Ten-year anniversary lecture series

The Supreme Court and Scotland: the First Ten Years

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This evening I would like to consider the Supreme Court in relation to Scotland, where I lived and worked until my appointment to the Court. I should begin by explaining, in very broad terms, the relevant background.

Like many European countries, the United Kingdom is a relatively recent creation, but is composed of a number of older nations which were gradually brought under a common sovereignty. England is the largest and most populous of those nations. It brought Wales under its control by military conquest during the thirteenth century, but its attempt to conquer Scotland was unsuccessful. Instead, a process of unification began in 1603, when King James VI of Scotland succeeded to the English throne as James I, with the result that the Scottish court moved to London. Unification was completed in 1707, when England and Wales united with Scotland under the Treaty of Union to form Great Britain. Ireland had been brought under English control by military conquest under the Tudors, but remained under separate administration until the Acts of Union 1800 brought the United Kingdom into being. In 1922, Ireland became divided and only Northern Ireland remained within the UK. So the UK as it currently exists is less than 100 years old.

That political history is reflected in the law. The English legal system was extended to Wales in 1536, and Welsh law was abolished. There was, and remains, a single system of courts for England and Wales, a single Bar based at the Inns of Court in London, and a single Law Society. There is a single system of law in force in England and Wales, except

to the extent that separate provision has been made by legislation: something which has become more significant since the creation of the National Assembly for Wales.

English law was also extended to Ireland, but because of its separate administration, there was a distinct system of courts, a separate Bar and a separate Law Society. That remains the position today in Northern Ireland. It has a distinct system of courts from England and Wales, and distinct legal professions, but it applies the same law as England and Wales, except to the extent that different provision has been made by legislation.

The position in Scotland is different. Because Scotland was never brought under English control, it preserved its own system of courts, its own legal professions and its own laws. The Treaty of Union of 1707 provided for the continuation of Scotland's separate legal system, and that was reflected in the Acts of Parliament by which the Treaty was given effect. That was important because Scots law had developed separately from English law, and although they had many common features, they also differed in many respects. In particular, Scots law was more profoundly influenced by the continental civilian tradition, and it did not develop the distinction between law and equity which is central to English law. So the differences are not simply a matter of separate provision being made by legislation, as in Northern Ireland and Wales. Legislation is interpreted by the courts in the same way throughout the UK, and so the existence of English, Welsh, Northern Irish or Scottish legislation does not in itself present judges from other parts of the UK with any difficulty. As I have explained, the differences between English and Scots law are more profound.

The effect of the Union of 1707 was to create a single economic area throughout Great Britain, a single legislature located at Westminster, and a single government with its principal base in Whitehall. The merger of the Scottish and English Parliaments also had the effect of conferring on the British Parliament the function of a final court of appeal, the English Parliament having formerly performed that function for England and Wales,

and the Scottish Parliament for Scotland. That appellate function was performed by the House of Lords. There is an analogy with the creation of the EU, with a European legislature, executive and court.

As in the EU, the single economic area and common citizenship necessitated the creation of a largely uniform body of law governing matters of importance to commerce and trade or to a sense of belonging to a single political community. In relation to commerce, Lord Mansfield laid down the principles of English commercial law in the eighteenth century on the basis of Roman law, and similar principles were also adopted in Scotland. Parliament legislated to create a largely uniform body of law throughout the UK in areas such as company law, the sale of goods, consumer protection, employment law, copyright law, taxation, social security, nationality and immigration, to give only a few examples. On the other hand, areas of the law which were of little importance to commerce or to the creation of a single political community, such as criminal procedure and the law of inheritance, remained substantially different on either side of the border.

That pattern has been preserved since the advent of devolution. The legislation creating the Scottish Parliament and the Scottish Government reserves to Westminster and Whitehall the areas of law and administration which it is thought should be uniform in a single country, while placing other areas within the powers of the devolved institutions.

Harmonisation of the law throughout the UK has also developed as a consequence of our membership of the EU. Just as Westminster has created substantially uniform laws in relation to matters which affect the functioning of the UK, so the EU institutions have created substantially uniform laws for matters which affect the functioning of the EU, such as health and safety at work, equality law, data protection and financial regulation, to give only a few examples. There is now a substantial body of EU law and EU-derived law in force in all parts of the UK.

In addition to the harmonisation brought about by Westminster and by the EU, there is also harmonisation brought about by the actions of individuals and organisations. When I was a commercial judge in Scotland, many of the cases I dealt with were governed by English law, as that was the system of law which the parties had chosen to govern their arrangements. English law has a global status, as perhaps the most trusted legal system in the world for commercial transactions, which leads to its being favoured by some of Scotland's largest commercial organisations, as well as by the English and overseas companies which now control much of the business sector in Scotland.

Harmonisation has also resulted from the very substantial influence which English and Scots law, and judicial decisions in each jurisdiction, have had, and continue to have, on each other. English influence on Scots law is well known: English judgments are cited every day in the Scottish courts. Scottish influence on English law is less well known. To give only a few examples of some Scottish principles of law which have been adopted in England, I would mention the declaratory remedy, the law of penalty clauses in contract, and the doctrine of forum non conveniens in private international law.[1] Countless examples could be given of the influence which decisions in Scottish appeals have had upon English law, most notably in the law of negligence, as I shall be explaining later. That influence has been exercised above all in the House of Lords and the Supreme Court, where judges with backgrounds in both systems work together.

So Scots law and English law have become less different from one another over time. The differences have been largely if not entirely eliminated in areas which are important to commerce or to a sense of common citizenship, but they remain particularly noticeable in non-commercial areas of limited significance for the creation of a political community, such as criminal procedure, family law and inheritance law.

[1] See Braun, "The Value of Communication Practices for Comparative Law: Exploring the Relationship Between Scotland and England" (2019) Current Legal Problems 1.

One other aspect of the Scottish legal system should also be mentioned. Although Scotland's population is much smaller than England's, it is much larger than that of Northern Ireland or Wales, and generates a considerable quantity of litigation domestically and some significant cases in international courts. And since Edinburgh is the UK's most important financial centre after London, and one of the top seven in the EU,[2] there is also a considerable quantity of commercial and financial litigation. So judges and lawyers in Edinburgh deal with much the same range of work as their counterparts in London, if international commercial litigation is put to one side.

These matters form the background to consideration of the Supreme Court in relation to Scotland. I am going to consider four matters in particular: first, the role of the Court generally; secondly, the Court's work in relation to Scotland; thirdly, the impact of the Court on the Scottish legal system, and finally the impact of the Scottish legal system on the Court.

The role of the Court generally

Considering the role of the Court generally, it has three principal functions, which overlap to a considerable degree. The first is to act as the constitutional court of the UK. It is not a constitutional court in the same sense as some other constitutional courts, such as the United States Supreme Court, since it cannot strike down legislation enacted by Parliament. But questions of constitutional law nevertheless arise in this country, as we have recently seen in the prorogation case. The debate over withdrawal from the EU has given rise to questions concerning the legal relationships between Parliament, the Government and the devolved institutions. The Court also has to decide questions which are brought before it as to whether devolved legislation lies within the powers of the Scottish Parliament or the Welsh or Northern Irish Assemblies, or whether actions taken by the devolved governments lie within their powers. It also decides questions of EU law, which can result in its having to decide that provisions of Acts of Parliament should be

[2] As measured by the Global Financial Centres Index as of 19 September 2019. Glasgow is also in the top 25.

disapplied in accordance with the European Communities Act 1972. It also decides questions arising under the Human Rights Act 1998, which can result in its having to declare that provisions of Acts of Parliament are incompatible with Convention rights. It also has to deal very frequently with questions concerning whether or not the government and other public authorities throughout the UK have kept within their legal powers and used them for their proper purpose.

The Court's second function arises from the fact that, as I explained earlier, the House of Lords became in 1707 the highest court for all the jurisdictions of Great Britain, as it then was, and after 1800 for all the jurisdictions of the UK. The Supreme Court inherited that function. As the highest court for all three jurisdictions, it is the only court which can ensure that a consistent approach is followed in areas of the law which should be uniform across the UK. This involves, in the first place, giving an authoritative interpretation of legislation which applies throughout the UK.[3] As I have explained, there is a large amount of legislation, both domestic and EU, in that category. The Scottish, English and Northern Irish courts cannot achieve a uniform interpretation, because they may disagree. When they do, this Court has to give a definitive decision. Even where no disagreement has arisen, this Court can resolve difficult issues of interpretation so as to provide certainty throughout the UK.

There are also important areas of the common law which are substantially the same across the UK, such as the law of negligence, the principles of judicial review, much of our constitutional law, and much of the law of contract. There are reasons why the courts have developed a harmonised approach in these areas, arising from their commercial importance or their significance to the creation of a single community. So it is important that the development of the law in these areas should generally proceed along similar lines throughout the UK, and that there should be a good reason for any differences. In

[3] Or sometimes legislation which applies throughout Great Britain, that is to say the UK minus Northern Ireland.

order to achieve that, it is necessary to have a court which has jurisdiction over, and knowledge of, all three of the UK's legal systems.

The Court's third function arises from the fact that the lower appeal courts – the Court of Appeal in England and Wales, the Inner House of the Court of Session in Scotland, and the Court of Appeal of Northern Ireland - have to deal quickly and efficiently with hundreds or thousands of cases each year. The great majority concern errors in the application of established law. The courts dispose of them by sitting in constitutions usually of two or three judges, and allocating the judgment writing between the members of the court in advance of the hearing. In deciding the cases, the lower courts are bound by previous decisions of this Court, and usually also by their own previous decisions. The Supreme Court operates very differently. It grants permission to appeal in only a tiny fraction of the cases heard by the lower appeal courts: around 70 cases a year, which the Justices hear along with another 50 or so appeals from Crown dependencies, British overseas territories and some independent countries, mostly in the Commonwealth, that are dealt with in the Judicial Committee of the Privy Council. The numbers are so low because it is not this Court's function to review how lower courts have applied established principles: that is the role of the lower appeal courts.[4] Instead, the role of the final appeal court is to resolve difficult points of law which are important to many people besides the parties to the case.

Consistently with that approach, the Supreme Court normally grants permission to appeal only where the appeal raises an arguable point of law of general public importance which the Court ought to consider at that time. That criterion enables us to hear a small number of cases raising important issues of principle. Unlike the lower courts, we are not bound by precedent, and so an important aspect of our role is the development of the law.

[4] *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222, 2228 per Lord Bingham of Cornhill.

Because the Court hears only a small number of appeals, it can devote greater resources to each case than can normally be expected of the lower courts of appeal. It sits in larger panels than the lower court: at least five Justices, and sometimes seven or more. That larger panel tends to even out the differences in judicial outlook and temperament which can be significant on a smaller court, and reduces greatly the risk of a panel's being dominated by the views of any one person. The panels are constituted so as to ensure that there is a breadth of experience and expertise from across the law as a whole. Judgment writing is not allocated in advance, and every member of the panel prepares each case thoroughly. We spend more time discussing cases than is usual in lower courts. We expect more of the advocates who appear before us. We carry out a great deal of research of our own, with the assistance of our team of judicial assistants, and sometimes raise questions with the parties' legal teams which were not put before the lower courts. We also receive interventions from interested parties, which can give us a wider perspective of the issues raised by the appeal. So this Court is designed specifically for the resolution of difficult issues of principle, devoting to them more time, more discussion, a greater number of minds, greater combined legal experience and expertise, and a wider perspective, than can normally be expected of the lower courts.

The work of the Court in relation to Scotland

Considering the work of the Court in relation to Scotland, during the period from October 2009 to the present date, the Court has handed down 692 judgments altogether. 94 of those concerned cases from Scotland: in other words, 14% of the total. That is higher than one might expect: Scotland's share of the UK's population is only 8%, and it does not have the volume of international litigation that dominates the commercial court in London. On the other hand, legal aid is more widely available in Scotland, which is a countervailing factor. However, the proportion of our appeals which come from Scotland has declined over time. The average over the first three years was 18% of all appeals,[5] reaching a high of 22% in 2012, whereas the average over the last three years was 10%, declining from 13% in 2017 to 6% in the current year. There are a number of

[5] Figures for 2009 to 2012 inclusive, ie 3 years and 3 months.

possible reasons for that decline. One is a marked fall in the number of appeals concerning the compatibility of Scottish criminal procedure with the European Convention on Human Rights (ECHR), as I shall explain shortly. Another factor is likely to be the introduction in 2015 of a requirement that permission to appeal should be obtained: a requirement which had long existed in relation to the rest of the UK but not in relation to Scotland, with the result that a number of appeals were brought for which permission would not have been granted. The importance of that requirement can be gauged from the fact that over the three years between 1 April 2016 and 31 March 2019 the Court received 54 applications for permission to appeal from the Scottish courts, and granted nine. Another factor is likely to be the fall in the number of appeals being heard by the Inner House in recent times, due in part at least to the transfer of much of the lower-value work of the Court of Session to the Sheriff Court, and the creation of the Sheriff Appeal Court.

When one breaks down the 91[6] Scottish appeals according to their subject matter,[7] I would describe 23 of them, or 25% of the total, as relating to the Court's performance of its constitutional function. Indeed, Scottish cases been at the forefront of the Court's performance of that function. However, there has been a change in the balance of the Scottish constitutional cases over time.

During the early years of the Court's existence, there were a number of Scottish appeals challenging the compatibility of Scottish criminal procedure with the European Convention on Human Rights (the ECHR).[8] Appeals of that kind largely came to an end

[6] Three of the 94 judgments were not substantive judgments on appeals (or references). I have treated different appeals disposed of by the same judgment as single appeals. Clearly, my statistics would be different if a different methodology were adopted. They are not intended to be definitive, but merely to convey a broad impression.
[7] There is a subjective element involved in the categorisation of cases, especially (but not only) where, as is often the case, an appeal raises a number of points, which might be categorised in different ways. In this respect too my statistics are not definitive and are intended merely to convey a broad impression.
[8] *Allison v HM Advocate* [2010] UKSC 6; *McInnes v HM Advocate* [2010] UKSC 7; *Cadder v HM Advocate* [2010] UKSC 43; *Fraser v HM Advocate* [2011] UKSC 24; *HM Advocate v Ambrose* [2011] UKSC 43; *HM Advocate v P* [2011] UKSC 44; *McGowan v B* [2011] UKSC 54; *Jude v HM Advocate* [2011] UKSC 55; *Kinloch v HM Advocate* [2012] UKSC 62; *O'Neill v HM Advocate* [2013] UKSC 36; and *Macklin v HM Advocate* [2015] UKSC 77.

in about 2013, by which time the most serious problems had been addressed. The Court also made it clear in 2015[9] that it would not normally grant permission to appeal in Scottish criminal cases unless there was a question as to whether the Scottish courts had applied the correct legal test, as distinct from a question as to whether they had applied the law correctly to the facts.

There has also been a steady stream of cases concerning the legislative powers of the Scottish Parliament, almost all brought by private parties: only one was brought by the UK Government. Some of these cases have concerned the compatibility of Acts of the Scottish Parliament (ASPs) with the ECHR[10] or EU law,[11] and others have concerned the question whether ASPs trespassed into matters reserved to Westminster.[12] These cases have raised some important issues. For example, the case of *Axa General Insurance Ltd v Lord Advocate*[13] established that the devolved legislatures were not to be treated in law in the same way as other statutory bodies, such as local authorities, but as democratic legislatures, albeit with constitutional limitations upon their powers. That case was recently included in a collection of the UK's most important public law cases, entitled *Landmark Cases in Public Law*.[14] Other cases of that kind, important for other reasons, have included *Imperial Tobacco Ltd v Lord Advocate*,[15] concerned with an ASP imposing restrictions on the sale of tobacco products, and *Scotch Whisky Association v Lord Advocate*[16], concerned with an ASP establishing minimum pricing for alcohol.

[9] In *Macklin v HM Advocate* [2015] UKSC 77.
[10] *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46; *ANS v ML* [2012] UKSC 30; *Salvesen v Riddell* [2013] UKSC 22; *Christian Institute v Lord Advocate* [2016] UKSC 51; and *AB v HM Advocate* [2017] UKSC 25.
[11] *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76.
[12] *Martin v Most* [2010] UKSC 10; *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; and *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.
[13] [2011] UKSC 46.
[14] (2017), eds Juss and Sunkin.
[15] [2012] UKSC 61.
[16] [2017] UKSC 76.

There have also been a number of Scottish cases[17] raising important constitutional issues under the common law, to which I shall return.

As I mentioned earlier, the second function of this court is to decide appeals concerned with statutory provisions or common law rules which are identical or similar across the different parts of the UK. The constitutional cases I have already mentioned might be regarded as falling into this category, but leaving them to one side, I would regard about 59 of the Scottish appeals over the past ten years as falling into this category: in other words, 65% of the total. They have concerned human rights law,[18] EU law,[19] statutory interpretation,[20] the scope of appeals on questions of fact,[21] judicial review,[22] freedom of information,[23] planning and environmental law,[24] nationality,[25] extradition,[26] immigration and asylum,[27] prisons law,[28] tax,[29] social security,[30] employment,[31] equality law,[32] health

[17] *RM v Scottish Ministers* [2012] UKSC 58; *A v British Broadcasting Corporation* [2014] UKSC 25; and *Cherry v Advocate General for Scotland* [2019] UKSC 41, heard and decided together with *R (Miller) v Prime Minister*.

[18] *Principal Reporter v K* [2010] UKSC 56; *Ruddy v Chief Constable, Strathclyde Police* [2012] UKSC 57; *McCann v State Hospitals Board* [2017] UKSC 31.

[19] *McGeoch v Lord President of the Council* [2013] UKSC 63, heard with the English case of *R (Chester) v Secretary of State for Justice*; *Joint Administrators of Heritable Bank plc v Winding-Up Board of Landsbanki Islands HF* [2013] UKSC 13; *Healthcare at Home Ltd v Common Services Agency* [2014] UKSC 49*; Sadovska v Secretary of State for the Home Department* [2017] UKSC 54.

[20] *Davies v Scottish Commission for the Regulation of Care* [2013] UKSC 12; *Campbell v Gordon* [2016] UKSC 38.

[21] *McGraddie v McGraddie* [2013] UKSC 58; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; *Carlyle v Royal Bank of Scotland plc* [2015] UKSC 13.

[22] *Eba v Advocate General for Scotland* [2011] UKSC 29, which was heard together with *R (Cart) v Upper Tribunal* [2011] UKSC 28; *Gordon v Scottish Criminal Cases Review Commission* [2017] UKSC 75.

[23] *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55.

[24] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; *G Hamilton (Tullochgribban Mains) Ltd v Highland Counci*l [2012] UKSC 31; *Walton v Scottish Ministers* [2012] UKSC 44; *Uprichard v Scottish Ministers* [2013] UKSC 21; *Sustainable Shetland v Scottish Ministers* [2015] UKSC 4; *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; *Aberdeen City and Shire Strategic Development Authority v Elsick Development Co Ltd* [2017] UKSC 66.

[25] *Advocate General for Scotland v Romein* [2018] UKSC 6.

[26] *BH v Lord Advocate* [2012] UKSC 24; *Kapri v Lord Advocate* [2013] UKSC 48*; Dean v Lord Advocate* [2017] UKSC 44.

[27] *IA v Secretary of State for the Home Department* [2014] UKSC 6; *MN v Secretary of State for the Home Department* [2014] UKSC 30.

[28] *Shahid v Scottish Ministers* [2015] UKSC 58; *Brown v Scottish Ministers* [2017] UKSC 69.

[29] *Grays Timber Products Ltd v HMRC* [2010] UKSC 4; *Scottish Widows plc v HMRC* [2011] UKSC 32; *RFC 2012 plc v Advocate General for Scotland* [2017] UKSC 45; *HMRC v Taylor Clark Leisure plc* [2018] UKSC 35; *HMRC v Frank A Smart & Son Ltd* [2019] UKSC 39.

[30] *Secretary of State for Work and Pensions v MM* [2019] UKSC 34.

[31] *University and College Union v University of Strathclyde* [2015] UKSC 26; *McBride v Scottish Police Authority* [2016] UKSC 27.

[32] *Hewage v Grampian Health Board* [2012] UKSC 37; *North v Dumfries and Galloway Council* [2013] UKSC 45.

and safety,[33] adoption,[34] international child abduction,[35] other international conventions,[36] abortion,[37] the law of contract,[38] and the law of negligence.[39] I will discuss some of these cases in a moment.

There remains the Court's third function, as a final court of appeal. So far as this relates to constitutional cases and to cases concerning law which is largely shared throughout the UK, I have already mentioned the relevant appeals. There remain those which concern points of law arising in relation to legislative provisions or common law rules which are particular to Scotland and have no near equivalent elsewhere in the UK. Over the past ten years, there have been about nine cases falling into this category, forming about 10% of the total. Seven of them have raised questions of statutory interpretation, which must be decided in accordance with UK-wide principles.[40] Two have concerned rules of Scottish common law, relating in one case to rights arising on a breach of contract,[41] and in the other case to obligations arising in conveyancing.[42] The Court has not decided a case of that common law kind – Scots law in its purest form - in the last seven years.

[33] *Morrison Sports Ltd v Scottish Power* [2010] UKSC 37; *Russell v Transocean International Resources Ltd* [2011] UKSC 57; *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; *HM Inspector of Health and Safety v Chevron North Sea Ltd* [2018] UKSC 7. In the latter case there had been conflicting decisions of the Scottish and English courts. This Court endorsed the approach adopted by the Scottish courts.
[34] *NJDB v JFG* [2012] UKSC 21; *EV (A Child)* [2017] UKSC 15.
[35] *AR v RN* [2015] UKSC 35.
[36] *Warner v Scapa Flow Charters* [2018] UKSC 52. There had been conflicting decisions of the Scottish and English courts. This Court endorsed the approach adopted by the Scottish courts.
[37] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.
[38] *Farstad Supply AS v Enviroco Ltd* [2010] UKSC 18 (which also raised a question as the interpretation of Scottish legislation); *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47; *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56*; Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1; *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3; *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9; *L Batley Pet Products Ltd v North Lanarkshire Council* [2014] UKSC 27.
[39] *Jackson v Murray* [2015] UKSC 5*; Montgomery v Lanarkshire Health Board* [2015] UKSC 11; *Steel v NRAM* [2018] UKSC 13.
[40] *Royal Bank of Scotland v Wilson* [2010] UKSC 50 (the Conveyancing and Feudal Reform (Scotland) Act 1970); *Gow v Grant* [2012] UKSC 29 (the Family Law (Scotland) Act 2006); *G v Scottish Ministers* [2013] UKSC 79 (the Mental Health (Care and Treatment) Act 2003); *David T Morrison Ltd v ICL Plastics Ltd* [2014] UKSC 48 (the Prescription and Limitation (Scotland) Act 1973); *Brown v Pelosi Ltd* [2016] UKSC 30 (section 242 of the Insolvency Act 1986); *McDonald v McDonald* [2017] UKSC 52 (the Family Law (Scotland) Act 1985); *Gordon v Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75 (the Prescription and Limitation (Scotland) Act 1973).
[41] *Inveresk plc v Tullis Russell Papermakers Ltd* [2010] UKSC 19 (rights of retention). The appeal also concerned contractual interpretation, which is based on the same principle throughout the UK.
[42] *Morris v Rae* [2012] UKSC 50 (warrandice clauses).

The impact of the Court on the Scottish legal system

Considering next the impact of the Court on the Scottish legal system, it seems to me that the Court has had, and continues to have, a significant impact on the Scottish legal system. So far as the law is concerned, the Court cannot carry out systematic law reform in the way that the Scottish Law Commission does, but it can clarify and develop the law on a case by case basis in the appeals which are brought before it. This is particularly important given that the clarification and development of the law, and especially of the common law, is a responsibility of judges, but it is not one which first tier appeal courts may have the time and resources to undertake, and of course they cannot do so for the whole of the UK in cases where that is appropriate.

During the early part of the Court's existence, the exposure of Scottish criminal procedure to scrutiny against the standards set by the ECHR revealed a number of respects in which it had failed to keep in step with more widely prevailing ideas about a fair trial. Two problems were particularly serious. One was the practice of detaining suspects for police questioning without access to a lawyer, introduced in 1980 in the hope that, without legal advice, the suspect would be more likely to incriminate himself. By the 21st century this was out of step with prevailing standards at a European level. The other problem was the under-developed state of the law relating to the disclosure of evidence by the prosecution which might be relevant to the defence. Although the appeals challenging the compatibility of Scottish criminal procedure with Convention rights gave rise to some tensions with the courts in Scotland, and some political criticism, with the benefit of hindsight I think most people would agree that the changes to the Scottish criminal justice system which resulted from those appeals were beneficial and indeed overdue.

There have been a number of other decisions of considerable importance for Scots law. The most obvious examples were also important for the rest of the UK, and I shall mention some of them in a moment. But I would also pick out three decisions in Scottish

cases during the last decade that concerned the care of children,[43] and identified shortcomings in the way those cases had been handled by the Scottish courts. I understand that improved practices have been established following those judgments.

It is also important to understand that it is not only, or even mainly, the Scottish appeals to this court that are important to the Scottish legal system. Because of the extent to which we have a shared system of UK law, most of the important questions arising in this court that affect Scotland are decided in appeals from other parts of the UK. To give just one example, the first *Miller* case,[44] concerning the legal constraints on the Government's power to serve notice of withdrawal from the EU under article 50, was an English appeal, but obviously affected the whole of the UK. It also had an important Scottish dimension, as it raised a question as to the legal effect of constitutional conventions: in particular, the Sewel convention concerning the relationship between the legislative process at Westminster and the interests of the Scottish Parliament in UK legislation concerning devolved matters. The Scottish Government therefore intervened in the appeal and was represented at the hearing by the Lord Advocate.

Of course, not every decision of this Court meets with universal acclaim, either in Scotland or elsewhere. Some criticisms are based on misunderstandings. For example, when the Court sat in Edinburgh in 2017, I saw a complaint online that it was outrageous that the Court was coming to Scotland to apply English law in Scottish cases. It would indeed be outrageous if it were true, but of course the Court does no such thing.[45] There are also complaints online that it is appalling that English judges, with no training in Scots law, decide Scottish appeals. It never seems to occur to the people who make that complaint that the Scottish Justices sit, and write judgments, in far more English appeals than their English colleagues do in Scottish cases; or that all the Justices sit on appeals in which they have to apply much more unfamiliar legal systems, such as French law, which

[43] *NJDB v JFG* [2012] UKSC 21; *ANS v ML* [2012] UKSC 30; and *EV (A Child)* [2017] UKSC 15.
[44] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[45] Unless, of course, the dispute happens to be governed by English law, as was the position in relation to one of the issues in *Farstad Supply AS v Enviroco Ltd* [2010] UKSC 18.

governed an English appeal we heard in this Court a few weeks ago, and which also applies in the appeals which we hear in the Privy Council from Mauritius, or customary Polynesian law, which applies in some of the appeals we hear in the Privy Council from other jurisdictions. But as I have explained, very few appeals to this Court concern purely Scots law. When they do arise, two or sometimes three[46] Scottish judges sit, and the English or Northern Irish judges on the panel are not going to overrule them on purely Scottish questions. People should not in any event under-estimate the amount of work which the non-Scottish justices put into the Scottish appeals, often writing the judgment if it is on a point of UK law; nor should they under-estimate their ability to get to grips with the Scots law bearing on the point, just as the Scottish judges put in the necessary work to ensure that they have a sound understanding of the questions arising in English and Northern Irish appeals.

At the level of the Scottish legal professions and judiciary, I have not detected a general concern about the impact of this Court's decisions on the Scottish legal system in recent years,[47] since the flurry of cases concerned with criminal procedure and human rights came to an end. The old complaint that the House of Lords brought about an anglicisation of the purity of Scots law, particularly in the period in the 18th and 19th centuries before Scottish law lords were appointed, is not a criticism that could be made of this Court. All the Justices are well aware that there are differences between the Scottish and English legal systems,[48] and are equally anxious to arrive at the answer which is right for Scots law. The Court has also taken care to ensure that the Justices engage with Scotland and Scottish institutions. The Court has strong relationships with the Faculty of Advocates, the Law Society of Scotland and the Scottish courts, and has been

[46] As in *Brown v Scottish Ministers* [2017] UKSC 69.

[47] That is not to deny that, as in the rest of the UK, decisions which alter existing understandings of the law are liable to be controversial for a time. Examples of decisions which initially received a mixed reception in Scotland include *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46, concerned with standing to bring proceedings for judicial review, *McGraddie v McGraddie* [2013] UKSC 58, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 and *Carlyle v Royal Bank of Scotland plc* [2015] UKSC 13, all concerned with the role of appellate courts in relation to factual findings made by the judge sitting at first instance, and *David T Morrison Ltd v ICL Plastics Ltd* [2014] UKSC 48, concerned with the interpretation of s 11 of the Prescription and Limitation (Scotland) Act 1973.

[48] These were spectacularly overlooked by counsel in *Re Baronetcy of Pringle of Stichill* [2016] UKPC 16, a case concerned with the succession to a Scottish title, which the parties proposed to argue as a question of English law until the Court forced them to accept that Scots law must be applied.

able to strengthen those relationships through sitting in Scotland and through the frequent participation of Justices in events there. The Court has also developed relationships with the Scottish universities through events both in Scotland and in London, and with Scottish schools, particularly through the "Ask a Justice" scheme, which enables Justices to have discussions directly with Scottish schoolchildren in their classrooms using Skype.

The impact of the Scottish legal system on the work of the Court

Turning next to the impact of Scottish cases, and of Scottish lawyers and judges, on the work of the Court, and hence on the development of the law of the UK as a whole, it has undoubtedly been important. Indeed, because of the attention paid to the Court's judgments around the common law world, the Court has given Scots law a platform which it has enabled it to have a worldwide influence.[49]

In this respect, the Court has followed in the footsteps of the House of Lords. Scottish judges such as Lord Watson in the nineteenth century, and Lords Dunedin, MacMillan and Reid in the twentieth, were very influential figures in the House of Lords, in English appeals as well as those from Scotland, and also in the Judicial Committee of the Privy Council. That tradition was continued on this Court by Lord Hope of Craighead, the Deputy President of the Court during the first four years of its existence, and Lord Rodger of Earlsferry. I leave it to others to assess the contribution made by their successors, Lord Hodge and myself. I would say, however, that the Scottish Justices bring two important qualities to the Court besides their legal abilities. First, they have spent their lives living and working outside England, with the result that their presence on the Court makes an important contribution to its diversity. Secondly, they come from a jurisdiction where specialisation is less developed than in England, with the result that

[49] This is best illustrated by the Scottish appeals to the House of Lords in negligence cases, which are familiar to common lawyers around the world. More recent examples in the same category are *Jackson v Murray* [2015] UKSC 5, *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 and *Steel v NRAM* [2018] UKSC 13. The Supreme Court's judgment in *Cherry v Advocate General for Scotland* [2019] UKSC 41 also attracted worldwide attention.

they have a breadth of experience that enriches the Court and makes it easier for it to cover all the categories of work with which it has to deal.

As was the case in the House of Lords, Scottish appeals have also continued to influence the development of the law of the rest of the UK. In the law of negligence, for example, Scottish cases have been at the heart of the development of the modern law, and that continues to this day. A recent example is the decision in *Montgomery v Lanarkshire Health Board*,[50] which established that medical professionals are under a duty to inform their patients of the treatment options available and to allow them the opportunity to consider which of the available treatments they would prefer: a decision which has had an impact on medical practice throughout the UK. I hope that the flow of negligence cases from Scotland will continue notwithstanding the recent transfer of most personal injury work from the Court of Session to the Sheriff Court. It is of course only right that cases should be heard at an appropriate level, but it is also important that cases of legal significance should be recognised as such, wherever they are heard.

Constitutional cases are another category of case where Scottish appeals continue to be important to the UK as a whole. The recent prorogation case,[51] for example, raised a fundamental question as to the respective powers of Parliament and the Government. The English courts decided in the *Miller* case that Parliament had been lawfully prorogued, whereas the Scottish courts decided in the *Cherry* case that it had not. The reasoning of each court was valuable to us, but they could not both be correct. The issue had to be finally decided by a court sitting above both the English and the Scottish courts. That function was performed by this Court when it heard the *Miller* and *Cherry* appeals together and decided them in a single judgment.

[50] [2015] UKSC 11.
[51] *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41.

There have been other constitutional issues raised in Scottish appeals besides those arising from Brexit or from devolution. For example, the case of *RM v Scottish Ministers*[52] concerned the question whether the Scottish Government could use its discretion to make commencement orders so as to avoid bringing provisions of an ASP into force, frustrating the intention of the Scottish Parliament in passing the legislation. Our decision in that case was one of the forerunners of the decision in the prorogation case. Another example is the case of *A v BBC*,[53] which concerned the principle that court hearings should be open to the public and reportable by the media. It is an important case on that subject throughout the UK. Many other Scottish cases also achieve UK-wide importance by virtue of being decided by this Court: indeed, as I have said, they sometimes have world-wide influence as a result.

Conclusion

In conclusion, I should say that it is a privilege for the Scottish Justices to be ambassadors for the Scottish legal system through their work on this Court. It is also a great responsibility. We arrive here unknown to most of the counsel appearing before us, unknown to most of the judges whose decisions we are considering on appeal, and indeed unknown to most of our colleagues on this Court. We have to earn the respect of those colleagues, and of the English and Northern Irish bench and bar. My impression is that we succeed in doing so. I hope that that will serve as an encouragement to the Scottish lawyers who come after us.

[52] [2012] UKSC 58.
[53] [2014] UKSC 25.