

# The UK Supreme Court's Jurisdiction over Scottish Criminal Cases

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## Abstract

This paper examines the system of 'devolution issues'<sup>1</sup> in Scottish criminal cases - the only basis on which an appeal lies to the UK Supreme Court ('UKSC') from the High Court of Justiciary sitting as an appeal court. As a consequence of the provisions of the Scotland Act 1998, any act or omission of a member of the Scottish Government is *ultra vires* insofar as it is incompatible with Convention rights.<sup>2</sup> It will be contended that the link between this constitutional fact and recent controversial decisions of the Supreme Court - such as *Cadder v HM Advocate*,<sup>3</sup> where the practice of police interviewing suspects for up to six hours without access to a lawyer was ended, or the high profile case of *Fraser v HM Advocate*,<sup>4</sup> where a previously upheld conviction for murder was quashed - is far from apparent, let alone recognisable on the basis of a clear constitutional principle. It will be concluded that the scope of the Supreme Court's jurisdiction mirrors a general right of appeal and such a wide-ranging jurisdiction over Scottish criminal matters was neither foreseen nor inevitable.

## 1. Introduction

The policies of increasing the legal protection for human rights and devolving power to Edinburgh, Cardiff and Belfast were fundamental components of the constitutional reforms announced by the new Labour Government in 1997.<sup>5</sup> The point at which these two policies intersected was in the measures taken to ensure that powers which were devolved were competent only insofar as they were compatible with the European Convention on Human Rights ('ECHR').<sup>6</sup> As a consequence of provisions in the Scotland Act 1998, any act or omission of a member of the Scottish Government is *ultra vires* insofar as it is incompatible with Convention rights.<sup>7</sup> The link between this constitutional fact and recent controversial decisions of

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<sup>1</sup> As defined in Part I, Schedule 6 of the Scotland Act 1998. This definition will be adopted throughout this paper.

<sup>2</sup> Scotland Act 1998, s 57.

<sup>3</sup> *Cadder v HM Advocate* [2010] UKSC 43.

<sup>4</sup> *Fraser v HM Advocate* [2011] UKSC 24.

<sup>5</sup> Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997); Scotland Office, *Scotland's Parliament* (White Paper, Cm 3658, 1997).

<sup>6</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols No.11 and No.14), 4 November 1950 <<http://www.conventions.coe.int/treaty/en/treaties/html/005.htm>> accessed 12 June 2012.

<sup>7</sup> Scotland Act 1998, s 57.

the Supreme Court<sup>8</sup> is far from apparent, let alone recognisable, on the basis of a clear constitutional principle. One legal commentator is undoubtedly correct when she asserted that '(...) the establishment of an explicitly 'UK' court rekindled sensitivities about the continued independence of Scots law.'<sup>9</sup>

The first formal, if brief, consideration of devolution issues and the jurisdiction of the Judicial Committee of the Privy Council (the 'JCPC') appeared in the 2002 Bonyon Report on High Court of Justiciary Reform.<sup>10</sup> The Report spoke of the '(...) tendency for proceedings to be delayed and for the efficient running of criminal trials to be disturbed',<sup>11</sup> and highlighted the incongruity with the position in the rest of the UK with issues of fair trial being dealt with only under the Human Rights Act 1998 ('HRA 1998'). Lord Bonyon's report emphasised the extent to which specific criticisms of the system of devolution issues fell into one of two categories: (i) those relating to the constitution; or (ii) those relating to the effective running of the criminal justice system. This distinction must be fully recognised for any criticism to be coherent, particularly with regard to proposals for reform, for the constitution falls within the matters reserved to the Westminster Parliament<sup>12</sup> whereas the justice system is devolved to Holyrood.

This paper will contend that the scope of the Supreme Court's jurisdiction mirrors a general right of appeal for which there is no constitutional justification. Such a wide-ranging jurisdiction over Scottish criminal matters was neither foreseen nor inevitable. This paper will examine the provisions of the Scotland Act 1998 which provide the mechanism for resolving questions of competence, i.e. 'devolution issues' and the decisions of the JCPC, and latterly the UKSC, in which the courts interpreted the extent of the jurisdiction of those provisions. Consideration will then be given to the criticisms of the system of 'devolution issues' and the jurisdiction of the Supreme Court before finally concluding whether the proposals for reform contained in the new Scotland Act 2012 constitute an effective solution.

## 2. Jurisdiction of the Supreme Court

There is no right of appeal from a decision of the High Court of Justiciary sitting as an appeal court to a higher court. However, there is one exception. As provided by the Scotland Act 1998,<sup>13</sup> an appeal will be possible where an act of the Lord Advocate

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<sup>8</sup> Such as *Cadder v HM Advocate*, where the practice of police interviewing suspects for up to six hours without access to a lawyer was ended, or the high profile case of *Fraser v HM Advocate* where a previously upheld conviction for murder was quashed.

<sup>9</sup> Aileen McHarg, 'Final Appeals in Scots Criminal Cases' (UKSC blog, 5 October 2011) <<http://uksblog.com/final-appeals-in-scots-criminal-cases>> accessed 12 June 2012.

<sup>10</sup> Lord Bonyon, *Improving Practice – The 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2002) <<http://www.scotcourts.gov.uk/bonyon/documentIndex.asp>> accessed 12 June 2012. Lord Bonyon's opinion was that where there was a lack of 'compelling reasons' for treating issues that could be dealt with under the HRA 1998 as devolution issues, '(...) there can be no justification for the delay and disruption that is caused to certain cases' and recommended the removal of acts of the Lord Advocate from the statutory definition of a devolution issue: *ibid* [17.14].

<sup>11</sup> *ibid* [17.10].

<sup>12</sup> Scotland Act 1998, Sch 5.

<sup>13</sup> *ibid* s 57(2) and Sch 6.

is claimed to be incompatible with EU law or with the ECHR obligations, as incorporated into domestic law by the HRA 1998. Since the advent of devolution, there have been numerous cases heard in London<sup>14</sup> to resolve the question of whether an act of the Lord Advocate has transgressed against either of these areas of law. However, in spite of the repeated assertions made by the Justices of the Supreme Court that the High Court of Justiciary is the highest authority in Scots criminal matters, the effect of the jurisdiction has been very close to that of a general right of appeal which remains at odds with the historical position of the Scottish criminal courts.

## A. Historical Position Prior to Devolution

When Scotland and England were joined in Union, provision was made that ostensibly protected the position of Scotland's supreme courts<sup>15</sup> with Article 19 of the Treaty of Union specifying that:<sup>16</sup>

(...) no causes in Scotland be cognoscible by the courts of chancery, queen's bench, common-pleas, or any other court in Westminster Hall; and that the said court, or any other of the like nature after the union, shall have no power to judge, review or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same.

While this would seem to be a clear defence of the Scottish courts, two facts render it much more vague than would at first appear. Firstly, the House of Lords did not sit in Westminster Hall alongside the central English courts mentioned; and secondly, immediately prior to union, a right of appeal from the Court of Session to the Scottish Parliament existed.<sup>17</sup> The level to which this ambiguity was calculated has since been subject to debate and analysis by legal historians.<sup>18</sup> Nonetheless, civil litigants, or rather their creative counsel, began to bring cases before the House of Lords with that court accepting jurisdiction thereof. By the latter part of the 18<sup>th</sup> century, the House of Lords had resolutely rejected entertaining Scottish criminal appeals,<sup>19</sup> despite a few wobbles along the way.<sup>20</sup> However, all doubts were finally quashed when the legislature had the last word on the matter confirming no appeal was possible from the High Court of Justiciary.<sup>21</sup>

The history of the appellate jurisdiction is important in considering the foundation of the current appeals position. It is a provision of the Constitutional

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<sup>14</sup> By the JCPC and, latterly, the UKSC.

<sup>15</sup> The High Court of Justiciary and the Court of Session.

<sup>16</sup> Union with Scotland Act 1706.

<sup>17</sup> The Claim of Right of 1689.

<sup>18</sup> Neil Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (Scottish Government, January 2010) [3.1], Appendix 1 <<http://www.scotland.gov.uk/Publications/2010/01/19154813/0>> accessed 12 June 2012.

<sup>19</sup> *HM Advocate v Murdison* (1773) MacLaurin 557; *Bywater v Lord Advocate* (1781) 2 Paton 563.

<sup>20</sup> *Magistrates of Elgin v Ministers of Elgin* (1713) Robertson 69 was perhaps the only recorded successful Scottish criminal appeal before the Lords. See also *Mackintosh v Lord Advocate* (1876) 3 R (HL).

<sup>21</sup> Criminal Procedure (Scotland) Act 1887.

Reform Act 2005<sup>22</sup> that an appeal from a Scottish court will only be competent ‘(...) if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section’.<sup>23</sup> Therefore, in light of the fact that no criminal appeal to the House of Lords was possible, there would be no criminal appeal to the Supreme Court from the Scottish criminal courts. In addition, the Criminal Procedure (Scotland) Act 1995 also stresses that the judgements handed down by the High Court of Justiciary ‘(...) shall be final and conclusive and not subject to review by any court whatsoever’.<sup>24</sup> This represented the *status quo* until the Scotland Act 1998 provided for an appeal from a court of two more judges of the High Court of Justiciary in respect of determination of a ‘devolution issue’.<sup>25</sup>

## B. The Lord Advocate, Human Rights and Competence in the Devolution settlement

The UK government White Paper, *Rights Brought Home: the Human Rights Bill*,<sup>26</sup> made clear that, post devolution, the Scottish Parliament would be unable to pass legislation and the Executive unable to make decisions or engage in acts incompatible with Convention Rights.<sup>27</sup> Insofar as devolution issues are concerned, the difficulty in the Lord Advocate’s position begins with section 44(1)(c) confirming the place of the Scottish law officers within the Scottish Executive. The situation is further compounded by the restriction placed on members of the Scottish Executive found within section 57:

- (2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with [EU] law.
- (3) Subsection (2) does not apply to an act of the Lord Advocate –
  - (a) in prosecuting any offence, or
  - (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.

Thus, both administrative and legislative functions are limited in the above manner. Beyond the narrow exception contained within section 57(3),<sup>28</sup> any act of the Lord

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<sup>22</sup> The statute making provision for a Supreme Court in the United Kingdom.

<sup>23</sup> Constitutional Reform Act 2005, s 40(3).

<sup>24</sup> Criminal Procedure (Scotland) Act 1995, s 124(2).

<sup>25</sup> Scotland Act 1998, Sch 6 para 13; the Crime and Punishment (Scotland) Act 1997 also made provision for cases to be examined by the Scottish Criminal Cases Review Commission, and if required in the Commission’s opinion, to be remitted back to the High Court of Justiciary.

<sup>26</sup> Home Office, *Rights Brought Home* (n 5).

<sup>27</sup> *ibid* [2.21]. This system being replicated in the other jurisdictions benefiting from the new constitutional arrangements of devolution. See, for example, Government of Wales Act 1998 and Northern Ireland Act 1998.

<sup>28</sup> HRA 1998, s 6(1) as mentioned in Scotland Act 1998, s 57(3), provides that ‘(...) it is unlawful for a public authority to act in a way which is incompatible with a Convention right’. Section 6(2) provides

Advocate is subject to the control of section 57 and, therefore, the supervision of the courts. Therefore, any such acts are capable of being declared incompetent and hence *ultra vires*. The supervision of administrative and legislative functions is the essence of a 'devolution issue',<sup>29</sup> with the definition of and mechanisms of operation provided by Schedule 6 of the 1998 Act.<sup>30</sup> The 1998 Act also makes reference to the 'retained functions' of the Lord Advocate.<sup>31</sup> These are any functions exercised by him prior to devolution and, therefore, necessarily imply the conducting of prosecutions. However, the Act does not exclude them from the question of competence and the aforementioned supervision of the devolution regime by the courts. On the other hand, neither does it make any express mention of this important matter either.

### C. Interpretation of the Scotland Act 1998 by the Courts

As 'acts of the Lord Advocate' are open to review by the courts, it is their role to interpret and construe the reach of that phrase. From the outset, case law has rejected the argument that his 'acts' should be limited to administrative and legislative acts. The High Court of Justiciary in *Robb v HM Advocate*,<sup>32</sup> held there to be '(...) no justification for giving the word 'act' a restricted meaning'<sup>33</sup> when it rejected the argument that section 57(2) should not apply to the act of leading certain evidence. The court looked to the qualification in section 57(3) which it saw as important '(...) in the light it throws on the interpretation of subsection (2)'.<sup>34</sup> Furthermore, in Lord Penrose's opinion, as the only qualification of section 57(2) was narrowly contained within section 57(3), scope for interpreting the term 'act' with reference to the term immediately preceding it<sup>35</sup> was removed on a *eiusdem generis* basis.<sup>36</sup>

The earliest case in which the matter was given the most comprehensive consideration was that of *Montgomery v HM Advocate*<sup>37</sup> on appeal to the JCPC. The case concerned the murder of Surjit Singh Chhokhar which received intensive media attention due to the nature of the crime and the Crown's handling of the case. Given the pre-trial media coverage, questions about the fairness of the trial were of

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an exception to s 6(1) where '(...) as the result of one or more provisions of primary legislation, the authority could not have acted differently'.

<sup>29</sup> Scotland Act 1998, s 98.

<sup>30</sup> The definition is specified in the form of six questions in Sch 6 para 1: whether an Act of the Scottish Parliament is within its devolved competence (clause a); questions relating to a functions of the members of the Scottish Executive (clause b); whether an exercise of a function of a member of the Scottish Executive is within devolved competence or incompatible with a Convention right or EU law (clause c, d); whether a failure to act on the part of a member of the Executive would be incompatible with EU law or Convention rights (clause e).

<sup>31</sup> Scotland Act 1998, s 52.

<sup>32</sup> *Robb v HM Advocate* 1999 SCCR 971.

<sup>33</sup> *ibid* 976 (Lord Prosser).

<sup>34</sup> *ibid* 975 (Lord Prosser). That is, in understanding the subsection (3) exception for a breach that was unavoidable by virtue of primary legislation in relation to 'prosecuting any offence' or '(...) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland', these must be taken to be included in the 'acts' of s 57(2) generally, to which the exception applies.

<sup>35</sup> i.e. 'subordinate legislation'.

<sup>36</sup> *Robb* (n 32) 975 (Lord Prosser).

<sup>37</sup> *Montgomery v HM Advocate* 2001 SC (PC) 1.

relevance to the ability of the Lord Advocate to guarantee a fair trial for the accused. Furthermore, the constitutional question of the role of Lord Advocate as 'master of the instance' of criminal prosecutions in Scotland, and also as a member of the Scottish Executive, rendered him open to claims for breach of Article 6, ECHR.

As one of two Scottish judges sitting on the board of the JCPC in *Montgomery*, Lord Hope considered the position of the Lord Advocate by (i) contrasting his role with parallel offices within the UK's other jurisdictions; and (ii) citing three examples demonstrating the Lord Advocate's role as 'master of the instance' as the '(...) fundamental rule on which the system of criminal justice in Scotland is based.'<sup>38</sup> The reasoning behind the three examples ultimately led Lord Hope to conclude that '(...) the approach which...[the Scotland Act]...takes is that the right of the accused to receive a fair trial is a responsibility of the Lord Advocate as well as of the court.'<sup>39</sup> However, a 'striking'<sup>40</sup> distinction between the interpretation of the Scottish judges<sup>41</sup> on the panel and the English judges can be observed. In contrast to Lord Hope, Lord Hoffman expressed the view that while he accepted that the commencement and continuation of proceedings was an act of the Lord Advocate,<sup>42</sup> the burden of ensuring a fair trial fell to the court alone.<sup>43</sup> He also accepted the position of the Scottish prosecutor as being of enhanced power and discretion when compared to his Welsh or English equivalent, but nevertheless felt that ultimately, it was the court that determined the criminal charge.<sup>44</sup> Lord Hoffman's reasoning would appear to be an argument based upon a logical interpretation of the facts.

In addition to the analysis of Lord Hoffman, Lord Nichols observed the possible *non sequitur* of saying that as it is the responsibility of the Lord Advocate to ensure a fair trial, if a fair trial was not possible for some reason and halted at a preliminary diet, the Lord Advocate would have acted beyond his powers in bringing the prosecution.<sup>45</sup> Yet, in spite of such significant reservations expressed by Lords Hoffman and Nichols, the court deferred to the judgement of the Scottish judges. However, the need for a concluded opinion on the issue was negated in light of the agreement between the parties that the issue was indeed a devolution issue, thereby preventing the court from offering a conclusive analysis.

The issue was again revisited in the landmark case of *Brown v Stott*,<sup>46</sup> which represents the first time that a decision of the High Court of Justiciary, sitting as an appeal court, was overturned by a higher court.<sup>47</sup> Lord Hope built upon and reinforced his earlier judgement in *Montgomery* with regard to the question of whether the Lord Advocate's act of conducting a prosecution constituted the basis of

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<sup>38</sup> *Montgomery* (n 37) 18 [H] (Lord Hope).

<sup>39</sup> *ibid* 19 [E]-[G] (Lord Hope).

<sup>40</sup> TH Jones, 'Splendid isolation: Scottish criminal law, the Privy Council and the Supreme Court' (2004) Crim LR 96.

<sup>41</sup> In addition to Lord Hope of Craighead sat Lord Clyde.

<sup>42</sup> *Montgomery* (n 37) 6 [G] (Lord Hoffmann).

<sup>43</sup> This was on the basis that the court decides whether the evidence brought by the prosecutor will be admissible before the jury. Lord Hoffmann held that '(...) I think the short answer is that criminal charges are determined by courts and not prosecutors': *ibid* 8 [A].

<sup>44</sup> *ibid*.

<sup>45</sup> *Montgomery* (n 37) 5 [C]-6 [D] (Lord Nichols).

<sup>46</sup> *Brown v Stott* 2001 SC (PC) 43.

<sup>47</sup> S Di Rollo, 'Section 172 - An Unconventional Approach?' 2001 SLT (News) 13.

a devolution issue. He considered that, with close reference to the wording of the Scotland Act 1998, the devolution system sought to ensure that the right of an accused to receive a fair trial was jointly the responsibility of the court and the Lord Advocate.<sup>48</sup>

In developing the jurisprudence of the court regarding the position of the Lord Advocate within the devolution arrangements, Lord Hope considered that of 'cardinal importance' to this view was the '(...) overall context in which the relevant provisions were enacted'.<sup>49</sup> Per Lord Hope:<sup>50</sup>

Parliament has chosen to legislate in a way which ensures that those obligations [the Convention rights] are respected both by the Scottish Parliament and the Scottish Executive by limiting their competence (...) one of the matters which was devolved to the Scottish Parliament and to the Scottish Executive was the system of criminal prosecution for which the Lord Advocate is responsible.

In further clarifying the role of the Lord Advocate within the devolution settlement, Lord Hope pointed to the creation of the office of the Advocate General and the functions bestowed upon him by the Scotland Act 1998. These functions include both safeguarding the interests of the United Kingdom within the devolution arrangements and '(...) seeing to the fulfilment of the States' international obligations (...) in particular those to which it owes as a Contracting State under art 13 of the Convention'.<sup>51</sup> Pointing to the provisions that allow the Advocate General to refer devolution issues and respond to those raised by the Lord Advocate, and *vice versa*,<sup>52</sup> Lord Hope concluded that, 'It seems to me to be clear from these provisions that it was the intention of Parliament that acts of the Lord Advocate in prosecuting offences should be subject to judicial control under the devolved system'.<sup>53</sup> His reasoning represents justification of the court's jurisdiction in cases such as *Montgomery* and *Brown*. Therefore, in *Brown* virtually no resistance was shown by the non-Scottish judges to Lord Hope's reasoning as to the fact that a devolution issue had arisen<sup>54</sup> allowing the jurisdiction of the JPC to continue unchallenged.

However, in *HM Advocate v R*,<sup>55</sup> the Lord Advocate's policy based submission that '(...) a broad construction of the word [act] could lead to numerous points being taken as devolution issues and to the Judicial Committee becoming the final court of appeal in a wide variety of Scottish criminal matters', was rejected by Lord Hope, again giving the leading judgement, as an irrelevant consideration in statutory

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<sup>48</sup> *Brown* (n 46) 70 [B] (Lord Hope).

<sup>49</sup> *ibid* 70 [C] (Lord Hope). This context relates to the manner in which the rights set out in the convention were to be secured by Parliament in the legislation enacted at the time, acting on the requirement of Article 13 to ensure an 'effective remedy before a national authority' where a violation of a convention rights was alleged.

<sup>50</sup> *ibid* 70 [E]-[G].

<sup>51</sup> *ibid* 71 [C].

<sup>52</sup> Scotland Act 1998, Sch 6, [4] and [33].

<sup>53</sup> *Brown* (n 46) 71 [D] (Lord Hope).

<sup>54</sup> *ibid* 47 [C] (Lord Bingham).

<sup>55</sup> *HM Advocate v R* [2003] 2 WLR 317.

interpretation.<sup>56</sup> The dismissal of this argument is interesting particularly given the many paragraphs in the preceding cases, especially in the judgements of Lord Hope himself, dedicated to considering the intention of Parliament and the relevance of this intent in interpreting the 1998 Act. It may be said that the JCPC preferred an interpretation of the statute which allowed it to retain jurisdiction on the basis of human rights considerations. Therefore, on the basis of the civil law, rather than as a final court of appeal in criminal matters, issues of human rights extend to every part of the criminal justice system.

#### D. Result of the Interpretation

When combined with the allegation that almost any part of the criminal justice process could potentially raise a devolution issue on the basis of Article 6,<sup>57</sup> section 57 and schedule 6 create a route of appeal from the High Court of Justiciary in Edinburgh to the Supreme Court. Furthermore, the effect of the broad interpretation of 'acts' of the Lord Advocate is to render all procurators fiscal members of the Scottish Executive for the purposes of devolution issues. Therefore, acting on the authority of the Lord Advocate, fiscals are to be seen as one and the same as the Lord Advocate.<sup>58</sup> However, this very broad construction of devolution issues was not inevitable.<sup>59</sup> In addition to the passively-dissenting judicial voices, such as Lords Hoffmann and Nichols in *Montgomery*, several other arguments have been advanced that suggest it was not certain that the JCPC/UKSC's jurisdiction should be interpreted this widely. Indeed, Stewart makes the case that, on the basis of other provisions of the Scotland Act 1998, the categories of 'member of the Scottish Executive' and 'members of the staff of the Scottish Administration'<sup>60</sup> are mutually exclusive.<sup>61</sup> Reinforcing his point, he cites the example that procurators fiscal are not included in the definition of 'Scottish Executive' but are covered by the definition provided under staff of the 'Scottish Administration'.<sup>62</sup> Therefore, when certain other provisions of the 1998 Act, which make a clear distinction between fiscals and the Lord Advocate, are considered,<sup>63</sup> the argument that within section 57(2) they amount to one and the same becomes less tenable. In sum, the interpretation of 'acts' of the Lord Advocate, as preferred by the JCPC, can be called into question.

The second strand of this argument comes from the need to read the Scotland Act 1998 alongside, or at least appreciating the existence of, the HRA 1998. There is

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<sup>56</sup> *ibid* [39] (Lord Hope).

<sup>57</sup> In the Lord President's submission to Parliament on the Scotland Bill, his lordship suggests that sentencing, a process that the Lord Advocate has no part to play out with moving that the accused be sentenced, might not come within the remit of a devolution issue. But even this is not clear: Lord President, *Scotland Bill: Written Representations under the Constitutional Reform Act 2005* (Judiciary of Scotland, 2012) [8] <[www.scotland-judiciary.org.uk/24/865/Lord-President-Makes-Written-Representations-to-parliament](http://www.scotland-judiciary.org.uk/24/865/Lord-President-Makes-Written-Representations-to-parliament)> accessed 12 June 2012.

<sup>58</sup> A Stewart, 'Devolution issues and human rights' 2000 SLT (News) 239.

<sup>59</sup> Walker (n 18) [3.4].

<sup>60</sup> As contained in the list of defined expressions at s 127.

<sup>61</sup> Stewart (n 58) 241.

<sup>62</sup> *ibid*.

<sup>63</sup> Scotland Act 1998, ss 23(10), 27, 29(2) and 48(5).

little controversy in the notion of the fiscal being a 'public authority' in terms of the latter Act.<sup>64</sup> Aside from the narrow window between the enactment of the Scotland Act 1998 and the HRA 1998, had Parliament truly intended such an overlap of jurisdiction, with an issue of a breach of Convention rights being actionable under two distinct statutory regimes, more unequivocal language would have been used to confirm that this was to be the case. Despite the general consensus of the legal profession at the time, that the systems did offer an alternative,<sup>65</sup> it has been argued that due to the differing nature of the approach to breaches of Convention obligations in each Act,<sup>66</sup> they do not offer an alternative procedural approach to each other. If an act of a member of the Executive is incompatible with Convention rights it is *ultra vires*, the effect being essentially that it is void; under the HRA 1998, the act is 'unlawful', but still stands. However, this argument of 'sudden death' on the basis of the *vires* of acts challenged under the Scotland Act 1998 loses its force completely with regard to the Lord Advocate, when it is recalled that his acts in relation to criminal justice are subject to an exception to the *vires* control found at section 57(3). This exception clearly states that section 57(2) does not apply to an act of the Lord Advocate in prosecuting an offence where, by virtue of a provision of primary legislation elsewhere, no alternative course of action is available. This is exactly the same exception for acts of public bodies under the HRA 1998.<sup>67</sup> This shows the position of the Lord Advocate being subject to less control than the other Scottish Ministers under the Scotland Act 1998, for whom no exception to the *vires* control applies. This is a fact that could be employed to suggest that either, in carrying out his reserved functions, the Lord Advocate was clearly intended to be subject to the *vires* control in all situations, or it was neglected that the exception was followed through to its logical conclusion. However, in either case, it is still unclear that Parliament intended an interpretation of 'acts' capable of encompassing almost any action in a criminal trial.

Giving evidence to the Joint Committee on Human Rights, Lord Bingham said that, 'One of the anomalous, and to me surprising and unexpected, results of devolution is that for the first time one does have judges, Scots prominently among them but nonetheless judges, sitting in London ruling on questions relating to Scots criminal trials'.<sup>68</sup> During debate on the original Scotland Bill in the House of Lords, the Lord Advocate stated that '(...) most devolution issues will be raised competently only by way of judicial review in the Court of Session'.<sup>69</sup> That the consequences of such a provision were not foreseen is further reinforced by the statement Lord Dubs, a minister in the Northern Ireland Office, that an amendment to the Northern Ireland Bill '(...) resembles amendments already made to the Scotland Bill to take account of

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<sup>64</sup> HRA 1998, s 6.

<sup>65</sup> I Jamieson, 'Relationship between the Scotland Act and the Human Rights Act' 2001 SLT (News) 43.

<sup>66</sup> Acts in breach of s 6 HRA 1998 are merely declared incompatible but will stand, whereas under s 57(2) Scotland Act 1998, the act will instead be deemed *ultra vires* and will be void, leaving aside the narrow s 57(3) exception.

<sup>67</sup> *ibid* (n 64).

<sup>68</sup> Joint Committee on Human Rights, *Minutes of Evidence* (2000-01, HC 26) [110] <<http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/66/1032607.htm>> accessed 12 June 2012.

<sup>69</sup> HL Deb, 28 October 1998, vol 594, col 79.

the contingency, which again is likely to be infrequent, of devolution issues arising in criminal proceedings'.<sup>70</sup> The inaccuracy of these predictions is only apparent with hindsight. By mid-2010, at least 10,000 devolution issues arising in criminal proceedings had been intimated to the Advocate General.<sup>71</sup> Further, the most commonly litigated issue by far under the JCPC/UKSC's devolution jurisdiction were proceedings brought on the basis of acts of the Lord Advocate.<sup>72</sup> Finally, the statement that the limitations on the Welsh Assembly and Executive would mirror those placed on Scotland in the aforementioned White Paper *Rights Brought Home*,<sup>73</sup> is again a possible clue pointing to the neglect in appreciating the Lord Advocate's unique position in government when compared to other prosecutors in the United Kingdom.<sup>74</sup> That the extent and effect of the Supreme Court's jurisdiction was foreseen neither by senior members of the judiciary nor the architects of devolution is abundantly clear.

### 3. *The Effects of the Jurisdiction*

While some rumblings of discontent with the system of devolution issues could be detected following devolution,<sup>75</sup> matters truly came to a head following two separate judgements of the Supreme Court sparking controversy, debate and ultimately change. The cases of *Cadder v HM Advocate*<sup>76</sup> and *Fraser v HM Advocate*<sup>77</sup> were heard by the UKSC, under its own authority, in spite of the fact that in neither case a devolution issue was heard by the Scottish Criminal Appeal Court. Although the cases were advanced ostensibly on the basis of an argument that there had been a breach of the Article 6 ECHR, both cases considered and overruled a number of substantive judgements of the High Court of Justiciary. Both cases involved many of the senior Scottish judiciary and, controversially, were both remitted back to the

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<sup>70</sup> HL Deb, 28 October 1998, vol 594, col 818 (Lord Dubs).

<sup>71</sup> Advocate General's Expert Group, *Section 57(2) and Schedule 6 of the Scotland Act 1998 and the Role of the Lord Advocate* (Office of the Advocate General, Nov 2010) [3.13] <<http://www.advocategeneral.gov.uk/oag/225.html>> accessed 12 June 2012. It is noted that out of the issues raised, the Advocate General intervened in only thirty-five.

<sup>72</sup> Walker (n 18) [3.4].

<sup>73</sup> Home Office (n 5) [2.22].

<sup>74</sup> McCluskey Review Group, *Examination of the Relationship Between the High Court of Justiciary and the Supreme Court in Criminal Cases* (Scottish Government, 2011) 41 <[www.scotland.gov.uk/About/supreme-court-review](http://www.scotland.gov.uk/About/supreme-court-review)> accessed 12 June 2012.

<sup>75</sup> Lord Bonomy (n 10). For instance, the Bonomy Review criticised the devolution procedure on the basis of constitutional propriety and the disruption caused to the efficient running of the criminal justice system. This is considered further below. The Calman Commission on Scottish also considered the issue slightly later but declined to make a recommendation considering the issue beyond its remit: Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century* (Final Report, June 2009). This was the impetus for the setting up of the Advocate General's Expert Group (n 71). This is discussed in greater detail below.

<sup>76</sup> *Cadder* (n 3).

<sup>77</sup> *Fraser* (n 4).

High Court of Justiciary following the quashing of the convictions, under the rule that the Supreme Court has all the powers of the lower court.<sup>78</sup>

### A. *Cadder v HM Advocate*

*Cadder* turned on whether the accused had been capable of having a fair trial given that, as per the standard and accepted practice in Scotland, evidence was led that had been obtained during a police interview at which no solicitor was present. The appeal, by way of a devolution issue was, in the words of Lord Hope, '(...) in effect, an appeal against the decision of the High Court of Justiciary in *HM Advocate v McLean* 2010 SLT 73'.<sup>79</sup> The court in *McLean* had ruled unanimously that reliance by the Crown on statements made by the accused before they had consulted their lawyer did not itself constitute a breach of Article 6, in the light of other safeguards afforded to the accused by the Scottish system, affirming previous decisions of the High Court of Justiciary on the matter.<sup>80</sup> It found that it was not obliged to apply the case of *Salduz v Turkey*<sup>81</sup> directly, as the European Court of Human Rights ('ECtHR') had not carefully considered Scottish criminal procedure and protections, and thus the Scottish court could not be required to apply any principle emanating from the decision in Scotland without question or qualification.<sup>82</sup>

The Supreme Court held that the High Court of Justiciary was not entitled to interpret *Salduz* in the way in which it had done in *McLean*, and that the ECtHR case must be applied directly.<sup>83</sup> Lord Rodger's view was that there was not 'the remotest chance' that it would be held in Strasbourg that, on the basis of the unique Scottish safeguards, it would be compatible with Article 6(1) and (3) for access to legal advice to be routinely restricted, and that this was 'the very converse' of what is required by Article 6.<sup>84</sup>

The effect of this judgement was to render the system of Scottish criminal justice, predicated on detention and interview by the police under the Criminal Procedure (Scotland) Act 1995, incompatible with the ECHR where the Crown relied on evidence obtained during interviews at which no solicitor was present. Despite the imposition of the Lord Advocate's interim guidelines that anticipated the Supreme Court's decision by several months, altering the manner in which the police conducted interviews,<sup>85</sup> over one thousand prosecutions were abandoned, including

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<sup>78</sup> Supreme Court Rules 2009, SI 2009/1603, rule 29(1).

<sup>79</sup> *Cadder* (n 3) [1] (Lord Hope).

<sup>80</sup> *Paton v Ritchie* 2000 SCCR 151; *Dickson v HM Advocate* 2001 SCCR 397.

<sup>81</sup> (2009) 49 EHRR 19. The ECtHR held that '(...) the rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for a conviction': *ibid* [55].

<sup>82</sup> *HM Advocate v McLean* 2010 SLT 73 [31].

<sup>83</sup> *Cadder* (n 3) [40] (Lord Hope). Lord Hope spoke of the Strasbourg court's aims of 'universal' and 'harmonious' application of its principles, not coloured by 'national choices and preferences'.

<sup>84</sup> *Cadder* (n 3) [93] (Lord Rodger).

<sup>85</sup> Crown Office, *Lord Advocate Guidelines - Interim Guidelines on Access to a Solicitors* (COPFS, June 2010) <<http://www.crownoffice.gov.uk/publications/2010/06/laguidelines>> accessed 12 June 2012.

nearly eighty solemn proceedings.<sup>86</sup> Further, in spite of the Lord Advocate's guidelines, the Scottish Government introduced the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill (Emergency Bill) to the Scottish Parliament.<sup>87</sup> The rapid transit of this legislation prompted much criticism and questions as to the justification or necessity of the use of the emergency legislative procedure by the Scottish Parliament.<sup>88</sup> However, *Cadder* was soon to be followed by a case which would further confirm the Supreme Court's willingness to assert its jurisdiction in this area of law.

### B. *Fraser v HM Advocate*<sup>89</sup>

In 2003, Nat Fraser was found guilty of the murder of his wife, Arlene. On the first day of the hearing before the Appeal Court, counsel for the appellant moved the court to allow a devolution minute intimating that the non-disclosure of evidence by the Crown had infringed the appellant's rights under Article 6.<sup>90</sup> This was repelled by the court, on the basis that (i) in light of the late receipt of the motion, sufficient cause had not been shown for its inclusion and, (ii) that the matters were adequately covered by the original grounds of appeal. Following refusal of the general appeal, the appellant sought leave from the High Court of Justiciary to appeal to the JCPC against the refusal of the devolution minute. This application was repelled:<sup>91</sup>

(...) the allowance of leave for such an appeal as this would authorise a procedure under which the Judicial Committee (...) would quite simply, review the merits of the decision reached by this court on 6 May 2008. Whatever was contemplated by Parliament in enacting paragraphs 1(c) and 13 of Schedule 6 of the Scotland Act 1998, we do not think that it was intended to achieve such a result as that.

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<sup>86</sup> 'Cadder bar cases top 1,000' (*The Journal of the Law Society of Scotland*, 5 December 2011) <[www.journalonline.co.uk/News/1010558.aspx](http://www.journalonline.co.uk/News/1010558.aspx)> accessed 12 June 2012.

<sup>87</sup> Upon receiving Royal assent, the Bill became the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2012.

<sup>88</sup> A Parliamentary motion, lodged by Robert Brown MSP, noted that: 'Parliament...feels that the speed with which the legislation was rushed through the Parliament was unnecessary and represented a *constitutional outrage*, and is appalled that the Scottish Government did not consult the Scottish Human Rights Commission, a body set up for advice on precisely this type of case, on what is considered the biggest human rights issue since the Scottish Parliament was established in 1999': Motion S3M-07333 (3 November 2011) (emphasis added).

<sup>89</sup> *ibid* (n 4).

<sup>90</sup> The Crown had placed significant reliance on evidence that jewellery including the wedding and engagement rings of Arlene had been found in the bathroom of the couple's house several days after an initial search had failed to discover them. Following conviction and sentence, it came to light that the Crown had been in possession of a precognition taken from a police officer that had visited the house on three occasions prior to the 7th May and had been of the opinion that he had in fact seen the rings. Following this realisation on the part of the Crown, the officer confirmed this in a further precognition in 2006. A precognition was also taken from the WPC that had accompanied him on the last occasion that he visited the house, to the effect that she had also seen jewellery in the bathroom.

<sup>91</sup> *Fraser v HM Advocate* [2009] HCJAC 27 [13] (Lord Osborne).

Despite the ruling of the High Court of Justiciary, the Supreme Court granted the special leave sought on two bases. Firstly, it was held that the High Court of Justiciary's refusal to allow the minute accordingly '(...) amounted to a determination of that issue' for the purposes of the special leave.<sup>92</sup> Secondly, and more importantly, it appeared that the High Court of Justiciary had erred in applying the test laid down in the superior court regarding the consequences of a failure to disclose.<sup>93</sup> It was accepted by the court that, '(...) it is, of course, clearly established on the cases that not every Article 6 failure to disclose disclosable material automatically results in an unfair trial'.<sup>94</sup> However, the High Court of Justiciary had failed to ensure that a fair trial had been received in spite of the non-disclosure, as that court had applied the test of 'fresh evidence'<sup>95</sup> and subsequently treated the appeal on that basis rather than on the basis of non-disclosure. Therefore, in the judgement of the Supreme Court, the Appeal Court had applied the wrong test. It should have asked whether, '(...) the material might have materially weakened the Crown case or materially strengthened the case for the defence'<sup>96</sup> and '(...) taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict'.<sup>97</sup> The difference of approach was due to the fact that the High Court of Justiciary considered whether there was a miscarriage of justice, whereas the UKSC said they should have asked whether the trial was fair or not. The Supreme Court, expressing regret at the delay and distress caused to the victim's family, remitted the case back to the High Court of Justiciary to quash the conviction and to consider whether a retrial should be authorised.<sup>98</sup>

Yet, as the High Court of Justiciary had already stated, they were not considering the matter as a devolution issue. Therefore, it makes little sense to say that they should have applied the Article 6 fair trial test due to the fact that determining whether the matter is (i) a devolution issue or (ii) a fair trial issue practically represents the same test. The facts of *Fraser* highlight acutely the problem that, given the broad and all-encompassing nature of the Article 6 right to a fair trial, almost any miscarriage of justice argument can be translated into an Article 6 argument, and hence subject to final determination by the Supreme Court as a devolution issue. Such an outcome, for all intents and purposes, mirrors a general right of appeal.

### C. Political reaction and Analysis of Jurisdiction

Following *Cadder*, relying on confessional evidence obtained before an accused person had the benefit of legal advice constitutes a breach of the Article 6 right to a fair trial. This was foreseen by many commentators, and indeed the decision was

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<sup>92</sup> *Fraser* (n 4) [12] (Lord Hope).

<sup>93</sup> *McInnes v HM Advocate* 2010 SC (UKSC) 28.

<sup>94</sup> *Fraser* (n 4) [45] (Lord Brown).

<sup>95</sup> *Cameron v HM Advocate* 1991 JC 252.

<sup>96</sup> *McInnes* (n 93) [19] (Lord Hope).

<sup>97</sup> *ibid* [20].

<sup>98</sup> *Fraser* (n 4) [44] (Lord Hope).

lauded by many.<sup>99</sup> On the other hand, the political reaction to the decision by the Scottish Government was fierce and at times vitriolic.<sup>100</sup> What *Fraser* shows is how easily a decision of the High Court of Justiciary can be overturned under the current devolution issue procedure on the basis of a human rights argument that mirrored the original appeal. There is little logic in the ruling of the Supreme Court that the High Court of Justiciary should have applied the test emanating from the devolution issue jurisprudence. Indeed, the High Court of Justiciary regarded the matter as to whether a devolution issue arose as already settled by case law and accordingly rejected the appeal. There is further illogicality in the holding of Lord Hope that the test laid out in *McInnes* should have been applied. There it was accepted that it was exclusively for the High Court of Justiciary, as '(...) the court of last resort in all criminal matters in Scotland', to determine the test to be applied in cases that did not raise a devolution issue.<sup>101</sup>

It may be suggested that the Supreme Court correctly held that the matter did raise a devolution issue, and in both *Cadder* and *Fraser* it can be argued with ease that the court got the fair trial issue correct and amended Scots law where it was deficient with regards to human rights.<sup>102</sup> Nonetheless, the strain on logic used to justify reviewing and revising substantive decisions of the High Court of Justiciary is obvious. It is plain that the conduct of the High Court of Justiciary was being investigated and the supposed 'act of the Lord Advocate' that is key to the Supreme Court's jurisdiction is not immediately apparent. What has been reviewed and overturned is not the decision or an act of a member of the Scottish Executive, but the rulings of the highest court in Scottish criminal matters in respect of far-reaching areas of criminal law. In spite of the benefit of rigorous protection of Convention rights in Scottish criminal cases, the manner in which this has been achieved was not one that was either provided for, or envisaged by, the Scotland Act 1998.

### 3. *Convention Rights in Scottish Criminal Cases*

The current system is regarded as not being fit for purpose and has been described as 'constitutionally inept'.<sup>103</sup> Criticism regarding the application of the system of devolution issue appeals in securing Convention rights in Scottish criminal cases will now be assessed on the basis of three main grounds: (i) constitutional propriety; (ii) efficiency and effectiveness of the criminal justice system; and, what can perhaps be

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<sup>99</sup> See F Raitt and P Fergusson, 'Re-configuring Scots criminal procedure – seismic shifts?' (2006) 10 *Edinburgh Law Review* 1 102; P Duff, 'Section 172: why the Privy Council got it right' 2001 *SLT (News)* 87.

<sup>100</sup> First Minister Alex Salmond MSP reserved much criticism for Lord Hope personally, in a tone that drew widespread criticism with some even suggesting as tantamount to 'murmuring' (Joshua Rosenberg, 'Alex Salmond is gunning for the Supreme Court' (*Law Society Gazette*, 9 June 2011) <<http://www.lawgazette.co.uk/opinion/joshua-rozenberg/alex-salmond-gunning-supreme-court>> accessed 12 June 2012.

<sup>101</sup> *McInnes* (n 93) [5] (Lord Hope).

<sup>102</sup> C Shead, 'The decision in the Fraser appeal: some brief observations' 2008 *SCL* 664.

<sup>103</sup> Advocate General's Expert Group (n 71) [4.22].

seen as a mixture of (i) and (ii), but fundamental in its own right, (iii) the status of the High Court of Justiciary and the effect of competing jurisdictions.

The jurisdiction of the Supreme Court in respect of Scottish criminal cases, the devolution issue procedure and the position of the Lord Advocate has recently been considered in three separate reports. All three reviews – the Walker Report, the Expert Group Report and the McCluskey Review – concluded that, provided by a free-standing statutory right of appeal, the Supreme Court should continue to have jurisdiction to hear Scottish criminal appeals advanced on the basis of human rights and EU law arguments, albeit with slightly differing procedures and limitations. Specific representations were made by the Scottish judiciary to the Calman Commission on Scottish Devolution<sup>104</sup> and were the original impetus for the formation of the Advocate-General’s Expert Group<sup>105</sup> whereas the ‘concern’ felt by the Scottish Government following the cases of *Cadder* and *Fraser* prompted the establishment of the McCluskey Review Group.<sup>106</sup> The McCluskey Review made it clear that their consideration of the issues of the constitution was premised on the basis of Scotland remaining part of the United Kingdom, i.e. the ‘prevailing constitutional position’,<sup>107</sup> while it was accepted that for those who wished full independence, such as the SNP administration, arguments of ‘constitutional integrity’ would carry no weight.<sup>108</sup> Finally, a wide-ranging review of appellate jurisdiction in the Scottish legal system generally was conducted by Professor Neil Walker,<sup>109</sup> commissioned in 2008 by the Scottish Justice Secretary Kenny MacAskill.<sup>110</sup>

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<sup>104</sup> Commission on Scottish Devolution (n 75).

<sup>105</sup> Advocate General’s Expert Group (n 71). Chaired by former European Court of Justice judge Sir David Edward and comprising four QCs, the Advocate General for Scotland asked the group to consider ‘...whether, and if so under what conditions, the Supreme Court of the United Kingdom should have jurisdiction to consider matters relating to the conduct of criminal proceedings in Scotland’: *ibid* [2].

<sup>106</sup> McCluskey Review, *Final Report* (n 74).

<sup>107</sup> *ibid* [35].

<sup>108</sup> McCluskey Review, *First Report: Examination of the Relationship Between the High Court of Justiciary and the Supreme Court in Criminal Cases* (Scottish Government, 2011) [34] <[www.scotland.gov.uk/About/supreme-court-review](http://www.scotland.gov.uk/About/supreme-court-review)> accessed 12 June 2012.

<sup>109</sup> Walker (n 18).

<sup>110</sup> It had the remit of identifying relevant established constitutional principles, to appraise the current system and consider possibilities for reform, all in light of comparatively recent developments in appellate jurisdiction: *ibid* [1.1]. The Report considered six models of appellate jurisdiction, but recommended one where the Supreme Court would be reorganised along ‘quasi-federal’ lines, having jurisdiction over criminal and civil cases that raised common UK issues. It has been suggested that the report has effectively been shelved, in light of its discounting as infeasible, the preferred option of the Scottish Government of a fully autonomous court system: Peter Nicholson, ‘Power struggle’ (*Journal of the Law Society of Scotland*, 10 June 2011) <[www.journalonline.co.uk/Magazine/56-6/1009838.aspx](http://www.journalonline.co.uk/Magazine/56-6/1009838.aspx)> accessed 12 June 2012.

## A. Constitutional Propriety

The main basis for the submission by the Expert Group that the current system was 'constitutionally inept',<sup>111</sup> owed to the inclusion of the Lord Advocate's acts in the class of 'devolution issues'. This conclusion of constitutional ineptness was fully accepted by the McCluskey Review Group.<sup>112</sup> The vast majority of the Lord Advocate's acts were not conferred by the devolution settlement but were classed and defined as 'retained functions'<sup>113</sup> by the Scotland Act 1998. Indeed, the devolution settlement expressly protects the independence of the Lord Advocate from the other members of the Executive when taking decisions in criminal prosecution and investigation of deaths.<sup>114</sup> When juxtaposed with the description of the Lord Advocate's powers as '(...) quite distinct in character from his ministerial responsibility to Parliament',<sup>115</sup> the independence of the Lord Advocate was regarded by the Expert Group as significant. The McCluskey Review also considered the 'striking anomaly' of the High Court of Justiciary, regarded and legally recognised<sup>116</sup> as the apex court in relation to Scottish criminal matters, being subject to a wider and 'more intrusive'<sup>117</sup> jurisdiction in relation to Community law and human rights than the courts in other parts of the UK, as a result of the exercise of devolving more power to Scotland.<sup>118</sup> This 'constitutional ineptness', therefore, is a by-product of devolution.

While the Lord Advocate had functions as head of the systems of prosecution and the investigation of deaths prior to devolution, powers over justice and the legal system were devolved to the Scottish Parliament.<sup>119</sup> Irrespective of the Lord Advocate's position in government, the holder of the office went from being answerable to the Parliament at Westminster to the Scottish Parliament at Holyrood. Thus with the obligations arising from the ECHR and EU falling on the United Kingdom as the contracting state, it was reasonable to impose a control in respect of those obligations over an office devolved from Westminster to Holyrood.<sup>120</sup> It could be argued that it would have made less constitutional sense to have the Lord Advocate answerable to Holyrood in respect of administrative actions as a member of the Scottish Executive, and hence subject to a *vires* control, but answerable to

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<sup>111</sup> Advocate General's Expert Group (n 71) [4.22].

<sup>112</sup> McCluskey Review, *Final Report* (n 74) [13].

<sup>113</sup> Scotland Act 1998, s 52(6): 'In this Act, "retained functions" in relation to the Lord Advocate means - (a) any functions exercisable by him immediately before he ceases to be a Minister of the Crown, and (b) other statutory functions conferred on him alone after he ceases to be a Minister of the Crown'.

<sup>114</sup> Scotland Act 1998, s 48(5). The Lord Advocate's independence is also protected by s 29(2), which limits the competence of an Act of the Scottish Parliament that purports to remove him from his position as head of the systems of criminal prosecution and the investigation of deaths.

<sup>115</sup> Advocate General's Expert Group (n 71) [4.21].

<sup>116</sup> Criminal Procedure (Scotland) Act 1995, s 124(2).

<sup>117</sup> McCluskey Review, *First Report* (n 108) [52].

<sup>118</sup> This has also been described as the 'paradoxical' position that, as a result of devolving aspects of the legislature and executive, a degree of judicial centralisation has resulted in power flowing in the other direction, with criminal cases being heard in London: T Jones, 'Splendid isolation: Scottish criminal law, the Privy Council and the Supreme Court' (2004) Crim LR 96.

<sup>119</sup> Scotland Office, *Scotland's Parliament* (Cm 3658, 1997).

<sup>120</sup> Jamieson (n 65).

Westminster in respect of actions as head of the prosecution service and limited only as a public authority under the HRA 1998 in that regard. Such a division would have undermined the Lord Advocate's constitutional position, and indeed the authority of the Scottish Parliament in criminal justice matters, by imposing an artificial separation on the role and function of the Lord Advocate.

There is perhaps a more fundamental criticism concerning the constitutional propriety of only 'acts' of the Lord Advocate, and not the trial as a whole, being the subject of a Convention rights breach and that is the shift in focus from the fairness of the proceedings in their entirety. Indeed, this shift in focus away from the fairness of proceedings as a whole, including fairness for victims and families,<sup>121</sup> was highlighted by both the Expert Group and the McCluskey Review Group. As can be concluded in light of the cases cited in the first half of this paper, the 'straightjacket'<sup>122</sup> of the 'act of the Lord Advocate' has not hampered the activities of the JCPC/UKSC in considering the fairness of the trial overall. Nonetheless, it should be made clear legislatively that what is important is the breach of the Convention right, regardless of how this might arise.<sup>123</sup> A particular failing of the Expert Group report is that, despite criticising the tethering of the compatibility question to the 'act of the Lord Advocate', no final recommendation is made in respect of this.<sup>124</sup>

Both groups contrasted the position of Scotland with procedures in the rest of UK as a source of constitutional impropriety. The Expert Group cited the source of '(...) much of the dissatisfaction with the current procedures' as being the fact that issues of compatibility with Convention rights and EU law in criminal trials are not dealt with through normal court procedures as is the case in the rest of the UK, but through procedures designed for enforcing the *vires* of legislative and administrative acts.<sup>125</sup> This point relates to the reliance placed on the 'act of the Lord Advocate' and the issue of access to the highest court. This is the matter on which views of the Expert Group and the McCluskey review diverged most significantly. The Expert Group appeared to concede that no practical changes should be made to the manner of reference<sup>126</sup> and no recommendation was made in regard to changing the procedure for leave to appeal being granted by the High Court of Justiciary, or special leave from the Supreme Court itself. This seems somewhat understandable based on their interpretation of the problem associated with the system being only that of the mis-location of 'retained functions' in the list of devolution issues and not on the question of the Supreme Court's jurisdiction in such matters.

The analysis of the McCluskey Report took a different approach, founding on the '(...) anomaly that it is only in the case of Scotland that the Supreme Court has an

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<sup>121</sup> Discussed further below.

<sup>122</sup> McCluskey Review, *Final Report* (n 74) [30].

<sup>123</sup> *ibid* [27].

<sup>124</sup> Advocate General's Expert Group (n 71) [4.31].

<sup>125</sup> *ibid* [4.30].

<sup>126</sup> Advocate General's Expert Group (n 71) [4.32]: 'If, as we recommend, Convention and EU issues affecting the prosecution of crime and investigation of deaths were no longer to be treated as devolution issues, then it would, in our opinion, be desirable to maintain the possibility, as at present, for such issues to be referred, as issues of law, to the High Court or the Supreme Court in the same way as 'devolution issues'.

unqualified statutory right to grant special leave'.<sup>127</sup> Thus, to put the High Court of Justiciary on an '(...) equal footing with its counterparts elsewhere in the UK', it was recommended that the special leave of the Supreme Court should only be exercised after a grant of certificate from the High Court of Justiciary that the appeal raised a point of general public importance.<sup>128</sup> It appears contrived that the High Court of Justiciary should require to be put on an 'equal footing' with regards to other UK jurisdictions in order to preserve that court's 'historical position' as distinct from the Court of Appeal in England and Wales or Northern Ireland.<sup>129</sup> Indeed, these courts are subject to a general appeal to the Supreme Court, exercisable only following certification by the lower court. One justification stated by the McCluskey Review for certification was the protection of Scot's law from future, differently constituted, Supreme Courts. While it was accepted that the Supreme Court had made it quite clear on several occasions<sup>130</sup> that they had no intention of acting as a general appeal court in criminal matters, the entirely logical conclusion was drawn that the very need for the court to stress this suggested the possibility for such an event occurring in the future.<sup>131</sup>

## B. Competing Jurisdictions and the Position of the High Court of Justiciary

Noting that a tension had developed between the tests used by the High Court of Justiciary and the JCPC/UKSC, the Senators of the College of Justice articulated their concern in a submission to the Calman Commission on Scottish Devolution.<sup>132</sup> They suggested that the tension arose due to the differing constraints operating on the courts. The High Court of Justiciary must have regard to statute and the common law, as well as complying with its obligations as a public body under the HRA 1998 section 6. However, for the Supreme Court, the issue was much narrower and related to whether the act could be regarded as Convention compliant, or not.<sup>133</sup> In showing the practical effect of this division, the example of the various appeals on 'fresh evidence' was used. In such appeals before the Court of Criminal Appeal, that court must have regard to section 106(3A) of the Criminal Procedure (Scotland) Act 1995,<sup>134</sup> as well as the 'long line of authority'.<sup>135</sup> However, the Scottish judiciary have averred that, in contrast to the approach of the High Court of Justiciary, the JCPC developed

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<sup>127</sup> McCluskey Review, *First Report* (n 108) [48].

<sup>128</sup> *ibid* [74].

<sup>129</sup> McCluskey Review, *Final Report* (n 74) [41].

<sup>130</sup> Such as in *McInnes v HM Advocate* (n 86).

<sup>131</sup> McCluskey Review, *Final Report* (n 74) [44].

<sup>132</sup> Submission by the Judiciary in the Court of Session, *The operation of section 57(2) and Schedule 6 of the Scotland Act 1998 and related matters* (10 October 2008) <<http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf>> accessed 12 June 2012.

<sup>133</sup> *ibid*.

<sup>134</sup> This provides that: 'Evidence such as is mentioned in subsection 3(a) above [the existence and significance of evidence which was not heard at the original proceedings] may found an appeal only where there is a reasonable explanation of why it was not so heard'.

<sup>135</sup> Judiciary in the Court of Session (n 132) [8]. See *Cameron v HM Advocate* 1991 JC 251; *Kidd v HM Advocate* 2000 JC 509; *Al Megrahi v HM Advocate* 2008 HCJAC 15.

its own test.<sup>136</sup> Furthermore, that the JCPC court was only able to do so as it remained unshackled by the requirement that a conviction may only be quashed where it can be satisfied that a miscarriage of justice, as defined by Scots law, has occurred.<sup>137</sup> As noted above, the Scottish Judiciary have suggested that the effect of these two approaches is the creation of two distinct jurisdictions with quite different jurisprudence, either of which may result in the quashing of a conviction. Additionally, the appeal to London is more flexible and open to alternative approaches to established Scots law, not being forced to strictly apply the miscarriage of justice test.

It could be argued that such sentiments demonstrate an 'undertone of apparent resentment'<sup>138</sup> and that it is petty for the Scottish judiciary to take issue with a higher court not giving regard to judgements of the lower court; or that it is simply for the lower court to apply the test determined by the higher court. However, these would only be valid arguments if the Supreme Court was a court of general appeal in criminal matters, and if the point was not so often repeated that the High Court of Justiciary is the highest court in Scottish criminal matters. It has been said by Walker that '(...) the development of an expansive devolution issue jurisprudence by the JCPC meant that, when coupled with the difficulty of having a dual apex court system, and a dual human rights regime represented by the Scotland Act 1998 and the HRA 1998, the scene was set for conflict'.<sup>139</sup>

The status of the High Court of Justiciary must be addressed. For the McCluskey Review Group, it was felt that any statutory changes to the constitution should '(...) preserve the special constitutional and historical position of the High Court [of Justiciary] as the final court of criminal appeal in Scotland, an historical and constitutional fact that distinguishes it from the Court of Appeal in England and Wales or Northern Ireland'.<sup>140</sup> Yet, what is demonstrated is the extent to which human rights issues and the general criminal law are so tightly interwoven as to be virtually indistinguishable in many cases. Thus, where a human rights issue is allowed to proceed, the Supreme Court will indeed be Supreme. However, where the issue is deemed to be one resolved by the general criminal law, the High Court of Justiciary will have the last word. Cases such as *Fraser* show the extent to which this distinction is in contention. It is hard to see how this tension could be resolved where the same method of accessing the jurisdiction is employed. However, even if a system of certification was in place, it is perhaps unlikely that Scottish judges would generally be willing to grant the necessary certificate.<sup>141</sup>

The proposal for certification received a degree of criticism. For example, the Scottish Human Rights Commission stated that the Supreme Court was best placed

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<sup>136</sup> *Holland v HM Advocate* 2005 SC (PC) 3; *Sinclair v HM Advocate* 2005 SC (PC) 28. The judgement of Lord Rodger of Earlsferry in *Holland*, particularly at [82] and [83], is cited by the Scottish Judiciary as demonstrative of the different test, arrived at without reference to the Scots line of authority on essentially the same matter.

<sup>137</sup> *ibid.*

<sup>138</sup> A O'Neill, 'The Curtailment of Criminal Appeals to London' (2011) 15 *Edinburgh Law Review* 1 88.

<sup>139</sup> Walker (n 18) [3.4].

<sup>140</sup> McCluskey Review, *Final Report* (n 74) [41].

<sup>141</sup> I Jamieson, 'Scottish criminal appeals and the Supreme Court: quis custodiet ipsos custodies?' (2012) 16 *Edinburgh Law Review* 1 77.

to determine what issues should come before it, while the Dean of the Faculty of Advocates stated that, in effect, it would fall to the High Court of Justiciary to certify whether the Supreme Court could determine the UK's international obligations in relation to Scotland.<sup>142</sup> However, the McCluskey Group felt that the High Court of Justiciary must be trusted to develop and apply the key test that would be one of 'general public importance', and that the protection of rights is best served where there is '(...) optimal division of labour between courts, and the best procedures for ensuring that different courts carry out their functions as effectively as possible in a complimentary fashion'.<sup>143</sup> It would seem that the opposing positions consist of either: the Supreme Court having the final say on the UK's international obligations; or, of the High Court having control over what points of Scots law should be developed further by the higher court. On any constitutional view these positions are difficult to reconcile.

### C. An Efficient Criminal Justice System

The 'delay and disruption' identified in the Bonomy Review has been cited frequently in criticism of the system of devolution issues. In their submission to the Calman Commission, the Scottish judiciary regarded that, given the presence of two jurisdictions capable of quashing a sentence, it was not justified that recourse to the Supreme Court could be invoked '(...) only if certain procedural steps have been timeously taken, which they may not have been, for whole arbitrary reasons'.<sup>144</sup> The McCluskey Review Group held the view that the system used in the Scottish courts for dealing with human rights issues in criminal cases was '(...) responsible for some slowing down of the court's processes and some lack of finality'.<sup>145</sup> They also highlighted the importance of mitigating delays and uncertainty as to avoid undermining public confidence and that the maxim 'justice delayed is justice denied' applied equally to victims.<sup>146</sup> However, the Expert Group observed that there was little empirical evidence that the present arrangements disrupted the Scottish courts and that any disruption was attributable to a general increase in arguments based on human rights being brought in criminal cases, a situation that would be unchanged by removing the jurisdiction of the Supreme Court.<sup>147</sup>

There seems to be a logical flaw in playing down the question of delay and thereafter attributing any delay to the increased use of human rights arguments. It is predominantly through devolution issues that human rights arguments are advanced in Scots law and, therefore, any delay is indeed directly attributable to human rights. What is thoroughly confusing, however, is the Expert Group's subsequent acceptance of the arrangement '(...) as being clumsy, bureaucratic and productive of delay (...) creating a very serious problem for the Scottish court system

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<sup>142</sup> Scotland Bill Committee, *First Report: Report on the Scotland Bill – Vol 2 Main Report* (SP Paper 49, 2011) 90.

<sup>143</sup> McCluskey Review, *Final Report* (n 74) [46].

<sup>144</sup> *ibid* (n 132).

<sup>145</sup> McCluskey Review Group, *First Report* (n 108) [24].

<sup>146</sup> *ibid* [22].

<sup>147</sup> Advocate General's Expert Group (n 71) [3.5].

and the work of the Lord Advocate and Advocate General, as well as for victims and witnesses'.<sup>148</sup> This inconsistency in approach to the same matter is difficult to reconcile.

Furthermore, the Expert Group commented that '(...) insufficient consideration is given by those who argue in favour of retaining the present system to its effect on victims, witnesses and others, apart from the accused, that are caught up in the criminal process',<sup>149</sup> and that '(...) there is a public interest, as well as a legitimate interest of victims and witness, in determining criminal proceedings as speedily as is consistent with justice'.<sup>150</sup> Unfortunately, there was little further discussion of how the interests of victims and others were specifically affected. One is left assuming that, even with the lack of empirical evidence, the effect lies in both the delay and the lack of certainty arising from a further appeal. In *Fraser* for instance, where Lord Hope expressed regret at the delay and distress that would be caused to the family of Arlene,<sup>151</sup> and *Cadder*,<sup>152</sup> where over one thousand prosecutions were abandoned following the decision,<sup>153</sup> the problems for victims are apparent. However, it is no justification for the removal of a tier of appeal that problems stem from the fact that an appeal to the Supreme Court exists. When one considers that the constitutional basis for the jurisdiction is lacking, the issue of the severe problems for victims and the rest of the justice system is further compounded.

Although certainly not an argument against striving for less delay and disruption in the current system, it has been observed in defence of the current system, that there would be inexorably greater delay and disruption in having recourse only to the ECtHR. An autonomous Scottish court system, with all appeals to the Supreme Court ending, has been mooted, most vocally by the SNP. In light of the current constitutional arrangement of the UK, all three reviews, in fairly brief terms, ruled out removing the jurisdiction of the Supreme Court altogether. The position was summed up succinctly by the Advocate-General: '(...) it is a curious definition of 'simpler' to have a case sent to a court twice as far away, in France, where there is a backlog of 150,000 cases'.<sup>154</sup>

## D. Proposals for Reform

The current statutory regime of the Scotland Act 1998, combined with the interpretational gymnastics displayed by the JCPC/UKSC, has resulted in a human rights jurisdiction that is devoid of clear constitutional principle. While it may seem that much of the criticism of the system is also incoherent, the Advocate General's Expert Group and the McCluskey Review Group found agreement on two fronts: the inclusion of the Lord Advocate's 'retained functions' in the system of devolution

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<sup>148</sup> *ibid* [4.19].

<sup>149</sup> *ibid* [4.4].

<sup>150</sup> *ibid* [4.31].

<sup>151</sup> *Fraser* (n 3) [44] (Lord Hope).

<sup>152</sup> *Cadder* (n 4).

<sup>153</sup> JLSS (n 86).

<sup>154</sup> BBC News, 'UK Supreme Court to retain role in Scots law' (*BBC News*, 14 September 2011) <[www.bbc.co.uk/news/uk-scotland-scotland-politics-14923605](http://www.bbc.co.uk/news/uk-scotland-scotland-politics-14923605)> accessed 12 April 2012.

issues was a constitutional error resulting in practical problems; and that the Supreme Court should have a continued role in determining compatibility issues in criminal cases. However, the differing solutions proposed have sparked debate as to how best to reform the law in this area and the resolution of that debate has served to be an interesting illustration of the contemporary relationship between the Parliaments at Holyrood and Westminster.

The White Paper *Strengthening Scotland's Future*<sup>155</sup> contained the UK Government's commitment to alter the position of the Lord Advocate with regard to devolution issues through the new Scotland Bill, now Act.<sup>156</sup> Initially, the UK Government sought to act on the report's recommendations and tabled an amendment to the Scotland Bill that attempted to achieve two objectives. First, to remove from the list of devolution issues the question of whether an act of the Lord Advocate, acting in his capacity as head of criminal prosecutions in Scotland, was incompatible with EU law or Convention rights. Secondly, to create a new statutory right of appeal from the High Court of Justiciary to the Supreme Court where it was alleged that an act of the Lord Advocate, acting in his capacity as head of criminal prosecutions in Scotland, was similarly incompatible. Introducing the amendment, Secretary of State for Scotland, Michael Moore MP, claimed that the amendment would deal with the problems associated with the duality of the role of Lord Advocate and welcomed the wide support for the notion that '(...) people in all parts of the United Kingdom should enjoy the same rights under the courts'.<sup>157</sup> However, opposition came from both Labour and the SNP Members<sup>158</sup> stating that, following consideration of the McCluskey Review, the Government should revise the clause. Furthermore, following the introduction of the amendments to the Scotland Bill, the McCluskey group concluded that an anomaly existed in that a claim under Convention rights was only available in respect of an act of the Lord Advocate.<sup>159</sup> They also concluded that this was an anomaly perpetuated further by the fact that the proposed provision did not, it was felt, adequately distinguish between Convention rights and real *vires* devolution issues based on competence and failed to clearly define and limit the Supreme Court's jurisdiction.<sup>160</sup>

The Bill in its original format merely sought to rearrange the wording of the Scotland Act 1998 in relation to the position of the Lord Advocate. While this would have achieved a marginal amount in addressing the interpretational gymnastics, it would have done nothing to resolve the more fundamental concerns of providing a proper constitutional basis for the Supreme Court's wide jurisdiction nor defined the competing positions of that court and the High Court of Justiciary. Faced with the criticisms of the scope of appeals and the powers of the Supreme Court, the

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<sup>155</sup> Scotland Office, *Strengthening Scotland's Future* (White Paper, Cm 7973, 2010).

<sup>156</sup> *ibid* 67.

<sup>157</sup> HC Deb, 21 June 2011, vol 530, col 283.

<sup>158</sup> HC Deb, 21 June 2011, vol 530, col 291. Pete Wishart MP stated that '(...) the Bill contains unpalatable measures that are totally unacceptable to the Scottish Government, and will be totally unacceptable to the Scottish people too...When the last Scottish Parliament Bill Committee considered the Government's proposals, even that Unionist-led Committee did not see fit to pass them. I do not think that a new Scottish Parliament Bill Committee will be any better disposed towards them'.

<sup>159</sup> McCluskey Review Group, *First Report* (n 108) [28].

<sup>160</sup> *ibid*.

Advocate General, having responsibility for this aspect of the Bill, was swayed by the 'persuasive case' that had been made.<sup>161</sup> With regard to the issue of certification, Lord Wallace was of the opinion, that the case for certification had not been made, but conceded that it had not been ruled out. He assured that there would be a '(...) proper consideration of the Bill when the committee stage at the House of Lords takes place'.<sup>162</sup> It appears that, possibly due to constraints of time, no such debate took place.<sup>163</sup> This is regrettable for the denial of the benefit of further analysis and insight this would have afforded.

Ultimately, the Scottish Government received all the amendments to the Bill that it desired<sup>164</sup> in relation to the jurisdiction of the Supreme Court, with the exception of a certification requirement.<sup>165</sup> In sum, the purpose of the Legislative Consent Motion was to:<sup>166</sup>

(...) ensure the role of the UK Supreme Court is properly defined; ensure that one procedure, with appropriate time limits, is available for human rights issues in criminal cases; retain the Lord Advocate and Advocate General's current powers of reference to the UK Supreme Court and allow for points of general public importance to be referred to the High Court [of Justiciary] and then Supreme Court for adjudication before trial; and to allow for a review in three years of the need for certification of cases by the High Court [of Justiciary] for Supreme Court consideration, to be chaired by the Lord President.

This would seem to be a vindication of the assertion that the political power lies in Westminster, the political will lies in Holyrood.<sup>167</sup> The Scotland Bill has now become the Scotland Act 2012 and sections 34-37 of the 2012 Act have implemented amendments to the system, as suggested by the abovementioned Legislative Consent Motion. These amendments represent a significant improvement and

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<sup>161</sup> Scotland Bill Committee, *Official Report* (1 November 2011) cols 426 and 460.

<sup>162</sup> *ibid.*

<sup>163</sup> 'Obviously we will come to discuss Clause 17 at the next sitting of the Committee, *if we get that far*, which in a number of important respects is a response to the review undertaken by the noble and learned Lord, Lord McCluskey, at the request of the Scottish Government': HL Deb, 26 Jan 2012, vol 539, col 1191 (Lord Wallace) (emphasis added).

<sup>164</sup> Scotland Bill Committee, *Report on the Scotland Bill – Vol 2 Main Report* (1<sup>st</sup> Report, 2011 Session 4, SP Paper 49) [414] (Kenny MacAskill MSP): 'The Scottish Government wishes to see a situation whereby the UK Supreme Court has a more focused jurisdiction and the High Court of Justiciary retains its place at the apex of the Scottish criminal justice system. We remain deeply concerned that the proposals of the Advocate General seek inappropriately to establish the UK Supreme Court as a court of appeal within the Scottish criminal justice system, rather than as a specialist court whose role is to define and interpret Convention Rights and then to remit cases back to the High Court for determination of the appropriate remedy.'

<sup>165</sup> Significant compromise was made on this point also. It is suggested that the fact that the Lord President, whose desire for a certification system has already been made known, will chair the review shows this is a serious compromise that goes beyond merely kicking the issue into the long grass: Lord President (n 57).

<sup>166</sup> Scottish Parliament, *Legislative Consent Memorandum- Scotland Bill* (LCM (S4) 8.1, 21 March 2012).

<sup>167</sup> Tony Kelly, 'The Supreme Court and the Scotland Bill' (*UKSC blog*, 26 January 2012) <<http://uksblog.com/the-supreme-court-and-the-scotland-bill>> accessed 12 June 2012.

certainly a serious attempt to tidy up the constitutional problems that dogged the previous system.

#### 4. Conclusion

This paper has sought to provide analysis of the jurisdiction of the UK Supreme Court in relation to Scottish criminal cases. It has done so with reference to the manner in which the jurisdiction came about, its effect and the criticism that can be levelled against it. It has been argued that on the wording of the provisions in the Scotland Act 1998 relating to the *vires* control over decisions or acts of the members of the Scottish Executive, such a wide interpretation of the jurisdiction conveyed was neither inevitable nor foreseen. Furthermore, by virtue of the broad interpretation given to 'acts of the Lord Advocate' and the wide scope for basing an argument on an ECHR Article 6 point, the Supreme Court has exercised what effectively amounts to a general jurisdiction over all areas of Scots criminal procedure. In an activity lacking in constitutional justification, the Supreme Court has reviewed and overruled tests that have been developed and applied by the High Court of Justiciary in respect of miscarriages of justice.

The main theme that emerges from a consideration of the various criticisms of the arrangement is incoherence. Such illogicality is evident from the interpretative use of language by the JCPC/UKSC in developing the jurisdiction from acts of the Lord Advocate, to the constitutional grey area of which court is in fact the highest authority in Scottish criminal matters. It has been said that the whole issue amounts to a simple question: should parties in criminal proceedings emanating from Scotland be able to appeal to the Supreme Court.<sup>168</sup> The answer must be 'yes'. There must be a court at UK level ensuring compliance with the UK's international obligations. In many cases the decision on the ultimate issue, the protection of human rights in Scots trials, has been lauded.<sup>169</sup> However, the independent and defended position of the High Court of Justiciary as the apex court in criminal matters and the fact that the no clear and explicit case has been made for altering this position, render the question anything but simple. Despite the controversy that ensued following the decisions of *Cadder* and *Fraser*, the fact that the debate was reduced to a question of how best to uphold, with adequate regard to the 'prevailing constitutional position', the constitutional right of a Scottish person to access the Supreme Court for a determination of their Convention rights in criminal matters is indeed 'testament to the calming of fury'.<sup>170</sup>

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<sup>168</sup> O'Neill (n 138).

<sup>169</sup> Raitt and Fergusson (n 99).

<sup>170</sup> Kelly (n 167).