

The Administration of Law in a Devolved Context

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Introduction

As a preface, and recognising immediately that Scotland and its laws and legal system have their own problems, some of which are unique, the message I wish to convey is that having a small separate jurisdiction has advantages, even if it means formally disengaging from a much larger jurisdiction. There are undoubtedly disadvantages. These should be recognised and, if possible, mitigated, but the ability, figuratively or literally, of all the major players in both a legal and a political system to sit round the same table and discuss ways of addressing ongoing or anticipated problems, and being able to budget for and to implement the solutions, should not be underestimated. Success, for a new legal jurisdiction, depends on the confidence of those operating within it and the perception of those outside it, in Wales and elsewhere, looking in.

A nation can have a devolved legislature, which creates or changes its own substantive laws and legal procedures, yet not have a separate legal jurisdiction or court system. This is, at present, broadly the position in Wales. Conversely, as Scotland pre-devolution illustrates, a nation can have its own jurisdiction and court system, without its own legislature. Historically, in Scotland, this produced pluses and minuses; the nature of which varied depending to a degree upon political viewpoint. The Treaty of Union of 1707

specifically provided¹: (1) for the continued existence of the Court of Session² and the High Court of Justiciary³, collectively known in Scotland as the Supreme Courts (plural); (2) that, with the exception of taxes, the law in Scotland should remain the same until changed by the Parliament of Great Britain; and (3) that private law could be not altered even then, “except for evident utility of the subjects within Scotland”. On the positive side, this meant that Scottish legal institutions were protected, although civil appeals did ultimately go to the House of Lords because of a quirk of drafting in the Treaty. It also resulted in Scots law being protected. It remains a distinct mixed system. On the negative, both the substantive law and the rules of evidence and procedure have been, in certain respects, rather preserved in aspic rather than modernised. It is primarily with devolution that this has altered.

Of comparative interest from the Welsh point of view may be those characteristics of devolution in Scotland which are distinct; in that they spring from having local control over both law and legal system. It may also be of interest to hear more specifically about what it means to have a separate legal system within the United Kingdom.

Devolution in Scotland

Introduction

The general administration of law in a devolved context is a feature of both Wales and Scotland. There are differences. *First*, ever since Scotland has existed, its laws have

¹ Article 19, that no causes in Scotland be “cognoscible” by the Courts of Chancery, Queen’s Bench, common pleas or any other court in Westminster Hall.

² Scotland’s superior appellate and first instance civil court.

³ Scotland’s superior appellate and first instance criminal court.

been Scots, or perhaps more accurately mixed civilian; that is derived from the *ius commune* of the later Roman Empire overlaid with native, part Celtic and part Norman, customs. A curiosity of expression is that when a Scots lawyer refers to “the common law”, the reference is not to the Anglo-American system prevalent throughout almost all of the English speaking world, but to Scots law unadorned by statutory innovation. The common law to a Scots lawyer means Scots law in its native state, as described by the Institutional Writers of the 16th to 19th centuries and as explained and developed by precedent; the latter carrying a much weaker form of respect than is current in the rest of the Commonwealth. The rehearsal of precedent in court opinions is not a feature of judgment writing which is encouraged in Scotland, even if it is prevalent in some judges’ thinking.

I do not begin to be a scholar of Welsh history, legal or general. I therefore apologise in advance for, and hope to be corrected on, any errors, in that regard. However, I gather that, between the Laws in Wales Acts in the first half of the 16th century, under Henry VIII, and the introduction of law-making powers by the Government of Wales Act 2006, the law was not Welsh, but English and Welsh. Welsh law, as a new entity, will presumably be, at first, entirely statutory. In contrast, all law in Scotland is Scots even if it may, in certain areas, embrace the Udal law of the Vikings.

Secondly, since devolution in 1999, the administration of the law has been something done by Scotland alone. In Wales, it remains part of Westminster’s legislative competence, under the General Reservation: “Single legal jurisdiction of England and Wales”. The

Government of Wales Act 2006 provides⁴ that, judges, courts, and civil and criminal proceedings are all reserved matters. There are significant additional features of the administration of law, in the context of Scotland's devolution settlement, which are not part of the picture in Wales.

Institutional Geography: Some Advantages & Disadvantages

When the Law Lords became Justices of the Supreme Court of the United Kingdom in 2009, the judges moved out of the Palace of Westminster; that is further away, albeit slightly, from the seat of legislative power, to the Middlesex Guildhall⁵. In contrast, with the advent of devolution, Scottish Parliamentarians, armed with legislative competence over Scots law and the legal system, moved considerably closer to the Supreme Courts of Scotland; about 400 miles closer. It is now a 12-minute walk down the High Street⁶ from Parliament House, where coincidentally the Court of Session and the High Court of Justiciary have sat since the 1630s, to the new Scottish Parliament⁷. That is 12 minutes longer than it was before the Union in 1707, but it is still very close.

Proximity has practical advantages. It has facilitated easier engagement between the senior judiciary and government ministers⁸; especially in the instigation, and perhaps quickening, of necessary reforms to both procedure and institutions; notably the creation of

⁴ Sch 7A, Part I, para 8.

⁵ Designed incidentally by the Scottish architect James Gibson.

⁶ aka the Royal Mile.

⁷ Designed by the Spaniard Enric Miralles as a building "growing out of the land".

⁸ Principally the Cabinet Secretary for Justice and the Ministers for Community Safety.

the Scottish Courts and Tribunals Service, as an agency independent of Government⁹. One major example has been the Scottish Civil Courts Review, which my predecessor, Lord Gill, was asked to chair by the then Labour/Liberal Democrat Coalition. Its recommendations were incorporated into the Courts Reform (Scotland) Act 2014, which was passed during the SNP majority administration. The changes that it has introduced have been radical; modernising civil procedure by setting up two new courts, the Sheriff Appeal Court and the All-Scotland Personal Injury Court, with a nation-wide ambit, as well as a new lower tier of judiciary; the summary sheriffs with non-exclusive jurisdiction, primarily in summary crime and low value¹⁰ civil cases.

Another example is my own review into criminal law and practice which, by the Criminal Justice (Scotland) Act 2016, overhauled the whole custody regime. Ultimately the sections which would have removed the archaic requirement for corroboration, which derives from the canon law and applies to all criminal charges, were removed at a late stage in the Bill's progress, primarily because the SNP government's majority was so slender, and is now a minority, that it could not otherwise have carried through the legislation. The difficulties in progressing reforms in the context of minority governments should be recognised. This is democracy in action.

Most recently, there has been the progress of the Evidence and Procedure Review. This tackles, in one of its streams, the problems, which I am sure occur in Wales, concerning the testimony of children and vulnerable adults. The quite different other stream is

⁹ Established by the Judiciary and Courts (Scotland) Act 2008.

¹⁰ Under £5,000.

intended to deal with churn¹¹ in summary criminal cases. The main proposals on court reform in the post devolution era have been largely driven by the judiciary. They have progressed as a result of relatively close collaboration between the judiciary, on the one hand, and the Scottish Government and Parliament on the other.

So far as the substantive law is concerned, the picture has been, at best, mixed. Although the creation of a unicameral Scottish Parliament was seen as a cure for the problem of lack of legislative time in Westminster, it has not proved to be quite the panacea that some had anticipated. A series of law reform proposals, which have been advanced by the Scottish Law Commission, remain on the legislative shelf. In the last decade alone, these have concerned unincorporated associations, prescription, title to moveables, judicial factors, trusts, adults with incapacity, defamation and, most recently, a major review of contract law. That said, some of these are still gestating; some more actively than others. There have been many recommendations which have been implemented since devolution, notably major changes to land law, succession and bankruptcy and certain special aspects of contract law.

Collaboration, if that rather pejorative term is appropriate, and having a legislature and government just down the road from the courts, may give rise to legitimate concerns about the independence of the judiciary from the other institutions of the state. The participation of the senior judiciary in the processes of the political institutions, which are designed to facilitate legislative reform may be a good thing, but it must be confined to matters in which the senior judiciary are in broad agreement with the proposed reform and

¹¹ The repeated calling of cases to no practical effect.

can bring their experience usefully to the table. As a generality, the judiciary must remain aloof from matters of government policy. Just as the judiciary must discipline themselves to refrain from engaging in political discourse, it is important that both Government and Parliament remember and adhere to the limits which must be maintained to prevent interference in what are strictly judicial matters.

It is sometimes hard to identify where the boundaries between the judicial and political arenas lie, and these boundaries are sometimes tested. There are, of course, protections in place to preserve the fundamental principles of the separation of powers and responsibilities. Scottish Ministers and Members of The Scottish Parliament are statutorily required to uphold the independence of the judiciary¹²; and Parliament, primarily in the form of its Committees, is prevented from summoning judges to appear before it¹³. By and large, these principles are well respected, but the constraints can cause some tension where a judicial matter is raised in the political arena.

A recent example is the exchange between my predecessor and the Scottish Parliament's Public Petitions Committee, which deals with a miscellany of matters brought to their attention by members of the public. The Committee was faced with a petition calling for a register of interests for the judiciary. Notwithstanding the prohibition on compelling the appearance of judges, the Committee was forthright in publicised correspondence¹⁴ about the need to hear and question evidence from the senior judiciary.

¹² Section 1, Judiciary and Courts (Scotland) Act 2008.

¹³ Section 23(7), Scotland Act 1998.

¹⁴ Scottish Parliament Public Petitions Committee, [Letter from the Convener to the Lord President of 18 April 2013](#).

This was despite that fact that both my predecessor and I had already provided written reasons¹⁵ on why we considered that change was neither necessary nor desirable. In the end, we accepted the invitation to speak to the Committee, but it is questionable whether our appearance added anything more to what had already been provided. In the event, the Committee simply disagreed with our views.

It is not a problem to provide Parliamentary Committees with judicial views, particularly on the practical implications for the courts of proposed or potential reforms. The judiciary stands very willing to provide decision-makers and opinion-formers with its perspective, which is based on its experience and detailed understanding of the law and its application. This must be carefully managed. One risk is that, if a senior judge does appear before a Committee, he or she will be invited to take part in an adversarial debate, which may compromise his or her judicial independence. Another risk is that matters, which fall exclusively within the judicial sphere, such as the measures that the Lord President might take to ensure the efficient disposal of business within the courts, judicial deployment or judicial training, are drawn into the political decision-making arena.

Fortunately, that is not what generally occurs. There is a strong degree of mutual respect for the constitutional niceties; the separation of powers. Engagement on appropriate issues is valuable; but the judiciary must be able to protect their independence, and to avoid being themselves drawn into overstepping the boundary of the political arena, by declining to add to what they have already explained in writing or by retaining control over an issue which is exclusively within the judicial sphere.

¹⁵ [Lord President Letter to Convenor, 2 April 2013](#).

Law officers

A question arose on devolution over the roles of the Lord Advocate and the Solicitor General, who were then the Scottish law officers of the UK Government; advising on both civil and criminal matters. It was not the sole consideration, but, particularly in light of their responsibilities for the prosecution of crime, and given that the criminal law itself was being devolved, it was thought that they should become part of the devolved government rather than remaining at Westminster. The Lord Advocate is now an *ex officio* a member of the Scottish cabinet, rather than being a member of the House of Lords or Commons. He is the equivalent of the Counsel General for Wales, but responsible to the Scottish Parliament. A change was made in 2007, whereby he only attends cabinet in the role of principal legal adviser. A new role was created, that of the Advocate General, who advises the UK Government on the law in Scotland. Any one of the Advocate General, Lord Advocate or Attorney General may, like the Counsel General, refer the legislative competence of a Bill in the Scottish Parliament to the UK Supreme Court, as was done recently for the first time in relation to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, on which a decision is awaited.

Judicial appointments

An important development following devolution was in the appointment of judges. Judges in Scotland are appointed by the Queen on the First Minister's recommendation; but

the First Minister cannot recommend anyone unless they have in turn been recommended by the Judicial Appointments Board for Scotland¹⁶, which also recommends the appointment of sheriffs. The JABS has 12 board members, six either judicial or legal, and six lay, including the chair. Interestingly, however, the pre-devolution position on the appointments of the Lord President and the Lord Justice Clerk (the second senior judge in Scotland) has been retained.¹⁷ Rather than the First Minister, it remains for Prime Minister to make a recommendation to the Queen. The Prime Minister may not do so unless the individual has first been nominated by the First Minister. The First Minister's nomination is not on the recommendation of JABS. Instead, she must have regard to the recommendation of a panel specially selected by her.

One concern, which may exist in Wales, especially if a separate legal jurisdiction is to be established, may be the quality of judicial appointments. In this, I am not referring to the current problem of recruitment to the senior judiciary generally, because of the pay and pensions debacle, which has dogged the system for some years now, but to the fear that the most able Welsh talent will be syphoned off to London. This does not happen in Scotland, or at least it is not perceived to be a problem. It is certainly true that some young Scots lawyers do go to London, especially, but not exclusively, if they have studied English law at English universities. Some settle there; never to return. The vast bulk of those who take their law degrees in Scotland remain on native soil. The Faculty of Advocates, which also has its home in Parliament House, is a vibrant institution, with almost 500 practising

¹⁶ Formalised under the Judiciary and Courts (Scotland) Act 2008.

¹⁷ Scotland Act 1998 s 95.

members, of whom around 100 are Scottish QCs. These numbers are maintained even though, in Scotland, a great deal of litigation and criminal defence work outwith the Supreme Courts is, and always has been, conducted by solicitors.

The maintenance of a successful court system is not just a function of Edinburgh, rather than London, being regarded as the centre of the legal world in Scotland. It is because of wider societal considerations. Within reason, people will migrate to where the wealth is. In the modern era, the young travel extensively. They use aircraft like buses. They have their Erasmus years. They experience other places and cultures in a manner which the previous generation did not. Yet they very often return home, if economic conditions favour that move. If the creation of a new legal jurisdiction in Wales is in contemplation with, for example, a separate appeal court and legal administration in Cardiff or elsewhere, it ought to be sufficiently attractive to hold onto talent, young and old, and even encourage, as happens in Scotland, those from London, or Bristol or Liverpool, to move to Wales instead.

It is all about confidence and the ability to create a vibrant legal culture, with a recognised centre, or perhaps centres, of excellence at its core, having jurisdiction over events occurring in Wales and an administrative heart within Wales itself. These would be fed primarily, but by no means exclusively, by talent from the five Welsh law schools.

This may be easier said than done, but the art is not to be afraid of the larger jurisdiction; or the elephant in the room, as it sometimes referred to in Scotland. London is a great centre of international commercial dispute resolution. It competes on a different playing field, with New York and Hong Kong. The judges of the Royal Courts of Justice have an excellent reputation as masters of the English common law. They form a cadre of

extremely able and talented people. That ought not to be a concern when setting up a separate jurisdiction which will grow to have its own equally talented group of judges and legal practitioners.

That may seem a difficult objective at present, given the predominance of London as the legal centre of English law, but as the *locus* changes so will the personnel. Much will depend on the structure of the court. The manner in which success is achieved in Edinburgh is both simple and complex, but instructed by the wisdom of the ages. The civil and criminal courts are different, but have the same judges. The appellate Divisions, of which two are permanent, and a third "extra" is convened as required, do not form a separate court. The judges can be deployed on first instance work, principally criminal trials, and the first instance judges can be brought into the appellate Divisions if they have specialist skills in the particular area of law under consideration. Because of the requirement in Scotland that rape cases must be heard in the High Court of Justiciary, there is at present an unusually high complement of 35 (including 11 appellate) judges. In a remoulded court, without that requirement, the Supreme Courts could probably operate in Scotland with about 24 (including 9 appellate). With that sort of number, and even with a proportionately small number in Wales, there should be a reasonable degree of confidence that there will be sufficient expertise to deal with any area of law. That will depend, of course, on the quality of appointments. In Scotland that is effectively determined by the JABS; not always entirely successfully.

There are cases, which are mainly Scottish in origin, notably involving the oil industry in the North Sea, which are litigated in London. There are concerns, which Wales will not have, about English choice of law clauses, and even jurisdictional provisions, being

written into contracts concerning events which occur primarily or even exclusively in Scotland. This is mainly because many of the commercial concerns will be based in England and the clauses will either be standard or included by default. This causes a difficulty in Scotland, where English law must be proved as fact. Some wish to change that, but the general view is against that, partly perhaps for protectionist reasons; albeit justifiable ones. In the overall picture the problems inherent in a small system have not presented an insuperable barrier to the success of the commercial courts, not only in the Court of Session, but also in several sheriffdoms at Edinburgh, Glasgow, Perth, Aberdeen and elsewhere.

Scottish Reflections on a Separate Welsh Legal Jurisdiction

Ancient History

It may have been somewhat patronising, or at least incomplete, to have said that ever since Scotland has been in existence, Scots law has existed. Wales of course did have its own law before Henry VIII's statutes. The law of Hywel, who died in 950 AD, survives in the form of the 40 manuscripts compiled between 1250 and 1500.¹⁸ That fact may be a source of envy to legal historians in Scotland. Many of Scotland's original public records, including its statutes, as existed prior to 1291, were lost on their seizure by Edward I of England during the Wars of Independence. In the 17th century, when the Scottish national archives were on their way back to Edinburgh after they had been taken to London by Cromwell, they were lost at sea. There is, however, the *Regiam Majestatem*, which provides a digest of the

¹⁸ [Legal Wales](#), Institute of Welsh Affairs.

non civilian (roman) laws of Scotland, and dates from the 14th century; post Bannockburn. It is, as expected, partly canon law, partly Norman and partly Celtic.

Different foundations

History shows a need for caution when comparing proposals for a Welsh jurisdiction with Scotland. There would inevitably be significant differences. The Welsh jurisdiction would have a starting point rooted, initially, in English law and subsequent Cardiff legislation. Scots law does not have a starting point other than, at least in theory, immemorial custom. Its basis is shrouded in the mists of time, or more likely the Institutes of Justinian. It exists because it has always been; or so it is, for practical purposes, assumed. There would be another difference. Welsh legislative devolution, especially with its conversion to the reserved powers model, could be a catalyst for establishing a separate legal jurisdiction. The practical justification for this is that civil and criminal law are not topics or policy areas in themselves, but necessary mechanisms towards the effectiveness of law-making. Reserving legal jurisdiction, in the process of moving from the devolved to the reserved power model, would undermine the substantive law-making powers of the Assembly.

The new legal jurisdiction would be conceived as part of the necessary apparatus for the effectiveness of the Assembly as a law-making body. The development of law and legal institutions is seen by some as an essential part of a trajectory towards full nationhood¹⁹.

¹⁹ This is a phrase in the factfile on [Legal Wales](#) by Institute of Welsh Affairs document used to represent the view given by Lord Thomas in his Lord Morris of Borth-Y-Guest Lecture in 2000.

The same may be true of Scots law and the Scottish Parliament, but the question has never been considered directly. Regardless of the existence and extent of the power exercised by the Scottish Parliament at Holyrood, Scots law has been an unbroken characteristic of Scotland, which was specifically preserved by the terms of the Treaty of Union. It may be that, in time, the development of law and legal institutions will lead to the same status of law in Wales. The fact that a Welsh legal jurisdiction would start from a position of similarity with England is in contrast to the Scottish situation. Scots law is not Anglo-American common law, although in its adversarial system, it has many aspects of its procedures.

It has been said that “there is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions”²⁰ The same may not be said for Scotland. If the courts of Scotland, in parallel with the unification of the Parliaments, had merged into a unified system with the courts of England and Wales in 1707, a separate Scots law would not have been sustainable. Conversely, Scotland would not have been able to maintain an independent court system if, at the Union, Scots law had been abolished (as it was in relation to treason) and Scotland became exclusively subject to English law.²¹

Judicial remedies cannot be separated from the substantive law of a jurisdiction or from the procedure establishing and enforcing them.²² Scots law remedies would have made little sense to the newly extended courts of England and Wales. Scots remedies were

²⁰ Lord Thomas, [The Law of Wales: Looking Forwards](#), Speech at the Legal Wales Conference, 9 October 2015.

²¹ As it was for Welsh law in the Acts of 1536/1543.

²² This is paraphrased from a passage in the preface to DM Walker, *Civil Remedies* (W Green & Son Ltd; 1974), p v.

and are predicated on Scots substantive law. For this reason, the Court of Session has held that barristers, who have not undergone the requisite training in the practice and procedure of the Scottish courts, have no right of audience, even where the substantive law at issue in a particular case is exclusively contained in a UK statute.²³

If the English courts had been extended to Scotland, applying their own procedure, Scots law and its independent Bar would have gradually ceased to exist. Scottish courts, with their own procedure, would have had to have given effect to remedies supplied by English law, which had been shaped by English procedure. The moulding of foreign law into a remedy known to the *lex fori* is a requirement of modern systems of international private law,²⁴ but it would never suffice or last as the basis of a legal system. If there had been a wholesale transplantation of English law, as there was earlier in Wales, with law and law-making in union, it would have made little sense to maintain separate Scottish legal institutions. This is a distinctly Scottish perspective. It bears no relevance to the question of a Welsh jurisdiction today, starting, as it would, from a position of consistency rather than difference with England.

²³ *Taylor Clark Leisure Plc v Revenue and Customs Commissioners* 2015 SC 595.

²⁴ See eg. EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast), Recital (28): “Where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. How, and by whom, the adaptation is to be carried out should be determined by each Member State.”

A Welsh Court of Appeal; Precedent

A particularly novel aspect of a Welsh legal jurisdiction may be a Welsh Court of Appeal. There are sittings of both the Civil and Criminal Divisions of the Court of Appeal in Cardiff already, but its categorisation as a court of Welsh law raises a plethora of questions, not least concerning the status in precedent of English Court of Appeal judgments delivered after the introduction of its new Welsh counterpart, and perhaps even those of the UK Supreme Court in what would then be strictly English cases.

English *dicta* is regularly cited in legal argument before, and often followed in the opinions of, the Scottish courts. It is not binding in Scotland and is sometimes not followed, either because it is based on different principles or practice or simply because the courts in Scotland do not agree with their English counterparts.²⁵ This applies even to UK Supreme Court decisions in English, Welsh or Northern Irish cases, albeit that the opinions will, for obvious reasons, be highly persuasive. That is of the essence of an independent legal jurisdiction.

UK Supreme Court Appeals

Prior to 2015, an appeal to the UK Supreme Court from a final judgment of the Court of Session did not require leave from either court. The only requirement was that two Scottish counsel certified that the appeal was “reasonable”. Scottish appellants had a

²⁵ See eg recently *HM Inspector of Health and Safety v Chevron North Sea* 2018 SC (UKSC) 132.

privilege not enjoyed by litigants in any other part of the UK. The *dictum* of Lord Bingham, that the Supreme Court “must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance” and “cannot seek to correct errors in the application of settled law, even where such are shown to exist”, did not apply. This was criticised in three cases,²⁶ culminating in 2013 in Lord Reed’s postscript to *Uprichard v Scottish Ministers*. Appeals to the UK Supreme Court were not in the remit of Lord Gill’s Civil Courts Review, but, in keeping with its principle of proportionate allocation of judicial resources, the relevant legislation was amended to introduce a general leave requirement.²⁷ Permission may be granted “only if the... [court] considers that the appeal raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time”.²⁸ If permission is granted by the Court of Session, there is no method of review of that decision by the UK Supreme Court.

The result is that the permission stage for Scottish cases is now theoretically the same as the position for English and Welsh cases. The modern approach in England and Wales, as Lord Reed noted in *Uprichard*, has been for the Court of Appeal to refuse leave as a matter of course, and to allow the appeal panel of the UK Supreme Court to select the cases which it wishes to hear.²⁹ For several reasons, this is not appropriate for Scots cases. The first stems from the simple fact that Scotland is a small jurisdiction, or rather that it is so in comparison

²⁶ *Wilson v Jaymarke Estates Ltd* 2007 SC (HL) 135, Lord Hope at paras 17 and 20; *G Hamilton (Tullochgribban Mains) v The Highland Council* [2012] UKSC 31, Lord Walker at para 29; *Uprichard v Scottish Ministers* 2013 SC (UKSC) 219, Lord Reed at paras 58 and 63.

²⁷ Court of Session Act 1988, section 40(1).

²⁸ Court of Session Act 1988, section 40A(3).

²⁹ *Uprichard v Scottish Ministers (supra)*, Lord Reed at 59.

with England and Wales.³⁰ Cases which raise novel or unusual points of law may not arise again for some time. Secondly, there is a public interest in the development of Scots law, at least where the law is unclear. The Court of Session, as a singular collegiate institution, where the most important Scottish litigation is conducted, will have its collective ear to the ground on the points of law and legal arguments that are being repeatedly aired, causing concern, and which are in need of final resolution. Thirdly, where there is a dissenting judgment or, where an appellate Division has reversed the interlocutor of the Lord Ordinary or the Sheriff Appeal Court, this may suggest a degree of uncertainty. Fourthly, in a case where the Court of Session considers that a previous decision of the House of Lords or UK Supreme Court has been wrongly decided, but regards itself bound by it, the grant of leave would ensure that the issue could be reconsidered. These considerations are not to say that there will not be cases where it may be appropriate to let the appeal panel of the UK Supreme Court decide whether to grant permission. The point is that a general practice of refusing permission is not appropriate for a small jurisdiction such as Scotland. Some of these reasons may equally apply to appeals from a Welsh Court of Appeal.

Conclusion

The lasting advantages of a small jurisdiction are not confined to an ability to reform the law. They include also being able to tailor the system to the particular needs of the country. Central to that is the securing of the source of funding for the courts. In Scotland, this had been done with the creation of the Scottish Courts and Tribunal Service which,

³⁰ It is, after all, basically the same size as Denmark, Finland, Norway and Ireland.

within the confines of its budget as agreed with the Scottish Government, is in exclusive control of all the Scottish Courts and Tribunals; buildings, staff and systems. It is judicially led by myself as chair, the Lord Justice Clerk, the President of the Scottish tribunals, five other judicial members appointed by myself, the Chief Executive, an advocate (barrister), a solicitor and three lay members.³¹ The total budget is about £150m, of which about £35m is paid from civil court fees. With this, the SCTS is able to prioritise expenditure in accordance with our own views, and not those of the Government. This includes the maintenance of the Supreme Courts in Scotland and the 39 sheriff courts, from Lerwick in Shetland, Stornoway in Lewis and Lochmaddy in the Uists down to Stranraer, Dumfries and Jedburgh in the Borders, as well as the devolved tribunals. Some 10 sheriff courts were closed in 2013³², but no further closures are planned. Rather like banks, the importance of the court in a local community should not be underestimated. In the future, it is anticipated that the reserved tribunals (notably the Social Entitlement and the Employment Tribunals) will join existing domestic tribunals in the mix.

The fact that legal administration is regulated locally has had the advantage of not requiring the same types of approach as those which have prevailed in England and Wales, although financial pressures have not abated. The Scottish Government can set its own policy. There is no doubt much to be gained by sharing ideas with our neighbours, but the benefit of local control can far outweigh any loss of scale.

³¹ At present a retired professor of medicine, a former colonel and an active businessman.

³² Kirkcudbright, Rothesay, Dornoch, Arbroath, Cupar, Stonehaven, Dingwall, Duns, Haddington and Peebles.