A Critical Analysis of the Admission of Sexual History and Bad Character Evidence of Complainers in Scots Law

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I. Introduction

This paper explores the admission of character evidence in Scotland in the context of complainers in sexual offence cases. It traces how the application of 'rape shield'[1] legislation in The Criminal Procedure (Scotland) Act 1995[2] combats complainer's 'Kafkaesque' experiences of fear, re-traumatisation and secondary victimisation in sexual offence and rape trials.[3] My intent here is to uncover the rationale for the legislation, the historical 'rape myths' it seeks to combat, and whether it achieves this in practice. I focus primarily on the use of evidence of prior sexual relations between the complainer and the accused, as well as indirect character attacks. I conclude by suggesting that independent legal representation (ILR) for complainers could help prevent tenacious stereotypes from entering the courtroom and properly protect complainer's dignity and privacy.

II. Complainers in Sexual Offence Trials: Rationalism and Myth

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[1] J Temkin, 'Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives' (1984) Modern Law Review 625, 637.
[2] Henceforth 'the 1995 Act'.
[3] C Smart, *Feminism and the Power of Law* (Routledge 1989) 34; Scottish Executive, *Redressing the Balance: Cross Examination in Rape and Sexual Offences Trials* (Scottish Executive 2000); L Campbell and S Cowan, 'The Relevance of Sexual History and Vulnerability in the Prosecution of Sexual Offences' in P Duff and P Ferguson, *Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh University Press 2018) 67; see also *Y v Slovenia* (2016) 62 EHRR 3; *Mraović v Croatia* (30373/13) 14 May 2020 (unreported) at [49].

Historically, evidence of a complainer's character in rape cases was the exception to the general inadmissibility of character evidence in criminal trials.[4] This was 'justified' by the risk of false allegations, 'concocted in a fit of jealousy, or with the view of extorting money, or covering her shame when discovered in a voluntary connection'.[5] The test of relevancy for the admission of evidence in court was thus premised on sexist tropes, allowing evidence of complainers' general reputation for chastity or immorality to undermine their credibility and suggest that they were someone likely to consent to sexual intercourse, and therefore less meriting of belief (the 'twin myths' of rape complainers).[6]

The law erected corroboration safeguards influenced by assumptions about rape complainers, typified in the well-known remarks of Sir Matthew Hale, that 'rape is an accusation easy to be made and hard to be proved, and harder still to be defended by the party accused, tho' never so innocent'.[7] This reflects the common law's sexist foundations, subsequently self-reinforced through authoritative judgements lending legitimacy to judges' apparently 'neutral' formal logic.[8] It obscures the reality that 'facts' about how a 'genuine' complainer acts are constructed through gendered assumptions of women and men's roles in society, prioritising the 'rational' perspective held by the main protagonists in the legal system: men.[9]

The corroboration requirement allays concerns of wrongful convictions by preventing convictions based on a single testimony, recognising that a witness may be

[4] *Dickie v HMA* (1897) 5 SLT 120; C McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) The Journal of Criminal Law 367, 368.

[5] W Dickson, *A Treatise on the Law of Evidence in Scotland* (3rd Ed 1887) Vol 1, 1622.

[6] *Webster* (1847) Ark 269; *Dickie v HMA* (1897) 5 SLT 120; D Nicholson, 'Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory' in M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (Cavendish 2000) 13.

[7] M Hale, *History of the Pleas of the Crown* (1st ed 1736, Professional 1971) 634.

[8] D Nicholson, 'Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory' (n 6) 18; C Smart, *Feminism and the Power of Law* (n 3) 4-25.

[9] Ibid, Nicholson, 21.

mistaken or lying about their observations.[10] However, as sexual assault and rape are offences that often occur in private, the complainer's testimony is often a crucial piece of evidence and is pitted against that of the accused.[11] Difficulties of securing corroborative evidence may contribute to the low conviction rate for rape and attempted rape (47%) and sexual assault (56%), compared with all crime types (87%),[12] and set against an inclining rate of offending.[13] In the majority of rape cases, the accused relies on the defence of consent, or reasonable belief of consent.[14] However, as it is rare for rape complainers to be mistaken about their consenting to sexual intercourse, the rationale for corroboration must be to protect the accused from false allegations.[15] Indeed, throughout history complainers' allegations have been doubted.[16] This historically constructed doubt of women's accounts leads to suggestions that women make allegations of rape in retaliation against a former partner or to cover up sexual promiscuity.[17] Kelly's work suggests that this historical view of women's credibility persists in criminal justice systems in the face of contrary evidence on the rarity of false allegations.[18]

1. Scotland's Rape Shield

[10] *Morton v HMA* 1938 JC 50.
[11] R Hunter, 'Gender in Evidence: Masculine Norms vs Feminist Reforms' (1996) 19 Harvard Women's Law Journal 127, 129.
[12] Scottish Government, *Criminal Proceedings in Scotland: 2018-2019* (Scottish Government 2020) accessed < https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/1/> 12/12/2020; S Easton, 'The Use of Sexual History Evidence in Rape Trials' in M Childs and L Ellison, *Feminist Perspective on Evidence* (Cavendish 2000) 167.
[13] Scottish Government, *Recorded Crime in Scotland: 2018-19* (Scottish Government 2019) accessed < https://www.gov.scot/publications/recorded-crime-scotland-2018-19/pages/8/> 15/12/2020.
[14] To prove the crime of rape, the Crown must prove that the complainer did not consent to sexual penetration (actus reus) and that the defendant knew or did not care that she was not consenting (mens rea). On this see Sexual Offences (S) Act 2009 section (1); M Burman, L Jamieson, J Nicholson and O Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluative Study* (Scottish Executive 2007) 2.
[15] P Ferguson, 'Corroboration and Sexual Assaults in Scotland' n M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (Cavendish 2000) 155.
[16] For an early example of this see M Hale, *The History of the Pleas of the Crown* (n 7) 634; O Smith, *Rape Trials in England and Wales* (Springer International Publishing 2018) 53; K Mack, 'Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process' (1993) 4 Criminal Law Forum 327.
[17] L Kelly, 'The (In)credible Words of Women: False Allegations in European Rape Research' (2010) 16 Violence Against Women 1345.
[18] Ibid.

The implicit assumptions about complainers' (in)credibility underlying the common law did not reflect empirical reality: rape allegations are extremely difficult to make, but are harder still to prove than other crimes.[19] In fact, according to the Scottish Crime and Justice Survey statistics from 2019-20, only 22% of respondents who had experienced forced sexual intercourse reported it to the police, and this is likely to be a higher percentage than the actual figure taking into account those survivors who may not have felt comfortable recounting it to the Survey.[20] Although Scottish complainers are reporting rapes at ever increasing levels,[21] research suggests that there is a high 're-victimisation' risk and emotional toll on complainers who run the gamut of trial and giving evidence in sexual offence cases, and that complainers are particularly concerned with the manners in which their sexual history may be raised in court.[22]

Reflecting this, the provisions under sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') are designed to tackle the 'twin myths' surrounding complainers in sexual crimes.[23] The 1995 Act sought to strengthen the previous 1985 'rape shield' legislation after it was found that 24% of sexual offence trials involved the introduction of prejudicial character evidence in breach of the provisions.[24] Subsequent

[19] K Mack (n 16) 336; P Ferguson, 'Corroboration and Sexual Assaults in Scots Law' (n 15) 156.
[20] Scottish Government, *Scottish Crime and Justice Survey 2019/20: Main Findings* (Scottish Government 2021) accessed Scottish Crime and Justice Survey 2019/20: main findings - gov.scot (www.gov.scot)> 07/072021.
[21] Scottish Government, *Investigation and Prosecution of Sexual Crimes: Review* (2017) accessed <Investigation and prosecution of sexual crimes: review - gov.scot (www.gov.scot)> 05/07/2021; on this, see M Burman and O Brooks-Hay, 'Victims are more willing to report rape, so why are conviction rates still so woeful?' (2018, The Conversation) accessed < Victims are more willing to report rape, so why are conviction rates still woeful? (theconversation.com)> 05/07/2021.
[22] O Brookes-Hayes, M Burman and L Bradley, *Justice Journeys Informing Policy and Practice through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault* (The Scottish Centre for Crime and Justice Research August 2019) 22; see also O Brooks-Hay, 'Doing the ''Right Thing''? Understanding Why Rape Victim-Survivors Report to the Police' (2020) 15(2) Feminist Criminology 174.
[23] *R v Seaboyer* [1991] 2 SCR 577 per McLachin J at 634; Scottish Executive, *Redressing the Balance* (n 3).
[24] The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 36, amending s 141 of the Criminal Procedure (Scotland) Act 1975; E Keane and F Davidson, *Raitt on Evidence: Policy, Principles and Practice* (W Green, 3rd Ed, 2018) 247; M., Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (2009) 56 Probation Journal 379, 386; B Brown, M Burman and L Jamieson, *Sexual History and Sexual Character*

reform in 2002 again sought to strengthen protections, requiring detailed reasons to be given as to why evidence should be admitted, and requiring advance notice where the defence of consent is to be relied on.[25] Although the 1995 Act is gender-neutral, the majority of complainers are women.[26] Disrupting and correcting law's gendered slant is crucial to securing justice for victims of crime, but also to displacing law's concomitant legitimising effect on societal views.[27]

Section 274 of the 1995 Act sends a clear message that sexual history and bad character evidence of complainers is irrelevant. However, as with most legal rules, exceptions are provided under section 275, offsetting any encroachment on the accused's Article 6 right to fair trial under the European Convention of Human Rights.[28] These may be granted on application by the

accused or the Crown at a preliminary hearing.[29]

Exceptions will only be granted where the application satisfies a cumulative test: the evidence sought to be led relates to a 'specific occurrence or occurrences'; is relevant to establishing guilt;[30] and that its probative value outweighs any prejudicial effect to the proper administration of justice,[31] having regard to the protection of the complainer's dignity

Evidence in Scottish Sexual Offence Trials (Scottish Office 1992).

[25] Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 amending ss274 and 275 of the 1995 Act; see *CH v HMA* [2020] HCJAC 43 at [42]; *HMA v JG* [2019] HCJ 71; *RN v HMA* [2020] HCJAC 3 at [26].

[26] Alongside Scotland's reformed substantive law on sexual offences and rape see *Lord Advocate's Reference No 1 of 2001* 2002 SLT 466; Sexual Offences (Scotland) Act 2009.

[27] M Burman, 'Evidencing sexual assault: women in the witness box' (n 24) 380; although note the importance of avoiding essentializing women's experiences: D Nicholson, 'Gender, Epistemology and Ethics' (n 61) 28; R Hunter, 'Gender in Evidence: Masculine Norms vs Feminist Reforms' (n 8) 128.

[28] Council of Europe, *European Convention on the Protection of Human Rights and Fundamental Freedoms* (Council of Europe, 1950) accessed https://www.echr.coe.int/Documents/Convention_ENG.pdf 14/12/2020, (the 'ECHR'), Article 6; see *Moir v HM Advocate* 2005 1 JC 102; L Campbell and S Cowan, 'The Relevance of Sexual History and Vulnerability in the Prosecution of Sexual Offences' (n 3) 74.

[29] See S 275 (1) - (9) of the 1995 Act for an elaboration of the requirements.

[30] S 275 (1) (b) of the 1995 Act.

[31] S 275 (1) (c) of the 1995 Act; *CH* (n 25) per Lady Dorrian.

and privacy.[32] If an application is granted, complainers must respond to allegations of their bad character or sexual history under examination-in-chief, cross-examination and re-examination.[33] Importantly, an additional layer of protection is afforded through the requirement that evidence must first pass the common law test of relevancy; evidence cannot be admissible under the 1995 Act if it would not be admissible under the common law.[34]

2. Does the Shield Work?

Despite strengthened provisions in the 1995 Act, more sexual history and bad character evidence is now being admitted than ever before,[35] and there is scant improvement in attrition levels.[36] Attacks on a complainer's credibility are common, and the Crown does not always oppose s.275 applications, even where their content is of doubtful relevance.[37] This suggests there is still a problematic connection made between the probative force of such evidence and its prejudicial impact. In this section, I explore the application of the 'rape shield' provisions in relation to sexual behaviour not forming the basis of the charge, and general bad character evidence or evidence of behaviour (not necessarily sexual behaviour) to reveal the assumptions still being made in the courts despite the shield legislation.

A. Sexual Behaviour Not Forming the Basis of the Charge

Section 274 prohibits the leading of evidence of sexual behaviour which does not form the basis of the charge libelled.[38] The rationale for this is that consent to sexual

[32] S 275 (2)(b)(i) of the 1995 Act.
[33] S 275 of the 1995 Act.
[34] *CJM v HM Advocate* 2013 SLT 380 at [10]; *Moir* (n 109); see also *CH* (n 25) at [34].
[35] S Cowan, *Research Report Summary: The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials* (Equality and Human Rights Commission Scotland 2020).
[36] See also L Campbell and S Cowan, 'The Relevance of Sexual History and Vulnerability in the Prosecution of Sexual Offences' (n 3) 67.
[37] E Keane and F Davidson (n 24) 246.
[38] S 274 (1) (b) of the 1995 Act.

intercourse on one occasion, whether with the accused or a third party, has nological bearing on consent to sexual intercourse in the incident libelled.[39] Consent is 'person and situation specific'.[40] Indeed, it was recognised as early as 1887 that a complainer's consent to sexual intercourse with a third party is not eloquent of consent to sexual intercourse with the accused.[41] Nevertheless, over a hundred years later, Lord Bingham claimed that 'no rational person would think that those questions are irrelevant…to the truth of the complaint made' and to the defence of consent.[42] *Kinnin v HMA* (2003) suggests that these views continued to hold sway in the Scottish courts.[43] Here, allegations of the complainer telling the accused's son that she wanted sexual relations with him was admissible to allow the jury to assess that she 'was a person willing to engage in adulterous liaisons' and thus 'assist' the defence of consent.[44] It is highly suspect that a suggestion of future consent to sexual intercourse with someone could signal a desire to do the same with their father.[45]

English courts have found prior consensual sexual intercourse between the accused and a complainer as relevant to showing the accused's belief in consent, according to 'common sense'.[46] This suggests 'common sense' has not developed far in England over the centuries. In Scotland, there are recent hints of the courts adopting more nuanced understandings of consent. In *LL v HMA*, prior consensual sexual intercourse with the accused several months before the incident alleged was irrelevant; no reasons were given for its

[39] *Seaboyer* (n 23).
[40] see C McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (n 4) 369.
[41] *R v Riley* (1887) 18 QBD 481 at 483-4.
[42] Hansard, 8 Feb 1999, col. 55, legislative debates for the Youth Justice and Criminal Evidence Act 1999 accessed < https://publications.parliament.uk/pa/ld199899/ldhansrd/vo990208/text/90208- 14.htm#90208-14_spnew5> 13/12/2020.
[43] *Kinnin v HMA* 2003 SCCR 294.
[44] Under s275(1)(b) of the 1995 Act; ibid at 296; P Duff, 'The Scottish ''rape shield'': as good as it gets?' (2011) 15(2) Edinburgh Law Review 218, 226.
[45] Ibid, Duff.
[46] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [31] per Lord Steyn.

bearing on consent on a later occasion, or a reasonable belief in consent.[47] For a while it was thought that evidence of consensual sexual intercourse in the 'immediate aftermath', constituting 'a period of hours, or perhaps a day or two' of the incident charged had probative value on the complainer's credibility.[48] However, Lord Turnbull clarified matters, asserting such evidence is 'an almost classic example of a collateral issue,'[49] and 'in conflict with the concept of autonomy which underpins the Sexual Offences (S) Act'.[50] In *CH v HMA,* prior and subsequent consensual sexual intercourse with a complainer while not intoxicated had no relevance upon the complainer's consent while intoxicated, with Lord Turnbull pronouncing that '"there are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth"'.[51]

The courts have held that evidence of cohabitation between the complainer and accused is not prohibited by s.274 as it does not constitute 'sexual behaviour'.[52]It is purportedly relevant to showing the context surrounding the charge, and a 'shared way of life'.[53] However, arguably it does more than show a 'shared way of life'. It suggests that the complainer has likely consented to sexual intercourse with the accused before, and that they are not strangers.[54] This feeds myths on victim precipitation, that the cohabitee encouraged the offence through miscommunication, or that it was consensual because 'real rape' happens between strangers in dark alleyways and involves physical force, not between

[47] *LL v HMA* [2018] HCJAC 35 at [13]-[21] per Lord Brodie; see also *Lee Thomson v HMA* [2019] HCJAC unreported; *HMA v JW* [2020] HCJ 11 at [19] per Lord Turnbull.
[48] *Oliver v HMA* [2019] HCJAC 98 at [7]; Note seeming doubt on the appropriate timescale in *Lee Thomson* (ibid) cited in *CH v HMA* [2020] HCJAC 43 at [57] per Lady Dorian.
[49] *SJ v HMA* 2020 SCCR 227 at [69] per Lord Turnbull.
[50] *JW* (n 47) at [26] per Lord Turnbull, citing *R v Cooper* [2009] UKHL 42 at [27] per Lady Hale that '[I]t is difficult to think of an act which is more person – and situation – specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so.'
[51] *CH* (n 25) at [112] per Lord Turnbull, citing *Seaboyer* (n 23) at 679 per Justice L'Heureux-Dube; Although note dissent of Lord Glennie in *CH* at [90], [94-98], [101-103].
[52] *Moir* (n 28) at [27] per Lord Justice Clerk Gill; *DS v HMA* [2017] HCJAC 12 at [27].
[53] Ibid, *DS* at [46], [75] per Lord Hope and Rodger; *Tant v HM Advocate* 2003 SCCR 506 at [19]; P Duff, 'The Scottish ''Rape Shield'': as Good as it Gets?' (n 44) 222.
[54] S Lees, *Carnal Knowledge: Rape on Trial* (Penguin 2002) 157.

couples in their homes.[55] The 'real rape' myth overlooks the fact that the majority of sexual crimes occur between acquaintances.[56] In mock juror research, previous relationships complicated questions of consent and guilt, and jurors placed more weight on the complainer's actions as the primary 'sexual gatekeeper'.[57] The law's reinforcement of these beliefs is a continuation of its unwillingness to regulate the private sphere, ignoring the possibility of abusive or coercive relationships, and harking back to laws permitting marital rape.[58] In excluding cohabitation from the definition of 'sexual behaviour', the courts draw boundaries around what they can legitimately consider as outside the realm of morality or politics, allowing them to maintain the guise of neutrality.

B. Bad Character Evidence

S275 prohibits introducing general bad character evidence and evidence of behaviour (sexual or not) designed to infer that a complainer consented or is not a credible witness.[59] In *Cummings v HMA,* it was held that allegations of the complainer sitting on the accused's lap years after the alleged abuse was admissible as it had significant probative value and was relevant to credibility and establishing guilt.[60] This suggests that evidence is relevant where it shows the complainer acting contrary to how 'rational' individuals would in the face of their apparent abuser. This is a common tactic used to denigrate complainer's actions as 'abnormal' and 'irrational' and thus suggest they do not deserve belief.[61]

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[55] J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008) 47- 50, 84; L Ellison and V E Munro, 'Better the Devil you Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) International Journal of Evidence and Proof 299, 301.
[56] Scottish Government, *Scottish Crime and Justice Survey 2019/20: Main Findings* (n 20).
[57] L Ellison and V E Munro, 'Better the Devil you Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (n 137) 310.
[58] C McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (n 4) 370; R Hunter, 'Gender in Evidence: Masculine Norms vs Feminist Reforms' (n 11) 129.
[59] S 274 (1) (a) and (c) of the 1995 Act.
[60] Under s 275(1) (b) and (c) of the 1995 Act; *Cumming v HM Advocate* 2003 SCCR 261 at [10].
[61] O Smith, *Rape Trials in England and Wales* (n 16) 53, 64.

This binary approach to rationality is ingrained in legal logic, as complainers' credibility is assessed by reference to a 'normal' person, building on jurors' predetermined cultural understandings.[62] Casting complainers' as not 'true' victims is therefore common and takes subtle forms, for example, focusing on whether they physically resisted their attacker; the time taken to report the incident; whether they were visibly distressed after the incident; or whether they continued to stay with the accused or remained in contact.[63] It may take very little to insert an element of doubt in the jury's mind, in order to 'put a smell on' the complainer's credibility.[64] However, dichotomising actions as 'rational' or 'irrational' obfuscates the complex reality of victims' responses to trauma. Seemingly irrational actions may be completely expected when the context of fear, coercion and cultural gender expectations is accounted for, as well as the desire for self-preservation.[65] Similarly, seeking to discredit complainers' accounts by focussing on inconsistencies ignores the role of trauma on memory recollection and decision-making.[66]

Nevertheless, the recent case of *MacDonald v HMA* (2020) illustrates the need to stay alert to tenacious stereotypes.[67] Numerous allegations were admitted, including that the complainer had 'done lines' with the accused; kissed him; had only been wearing a thong and crop top; and had fallen off a roof drunk at some unspecified date.[68] This was a 'gratuitous'

[62] Ibid 63-65; D Nicholson, 'Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory' (n 6).
[63] Ibid, Smith, 53, 64-66.
[64] As per G Jackson, at the time Dean of the Faculty of Advocates, see Rape Crisis Scotland, 'Faculty of Advocates Investigation: 'boys club' accused of closing ranks to protect their own' (Online, 4th December 2020) accessed < https://www.rapecrisisscotland.org.uk/news/> 15/12/2020; see also J Allardyce, 'Alex Salmond was a bully and a 'sex pest' his own QC says on train' (29th March 2020) The Sunday Times, accessed < https://www.thetimes.co.uk/article/alex-salmond-was-a-bully-and-a- sex-pest-his-own-qc-says-on-train-jfgbkr857> 15/12/2020.
[65] O Smith, *Rape Trials in England and Wales* (n 16) 66.
[66] Ibid, 69.
[67] *MacDonald v HMA*, [2020] HCJAC 21.
[68] Ibid.

attack on her character, with Lord Carloway stating that the trial was conducted 'in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law', which if repeated, 'the situation in sexual offence trials would be unsustainable'.[69]

III. Reform

There are clearly continued failings with the rape shield's ability to protect complainers from stereotypes. However, without more information about how the provisions are implemented in the lower courts, it is hard to evaluate the extent of malpractice.[70] With the last extensive empirical research carried out in 2007,[71] there is a need for fresh research and publicly available information on how applications are made, their success rate, and the Crown's response to applications.[72]

Features of the adversarial system may provide reasons for complainers' continued negative experiences of giving evidence. The first is that judges' traditional role during trial is to be an impartial 'referee' to the accused's guilt, with a view to upholding the accused's right to a fair trial and the presumption of innocence afforded to them. However, in rape shield cases, judges have a duty to take an 'evaluative' and interventionist role in weighing the potential impact of the introduction of evidence on complainers and the effect it might have on their privacy and dignity.[73] As Lord Hope stated in a Privy Council judgement on the compatibility of the rape shield provisions with the article 6 ECHR rights of the accused to a fair trial, the provisions 'lean towards the protection of the complainer.'[74]

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[69] Ibid at [47].
[70] S Cowan, *Research Report Summary* (n 35) 13.
[71] M Burman, L Jamieson, J Nicholson and O Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 14).
[72] S Cowan, *Research Report Summary* (n 35) 14-15.
[73] As found in *Dreghorn v HMA* 2015 SCCR 349 at [39]*;* see also *CH* (n 25) at [6] per Lord Carloway; *RN* (n 106); *Donegan v HMA* [2019] HCJAC 10; *HMA v JG* [2019] HCJ 71.
[74] *DS* (n 52).

The exercise of judicial discretion required to apply the triple test of specificity, relevance, and balancing of rights and prejudicial impact does not accord with judges usual role as solely an arbiter of relevance.[75] This balancing test may also be influenced by considerations of time, with evidence more likely to be screened out if the alleged sexual history or character evidence stems from incidents far in the past to the present offences.[76] As there is no clear Scots doctrine of similar fact evidence, judges may lack experience in weighing evidence in this manner.[77] In *Dreghorn v HMA* and *Donegan v HMA*, this lack of experience may be what led to the trial judges treatment of the evidence being likened to a cross-examination.[78]

Second, it is obvious that the Crown does not oppose s.275 applications in instances where it would be in the complainer's interests to do so.[79] This is because their interests are not always coterminous; the Crown cannot provide advice to complainers or take instructions from them as if they were their laywer, as they prosecute in the public interest, not in the complainer's particular interests.[80] Both the Crown and the justiciary may also be reticent to oppose s.275 applications due to the risk it poses of the accused pursuing an appeal. Clearly, the defence is not in a position to argue a complainer's objections to their s.275 application.[81]

Complainers' experiences of giving evidence could be ameliorated if they could

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[75] M Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (n 24) 392; G Gordon, Commentary to *MM v HM Advocate* at 2004 SCCR 695; P Duff, 'The Scottish ''Rape Shield'': as Good as it Gets?' (n 44) 224.
[76] *Stewart v HMA* 2014 SCCR 1.
[77] Ibid, Duff, 228.
[78] *Donegan* (n 73) para [54] – [55].
[79] For example, in *LL* (n 24) at [12], [22]*; MacDonald* (n 67); *RN* (n 25); *HMA v JG* (n 25); *Kinnin v HMA; Cumming v HMA;* M Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (n 24) 393;
[80] E Keane and T Convery, 'Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character' (Rape Crisis Scotland 2020) 18; F Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (Rape Crisis Scotland, 2010) 7.10-7.12.
[81] As recognised by Lord Glennie in relation to the disclose of medical records *WF v Scottish Ministers* [2016] CSOH 27 at [39].

access independent legal representation (ILR) at pre-trial hearings to oppose the content of applications, as is the case in Ireland.[82] Keane and Convery have argued that a basis for IRL in this limited circumstance exists under Article 8 of the ECHR, which enshrines the right to privacy, supported by the finding in *WF v Scottish Ministers* that complainers have a right to ILR in pre-trial hearings to disclose medical records and phone logs, and have a right to be told of such disclosure.[83] Furthermore, the European Court of Human Rights has established a positive obligation on signatory states to ensure that the use of evidence in criminal proceedings is regulated according to the protection of Article 8 rights.[84] Extending these procedures already in place for obtaining complainers' sensitive records to those concerning applications under s.275, whether through legislation or judicial ruling, is then is therefore not a radical suggestion. This suggestion does not entail a wholesale revision of the criminal justice system which would be entailed by ILR for complainers in all stages of sexual offence trials,[85] and is in this sense more amenable to swift introduction.

There is growing recognition among scholars and activists that the criminal justice system is excluding the voices of complainers and that this is detrimental to seeking the truth of a matter and successfully prosecuting crimes, as well as providing adequate redress to victims.[86] The recent *nobile officium* petition *RR v HMA* of October 2020 is instructive of how the courts are being forced to consider how the rape shield legislation functions in

[82] S 4A of the Criminal Law (Rape) Act 1981 as introduced by s 34 of the Sex Offenders Act 2001, although note this only applies to the offence of rape; see ibid, Keane and Convery (n 80) 23.
[83] *WF* (n 81); see also *JC petitioner (2018)* HCA/2018/000013/XM*; AR v HMA* [2019] HCJ 81*; X & Y v The Netherlands* 1985 EHRR 235;Ibid, Keane and Convery, 17; see the Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 (SSI 2017 No 291).
[84] *Y v Slovenia* (2016) 62 EHRR 3.
[85] For details of these proposals see for example F Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (n 80); J Chalmers, 'Independent Legal Representation for Complainers in Sexual Offence Cases' in J Chalmers, F Leverick, and A Shaw (eds) *Post-Corroboration Safeguards Review Report of the Academic Expert Group* (The Scottish Government 2014) 185.
[86] See e.g. S J Brubaker, 'Campus-based Sexual Assault Victim Advocacy and Title IX: Revisiting Tensions Between Grassroots Activism and the Criminal Justice System' (2019) 14 Feminist Criminology 307; S Walklate, 'What is to be Done About Violence Against Women? Gender, Violence, Cosmopolitanism and the Law' (2008) 48 The British Journal of Criminology 39.

principle and the impact this has on complainers.[87] The five judge bench in the appeal court considered the position of a complainer who had not been notified of a s.275 application being made until after it had been granted, and whether this was contrary to Article 8 rights and the Victims and Witnesses (Scotland) Act 2014 s1 (3)(d).[88] The petitioner averred that she had a right to participate effectively in the proceedings, be notified of the application, and be able to discuss it with the Crown and challenge the application. The court held that the petition was competent, and that although the 2014 Act did not grant a wide right to participate as a party to the proceedings, it did grant a general right to be heard and to have active information about them and effective participation as far as is appropriate.[89]

As 'intrusive or humiliating' cross-examination may breach statute,[90] the common law,[91] and infringe Art 8,[92] it seems necessary that there is a right to representation for pre-trial hearings determining the content of s.275 applications. Fundamentally, as was recognised by Lord Glennie in the *WF* case concerning sensitive records, and subsequently in *RR*, it is surely impossible for judges to weigh the effect of questioning on a complainer's dignity and privacy without hearing the complainer's view.[93]

Given the particularly distressing effect that the introduction of sexual history and character evidence can have on complainers, ILR would benefit their experiences by ensuring that they understand before trial how the rape shield provisions function according to legislation and case law.[94] Complainers would also then be made aware in advance of the

[87] *RR v HMA* [2021] HCJAC 21.
[88] ibid.
[89] ibid para [52].
[90] *MacDonald* (n 67); *Moir* (n 28); *Begg v HM Advocate* [2015] HCJAC 69; 2015 S.L.T; *DS* (n 52).
[91] *SN v Sweden* (34209/96), unreported, 2 July 2002, European Court of Human Rights.
[92] *Y v Slovenia* (2016) 62 EHRR 3.
[93] See *WF* (n 81) at [39] per Lord Glennie that 'if the complainer is not given the opportunity to be heard, how is the court to carry out the balancing exercise required of it?'; E Keane and T Convery, 'Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character' (n 80) 20.
[94] This is a benefit noted by Keane and Convery in discussion with Irish rape crisis professionals, see ibid, 24.

questioning they can expect at trial, and which pieces of information can be legitimately raised.

Cost is a hurdle which must be overcome if complainers are to benefit from free non means tested legal advice under the legal aid regulations. However, these are hurdles which must be overcome in the interests of complainer's rights and the pursuit of justice, and have been overcome with respect to the recovery of complainers' sensitive records.[95] Further, as complainers is under a duty to attend court, it would not be appropriate to rely on complainers to fund their own representation.

IV. Conclusion

This paper has highlighted how the 'rape shield' continues to fail in some instances to prevent myths from entering the courtroom and influencing fact finders' determinations, although there are positive signals of change. Whether real change occurs depends on shifting the pervasive stereotypes underlying socially constructed considerations of 'relevancy'. Introducing ILR for complainers may be a step towards eradicating the problematic beliefs held by jurors, advocates and judges in the criminal justice system, signalling a willingness to listen to the experiences of survivors.

[95] The Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017.

Human Rights Protections in the United Kingdom Post-Brexit: The Case for a Codified Constitution

Kristen Lew[*]

I. Introduction

The United Kingdom's (UK) exit from the European Union (EU), on 31 January 2020, marked the end of a series of negotiations sparked by a referendum held nearly four years prior.[1] The referendum, held on 23 June 2016, posed a deceptively simple question to Britons: 'Should the United Kingdom remain a member of the European Union or leave the European Union?'[2] The result – a vote in favour of an exit from the EU, or 'Brexit' – called into question the stability of the EU as well as the UK's role in the region and the wider world.

Membership in a greater European community has been a point of contention for some Britons since the UK enacted the European Communities Act 1972 (ECA) and subsequently acceded into the European Economic Community (EEC).[3] Some scholars suggest that the idea of 'British exceptionalism' prevented enthusiastic acceptance of European integration.[4] These biases

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[1] Benjamin Mueller, 'What is Brexit? And What Happens Next?' *The New York Times* (21 January 2020) <https://www.nytimes.com/interactive/2019/world/europe/what-is-brexit.html> accessed 13 May 2020.

[2] Roch Dunin-Wasowicz, 'The Brexit Referendum Question Was Flawed in Its Design' (London School of Economics and Political Science, 17 May 2017) <https://blogs.lse.ac.uk/brexit/2017/05/17/the-brexit-referendum-question-was-flawed-in-its-design/> accessed 13 May 2020.

[3] James Dennison and Noah Carl, 'The Ultimate Causes of Brexit: History, Culture, and Geography' (London School of Economics and Political Science, 18 July 2016) <http://eprints.lse.ac.uk/71492/1/blogs.lse.ac.uk-The%20ultimate%20causes%20of%20Brexit%20history%20culture%20and%20geography.pdf> accessed 13 May 2020.

[4] Christopher G Gifford, 'The British State and European Integration: The Politics of Modernism' (unpublished PhD thesis, London School of Economics and Political Science 2004).

were exacerbated by factors such as rapid immigration and the Eurozone debt crisis.[5] The financial crisis of 2008 devastated the British economy and weakened the UK's tenuous relationship with the EU.[6] By 2015, less than 30 percent of Britons trusted the EU and nearly two-thirds of Britons did not identify as European at all.[7]

In the lead up to Brexit, a number of Britons felt a lack of control over the UK's affairs.[8] In 2013, harnessing this discontent, the Prime Minister at the time, David Cameron, promised a referendum on an exit from the EU.[9] Under the subsequent leadership of the current Prime Minister, Boris Johnson, the United Kingdom formally left the EU on 31 January 2020, following the passage of the 2020 European Union Withdrawal Agreement.[10] The UK remained bound by EU law during the transition period, which ended on 31 December 2020.[11]

Much has been discussed regarding economic and travel uncertainty attributed to Brexit; however, the implications for human rights law deserve special attention. This is in part due to the nature of the relationship that existed between the EU and the UK as a Member State. Tömmel suggests that while it is not a traditional iteration of a federation, the EU can be conceptualised as a *sui generis* federation based on the distribution of powers on levels of national and supranational

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[5] Ibid; Paul Taggart and Aleks Szczerbiak, 'Putting Brexit into Perspective: The Effect of the Eurozone and Migration Crises and Brexit on Euroscepticism in European States' [2020] 25 Journal of European Public Policy 1194.

[6] Hussein Kassim et al., 'The UK and the Eurozone Crisis: Preferences and Preference Formation in a Euro Area Out' (2017) EMU Choices <https://emuchoices.eu/wp-content/uploads/2017/12/2017_Working-Paper-KassimScottHH.pdf> accessed 18 September 2020.

[7] Dennison and Carl (n 3).

[8] Ros Taylor, 'Leavers Have a Better Understanding of Remainers' Motivations Than Vice Versa' (London School of Economics and Political Science, 4 May 2018) <https://blogs.lse.ac.uk/brexit/2018/05/04/leavers-have-a-better-understanding-of-remainers-motivations-than-vice-versa/> accessed 13 May 2020.

[9] Kylie MacLellan, 'Ex-UK PM Cameron Thought 'No Risk' of Brexit Vote: EU's Tusk' (Reuters, 21 January 2019) <https://www.reuters.com/article/us-britain-eu-cameron/ex-uk-pm-cameron-thought-no-risk-of-brexit-vote-eus-tusk-idUSKCN1PF1PG> accessed 13 May 2020.

[10] Colinn Dwyer, 'Rain Chexit: European Union Grants Brexit Delay to U.K. – Again' (*NPR*, 28 October 2019) <https://www.npr.org/2019/10/28/774031088/rain-chexit-european-union-grants-brexit-delay-to-u-k-again> accessed 13 May 2020; European Union Withdrawal Agreement 2020 arts 126-132.

[11] European Union Withdrawal Agreement 2020.

levels.[12] This allocation of power is especially relevant for human rights protections.[13] Human rights will be defined broadly, referring to rights inherent to all individuals regardless of any definable status, such as, but not limited to, race, sex, nationality, ethnicity, or religion. These rights encompass civil and political rights, as well as economic, social, and cultural rights.

Furthermore, Brexit fundamentally reframes the issue of the UK's constitution. Of note are the unique structure and features of the United Kingdom and its uncodified constitution that could make departure from the EU detrimental to human rights law, in particular the concept of Parliamentary supremacy. Though expressed decades ago, former judge Lord Scarman's concern of the UK's lack of codified constitution remains relevant today:

> The rights of the people lack the protection of the law against oppression, tyranny and injustice if threatened by a prejudiced or frightened political party in control of the [House of] Commons. The risk is real: and our constitutional insurance is weak, limited and very fragile.[14]

To address this issue, procedural entrenchment of human rights through a codified constitution would provide a more durable instrument to protect these rights by making it more difficult for Parliament to alter this area of law. This is compatible with developments in Parliamentary supremacy resulting from the UK's former membership in the EU.

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[12] Ingeborg Tömmel, 'The European Union – A Federation Sui Generis?' in Finn Laursen (ed), *The EU and Federalism: Polities and Policies Compared* (Ashgate Publishing Limited 2011).

[13] Martijn van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017); José Luís da Cruz and Alessandra Silveira, 'The European Federalization Process and the Dynamics of Fundamental Rights' Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

[14] Lord Leslie Scarman, 'Why Britain Needs a Written Constitution' (1993) 19 Commonwealth Law Bulletin 317.

II. Constitutional Framework

Unlike most states, the United Kingdom does not have a codified constitution in a single, written document.[15] Instead, the UK's constitution consists of various statutes, conventions, judicial decisions, and treaties.[16] In *R (HS2 Action Alliance Ltd)*, the UK Supreme Court found that the United Kingdom had 'no written constitution, but . . . [instead had] a number of constitutional instruments.' The court further clarified that:

> [The constitutional instruments] include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognizes certain principles as fundamental to the rule of law.[17]

Aside from its uncodified constitution, a defining aspect of the British legal system is the concept of Parliamentary supremacy. Since the nineteenth century, there has been an understanding that Parliament enjoys absolute power to enact or abolish laws.[18] Thus, domestic statutes were deemed the highest form of law in the United Kingdom.[19] As early as 1963, the doctrine began to evolve when the European Court of Justice (ECJ) found that Member States of

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15 See Janet McLean, 'The Unwritten Political Constitutions and Its Enemies' (2016) 14 International Journal of Constitutional Law 119.

16 Mary Louise Kelly, Interview with Lord Philip Norton, Professor of Government and Director of the Centre for Legislative Studies, University of Hull (5 September 2019) <https://www.npr.org/2019/09/05/758043757/professor-explains-britains-unwritten-constitution> accessed 13 May 2020.

17 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

18 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press 1999). Compare this to other countries, such as the United States. Nat Stern, 'Separation of Powers, Executive Authority, and Suspension of Disbelief' (2016) 54 Houston Law Review 125.

19 John McGarry, 'The Principle of Parliamentary Sovereignty' (2012) 32 Legal Studies 577.

the EEC limited their sovereign rights to gain the benefit of membership in a greater European community.[20]

The shifting conception of Parliamentary supremacy was demonstrated by the ECJ's binding decision in *Costa v ENEL*, finding that European law can override the laws of any Member States where there is a conflict.[21] Later, in *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, the ECJ held that EU law supersedes conflicting national law.[22] It additionally required any new legislation implemented by Member States to comply with EU law and directives.[23] While it may be posited that the traditional theory of omnipotent Parliamentary supremacy has been reinstituted in the wake of Brexit, the 'political reality' of this concept within the UK does not lend itself to this argument.[24]

III. Human Rights Protections in the UK

Human rights law derives from an array of international, regional, and domestic obligations in the United Kingdom.[25] Brexit will have the greatest impact on regional instruments. Unlike international obligations which suffer from a lack of enforcement capability,[26] regional instruments often prioritize human rights and have proved successful in expanding and enforcing

[20] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1 1, 12.

[21] *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66 587; see Jan Herman Reestman, 'Primacy of Union Law' (2005) 1 European Constitutional Law Review 104.

[22] *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49 630.

[23] Ibid.

[24] Mark Elliott, 'United Kingdom: Parliamentary Under Pressure' (2004) 2 (3) International Journal of Constitutional Law 545. According to Elliott, 'the doctrine of parliamentary sovereignty, in its traditional form, is increasingly under pressure.' Aside from membership in the EU, Elliott points to devolution as an example of a matter in which the traditional theory of Parliamentary supremacy diverges from the 'political reality.'

[25] 'Regional' shall refer to European entities, laws, and other bodies.

[26] Carmen E Pavel and David Lefkowitz, 'Sceptical Challenges to International Law' (2018) 13 Philosophy Compass 1. Pavel and Lefkowitz note how '[s]tate consent plays a fundamental role in shaping and legitimizing international law.'

protections.[27] In this context, the EU's characteristics of federalism regarding power sharing and distribution become apparent. As a member of the EU, the United Kingdom was required to get rid of any British laws that conflicted with European law.[28] In *Factortame*, the House of Lords found that:

> [W]hatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.[29]

In the High Court's 2002 decision in *Thoburn v Sunderland City Council*, the court refined earlier ECJ decisions regarding constitutional instruments.[30] The High Court held that Acts of Parliament could be divided into a hierarchy of ordinary and constitutional statutes. Statutes deemed constitutional in nature, such as Magna Carta 1297, the Bill of Rights 1688, the Human Rights Act 1998 (HRA), and the ECA, could only be expressly repealed through affirmative language of subsequent acts or 'by words so specific that the inference of an actual determination to effect the result contended for was irresistible.'[31] Notably, the EU Withdrawal Act includes a roadmap for the post-Brexit United Kingdom. It expressly repeals the ECA, incorporates and adapts a significant amount of EU law, and ends the supremacy of EU law subject to the Act.[32]

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[27] Gerda Falkner, 'Fines against Member States: An Effective New Tool in EU Infringement Proceedings?' (2016) 14 Comparative European Politics 36.

[28] *Queen v Secretary of State for Transport, ex parte: Factortame Ltd. and others* [1990] UKHL 7 SC (HL).

[29] Ibid.

[30] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), Divisional Court.

[31] Ibid. Alternatively, ordinary statutes may be impliedly repealed when there is a conflict between an old and new statute. See Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37 Oxford Journal of Legal Studies.

[32] European Union (Withdrawal) Act 2018 ss 1-5, 7. The Act requires express legislation from Parliament to alter incorporated EU law.

A key component of regional human rights protection is the Charter of Fundamental Rights of the European Union (the Charter). Under the Withdrawal Act of 2020, the UK will no longer be bound to the Charter.[33] Emmert and Carney opine that the Charter enumerates the shared values of the EU.[34] The Charter is highly inclusive in its references to disability, age, and sexual orientation, setting it apart from other documents that promote human rights.[35] While the Charter contains similar provisions to the European Convention of Human Rights (ECHR), it is more expansive.[36] However, the Charter's application is narrow as, 'not all of its provisions have direct effect . . . and it applies to Member States "only where they are implementing Union law."'[37]

The Court of Justice of the European Union (CJEU) decides cases regarding the application of EU law and interprets the Charter.[38] Under the Withdrawal Act, the CJEU will no longer have general jurisdiction in the UK after the conclusion of the transition period.[39] At the conclusion of the transition, the CJEU's jurisdiction will only continue in limited areas.[40] Nakanishi observes that the CJEU draws influence from the European Court of Human Rights (ECtHR).[41] However,

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33 European Union (Withdrawal) Act 2018 s 5.

34 Frank Emmert and Chandler Piche Carney, 'The European Union Charter of Fundamental Rights vs. the Council of Europe Convention on Human Rights and Fundamental Freedoms – A Comparison' (2017) 40 Fordham International Law Journal 1047.

35 Ibid.

36 Charter of Fundamental Rights of the European Union [2012] OJ C 326/02. For example, compare Charter arts. 47-50 with Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14 [2010] art. 6; see also Charter arts. 3 (informed consent), 21 (discrimination based on genetic features), 31 (limitation of working hours), 33 (family leave).

37 The European Union Committee, *The UK, the EU and a British Bill of Rights* (2015-16, HL 139) <https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf> accessed 6 December 2020.

38 Yumiko Nakanishi, 'Mechanisms to Protect Human Rights in the EU's External Relations' in Yumiko Nakanishi (ed) *Contemporary Issues in Human Rights Law: Europe and Asia* (Springer 2018). National courts may also adjudicate these claims. *European Commission v Republic of Poland*, [2019] ECLI:EU:C:2012:181; Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

39 Sylvia de Mars, 'Brexit Next Steps: The Court of Justice of the EU and the UK' (House of Commons Library, 7 February 2020) <https://commonslibrary.parliament.uk/brexit/the-eu/brexit-next-steps-the-court-of-justice-of-the-eu-and-the-uk/> accessed 13 May 2020.

40 Ibid.

41 Nakanishi (n 38).

the CJEU enjoys stronger enforcement mechanisms than the ECtHR.[42] In the interpretation of retained EU law, UK courts are given discretion in deciding whether to take notice of post-Brexit CJEU decisions.[43] It is likely that lower courts in the UK will be permitted to depart from previously binding CJEU rulings.[44]

Another regional instrument is the European Convention on Human Rights. Rights provided under this convention include the right to life, the right to a fair trial, the right to respect for private and family life, and freedom of expression.[45] The ECHR and its associated court, the ECtHR, are distinct entities from the EU, and are not directly impacted by Brexit.[46]

Domestically, the UK has enacted statutes aimed at protecting human rights. The UK incorporated almost all articles of the ECHR into domestic law in the HRA.[47] A major feature of the HRA was to allow UK courts to adjudicate claims that had previously only been justiciable in the ECtHR once a petitioner exhausted available domestic remedies.[48] David Bonner posits that

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[42] Joint Committee on Human Rights, *The Human Rights Implications of Brexit* (2016-17, HL 88, HC 695); see Stine Anderson, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press 2012) < https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/695.pdf> accessed 6 December 2020.

[43] European Union (Withdrawal) Act 2018 s 6, as amended by European Union (Withdrawal) Act s 26. Exceptions include questions as to the interpretation of the 2020 Withdrawal Agreement or complaints of breaches of EU law. Such claims may be brought to the CJEU within five years of the end of the transition period.

[44] Ministry of Justice, *Retained EU Case Law: Consultation on the Departure from Retained EU Case Law by UK Courts and Tribunals* (2020), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896830/retained-eu-case-law-consultation.pdf> accessed 22 November, 2020. According to the consultation, courts in addition to the Supreme Court or High Court of Justiciary in Scotland are expected to be permitted to overturn incorporated law. At a minimum, this would include the Court of Appeal of England and Wales, the Court Martial Appeal Court, the Court of Appeal of Northern Ireland, the High Court of Justiciary in certain circumstances, and the Inner House of the Court of Session in Scotland.

[45] Convention for the Protection of Human Rights and Fundamental Freedoms [1950].

[46] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14 [2010].

[47] Human Rights Act 1998 s 1(1).

[48] Bonner et al., 'Judicial Approaches to the Human Rights Act' (2003) 52 International and Comparative Law Quarterly 549; Amended Convention for the Protection of Human Rights (n 45) Art. 35.

this legislation allowed for the protection of human rights in a way that preserved Parliamentary supremacy.[49]

Also notable is the increased application of the common law relative to human rights issues.[50] Where judges in UK courts previously took on an enforcement role in cases brought on ECHR grounds, they increasingly minimised its role, instead looking to the common law.[51] The more rigorous use of common law was a way for the court to continue to respect the UK's human rights obligations under the ECHR in a way that did not draw attention to the convention.[52] This also demonstrates the general shift in attitudes regarding the courts as potential guardians of constitutional rights in the tradition of the common law.[53]

IV. Argument for a Codified Constitution

A codified constitution procedurally entrenching human rights is a preferable method of ensuring respect for human rights in the UK, post-Brexit. This argument relies on two overarching principles. First, that the entrenchment of constitutional instruments is consistent with the evolution of Parliamentary supremacy in the UK. Second, that the entrenchment of rights through codification is appropriate, based both on the UK's former status as a member of a supranational entity with notable characteristics of a federation and on the UK's own domestic characteristics within that context.

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[49] Bonner et al. (n 48).

[50] Paul Daly, 'A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom' (2015) 41 Queen's Law Journal 1.

[51] Ibid.

[52] Ibid.

[53] Ibid.

As a threshold matter, entrenchment refers to mechanisms that make laws more difficult to change. This promotes legal stability, but also restricts flexibility.[54] Levels of entrenchment are relative. In the UK, where constitutional instruments may be changed by express language or Parliamentary intent, requiring a two-thirds vote or supermajority vote in Parliament concerning constitutional issues would provide relative procedural entrenchment.[55] In this way, a codified constitution containing such a requirement would clarify which matters are entrenched and make it more difficult to change constitutional instruments. While weaker than substantive entrenchment, which is more restrictive, procedural entrenchment protects rights in a way that still allows Parliament the capability and flexibility to alter legislation when certain conditions are met.

Entrenchment provides a stronger protection for rights and could designate human rights beyond the purview of routine Parliamentary activities.[56] The High Court's decision in *Thoburn*, which created specific conditions to repeal constitutional statutes, can be seen as part of the trend in this direction. Further entrenchment would not necessarily prevent Parliament from adjusting to the wishes of the people and hinder democracy; rather, it would make it more difficult to diminish rights that have already been established, especially in circumstances when Parliament does not represent the majority's viewpoint.[57]

Developments in UK jurisprudence since the adoption of the ECA point towards domestic acceptance of some form of entrenchment and have further marked a starting point from which a

[54] Michael D. Gilbert, 'Entrenchment, Incrementalism, and Constitutional Collapse' (2017) 103 Virginia Law Review 631.
[55] Ibid.
[56] Hin-Yan Liu, 'Constitutional Entrenchment: Questions of Legal Possibility and Moral Desirability in the United Kingdom' (2010) 2 City University of Hong Kong Law Review 193.
[57] Ibid.

codified constitution can be drafted.[58] Specifically, certain instruments have been designated constitutional and therefore granted a special status.[59] Concerns that a codified constitution would weaken or destroy Parliamentary supremacy largely ignore the evolution of the concept in the years following the ECA. There is a trend moving away from a rigid view of Parliamentary supremacy that could, for instance, abolish judicial review or impede on the functions of the courts.[60] The increased role of the courts in the UK as protectors of rights in the wake of the ECA further indicates an evolution in interpretation.[61]

Concerns are often cited that drafting such a codified constitution could force unpopular or concealed constitutional changes, shift political power to the judiciary, and trigger a destabilizing constitutional crisis.[62] It should be noted that the judiciary already performs constitutional functions, such as determining what constitutes a valid law and conducting judicial review of administrative action.[63] The UK's unwritten constitution grants courts a greater constitutional role than other systems in some regards, as courts decide both whether constitutional requirements have been met and what the constitutional requirements actually are.[64] Elliott notes that overall, the UK's judiciary is functionally similar to court systems with codified constitutions.[65] In particular, there is a degree of hierarchy in UK legislation, which is present in systems with codified

[58] *R (HS2 Action Alliance Ltd)* (n 17). A codified constitution could encompass the instruments already determined by the courts to be constitutional in nature. See supra Section II.
[59] Ibid.
[60] Daly (n 50).
[61] Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (Bloomsbury Publishing Plc 2019).
[62] N.W. Barber, 'Against a Written Constitution,' [2018] Public Law 11.
[63] Mark Elliott, 'The Constitutional Role of the Judiciary if There Were a Codified Constitution' (2013) House of Commons Political and Constitutional Reform Committee Research Paper Series 51/2013, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=23435892013> accessed 7 June 2021.
[64] Ibid.
[65] Ibid.

constitutions, albeit to a lesser degree in the UK. Thus, the increased role potentially brought upon by a codified constitution is not unprecedented considering the role already played by the judiciary.

It is important when discussing a codified constitution to consider the implications of withdrawal from the EU in context of the evolution of Parliamentary supremacy. Membership in the EU provided some recourse to Parliamentary supremacy under a system with shared history and values.[66] As what some scholars consider a *sui generis* federation, this system also provided continuity and created an expectation that certain core rights would be protected at the Union level due to the EU's power sharing and distribution arrangements with Member States.[67] EU law is notable for the permeation and application of human rights into areas such as criminal justice, data privacy, family reunification, asset freezing, and terrorism; rather than treating the concept as a separate subject area.[68] In addition, the Charter and EU law provide protections that are unavailable under the ECHR. In particular residency rights, the right to family life, the right to preventative healthcare and workers' rights are more expansive.[69] This contextual background demonstrates the extent to which the UK's legal framework was interconnected with that of the EU as a Member State. As a practical matter, codification is an opportunity to promote continuity and to ensure that rights that were previously addressed under the EU's *sui generis* federal structure continue to be a priority in the UK.

A codified constitution could compile the current constitutional sources into one place. Such a document would be more accessible to the populace and provide greater transparency than

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66 See *R (Jackson) v Attorney General*, [2005] UKHL 56 and *Axa General Insurance Ltd v Lord Advocate*, [2011] UKSC 46; Charter of Fundamental Rights of the European Union [2012] OJ C 326/02 Preamble.

67 Tömmel (n 12).

68 Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649.

69 Joint Committee (n 42).

current constitutional sources.[70] This would ensure continuity and stability in the transition from the EU. Even in written form, constitutions may suffer from ambiguity or a lack of clarity[71] and this is amplified when citizens cannot look to a single, written document.[72] A codified constitution could demonstrate the priority of human rights in the UK's legal system, even after departure from the EU. Valaers argues that '[o]ne may expect [a constitution] to offer citizens insight into their fundamental rights,' something that the current constitutional framework fails to do on the same level as the EU.[73]

A codified constitution protecting human rights is of particular importance in the context of the devolved UK. At a time when there are increased tensions between Scotland, Wales, North Ireland and England due to Brexit,[74] such a document could be a method to strengthen relations within the UK. Under the devolution agreements, human rights are not completely devolved.[75] In particular, Scotland has voiced its support of EU fundamental rights protections and wishes to follow EU human rights principles to the maximum extent permitted.[76] Divergence among the devolved governments could produce varying levels of rights protections.

This corresponds to the contention that common law protections couched in a potentially more active judiciary are sufficient to protect human rights. This presents distinct issues in the

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70 Nikolas Bowie, 'Why the Constitution Was Written Down' (2019) 71 *Stanford Law Review* 1397.

71 Jan Valaers, 'Constitutional Versus International Protection of Human Rights: Added Value of Redundancy? The Belgian Case, in Light of the Advisory Practice of the Venice Commission' (2016) 77 Interdisciplinary Review of Jurisdictional Studies 265.

72 Mohammad Nayyeri, 'Why Does Britain Need a Codified Constitution?' [2015] Young Human Rights Lawyer 1.

73 Valaers (n 71).

74 Aileen McHarg, 'Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention' in Mark Elliott et al. (eds), *The UK Constitution after Miller: Brexit and Beyond* (Bloomsbury Publishing 2018).

75 Katie Boyle & Leanne Cochrane, 'The Complexities of Human Rights and Constitutional Reform in the United Kingdom Brexit and a Delayed Bill of Rights: Informing (on) the Process' (2018) 16 Northwestern Journal of Human Rights 22.

76 SP Bill 77 UK Withdrawal from the European Union (Continuity) (Scotland) Bill [as introduced] Session 5 (2020).

context of devolution, perhaps most importantly that the common law has English origins that do not resonate in the legal traditions of the devolved governments.[77] Reliance on common law could further alienate Scotland, Wales, and North Ireland. Indeed, while the judiciary has expressed a tentative possibility of a more active role, it still problematically relies on the common law and it is uncertain whether the courts would oppose Parliament in practice.[78]

The UK's obligations under the EU as well other European instruments and bodies were a main point of contention in the build-up to the 2016 referendum, with the ECHR seen as particularly controversial among critics.[79] Ironically, Brexit may place added pressure on the UK to remain in the ECHR, as law enforcement and judicial cooperation with the EU is conditional upon future adherence to the convention.[80] While the ECHR is unaffected by Brexit, the ECtHR is arguably deferential to national courts.[81] In fact, following the passage of the HRA, the UK was able to enjoy a much greater margin of appreciation for the decisions of its national courts.[82] The ECtHR has also emphasised the principle of subsidiarity and its residuary role, making it and the ECHR insufficient to adequately protect human rights without supplementary EU instruments such as the Charter.[83] A codified constitution drafted by the UK would be less likely to suffer from the

77 Daly (n. 50).

78 Ibid.

79 Alice Donald et al., *The UK and the European Court of Human Rights* (Equality and Human Rights Commission Report Series 2012).

80 Lucy Moxham & Oliver Garner, 'Will the UK Uphold Its Commitment to Human Rights?' *London School of Economics* (30 June 2020) <https://blogs.lse.ac.uk/brexit/2020/06/30/long-read-will-the-uk-uphold-its-commitment-to-human-rights/> accessed 18 September 2020.

81 Paul Mahoney, 'The Relationship Between the Strasbourg Court and the National Courts – As Seen from Strasbourg' in Katja S Ziegler et al. (eds) *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing Ltd 2015); Ed Bates, 'The UK and Strasbourg: A Strained Relationship – The Long View' in Katja S Ziegler et al. (eds) *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing Ltd 2015).

82 Bates (n 81).

83 Ibid.

level of discontent than European law and institutions.[84] While there have been criticisms against the HRA, the crux of these criticisms were largely a response to the ECHR and its associated court.[85]

Scholars such as Lord Norton of Louth posit that Britons generally respect and follow conventions and practices of the United Kingdom's current constitution, which in turn facilitates the political system.[86] Regardless, the current framework as it stands leaves the system subject to greater uncertainty than experienced under the EU, especially for human rights law. In the aftermath of the referendum, some scholars also believe this uncertainty helped break down the party system, compromised the role of the Cabinet, undermined the relationship between the executive and Parliament, destabilised the UK, and drew the courts into political controversy.[87]

The Conservative party's long-standing push for a British Bill of Rights is sometimes touted as a potential alternative to protect rights; however, it would likely be deficient when compared with a codified constitution. Passage of a British Bill of Rights is unlikely at this juncture.[88] Furthermore, a British Bill of Rights would likely diminish rights rather than protect or augment them.[89] Under the Conservative Party's 2015 manifesto, a British Bill of rights would 'reverse the mission creep that has meant human rights law [has been] used for more and more

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84 Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25 European Journal of International Law 1019.

85 Lecture by Dr Jeff King (7 March 2016) https://constitution-unit.com/2016/05/03/the-human-rights-act-1998-past-present-and-future/ accessed 18 September 2020.

86 Lord Philip Norton, 'Do We Need a "Written" Constitution?' (The Norton View, 20 September 2019) <https://nortonview.wordpress.com/2019/09/20/do-we-need-a-written-constitution/> accessed 13 May 2020.

87 Andrew Blick, 'Do We Need a Written Constitution?' (The Federal Trust for Education and Research, 25 October 2019) <https://fedtrust.co.uk/do-we-need-a-written-constitution/> accessed 13 May 2020.

88 Jon Stone, 'British Bill of Rights Plan Shelved Again for Several More Years, Justice Secretary Confirms' *Independent* (23 February 2017) <https://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-rights-brexit-liz-truss-theresa-may-a7595336.html> accessed 6 December 2020.

89 Alexander Horne et al., 'A British Bill of Rights?' (House of Commons Library, 19 May 2015) <https://researchbriefings.files.parliament.uk/documents/CBP-7193/CBP-7193.pdf> accessed 6 December 2020.

purposes.'[90] Even if such an act was given effect, it would still be constrained by Parliamentary supremacy. Efforts for a codified constitution should therefore be prioritised.

V. Conclusion

The European Union provided significant human rights protections in the UK, in part due to its role relative to the UK, with functional similarities to a federation. EU instruments served not only to supplement the UK's constitution and domestic legislation, but were also a catalyst for change in the UK's constitutional framework. Losing the protections afforded these regional instruments thus makes human rights law more susceptible to erosion in the UK. At the same time, the changes in the UK's constitutional framework brought about by membership of the EU make the creation of a codified constitution possible. Thus, entrenchment through a codified constitution is not only compatible with developments in Parliamentary supremacy, but is also a preferable way to ensure that human rights law in the UK is not eroded due to the departure from the EU.

[90] *The Conservative Party Manifesto 2015* (University Centre for Computer Corpus Research on Language 2015) <http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf> accessed 5 December 2020.

Concerns About the Check Employment Status Tool

Emma McFarlane[*]

Overview

The clamp-down on the use of intermediaries, usually Personal Service Companies (PSCs), in the UK to evade or minimise the payment of income tax and National Insurance Contributions began in 2000. IR35 applies when, if not for the intermediary, there would be a direct contract of employment to personally perform services between the worker and the end-client. As of 6 April 2021, the onus for determining the application of IR35 was shifted from the PSC to medium and large companies in the private sector that engage with a PSC; this obligation has applied to public sector end-clients since 2017.

Calls to further postpone these changes often drew attention to concerns about HMRC's Check Employment Status Tool (CEST). This article offers a critical assessment of CEST, focussing on the reasons and (potential) benefits of having such a tool and whether CEST can offer any improvement and provide greater clarity for taxpayers. The reasons behind CEST are understandable and the intended benefits desirable, but the tool is inconsistent with the approach taken by judges, who are free to disagree with CEST's determinations. As Noele McClelland points out, the way that factors are weighted has been criticised. This article agrees with those who criticise the lack of emphasis placed upon mutuality of obligation and the

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overemphasis placed upon substitution. There are also practical issues that taxpayers may encounter. Overall, this article concludes that CEST will not likely result in improvement or more clarity for taxpayers.

A wide range of sources were consulted to reach the above conclusion: 1) recent case law, most famously involving TV personality Lorraine Kelly's PSC; 2) journal articles expressing the views of experienced solicitors; 3) reports by parliamentary and government bodies; 4) various guidance published by HMRC; and 5) appraisals of CEST published on *Contract Calculator*.

Introduction

This article focuses on HMRC's Check Employment Status Tool (CEST), offering a critical assessment of the tool. To do so, Part 1 provides some context on the intermediaries legislation (IR35) and Part 2 gives a brief overview of what CEST is for and the factors that are considered. This article considers the reasons for and benefits of CEST. It also builds upon the view expressed in Noele McClelland's article to assess whether the tool will be an improvement and provide clarity for taxpayers. CEST is also compared to recent case law. Although the tool is not compulsory, HMRC encourages taxpayers to use CEST[1] and believes it is fit for purpose; however, the vast majority of interested parties do not share this view.

Part 1: IR35 – Context

IR35 legislation, which takes its name from the press release made by Inland Revenue (now HMRC), was introduced in 2000 to tackle the use of intermediaries, usually Personal

[1] Dawn Register, 'Analysis – HMRC's defeat in *Albatel*: the IR35 puzzle' (2019) 1440 Tax Journal 14, 15.

Service Companies (PSCs), to 'avoid or reduce the worker's personal tax and National Insurance liabilities', as well as employers' National Insurance Contributions (NICs).[2] In 2019, the UK Government estimated that those using PSCs paid £6,000 less in tax and NICs than those in direct employment on an income of £50,000.[3]

IR35 rules are found in sections 48-61X of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and the Social Security Contributions (Intermediaries) Regulations 2000.[4] IR35 applies when, if not for the intermediary, there would be a direct contract of employment to personally perform services between the worker and the end-client.[5] It ensures that fees paid to the PSC are treated as deemed salary, subject to PAYE and Class 1 NICs, rather than company revenue, subject to more favourable corporation tax rates.[6]

In 2017, the onus for determining the application of IR35 was shifted from the PSC to public sector end-clients engaging with a PSC.[7] From 6 April 2021, this obligation was extended to medium and large companies in the private sector.[8] The policy objectives behind this shift were compliance, protection of the tax base, and fairness.[9] Although not the focus of

[2] HMRC, Employment Status Manual <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual> accessed 29 October 2020.
[3] 'HMRC issue briefing: reform of off-payroll working rules' (22 October 2019) <https://www.gov.uk/government/publications/hmrc-issue-briefing-reform-of-off-payroll-working-rules/hmrc-issue-briefing-reform-of-off-payroll-working-rules> accessed 12 October 2020.
[4] SI 2000/727. As the provisions are similar, references will be made to ITEPA.
[5] ITEPA 2003, ss 49, 61M.
[6] *Albatel Ltd v HMRC* 2019 WL 01280223 [3].
[7] ITEPA 2003 Ch 10, as amended by Finance Act 2017.
[8] ibid as amended by Finance Act 2020; 'HMRC issue briefing: reform of off-payroll working rules'' (n 3); Employment Status Manuel (n 2) ESM1006.
[9] Economic Affairs Committee Finance Bill Sub-Committee, *Off-payroll working: treating people fairly* (HL 2020-21 50) paras 115-130.

this article, it is worth noting that fairness appears to extend to tax but not employment rights; this creation of essentially 'zero-rights employees' is part of the wider criticism of IR35.[10]

HMRC's poor success rate in recent cases and the effects of COVID-19 exacerbated calls for the UK Government to reconsider the change.[11] The efficiency of CEST was a key issue. However, a response to a petition given on 20 November 2020 stated:

> "The Government has already delayed this reform until April 2021 in response to the COVID-19 crisis. However, there will not be a further delay. … The reform was originally announced at Budget 2018. Many businesses were prepared for the reform to be implemented in April 2020 as originally planned, and HMRC have undertaken a significant programme of education and support to ensure that large and medium-sized organisations are ready."[12]

Part 2: CEST – Context

CEST was launched in 2017 to determine a worker's employment status for tax and NIC purposes.[13] It 'can be used by anyone who needs to understand employment status for tax and NIC purposes', including the organisation hiring the worker or the worker themselves.[14] The tool asks various multiple-choice questions, divided broadly into five sections: personal service, control, financial risk, part and parcel, and business on own account.[15] An example

[10] ibid Summary, paras 35-40, 125, 129; Caroline Colliston, 'IR35: Employment status for tax, contractors and off payroll working – where are we now?' (2017) 139 Emp Law 7, 8; Michael Ford, 'The fissured worker: personal service companies and employment rights' (2020) 49(1) ILJ 35, 45-46.
[11] Economic Affairs Committee Finance Bill Sub-Committee (n 9) Summary, para 64; Richard Curtis, 'IR35 does not apply to presenter's personal service company' (2019) 183 Taxation 6.
[12] 'Delay implementation of IR35 legislation reform until COVID-19 is resolved' (*Petitions: UK Government and Parliament*)
<https://petition.parliament.uk/petitions/552730?reveal_response=yes> accessed 18 May 2021.
[13] Employment Status Manual (n 2) ESM11005 Introduction; CEST was updated in 2019.
[14] ibid ESM11006 Who can use CEST?
[15] ibid ESM11000 Check Employment Status For Tax: Content.

question within the control category is: 'Does your organisation have the right to move the worker from the task they originally agreed to do?'[16] The tool also specifically asks, 'Does the client have the right to reject a substitute?'[17] The Employment Status Manual provides examples of when the answer would be 'yes' or 'no'. The intended benefits are to provide taxpayers with clarity and prevent surprises, such as being caught by IR35 following a HMRC investigation.

Part 3: Critical assessment of CEST

HMRC stated that CEST 'was rigorously tested…against live and settled cases and reflects employment status case law'.[18] However, since this statement, HMRC lost against the PSCs of Lorraine Kelly[19] and Kaye Adams,[20] despite its win against Christia Ackroyd's PSC.[21] The starting point in these cases was the tripartite test: a contract of service (employment) exists where there is mutuality of obligation, sufficient degree of control, and the other provisions in the contract are consistent with it being a contract of service.[22] The court or tribunal constructs a hypothetical contract, which may be different to any actual contract, when applying the test.[23]

Walter Myer comments that CEST was introduced in response to the uncertainty often generated by case law.[24] A desire for certainty is understandable and appropriate. However, given CEST's performance in recent cases, it is doubtful whether the tool will be that

[16] ibid ESM11065 Control – What the worker does.
[17] ibid ESM11045 Personal Service – Hirer's right to reject a substitute.
[18] 'FOI Release: CEST tool tested against tax cases' (6 September 2018) <https://www.gov.uk/government/publications/cest-tool-tested- against-tax-cases/test-results-produced-after-cests-development> accessed 4 November 2020.
[19] *Albatel* (n 6).
[20] *Atholl House Productions Ltd v HMRC* [2019] UKFTT 242 (TC). HMRC also lost on appeal. *HMRC v Atholl House Productions Ltd* [2021] UKUT 0037 (TCC).
[21] *Christa Ackroyd Media Ltd v HMRC* [2018] UKFTT 0069 (TC).
[22] *Ready Mix Concrete (South East) Ltd v Minister of Pensions & National Insurance* [1968] 2 QB 497, 439-440.
[23] *Usetech v Young (2004) 76 TC 811* in *Albatel* (n 6) [24].
[24] Walter Myer, 'Get on the scene like a tax machine' (2019) 19 LIM 61, 61.

beneficial, as results may not be trustworthy.[25] In *Albatel*,[26] the tribunal held that Lorraine Kelly's relationship with ITV was a contract for services, meaning she was self-employed, the use of her PSC was legitimate, and she was not liable to pay £1.2 million in income tax and NICs. However, the facts of *Albatel*, which was not a borderline case,[27] produced a result of deemed employment when entered into CEST,[28] contrary to the actual decision reached by the tribunal. Moreover, the results from CEST are not legally binding, notwithstanding HMRC's statement that it will stand by the result given, unless contrived.[29] Thus, a court or tribunal is free to disagree with or ignore CEST. For Myer, '[t]here are no apparent slam-dunk arguments' against making machine statements of law legally binding.[30] Regarding CEST, this seems absurd given that the tool is out of step with case law and thus the reasoned opinions of judges.

There are many examples of this inconsistency and, as Noele McClelland points out, '[CEST] has been highly criticised (by contractors associations) for the way in which it weights certain aspects of the test, whilst ignoring other factors making it more likely that deemed employment status will apply'.[31] Whether or not CEST is actually predisposed to produce a determination of deemed employment,[32] the perception that it does matters as this undermines the tool's credibility.

The most obvious factor that CEST ignores is mutuality of obligation (MOO). MOO is assumed by CEST as it is required for a contract to exist.[33] According to HMRC, CEST's

[25] Economic Affairs Committee Finance Bill Sub-Committee (n 9) para 77.
[26] (n 6).
[27] ibid [177].
[28] Economic Affairs Committee Finance Bill Sub-Committee (n 9) para 73; Register (n 1).
[29] Employment Status Manual (n 2) ESM11010 Results from CEST.
[30] Myer (n 24) 62.
[31] Noele McClelland, 'IR35 and the new rules for the private sector' (2019) 154 Emp LB 4, 5.
[32] Economic Affairs Committee Finance Bill Sub-Committee (n 9) para 76.
[33] 'IR35 Forum - HM Revenue and Customs Paper on Mutuality of Obligation (MOO)' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722316/HMRC_paper_on_Mutuality_of_Obligation.pdf> accessed 3 November 2020.

questions about the nature of the contract and on the subject of 'part and parcel' are thus testing MOO.[34] However, the preferred argument is that, as MOO exists both in a contract of service and a contract for services (self-employment), it needs to be looked at more deeply.[35] Whilst it is agreed[36] that control was the more decisive factor in *Albatel*[37] and *Ackroyd*,[38] the fact that judges consider MOO in the majority of cases should not be ignored.

Others criticise the emphasis CEST places on substitution.[39] Although there was a limited right to send a substitute in *Albatel*[40] and no such right in *Ackroyd*,[41] in neither case was this deemed to be determinative.[42] Dawn Register highlights that the right to substitute is less important than it was when *Ready Mix Concrete*[43] was decided.[44] For Simon Deakin, the reliance on substitution emphasises problems with asking binary questions; for example, a person may be genuinely self-employed but cannot offer a substitute for their work due to their level of 'personal skills, capabilities or judgement'. Therefore, if substitution is viewed in isolation, CEST is likely to provide 'skewed answers'.[45]

Irrespective of exactly what weighting CEST gives to each factor, which is still unclear,[46] the following indicates that CEST can never be reconciled with the approach taken

[34] Economic Affairs Committee Finance Bill Sub-Committee (n 9) para 74 n 103.
[35] Derick Francis, 'IR35: chasing a moving target – Part 1' (2020) 13 SLT 75 and 'Part 2' (2020) 14 SLT 81; Alastair Kendrick, 'Part of the game' (2020) 185 Taxation 12.
[36] Register (n 1) 14.
[37] *Albatel* (n 6).
[38] *Ackroyd* (n 21).
[39] Economic Affairs Committee Finance Bill Sub-Committee (n 9) para 75.
[40] *Albatel* (n 6).
[41] *Ackroyd* (n 21).
[42] Register (n 1) 15.
[43] *Ready Mix Concrete* (n 22).
[44] Register (n 1) 15.
[45] Simon Deakin, 'Decoding Employment Status' (2020) 31 Kings's Law Journal 180, 190-191
[46] ibid 189; 'HMRC continues to hide CEST test data' (*ContractCalculator* 6 April 2020) <https://www.contractorcalculator.co.uk/hmrc_continues_hide_cest_test_data_559210_news.aspx> accessed 6 November 2020.

by judges: determining employment status is 'not a mechanical exercise of running through items on a check list' but 'involves painting a picture in each individual case'.[47] For example, although 50% of Kaye Adams' income came from the BBC during the two tax years in question, the tribunal deemed it inappropriate to look at those years in isolation from her whole career.[48] It cannot be credibly argued that an online questionnaire can create such a nuanced picture. This problem is exacerbated further by the varied range of industries and sectors that users of CEST work within,[49] as a single set of questions cannot adequately account for differences between them. Reflecting on all the valid criticisms of CEST considered thus far, use of the tool is unlikely to generate improvements for taxpayers.

Such concerns about the efficiency of CEST lead to a continuing lack of clarity regarding proper compliance with IR35. Moreover, there is concern about CEST's 'unacceptably high' no-response rate.[50] *Contract Calculator* undertook research showing that CEST results feature a number of false positives, further undermining the tool's clarity.[51]

Furthermore, there are practical considerations which suggest that using CEST will not be of benefit to taxpayers. Firstly, the end-client has to take reasonable care when determining employment status.[52] Whether use of CEST meets this standard, given the aforementioned issues, is questionable; thus end-clients may resort to other tools.[53] In order to avoid making

[47] *Hall v Lorimer* [1994] 1 WLR 209, 216 (Nolan LJ citing Mummery J).
[48] *Atholl* (n 20) [112-113].
[49] Economic Affairs Committee Finance Bill Sub-Committee (n 9) para 72
[50] ibid para 72.
[51] 'CEST exposed as hopelessly unreliable using HMRC's own test data obtained via FOI' (*ContractCalculator.co.uk* 1 August 2018) <https://www.contractorcalculator.co.uk/cest_exposed_hopelessly_unreliable_hmrcs_foi_543610_news.aspx> accessed 6 November 2020.
[52] 'Guidance: April 2021 changes to off-payroll working for clients' (20 March 2020) <https://www.gov.uk/guidance/april-2020-changes-to-off-payroll-working-for-clients> accessed 5 November 2020.
[53] Economic Affairs Committee Finance Bill Sub-Committee (n 9) para 78.

costly mistakes, some end-clients in the public sector became risk averse by either issuing blanket determinations or only engaging contractors directly; there is some evidence that this is already taking place in the private sector.[54] This points to a wish to actually avoid using CEST in the first place. Employment status needs to be assessed per engagement rather than per client. For workers, this could result in different status determinations from different end-clients, which would be understandably bewildering;[55] however, HMRC does not appear to view this as problematic.[56] For end-clients, it adds to the administrative cost and burden that they will face;[57] HMRC may be optimistic in estimating a one-off preparatory cost of £14.4 million.[58]

[54] ibid paras 88-92; McClelland (n 31) 5.
[55] McClelland (n 31) 5.
[56] 'Guidance: Understanding off-payroll working (IR35)' (20 March 2020) <https://www.gov.uk/guidance/understanding-off-payroll-working-ir35> accessed 5 November 2020.
[57] Economic Affairs Committee Finance Bill Sub-Committee (n 9) para 48.
[58] ibid paras 81-83.

Conclusion

Despite criticism of the tool and the calls to further postpone the recent change to the IR35 rules, large and medium private sector end-clients now need to navigate CEST. Ultimately, whilst the reasons behind CEST are understandable and the intended benefits desirable, it cannot be reconciled with the approach taken by judges. The inconsistency between the tool's determinations and decisions of tribunals is starkly demonstrated by the case against Lorraine Kelly's PSC, Albatel Ltd. Indeed, it may not even be possible to create a tool that is consistent with the common law.[59] Moreover, as Keith Gordon, who represented Lorraine Kelly's PSC, points out, the fact that lawyers often find it difficult to determine employment status indicates the inherent challenges in creating an efficient and consistent tool.[60] By exploring and expanding upon the view expressed in Noele McClelland's article, namely that MOO should not be ignored and that the importance of substitution has been overemphasised, this article has demonstrated why CEST will not result in any great improvement or clarity for taxpayers. Similarly, the potential practical consequences, such as the additional administrative costs and burden faced by end-clients, also undermine the use of CEST.

[59] ibid para 72.
[60] Danish Mehboob, 'Taxpayers see long-term challenges under UK's IR35 regime' (*ITR*, 9 March 2020) <https://www.internationaltaxreview.com/article/b1kp6nvhwkgqjb/taxpayers-see-long-term-challenges-under-uks-ir35-regime> accessed 5 November 2020.

Inheritance Tax in the UK: Reform Required

Emma McFarlane

Overview

Inheritance Tax (IHT) has been described as Britain's 'most hated tax'. Less than 25,000 estates are liable to pay IHT each year and in the 2019-2020 tax year, payment of IHT accounted for less than 1% of the total revenue raised. Despite these figures, IHT is still widely unpopular: it is viewed as a 'voluntary tax' that the wealthiest can minimise or avoid.

Whilst unpopularity does not justify reform, there have been calls made to alter and redesign IHT over the last decade by various bodies and experts. This essay focuses on the recommendations made by both the Office of Tax Simplification (OTS) and the All-Party Parliamentary Group for Inheritance & Intergenerational Fairness (APPG) that, in the author's opinion, best demonstrate why IHT should be reformed: the treatment of lifetime gifting and the rate of tax. It also guided by two of Adam Smith's canons of taxation, fairness and certainty, as well as by *The Mirrlees Review's* call for a simpler and neutral tax system.

This essay concludes that replacing the current array of lifetime gifting exemptions with a single annual allowance, imposing a flat-rate gift tax when that allowance has been reached, and lowering the rate of tax would make IHT fairer, simpler, and more certain, whilst encouraging neutral behaviour. Although the Chancellor's March 2021 Budget made no changes to the IHT thresholds, reform may still be seriously considered to aid recovery from the impact of COVID-19.

Introduction

Inheritance tax (IHT) is widely unpopular.[1] Even though less than 25,000 estates are actually liable to pay IHT each year,[2] it has been dubbed Britain's 'most hated tax'.[3] Whilst unpopularity in itself does not justify reform, several aspects of IHT have been targeted for reform by various bodies.[4] This essay will focus primarily on lifetime gifting: first, by considering reform of lifetime exemptions and second, by assessing the abolition of potentially exempt transfers (PETs) in favour of a flat-rate gift tax. The merits for lowering the rate of IHT will also be considered, including how this would affect cohabiting couples. The amount of revenue raised is not the primary consideration. Rather, the focus is on fairness and certainty, drawing upon Adam Smith's canons of taxation,[5] as well as simplicity and neutrality.

Legislation

IHT is a tax on death, and transfers made within seven years of death. It is governed by the Inheritance Tax Act (IHTA) 1984 and 'charged on the value transferred by a chargeable transfer'.[6] A charge takes place when there is a disposition and a loss of value to the

[1] Office of Tax Simplification, 'Inheritance Tax Review – first report: Overview of the tax and dealing with administration' (OTS First Report) (November 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758368/Final_Inheritance_Tax_report_-_print_copy.pdf> accessed 5 December 2020 10.
[2] OTS First Report (n 1) 4.
[3] Emma Agyemang, 'Inheritance tax: what does the future hold?' *Financial Times* (London, 11 July 2019) <https://www.ft.com/content/10370c58-a235-11e9-974c-ad1c6ab5efd1> accessed 5 December 2020.
[4] OTS First Report (n 1); Office of Tax Simplification, 'Inheritance Tax Review – second report: Simplifying the design of Inheritance Tax' (OTS Second Report) (July 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816521/Final_Inheritance_Tax_2_report_-_print_copy.pdf> accessed 31 October 2020; All-Party Parliamentary Group for Inheritance & Intergenerational Fairness, 'Reform of Inheritance Tax' (January 2020) <https://www.step.org/system/files/media/files/2020-05/STEPReform_of_inheritance_tax_report_012020.pdf> accessed 31 October 2020; James Mirrlees et al, *Tax by Design: The Mirrlees Review (*OUP for the Institute for Fiscal Studies 2010*)*.
[5] G Morse and S Eden, *Davies: Principles of Tax Law* (9th edn, Sweet & Maxwell 2020) 5-6.
[6] IHTA 1984, s 1; see also s 2(1).

transferor's estate; the amount which the estate is diminished by is the value transferred.[7] A deceased person is treated as having made a disposition of all their assets immediately before death.[8] Once the nil-rate band (NRB), currently £325,000, and any reliefs or exemptions have been accounted for, the estate is taxed at 40%.[9] Some transfers are immediately chargeable during lifetime at 20%.[10]

Calls for reform of IHT

There is consensus amongst various bodies and experts that changes need to be made to IHT. *The Mirrlees Review* consists of two volumes, published in 2010 and 2011.[11] It identified what an ideal tax system would look like and how the UK tax system could be improved to meet this idea, modernised Smith's canons of taxation, and advocated a 'simple, neutral, and stable' tax system.[12] The only significant change made to IHT since its publication was the introduction of the residence nil-rate band (RNRB), currently fixed at £175,000, which became operative in 2017.[13] Therefore, its recommendations remain relevant.

In July 2019, the Office of Tax Simplification (OTS) published its second report on IHT, making eleven recommendations for simplifying the tax's design.[14] The All-Party Parliamentary Group for Inheritance & Intergenerational Fairness (APPG) agreed with many

[7] ibid, s 3(1).
[8] ibid s 4(1).
[9] ibid Sch 1. Estates worth less than the NRB do not pay IHT.
[10] ibid s 7.
[11] 'Mirrlees Review' (*Institute for Fiscal Studies)* <https://ifs.org.uk/publications/mirrleesreview#:~:text=The%20Mirrlees%20Review%20brought%20together,and%20recommend%20how%20it%20might> accessed 1 December 2020.
[12] Mirrlees et al (n 4) 22.
[13] IHTA 1984, s 8D.
[14] OTS Second Report (n 4).

of the OTS's recommendations. However, as an informal report, it was under no restrictions regarding remit and consequently made more radical suggestions.[15]

Reform of lifetime exempt transfers

There are various exemptions for lifetime transfers: annual exemption (currently £3000),[16] small gifts exemption (currently £250 per person),[17] normal expenditure out of income,[18] and gifts in consideration of marriage or civil partnership.[19] Having so many interacting exemptions can hardly be deemed simple. The OTS highlighted that respondents found the interaction between these exemptions confusing. It recommended an overall personal gifts allowance, subject to a *de minimis* rule, but was undecided as to whether normal expenditure out of income should be subsumed within this allowance or be retained as a reformed separate exemption.[20] The APPG's solution is arguably simpler: it recommends all of the current exemptions be replaced by a single annual gifts allowance of £30,000.[21] Helen Lewis, writing for *Taxation*, doubts that a 'reasonably informed taxpayer' would find the interaction between the various exemptions complex or confusing.[22] However, it is hard to dispute that a single gifts allowance would be more certain and simple, as the rules would be clearer and easier to understand.

Abolishing the normal expenditure out of income exemption has raised some concerns. For example, whilst there are not many claims,[23] it is regarded as a 'highly valuable' planning

[15] APPG (n 4); Helen Jones, 'Is the chancellor listening?' (2020) 185 Taxation 14, 14.
[16] IHTA 1984, s 19.
[17] ibid s 20.
[18] ibid s 21.
[19] ibid s 22.
[20] OTS Second Report (n 4) 20-23.
[21] APPG (n 4) 8.
[22] Helen Lewis, 'Overcome by complexity' (2019) 184 Taxation 8, 10.
[23] 579 estates claimed this exemption in 2015-16. OTS Second Report (n 4) 20.

tool by those who use it.[24] Others argue that gifts are made from money which has already been subject to income tax, meaning that the gift is not made tax-free.[25] Notwithstanding these concerns, it seems unfair that the exemption could be used, even if only occasionally, to exempt gifts worth more than £1 million,[26] especially if the purpose of IHT is to redistribute wealth. An annual exemption of £25,000 would cover 55% of the claims made in 2015-16;[27] therefore, those who use the exemption to cover specific costs, such as the payment of a grandchild's school fees,[28] would likely remain unaffected. Overall, abolishing the exemption would be simpler than removing the requirement for expenditure to be regular and introducing a percentage limit, as put forward by the OTS.[29]

If a single annual gifts allowance was rejected, each exemption should at least be adjusted to take into account the impact of inflation. For example, if the small gifts exemption reflected inflation, it would have increased to £1,010 in 2019-2020.[30] Perhaps exempting gifts towards helping a young relative get onto the property ladder would also be a more meaningful exemption than a gift in consideration of marriage in today's world. This would promote intergenerational fairness, albeit within family units.

[24] Lewis (n 22) 9; see also Paul Stainforth, 'Report: OTS proposes IHT shake-up of lifetime gifts' (2019) 1451 Tax Journal 8.
[25] Agyemang (n 3), Chris Whitehouse, 'The Office of Tax Simplification's second inheritance tax report' (2020) 2 BTR 137, 142.
[26] OTS Second Report (n 4) 19.
[27] ibid 23.
[28] Sue Laing, 'Analysis: Inheritance tax review: the OTS's second report' (2019) 1452 Tax Journal 16, 16.
[29] OTS Second Report (n 4) 22-23.
[30] ibid (n 4) 18-19.

A flat-rate gift tax?

The APPG's proposed £30,000 annual gifts allowance cannot be viewed in isolation. Its key recommendation is that once the £30,000 has been exceeded, all further gifts should immediately be taxed at 10%.[31] The APPG would abolish PETs,[32] as well as business property relief (BPR) and agricultural property relief (APR).[33] Reform of BPR and APR will not be discussed in detail. However, it is hard to dispute the view that there is 'no real merit in granting special treatment to preserve the wealth of a particular occupational group', which encourages a high level of non-neutrality.[34] Example 4 of the APPG report, which highlights that an estate with farms and business property worth £6 million is not liable to pay IHT, also makes a compelling case for abolishing these reliefs. Under the proposed new regime, £1 million would be payable over ten years, interest-free.[35]

The APPG would also replace the nil-rate band[36] with a death allowance, 'not renewable every seven years as it would only be available on the death estate' but of a similar value to the current £325,000 and still transferrable to a spouse/civil partner.[37] Estates exceeding the death allowance would be taxed at 10%, rising to 20% for estates worth more than £2 million. Additionally, the capital gains tax uplift on death[38] would be removed.[39] The OTS also recommended this where a relief or exemption from IHT applies.[40]

[31] APPG (n 4) 6-9.
[32] IHTA 1984, s 3A.
[33] ibid, ss 103-125.
[34] Mirrlees et al (n 4) 361.
[35] APPG (n 4) Example 4: Very large estate comprising mostly farms and business property 18-19.
[36] IHTA 1984, Sch 1.
[37] APPG (n 4) 3, 6, 8-9; IHTA 1984, s 8A.
[38] Taxation of Chargeable Gains Act 1992, s 62.
[39] APPG (n 4) 3.
[40] OTS Second Report (n 4) 44.

By tackling lifetime gifts, the APPG aligns itself with *The Mirrlees Review* which saw the failure to tax inter vivos transfers as the 'biggest barrier to the effective operation' of IHT.[41] Moreover, there is a perception that IHT is a 'voluntary tax',[42] as under the PET regime significant portions of wealth can be transferred during a person's lifetime IHT-free, provided they survive seven years.[43] If a person's wealth is tied to their home, they cannot take advantage of PETs. Therefore, the burden of IHT is viewed as 'falling disproportionately on the middle classes'.[44]

For Helen Jones, the APPG's recommendations are 'well-argued and highly credible'. She highlights that as there would be no additional tax on lifetime gifts upon death, there is still an incentive to make lifetime gifts,[45] which IHT was designed to encourage.[46] A flat-rate gift tax would also make the complex gift with reservation of benefit rules[47] obsolete. Moreover, the death allowance would not be deducted against lifetime gifts, as those which exceeded £30,000 each year would already have been taxed.[48]

Abolishing PETs was not on the OTS's agenda. Instead, it recommended a five-year period with no taper relief to simplify IHT, influenced by the small amount of IHT raised from gifts made more than five years before death.[49] For executors and advisors, this would make

[41] Mirrlees et al (n 4) 363.
[42] ibid 362; Paul Johnson, 'Inheritance tax isn't fit for purpose if the super-rich find ways round it' *The Times* (London, 3 February 2020) <https://www.thetimes.co.uk/edition/business/inheritance-tax-isnt-fit-for-purpose-if-the-super-rich-find-ways-round-it-2hxlnc7s2> accessed 1 December 2020.
[43] Taper relief may apply if the donor dies within seven years, IHTA s7(4). For an explanation of taper relief see OTS Second Report (n 4) 24-26.
[44] Emma Chamberlain, 'Reform of Inheritance Tax' (2020) 2 BTR 184, 184.
[45] Jones (n 15) 14-15.
[46] OTS Second Report (n 4) 15.
[47] Finance Act 1986, s 102, Sch 20.
[48] APPG (n 4) 17.
[49] OTS Second Report (n 4) 26-27.

the calculation for IHT simpler. However, this does not tackle the 'voluntary tax' issue, nor does it encourage neutral behaviour.

Making all lifetime gifts above an annual gifts allowance immediately chargeable would encourage neutrality. Removing the distinction between, and different treatment of, lifetime transfers and transfers on death should not, at least in theory, distort people's behaviour. The rules determining when IHT is payable would be simpler and more certain. A flat-rate gift tax is also fairer, as the wealthiest would no longer be able to use PETs to avoid IHT, and research suggests that the majority of gifters would remain unaffected.[50] Moreover, estates which currently suffer from 'failed PETs' would be in a better position, [51] as only the rate of tax levied on gifts made between six and seven years of death (8%)[52] is lower than the proposed flat-rate gift tax.

Neither the OTS nor the APPG suggested moving to the donee-based system advocated by *The Mirrlees Review*,[53] which is measured by an increase in the recipient's estate. Emma Chamberlain, who contributed to both *The Mirrlees Review* and co-authored the APPG report, has considered the practical complications of such a system and advocated the retention of a donor-based system.[54] Therefore, it will not be discussed further.

[50] HMRC, 'Lifetime Gifting: Reliefs, Exemptions, and Behaviours' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799577/Lifetime_Gifting_-_Reliefs__Exemptions__and_Behaviours_Research.pdf> accessed 5 December 2020.
[51] See APPG (n 4) Example 3A 18.
[52] OTS Second Report (n 4) 24.
[53] Mirrlees et al (n 4) 357.
[54] Emma Chamberlain, 'Comment: How to reform inheritance tax' (2020) 1477 Tax Journal 7, 7.

Lowering the rate

At face-value, it appears that the wealthiest would be better off if the rate of IHT is lowered to 10% and 20%. However, it has been pointed out that the effective rate of tax rarely goes above 20% due to the use of various reliefs and exemptions,[55] and this percentage does not take into account lifetime gifts made seven years before death.[56] Consequently, a lower rate combined with the taxation of lifetime gifts would arguably be more effective, and it is undoubtedly simpler. The APPG also noted that any rate above 20% encourages planning. Accordingly, a lower rate would render such planning less attractive and reduce the need for so many reliefs.[57] Furthermore, a comparative study of selected OECD countries revealed that only the UK has a fixed rate.[58] Therefore, the APPG's suggestion also introduces an element of progressivity,[59] which is equated with fairness, in a way that is not overly complex and aligns the UK with other countries.

Treatment of cohabitants

The argument for a lower rate has another dimension which is arguably more important than the amount of revenue raised. Transfers between spouses and civil partners are exempt.[60] The NRB and RNRB are both transferable upon the first spouse's/civil partner's death, meaning that up to £1 million could be inherited free of IHT.[61] This creates inequity between those in legally recognised relationships and those who are not. Both the OTS and the APPG have pointed out the significant growth of cohabiting couples.[62] IHT will be due upon the death

[55] Notably APR and BPR. APPG (n 4) 13; Johnson (n 42); OTS First Report (n 1) 5-6.
[56] Chamberlain (n 54) 8.
[57] APPG (n 4) 6.
[58] Marcus Drometer et al, 'Wealth and Inheritance Taxation: An Overview and Country Comparison' (2018) 16 ifo DICE Report 45.
[59] An example of a tax which is already progressive in the UK is income tax.
[60] IHTA 1984, s 18.
[61] ibid, s 8A.
[62] OTS Second Report (n 4) 64; APPG (n 4) 38.

of a partner in such a relationship who has left all their assets to the other where the estate exceeds £325,000 and no other exemptions apply. Moreover, as *Burden v United Kingdom*[63] demonstrated, siblings who have lived together all their lives 'in a stable, committed and mutually supportive relationship'[64] will also be liable to pay IHT upon the first sibling's death, provided the NRB has been used up. The European Court of Human Rights held that there was no violation of Article 14,[65] namely because the sisters' relationship could not be compared to marriage or civil partnership.[66] The 'circularity' of this argument was highlighted by dissenting judges in both Chambers,[67] and has been discussed elsewhere.[68] Whether one agrees with the judgment or not, there is an imbalance created by the UK's desire to promote marriage and, by extension, civil partnership.

IHT raised £5.1 billion in 2019-20, accounting for less than 1% of the total revenue raised.[69] In the words of Chamberlain, extending the spouse/civil partnership exemption to cohabitees is likely to make IHT 'wholly uneconomic'.[70] On the other hand, abolishing the spouse/civil partnership exemption would be politically difficult. Therefore, a lower rate of tax would result in an effective middle-ground: marriage/civil partnership would retain a tax advantage but there would not be such a 'harsh distinction' between spouses/civil partners and cohabiting couples.[71] Those in situations similar to the Burdens would also benefit from the lower tax rate.

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[63] (2008) 47 EHRR 38.
[64] ibid para 10.
[65] European Convention of Human Rights 1950, Art 14 Prohibition of discrimination.
[66] *Burden* (n 63) paras 62-65.
[67] ibid; *Burden v United Kingdom* (2007) 44 EHRR 51.
[68] Brian Dempsey, '*Burden v UK*: "dissin" lesbians or decentring marriage (Part 1)' (2009) 376 SCOLAG 35 and 'Part 2' (2009) 377 SCOLAG 58; Brian Sloan, 'The benefits of conjugality and the burdens of consanguinity' (2008) 63 CLJ 484.
[69] HMRC, 'Annual Reports and Accounts 2019 to 2020' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932874/HMRC_Annual_Report_and_Accounts_2019_to_2020__Print_.pdf> accessed 12 December 2020.
[70] Chamberlain (n 44) 192.
[71] APPG (n 4) 11, see also Example 2 16-17.

Conclusion

This essay has evaluated certain aspects of IHT which, it is submitted, best demonstrate why reform is required. The case for reforming lifetime gifting is strong: a single annual gifts allowance would be simpler and more certain than the current array of exemptions; it would also be fairer as the limit would be more in line with inflation. Whilst it would usher in radical change, the arguments in favour of a flat-rate gift tax are also convincing: it better adheres to the principles of fairness, certainty, and neutrality than the PET regime. Lowering the tax rate would be complementary to a flat-rate gift tax, and an element of progressivity is welcome. Moreover, lower rates would alleviate the tax burden on cohabitants, making the system fairer for them. Undoubtedly, IHT needs reformed. Although the Chancellor's March 2021 Budget made no changes to the IHT thresholds, such changes may still be seriously considered to aid recovery from the impact of COVID-19.

The Reform of Summary Criminal Procedure in Edwardian Scotland

*Robert Shiels**

Introduction

Summary criminal trials, proceeding in the inferior courts to the point of proof of fact and consequential sentence without a jury present, had been established in Scots criminal law well before the Edwardian era but legislation in 1908 constituted a material development. That change in court business introduced new procedural subtleties into the prosecution of minor crime and regulatory offences. As always, events in the reform in one era, the Edwardian years are reviewed now, depended on what had occurred earlier and also on changed circumstances.

The Victorian state remains elusive.[1] That proposition applies to what is now described as the criminal justice system. The history and development of events across the United Kingdom proceeded in different ways: thus, even in mid-century it could be said of England that while the office of public prosecutor had been "actively canvassed" about the time of Waterloo in 1815, the office "does not yet exist in this country".[2] However, in Scotland the lower criminal courts had within them

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[1] K.T. Hoppen, *The Mid-Victorian Generation, 1846-1886* (Oxford, Clarendon Press, 1998), 91.

[2] J.J. Tobias, *Crime and Industrial Society in the 19th Century* (London: B.T. Batsford, 1967), 227.

Procurators Fiscal as local public prosecutors, whose introduction was the result of earlier French influence.[3]

Some historians have long recognised that the rise of summary justice was central to the nineteenth century transformation of criminal justice.[4] This change took a number of forms.[5] Summary justice required to be developed as procedural reform and was of little interest to the public until they were summoned to court. The involvement of national policy makers led to the growing belief that the incidence of crime, like any other social phenomenon, could be affected by the nature of legislative intervention. Criminal law came to be seen as a means of implementing policy by legislators responding to social problems. There were also changes in the ideas around the use of criminal law; that is to say, retribution as an aim of punishment was being dismissed in favour of prevention or deterrence.[6]

Yet, the precise law providing for the progressive extension of summary jurisdiction varied between geographical jurisdictions.[7] The problems resulting from the extension of the summary jurisdiction also varied.[8] Consideration is given here to the practicalities of the introduction of a summary jurisdiction, which is not to denigrate the abstract and theoretical discussion of jurists studying these profound

[3] W. Reid "The Origins of the Office of Procurator Fiscal in Scotland" 1965 *Juridical Review* 154-160.
[4] Lindsay Farmer, "The Law of the Land: Criminal Jurisdiction, 1747-1908" in Peter Rush *et al*, *Criminal Legal Doctrine* (Dartmouth: Ashgate, 1997), Chapter 3.
[5] Lindsay Farmer, "Book Review", *Law, Crime and History* (2016) 6(1), 103.
[6] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016), 78-82.
[7] C.f. the list of the English provisions in Tobias, (n. 2), 227-230, and those for Scotland: H.H. Brown *The Principles of Summary Criminal Jurisdiction According to the Law of Scotland* (Edinburgh, T & T Clark, 1895), xx-xxi.
[8] Farmer, (n. 6),82-5, explains the unique problems for English law of the old classification of offences and their inconsistency with modern conditions.

change: once reform was thought necessary on a policy level and legislated for in parliamentary terms, the new law had to be implemented.

The earlier nineteenth-century legislation

In Scotland, the procedure in the 'inferior courts' prior to the passing of the Heritable Jurisdictions (Scotland) Act 1746 (c.43) would form "an interesting subject of antiquarian research".[9] The authors of the new Edwardian textbook merely sketched the relevant law and began with regulations introduced in 1752 for implementation in the Sheriff Courts, although these had no statutory authority.[10] The procedure was regulated also by Act of Adjournal in 1827, on statutory authority, although that made no special reference to procedure by summary complaint, which presumably still continued to be dealt with by the regulations of 1752.[11] Subsequent legislative provisions to the middle of the nineteenth-century seem to be aggregates of experience in practice, and incremental in regards to their application in the various types of summary courts that were extant.

The minimal summary procedure had been enhanced by the Summary Procedure (Scotland) Act 1864 (c.53).[12] The object of the statute had been, by the long title, "to make Provision for the Uniformity of Process in Summary Criminal Prosecutions". That was supplemented by provisions for the recovery of penalties

[9] Robert W. Renton and Henry H. Brown, *Criminal Procedure According to the Law of Scotland* (Edinburgh: William Green and Sons, 1st ed., 1909), 179. 'Inferior' merely locates the courts in the hierarchy rather than assesses the quality of anything associated with these courts.
[10] ibid.
[11] Renton and Brown (n. 9), 180.
[12] The Scottish Act was initially an adaption of an earlier English Act of 1848 but it had required to be adjusted to provide for review or supervision of the lower courts. These were in essence modes of appeal: Henry J. Moncreiff, *A Treatise on the Law of the Review in Criminal Cases*, (Edinburgh: W. Green, 1877), 51.

which has hitherto been attained by separate legislation.[13] On introduction of the Bill to Parliament, it was commented that despite the large number of Acts passed each year with statutory offences there were few prosecutions. It was thought that the new laws were enforced infrequently.[14]

One commentator thought that the legislature was chiefly responsible for failing to provide a proper means of enforcing the increased number of new offences.[15] Not least of the problems was the divergent legal jurisdictions: the greater number of statutes creating petty offences and imposing penalties extend to the whole of the United Kingdom, but there was concern that the relevant forms of procedure and the entitlement to prosecute were inconsistent with settled Scottish practice.[16]

The constrained enthusiasm for the 1864 Bill made reference to the general approval elsewhere for "this branch of administrative jurisprudence".[17] The Act itself marks a change in the history of summary criminal procedure and it was noted in particular that that the procedure introduced was "a simple and uniform code" applicable to the various summary courts with a degree of discretion allowed to the selection of the forms to be used.[18] The value of the Act was thus to allow the better application of United Kingdom statutes in Scotland than there had been earlier.[19] Yet, the leading feature of the new law was that it regulated procedure but did not confer any more than was the law before its passing into force.[20] It appears safe to assert then

[13] Renton and Brown (n. 9), 182.
[14] "Bills Before Parliament: The Summary Procedure Bill", (1864) 8 *Journal of Jurisprudence* 258.
[15] ibid.
[16] ibid.
[17] ibid.
[18] "T", "The Summary Procedure (Scotland) Act 1864", (1865) 9 *Journal of Jurisprudence* 51-9, 51.
[19] Moncreiff (n. 12), 62.
[20] Moncreiff (n. 12), 63.

that in seeking to explain modification of the summary criminal procedure of Scotland, a baseline for assessing change was the then new law of 1864.

Even so, the 1864 Act was found to be defective in the manner in which trials were to be recorded and further reform followed in 1875.[21] Crucially, and scarcely believably:

> "The procedure under the Act of 1864 was ***not made compulsory***, with the result that uniformity was not attained, many courts, preferring to proceed under their own forms, which were much simpler."[22]

Some attempt to achieve uniformity was attempted in 1881 legislation and that was only partially successful because, again, amendments to the 1864 Act corrected the omissions but did not apply the legislation to all summary courts.[23] The over-arching assessment would seem then to be reform that was a failure because a succession of expedient rules and poorly thought-out legislation did not apply nationally, leaving courts to proceed, as they had always done, or as they thought they should do.

Any general survey of summary procedure in the mid- to late-Victorian era, and there do not seem to have been any for Scotland, would likely show a wide range of statutory offences to be prosecuted summarily that were concerned with the regulation of public houses (the *sine qua non* of Scottish politics), other aspects of the

[21] Renton and Brown (n. 9), 182.
[22] Renton and Brown (n. 9), 182. Bold emphasis added.
[23] Renton and Brown (n. 9), 182.

urban environment and developing events of concern, such as poaching. The judiciary were alert to the distinctions that might be made amongst the welter of new statutory offences, viz, some were purely regulatory matters, perhaps really civil matters, and others were indeed new crimes. One example was the statutory offence prohibiting the holding of unauthorised lotteries.[24] After considering an appeal, it was held to be "a criminal proceeding of a very stringent kind, and calculated to stamp a very criminal character upon the offender."[25]

In these types of cases, there can be seen an awareness of an emerging strict liability for some statutory offences of a merely regulatory nature, and also a recognition of the truly criminal nature of other new provisions that required the full application of traditional principles of fairness to achieve justice, albeit within the abbreviated criminal procedure then developing. This all required statutory interpretation: thus, in a 'man shoots trespassing dog' case, an appeal was allowed on the ground that the actions of the man did not constitute 'cruelty in the sense of the statute'.[26]

It would take substantial effort to present a full analysis of the threat, actual or perceived, to the traditional coherence of criminal law, evidence and procedure from the vast swathe of statutory offences, or regulatory duties.[27] Doubtless the judges, with stoic emotional indifference, dealt with whatever subject was put in front of them

[24] *McAllister v Douglas* (1878) 15 Scottish Law Reporter 459.
[25] ibid, per the Lord Justice Clerk (Lord Moncreiff) at p.461.
[26] *Jack v Campbell* (1880) 18 Scottish Law Reporter 17.
[27] E.g., duties were imposed on medical practitioners in regard to vaccination, for example without there being a statutory offence and related penalty in the Vaccine (Scotland) Act 1863 (c.108): *HM Advocate v Webster* (1872) 2 Couper 339, 343.In that case the Crown proceeded on a common law charge of fabricating a certificate in breach of a duty. The charge proved and the doctor was imprisoned immediately for four months.

for a decision. Yet, in one of the many appeals that seem to test every conceivable phrase in the public house legislation consideration was given to the offence where a licence-holder did 'knowingly permit or suffer men and women of notoriously bad fame to assemble and meet in a public house'.[28] Further, in a 'man stabs angry dog' case there was doubt as to whether the issue should even be in court.[29] These summary cases reveal a hitherto hidden aspect of modern Scottish history.

Messrs Renton and Brown did not live to complete a second edition of their textbook and when it appeared in the late 1920s, nearly two decades after the first, it had been revised by G.R. Thomson, advocate, and no 'historical sketch' of the law was included.[30] The relevant Chapter merely begins by stating the principle that the procedure in all cases of summary jurisdiction is regulated by the Summary Jurisdiction (Scotland) Act 1928 (c.65).[31] In short, the original authors seemed to have had direct experience of the severely disjointed nature of the summary procedure that was of urgent necessity improved and made uniform in the single jurisdiction. The learned author of the second edition, two decades after the first edition, had only known of the outcome of a reforming Act, and as counsel knew the law but probably had little practice in the summary courts.[32]

The need for legislative change

[28] *Maxwell v Malcolm* (1879) 17 Scottish Law Reporter 105. It was observed by the Lord Justice Clerk (Lord Moncreiff), at p.106, that the notoriety must be in the district in which the public house is situated. The unsettled concepts of 'notorious bad fame' and 'assembly of meetings' were contemporary ones; see e.g., *Kirkton v Cadenhead* (1880) 18 Scottish Law Reporter 19.
[29] *Cornelius v Grant* (1879) 17 Scottish Law Reporter 633 per the Lord Justice Clerk (Lord Moncreiff), at p.634, "[…] this was not a case under which the prosecution was called for".
[30] Robert W. Renton and Henry H. Brown, *Criminal Procedure According to the Law of Scotland* (Edinburgh: W Green & Son, 2nd ed. by G.R. Thomson, 1928).
[31] ibid, 127.
[32] George Reid Thomson (1893-1962) was admitted as an advocate in 1922, that having been delayed by war service, and in 1947 he became Lord Justice Clerk.

There was in the late-nineteenth century, however, a recognisable shift in the role of the state from individualism to greater collectivism with an increased statutory regulation, albeit in a free-market economy.[33] These major shifts in power and authority required efficient statutory provisions for effectiveness. During the second half of that century, local authorities had expanded in scale and function as urbanisation resulted in statutory duties being placed on them. The rapid population growth led to a myriad of other problems for local government. The provision by local authorities of the utilities was known, particularly by its opponents, as "municipal socialism".

At the start of the twentieth century, there were then "hundreds of statutory offences" which had been created by Acts of Parliament to meet the new social and urban conditions.[34] From a policy perspective, with this proliferation over the previous century, there was an associated general pragmatic ambition of achieving a higher prosecution rate of these petty offences at the lowest cost.[35] There were, moreover, developing social problems requiring attention and for which legislation often brought new statutory offences.[36] New policy and institutional parliamentary experience identified a need for legislative intervention without, it would seem, necessarily considering the best means of implementation: not all parliamentarians thought as lawyers did.

[33] M. Willis, *Democracy and the State, 1830-1945* (Cambridge: Cambridge University Press, 1999).
[34] A.B. McHardy "The Economics of Crime" (1902) 14 *Juridical Review* 45, 46.
[35] K. Smith, "Criminal Law: Part III, The Trial" in K. Smith *et al*, *The Oxford History of the Laws of England: volume XIII, 1820-1914* (Oxford: Oxford University Press, 2010), 115.
[36] E.g., the policy and penal issues in David Smith, "Drinking and Imprisonment in Late Victorian and Edwardian Scotland" *Social History*, 19 (37) (1986), 161-176.

These points suggest some of the real reason for the development of summary criminal procedure. Trial by jury was too expensive, time-consuming and simply inappropriate for the comparatively minor regulatory nature of many of the new offences, many of which were expected to be prosecuted in bulk. Yet, the precise origins of summary procedure may not be located easily, and indeed may not necessarily be statutory. In the first quarter of the nineteenth-century a rather basic textbook offered some description of a judicial role and appended, for interest, the *Regulations of the Sheriff of Perthshire* as an example of the form of process to be "observed" in practice.[37]

The greater part of these regulations set out what is now solemn procedure, that is to say trial by jury. Yet, there is a small aspect under the heading of "Application by Summary Complaint" in the following terms:

> "In all cases which require extraordinary dispatch, the private party aggrieved, or the Procurator Fiscal, may apply to the Sheriff by summary complaint, who, if he sees cause, will either grant warrant for bringing the party before him for examination, or appoint the complaint to be intimated to the defender, and ordain him to appear personally in court for examination, or to make answers thereto, upon such *induciae* as he shall fix; and shall farther proceed therein as the nature of the case shall require."[38]

The expedient nature of early summary criminal prosecution and its adaption from other forms of process is revealed in the regulation as a mixture of the

[37] R. Clark, *A View of the Office of Sheriff in Scotland* (Edinburgh: Bell and Bradfute; 1824), 345-54.
[38] ibid, 353-54.

terminology of solemn criminal procedure and civil practice. There was in due course dissatisfaction at the pragmatic mode of summary criminal practice either because of the terms of the law or the way it was applied. Sustained and informed by a commentator in 1857, for example, was directed at the inherent lack of fairness of the procedure for an accused, the absence of full appeal procedure and the capabilities of the unpaid magistrates.[39]

Notwithstanding these critical views of past and contemporary practices, it was clear that summary criminal procedure by the middle of the century had become acceptable *in principle* as a divergence from the traditional procedure:

> "Constitutionally speaking, no one should be convicted of a crime except by verdict of a jury. Not that jury trial is, in the abstract, the best means of arriving at the truth in a disputed question of fact. We have not met many men who believe that it is." [40]

The relevant legislative change might be said to have been most apparent in two provisions; the General Police and Improvement Act 1862 (c.2).[41] and the Burgh Police (Scotland) Act 1892 (c.55).[42] The latter Act with 518 sections and ten schedules, by the long title, regulated "the Police and Sanitary Administration of towns and populous places" and facilitated "the union of Police and Municipal

[39] Anon. 'Police Jurisdiction' (1857) 1 *Journal of Jurisprudence* 142-151 explains in detail the issues, and a letter, ibid, at 379-381 offers further contemporary examples of unfairness and suggests some reform.
[40] ibid, 146.
[41] J.C. Irons, *Manual of Police Law and Practice* (Edinburgh: T & T Clark 1876).
[42] The Act had a long history: see Anon. 'The Struggle for the Burgh Police (Scotland) Act 1892', (1892) 8 *Scottish Law Review* 181; and J. Muirhead, 'The Burgh Police (Scotland) Act 1892', (1892) 8 *Scottish Law Review* 317.

Administration in burghs in Scotland". The content of the Act included under Police Administration, street lighting (ss.99-106), cleansing (ss.107-127), slaughter-houses (ss.278-287) and fire and fire-establishment (ss.289-299). Ten of these sections create a variety of new offences.[43]

Further, Part VI of the 1892 Act made extensive provision for offences and penalties: s.380 set out a £10 fine or sixty days' imprisonment maximum competent sentence for eight offences which in their specification of alternative modes of commission suggests a combination of alternatives implying far more possible offences, "publishes, prints or offers for sale" and so on. A £5 penalty is competent for four more offences and a penalty of £2 is competent for eight offences. Section 381 established "police offences", being criminal behaviour in a street which was widely defined, with a £2 maximum competent sentence. The section then specifies 53 different individual offences.[44] Habitual drunkards could be dealt with in terms of s. 381(24) with an aggravating offence with enhanced penalty for repeated drunkenness: s 382. All the provisions dealt with subject-matter that was unsuitable for trial by jury.

Contemporary statistics were considered closely: in 1897, 154,000 individuals were prosecuted which contrasts with 1900 when the police dealt with 180,000 individuals. This increase of 26,000 over three years may not have been quite so dramatic as "the same man or woman may get into trouble twice or thrice or oftener

[43] See ss 101, 113-4, 119, 125, 283, 287, 289, 290 and 296 of 1892 Act.
[44] These included the strange offence, in terms of s 381 (32), of permitting "any female to stand on the sill of any window, in order to clean, paint, or perform any other operation upon the outside of such window, or upon any house or other building, unless such window be in the sunk or basement storey".

during the same year."[45] In many ways, the legal context is critical: in the same era, the numbers of crimes and offences in England were proportionately very much below those of Scotland. A contemporary explanation was that England had no public prosecutors.[46] There was said to be reluctance in England for those with a grievance to bring their own prosecution.[47] Such broad statements, even by contemporaries, do not sit easily with assertions by historians that the level and nature of crime in Scotland reflected trends found south of the Border.[48]

The state of the law at the start of the twentieth century

The effectiveness of any law reform required that the implementation of any sanction of the courts was compatible with the prevailing conditions: legislative expectations through changed legal requirements has to match the ability of those affected to be able to comply with the changes. Henry Brown, who had extensive experience in practice, wrote in November 1905:

> "It has been remarked, somewhat bitterly, that there is less difficulty in prosecuting a man for murder than for failing to vaccinate his child. This is merely a forcible way of saying that summary procedure is hampered by petty rules and restrictions from which solemn procedure is free."[49]

[45] McHardy (n. 34), 46-47.
[46] The possibility of public prosecutors there had, however, been considered: Anon. 'The Cost of a Public Prosecutor' (1877) 21 *Journal of Jurisprudence* 572.
[47] McHardy (n. 34), 47.
[48] David Smith, "Drinking and Imprisonment in Late Victorian and Edwardian Scotland", *Social History*, 19(37) (1986), 161, 162.
[49] H.H. Brown 'The Recovery of Statutory Penalties', (1905-1906) *Scots Law Times* 100.

The law of criminal procedure needed developing for the new demands. From 1864 to 1908 there emerged a summary criminal jurisdiction.[50] Indeed the passing of the Summary Jurisdiction (Scotland) Act 1908 (c.65) ("the 1908 Act") when taken with the reforms of twenty years earlier: "produced the nearest approach to a code of procedure that Scotland has yet possessed."[51] One writer in the mid-Victorian era had been moved to assert that advise that the criminal law of Scotland was "perhaps as near to perfection as the code of any of the surrounding nations. It is at once simple, mild and equitable."[52] A few years later a writer, possibly the same person as the earlier, contrasted criminal law and civil law with the comment that the: "character, liberty or life of the subject is involved in the former; the patrimonial interests are chiefly affected by the latter".[53]

It was noted then by a contemporary commentator, with a degree of exasperation perhaps, that the Summary Procedure Bill that went through Parliament had about 15 additional clauses introduced. These substituted local appeals then for appeals to the central courts and that was seen as "another attempt of the Edinburgh bar to draw business thitherward"[54] The appeal clauses were struck out in committee mainly it would seem, due to Glasgow influence. The practical lesson to be learned from the Bill was that there were signs of legal self-interest in the details of the reforms.[55] At any rate, the 1864 Act intended by the long title to make provision for the uniformity of process in summary criminal prosecutions and prosecutions for penalties in the inferior courts in Scotland. The substance of the Act was process,

[50] L. Farmer, *Criminal law, tradition and legal order* (Cambridge University Press 1997), 75
[51] Renton and Brown (n. 9), Preface, v.
[52] Anon. 'Criminal Procedure in Scotland', (1859) 1 *Scottish Law Journal* 25. C.f., these comments with the quote supra and fn.39.
[53] Anon. 'Criminal Procedure', (1862) 1, New Series, *Scottish Law Journal* 37.
[54] Anon. 'Criminal Procedure', (1864) 3, New Series, *Scottish Law Journal* 33.
[55] ibid.

which is to say the forms and styles from first step down to bringing the matter under judicial cognisance.

Further anonymous comment on summary criminal procedure disabused anyone who took an interest of any idea that the reforms then had improved the state of the law: the first article argued that:

> "The observant reader of our writers on criminal law and the Justiciary reports of decided cases, cannot fail to be struck with the frequent escapes from justice of prisoners on purely technical grounds. These cases forcible illustrate the extreme strictness of our practice, and the tenderness with which accused persons have been regarded since the bad practices of earlier times."[56]

The authorities cited by the anonymous commentator demonstrated the principal complaint, but they were restricted to solemn prosecutions. In the following two articles, the writer provided greater analysis of the problems in the application of the law again regarding solemn prosecutions.[57] Trial by jury then was difficult and, it would seem, possibly becoming close to impossible.

In the concluding paper, summary criminal procedure was considered with a few cases selected from "a host of reported decisions" in which inferior court convictions have been set aside on review by the Supreme Court.[58] The quite severe criticism of the pedantic and technical nature of the successful grounds of appeal was

[56] Anon. 'Escapes of Prisoners on Technical Grounds', (1865) 4, New Series, *Scottish Law Journal* 46.
[57] ibid, 53 and 61.
[58] ibid, 69.

based on about 70 cited cases, and illustrated "justice groping blindly through a confused mass of antiquated and artificial formalities, which perplexed even our Judges, and which led to manifest contradictions and to directly opposite opinions."[59]

The problem in its essence was said to be that the question of guilt had been lost sight of in the technical maze, and legal ingenuity had been concentrated upon the discovery of some minute slip which might stop the course of justice and "set criminals at large, unpunished, and wondering at the impotence of the law."[60] The most fruitful of all errors were in point of form in the procedure of the summary courts. Notwithstanding recent Acts then that included the provision that "no conviction shall be quashed for want of form" the Judges of the High Court had held that what mere thought to be mere matters of form had been held to be errors of substance and, as a result, convictions had been "remorselessly quashed". The commentator then confessed an inability to see any substantial error in cases cited.[61]

The anonymous commentator was subsequently shown to be William B. Dunbar when his articles were reprinted in pamphlet form the following year.[62] At that time, Dunbar was Assistant to the Procurator Fiscal at Dundee and presumably would know from experience the manifest failures of the law to do what it was meant to. It is a significant matter of contemporary comment that the reviewer commences with the point that the work contrasts the barbarous treatment to which accused were subjected before the eighteenth century when torture was prevalent with "the tenderness with which they are treated in our modern practice, under which they get

[59] ibid, 73.
[60] ibid, 73-74.
[61] ibid, 69-70.
[62] Anon. 'Book Review', (1866) 5, New Series, *The Scottish Law Journal* 77.

the utmost advantage from every trivial slip of the prosecutor or the jury."[63] Any prosecution for crimes *mala in se*, murder or rape for example, could proceed with the view of the Court firmly on the behaviour to be condemned if confessed or proved, Prosecutions for offences *mala prohibita* were viewed differently, and often considered as scarcely criminal conduct at all.

The Reform of 1887

The complications in the form of indictments had become before 1887 such "as to make it almost a matter of surprise when a criminal, if adequately defended, ever reached the stage of being tried at all."[64] The Criminal Procedure (Scotland) Act 1887 (c.35) was intended, by the long title, to simplify the criminal law of Scotland and its procedure and to alter the constitution of the Justiciary and Sheriff Courts. In practice, most the reforms were directed at the then archaic conditions under which the most serious crimes were prosecuted. Certainly, the structure of the Act was directed at the indictment and the related solemn procedures.

Yet, some consideration was given to summary practice but it was hardly carried out in a satisfactory manner. Section 71 of the 1887 Act merely listed the 25 sections "and the relative schedules" in the Act that had been intended principally for solemn business as being applicable also to summary prosecutions. It did not in that style of drafting suggest that summary procedure was much of a policy priority. Nor did it make for easy reference in practice. Thus, ss.4 to 15 imported into the charges as set out on summary complaints a variety of reforms which had the effect of simplifying the words of the charges. Sections 58 to 70 made patent that there were in

[63] ibid.
[64] W.M. Gloag, 'The Margin of Error in Criminal Procedure', (1899) 11 *Juridical Review* 87.

many crimes specified in the sections implied alternative crimes which allowed courts greater opportunity to hold as proved a crime other than one which was obvious on a reading of the charge.

Section 70 adjusted the terms of the remainder of the 1887 Act so that where there was reference to the High Court of Justiciary and the Sheriff Court where the Sheriff is sitting with a jury it shall also apply to all summary complaints in inferior courts. The wording of these sections was by implication adjusted to make that application. The provision at the end of the section was nothing in the 1887 Act made it competent to try summarily a person accused of any crime or attempt at crime, where trial on summary complaint for such crime was not then competent by existing law and practice.

In practice, the new procedure dating from 1887 really was summary, the Lord Justice Clerk (Lord Kingsburgh) commented that: "summary trials must be carried on in more rough and ready way than [jury trials]".[65] The comment was made in a case that was itself an indication of how matters were changing rapidly. It was held that there was no statutory requirement by the new law that an accused had to state in writing a special defence in advance of the trial: summary really did mean summarily.

Of course, there were initial difficulties in adjusting to the new law of 1887 and there are examples illustrating the suspension on appeal of summary convictions. These were often, it would seem, errors of drafting, for example in not specifying

[65] *Howman v Ross* (1891) 29 S.L. Rev. 281 at p.282.

precisely the sections of the Acts said to have been contravened.[66] Others were concerned with the sheer complexity of intensely complex statutory matters, such as the revenue, being prosecuted on a summary complaint yet carrying with serious implications because of divergent judicial views on jurisdiction.[67]

The syllogistic style of drafting indictments was labour-intensive with a need to specify precisely the facts and circumstances said to constitute the crime alleged to have been committed, as well as a conclusion that these two matters taken together constituted a crime committed by the accused. The greatly reduced or minimalist charges on summary complaints without much, and increasingly often no, specification marked a serious departure from the old standards and practices.[68]

The legal textbooks

The literature available immediately before and following the 1908 Act illustrates the state of the law of summary procedure as it had been for many years. Moreover, it has been argued, and correctly so, that notwithstanding the supposed informality of summary procedure it was becoming increasingly an area that was only "comprehensible to those with a professional understanding".[69] The growth of summary procedure has to be seen as a slowly emerging and new jurisdiction with its own practitioners.

[66] *Kemp v Macdonald* (1889) 2 White 323; *Hastings v Charles* (1889) 2 White 325.
[67] *Schulze v Steele* (1890) 2 White 449.
[68] *Bewglass v Blair* (1888) 1 White 574 per Lord Craighill, 577.
[69] Farmer (n. 50), 81

Robert Renton's work on summary procedure was published in 1890.[70] There were then still some police burghs that proceeded to deal the minor matters that might competently be dealt with under the General Police and Improvement (Scotland) Act 1862 (c.101) although the Summary Procedure Act 1864 (c.53) had become was the principal provision until modified by the Summary Jurisdiction (Scotland) Act 1881 (c.33).[71] Section 1 of the 1881 Act provided that these two Acts were to be construed as one and cited together as the Summary Jurisdiction (Scotland) Acts 1864 and 1881. The confusing approach to reform was perhaps accentuated by the summary provisions of the Criminal Procedure (Scotland) Act 1887 (c.35). Renton's book sought to give a concise statement of the law but it arguably demonstrated how unsatisfactory the law of summary criminal procedure had become for the practitioner to need to have recourse to three Acts at least.[72] By explaining the law Renton demonstrated its unsuitability for modern conditions. That was particularly true of appeals where recourse in summary matters proceeded under various provisions depending on the date of the passing of the Act under which a prosecution was raised.[73]

Within a short time of the publication of Renton's work Henry Brown added to the literature.[74] He noted that the "number of persons affected by procedure of a summary character [...] exceeds by many times the number of those arraigned before the more solemn tribunals, and although the punishments competent in summary process are lighter than those which may lawfully be inflicted by the Superior Courts,

[70] R. Renton, *Procedure and Appeal in Summary Cases in Scotland*, (Edinburgh: T. & T. Clark, 1890)
[71] ibid, 84.
[72] There were contemporary provisions such as the General Police and Improvement (Scotland) Act 1862 (25 & 26 Victoria c. 101) and the Summary Prosecutions Appeals (Scotland) Act 1875 (38 & 39 Victoria c 62): Renton (n. 70) 84-91 and 99-107 respectively
[73] Renton (n. 70), 99 and Moncreiff (n. 12), 189.
[74] Brown (n. 7).

they are not in any sense trivial".[75] Brown also referred to the principles of procedure "which are truly identical in the several courts, notwithstanding some diversity in their forms of process". [76]

Thereafter Brown listed the twenty-three Acts of Parliament (from 1746 to 1892) that indicated that summary criminal procedure had not been ignored by the legislature, but the outcome of that attention was deficient for changing conditions. It was, he wrote, "to be regretted that the numerous and varied enactments make a patchwork of a pattern so confused".[77] Moreover, there were several local Police Acts applying to the larger towns, and a number of Acts of Parliaments conferring or modifying powers of punishment.[78]

Brown suggested that the practice of summary courts prior to 1828 was of interest mainly to the legal antiquarian: he selected that year because of the passing of what was known traditionally as 'Sir William Rae's Act', more properly referred to as the Circuit Courts (Scotland) Act 1828 (c.29). That Act ought to be considered with the Criminal Law (Scotland) Act 1830 (c.37) by which shape was given to summary criminal process.[79] The point made by Brown was that there was for him three epochs of summary criminal procedure; prior to 1828, then from Sir William Rae's Act to the reform of 1864, and thereafter thirty years to Brown's own era.[80] Little is said by Brown of the direct influences on or the real reasons for the development of summary

[75] ibid, xix.
[76] ibid, xix.
[77] ibid, xx-xxi.
[78] ibid, xxi.
[79] ibid, xxi.
[80] ibid, xxi.
[80] ibid, xxi-xxii.

procedure. It is a hint of the changes that were afoot that there was even a comment on the method of addressing the court.[81]

It may seem incredible now that it could be observed that "the Summary Procedure Acts make no provision for the parties or their agents addressing the Court." [82] This is supplemented with the observation that it was always right that the Court should hear what is to be said on behalf of parties.

> "[I]n addressing the judge, brevity and cogency will be studied. Rhetoric is out of place in a summary criminal court. The speaker will select the most telling facts, and press in few words, but with firmness, the grounds upon which he rests his appeal for acquittal or conviction, as the case may be".[83]

That sagely advice extended to a few (eight are given) of "the ordinary grounds" or reasons for mitigation of punishment.[84] The list would come as no great shock to the modern practitioner, beginning with 'good character' and ending with "an expression of penitence for the past, and a promise of amendment for the future".[85] In requiring only such instant advocacy, and in many other ways, summary criminal procedure had "to a very great extent supplanted the old order of things" [86]

Nevertheless, the overarching comments in 1894 from HH Brown were, first, to advert to the poor standards of summary court practice leading to appeals: "no one

[81] ibid, 160-162.
[82] ibid, 160.
[83] ibid, 161-162.
[84] ibid, 161.
[85] ibid.
[86] See (1889) 1 *Juridical Review* 225 discussing *Mackenzie v McPhee* (1889) 2 White 188.

can fail to be astonished at the slovenly practice which is occasionally permitted in summary criminal courts".[87] Secondly, the nature of summary procedure then was being telescoped or abbreviated from what court lawyers had been used to: "summary procedure must be rapid; but rapidity has to be guided by knowledge of principles."[88]

Similarly, WM Gloag in 1899 referred to the reformed indictments then being "almost ludicrously simple" and he also thought that something like the old system "still lingers" in the case of summary complaints before the Sheriffs or the Justices of the Peace.[89] These documents were, he asserted, often carelessly prepared and the procedure, following on from service, was marked by irregularities. In reviewing contemporary reported authorities Gloag assessed the Sheriff and the Magistrates as "usually the administrators of that network of penal statutes by which the modern man […] is surrounded […]"[90] The precise nature of judicial duties seemed to have changed.

By reference to 27 reported cases in the seven years before publication of his article Gloag could specify examples of where errors arose: "a loophole of escape is occasionally offered by a discrepancy between the principal copy of the complaint and the copy served upon the accused."[91] The difference seems to have been due to the pre-printed documents being filled in with the alleged facts, and errors being made in that regard. Gloag indicated the possible means of avoiding a conviction "in the hope that it may be of use to some at least of the criminal classes. The contravention of the Burgh Police Act may be the first step which leads to a life of crime; and a

[87] Brown (n. 7), xxiv.
[88] Brown (n. 7), xxiv.
[89] Gloag (n. 64), 87.
[90] Gloag (n. 64), 87-8.
[91] Gloag (n. 64), 89 and *Stewart v Lang* (1894) 1 Adam 493.

contravention for such an offence, if not followed by a suspension, may undermine that self-respect which is the leading characteristic of the good citizen".[92]

That much seemed to have been known to the Government for there was in existence then a Departmental Committee on Sheriff Court Procedure. The matters in issue did not take absolute priority.[93] Five years, for example, elapsed between the third meeting on January 16, 1899, and the fourth meeting on January 4, 1904 after which there was a report for the public.[94] The main focus of the attention of the committee members seems to have been the civil jurisdiction of the Sheriff Court but the criminal jurisdiction was considered.

Robert Renton, as Procurator Fiscal for Midlothian and also Secretary of the Association of County Procurators Fiscal gave written and oral evidence. He identified, in his *precis* of evidence apparently provided in advance of his appearance before the committee, four different 'systems of procedure': these were: first, the summary jurisdictions legislation available to all courts; secondly, separate police legislation for Edinburgh and Glasgow; thirdly, the Burgh Police (Scotland) Act 1892 of general application throughout Scotland; finally, the Tweed Fisheries legislation.[95] Renton suggested the desirability of consolidating these into one Act.[96] Specific areas for possible improvement were identifies by those in practice and that extended from the law procedure to the law of evidence.[97]

[92] Gloag (n. 64), 95.
[93] National Records of Scotland [hereafter 'NRS']: HH83/135.
[94] NRS: HH83/745.
[95] ibid, 53.
[96] ibid, 53.
[97] ibid, 53-4.

A potential Bill encompassing the changes had been provided by the Association of County Procurators Fiscal in 1898 and that was again offered for consideration for implementation in the Sheriff Courts, the Police Courts, and the Justice of the Peace Courts all of which had a summary criminal jurisdiction.[98] Something of the essence, or perhaps better described as tensions, of the legal change of the era is available in questioning of the committee and, thus, question 844 was this: "What have you to say with regard to the law of evidence in summary cases?" Renton replied:

> "Many of the prosecutions in the summary criminal courts are really not of a properly criminal character but are for the recovery of penalties for breaches of statutory regulations made in the interests of public safety or public health, or with a view to the protection of certain classes of society. Prosecutions under the Coal Mines Regulations Acts, the Public Health Acts, the Factory Acts, are familiar illustrations of this. But although this is so, the strict rules of law applicable to criminal procedure apply to all such prosecutions."[99]

The implication of all the contemporary comment was, accordingly, that with summary criminal procedure the swift despatch of mounting business was necessarily becoming the principal, and perhaps only, object. The legal profession in practice was faced with a different type of summary business with a criminal procedure that did not allow for the older and more pedantic practices and yet was intolerant of a failure to adhere to the basic principles: the summary reforms of 1887, such as they were, had not achieved much.

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[98] ibid, 55.
[99] ibid, 54.

The substance of the 1908 Act

The Edwardian Under-Secretary at the Home Office, Herbert Samuel, advised that when "the sessional programme is crowded [...] and there is much competition between Ministers for the time available, a Bill should either be so small and uncontroversial that it is likely to slip through quickly, or else be so striking and important that it would attract a wide public interest and a cordial parliamentary support."[100] There is a further option and that was of introducing a Bill at the close of a Parliamentary session so that it might be considered by those with an interest before Parliament met again. That seems to have been done in 1907, although it ran out of Parliamentary time.[101]

The successful Summary Jurisdiction (Scotland) Bill was introduced to the House of Commons on 9 July 1908 by the Lord Advocate (Thomas Shaw QC). Emphasis was laid on the desirable need for simplifying and codifying the very extensive legislation in several large statutes then regulating summary procedure.[102] The second reading of the Bill in the House of Lords was on 14 December 1908.[103] There, Lord Balfour of Burleigh thought that that there was within Scotland virtual unanimity in accepting the principles of the Bill. The House agreed and passed the Bill.

[100] Lord Samuel, *Memoirs*, (London: The Cresset Press 1945), 55
[101] R.W. Renton, 'The Criminal Procedure and Summary Jurisdiction Bill 1907 (1907) 23 *Scottish Law Review* 309.
[102] Parliamentary Debates, H.C. Deb. 09 July 1908 vol.192 cc. 99-105.
[103] Parliamentary Debates, H.L. Deb. 14 December 1908 vol.198 cc.1205-7.

The effect of, or the change brought about by, the Summary Jurisdiction (Scotland) Act 1908 was explained by Robert Renton. He gave a talk on 22 September 1908 to solicitors in Glasgow in which he indicated that the 1908 Bill was the same in effect as that the Bill of the year before but that 'valuable suggestions' had been included.[104] Renton identified six principles that were broad features of the Bill: (1) it provided one uniform procedure applicable to all summary criminal courts where previously there had been variations; (2) provisions had been inserted for the purpose of reducing the verbose statements then described as so common in statutory charges; (3) the minutes of procedure and sentence were intended to be clear and intelligible but stated with the fewest possible words; (4) a modification on the existing law of evidence in criminal cases had been introduced which was intended to allow admissions being given by either party where facts were not in issue; (5) there was an extension of the maximum competent powers of the Sheriff; (6) a simple and comprehensive system of review was introduced.

The 1908 Act applied, by s.4, to any offence which might prior to the Act be tried in a summary manner. Also, it applied by the same section to any offence or the recovery of a penalty under any statute which does not exclude summary procedure. Finally, the section also applied to any order that involved something other than the payment of money as far as the relevant court had jurisdiction in the matter.

The annotations to s.4 provide a probable clue to one of the reasons for the reform: there had been decisions on appeal to the effect that certain prosecutions for Sunday trading under ancient Acts of the Old (pre-Union) Scottish Parliament could

[104] R.W. Renton, The Summary Jurisdiction (Scotland) Bill' (1908) 24 *Scottish Law Review* 219.

not be tried summarily owing to certain of their provisions being, it was thought, inconsistent with summary procedure.[105] The old approach was hardly conducive to a Government intent on improving, for example, the working conditions of shop staff.[106] There is also reference to a series of seven reported cases where it had been held that summary prosecutions were competent under a variety of what may well have been less commonly enforced statutes.[107] One example was the Alkali Works Regulation Act 1881, bearing on the safety of workmen.[108]

There was of course the enduring solemn reform in 1887 of Sir John H.A. Macdonald QC MP (by 1908 Lord Kingsburgh). An essential reform then was to replace long and at times impenetrable indictments filled with complex set phrases with a simple charge in which there was implied the details the specification of which had so occupied earlier generations.[109] Comparable provisions were made by s. 71 of the 1887 Act for the then summary procedure. The thrust of the reform was directed at indictments as can been seen from the may explicit sections directed at the overly demanding documents that clearly by reason of the accumulated practice of generations resulted in form before substance.

Further, there may well have been some antipathy by Judges and the Law Officers, and advocates, towards summary criminal procedure, and those able to establish general policy probably had little experience of the workings of any

[105] Thomas Trotter, *The Summary Jurisdiction (Scotland) Act 1908: With Introduction, Notes and Forms* (Edinburgh and Glasgow: William Hodge and Company, 1909), 83, fn. 4 citing *Bute v More* (1870) 1 Couper 495 and *Nicol v McNeil* (1887) 1 White 416
[106] H. Samuel, *Liberalism*, (London: Grant Richards, 1902) p 87-90 esp. at p 87 "In hardly any class of employment is overwork so widespread, in hardly any is it carried to so shocking an extreme, as in shop employment in our large towns".
[107] Trotter (n. 105), 84, fn.4.
[108] *Fletcher v Eglinton Chemical Company* (1886) 1 White 259
[109] See Criminal Procedure (Scotland) Act 1887 ss. 2, 16, 71 and Sched A (for examples of abbreviated indictments) and e.g 8-15 inclusive (for implied terms that avoided objections being taken) and article

summary procedure as practitioners, except perhaps on review of convictions.[110] Further, the sources of the new statutory offences were Acts of the United Kingdom Parliament and generally applicable across all home jurisdictions: the common law of Scotland was slowly being supplemented by a new form of law and application.

The transferred wisdom from s.71 of the 1887 Act became s.5 of the 1908 Act which encompassed the implied terms but in a far more explicit manner accentuating it may reasonably be said the benefits to be accrued by summary prosecution. The newer substantially re-enacted the later but from a presentational point of view the summary rules were beginning to receive their own attention rather than being a mere appendage to solemn requirements.[111]

Practical assistance for the reform

In 1904, the members of the *Association of Procurators Fiscal* produced a small book with 'Forms', or what might be called styles or draft charges for the use of local public prosecutors.[112] With suitable amendment to meet the individual facts of a prosecution, the forms might provide a suitable starting place. The aim of the publication was intended "to secure uniformity in the preparation of summary complaints".[113] The Association had asked in a circular for examples of summary complaints and "many hundreds of Forms were sent it".[114]

[110] Moncreiff (n. 12) published his treatise, which covers summary criminal procedure, for the purpose of appeals: Preface, iii.
[111] See Sched. B of the 1908 Act which reproduces the summary rules.
[112] English-trained lawyers might call them precedents, but perhaps they were not strictly that
[113] Anon. *Forms in Summary Criminal Procedure Prepared by a Committee of the Association of Procurators Fiscal*, (Edinburgh: John Baxter and Son; 2nd Ed. 1911), Preface, xvii.
[114] ibid.

Style charges were drafted by the Procurator Fiscal at Dundee (Alex Agnew) and at Cupar (Henry H. Brown) and considered by a committee of eleven Procurators Fiscal, including Robert Renton. "The duty of finally adjusting the Forms and passing them through the press was remitted to a sub-committee consisting of Mr Agnew, Mr Brown and Mr Renton."[115] The resulting publication was issued in 1904 and the Forms were "favourably received by prosecutors and clerks, who found their labours considerably lightened by them".[116] The new Act of 1908 rendered these Forms out of date and a new publication was thought necessary "after some experience of the statutory forms had been gained by actual practice".[117] The second edition of 1911 was prepared by the ubiquitous Messrs Renton and Brown, Alex. Agnew having died recently, and considered by a committee of six Procurators Fiscal. The final work of adjustments was left to Messrs Renton and Brown.

The Form book was essentially a collection of draft summary charges based on the accumulated experience of practitioners. The Forms set out in the book reflect the abbreviated method of stating criminal charges following the reforms of 1887 and 1908. All words and phrases which under these statutes were held to be implied in statements of charge were omitted, therein probably is to be found the key to the reform, namely "the abbreviated method of stating criminal charges".[118]

The style book begins with a reprint of the *schedules* of the 1908 Act and it also has arranged the Forms into summary complaints for common law charges; summary complaints for statutory contraventions and summary applications and

[115] ibid.
[116] ibid.
[117] Anon. (n. 113) xvii.
[118] Anon. (n. 113) xviii.

miscellaneous forms. On a broader view, the Association's book is evidence of an internal dynamism that had come to influence the development of the Scots summary criminal jurisdiction. It was the work of many individual practitioners who collectively were providing an important element in the practice of the existing law that informed the development of the momentum of government.

One point of crucial relevance must be considered because of its importance to the *efficiency* of summary prosecution and the development of identical charges: there are lots of ways of killing others but very few ways of committing a highly specific regulatory offence. The traditional manner of charging an accused on indictment required a charge that gave with the requirements of law fair notice of the manner in which the crime charged had been committed. There could be no such great attention to detail for minor regulatory charges in huge bulk.

In some court the use of forms provided by certain statute was "imperative".[119] Yet, the public prosecutor did have options as to which of several statute to proceed under with the provision that a mistake in the choice of the appropriate form might have led to the conviction upon a complaint being set aside.[120] By 1895 the two choices were summary complaints for charges at common law, or for statutory offences. The examples provided by H.H. Brown would appear to be in the forms of *petitions* to the Sheriff, and were, in practice, probably handwritten.[121] The examples provided were based on amended complaints originating in the 1864 Act. These were to be taken seriously because, first, a new offence was being created and a punishment

[119] Brown (n. 7), 41.
[120] Brown (n. 7), 42 and case cited there.
[121] Brown (n. 7), 42-4.

imposed which did not exist previously at common law; and, secondly, the right of an accused to be tried by a jury was removed.[122]

There were examples of charges in the Criminal Procedure (Scotland) Act 1887 applicable to summary complaints.[123] These were supplements by examples in Summary Jurisdiction (Scotland) Act 1908.[124] Perhaps the few words, crucial to the reform were those in s.19 of the 1908 Act which provided that the charge in a summary complaint required to be "stated in accordance with the forms contained in schedule C to this Act. No further specification shall be required than a specification similar to that given in said forms".

The contemporary view was that the section: "introduces short and simple forms for libelling charges, both at common law and under statute."[125] That part of s.19 is supplemented by subsections (1) to (7) that provide for rules that may be said to buttress summary charges by implication or inference and thus assist to expedite the whole procedure, for which one might read the processing of charges.

Improved business practices

The previous practice of individual drafting of petitions to go before a Court, even for summary matters, was an onerous task and unsuitable for prosecutions of large numbers of people for essentially the same inappropriate behaviour.[126] The old rule and its authority was:

[122] Moncreiff (n. 12), 127, fn. 1.
[123] 1887 Act, s.71 and Schedule A.
[124] 1908 Act, ss. 16,18, 19 with Schedule C.
[125] Trotter (n. 105), 113, fn.4.
[126] Renton (n. 70) provides styles at pp.113-127 which, it is understood, required to be drafted individually.

> "A general dispensation with written pleadings contained in the Act of Parliament founded upon, does not extend to the initial writ, which must always be in writing (*Law v Steel*, 21 July 1846, Ark. 109)"[127]

The 1908 Act was seen at the time merely as a consolidating Act.[128] Yet, it allowed for the more efficient despatch of business and better management of the courts, taking advantage of change from 1846. Change came in many ways: the business practices of the late-Victorian era had affected the practice of law in ways now forgotten.

> "The typewriter has proved itself to be an instrument of great utility in the legal office […]. The law clerk is now an almost unknown quantity in the smaller office [..]".[129]

It is to be recalled most of the Procurators Fiscal were solicitors in private practice, holding down several appointments as well as running a business with defence solicitors in other firms. For all in private practice, the pursuit of efficiency led to changed standards.

> "The utility and cheapness of the typewriter has led to certain of the smaller agents [i.e. smaller businesses] regarding it as the chief god of the office, and so long as they can have rattled off at economical rates all the steps which

[127] Brown (n. 7), 40
[128] Trotter (n. 105), 81.
[129] Anon. "Notes from Edinburgh" (1909) 25 *Scottish Law Review* 197-208, 201-203.

> form a process for use in Court, they take no heed of the fact that processes are meant to be durable and, so far as possible, permanent articles, and that in a short space of time, both the typewriting and the rubbishy [*sic*] paper used are liable to vanish".[130]

It seems unlikely that an Edwardian Procurator Fiscal with responsibility in a Scottish burgh for prosecuting drunks or public urinators, or whatever ghastly behaviour the criminal classes got up to regularly within his jurisdiction, would see his role as anything other than a process. The development of the statutory and regulatory regime of the nineteenth-century led to the growth of an industrial aspect to the Scottish legal system. The economies of scale came from placing the many accused before a summary court in large numbers with an unobjectionable complaint at lowest cost and as efficiently as technology then permitted. The advent of the typewriter meant that pre-printed summary complaints following the forms in the schedules needed only the minimum personal details added to the forms and no handwritten petition by a skilled draftsman was then necessary.

Indeed, given the apparent certainty that human behaviour runs in patterns, little was probably required in advocacy in court: a drunk found lying on a pavement in any High Street, like many regulatory offences replicated on a weekly basis, could be served with a summary complaint and there was little for the forces of law and order as represented by the Procurator Fiscal to say about the matter. The earlier novelty of typewriters was replaced less than a decade later with its greater familiarity.[131]

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[130] ibid, 203-204.
[131] W.C.D., "The Typewriter" (1916) *Scottish Legal Review* 36 discusses law cases about typewriters.

Doubtless the typewriter became a boon for the textbook writers: the complexity of the new statutory regimes and the resulting case law provided a different sort of legal commentator from the Institutional Writers and even the work of Sir John H.A. Macdonald in the mid-Victorian era. The proliferation, for a jurisdiction the size of Scotland, of legal textbooks on the 1908 Act nevertheless reflects, presumably, a commercial demand given the scale of the reform as well as available expertise on summary procedure, or at least people with sufficient time and interest to write about it. Robert Renton and Henry Brown, until then separate authors, conjoined their respective earlier work to produce a new book that became the standard work.[132]

Thomas Trotter produced a substantial work on the passing into force of the 1908 Act which must have stood its ground, intellectually and economically, to justify a further work six years later to bring the relevant law up to date.[133] The first 21 pages of his 1908 edition might then be read as a substantial description of the jurisdiction of summary prosecution, as a developed area in its own right rather than merely an appendage to traditional solemn business. He persevered to the extent of producing a new work encompassing the earlier volumes brought up to date.[134] David Dewar was a prolific author, although his small book merely reproduced the 1908 Act along with some other statutory summary provisions.[135]

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[132] Renton and Brown (n. 9), starting in 1909, was the first of six editions.
[133] Trotter (n. 105) and by the same author, *The Law of Summary Criminal Jurisdiction: Supplement* (Edinburgh and Glasgow: William Hodge and Co., 1915)
[134] T. Trotter, *Summary Criminal Jurisdiction According to the law of Scotland,* (Edinburgh and Glasgow: William Hodge and Co. Ltd.:1936)
[135] D. Dewar, *The Summary Jurisdiction (Scotland) Acts,* (Edinburgh and London: William Green and Sons, 1910)

Discussion

The "constant nineteenth-century question" has been said to be: "what should government do?" [136] There was what has been described as "a capillary growth" of regulation in the areas of retail, health, welfare, and leisure particularly from the 1890s that was designed to alleviate social conditions and impose order.[137] Creating offences by statute was one matter, ensuring their prosecution successfully was a separate issue. Summary reform was directed to the practical implementation of legislative intentions and it was concerned with providing the courts with a modern means of doing so.

By the early 1900s there emerged a growing consensus in favour of positive action by the State to improve the working of the economy and advance social reform: laissez faire had lost its hold.[138] Perhaps the majority of Victorian business men believed in a market economy and wanted to keep State powers to a minimum. They nevertheless recognised the need for the State to intervene, not least in the provision of the public provision of decent drainage and sewerage, and the maintenance of law and order.[139]

The reform measures of a general nature passed by the Liberal Government might be considered in at least three groups: first, children and the old; second, unemployment and minimum wages; finally, health insurance.[140] The nineteenth

[136] Hoppen (n. 1),118.
[137] B. Godfrey, 'Changing prosecution practices and their impact on crime figures, 1857-1940', *Brit. J. Criminol.* 2008, 48(2), 171, 183.
[138] A.V. Dicey, *Law and Public Opinion in England*, (London, Macmillan, 2nd edn 1914) p. xxxi.
[139] G.R. Searle, *Entrepreneurial Politics in Mid-Victorian Britain*, (Oxford: Oxford University Press 1993) p 316.
[140] J.R. Hay, *The Origins of the Liberal Welfare Reforms 1906-1914*, (London Macmillan 1975) Chap. 4 esp. pp.43-57

century reform of public social welfare services had been in essence a move from local authorities to central government and that had resulted in statutes containing numerous new statutory offences. Reform was necessary for the greater efficiency of new legislation.

Particular mention must be made of the need to reform the law relating to mental illness which seems to have been long acknowledged and Edwardian reform followed a Royal Commission. [141] The resulting legislation was intended, by the long title, "to make better and further provision for the care of mentally defective persons".[142] The Act contained several offences, ss. 43, 44 and 45, which when read with s.77, could have been dealt with competently by imprisonment or by fines.[143] A contemporary commentator noted that the new legislation bore obvious traces of having been passed hurriedly.[144] Nevertheless the importance of the subject matter served to enhance the need for efficient dispatch of contraventions of the essentially protective legislation.

The Convenor of the Sheriffs of Scotland (Sheriff J.M. Lees) intimated to the government that the Sheriffs "approve generally of the Bill as it now stands".[145] Such reticence suggests a certain grittiness with the nature and extent of legislative change then applicable to Scotland. It may well have been that the development of the State was imperceptible for most of the nineteenth century and that nobody seems to have

[141] J.E. Graham, *The Mental Deficiency and Lunacy (Scotland) Act 1913*, (Edinburgh: William. Hodge, 1914) p 1-8
[142] The Mental Deficiency and Lunacy (Scotland) Act 1913 (c 3 & 4 Geo. 5 ch. 38)
[143] Section. 43 and 44 were summary matters only and s 45 was triable either on indictment or summarily.
[144] Graham (n. 141), 14.
[145] NRS: HH60/145, printed submission p1.

realised what was happening.[146] Common assumptions of the past, such as trial by jury, were being displaced. Yet, the Council of the Society of Solicitors in the Supreme Court, representing many practitioners, by a written report concluded more enthusiastically that the Bill had "been carefully prepared and well arranged" and that it was considered that it would "effect considerable improvement in criminal procedure".[147]

There seems to be little doubt that there were serious changes in the Scottish legal system generally, and particularly criminal procedure, in the Edwardian era that marked a break with the past. Indeed, Sheriff James Irvine Smith QC identified 1908 as the point down to which the inquisitorial system had survived in Scotland.[148] He did not give reasons for specifying that year but some hints as to how matters developed are to be found in the Sheriff's description of what he found in the study of earlier cases. "Seventeenth century Scots law had a profound and, what some might regard as a proper regard for ***the ascertainment of the facts*** of a case, as the principal object of criminal procedure".[149] Thus, the tribunals of the earlier era were:

> "[…] concerned with ascertaining facts, not with providing rules whereby two sides might, more or less decorously, sublimate a trial by combat in words, and they would have regarded as unrealistic and dangerous, if not perverse, any system in which the accused person could not be examined, confronted with evidence against him, and asked for his explanation, and in which the

[146] GSR Kitson Clark, *An Expanding Society, Britain 1830-1900* (London: Melbourne University Press, 1967) p. 126.
[147] NRS: HH60/146: printed report p1.
[148] J. Irvine Smith QC "Selected Justiciary Cases, 1624-1650" (Edinburgh: The Stair Society, 1972), vol.2, x.
[149] ibid. Bold emphasis added.

verdict might turn on considerations which bore little or no relation to the facts."[150]

Sheriff Irvine Smith was historical commentator and he was a practical lawyer of the 1950's through to the 1980's.[151] He would know from experience, as did others, that the ascertainment of the facts for many of the new statutory offences, that proceeded summarily, facts were proved primarily by written certificate or reports by skilled witnesses. Many also were exceedingly small events which simply could not justify extensive investigation.

Concluding remarks

Three factors in the early nineteenth century changed the relationship of the State to its subjects or citizens in matters of crime and punishment. These were state-building or the growth of bureaucratic centralism, the development of capitalist practices, and urbanisation.[152] To enforce the statutory regulations associated with these changes, particularly the first and third, a new mode of prosecution was required. Generally, it is to be recalled, the policy formation in the Victorian and Edwardian legal system was required to develop legal processes that could match the demands of an industrialised society. Specifically, these procedures had to be able to process, swiftly and economically, the very large numbers of criminal cases that certainly did not envisage or carry the risk of mass imprisonment or any imprisonment for very long periods.

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[150] ibid.
[151] J. Irvine Smith, *Law, Life and Laughter: A Personal Verdict* (Edinburgh: Black and White, 2011).
[152] R. Gildea, *Barricades and Borders: Europe 1800 – 1914*, (Oxford: Oxford University Press, 3rd edn. 2003) p. 123.

There were Scottish developments from the new criminal procedure: *first*, summary procedure by definition did not need an inquisitorial regime for a penetrating investigation of the crucial event for proof of facts: at the very least, for example, the involvement of trained inspectors, knowing and recalling what to look for, assured the prosecutor of the likelihood of credibility and reliability of the necessary facts required to show that a statutory contravention had occurred. By contrast down to the Edwardian era much serious crime had been disposed of in quasi-inquisitorial fashion following European procedures adapted to Scottish practices.

Under the newer system summary reports (with a synopsis of the police discovery, and perhaps assessment, of evidence) and a different standard of forensic advocacy was all that was necessary to decide to prosecute, to prosecute and to obtain what was often a derisory outcome of a minor fine or very short period of imprisonment. These were for breaches of regulations intended to encouraged civic regulation with due regard to health and safety, and the mass existence in an urban environment. The costings of bulk prosecution loomed large in summary prosecution and is an element yet to be explored. At any rate, there was not much room in all this for those who rely on a moral-philosophical analysis of the law.[153]

Secondly, a problem with an increase of summary prosecutions was that the *bourgeois* element, the wealthy middle class, was running a greater risk than was ever conceived as possible before the late Victorian era of being called upon in a criminal court to justify actions that had endangered the health and lives of others. The disdain

[153] Alan Norrie, "Subjectivity, Morality and Criminal Law" (1999) *Edin. LR*. 359, 361.

with which engagement by respectable people with the criminal courts was occasionally shown up in prosecution policy.[154] Summary criminal prosecution raised the chances of such an event and attendant embarrassing publicity.

Finally, with each reform the balance of the long-established professional relationships and practices were altered. The summary procedure of before the Edwardian era had proceeded upon a petition by the Procurator Fiscal to the Court.[155] After the 1908 reforms a summary complaint was served, and for the commonest offence a standard form was pre-printed and required only a few details to be typed in. While that may not seem much of an advance, it diminished the need for skilled drafting. There can also be inferred from the change a diminution of the Procurator Fiscal as a quasi-judicial appointment with the office-holder working in conjunction with the Court. That argument is supported even more by the increased role of the Lord Advocate in the appointment of a person to hold office.[156] Procurators Fiscal were not yet established civil servants but, in keeping with trends elsewhere, were becoming under more effective political control.[157] Questions of the degree of independence were being settled by State intervention.

There was another important matter to be considered: not all of the legislation passed for Scotland was necessarily unique to the jurisdiction. Thus, in an attempt to supress unacceptable gambling based on animals fighting the Cruelty to Animals (Scotland) 1850 (c.92) had been passed. In a prosecution in Scotland in 1891 the issue that arose for appeal was identical to that which had been considered in England and

[154] M.G.A. Christie (ed.) G.H. Gordon, *The Criminal Law of Scotland*, (Edinburgh: W. Green, 3rd edn., 2001) vol. 2, p. 367, para. 26.09.
[155] Moncreiff (n.12), 126-130.
[156] Sheriff Court (Scotland) Act 1907 (c.51).
[157] Kitson Clark (n. 146), 145.

Ireland where the legislation, albeit in another Act, was identical and their case law was becoming relevant in Scotland.

> "It would not be seemly to put a different construction upon the same language of the same Parliament, used for the same purpose, from that put upon it in England. […] it is fitting […] that we should hold to that construction which has been established in England".[158]

Reform of summary criminal procedure in the context of other legislative changes marks a stage in the development of legal modernity, and it was indeed an improved business process for criminal business in the courts. That was all necessary with many statutory offences such as, for example, contravening the prohibition of indecent advertising. [159] Yet, the threats within the new system were recognised even by late-Victorians:

> "The law, which is proverbially censured for its delay, is not always free from the danger of falling into disrepute on account of the rapidity of its action. Summary procedure which, especially in criminal matters, has to a very great extent supplanted the old order of things, may, and in many cases undoubtedly does, lead to the administration of but summary justice. The machine which has been devised for the swift and certain punishment of the criminal may, unless carefully handled, become a source of danger to the innocent. There is nothing which it is more important for those who are concerned in the conduct

[158] *Brown v Renton* (1891) 3 White 83 per Lord Young, 88-9. The other two appellate judges agreed.
[159] Anonymous, "Summary of Legislation, 1889" (1889) 1 *Juridical Review* 392, 396. "The Act" was the Indecent Advertisements Act 1889 (c.18).

> of the Courts of summary jurisdiction to keep in mind than this - that summary powers must not be hastily administered. Where procedure is summary, regularity must be the more strictly observed."[160]

The same writer thought that: "the interests of the accused were undoubtedly sacrificed to despatch of business" and there was a "tendency so to treat accused persons is not unnatural in those who are daily dealing with the criminal cases, and it was important that it should be restrained".[161] It necessary for the appellate court to ensure "a strict observance or regularity of procedure in all Summary Cases".[162] The balance between *mala in se* and *mala prohibita* in the late-Victorian era tipped in favour of the latter, by substantial legislative action.

All this legislation was not passed for the benefit of lawyers, but someone had to do all the summary business, and the solicitors were getting better at it the more there was. In that respect a final word must be reserved for Robert Renton. He seems by to have been largely, but not wholly, responsible for the 1908 Act and its contents. A dinner was held in Renton's honour.[163] The solicitor branch of the legal profession must surely have seen that in the context of the many new statutory offences an improved and efficient criminal summary procedure marked a serious advance in the potential business for the foreseeable future. The Criminal Procedure (Scotland) Act 1887 and the Bail (Scotland) Act 1888, when taken with that of 1908, driven by Renton, amounted in effect to a code."[164]

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[160] R.T.Y. [Robert T. Younger, advocate] "Notes on Decided Cases" (1889) 1 *Juridical Review* 225-226, at p.225, considering *Mackenzie v McPhee*, (1889) 16 R. (J.) 53; 2 White 188.
[161] ibid, 226.
[162] ibid.
[163] "Honouring the Procurator Fiscal of Midlothian" (1909) S.L.T. (News) 70.
[164] Renton and Brown (n. 9), v.

By the Edwardian era, the evidence of material progress was all around, and not least were the motor cars and the necessary roads, and the taxes to pay for them and many other new things.[165] The coercive element of criminal law was becoming ever more necessary, albeit in an attenuated form, to ensure universal compliance in modern society with regulating statutes, and efficient procedural law was needed to match the task.

[165] Roy Hattersley, *The Edwardians* (London: Little, Brown, 2004) 3.