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# Scottish Appeals and the Proposed Supreme Court

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*The government's proposal to create a Supreme Court might have been expected to open up a debate on the extent to which Scottish appeals should be allowed to proceed "to London". Instead, that issue has been sidestepped and the consultation paper presupposes that the new Supreme Court will assume the existing jurisdiction of the Appellate Committee (and probably also that of the Judicial Committee) in Scottish cases. This article argues that such an approach is a mistake, and that the jurisdiction of the Supreme Court over Scottish cases should be limited to those cases which are of UK-wide importance. Such cases could be properly identified through a requirement of leave to appeal, which is not a general feature of Scottish appeals to the House of Lords at present.*

## A. INTRODUCTION

From a Scottish perspective, the government's recent consultation paper on the creation of a Supreme Court is a curious mixture of radicalism and conservatism.<sup>1</sup> The basic proposal – “to remove the jurisdiction of the Appellate Committee of the House of Lords and transfer it to a new Supreme Court”<sup>2</sup> – is self-evidently radical and far-reaching. At the same time, however, the government's proposals adopt a strikingly conservative approach to the jurisdiction of the proposed court.

At present, the Appellate Committee can hear appeals from decisions of the Court of Session (the highest Scottish civil court) but not from the High Court of Justiciary (the highest Scottish criminal court).<sup>3</sup> In addition, the Judicial Committee

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1 Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom* (2003) (henceforth *A Supreme Court for the United Kingdom*), at <<http://www.lcd.gov.uk/consult/supremecourt/supreme.pdf>>.

2 *A Supreme Court for the United Kingdom*, 8.

3 The history of the current position is well-known and it is not rehearsed further here. See further A J MacLean, “The 1707 Union: Scots law and the House of Lords” (1983) 4 J<sub>LH</sub> 50; A J MacLean, “The House of Lords and appeals from the High Court of Justiciary, 1707-1887” 1985 J<sub>R</sub> 192; *The Laws of Scotland: Stair Memorial Encyclopaedia* (henceforth SME), vol 6 (1988), paras 801-822.

of the Privy Council has jurisdiction over “devolution issues” arising under the Scotland Act 1998, even if these issues arise within the Scottish criminal courts.

The government does not propose, however, to reassess this rather untidy jurisdictional framework. Instead, the consultation paper makes it clear that the existing jurisdiction of the Appellate Committee (and, probably, that of the Judicial Committee)<sup>4</sup> will simply be transferred to the new Supreme Court. This aspect of the proposals is, it seems, not even up for debate, and has not been made the subject of consultation.<sup>5</sup>

The consultation paper makes no serious attempt to justify this distinction between civil and criminal appeals, beyond asserting that there are “historic and practical reasons” for the absence of any right of criminal appeal from the High Court of Justiciary to the Appellate Committee.<sup>6</sup> No attempt is made to identify these reasons beyond a brief reference to the “considerable differences” between the two systems of criminal law (a comment which might be thought to be equally applicable to many other areas of Scots law). The reliance on “historical reasons”, in particular, sits rather uneasily with the underlying thrust of the consultation paper – if historical reasons (whatever they might be) were sufficient to justify the retention of an existing system, there could be no question of creating a Supreme Court in the first instance.

There is, however, some room for manoeuvre in respect of the “Scottish questions”. At present, there is no general requirement that leave be obtained in order to bring an appeal to the Appellate Committee from a decision of the Court of Session.<sup>7</sup> Whether or not this should continue has explicitly been made the subject of consultation. Again, the consultation paper displays a curious conservatism, arguing that “there is no evidence that change is needed” – a dubious assertion to which this article returns<sup>8</sup> – and that “there are strong arguments for leaving the position unchanged”, although no attempt is made to identify these arguments.<sup>9</sup>

This article considers the extent to which a right of appeal to a UK-wide court is beneficial to the Scottish legal system. Because the issue is not squarely addressed by the consultation paper, this analysis will be undertaken by reference to the earlier work of Andrew Le Sueur and Richard Cornes, which considers the question of what may be regarded as “valuable” about the work of the UK’s highest

4 See *A Supreme Court for the United Kingdom*, paras 19-21.

5 See *A Supreme Court for the United Kingdom*, paras 26-27.

6 *A Supreme Court for the United Kingdom*, para 26.

7 See below, note 35 and accompanying text.

8 See below, section B.(1)(b).

9 *A Supreme Court for the United Kingdom*, para 56.

courts and how a Supreme Court should be structured.<sup>10</sup> Having identified the extent to which a UK-wide court may prove beneficial to the Scottish legal system, the article will then consider the consequences of this analysis for the government's proposals.

## B. SHOULD A SUPREME COURT HAVE JURISDICTION IN SCOTTISH APPEALS?

This (and the following) section will do the following. First, adopting the framework identified by Le Sueur and Cornes – in particular, the features of the current work conducted by the UK's highest courts which they regard as “valuable” – it will consider whether appeals “to London”<sup>11</sup> can provide such functions for the Scottish legal system, concluding that such a right of appeal is necessary to provide a small number, but not all, of these features. Secondly, it will consider whether these functions are actually valuable in the Scottish context. Finally, before concluding, it will examine Le Sueur and Cornes' rebuttal of what they perceive as the likely objections to extending the jurisdiction of a UK supreme court to include Scottish criminal appeals.

### (1) The justification for a second tier of appeal

As Le Sueur and Cornes acknowledge, second appeals cannot be regarded as a matter of constitutional right.<sup>12</sup> Indeed, it is only recently that the right to appeal

10 In 2000, Andrew Le Sueur and Richard Cornes set out to identify a number of models for the future of the Law Lords. These included: (a) maintaining the status quo; (b) establishing a new supreme court with broad jurisdiction; (c) creating a specialist constitutional court along with a supreme court with a narrower jurisdiction; and (d) a UK “court of justice” which would consider questions of UK-wide law referred to it from the courts of appeal in England and Wales, Scotland and Northern Ireland. The aim of the report was to begin an assessment of these various models by identifying arguments and evidence supporting or undermining them. In relation to option (b), the authors considered what, if any, arguments supported the view that a new Supreme Court should maintain jurisdiction over Scottish civil matters, or have jurisdiction extended to Scottish criminal appeals. The authors made clear in their report they were not advocating such a change, but merely seeking to identify all the possible options for reform in order to inform and stimulate debate. See A Le Sueur and R Cornes, *The Future of the United Kingdom's Highest Courts* (2001); A Le Sueur and R Cornes, “What do the top courts do?” (2000) 53 *Current Legal Problems* 53.

11 This terminology assumes, incidentally, that a reformed Supreme Court would continue to sit in London when hearing Scottish appeals. The question of whether the Appellate Committee or any replacement should sit in Edinburgh for such purposes has been raised before now, but it is not addressed by the consultation paper. See T B Smith, *British Justice: The Scottish Contribution* (1961), 88-89; Le Sueur and Cornes, *The Future of the United Kingdom's Highest Courts*, 70.

12 Le Sueur and Cornes, “What do the top courts do?”, 55-56. Appeals to the House of Lords from the Scottish courts may in some cases be third, rather than second appeals, where the case has proceeded via an appeal to the sheriff principal or through a tribunal system. I refer to “second” appeals in the text for the sake of convenience.

has itself been recognised as of constitutional significance. Some international conventions do not recognise a right to appellate review at all,<sup>13</sup> while other (more recent) conventions recognise it only in respect of criminal convictions.<sup>14</sup> None of these conventions recognises a right to a second appeal. Le Sueur and Cornes seek, therefore, to justify appeals to the Appellate Committee or Judicial Committee on the grounds that the Committees' work is "valuable", and identify a number of features which might be considered valuable in this context. These are as follows: better quality adjudication; determination of important cases; error correction; managing precedent; a constitutional court; a court for the whole of the United Kingdom; system management; and ability to innovate.<sup>15</sup>

A large part of Le Sueur and Cornes' work has involved an analysis of whether the Committees' work does indeed provide "value" in the above fields. What is missing from their work here, however, is a specific analysis of whether the Committees currently provide such "value" in respect of Scottish appeals. This section sketches out a preliminary analysis of this issue.

*(a) Better quality adjudication*

One justification for a second tier of appeal may simply be that the highest court produces "better" judgments than the courts below. From a theoretical perspective, there are four possible reasons why this might be so. First, a second appeal provides opportunities for the arguments to be refined further. Secondly, a second appellate court may sit with more judges than the lower court. Thirdly, a second appellate court may sit with better-qualified judges than the lower court. Fourthly, appeals to the second appellate court may be presented by better-qualified counsel.

The fourth seems unlikely in the Scottish context, where it appears common for the same counsel to present the case through both stages of the appellate process. The other three, however, deserve further consideration.

Refinement of argument is undoubtedly important. It would certainly be awkward if a supreme court had to consider an issue from scratch, without being able to scrutinise and debate a previous opinion which had been delivered on the

13 The European Convention on Human Rights (1950) does not include a right of appeal, although the Seventh Protocol (1984) (not yet ratified by the UK) provides, with some exceptions, for appeals in criminal cases as a matter of right. Art 10 of the Universal Declaration of Human Rights (1948) recognises the right to a "fair and public hearing" but makes no mention of any right to an appeal. See also art 7(1)(d) of the African Charter on Human and Peoples' Rights (1986).

14 See, for example, art 14(5) of the International Covenant on Civil and Political Rights (1966) and art 8(2)(h) of the American Convention on Human Rights (1969).

15 Le Sueur and Cornes, "What do the top courts do?", 60. Two other features are identified – adjudication services for overseas jurisdictions and first appeals from certain professional discipline tribunals – but these are not relevant to the present issue.

point – and this may provide an important justification for (for example) the role of the advocate-general before the European Court of Justice and the *commissaire du gouvernement* in the French *Conseil d'Etat*.<sup>16</sup> Similarly, the High Court of Justiciary has insisted that where an accused appeals against conviction, the trial judge's report must comment on the issues of law raised by the appellant.<sup>17</sup> It seems reasonable to expect that the opportunity for refinement of argument will normally provide (all other things being equal) better adjudication, although the law of diminishing returns must apply.

Consideration of the second and third possibilities, however, produces a less clear-cut outcome. The theory here is that a case which is heard before a greater number of better-qualified judges will result in better quality adjudication. However, an appeal from the Scottish courts “to London” need not necessarily result in such a procedure, because the Court of Session and High Court of Justiciary have the power to convene large benches where this is necessary to consider important points of law,<sup>18</sup> and it is far from obvious that the non-Scottish members of the Committees are to be regarded as “better qualified” to deal with issues of Scots law than their Court of Session and High Court counterparts.

In this context, it is instructive to consider the practice of the Appellate Committee in hearing Scottish appeals over recent years. Over the period 1993–2002,<sup>19</sup> in a total of forty-eight cases, there were ninety-one occasions on which a Scottish law lord sat on a Scottish appeal,<sup>20</sup> including sixty-two occasions on which one of these law lords delivered a speech.<sup>21</sup> Over the same period, there were 149 occasions on which a non-Scottish law lord sat on a Scottish appeal,<sup>22</sup> including twenty-five occasions on which one of these law lords delivered a speech. In summary, Scottish law lords delivered speeches in 68% of the Scottish appeals in

16 The first instance jurisdiction of the *Conseil d'Etat* is currently smaller than in the past, but remains significant. See L N Brown and J S Bell, *French Administrative Law*, 5th edn (1998), esp ch 3.

17 *McPhelim v HM Advocate* 1996 JC 203. See also *HM Advocate v Al-Megrahi (No 5)* 2002 JC 38.

18 See generally I D Willock, “Fuller bench decisions” 2000 SLT (News) 19. Courts of as many as thirteen judges have sat in the past (*Bell v Bell* 1940 SC 229). This would be unlikely in modern practice, but courts of seven or even nine judges still sit on occasion: see, e.g., *McCutcheon v HM Advocate* 2002 SLT 27 (nine judges); *Scottish Discount Co. Ltd v Blin* 1985 SC 216 (seven judges).

19 The following analysis is based on a study of all cases reported in the relevant Session Cases volumes for these years.

20 In modern practice, at least one (but often only one) Scottish law lord will sit on any appeal from the Scottish courts. In the period under consideration, there were ten Scottish appeals where three Scottish law lords sat, twenty-three where two sat, and fifteen where only one sat.

21 The calculation of “speeches” for this purpose does not include brief concurring remarks which simply endorse the reasoning of another law lord.

22 In total, this amounts to a total of 240 occasions on which a law lord sat in a Scottish appeal; i.e., forty-eight appeals with five law lords sitting on each occasion.

which they sat, while non-Scottish law lords delivered speeches in 17% of such cases.<sup>23</sup>

This breakdown is striking enough in itself. It becomes even more remarkable when one considers the *type* of Scottish appeal in which non-Scottish law lords are prepared to deliver speeches. Of the twenty-five speeches delivered by non-Scottish law lords sitting in Scottish appeals over this ten-year period, nineteen were concerned with questions of statutory interpretation or application.<sup>24</sup> Three were concerned with issues of contractual or testamentary construction. That leaves only a further three, concerned with liability for negligence, all of which were delivered in a case where it was accepted that there was no relevant difference between Scottish and English law.<sup>25</sup>

In short, non-Scottish law lords simply do not in current practice deliver speeches on questions of Scots common law, with the special exception of liability for negligence.<sup>26</sup> This means, in effect, that such issues are largely left in the hands of the small number of Scottish law lords (sometimes only one) sitting to hear the appeal. The end result is that such appeals may well be disposed of with only a single reasoned speech being delivered<sup>27</sup> – a practice which has been heavily criticised elsewhere.<sup>28</sup>

The historical record of the Appellate Committee in being dismissive of the distinctiveness of Scots law has been heavily criticised.<sup>29</sup> Modern practice, however,

23 For these purposes, two cases in which conjoined appeals from the Scottish and English courts were heard together are included in the category of “Scottish appeals” (*King v Bristow Helicopters Ltd* 2002 SC (HL) 59; *Wisely v John Fulton (Plumbers) Ltd* 2000 SC (HL) 95). If these two cases are excluded, the relevant figures are 68% and 15% respectively.

24 These included eleven cases dealing with UK statutory provisions, two dealing with Scottish provisions which were identical in substance to English provisions, and six dealing with Scottish provisions.

25 *McFarlane v Tayside Health Board* 2000 SC (HL) 1, per Lord Slynn of Hadley at 4 and Lord Steyn at 13.

26 This results from the unifying nature of the decision in *Donoghue v Stevenson* 1932 SC (HL) 105. See further R Evans-Jones, “Roman law in Scotland and England and the development of one law for Britain” (1999) 115 LQR 605.

27 See, e.g., *Ross and Cromarty District Council v Patience* 1997 SC (HL) 46. See also *Smith v Bank of Scotland* 1997 SC (HL) 111, where two Scottish law lords sat, but one was doubtful about the correctness of the Committee’s decision, effectively meaning that only one reasoned speech was delivered. On the difficulties of identifying the *ratio* of *Smith*, see G L Gretton, “Sexually transmitted debt” 1997 SLT (News) 195.

28 Particularly by Lord Reid. See “The judge as law maker” (1972) 12 JSPTL 22, at 28-29; *Broome v Cassell & Co* [1972] AC 1027, at 1084-1085; *Gallie v Lee* [1971] AC 1004, at 1015; *Chancery Lane Safe Deposit and Offices Co Ltd v IRC* [1966] AC 85, at 110. See also *Paal Wilson & Co v Partenreederei* [1983] 1 AC 854, per Lord Denning MR at 873.

29 For an extended diatribe, see A Dewar Gibb, *Law from Over the Border* (1950). For an infamous example of such practice, see *Bartonhill Coal Co v Reid* (1858) 3 Macq 266, per Lord Cranworth at 285 (“but if such be the law of England, on what ground can it be argued not to be the law of Scotland?”). As to whether *Bartonhill* is really as flagrant an example of unprincipled Anglicisation as is commonly supposed, see P Simpson, “Vicarious liability”, in K Reid and R Zimmerman (eds), *A History of Private Law in Scotland* (2000), vol 2, 574 at 588 *et seq.*

has swung away from dismissal in favour of deference. While this may be preferable, the theory that a second appeal “to London” may bring a greater number of better-qualified minds to bear on the issues under consideration is dealt a heavy blow by the actual practice, whereby many issues of Scots law appear to be left in the hands of a small sub-group of the Appellate Committee.

In the absence of any detailed comparison evaluating the respective qualities of Court of Session and Appellate Committee judgments (and it is difficult to see how such an exercise could be meaningfully carried out, other than impressionistically), this analysis is necessarily somewhat abstract. Perhaps significantly, it cannot explain what may happen during oral argument or discussion between the various law lords. It does, however, seem to make it clear that the Scottish and English law lords do not approach distinctively Scottish issues on equal terms. Furthermore, it suggests that, at the very least, it would not be sensible to assume that Scottish appeals “to London” will necessarily produce better quality adjudication than that carried out in the lower courts, at least where the issues under consideration are distinctively Scottish. It must, of course, be observed that the consequences of the Appellate Committee falling into error are far more severe than those of a mistake by the Scottish courts, because of the difficulty and delay involved in bringing such decisions under review.<sup>30</sup>

(b) *Determining important cases*

In identifying one function of a supreme court as the determination of “important cases”, it should be noted that “important” can have two meanings in this context. Firstly, cases can be intrinsically important as involving significant questions of liberty or patrimony. Alternatively (or additionally), a case can be important as raising a point of law of general importance, with ramifications beyond the particular case. It follows that it may sometimes be appropriate for a court to hear such a case even where there is no longer any live dispute between the parties.<sup>31</sup>

Civilian systems tend towards the view that, if the right of appeal to the highest court is to be restricted to important cases (and the traditional rule is that it should not be),<sup>32</sup> importance in either sense will serve to justify allowing an appeal to that court.<sup>33</sup> Common law systems, however, tend to the view that only cases which are important in the second sense should be appealable to the highest court – which is one of the reasons why the number of cases heard by the Appellate Committee

30 See section B.(1)(g) below.

31 For an example, see *Ross and Cromarty District Council v Patience* 1997 SC (HL) 46. Cf *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450.

32 R B Schlesinger *et al*, *Comparative Law*, 6th edn (1998), 491–492.

33 See, e.g., § 546 ZPO (German Code of Civil Procedure).



each year is no more than a tiny fraction of the workload of (for example) the French Cour de Cassation.<sup>34</sup>

Because there is no requirement of leave in order to bring an appeal from the Court of Session to the Appellate Committee (a historical accident which differs from the position in English cases),<sup>35</sup> the courts have no means of ensuring that only “important” cases come before the Appellate Committee from Scotland – as would be the case in relation to the remainder of the Committee’s work – although prospective appellants may be deterred by the cost of bringing an appeal.

Because of this, there is little doubt that a significant number of Scottish cases which are heard by the Appellate Committee do not fall within the category of “important cases”. In *Cumbernauld and Kilsyth District Council v Dollar Land Ltd*,<sup>36</sup> Lord Jauncey of Tullichettle was moved to observe that the appeal was “hopeless” and that had leave to appeal been required, “it would indubitably have been refused”.<sup>37</sup> In *Singh v Secretary of State for the Home Department*,<sup>38</sup> the appellants presented an argument on a point of UK immigration law which had already been rejected four times in the Court of Appeal,<sup>39</sup> Bridge LJ having gone so far as to describe the contention as absurd.<sup>40</sup> Between 1993 and 2002, the Appellate Committee also heard Scottish appeals in two cases involving actions of damages for personal injury where there was no question of law in dispute and the appeal was brought solely on a question of fact.<sup>41</sup> A number of other cases have turned on the proper construction of contractual or testamentary provisions or allegedly defamatory statements, without appearing to raise any fundamental issue of law.<sup>42</sup>

34 In 1994, 25,502 appeals were filed to the Cour de Cassation. See RB Schlesinger *et al*, *Comparative Law*, 6th edn (1998), 491 fn 386.

35 See Le Sueur and Cornes, *The Future of the United Kingdom’s Highest Courts*, 67. There are exceptions to this general rule. See Lord Hope of Craighead, “Taking the case to London – is it all over?” 1998 JR 135, 147-148; SME, vol 6, para 829. There is a requirement for two counsel to certify the reasonableness of the petition of appeal (House of Lords, *Practice Directions Applicable to Civil Appeals* (2002), para 9.2), but this does not appear to have prevented “unimportant” cases from reaching the Appellate Committee, as the examples discussed below show.

36 1993 SC (HL) 44.

37 *Cumbernauld and Kilsyth District Council v Dollar Land Ltd* 1993 SC (HL) 44, at 48D.

38 1993 SC (HL) 1.

39 *R v Immigration Appeal Tribunal, ex p Ekrem Mehmet* [1977] 1 WLR 795; *R v Secretary of State for the Home Department, ex p Makhan Singh*, 14 Dec 1976, (unreported); *Rhemtulla v Immigration Appeal Tribunal* [1980] Imm AR 168; *R v Secretary of State for the Home Department, ex p Yeboah* [1987] 1 WLR 586. Leave to appeal was refused in *Yeboah*: it does not appear to have been sought elsewhere.

40 In the unreported case of *Makhan Singh*: see *Singh v Secretary of State for the Home Department* 1993 SC (HL) 1, at 6F.

41 *Martinez v Grampian Health Board* 1996 SC (HL) 1; *Dingley v Chief Constable, Strathclyde Police* 2000 SC (HL) 77.

42 *Taylor v Secretary of State for Scotland* 2000 SC (HL) 139; *Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd* 1995 SC (HL) 19; *Wright’s Trs v Callender* 1993 SC (HL) 13; *Fraser v Mirza*

The Appellate Committee has also considered a number of Scottish cases of remarkably small value. Most strikingly, the 1992 case of *Drummond & Co, WS v Scottish Legal Aid Board*<sup>43</sup> involved a dispute over whether a firm of solicitors was entitled to claim the sum of £27.76 from the Scottish Legal Aid Board. Because the case involved a point of general importance in the interpretation of legal aid regulations, there can be no doubt that it was of importance to the Scottish Legal Aid Board and the profession that an authoritative and final decision was reached on the point so that the relevant legislation could be amended if necessary. However, this could have been achieved without the case being taken “to London”, had the Court of Session been able to refuse leave to appeal, or had no such right of appeal existed in the first place.

None of this means, of course, that the Appellate Committee *cannot* fulfil the function of “determining important cases”. It suggests two things however. First, the significance of the Committee’s current function for the Scottish legal system may be rather less than the (already small) number of Scottish appeals heard by the Committee would imply.<sup>44</sup> Secondly, if the Supreme Court is to have jurisdiction in Scottish cases, it would be desirable for a leave requirement to be introduced. In this respect, the consultation paper’s assertion that “there is no evidence that change is needed”<sup>45</sup> is difficult to sustain in the light of some of the cases which have come before the Appellate Committee in recent years.<sup>46</sup>

Regardless of these observations, however, the determination of important cases is not an end in itself – a second tier of appeal must provide some further value in respect of such cases in order to justify its existence. In this respect, the value of “determining important cases” is contingent upon the other values identified by Le Sueur and Cornes.

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1993 SC (HL) 27. *Caledonia North Sea Ltd v British Telecommunications plc* 2002 SC (HL) 117 also turned on the interpretation of contractual provisions, but might be considered intrinsically important due to the extremely high value of the case, which arose out of the Piper Alpha disaster.

43 1992 SC (HL) 1. See also *David Watson v Woolwich Equitable Building Society* 1992 SC (HL) 21, where the sum sued for was £179.07.

44 The Scottish Civil Judicial Statistics for the period 1966-2001 indicate that the Appellate Committee disposed of around five appeals from the Court of Session by judgment each year over that period, reversing the Inner House in around one-third of those cases. The figures do not suggest any discernible trend in either the volume of appeals or the propensity of the Committee to reverse the Inner House over that period. The writer is grateful to Hector MacQueen for this information.

45 *A Supreme Court for the United Kingdom*, para 56.

46 It should be observed, however, that the cases discussed in the text all came before the Appellate Committee in the early 1990s. While there is room to doubt whether leave to appeal, if required, would have been granted in some of the more recent cases cited in the footnotes, these cases are not as clear-cut. This may, perhaps, indicate a change in practice relating to the certification of the reasonableness of appeals.

(c) *Error correction*

As with “determining important cases”, “error correction” as a justification for second appeals may be understood in two ways – firstly, as allowing a supreme court to correct an error in the way in which a particular case has been decided, and secondly, as allowing that court to correct more general errors of law made by lower courts.

The first is an unlikely justification for second appeals in the UK context given the small number of cases currently heard by the House of Lords. Additionally, the requirement that a point of law of “general public importance” must be involved in order for an English criminal appeal to be heard by that court indicates that this is not properly one of its functions.<sup>47</sup> Other errors can, if necessary, be corrected in criminal cases by the Criminal Cases Review Commission referring the case back to the Court of Appeal.<sup>48</sup>

Nor, as Le Sueur and Cornes acknowledge, does the second possibility provide a strong justification for second appeals. Many appellate decisions might well be decided differently by a differently constituted court – often the importance of a supreme court’s decision is that it provides finality, and the matter can then be considered by the legislature if necessary. In any case, it is difficult to think of any significant errors of law which have been corrected by the House of Lords in a Scottish appeal in recent years.<sup>49</sup> If anything, *Sharp v Thomson*<sup>50</sup> may have given the Appellate Committee something of a reputation for error *creation* in this context.<sup>51</sup>

(d) *Managing precedent*

Le Sueur and Cornes assert that “a valuable function of the top court is to exercise control over what constitutes correct precedent and to supervise the application of precedent by lower courts”.<sup>52</sup> That is doubtless uncontroversial (unless one wants to reject the doctrine of *stare decisis* altogether). However, it does not in itself explain why a top court must be a *second* tier of appeal in order to fulfil this function.

47 See principally the Criminal Appeal Act 1968, s 33(2).

48 Criminal Appeal Act 1995, ss 8-25. In Scotland, see the Criminal Procedure (Scotland) Act 1995, ss 194A-194L.

49 *Armour v Thyssen Edelstahwerke AG* 1990 SLT 891 (a decision arising out of the Court of Session’s curiously sustained hostility to retention of title clauses) has been suggested to the author as a possible example.

50 1997 SC (HL) 66.

51 See generally Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001), and further references at para 1.8 of the Discussion Paper.

52 Le Sueur and Cornes, “What do the top courts do?”, 71.

It may be that the sheer volume of case-law handled by the English courts makes it unrealistic for a single tier of appeal properly to manage precedent. The potential problems are illustrated most acutely by the 1991 decision of the Appellate Committee in *R v Savage; R v Parmenter*.<sup>53</sup>

In disposing of these two conjoined appeals, the Committee had to consider whether foresight of harm was a necessary element of the offence of assault occasioning actual bodily harm.<sup>54</sup> The Court of Appeal, in two cases decided on the same day, had answered that question in the affirmative in one case<sup>55</sup> and in the negative in the other.<sup>56</sup> Shortly afterwards, the same question arose in a third case, where the court preferred the latter of the two decisions, again answering the question in the affirmative.<sup>57</sup> None of these three courts were referred to a fourth decision of the Court of Appeal, reached almost twenty years previously, where it had been held that the question should be answered in the negative.<sup>58</sup> The Appellate Committee eventually upheld the correctness of this fourth decision.

In Scotland, the lower volume of case-law handled by the Inner House and High Court of Justiciary on appeal, and the smaller personnel of those courts, mean that such a situation is far less likely to arise. Even if it does arise, it can be addressed by the power of these courts to convene a larger bench to review earlier decisions.<sup>59</sup>

Indeed, the existence of a second tier of appeal can actually be detrimental to the management of Scottish precedent, by making it difficult to bring earlier decisions under review. This was one reason for the Appellate Committee's reluctance to recommend changes in Court of Session practice in *Girvan v Inverness Farmers Dairy*, in which it noted that such a change "would also lack flexibility, as a decision of this House would be binding on the Court of Session and it would be very difficult to reverse except by legislation".<sup>60</sup> It is also instructive to note the way in which the Court of Session has responded to English developments allowing a negligent solicitor to be held liable in damages to an intended beneficiary,<sup>61</sup> initially holding that it was bound by an 1861 decision of the House of Lords in a Scottish appeal rejecting such liability,<sup>62</sup> before eventually declining to follow the

53 [1992] 1 AC 699.

54 Offences Against the Person Act 1861, s 20.

55 *R v Spratt* [1990] 1 WLR 1073.

56 *R v Savage* [1992] 1 AC 714 (Note).

57 *R v Parmenter* [1991] 2 WLR 408.

58 *R v Roberts* (1971) 56 Cr App R 95.

59 See Willock, note 18 above.

60 1998 SC (HL) 1, per Lord Hope of Craighead at 21. On such difficulties cf *Commerzbank Aktiengesellschaft v Large* 1977 SC 375.

61 See *Ross v Caunters* [1980] Ch 297; *White v Jones* [1995] 2 AC 207.

62 *Weir v J M Hodge & Son* 1990 SLT 266, following *Robertson v Fleming* (1861) 4 Macq 167.

1861 decision for reasons which are not entirely clear and may have involved an evasion of the *stare decisis* principle.<sup>63</sup>

(e) *A constitutional court*

In considering this function, it is important to separate out two different issues. The first is whether the Scottish courts are capable of dealing properly with what might be termed “constitutional issues” without a further right of appeal “to London”. The second is whether, even if the Scottish courts are capable of doing so, there is some additional value in a further right of appeal to a UK-wide court which could fulfil a unifying function in this sphere.

The answer to the first of these questions is, the writer suggests, in the affirmative. While the sheer volume of case-law which comes before first-level appeal courts in England and Wales may make it inappropriate for constitutional issues to be determined finally at that level, the relatively smaller caseload of the Scottish courts means that important constitutional cases are unlikely to be “drowned” in the general deluge of judicial business. The Court of Session has certainly dealt with crucial constitutional points in the past without the need for further reference to the House of Lords,<sup>64</sup> while the High Court of Justiciary has always had to determine what might be termed “constitutional issues” without a further right of appeal.<sup>65</sup>

As to the second issue, it may be that while some constitutional matters can be dealt with appropriately within the Scottish court system, others should be at least potentially subject to the jurisdiction of a UK-wide court. The most obvious example of the latter is what might be referred to as a “demarcation dispute”<sup>66</sup> relating to the competency of the Scottish Parliament vis-à-vis Westminster. Because it was seen as inappropriate to leave such issues solely within the competency of the Scottish judicial system, or to give the House of Lords jurisdiction over Scottish criminal cases involving devolution issues, the Scotland Act 1998 establishes that the Judicial Committee is to act as the “ultimate devolution court”.<sup>67</sup> Because the Supreme Court will, unlike the Appellate Committee, exist

63 *Robertson v Watt & Co*, Inner House, 4 July 1995, (unreported). See subsequently *Holmes v Bank of Scotland* 2002 SLT 544.

64 See, e.g., *MacCormick v Lord Advocate* 1953 SC 396; *T, Petitioner* 1997 SLT 724; *Whaley v Lord Watson of Invergowrie* 2000 SC 125.

65 This has changed to a limited extent due to the jurisdiction of the Judicial Committee in devolution issues. See further on this issue section C.(1)(c) below.

66 Lord Steyn, “Incorporation and devolution – a few reflections on the changing scene” [1998] EHRLR 153, at 153.

67 N Burrows, *Devolution* (2000), 174.

outside of Parliament, it appears likely that it will subsume the Judicial Committee's current jurisdiction in devolution issues.<sup>68</sup>

There may, therefore, be some value in a UK-wide court in this context, but that does not justify any universal jurisdiction for a UK-wide court in Scottish appeals, and simply begs the question: what type of cases require determination (or at least, the potential for determination) at a UK-wide level? Since this is no longer a question of whether the Scottish courts can fulfil this function (for they clearly cannot), but rather the extent to which such a function is actually valuable, the next part of this article returns to this issue.<sup>69</sup>

*(f) A court for the whole of the United Kingdom*

This potential function of a supreme court is closely linked to (but not synonymous with) the one just discussed. It goes without saying that domestic Scottish courts cannot act as courts for the whole of the United Kingdom. At this stage, therefore, it must be accepted that a second tier of appeal is necessary in order for this function to be provided. The question of whether such provision is in fact valuable is considered below.<sup>70</sup>

*(g) System management*

Le Sueur and Cornes suggest that the top courts may serve a useful "strategic case management function", providing guidance to lower courts as to the way in which business should be conducted. While providing a number of examples of the Appellate Committee engaging in such management, they express some doubts as to the "capacity and appropriateness" of the top courts fulfilling this role.<sup>71</sup>

Whether these doubts are well-founded is a separate debate. The important point for present purposes is to note that both the Appellate and Judicial Committees have already expressed reluctance to assume such a responsibility in respect of Scottish business. In *Girvan v Inverness Farmers Dairy*,<sup>72</sup> Lord Hope of Craighead took the view that it would be inappropriate for the House of Lords to recommend changes in Court of Session practice:

...it would, I believe, be inappropriate for your Lordships to recommend changes in the practice which is followed by the Court of Session in the conduct of jury trials in its own court. The Court of Session is, in a very real sense, the master of its own procedure. It has been said several times in the Inner House, on motions for leave to appeal in

68 See *A Supreme Court for the United Kingdom*, paras 19-21.

69 See section C.(1)(c) below.

70 See section C.(1)(c) below.

71 Le Sueur and Cornes, "What do the top courts do?", 79-80.

72 1998 SC (HL) 1.

interlocutory matters, that is it not appropriate to refer matters of practice for decision by the House of Lords... The basis for this view is that the Court of Session is far better placed than your Lordships can ever be to assess what changes in procedure or practice can appropriately be made and, if they were to be made, what would be their consequences.<sup>73</sup>

Lord Hope of Craighead has since reiterated these views in respect of Scottish criminal procedure whilst sitting in the Judicial Committee.<sup>74</sup> The reluctance of the Committees to adopt such a role is fortified by statute: while the Court of Session and High Court of Justiciary have statutory responsibilities in relation to the management of procedures in lower courts,<sup>75</sup> the Committees have no such responsibility in relation to the Court of Session or High Court of Justiciary, which are themselves responsible for regulating their procedure.<sup>76</sup>

#### (h) Innovation

Le Sueur and Cornes describe the “innovation” function of a supreme court as follows:

Statutory provisions may lose relevance over time. Rules of the common law fall out of date. It is the task of all courts to apply the law as it stands to new circumstances. At the level of the top courts this function may go even further – to that of innovation in the substance of the law – both in the sense of establishing new rules for novel situations and in the sense of modifying the law where it no longer accords with contemporary circumstances.<sup>77</sup>

The extent to which a supreme court should “innovate” is in itself controversial, but that issue need not concern us here. For present purposes, the question is whether any “innovation” function of the courts is enhanced by a second right of appeal, taking cases outside of Scotland. It is submitted that the answer to this question has to be in the negative. Despite the absence of criminal appeals to the House of Lords from the High Court of Justiciary, the latter court has demonstrated an exceptional ability to innovate in the field of criminal law.

Three examples are particularly pertinent here. In 1983, the High Court held that the sale of “glue-sniffing kits” to children could be prosecuted as the crime of “causing real injury” (almost two years before legislation was passed to criminalise

73 1998 SC (HL) 1, at 21. Le Sueur and Cornes cite *Girvan* as an example “of the Appellate Committee’s function as a manager of the legal system” (“What do the top courts do?”, 79), but that seems inappropriate given the Committee’s reluctance to engage in system management in that case.

74 See *Montgomery v HM Advocate* 2001 SC (PC) 1, per Lord Hope of Craighead at 13.

75 See District Courts (Scotland) Act 1975, s 4; Sheriff Courts (Scotland) Act 1971, s 33.

76 See Court of Session Act 1988, s 5; Criminal Procedure (Scotland) Act 1995, ss 304-305.

77 Le Sueur and Cornes, “What do the top courts do?”, 80.

78 *Khalid v HM Advocate* 1984 JC 23. See also *Ulhaq v HM Advocate* 1991 SLT 614. In England, see the Intoxicating Substances (Supply) Act 1985.



such sales in England and Wales).<sup>78</sup> In 1988, it removed the marital rape exemption (almost three years before the House of Lords did the same for English criminal law).<sup>79</sup> In 1992, it held that to “wheel-clamp” a car and demand payment for its release could be prosecuted as theft and extortion – in contrast to the rather different approach taken by the English courts.<sup>80</sup>

These examples would seem to demonstrate that a second tier of appeal is not required for “innovation” to take place, at least in a relatively small jurisdiction such as Scotland. The fact that some of these developments preceded similar change in England is an important indicator of the High Court’s ability to innovate, but it should not make a Scots lawyer feel smug – if an antidote is needed, one might refer to the recent decision in *Lord Advocate’s Reference (No 1 of 2001)*,<sup>81</sup> where the High Court “innovated” by removing force as an element of the *actus reus* of rape – a development which had taken place in English law long before.<sup>82</sup> Nevertheless, the *Reference* again provides a useful example of “innovation”, and also demonstrates how the High Court can use its power to refer questions to a larger bench of judges in order to allow previous case-law to be authoritatively reviewed in the process.

It is difficult to think of many Scottish House of Lords decisions, at least in recent years, that can properly be described as “innovations”.<sup>83</sup> That is, however, not the essential point here. More importantly, the record of the High Court illustrates that innovation can take place within the Scottish judicial system without the need for a further right of appeal, and it would be difficult, therefore, to regard innovation as justifying such a right. It might, however, be argued that a further right of appeal to a UK-wide court can provide *uniformity* in innovation, and that this is in itself valuable. This issue is discussed further below.

## (2) Some preliminary conclusions

At the start of this section, eight potentially “valuable” features of a second tier of appeal were noted. In the context of the Scottish legal system, the following tentative conclusions can be reached.

79 *S v HM Advocate* 1989 SLT 469. In England, see *R v R* [1992] 1 AC 599.

80 *Carmichael v Black; Black v Carmichael* 1992 SLT 897. In England, see *Lloyd v DPP* [1992] 1 All ER 982 (holding that a motorist who cut off a wheel clamp was guilty of criminal damage as he had no lawful excuse for his actions: if the clamping was a trespass, the motorist had consented to the risk by parking his car where he did).

81 2002 SLT 466.

82 At least since the Sexual Offences (Amendment) Act 1976, s 1 of which defined rape around the absence of consent rather than the use of force.

83 One example might be *Smith v Bank of Scotland* 1997 SC (HL) 111, which is discussed further below (section C.(1)(c)). *Sharp v Thomson* 1997 SC (HL) 66 should probably be regarded as aberration rather than innovation.



- (a) A second tier of appeal is not necessary for the purposes of error correction, managing precedent, system management, or innovation and may in fact prove counterproductive in respect of some of these functions.
- (b) A second tier of appeal can be used for the determination of important cases, although this would ideally require the introduction of a requirement for leave to appeal. There is, however, no benefit in having a second tier of appeal for the determination of such cases unless such appeals can also be justified by reference to other values.
- (c) A second tier of appeal is most likely to produce better quality adjudication in respect of UK-wide issues (principally questions of statutory interpretation, and also of liability for negligence). It is less (if at all) likely to provide better quality adjudication in respect of issues of Scottish common law.<sup>84</sup>
- (d) A second tier of appeal is unnecessary for the resolution of constitutional issues, except where these issues need to be addressed at a UK-wide level.
- (e) A second tier of appeal provides a means of having cases determined by a pan-UK court, although this in turn raises the question of whether it is actually advantageous to have issues determined at a UK-wide level.

All this suggests that many of the potentially valuable features of second appeals to a UK-wide court identified by Le Sueur and Cornes are of little relevance in the Scottish context. Instead, the principal value of such a tier of appeal is that it would allow issues to be adjudicated at a UK-wide level. This, indeed, is identified by Le Sueur and Cornes as the principal argument for a reformed Supreme Court having jurisdiction over both Scottish civil and criminal cases. Accordingly, this article now turns to an evaluation of the case which they sketch out for this position.<sup>85</sup>

### **C. REBUTTING THE CASE FOR THE MAINTENANCE AND EXTENSION OF SCOTTISH APPEALS “TO LONDON”**

Le Sueur and Cornes identify a case for the maintenance and extension of Scottish appeals “to London”, which can be divided into two parts. First, they suggest that

<sup>84</sup> A different conclusion might be reached if the second tier of appeal had a larger number of Scottish members, but this would be unlikely given the current volume of Scottish cases heard by the Committees.

<sup>85</sup> Because this analysis is restricted to the work of the Appellate Committee in hearing Scottish appeals, two incidental effects of Scottish representation on the Committee should be noted. Firstly, such representation might be thought to be detrimental to the Court of Session and High Court of Justiciary, by depriving those courts of the services of two particularly senior judges. Secondly, and conversely, it may be of benefit to the Scottish legal system in the unusual case of an English appeal with a Scottish dimension: see *R v Manchester Stipendiary Magistrate, ex p Granada Television Ltd* [2001] 1 AC 300.

a second tier of appeal has certain benefits for the Scottish legal system, while they secondly outline a rebuttal to various objections which might be raised to any proposal to extend the jurisdiction of the Appellate Committee or a reformed UK-wide supreme court to Scottish criminal cases.<sup>86</sup>

### **(1) The positive case for a UK-wide appeals court**

#### *(a) Workload*

Le Sueur and Cornes suggest that “permitting Scottish criminal appeals to a (reformed) top level court for the whole UK would assist the Scottish criminal justice system where, currently, there are enormous case load pressures on its highest courts”.<sup>87</sup> It is difficult to understand this argument. Unless some form of “leapfrog” appeal from first instance courts to a supreme court is proposed (which does not appear to be the case), introducing a second right of appeal in criminal cases would not, in itself, reduce the workload of existing courts one iota. If anything, it would marginally increase their workload, by requiring decisions on applications for leave to appeal and further procedure in any cases which are remitted back to the High Court where a second appeal is successful.

#### *(b) A larger pool of ideas*

The second argument for Scottish appeals “to London” identified by Le Sueur and Cornes is that Scots criminal law could “benefit from access to the larger pool of ideas created by the London courts”,<sup>88</sup> as they claim Scots civil law has already done.<sup>89</sup> It is difficult, however, to see why appeals to London are necessary in order to allow such “access”. English law has a sophisticated and well-established case reporting system and a vast literature, much of which is already readily accessible to the Scottish courts. References to English cases in Scottish judgments are already commonplace.<sup>90</sup>

The weakness of this line of argument is neatly demonstrated by Blom-Cooper and Drewry’s attempt to rebut Walker’s assertion that criminal appeals from Scotland to the House of Lords would be unnecessary: “...we dissent from this

<sup>86</sup> This case is presented on a hypothetical basis and should not be taken as necessarily representing the views of Le Sueur and Cornes.

<sup>87</sup> Le Sueur and Cornes, *The Future of the United Kingdom’s Highest Courts*, 69.

<sup>88</sup> Le Sueur and Cornes, *The Future of the United Kingdom’s Highest Courts*, 69.

<sup>89</sup> There are those, of course, who might dispute this assertion, which Le Sueur and Cornes do not seek to substantiate.

<sup>90</sup> Probably around one-quarter of cases cited in reported Scottish cases are decisions of the English courts. See C McDiarmid, “Scots law: the turning of the tide” 1999 JR 156, 161-162. See also D M Walker, “A note on precedent” 1949 JR 283, 288.

view. English criminal law has in recent years undergone many modifications, one at least of which, the defence of diminished responsibility was in 1957 borrowed from Scotland.”<sup>91</sup>

This “modification”, however, simply serves to illustrate neatly how one legal system can draw upon the ideas of another without sharing a common appellate court. Indeed, the High Court has since drawn on the English statutory formulation of diminished responsibility of its own accord.<sup>92</sup> Le Sueur and Cornes draw attention to the fact that judgments of the House of Lords are cited world-wide,<sup>93</sup> which again only serves to demonstrate how the Appellate Committee’s ideas may be “drawn upon” despite there being no right of appeal to that court.

*(c) UK issues should be determined by a UK-wide court*

One of the strongest arguments for allowing Scottish appeals to a Supreme Court is the need (or, at least, the perceived need) for UK-wide issues to be determined by a UK-wide court. Le Sueur and Cornes see this argument as being of particular importance in the context of UK-wide statute law, suggesting that “it is essential that, ultimately, a single court is able to interpret such legislation on appeal”.<sup>94</sup>

Such a possibility has, it must be conceded, an instinctive attractiveness. It is by no means clear, however, that it is actually “essential”. The possibility of disparate interpretation already exists in relation to UK statutes dealing with matters of criminal law, but does not appear to have proved unduly problematic. For some time, the Scottish and English courts gave a different interpretation to the meaning of “reckless” in the context of the offence of reckless driving, but it does not appear that cross-border drivers were left in a state of confusion as to how carefully they should drive away from home.<sup>95</sup> In a different context, there is no single pan-European court which is able to hear appeals from domestic courts on issues relating to the European Convention on Human Rights, yet there appears to be no suggestion that it would be desirable to create such a court for the sake of “uniformity”.<sup>96</sup> Parliament can, of course, always intervene to impose uniformity

91 L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (1972), 376, citing D. M. Walker, “Some characteristics of Scots law” (1955) 18 MLR 321, 336-337.

92 In *Galbraith v HM Advocate (No 2)* 2002 JC 1. See J. Chalmers, “Abnormality and anglicisation: first thoughts on *Galbraith v HM Advocate (No. 2)*” (2002) 6 EdinLR 108. More controversially, see *Jamieson v HM Advocate* 1994 JC 88 (adopting reasoning in *DPP v Morgan* [1976] AC 182).

93 Le Sueur and Cornes, “What do the top courts do?”, 63.

94 Le Sueur and Cornes, “What do the top courts do?”, 77.

95 In Scotland, see *Allan v Paterson* 1980 JC 57; in England, see *R v Lawrence* [1982] AC 510. The offence of reckless driving was replaced with one of dangerous driving by the Road Traffic Act 1991, s. 1.

96 The European Court of Human Rights can, of course, hear applications relating to alleged breaches of the ECHR. However, it has no appellate jurisdiction as such. Furthermore, if the case is decided *against*

by way of legislation if disparate interpretations are seen as problematic.

The fact that the lack of a “unifying” top court to deal with criminal statutes does not appear to have proved problematic does not, of course, demonstrate that such a court might not be beneficial in other areas. If there is one area where such a court is necessary, the interpretation of UK-wide statutes is probably that area.<sup>97</sup> The experience in criminal matters, however, suggests that the onus should be on those who base an argument for a unifying top court on such considerations to demonstrate why uniformity of statutory interpretation is *in itself* desirable, but Le Sueur and Cornes do not do so, asserting rather than arguing the point.<sup>98</sup>

A similar question arises in respect of human rights issues, where it might be felt that a UK-wide court should have jurisdiction over all such issues in order to ensure a uniform interpretation and application of the European Convention. This is, however, not something which the current structure of the Human Rights Act and the Scotland Act seeks to achieve.

Although human rights issues which arise in criminal cases may come before the Judicial Committee from the High Court of Justiciary in the form of devolution issues, such matters might in some cases be raised under the Human Rights Act, in which case there is no right of appeal to a UK-wide court. Le Sueur and Cornes refer to the “odd and unsatisfactory bifurcation” of the Appellate Committee being unable to hear Scottish criminal appeals, but the Judicial Committee having jurisdiction over such appeals where devolution issues are raised.<sup>99</sup> The remedy, however, is not necessarily to extend the scope of Scottish appeals “to London” to cover all criminal matters. As Lord Bonomy concluded in his recent review of High Court procedure:

In the absence of compelling reasons for treating [human rights] issues as devolution issues, there can be no justification for the delay and disruption that is caused to certain cases. I am unable to identify any justification for treating these cases exceptionally, given that these issues can be dealt with under the Human Rights Act without any

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the interests of the state in the domestic courts, there is no means by which the state can bring the matter under review before the European Court. Domestic courts should, of course, take account of decisions of the European Court, but they are not, in the UK at least, bound by such decisions (see the Human Rights Act 1998, s 2) – and this is no different in principle from the High Court taking account of decisions of the Appellate Committee on questions of interpretation of a UK-wide criminal statute despite the absence of any right of appeal to the House of Lords on the issue.

97 See further section D. below. See also D W McKenzie Skene and Y Enoch, “Petitions for administration orders where there is a need for interim measures: a comparative study of the approach of the courts in Scotland and in England and Wales” [2000] JBL 103 (empirical research on the differing practices of the courts in both jurisdictions regarding administration orders which seems to indicate that, while practitioners might prefer one interpretation of the relevant legislation over another, lack of uniformity was not *in itself* seen as a significant concern).

98 In a similar vein, see Blom-Cooper and Drewry, note 91 above, at 376-377.

99 Le Sueur and Cornes, *The Future of the United Kingdom’s Highest Courts*, 69.

special procedure and without a further appeal to the Judicial Committee of the Privy Council. The only practical reason for ever categorising such issues as devolution issues was to ensure that recognition was given to the Convention rights during the period between the implementation of the Scotland Act and the implementation of the Human Rights Act, but even there it was a rather artificial way of introducing Convention rights to Scottish criminal procedure. That interim period is now over. Schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord Advocate as prosecutor, and anyone acting on his authority or behalf as prosecutor, are excluded from the definition of a devolution issue. The Scottish Executive should urge the United Kingdom Parliament to make that amendment.<sup>100</sup>

Although the current legislative structure does not seek to provide a mechanism to ensure uniformity in the interpretation of Convention rights, it might nevertheless be argued that such a mechanism would be desirable. It is submitted that no such mechanism is necessary. The argument in support of this position has been put most clearly by Himsworth, who observes that mechanisms to ensure uniformity are not required by the terms of the Convention itself: the ECHR “does not itself require incorporation of either its substantive rights or the means of their enforcement”.<sup>101</sup> The ECHR system itself involves a great deal of diversity across the various signatories to the Convention. Given that the Scottish legal system is highly distinct from the remainder of the United Kingdom (at least in certain respects), complete uniformity in interpretation is probably unattainable in any case. Scottish courts will doubtless take account of the decisions of English courts on issues arising under the Human Rights Act, whether or not they are formally required to do so. The creation of a supreme court with the power to impose uniformity in interpretation is unnecessary.<sup>102</sup>

More generally, Le Sueur and Cornes suggest that “the social and economic conditions and attitudes to life are so similar in all parts of the United Kingdom that, unless there is clear reason to the contrary in particular cases, a common approach to legal questions should apply.”<sup>103</sup> Such a claim might seem odd when one considers that the devolution settlement – in the form of the Scotland Act

100 Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary (2002), para 17.14.

101 C Himsworth, “The hamebringing: devolving rights seriously”, in A Boyle *et al* (eds), *Human Rights and Scots Law* (2002), 19, at 31. Although framed in terms of legislative rather than judicial arrangements, the argument applies equally to this context.

102 It might be argued that, because the UK government is the relevant state party to the Convention and obliged to represent the government’s position in any cases taken to Strasbourg arising out of Scottish proceedings, this in itself justifies a uniformity of approach. In this context, however, it should be noted that the UK government did not seek to extend the Human Rights Act to the Channel Islands and the Isle of Man despite having responsibility for representing those jurisdictions before the European Court of Human Rights. See further Himsworth, note 101 above, at 31-32.

103 Le Sueur and Cornes, “What do the top courts do?”, 77.

1998 – specifically permits the Scottish Parliament to legislate differently from the remainder of the United Kingdom in all but a relatively small number of “reserved matters”, without any need to show “clear reason to the contrary”.

It is nevertheless uncontroversial that Scottish courts (and legislators) should properly take account of approaches adopted elsewhere in the United Kingdom. Such an approach is, of course, already adopted in practice. For example, in *Wallace v Paterson*,<sup>104</sup> Lady Paton adopted a very similar argument to that put forward by Le Sueur and Cornes in order to justify following the decision of the Court of Appeal in *Heil v Rankin*,<sup>105</sup> which had held that awards of solatium (in English law, damages for pain, suffering and loss of society) in cases of severe injury should be increased substantially.<sup>106</sup>

It is open to the courts, therefore, to adopt a common approach (where possible within the context of existing law) without having resort to a UK-wide court. The nub of this argument, therefore, is that it holds that it is appropriate to have a UK-wide court with the power to *impose* uniformity where lower courts are unwilling to adopt such an approach of their own accord. It should be self-evident that such an approach is wholly inconsistent with the devolution settlement.

In any case, it is far from clear that such attempts to produce “uniformity” are likely to be successful. As an example of such action being taken by the House of Lords, Le Sueur and Cornes refer to *Smith v Bank of Scotland*,<sup>107</sup> where it was held that a wife who had been induced to act as a cautioner for her husband’s business debts by misrepresentation on the part of her husband might be entitled to seek reduction of the security where the lender had not taken steps to warn her of the potential consequences of the transaction and to advise her to take independent advice.

*Smith* involved very similar facts to the earlier (English) House of Lords decision in *Barclays Bank plc v O’Brien*,<sup>108</sup> and the decision can therefore be seen as a “unifying” one, in that the same result was reached in both cases. However, such a view should only be reached with caution. First, because the decisions in both cases were based on different principles of law (in England, on the principle of constructive notice; in Scotland, on the principle of good faith), they cannot be regarded as truly “unifying”. Secondly, the decision in *Smith* was not required in

104 2002 SLT 563.

105 [2001] QB 272.

106 See 2002 SLT 563, at 569: “Damages to compensate a victim for pain and suffering are measured by reference to the injuries suffered, not by reference to the area in which the victim lives. It would be unfortunate if levels of awards for personal injuries in Scotland were to be significantly different from levels for such awards in England.” See also *Duthie v MacFish Ltd* 2001 SLT 833.

107 1997 SC (HL) 111.

108 [1994] 1 AC 180.

order to produce common commercial practice on both sides of the border, as the issue had already been addressed in the voluntary banking code.<sup>109</sup> Thirdly, because the decisions were not based on identical principles, they have not, in the longer-term, produced an entirely common result, as subsequent Scottish and English decisions have diverged on certain aspects.<sup>110</sup>

*Smith*, therefore, rather than supporting Le Sueur and Cornes' thesis, actually provides reason for doubting whether the "unifying" function of a UK-wide court which they contend for is either realistic or useful.

*(d) Providing judges to hear devolution issues*

Finally, Le Sueur and Cornes suggest that "it is important to have the conventional two Scottish Lords of Appeal in Ordinary so that adequate Scottish judges are available to sit on the Judicial Committee of the Privy Council to hear devolution issues under the Scotland Act 1998."<sup>111</sup> The same argument would apply to a reformed Supreme Court with jurisdiction over devolution issues.

While it is undoubtedly important to have Scottish judges sitting to hear such cases, this can hardly be regarded as in itself a strong justification for a general right of appeal to the Supreme Court in Scottish cases. If no such right existed, it would be possible to find from elsewhere Scottish judges to sit on appeals involving devolution issues – either from the existing Senators of the College of Justice or from the ranks of retired judges.<sup>112</sup> Indeed, not all of the Scottish judges who have sat on the Judicial Committee in devolution issues thus far have been serving Lords of Appeal in Ordinary.<sup>113</sup> Both solutions have their own problems, but to maintain a general right of appeal to the Supreme Court in Scottish cases purely for the purpose of providing manpower for devolution cases would be letting the tail wag the dog.<sup>114</sup>

109 See L Macgregor, "The House of Lords 'applies' *O'Brien* north of the border" (1998) 2 EdinLR 90, at 92-93.

110 See generally S Eden, "Cautionary tales – the continued development of *Smith v Bank of Scotland*" (2003) 7 EdinLR 107.

111 Le Sueur and Cornes, "What do the top courts do?", 77.

112 The consultation paper suggests that the Supreme Court should "be able to supplement its full-time membership". See *A Supreme Court for the United Kingdom*, para 31.

113 See *Brown v Stott* 2001 SC (PC) 43 (Lord Kirkwood); *Mills v HMA (No 2)* 2002 SLT 939 (Lord Mackay of Clashfern).

114 See, however, Lord Hope of Craighead, "Taking the case to London – is it all over?" 1998 JR 135, at 149 ("the only safe way to ensure a strong Scottish presence on the Judicial Committee is to maintain the present system by which there are two Scottish judges among the Lords of Appeal in Ordinary").



## (2) The likely objections to any proposal to extend Scottish criminal appeals “to London”

### (a) *Judicial expertise*

One obvious objection to allowing Scottish criminal appeals to the Supreme Court is that the members of that court could not be expected to have any expertise or experience in Scots criminal law. Le Sueur and Cornes observe that a small final court of appeal will invariably lack prior expertise in a variety of fields of law, and suggest that this objection might be rebutted as follows:

It is an exaggeration simply to assume, without argument, that the Scots criminal law falls into a class of its own. As with other important fields of law, judges appointed to the UK's highest court could be expected to acquire a deep understanding of this area of law. (Though of little comfort north of the border, it might also be pointed out that the Law Lords have at times in the past lacked any effective grasp of *English* criminal law!) It is also noteworthy that the Scottish Law Lords sit on English criminal appeals, having mastered the principles of that branch of law without having prior professional experience of it.<sup>115</sup>

The observation about English criminal law is indeed of little comfort, and is probably best disregarded. The most interesting thing about this line of argument is that it is flatly contradicted by the current practice of the House of Lords. If Scots law is just another branch of law, equally accessible to English lawyers, why do the English members of the Appellate Committee almost never deliver speeches on issues of Scots common law? It seems clear from the earlier breakdown of speeches delivered in Scottish appeals in civil matters to the House of Lords<sup>116</sup> that the members of the Appellate Committee do not themselves consider that they approach distinctively Scottish issues on equal terms.

It is true, of course, that appellate judges are rarely appointed with prior professional experience of all the areas of law which they may be expected to consider judicially. There is, however, something clearly distinct about the law of another jurisdiction. If Le Sueur and Cornes are correct in their suggestion that a lawyer trained in one jurisdiction can “acquire a deep understanding” of the law of another jurisdiction in their judicial capacity, then it is difficult to understand why they do not discuss the possibility of a lawyer from outwith the UK being appointed to the “top courts”, but instead appear to assume without discussion that all members of such court(s) should be drawn from the UK legal systems.<sup>117</sup>

115 Le Sueur and Cornes, *The Future of the United Kingdom's Highest Courts*, 69. The statement about English criminal law is made under reference to A T H Smith, “Criminal appeals in the House of Lords” (1984) 47 MLR 133.

116 See section B.(1)(a) above.

117 Le Sueur and Cornes, *The Future of the United Kingdom's Highest Courts*, 112-113. My purpose here is not to question the merits of this latter position, but merely to highlight the tension between these two aspects of Le Sueur and Cornes' analysis.



Although it is true that Scottish members of the Appellate Committee sit on English appeals despite not normally being qualified to practise English law, this is not in itself a convincing rebuttal to the “lack of expertise” objection. Firstly, the practice of Scottish judges deciding points of English law may be just as objectionable as the converse. However, as noted earlier, the citation of English authorities before the Scottish courts is commonplace,<sup>118</sup> and the fact that the secondary literature on English law is far more extensive than its Scottish equivalent may make it easier for a foreign lawyer to deal with English law than with Scots law.<sup>119</sup>

Le Sueur and Cornes suggest that any problem of lack of expertise might be solved by “permitting the top court to call upon additional members, drawn from the senior Scottish judiciary, to sit in Scottish criminal appeals.”<sup>120</sup> While this might seem an attractive solution in some ways, the problem of deference noted earlier would be worsened in such a case. If it were decided that a case was so distinctively Scottish that it required additional members of the Scottish judiciary to be called in to hear it, it would be near impossible for the English members of the court to do anything other than concur with their Scottish colleagues – and the idea that a small sub-group of the judges sitting to hear a case should have the effective power of decision seems inappropriate. Apart from anything else, it would seem to render the participation of the non-Scottish judges a purely symbolic exercise. All this, of course, would simply add to the workload of the Scottish judiciary, something which Le Sueur and Cornes suggest would be lessened by allowing a second right of appeal from decisions of the High Court of Justiciary.<sup>121</sup>

*(b) Elitist objections?*

Le Sueur and Cornes suggest that:

The objections to Scottish criminal appeals “to London” are curiously elitist ones, put forward only by Scottish lawyers and politicians. Viewed from the perspective of the ordinary citizen, people in Scotland are denied an opportunity which criminal defendants in other parts of the UK enjoy – the ability to take a case to the UK’s highest court.<sup>122</sup>

This line of argument needs unpacking in order to demonstrate a series of fallacies. First, there is nothing “elitist” about the fact that these objections come from

118 See section C.(1)(b) and note 90 above.

119 This remains the case despite the growth of Scottish legal literature in recent decades. See further K G C Reid, “The third branch of the profession: the rise of the academic lawyer in Scotland”, in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (1996) 39, at 43-46.

120 Le Sueur and Cornes, *The Future of the United Kingdom’s Highest Courts*, 69.

121 See section C.(1)(a) above.

122 Le Sueur and Cornes, *The Future of the United Kingdom’s Highest Courts*, 69.

Scottish lawyers and politicians. That is simply a reflection of the fact that these are the groups which are likely to take the greatest interest in the subject. If such a line of argument is acceptable, one might fairly respond by saying that “the arguments for Scottish criminal appeals ‘to London’ are curiously elitist ones, put forward only by English lawyers and academics”. This is hardly helpful to the debate. If Le Sueur and Cornes were able to demonstrate that the views of “Scottish lawyers and politicians” were in some way being given undue weight, or drowning out other views being expressed from Scotland, then this criticism might carry some weight – but they have not done so, and it does not do so.

Secondly, the “denial of a right enjoyed to others” line of argument is flawed in two ways. First, there are hundreds of courts worldwide to which Scottish appellants may not take their case, for the obvious reason that these are not courts which deal with appeals from Scotland. In these contexts, an argument that Scottish appellants are being denied a right enjoyed to others would receive short shrift. In other words, the point made by Le Sueur and Cornes is purely definitional and circular. Appellants have the right to appeal to courts which have jurisdiction to take their case, and are not denied any “right” solely because they cannot appeal to a court which lacks such jurisdiction. Secondly, a second right of appeal cuts both ways. At present, an appellant whose conviction is quashed by the High Court is entitled to treat that decision as final, as the prosecutor has no further right of appeal.<sup>123</sup> If a second appeal “to London” were permissible, such finality would be lost and the proceedings potentially drawn out for some time.

#### **D. WHERE DO WE GO FROM HERE?**

In summary, the case for a general right of appeal “to London” in Scottish cases is a weak one. This article has sought to demonstrate that most of the arguments for such a right simply do not stand up to scrutiny. In this respect, there is no readily apparent rationale for drawing a distinction between civil and criminal cases. The principal value of such a right of appeal lies in the fact that it allows the issues raised in the case to be considered by a UK-wide court, and any other benefits inherent in such a system are largely contingent upon this point.

Given the terms of the devolution settlement, however, it must be recognised that there is little need for most issues raised in the Scottish courts to be potentially subject to review by a UK-wide court. It may be, however, that certain issues – principally those concerned with questions of statutory interpretation – could

<sup>123</sup> Where a conviction is upheld, the appellant retains the option of a subsequent application to the Scottish Criminal Cases Review Commission: Criminal Procedure (Scotland) Act 1995, ss 194A-194L.

properly be regarded as reviewable at a UK-wide level.<sup>124</sup> This argument, however, depends upon various assumptions as to the desirability of ensuring uniformity in UK-wide statutory interpretation – assumptions which have yet to be properly articulated or defended.<sup>125</sup>

All this, I would argue, suggests that there should be no question of creating a general right of appeal to the new Supreme Court in Scottish criminal matters – and, indeed, that the present general right of appeal in civil cases is also undesirable.

The ideal way forward lies between a choice of two relatively similar positions. One option would be for the new Supreme Court to have no jurisdiction in Scottish cases whatsoever, with the exception of devolution issues (subject to the reform proposed in Lord Bonyon's report).<sup>126</sup> This option, however, seems unlikely given the terms of the consultation paper.

Here, it is suggested, is where the issue of leave to appeal becomes important. If there is to be a general right of appeal to the Supreme Court in Scottish civil cases, it would be appropriate to use the mechanism of leave to appeal in order to ensure that the Supreme Court hears only those Scottish cases where a "UK-wide" issue is raised.<sup>127</sup>

If such a system were adopted, a possible formulation might be that leave to appeal to the Supreme Court should be limited to cases where (a) the case raises a point of law of general public importance *and* (b) the point which is to be determined on appeal is common to both Scotland and another of the jurisdictions which make up the United Kingdom.<sup>128</sup> There would, however, be other possible ways of framing the criteria for leave to appeal, and this represents only a tentative proposal.<sup>129</sup> It would probably be desirable to frame the criteria for leave to appeal

124 It may be noted that the Appellate Committee has occasionally dealt with such issues by hearing appeals from both the English and Scottish courts together. See, e.g., *King v Bristow Helicopters Ltd* 2002 SC (HL) 59; *Wisely v John Fulton (Plumbers) Ltd* 2000 SC (HL) 95.

125 Space precludes a fuller examination of this issue here, but it is clear that the area could benefit from further study. The resolution of this issue would provide a basis for selecting between the two alternative options for reform suggested here.

126 See section C.(1)(c) above.

127 If this approach were taken, it is arguable that the Supreme Court should also have jurisdiction to hear appeals in Scottish criminal cases where this condition was satisfied. Such a possibility (devolution issues aside) appears to be excluded by the terms of the consultation paper, however.

128 It is not, of course, suggested that such a requirement should apply to appeals from other parts of the United Kingdom. Different considerations apply in such cases, particularly given the inevitable predominance of English-qualified judges on the new court.

129 Condition 3(b) could be replaced with a requirement that the matter (a) involves the interpretation of UK-wide statutory provisions, or (b) is one outwith the legislative competence of the Scottish parliament. Such tests have their own difficulties, however – *Sharp v Thomson* 1997 SC (HL) 66 might be viewed as raising an issue falling within both (a) and (b) (the correct interpretation of s 462(1) of the

relatively loosely, in order to allow whichever court is responsible on decisions for leave to appeal to fashion its own practice more specifically in response to the actual cases which arise.

Most importantly, this approach recognises Scots law's curious status as a distinctive legal system within a larger domestic legal order – something which any proposal giving unqualified jurisdiction over Scottish questions (civil or criminal) to a UK-wide appellate court would not. Therein, it is suggested, lies its strength.

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Companies Act 1985), while *McFarlane v Tayside Health Board* 2000 SC (HL) 13 would not fall within either (a) or (b). The test formulated in the text, properly applied, would include *McFarlane* but exclude *Sharp* from the jurisdiction of the UK-wide court. This assumes, however, that the Supreme Court *should* have jurisdiction over the type of issue raised in *McFarlane*, which is by no means obvious – it does not necessarily follow from the convergence of the Scots and English laws of negligence in *Donoghue v Stevenson* that future divergence should be impossible.