The conundrum of Scots Law

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In recent years there have been at least three readily identifiable cases of potential miscarriages of justice or denial of basic human rights taking place under Scots Law: the Megrahi, Cadder and Fraser cases, each with their own unique aspects, each with their own unique implications for Scots justice. In every case there have been strong common threads. All put Scots Law, and those who practise within it, under an external microscope. Each case had its own issues that rightfully required this intense scrutiny.

Each case highlighted the dissimilarities between England and Scotland.

History has demonstrated that in the view of the UK, differences are not encouraged. Differences that can give Westminster's dictated foreign policy a very bloody nose, as in the Megrahi case, shall and must be dealt with at the earliest opportunity.

With respect to Megrahi it was absolutely no surprise that the Scotland Bill was quietly and quickly amended in an attempt to address this issue, at least partially.

In the Cadder case the laws and conviction process in Scotland apparently had to be addressed quickly. It is doubtful a reasonable argument could be made that civil rights were not infringed in the Cadder case. It is also impossible to overlook the fact that an aspect of national sovereignty which had not been devolved to Westminster was probably breached. Ditto for Fraser.

The word 'probably' above is only because the UK court did not actually overrule, but "found" or "ruled" and "returned for consideration" final dispensation remaining within Scotland.

There are at least two separate aspects in each case, firstly there is the sovereignty of Scots Law, rendered in criminal cases to be inviolate for all time coming from oversight by English law. This was the price extracted by Scotland's law lords in 1706 for giving their support to the Treaty of Union. Without their support there would have been no Union. This article of the Union Treaty had been stringently adhered to by Westminster, until the creation of a UK Supreme Court.

In each case the UK Supreme Court has been cautious not to directly overrule the independent Scots criminal system, while undoubtedly diluting it. The 1707 Act of Union gave the UK the right to amend civil law, but held criminal law sacrosanct within Scotland "for all time".

There have been many arguments about why Tony Blair set up a UK Supreme Court as ostensibly to the highest UK court, yet it would only deal with human rights and civil cases from Scotland. It had no other jurisdiction north of the border.

The crux of the matter is possibly that Tony Blair and New Labour discovered themselves to be in a very sharply cleft stick. Scots Law is equal to English Law, to all law, but very different from it. The differences are so fundamental that they enshrine our separate identities and national histories.

English Law is property based, it stems from the monarch being "Of England", and having sole say in who gets what, and adjudicating land and titles appropriately. Scots Law is human, or citizen based, reflected by the fact there has never been a monarch "of Scotland", but rather of the people "of Scots" in whom the real power of the realm is recognized as being vested. Properly put Elizabeth the current monarch is Elizabeth the second, Queen of England, and Elizabeth the first, Queen of Scots.

It should be remembered it is only in the last decade or so that laws have again been actually made or changed in Scotland. Including the nonsense of "reserved" issues, Scots are still living under more than three centuries of London's legislation. It is too early to condemn Holyrood on this count.

Westminster has historically been extremely reluctant to interfere in Scots Law as it could contain a potential full blown challenge on the 1707 Treaty itself. In some aspects therefore it could be said Scots Law rumbled along in something of a no-man's land for centuries. It received only occasional updating by specific Scotland acts.

The legal systems of the respective nations are fundamentally incompatible. Practitioners in one often have difficulty with the other nation's law courts, even after training. It is not simply nuances and specific acts which differ, but the entire cultural framework of the systems themselves.

The idea of a UK Supreme Court is therefore rather nonsensical to begin with. Unlike the US where the legal systems in the states arose under a single constitution and federal framework, the UK possessed no such framework. The inception of a UK Supreme Court was something of an attempt at forcing square pegs into round holes.

Tony Blair's New Labour did not want this emphasized, of that there is reasonable certainty. Appeals to the European Court of Human Rights [ECHR] were likely from Scotland. Any such appeal would require

representation of Scotland within the EU at some level.

Any direct Scots international representation could be the crack in the door of Scots realizing that they were only living under a treaty and were not a part of a single British nation as they had been conditioned to believe. Worse still, the international community might also wake up to that fact, and the collar that the oil and whisky are only UK assets as long as Scots choose them to be.

Blair's New Labour also had the conundrum that the Scots had never signed up to the EU, or the ECHR except through default under the instigation of Westminster. This even though the default "sign up" was universally applauded at the time.

The problem Blair and Westminster potentially faced under this scenario was that someone might just argue that Westminster held no sway over Scots Law, then Scotland's legal system could not be arbitrarily "signed up" to the EU. It would need a separate treaty. Irrespective of the final decision in international courts, there was no win here for Westminster.

The best Westminster could hope to manage would be some form of containment of the UK constitutional fall out.

In many ways entrance to the EU without a referendum in Scotland whereby the individuality of Scot's law was surrendered to Westminster was an early death knell for the Union. Such a referendum would be extremely unlikely to pass. The issue could not even be allowed to be raised as it would bring the 1707 treaty back into a very sharp focus.

The only critical aspect remaining after the UK joined the EU and signed up to the ECHR was when the blow would fall.

The UK Supreme court was a potentially vain attempt at keeping the rest of Europe, and Britain's creditors unaware of the true status of the UK. It could not be publicized that like the EU, the UK really is a grouping of separate nations who have "agreed" to a joint government in one form or another. More critical was obfuscating the fact that the treaty agreement could be withdrawn by the Scots or the English at any time.

More correctly the agreement could be withdrawn by the Scots at any time they expressed a collective will to do so. The English do not have the options and choices available to the Scots in the 21st Century.

This brings the wheel full circle. The UK Supreme Court is an institution which gives every appearance of violating the treaty of 1707. The UK Supreme Court has to date managed to avoid violating that treaty and in all likelihood creating the argument that the treaty is void by simply returning verdicts to the Scots legal system for

amendment or “reconsideration”.

As long as the Scots have the final say, the argument can be made that the treaty is being adhered to in fact and principle. The issue would come when the Scots legal system states plainly to the UK Supreme Court that the case it reviewed has crossed into criminal law and therefore the UK Supreme Court has exceeded its jurisdiction and will be ignored.

Theoretically the Scottish government could take the same action on a pre-emptory basis.

The UK then has a dilemma it certainly does not want. It faces the following potential choices.

The UK must give a separate voice to the Scots nation at the European court. For Westminster this is unthinkable.

The UK must intentionally breach the Treaty of Union, effectively in the case of a challenge this has every possibility of negating the treaty entirely. For Westminster this is unthinkable.

The UK must acknowledge that the Scots judicial system is not tied to the English judicial system, and that as such treaties made under international law by the UK to bind both legal systems have no effect upon the Scots and their separate legal system, unless provision is specifically made for the same in any treaty with both Holyrood and Westminster approving the treaty individually. For Westminster this is unthinkable.

The UK can continue to bury its head in the sand and hope the problem will “go away”, it won’t.

The UK can quietly attempt to place an intermediary between the Scots and the ECHR, hoping that everything will stop there and the Scots will quietly accept this usurpation of rights. Slowly with time and unchallenged precedent the reach of English law can be extended into Scotland until it gains what Westminster would see as “a natural supremacy”.

First the UK Supreme Court and then the Scotland Bill were attempts at what can only be described as quiet subversion. Subversion in which, once again, those of our own nation were eminently culpable. These individuals were possibly made culpable by the enticement of a path towards individual reward and riches propagated at Westminster.

Recently both the First Minister and the Glasgow Herald, for very different reasons and motives, served hard reminders to Westminster that Scots law was different, protected and independent. It was another wake up call for the UK, although after Megrahi it may well be redundant. Westminster is awake, believe it.

With a Scottish government actively protecting our rights and our laws, Scotland can certainly ensure any future attempt at usurpation is as futile as attempting to enforce an English injunction in Scotland.

The ECHR is there for potential miscarriages of justice and human rights issues. Scotland should sign up to it directly, have a clear path there, and appoint a Scots law specialist to argue its cases in Europe. This should be, and has, the appearance of working towards an early agenda item for Holyrood.

In the case of Fraser, there is only one course apparently available for an independent legal system that is to have any credibility. The Scots establishment should refuse to re-hear the case at UK remit. They should instead take the request from the UK under advisement, initiate an investigation into who with-held evidence and pursue it through the criminal justice system. If the facts support that there was a perversion of justice which created the chance or possibility of a different verdict in the original trial, that conviction must automatically be reexamined, re-tried or quashed.

Only then will justice be seen to be done.