: The Saltire Society, 1991), 85-86; Smith, 'English Influences on the Law of Scotland' (1954) 3(4) *American Journal of Comparative Law* 522, 536; Walker, 'Some Characteristics of Scots Law' (1955) 18(4) MLR 321, 322.
[9] Chapter 4 section 3.3 above
[10] See literature criticising the SC's jurisdiction and on legal nationalism cited in Chapter 1 section 3 above and Chapter 2 section 2.1 above.
[11] See literature cited on legal transplants in Chapter 2 sections 2.1-2.3, 6
[12] Chapter 4 sections 3.3.5 and 4 above

legal harmonisation, the trend of laws being imported into Scots law will probably continue in future. Thus, there will continue to be debate about whether laws should be transplanted into Scots law and whether they are being transplanted carefully, especially in cases where the decision was made by a UK-wide court sitting with a minority of Scottish judges.

This thesis contributed to the debate about courts using judges trained in the law of foreign legal systems.[13] Chapter 5 found that JCPC/SC judges not trained in Scots law can develop sufficient expertise to decide whether Scots criminal law, procedure and evidence are compatible with the ECHR as interpreted by the ECtHR.[14] Caution must be used when drawing more general conclusions about the ability of judges to decide cases from a jurisdiction that they have no formal training in. The JCPC/SC does not have a general jurisdiction over Scottish criminal cases. Although knowledge of Scots criminal law, procedure and evidence are important in deciding whether Scots law is Convention-compatible, the main legal issue for the court to decide is whether the ECHR and ECtHR deem a practice to be Convention-compatible. The non-Scottish JCPC/SC judges have not been tested on their ability to decide Scottish criminal cases not raising devolution and compatibility issues. Moreover, the ability of judges to decide cases from other jurisdictions depends on the willingness of the judges with no training in the legal system to participate in the court's decision-making, to recognise differences between Scots and English law, to apply the law of the legal system the case is from and to be able to apply the law of the legal system correctly.[15] As the experience of the HOL deciding Scottish civil cases, like that of Quebec and South Africa, shows when these conditions are not met, judges may struggle to correctly apply the law of another legal system.[16] Nonetheless, the findings of this thesis suggest that if foreign judges exercise their power carefully, they can gain sufficient expertise to decide cases from another jurisdiction.

An important theme running throughout this thesis has been the tension between the centralisation of decision-making power at a UK-level and the desire to give parts of the UK

[13] The literature on the use of judges from other legal systems was cited in Chapter 1 section 3 above and Chapter 2 section 2.1 above.
[14] Chapter 5 section 5.1 above
[15] Chapter 2 section 6.2 above and Chapter 5 section 5.1 above
[16] Chapter 2 section 6.2 above

autonomy. The issue of whether the JCPC/SC should take a UK-wide approach to the enforcement of Convention rights is part of this debate.[17] On one hand, there is a desire to use the JCPC/SC to take a UK-wide approach to Convention rights protection to ensure that everyone in the UK has the same level of Convention rights protection and to create symmetry in the approach taken in each part of the UK. On the other hand, devolution legislation provides different enforcement mechanisms for Convention rights in Scotland, Wales and Northern Ireland and leaves open the possibility of these jurisdictions going beyond what the Convention requires.[18] Thus, devolution allows both Scotland and Northern Ireland to differ from the rest of the UK on abortion and welfare[19] and it is expected that the Scottish Parliament will create its own human rights document providing rights not found in the Convention.[20] This thesis contributed to this debate by considering how the JCPC/SC enforced Convention rights in Scottish criminal cases and by showing that there is a tendency to require Scots law to mirror the ECtHR even when the changes the JCPC/SC made to Scots law were not required for Convention compatibility.[21] Chapter 5 showed that while each part of the UK should normally meet minimum standards of Convention rights protection, there is a need to give each jurisdiction autonomy to develop its own approach to Convention rights protection.

The tension between the centralisation and devolution of decision-making powers applies to the broader devolution settlement where there has been a devolution of power on non-reserved matters to the Scottish Parliament but a retention of power at a UK-wide level because the UK Parliament retains the right to legislate on devolved issues and uses the reserved powers model to restrict the powers of the Scottish Parliament.[22] Like Convention rights enforcement in the UK, there is asymmetry in the devolution settlements applied to

[17] The literature discussing the enforcement of Convention rights is cited in Chapter 1 section 3 above and Chapter 5 section 6 above.
[18] Chapter 5 section 6 above
[19] Scotland Act 2016 s22-30 and s53; Northern Ireland Act 1998 s6. The Convention compatibility of Northern Ireland's approach to abortion was doubted in: *Northern Ireland Human Rights Commission's Application for Judicial Review, Re* [2018] UKSC 27
[20] Miller, 'Recommendations for a New Human Rights Framework to Improve People's Lives' (First Minister's Advisory Group on Human Rights Leadership, 2018), at http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf (last visited 10/03/2019).
[21] Chapter 4 section 4 above
[22] Chapter 5 section 6 above

Scotland, Wales and Northern Ireland although there has been some convergence.[23] This tension between the desire to retain decision-making powers at a UK level and the desire to give parts of the UK autonomy looks likely to continue for both the SC's jurisdiction over Scottish criminal cases and devolution more generally. The continued use of the devolution and compatibility issue mechanisms, which are designed to regulate the balance of power between the Scottish Parliament and Westminster,[24] will likely raise further cases which lead to questions about how much autonomy Scots law should have and whether issues require a UK-wide approach. There is continuing political debate on Scottish independence and Scotland's relationship with the rest of the UK and on how much autonomy the Scottish Parliament should have to make laws for Scotland particularly around human rights protection. Thus, during the passage of the Scotland Act 2016, there was debate about whether the Scottish Parliament should have the power to legislate on abortion and social welfare, both of which were devolved to the Scottish Parliament by the Act.[25] Supporters argued for the devolution of these powers to enable the Scottish Parliament to improve human rights standards in these areas while critics feared that the Scottish Parliament might use its powers to weaken Convention rights protection and that the ability of the Scottish Parliament to take a different approach might hinder the social cohesion of the UK.[26] Thus, there will be continued political debate about which powers, if any, should be reserved to Westminster and the SC's jurisdiction over Scottish criminal cases is likely to continue to invoke debate about how much autonomy should be given to Scots law and the suitability of Scottish cases being heard by a UK-wide court.

2 Possible Changes

Despite the SC's jurisdiction continuing to provoke legal and political debate, as Chapter 1 argued, it seems unlikely that any substantial change will be made to its jurisdiction over

[23] *ibid*
[24] *ibid*
[25] McHarg, 'A Powerhouse Parliament? An Enduring Settlement? The Scotland Act 2016' (2016) 20(3) Edin LR 360; Mullen, 'Devolution of Social Security' (2016) 20(3) Edin LR 382; Neal, 'Devolving Abortion Law' (2016) 20(3) Edin LR 399, 400; Calman, *Serving Scotland Better: Scotland And the United Kingdom in the 21st Century* (Edinburgh: Commission on Scottish Devolution, 2009) 12
[26] McHarg, 'A Powerhouse Parliament? An Enduring Settlement? The Scotland Act 2016' (2016) 20(3) Edin LR 360; Mullen, 'Devolution of Social Security' (2016) 20(3) Edin LR 382; Neal, 'Devolving Abortion Law' (2016) 20(3) Edin LR 399, 400; Calman, *Serving Scotland Better: Scotland And the United Kingdom in the 21st Century* (Edinburgh: Commission on Scottish Devolution, 2009), 12

Scottish criminal cases in the near future, beyond the modifications required to provide for the UK's expected departure from the European Union.[27] When the jurisdiction was reviewed in 2018 by Lord Carloway, he argued that the jurisdiction should mostly be maintained in its current form.[28] This thesis argued that the current jurisdiction works well, is justifiable and legitimate. Nonetheless, two problems were found with the current approach. First, access to the SC is asymmetrical, with Scottish criminal appeals to the JCPC/SC being restricted to devolution and compatibility issues, while Scottish civil cases and cases from the rest of the UK can be appealed to the SC on any issue that raises a point of importance.[29] Second, Chapter 5 raised concerns that the JCPC/SC sitting with a minority of Scottish judges might reduce the sociological legitimacy of the JCPC/SC's jurisdiction and that from the perspective of what is best for Scots law, its composition over prioritises knowledge of English law in Scottish cases.[30] These issues will be considered in turn to establish whether any changes should be made to the jurisdiction.

2.1 Asymmetrical Access to the SC

Like many elements of the SC debate, the asymmetrical access to the SC can be looked at from a UK or Scottish perspective.[31] On one hand, the SC is a UK-wide court with a general jurisdiction to deal with any important issue of law in Scottish civil cases and cases from the rest of the UK. One of the purposes of a UK-wide court is to regulate the level of difference between legal systems. From this perspective, the asymmetry in access to the SC for Scottish criminal cases makes it more difficult for the SC to regulate the level of difference between areas of Scots and English criminal law in cases where there are no grounds to raise a devolution or compatibility issue in Scotland. It seems odd to deny accused in Scotland a general right of appeal to the SC on important issues of law which accused in other parts of the UK have.[32] The approach of providing unequal access to a state-wide

[27] Chapter 1 section 5 above
[28] Lord Carloway, 'Review of Sections 34 to 37 of the Scotland Act 2012 Compatibility Issues' (Scottish Judiciary, 2018), 18 at http://www.scotland-judiciary.org.uk/Upload/Documents/ScotlandActReview2012CompatabilityissuesReportSeptember2018.pdf (last visited 24/02/2019). See Chapter 1 section 5.1 above
[29] Chapter 1 section 2 above
[30] Chapter 5 section 5.3 above
[31] Himsworth and Paterson, 'A Supreme Court for the United Kingdom: Views from the Northern Kingdom' (2004) Legal Stud 99, 105
[32] Le Sueur and Cornes, 'The Future of the United Kingdom's Highest Courts' (Constitution Unit, 2001), 69 at https://www.ucl.ac.uk/political-science/publications/unit-publications/76.pdf (last

court from a sub-state legal system is very unusual. Indeed, even in Canada, which has both civilian and common law legal systems, there is a right of appeal to the Supreme Court of Canada for cases from both legal systems.[33]

From a perspective which champions the autonomy of Scots law, treating Scottish criminal appeals differently from English appeals is less problematic. Indeed, for some who hold this belief, such as the SNP, it would be preferable to widen the anomalous treatment between Scottish and English criminal cases by denying any right of appeal to the SC in Scottish cases.[34] From this perspective, asymmetry in access to the SC can be seen as being consistent with the asymmetrical approach to devolution as a whole which enables the devolution settlement to be tailored towards the needs of each devolved part of the UK.[35]

This tension between giving Scots law autonomy and taking a UK-wide approach and the difficulty of removing the asymmetry becomes apparent when different models for creating a more symmetrical access to the SC are considered. This section draws on some of the models proposed by the Walker Report in 2010.[36]

2.1.1 Model 1: A General Right of Appeal to the SC

One model would involve broadening access to the SC so that any Scottish criminal or civil case could be appealed to the SC.[37] To achieve complete symmetry in access to the SC between Scotland and England, it would be necessary to require that Scottish cases raise a point of importance before they can be appealed to the SC.[38] This approach would widen the SC's ability to scrutinise HCJ decisions, since it would be able to hear appeals raising any important issue of law arising from a Scottish criminal case, rather than just cases raising devolution and compatibility issues. As Chapter 5 showed, an additional tier of appeal can, in cases not sent to the SC as a reference, enable the parties to refine their arguments and

visited 25/07/2018); Jones, 'Splendid Isolation: Scottish Criminal Law, the Privy Council and the Supreme Court' [2004] Crim LR 96, 100-101

[33] Paterson, n31 above, 105

[34] Chapter 1 section 3 above

[35] Chapter 5 section 6 above

[36] Walker, *Final Appellate Jurisdiction in The Scottish Legal System* (Edinburgh: Scottish Government, 2010) Chapter 6

[37] *ibid* para 6.2.1

[38] Court of Session Act 1988 s40A(3); Criminal Appeal Act 1968 s33; Constitutional Reform Act 2005 s40

help correct errors made by the lower courts.[39] However, further research would be needed to establish whether there is a need for an additional tier of appeal to correct HCJ decisions not raising a devolution or compatibility issue.

Widening access to the SC would increase the ability of the SC to take a UK-wide approach since it would have jurisdiction over all issues of substantive Scots criminal law not just those raising devolution and compatibility issues. Adopting a UK-wide approach could promote consistency between different legal systems which may make the criminal law easier to comply with for people and companies who operate across the UK.[40] However, as Chapter 5 showed it is possible for sub-state courts, like the HCJ, to harmonise Scots and English law although the harmonisation of law is easier for a UK-wide court.[41] In any event, the importance of the need to take a UK-wide approach should not be overstated. Too much focus on taking a UK-wide approach can make the law insensitive to political, social and economic conditions in different parts of the UK and fail to recognise that different legal systems may legitimately use different approaches to solve a legal problem.[42] Even when the same legislation applies to both Scots and English law, it is not uncommon for legislation to be interpreted in Scotland and England in different ways without negatively affecting the clarity of the law.[43]

There is a danger that having a UK-wide court deciding Scottish criminal cases might focus too much on taking a UK-wide approach while attaching less importance to the need for the Scottish legal system to have autonomy to develop in its own way.[44] As the experience of the House of Lords deciding Scottish civil cases showed, using UK-wide courts can lead to large areas of law being harmonised at the expense of existing distinctive approaches taken by the legal systems.[45] While the JCPC/SC has shown greater sensitivity to differences between Scots and English criminal law, it has sometimes harmonised Scots criminal law

[39] Chapter 5 sections 5.4 and 6.3.1 above
[40] Chapter 2 section 6.3.2 above
[41] Chapter 5 section 5.4 above
[42] Chapter 5 section 6.2 above
[43] Chalmers, 'Scottish Appeals and the Proposed Supreme Court' (2004) 8(1) Edin LR 4, 21
[44] Walker, n37 above, para 6.3.2; Le Sueur, n32 above, section 8.6
[45] Gibb, *Law from Over the Border: A Short Account of a Strange Jurisdiction* (Edinburgh: W Green, 1950); Chapter 2 section 6 above

with ECtHR case law and English law even when this was unnecessary to achieve Convention compatibility.[46]

Expanding the SC's jurisdiction over Scottish criminal cases raises the issue of whether the SC is a suitable court to hear appeals on any issue of Scots criminal law given that it sits with a minority of Scottish judges.[47] A broader criminal jurisdiction for the SC would increase the need for SC judges to apply substantive Scots criminal law, procedure and evidence. SC judges would increasingly be expected to decide how Scots criminal law should develop, to choose between different policy approaches for developing the law and decide between conflicting precedents. As Chapter 5 showed there are several factors which can help non-Scottish judges to understand Scots law.[48] Additionally, despite there being genuinely distinctive differences between Scots and English law, there are many areas of trivial and contextual differences which should be easier for non-Scottish judges to learn.[49] Nonetheless, as section 1 of this chapter showed, there is mixed evidence about the ability of non-Scottish judges to deal with a more general jurisdiction over Scottish cases.[50] Widening the jurisdiction would likely increase concerns about the prioritisation of knowledge of English law in the SC's composition and increase the likelihood of sociological legitimacy problems arising from this composition.

Widening SC access would be politically controversial because it would overturn the long tradition of the HCJ, except in devolution and compatibility issue cases, being the final appeal court for Scottish criminal cases.[51] Even among political parties which recognise the need for a UK-wide court, there is little appetite for such a change. Thus, in 2003 when the Labour Government was planning the jurisdiction of the new SC, it felt that the distinctive nature of Scots criminal law justified restricting Scottish criminal appeals to the SC to those raising devolution issues.[52] Widening access to the SC also sits uneasily with Scottish political and legal nationalist thinking which attaches importance to the need for Scots

[46] Chapter 4 sections 3.3, 4.3 above
[47] Chalmers, n43 above, 26 cf. Le Sueur, n32 above, 68-69
[48] Section 5.1 above
[49] Chapter 3 sections 2.1, 2.2, 3.1, 4.1 above
[50] Section 1 above
[51] Le Sueur, n32 above, section 7.3.2
[52] Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom Consultation Paper* (CP 11/03, 2003), para 26

criminal law to have autonomy to develop in its own way.[53] Given that the Scottish Government are opposed to the SC having any jurisdiction over Scottish criminal cases, a move to increase the SC's jurisdiction would be politically controversial.[54] Thus, it is very unlikely that such an approach will be implemented.

2.1.2 Model 2: A Court Dealing with UK-wide Issues

Another way to achieve greater symmetry would be to limit appeals to the SC to cases raising an issue of UK-wide importance.[55] There are several ways that an issue could be of UK-wide importance. One way would be to only allow the SC to hear Scottish cases raising an issue of UK-wide constitutional importance.[56] Alternatively, the SC could become more like a federal court which could hear Scottish cases which raised any issue of importance to the whole of the UK. The latter approach was advocated by Neil Walker in his 2010 report and whose recommendations were discussed in Chapter 1 section 4.1.3.[57] Both approaches suffer from the problem of defining which cases are of UK-wide importance.[58] First, there is debate about the extent that it is correct to talk of there being such a thing as UK law, although devolution issues are deemed to be UK law.[59] Second, it is debatable which areas of law, if any, should be deemed UK law.[60] Issues of constitutional importance are equally difficult to define. They could be limited to cases raising devolution or compatibility issues, or be defined more broadly to include constitutional issues which do not raise a devolution or compatibility issue.[61] This uncertainty would give the SC a wide discretion to decide the scope of its jurisdiction.[62] Although the JCPC/SC has not interpreted its current jurisdiction unreasonably, it has faced a large amount of criticism for how it defined its jurisdiction.[63] This suggests that giving the SC a large amount of discretion over the scope of a new jurisdiction would also be controversial.

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[53] Chapter 1 section 3 above and Chapter 2 section 2.1 above
[54] Chapter 2 section 2.1 above
[55] Le Sueur, n32 above, Chapters 9-10
[56] *ibid* Chapter 9
[57] Walker, n37 above, 6.6
[58] Le Sueur, n32 above, section 9.5; Walker, n37 above, 6.6
[59] Le Sueur *ibid* 98; Constitutional Reform Act 2005 s41(2)
[60] *ibid* section 10.8
[61] Walker, n37 above, 6.6
[62] *ibid* 6.6
[63] Chapter 1 sections 2 and 3 above and Chapter 5 section 3 above

The advantage of having a court only for UK-wide issues is that it allows UK-wide issues, such as the enforcement of Convention rights, to be decided at a UK level while promoting the autonomy of the Scottish legal system by allowing the domestic Scottish courts to decide other issues of Scots law.[64] It also means that Scottish cases not raising an issue of UK-wide importance would be decided by the HCJ and Court of Session. Thus, there would be a narrowing of the SC's Scottish civil jurisdiction. This would enable Scottish cases not raising a UK-wide issue to be decided by the HCJ and Court of Session where all the judges have expertise in Scots law while allowing issues of UK-wide importance to be decided by SC judges from throughout the UK. This in turn, would give greater recognition to the autonomy of Scots law than the general right of appeal model.

However, this approach would likely also narrow the ability to appeal cases to the SC from the rest of the UK, unless it was decided to apply the UK-wide importance requirement only to Scottish cases which would perpetrate asymmetry between the treatment of Scottish and English cases. Applying the UK-wide importance criterion to appeals from all parts of the UK would make the Court of Appeal and the Northern Irish Court of Appeal the final appellate courts for English, Welsh and Northern Irish cases not raising an issue of UK-wide importance. A SC which can only hear UK-wide issues would represent a significant departure from the UK's current constitutional approach where -except for Scottish criminal cases- the SC has the power to deal with any important issue of law.[65] It is far from clear that there is sufficient political will, even among supporters of the SC, to make such a radical change to the SC's jurisdiction.[66]

A constitutional or federal approach would also be controversial because it would be likely to broaden Scottish criminal appeals to the SC. A constitutional SC would widen the SC's criminal jurisdiction if it included constitutional issues which cannot be raised as devolution and compatibility issues. Since there is a sharing of legislation between Scots and English criminal law,[67] it is easy to imagine UK-wide statutory crimes relating to issues such as road traffic, drugs and terrorism being deemed to raise UK-wide issues which could be heard by a federal SC. Under the SC's current jurisdiction, cases challenging the devolved

[64] Walker, n37 above, 6.6
[65] Lord Carloway, n32 above, section 9.5
[66] Walker, n37 above, 73-74
[67] Chapter 2 section 2.1 above

competence of Scottish criminal legislation can only be sent to the SC if the case raises a devolution or compatibility issue.[68] Given the many areas of similarity between Scottish and English criminal law, procedure and evidence, [69] it is easy to imagine lawyers arguing that aspects of the Scottish criminal process raise UK-wide issues. This again creates a danger of focusing too much on taking a UK-wide approach and not giving Scots law autonomy. Thus, a federal approach would be controversial with those who prioritise the autonomy of Scots law. As Chapter 1 section 4.1.3 showed, it was for this reason that the SNP shelved the Walker Report.

2.1.3 Model 3: Certification

The next two models seek to reduce the asymmetry in access to the SC by prioritising the autonomy of Scots law and reducing the number/types of Scottish cases scrutinised by a UK-wide court. One way to achieve this would be to introduce a requirement that Scottish criminal cases can only be appealed to the SC when they are certified by the HCJ as raising an issue of general public importance. As Chapter 1 showed, certification was rejected during the passage of the Scotland Act 2012 and again by Lord Carloway's review of the compatibility issue jurisdiction.[70] Certification has already been mentioned in the discussion of Model 1.[71] The approach favoured by the Scottish Government will be considered here.[72] The Scottish Government argued that in order to be appealed to the SC, Scottish criminal cases should raise a devolution/compatibility issue and obtain certification.[73] This approach would remove the anomaly where Scottish criminal cases being appealed to the SC do not require certification but Scottish civil cases and cases from England normally do require this.[74] However, the position of Scottish criminal cases would still be anomalous because

[68] Walker, n37 above, 6.6
[69] Chapter 3 above
[70] Chapter 1 sections 4 and 5.1
[71] Section 2.1.1 above
[72] Scottish Government, 'Letter from the Scottish Government to Lord Carloway' (Scottish Government, 2018), 3 at http://www.scotland-judiciary.org.uk/Upload/Documents/ScottishMinisters_ScotlandActReview_2018.pdf (last visited 07/02/2019).
[73] Scottish Government, n72 above, 1,3
[74] Court of Session Act 1988 s40A(3); Criminal Appeal Act 1968 s33

unlike Scottish civil cases and English cases, they would need to raise a devolution/compatibility issue and obtain certification.[75]

There are different ways of defining importance. One is that the case is important to the accused. Such a requirement would be easily met in Scottish criminal cases because the purpose of the accused taking their case to the JCPC/SC is to obtain a ruling which will help them overturn their conviction[77] or make it more difficult for them to be convicted. Alternatively, a case can be important where it raises an important issue of law either for Scots law or for the whole of the UK.[78]

For the Scottish Government, certification would help to prevent large numbers of cases reaching the SC and protect the final appellate jurisdiction of the HCJ.[79] However, there are already barriers which prevent Scottish criminal cases reaching the SC as devolution or compatibility issues. First, the case raising devolution or compatibility issues must meet the requirements to be appealed or referred to the SC. Although devolution and compatibility issues are defined broadly,[80] there is no evidence suggesting that the SC is dealing with large numbers of Scottish criminal cases. As of March 2019, only three cases which raised a compatibility issue reached the SC[81] and all three reached the SC with the HCJ's permission.[82] Between April 2013 and December 2017, 1402 cases had raised a compatibility issue in a Scottish court and only two reached the SC.[83] During this time, the SC was asked eight times to grant special leave to appeal a compatibility issue to the SC but refused in every case.[84] Moreover, although there is no formal requirement that the HCJ certify the case as important before it can reach the SC, the HCJ has sometimes considered the importance of the case when deciding whether to refer it to the SC.[85] Thus, the current

[75] Scottish Government, n72 above, 1,3
[77] The SC cannot overturn convictions in compatibility issue cases.
[78] Chalmers, n43 above, 10
[79] Scottish Government, n72 above, 3-4
[80] Chapter 1 section 4.2.1 above and Chapter 5 section 3 above
[81] *AB* v *HMA* [2017] UKSC 25; *Macklin* v *HMA* [2015] UKSC 77; *O'Neill* v *HMA* [2013] UKSC 36
[82] Table 21 above
[83] Lord Carloway, 'Review of Sections 34 to 37 of the Scotland Act 2012 Compatibility Issues' (Scottish Judiciary, 2018), section 3.4 at http://www.scotland-judiciary.org.uk/Upload/Documents/ScotlandActReview2012CompatabilityissuesReportSeptember2018.pdf (last visited 24/02/2019).
[84] *ibid*
[85] *Macklin* v *HMA* [2013] HCJAC 141, at [6]

arrangement serves to adequately restrict the number of cases reaching the SC and there is no obvious need for certification.

2.1.4 Model 4: Ending Appeals to the JCPC/SC

The final possible approach takes the need to give Scots law autonomy to its extreme by preventing all Scottish cases from being appealed to a UK-wide court. This would treat all Scottish cases equally by preventing them from reaching the SC. However, it would increase the asymmetry in access to the SC between Scots and English law since Scottish cases would have no access to the SC, while English cases would have a general right of appeal to the SC if the case raised an issue of importance.

The ending of Scottish appeals to a UK-wide court could be achieved either by the HCJ and/or Court of Session making final decisions on Scots law or, as we shall see in the next section, these decisions being made by a newly established Scottish Supreme Court. As Chapter 5 showed, there is a need for an additional tier of appeal beyond the HCJ in devolution and compatibility issue cases because some HCJ decisions left Convention rights breaches unremedied and created potential for large numbers of cases raising the same Convention rights issue to go unremedied.[86] Moreover, having the HCJ and Court of Session as the final appellate courts would not create symmetry between Scottish civil and criminal cases since they would be sent to separate courts albeit courts which share the same judges.

2.1.4.1 A Scottish Supreme Court?

The alternative way of ending appeals to the SC by creating a Scottish Supreme Court also raises problems. A Scottish Supreme Court could take many forms. Decisions would have to be made about a number of issues. First, whether it should only hear devolution and compatibility issues or whether it should hear other civil and/or criminal appeals from the Court of Session and HCJ. Second, there would be a need to define its relationship with the HCJ and Court of Session. The Scottish Supreme Court could either be a chamber of the HCJ and Court of Session or a completely separate court.[87] Finally, it would also have to be decided in what circumstances there should be an appeal from the HCJ and Court of

[86] Chapter 5 section 6.3.1 above
[87] Walker, n37 above, 66

Session to a new Scottish Supreme Court and whether the decisions of a Scottish Supreme Court should be final or appealable to the UK SC.

The creation of a new court would be expensive because it would require a new building and new Supreme Court judges.[88] The fact that only 26 Scottish criminal cases raising a devolution or compatibility issue have reached the JCPC/SC in two decades does not suggest that there is a pressing need to create a completely new court to deal with these cases, especially when the JCPC/SC has shown expertise in deciding these cases. Supreme courts in common law jurisdictions are normally general courts and unlike more civilian based legal systems there is no separate court for constitutional issues.[89] Given that in the UK constitutional issues are not sent to a separate court from other issues of law, it is likely that a Scottish Supreme Court would be a general court hearing cases on any (important) issue of law including civil and criminal cases not raising devolution or compatibility issues. This would help increase the caseload of a new Scottish Supreme Court slightly and make the expense of creating it easier to justify.

Having a Scottish Supreme Court would prioritise the autonomy of Scots criminal law to develop in its own way because Scots law would likely not be scrutinised by a UK-wide court.[90] However, the Scottish Supreme Court model attaches little importance to the fact that Scotland is part of a unitary state, where despite there being an asymmetry in the approaches taken in areas such as devolution and the mechanisms for enforcing Convention rights, there is a sharing of constitutional law between different parts of the UK. As Chapter 5 section 2.2.1 showed, the interlinking of constitutionalism in each part of the UK means that there will be some constitutional issues which affect multiple parts of the UK. A Scottish Supreme Court would lack the ability to change the law in other parts of the UK (although its decisions on shared areas of law such as Convention rights might influence the English courts), making it difficult for it to make and implement decisions about whether a UK-wide approach is needed. Given that the UK Government attaches importance to the need to have a UK-wide court which can decide whether there is a need to take a UK-wide approach and to make final decisions on devolved competence,[91] it is unlikely to agree to a solution which removes Scots law from the control of the UK SC. Thus,

[88] Le Sueur, n32 above, section 7.4
[89] Walker, n37 above, 65
[90] Le Sueur, n32 above, section 7.3.1
[91] Chapter 1 section 3 above

all the potential models considered for removing asymmetry in access to the SC have significant drawbacks.

2.2 Composition

The case for making changes to the composition of the SC is more compelling. One way to address concerns about the SC normally deciding Scottish cases with a minority of Scottish judges would be to increase the number of Scottish judges sitting in the SC to three. Since the SC normally sits with five judges, this would normally put Scottish judges in the majority for Scottish cases. However, if the SC sat with an enlarged bench, as it did in *Macklin* v *HMA*[92] and *Cadder* v *HMA*,[93] then Scottish judges might be in the minority.[94] The remaining judges hearing Scottish cases would be non-Scottish judges to ensure that the SC has sufficient expertise to be able to consider the effect of the decision on the other UK legal systems.

The requirement that there are three Scottish judges deciding Scottish cases could either be a formal statutory entitlement, as is the case for the Supreme Court of Canada when deciding Quebecois cases,[95] or it could be a more informal convention like the one that the JCPC/SC should normally sit with two judges trained in Scots law when deciding Scottish cases.[96] The latter approach is preferable. Having an informal convention that three Scottish judges should sit on Scottish cases would have the advantage of being flexible by allowing the SC to sit with less Scottish judges should there be a need to decide a case urgently and there are not three Scottish judges available.

Given that it is rare for the SC to use temporary judges from the College of Justice or retired Scottish SC judges,[97] there would be a need for a third permanent Scottish SC justice. This would likely require increasing the number of SC justices to 13. Paying the salary and pension of another judge would be expensive.[98] It might also lead to calls for similar

[92] Macklin v *HMA* [2015] UKSC 77
[93] *Cadder* v *HMA* [2010] UKSC 43
[94] Table 22 above
[95] Chapter 2 section 6.2 above
[96] Lady Hale, 'Devolution and The Supreme Court – 20 Years On' (Scottish Public Law Group, 2018), 1 at https://www.supremecourt.uk/docs/speech-180614.pdf (last visited 29/12/2018).
[97] Chapter 5 section 5 above
[98] Paterson, n31 above, 109

representation of Welsh and Northern Irish judges in cases from these jurisdictions which, if implemented, would also be expensive.

Despite these practical problems, having three Scottish judges would provide several benefits to the SC's decision-making. The Supreme Court of Canada uses three judges trained in Quebecois law to increase the expertise and legitimacy of its decisions on Quebecois law.[99] While the UK SC does not have the legitimacy problems that the Supreme Court of Canada had when it initially heard Quebecois cases, having three Scottish judges would make it more difficult for politicians to question the SC's legitimacy to decide Scottish criminal cases since Scottish judges would normally be in the majority. It would also ensure that expertise in Scots law was prioritised in the composition of Scottish SC cases (rather than expertise in the other UK legal systems) while ensuring that Scottish devolution and compatibility issue cases can benefit from having judges with expertise in the other UK legal systems.

3 Recommendations

The above analysis highlights the difficulty of making changes to the devolution and compatibility issue jurisdiction. A balance must be found between allowing UK-wide issues to be debated in a UK-wide court while providing Scots law with autonomy to develop in its own way.[100] There is also a need to ensure that an adequate system of appeals is in place to ensure that the UK meets international obligations such as the requirement that it complies with the ECHR.[101] At the same time, there is a need to find a politically feasible solution which would be acceptable to both the Scottish and UK Governments.[102] The above solutions for widening or decreasing the SC's jurisdiction over Scottish criminal cases do not meet these needs. They either over-prioritise the need to deal with issues at a UK-wide level or give Scots law a level of autonomy which fails to recognise that Scotland is part of a unitary state. Many of the solutions would be politically controversial because they fail to meet an acceptable balance between these needs.

[99] Chapter 2 section 6.2 above
[100] Section 2 above
[101] Chapter 5 section 6.3 above
[102] Section 2 above

Despite the asymmetry in access to the SC, the current devolution and compatibility issue jurisdiction better meets the needs just identified. It has given Scots law autonomy to develop in its own way because few cases reach the JCPC/SC.[103] For cases not raising devolution and compatibility issues, the HCJ has autonomy to decide how the common law should develop and how to interpret legislation of the Scottish and UK Parliaments.[104] Many JCPC/SC cases have not made significant changes to Scots law when judged against the criteria in Chapter 4. Although the JCPC/SC has sometimes harmonised Scots and English law to ensure that Scots law is Convention-compatible and sometimes when it is not required for Convention compatibility, Scots criminal law, procedure and evidence have retained large numbers of distinctive elements.[105]

From a UK perspective, while it was contended that arguments for a UK-wide approach should be used cautiously, Chapter 5 accepted that the interconnectedness of the UK legal systems means that there is a need to consider some issues at a UK-wide level. The current approach allows a second tier of appeal to the JCPC/SC for devolution and compatibility issues. This helps ensure that the UK meets its obligations under the ECHR by correcting HCJ decisions which do not meet the minimum standard of Convention rights protection provided by the ECtHR. It also enables the JCPC/SC to resolve disputes about whether the Scottish Parliament and Government have acted within devolved competence.

The balance between Scottish and UK needs is not perfect and Chapter 5 argued that there was an over-willingness by the JCPC/SC to alter Scots law by reducing or increasing Convention rights protection when this was not needed to achieve Convention rights compatibility.[106] Chapter 4 showed that some cases significantly affected Scots law by importing ECtHR case law into Scots law, producing decisions which did not fit with existing Scots law, harmonising Scots and English law, causing confusion about the law and, in *Cadder* v *HMA*[107] by requiring legislative intervention. Nonetheless, the current approach of allowing Scottish criminal cases raising devolution and compatibility issues to reach the JCPC/SC works well. As Chapter 1 showed it represents a political compromise, which

[103] Chapter 5 section 8 above
[104] *ibid*
[105] Chapter 3 above and Chapter 4 section 3.3 above
[106] Chapter 5 section 6 above
[107] *Cadder,* n93 above

despite the SNP preferring that the jurisdiction be abolished, was politically acceptable to both the UK and Scottish Governments.[108] It has balanced the need for the Scottish legal system to have autonomy with the need to take a UK-wide approach in a way which has legitimacy and is justifiable. Thus, beyond increasing the number of Scottish judges to three, there is little need to change the SC's devolution and compatibility issue jurisdiction over Scottish criminal cases because the current arrangement works well.

[108] Chapter 1 section 4

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Appendix 2: Abbreviations Used

Abbreviation	Meaning
ABH	Actual bodily harm
COS	Court of Session
CPS	Crown Prosecution Service
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
EU	European Union
GBH	Grievous bodily harm
HCJ	High Court of Justiciary
HMA	HM Advocate
HOL	House of Lords
JCPC	Judicial Committee of the Privy Council
SC	Supreme Court
SNP	Scottish National Party
UK	United Kingdom