The Government Legal Service for Scotland Annual Conference 2025

"Reflections on twenty-five years of Devolution and fifteen years of the Supreme Court: Retrospect and Prospect."

Lord Hodge, Deputy President of the UK Supreme Court

The theme of your conference – 25 years of devolution – awoke memories for me. I remember receiving instructions as an advocate from your predecessors to defend the first Act of the Scottish Parliament passed as emergency legislation in 2000 against what was then a novelty, a human rights challenge.[1] The Act concerned the detention in hospital of people with personality disorders which rendered them a serious risk to public safety, and which were not treatable. I could claim no expertise in mental health law and almost no knowledge of human rights law which had just been brought into our domestic law. Adding to my discomfort while I was waiting to address the First Division, a Scottish Office lawyer in the team engaging me told me that the First Minister, Donald Dewar, had said that he would resign if the first Act of the Scottish Parliament were held to breach the petitioners' human rights. For Government lawyers this may have been a rather dramatic foretaste of what was to come.

As he crossed the Rubicon, Julius Caesar famously said (or Suetonius said that he said) "The die is cast". What were cast over twenty-five years ago were two dice: The Scotland Act 1998 and the Human Rights Act 1998. Those momentous statutes (and later devolution measures) gave the courts of the United Kingdom, including its apex court, new constitutional roles. The devolution statutes gave the courts the role of interpreting the boundaries of the competence of the devolved institutions; and the HRA gave the task of implementing the Convention on Human Rights in our domestic law and having regard to and interpreting the jurisprudence of the Strasbourg Court.

For approximately the first ten years of devolution in Scotland and Northern Ireland it was the House of Lords which was the apex court of the United Kingdom. It mapped out the boundaries of devolved power and established the jurisprudential building blocks by which the HRA has been interpreted and has made Convention rights a significant part of our public law. The two tasks were not wholly separate but overlapped because the legislative competence of the Scottish Parliament was and is limited by the

[1] *A v Scottish Ministers* 2002 SC (PC) 63.

statutory requirement that the legislature does not make provisions that are not compatible with any Convention right.[2]

The House of Lords got to grips with the HRA, which back in 2000 was an untested innovation, a terra incognita in domestic jurisprudence. One question was: how were the UK courts to "take account of" the judgments and decisions of the Strasbourg court in determining a question concerning a Convention right as section 2 of the HRA mandates? In 2004 Lord Bingham in *Ullah* famously formulated the mirror principle that in the absence of some special circumstance the British courts were to follow any clear and constant jurisprudence of the Strasbourg court. We were to keep pace with the Strasbourg jurisprudence as it evolved over time: no more but certainly no less.[3]

Also in 2004 when addressing the interpretative duty imposed by section 3 of the HRA the House of Lords, in G*haidan v Godin-Mendoza,*[4] took a robust approach holding that the section authorised the court to depart from the unambiguous meaning which a legislative provision would otherwise bear in order to make it Convention compliant. The court could read in or read out words in the provision to achieve that end. This was subject to only two limitations: that interpretation must not go against the grain of the legislation and the court was not authorised to make policy decisions for which it was not equipped.

The HRA also extended the role of the courts by requiring that they conduct a proportionality exercise in relation to non-absolute rights under the Act to reach a fair balance between the individual's fundamental rights and the general interest of the community in the measure under challenge. In 2007 in *Huang*[5]*,* the House of Lords set out the four criteria or stages of analysis which the Supreme Court restated in *Quila* and *Bank Mellat*.[6]

The combination of devolution and the domestic enforcement of human rights led to significant changes particularly in relation to Scottish criminal procedure. With the passage of time it is easy to forget the significance of those changes but they should not be understated. Several cases reached the Judicial Committee of the Privy Council

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[2] Section 29(2)(d) of the Scotland Act 1998.
[3] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, paras 20 and 26.
[4] [2004] UKHL 30; [2002] 2 AC 557.
[5] *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] AC 167, para 19.
[6] *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] AC 621; *Bank Mellat v H M Treasury (No 2)* [2013] UKSC 39, para 45; [2014] AC 700, paras 20 and 74.

(JCPC). They included the question of privilege against self-incrimination in relation to road traffic offences when the police ask who is the driver of a vehicle -*Brown v Stott* [7]- what constituted an independent and impartial tribunal,[8] including the challenge to the tenure of temporary sheriffs and temporary judges on the ground of a perceived lack of independence – *Millar v Dickson*[9] and *Kearney v HM Advocate*[10]-, delay in bringing cases to trial,[11] dock identification,[12] and inadequate disclosure by the prosecution,[13]

Challenges to the compatibility of Scottish criminal procedure with Convention rights remained a regular occurrence in the early years of the Supreme Court. There were ten such judgments in the first four years of the court (2009-2013). Of those the most politically controversial was the *Cadder* case,[14] which undermined the practice, introduced in 1980, of detaining suspects for police questioning without access to a lawyer. I recall the outrage among the judges of the High Court of Justiciary, who considered that the safeguards of the recording or filming of the police interview meant that the procedure was not unfair. I had some sympathy with that view but thought that the Strasbourg Court, faced with cases from Russia and Turkey which disclosed serious abuses in police interviews, had established a new European norm with which Council of Europe nations would have to comply. I also recall the political fallout in Scotland but was interested to discover how many countries had to alter their procedures to comply with the case of *Salduz v Turkey*,[15] which lay behind the *Cadder* decision.

The number of challenges to the compatibility of Scottish criminal procedure with the Convention has fallen off markedly in recent years. This may be because many of the questions have now been answered. But we still see such challenges in the form of compatibility issues as in the recent appeals by Keir and Daly over whether the Lord Advocate had an unrestricted discretion as to the pursuit or dropping of charges in the context of the statutory restrictions on the leading of evidence in relation to sexual history.[16]

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[7] 2001 SC (PC) 43.
[8] *Clark v Kelly* 2003 SC (PC) 77.
[9] 2002 SC (PC) 30.
[10] 2006 SC (PC) 1.
[11] *Dyer v Watson* 2002 SC (PC) 89; *Mills v H M Advocate* 2003 SC (PC) 1; *R v HM Advocate* 2003 SC (PC) 21; *Speirs v Ruddy* 2009 SC(PC) 1.
[12] *Holland v HM Advocate* 2005 SC (PC) 3.
[13] *Sinclair v HM Advocate* 2005 SC (PC) 28. See later the judgments of the UKSC in *McInnes v HM Advocate* 2010 SC (UKSC) 28 and *Fraser v HM Advocate* 2011 SC (UKSC) 113.
[14] *Cadder v H M Advocate* [2010] UKSC 43; 2011 SC (UKSC) 13.
[15] (2009) 49 EHRR 19.
[16] Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1997.

The introduction of compatibility issues into our criminal procedure by the Scotland Act 2012[17] was not the only significant reform at about that time. I have in mind the Courts Reform (Scotland) Act 2014 which reformed the grounds on which civil appeals could be brought to the Supreme Court. It introduced into Scottish civil appeals the permission to appeal regime and the criterion which applied elsewhere in the United Kingdom, that the appeal must raise a point of law of general public importance which ought to be considered by the court at that time,[18] in place of the self-certification by the appellant's counsel that it was reasonable to take the appeal to the Supreme Court.

Many challenges to devolved competence involved questions of compatibility with human rights, and disputes about the legislative competence of the Scottish Parliament, were initially confined to challenges on human rights grounds.[19] Challenges to legislative competence in relation to reserved matters were avoided for many years by legislative consent motions and the care of officials to keep legislation within competence. As a result, it has been the appeals to the Supreme Court since 2009 that have addressed the interpretation of the central provisions of the Scotland Act which define the legislative competence of the Scottish Parliament, and indirectly the devolved competence.[20] The seminal cases on the meaning of the words "relates to a reserved matter" in section 29(3) were *Martin v Most*[21] in 2010 *and Imperial Tobacco v Lord Advocate* in 2012.[22]

The court has subsequently discussed the issue in *Christian Institute v Lord Advocate*,[23] and in *UK Withdrawal from the EU (Legal Continuity) Scotland Bill*.[24] In short, the court has held that a system which enables the Scottish Parliament to exercise its legislative power must be coherent, stable and workable. That is achieved by adopting an approach to the meaning of a statute which is constant and workable, that is by construing the legislation according to the ordinary meaning of the words used. The expression "relates to" indicates more than a loose or consequential connection with the reserved matter and that is determined by reference to the purpose of the provision in question. That purpose is to be ascertained having regard to the effect of the provision, among other relevant matters. There was thus established a consistent line

[17] Scotland Act 2012, sections 34-37.
[18] Courts Reform (Scotland) Act 2014, section 117, introducing section 40A into the Court of Session Act 1988.
[19] *A v Scottish Ministers* (fn 1 above); *Adams v Scottish Ministers* 2004 SC 665; *Whaley v Lord Advocate* [2007] UKHL 53; 2008 SC (HL) 107; *DS v HM Advocate* [2007] UKPC36; 2007 SC (PC)1.
[20] Sections 29 and 54 of the Scotland Act 1998.
[21] [2010] UKSC 10; 2010 SC (UKSC) 40.
[22] [2012] UKSC 61; 2013 SC (UKSC) 153.
[23] [2016] UKSC 51; 2017 SC (UKSC) 29.
[24] [2018] UKSC 64; 2019 SC (UKSC) 13.

of jurisprudence which was later applied in *Lord Advocate's Reference (No 1)* on the power of the Scottish Parliament to enact legislation for holding an independence referendum.[25]

The Scottish *Continuity Bill* case[26] also gave guidance on what amounted to modification of a statute which was protected against modification by Schedule 4 of the Scotland Act and the court confirmed that guidance in the *UNCRC Incorporation Bill* case.[27]

There is now a substantial body of jurisprudence on the interpretation of devolution legislation, including cases from Wales and Northern Ireland. The Northern Irish reference concerning legislation to give women safe access to abortion clinics[28] in 2022, in which the Lord Advocate intervened and was the effective respondent, is an example of how rulings of the court in relation to proposed legislation in one of the United Kingdom's jurisdictions are relevant in another UK jurisdiction. The ability of law officers to make references and of law officers from other jurisdictions to intervene in such cases makes an important contribution to the court's constitutional jurisprudence.[29]

Also relevant to the court's constitutional jurisprudence is the judgment of an eleven Justice Bench in *Gina Miller (1)* in 2017,[30] in which they confirmed the status of the Sewell Convention as a convention rather than a rule of law, notwithstanding its recognition in the Scotland Act 2016.

Before moving on, I should also mention two judicial review petitions by private sector organisations which challenged the lawfulness of legislation of the Scottish Parliament.

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[25] [2022] UKSC 31; 2023 SC (UKSC) 40.

[26] Fn 24 above, paras 51-54.

[27] *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42; 2022 SC (UKSC) 1.

[28] *Reference by the Attorney General of Northern Ireland – Abortion Services (Safe Access Zones) Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505.

[29] For example, the Counsel General for Wales intervened in *Axa*, *the Continuity Bill*, and *the UNCRC Incorporation Bill* appeals.

[30] *R (Miller) v Secretary of State for exiting the European Union* [2017] UKSC 5; [2018] AC 61.

The first, *AXA v Lord Advocate*,[31] was a challenge by various insurance companies to legislation that provided that asbestos-related conditions, such as asymptomatic pleural plaques and pleural thickening, should be treated as always having constituted actionable harm for the purposes of an action for damages for personal injury. It is an important judgment which is concerned with both the grounds on which an Act of the Scottish Parliament could be reviewed and locus standi. On the former point the court held that the Acts of the Scottish Parliament, being the product of a democratic legislature, were not open to judicial review challenge on the ordinary grounds on which the acts of public authorities can be challenged. Equally important is the second point, because the judgment made it possible for individuals to challenge the lawfulness of the actions of public authorities without needing to show that their individual rights had been or were being infringed. This has enabled environmental and other organisations, as well as citizens with a reasonable concern, to bring such proceedings as in *Walton v Scottish Ministers*,[32] a case which has resonated internationally in the jurisdictions of the JCPC.

The second, *Scotch Whisky Association v Lord Advocate*,[33] involved a challenge to the Act establishing a minimum pricing regime for alcohol. The Court rejected the argument that there had been a breach of EU law because of its likely effect on the markets in agricultural products (including wine) in the EU and held that minimum pricing was a proportionate means of achieving a legitimate aim.

Turning from the court's devolution jurisprudence, the Supreme Court has continued its longstanding role as an appellate court on other civil matters. There have been important decisions in Scottish appeals concerning medical negligence and informed consent which have an application well beyond Scotland.[34] In such cases the court serves to amplify internationally the significance of Scottish jurisprudence. In the field of delict (or tort), where there is much commonality in the legal rules across the UK, cases in English law contribute to the development of Scots law. We have decided

[31] [2011] UKSC 46; 2012 SC (UKSC) 122
[32] [2012] UKSC 44; 2013 SC (UKSC) 67.
[33] [2017] UKSC 76; 2018 SC (UKSC) 94.
[34] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; 2015 SC (UKSC) 63; *McCulloch v Forth Valley Health Board* [2023] UKSC 26; 2023 SC (UKSC) 91.

cases on the boundaries of vicarious liability,[35] on liability in negligence for omissions,[36] and on liability for psychiatric injury caused by witnessing the death of a patient whom a doctor had at an earlier date negligently failed to diagnose or treat.[37] These decisions have a profound influence on Scots law. In the field of contract and commercial law, cases from elsewhere in the UK and from JCPC jurisdictions have a similar influence. In recent years we have decided among many others, cases on the interpretation of contracts,[38] implied terms,[39] penalty clauses,[40] the defence of illegality,[41] remoteness of damage,[42] and the scope for a plea of contributory negligence in a contractual claim.[43] In the field of employment law, the court's decision in *Uber* [44] affects the employment rights of many people engaged in the gig economy. In the field of company law, we have decided cases on the duty of directors of a company facing insolvency in relation to its creditors,[45] and on the circumstances in which a shareholder can raise a personal action against the company.[46] We have also made several important decisions on the law of arbitration.[47] Twenty-five years of devolution have not altered the significance of this jurisprudence for the development of Scots law and Scottish commercial life.

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[35] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1; *Cox v Ministry of Justice* [2016] UKSC 10; *Various Claimants v Wm Morrison Supermarkets plc* [2020] UKSC 12; [2020] AC 989; *Various Claimants v Barclays Bank plc* [2020] UKSC 12; [2020] UKSC 973; *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15; [2024] AC 567.
[36] *Michael v Chief Constable South Wales Police* [2015] UKSC 2; [2015] AC 1732; *Robinson v Chief Constable West Yorkshire Police* [2018] UKSC 4; [2018] 1 WLR 5536; Tindall v Chief Constable Thames Valley Police [2024] UKSC 33; [2024] 3 WLR 822.
[37] *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1
[38] *Rainy Sky v Kookmin Bank* [2011] USKC 50; [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
[39] *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742.
[40] *Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67; [2016] AC 1172.
[41] *Patel v Mirza* [2016] UKSC 42; [2017] AC 467.
[42] *Global Water Associates Ltd v AG of the Virgin Islands* [2020] UKPC 18; [2021] AC 23.
[43] *Primeo Fund v Bank of Bermuda* [2021] UKPC 22; [2022] 1 All ER (Comm) 1219.
[44] *Uber BV v Aslam* [2021] UKSC 5; [2021] 4 All ER 209.
[45] *BTI (2014) LLC v Sequana SA* [2022] UKSC 25; [2024] AC 211.
[46] *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2024] JCPC 36; [2024] 3 WLR 986.
[47] *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb* [2020] UKSC 38; [2020] 1 WLR 4117; *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48; [2021] AC 1083; *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp.* [2023] UKPC 33; [2024] 1 All ER (Comm) 697; *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32; [2024] 1 All ER 763.

Many decisions of the court on public law and human rights such as the judgments in *Nicklinson*,[48] *UNISON*,[49] *Steinfield*,[50] and in the Rwanda case[51] are of great importance to our fellow citizens in Scotland as are our decisions on taxation.

The wider role of the court

I move on now to the wider role of the court and the two Scottish Justices who serve on it. In a recent lecture at the University of Strathclyde Lord Reed explained why the UK Supreme Court matters to Scotland.[52] I wish to highlight certain matters.

The court sat in Edinburgh in 2017 and has since sat in the other capitals of the nations of the UK and in Manchester. I hope that we will return to Scotland in the future when resources permit.

The Lord President has sat with us in London in the Supreme Court and senior Scottish judges have sat with us and will continue to sit on the Judicial Committee of the Privy Council.

Lord Reed and I have regular meetings with the Lord Advocate and the Advocate General for Scotland to discuss legal developments in London which are relevant to Scotland and developments in Scotland which are relevant to the court. We also attend events and give lectures at universities and other institutions in Scotland.

I advocated for legal reform to provide a modern system for transactions in, including the taking of security over, moveable property, which, after a very able report by the Scottish Law Commission, has been enacted by the Scottish Parliament.[53] I am now engaged in supporting proposals to recognise digital assets as property in Scots law on

[48] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657.
[49] *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869.
[50] *R (Steinfield and Keidan) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1.
[51] *R (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42; [2023] 1 WLR 4433.
[52] Lord Reed (2024) *Why does the UK Supreme Court matter for Scotland?* Available at: https://supremecourt.uk/uploads/speech_lord_reed_141124_74ae8569d6.pdf (accessed on 24/01/2025).
[53] Moveable Transactions (Scotland) Act 2023 (2023 asp 3).

which the Scottish Government is consulting.[54] It is important for the health of the economy in Scotland that we have an up-to-date commercial law and the court is playing its part to that end.

Each year we have 12 young lawyers or legal scholars as our judicial assistants and actively recruit in Scotland. My current JA is a very able Scottish lawyer with aspirations to practise in Scotland when she completes her time in our court.

Since we were established in 2009, the court has expanded its outreach, recognising the need in modern society to explain the exercise of authority. We have a presence online and on social media. We host university moots, give lectures and engage with senior students in schools through our "Ask a Justice" programme. Scottish universities and schools engage in these events. We also try to set an example to the wider judiciary through our policies on diversity and inclusion.

The Future

I conclude by making a few comments about the future.

The pandemic accelerated our move to become a largely paperless court and our embrace of modern technology. In a three-year Change Programme we have introduced a portal by which litigants and the public engage with the court, lodge and serve documents and observe the progress of cases. It also enables us to operate online case management.

We will continue our impartial adjudication on constitutional disputes, which usually involve questions of statutory interpretation. This is a small part of our work but an important one. Equally important is our wider task of developing and clarifying the law more generally. We are not bound by precedent so can continue to develop the law when that is needed. We are very conscious that the UK is a global financial and dispute resolution centre. London dominates, but Edinburgh and Glasgow are both significant financial centres. It is increasingly recognised that there is a close relationship between

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[54] Scottish Government (2024) *Digital assets in Scots private law: consultation*. Available at: https://www.gov.scot/publications/digital-assets-scots-private-law-consultation/ (accessed on 24/01/2025).

the rule of law, the strength of our institutions and economic prosperity.[55] At a time when governments seek to find means to grow the economy, the court will play its part in supporting the economic development of our country by contributing to the UK's international standing as a rule of law society.

Finally, the Scottish Justices will continue to be active as ambassadors for the Scottish legal world on a wider stage, nationally and internationally.

Thank you.

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[55] See, for example, Acemoglu and Robinson, "Why Nations Fail: The Origins of Power, Prosperity and Poverty" (2012).