BALANCING THE RIGHTS OF COMPLAINERS AND THE PUBLIC INTEREST WITH THE ACCUSED'S RIGHT TO A FAIR TRIAL
TAIWAN CONSTITUTIONAL COURT ANNUAL ACADEMIC CONFERENCE 2023, JUDICIAL YUAN[1]

The Importance of the Right to a Fair Trial

It is a great pleasure to attend this year's conference. I have been looking forward to this visit enormously. I was last in Taiwan in 2009, when I accompanied my predecessor, Lord Gill, on a journey to learn more about Taiwan's judicial system; especially its use of digital technology. During that trip, we had the honour of meeting President Ma. We were made very welcome, and our hosts were both gracious and informative. We managed to visit both Taipei and Tainan and attended the annual International Orchid Show, which I remember fondly.

When we met with President Ma, he expressed his hope that he would enhance democratic standards and the rule of law during his presidency.[2] The judges whom I met were optimistic and enthusiastic about the proposed reforms. Shortly after our visit, Taiwan enacted domestic legislation implementing the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,[3] thus enshrining human rights into Taiwanese law, including the right to a fair trial.

I preface my remarks by stating the obvious but important proposition that each jurisdiction must apply its mind to what is best for its society, according to its own cultural values. I do not pretend to suggest that the system which exists in Scotland, but is still being developed according to its own social norms, is suitable in all its many aspects, to Taiwan or any other nation. It would be very surprising if it were entirely transposable. I do hope that

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[1] I am grateful to my law clerk, Ysabeau Middleton, for preparing the initial text of this paper, and to my personal secretary, Debbie Laidlaw, for mastering my scribbled revisions.

[2] *President Ma Meets Scotland's Second Most Senior Judge Lord Gill*, Press Release, Office of the President, Republic of China, 2 March 2009 (president.gov.tw/NEWS).

[3] Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Laws & Regulations Database (moj.gov.tw)).

it may assist you in formulating your own Code, just as I will benefit from your own views on what is appropriate.

Criminal trials have evolved a great deal over the centuries. Scots criminal procedure in medieval times (pre 15th century) could involve a trial by jury. This was introduced as a result of Norman influence following the invasion of England (but not Scotland) by William the Conqueror in 1066. It involved selecting people from the locality who might know what had happened rather than those who were impartial. However, often trials took the form of compurgation, whereby the accused had to find enough people to vouch for his innocence in order to achieve an acquittal. Alternatively, there was trial by ordeal, whereby the accused had to undergo some painful labour, such as holding a hot iron to prove his innocence, and there was trial by combat. Ordeal and combat presupposed that God would intervene on the side of the innocent or condemn he who was guilty. That only works in a God Fearing society, which Scotland was then and continued to be for many centuries. It was not until 1230 that the accused was given an entitlement to opt for a jury trial. The use of compurgation, ordeal and combat had died out by the time James VI of Scotland became James I of England in 1603.[4] In 1985, two brothers facing robbery charges moved the court to allow a trial by combat. That was never going to happen. Sadly for the brothers, they forgot to comply with the procedural requirement to throw down a white glove to signal their challenge. Their motion for a fight was refused. They had to settle for a jury.[5]

Our medieval counterparts would no doubt have thought that their system of criminal justice was fair, although they may not have said so in precisely those terms. The words "fair trial" did not come into regular usage until the late 19th century. The earliest recorded use of the phrase in a reported Scots case is 1764,[6] but there is no further mention of it until 1828, when the infamous murderer and body-snatcher, William Hare[7] successfully

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[4] *Criminal Procedure* (2020), Stair Encyclopaedia (3rd re-issue), para 39.

[5] *HM Advocate* v *Burnside* April 1985 (unreported); "*Brothers fail in plea for trial by combat*", The Times, 23 April 1985; "Two Scots Lose Bid for Trial by Combat on Robbery Charge", L.A. Times, 23 April 1985 (Los Angeles Times Archive); "Brothers want rough justice", United Press International, 20 April 1985 (UPI Archives).

[6] *Deas and Wann v The Procurator Fiscal* (1764) Mor 7684 at 7685.

[7] *Hare* (1828) Syme 373 at 379.

resisted prosecution on the basis that he could not receive a fair trial, having given an account of his own guilt when testifying against his partner-in-crime, William Burke.[8] Body snatching had become endemic in Scotland's capital, Edinburgh, because it was a major European centre for medical research. The doctors needed corpses to work on. Unfortunately, Burke and Hare took matters a little further by killing people first before selling their bodies to a leading anatomist, Dr Robert Knox. Turning King's evidence, as Hare had done, is a relative rarity in modern practice but it is still prevalent in cases of serious and organised crime.[9]

When it came to the question of the fairness of a prosecution, the courts of 19th century, Victorian Scotland were sometimes guilty of focussing too much on form. The abandonment (desertion) of prosecutions on technical grounds, owing to what were known as "flaws in the indictment", were rife. Professor Gloag commented that "the refinement in the form of indictments had reached such a point before … 1887[10], as to make it almost a matter of surprise when a criminal, if adequately defended, ever reached the stage of being tried at all".[11] The thinking was that fairness was achieved by the regulation of an consistency in, practice and procedure.[12] Having a procedure, to which prosecutions had strictly to adhere, was regarded as critical for the control of a society which was undergoing great upheaval as a result of the industrial revolution. It would not be correct to say that the Victorians did not regard fairness as important,[13] but systematic structure was an overarching priority. I do not depart from the importance of due process but, in the modern era, fairness is looked at in a more pragmatic and holistic way.

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[8] *Burke and McDougal* (1828) Syme 345.

[9] Nowadays, internal Crown Office policy requires that, if the Crown is communicating a decision not to prosecute a suspect, they reserve the right to do so "at a future date". See *HM Advocate* v *JM* [2023] HCJAC 19.

[10] The Criminal Procedure (Scotland) Act 1887.

[11] *The Margin for Error in Criminal Procedure* (1899) 11 Jur Rev 87.

[12] *Gray* v *McGill* (1858) 3 Irvine 29, Lord Ivory at 39; *Moffat* (1827) Syme 249, Lord Justice Clerk (Boyle) at 253.

[13] For example, in *Gray* v *McGill*, *ibid*, the conviction of a child of 8, who had been removed without warrant from his bed by two police officers, summarily tried and convicted of theft, and sentenced to twenty eight lashes, was quashed.

One example is in the Scottish approach to applications by the prosecution for extensions of the statutory time limit in which to bring proceedings.[14] Since the early 18th century, the right of an accused to be brought to trial within strict statutory time limits (now twelve months or 110 days if in custody[15]) has been seen as very important.[16] If it were breached, the accused would have "tholed his assize"; that is he would be free forever of the charges. In modern times, the time limits have come to be seen as designed to ensure that Scottish criminal procedure is compliant with the requirement to bring proceedings within a reasonable time under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms. The general purpose of Article 6 is to ensure the fairness of proceedings. Following that through, the length of time taken to bring an accused to trial only ceases to be lawful when fairness has been, or will inevitably be, compromised.[17] The court will therefore treat the time limit as important, but not sacrosanct. It will consider where the interests of justice lie, including the reasons for the delay and the seriousness of the alleged offence.[18] This is a more rounded approach, which factors in the public interest.

The modern right to a fair trial has a number of sources. In domestic (Scots) law terms it emanates from longstanding common law principles of natural justice. These are the collection of principles to be followed by all judges in all cases.[19] They can be categorised into those securing the rule of law or procedural fairness and those ensuring that error in the outcome of the trial process is minimised.[20] The judge must ensure that the accused is informed of the case against him.[21] He or she must allow the parties to be heard on an equal basis.[22] He or she must adjudicate without, and without a perception of, bias.[23] The judge must determine matters solely on the basis of relevant evidence put before the

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[14] Criminal Procedure (Scotland) Act 1995, s 65(3).
[15] *Warnes* v *HM Advocate* 2001 JC 110.
[16] *HM Advocate* v *Swift* 1984 JC 83 at 88.
[17] *Speirs* v *Ruddy* 2009 SC (PC) 1.
[18] *Barr* v *HM Advocate* 2023 SCCR 127 at para 22; *HM Advocate* v *Graham* 2022 SCCR 68 at para 19; *Uruk* v *HM Advocate* 2014 SCCR 369 at para 16.
[19] Jowitt's Dictionary of English Law (5th ed).
[20] Elias, "*Fairness in Criminal Justice*", The Hamlyn Lectures (2018) 1.
[21] *In re A (A Child) (Family Proceedings: Disclosure of Information*), paras 30 – 35.
[22] See *Barrs* v *British Wool Marketing Board* 1957 SC 72, Lord President Clyde at 82 – 83 and *Ewart* v *Strathern* 1924 JC 45, Lord Justice Clerk Alness at 49 and Lord Ormidale at 50.
[23] *Bradford* v *McLeod* 1986 SLT 244.

court.[24] The connection between relevant evidence and fairness lies in the fact that the party, against whom irrelevant evidence is led, cannot anticipate or prepare to contradict it.[25] There may also be principles deriving from a nation's Bill of Rights or Constitution.[26]

Internationally, Article 6 of the European Convention and Article 14 of the International Covenant on Civil and Political Rights, which are in near-identical terms, are the seminal sources. There is only one discrepancy between the two. This is the omission of the right to remain silent, and the privilege against self-incrimination, from the wording of Article 6.[27] Although not specifically mentioned, these rights are generally recognised international standards which lie at the heart of the notion of a fair procedure, even if unstated in Article 6. Fundamentally, these instruments guarantee a right: to a presumption of innocence; for an accused to have his or her case determined by an independent and impartial tribunal; to be heard in those proceedings; and to be able to lead evidence on a footing which is equal to that of the prosecution. He or she is entitled a swift resolution of the proceedings. He has a right to be able to understand what he has been charged with, what the likely consequences of a conviction are,[28] and the basics of the court process. The importance of these various components cannot be underestimated. If the state is unfairly advantaged in the trial process, the courts cannot effectively prevent state abuse of other rights. The effective protection of all human rights very much depends on the practical availability to an accused at all times of access to competent, independent and impartial courts and legal advice.[29] The question is, how should we balance these rights with the public interest and the rights of complainers?

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[24] See *B* v *Sailors' Society* 2021 SLT 1070, in which the court held that the absence of fundamental evidence was such that a fair trial could not be held; *Walker and Walker: The Law of Evidence in Scotland* (5th ed), para 1.3, citing Dickson, *Evidence* (3rd ed), para 1.

[25] *ibid*.

[26] For example the Canadian Bill of Rights S.C. 1960, c. 44, Arts 2(d) – (g) (justice.gc.ca); the Sixth Amendment to the Constitution of the United States (constitution.congress.gov); Constitution of the Republic of China, Arts 8 and 80 (moj.gov.tw).

[27] *Guide to Article 6 (Criminal Limb),* European Court of Human Rights at 41 (coe.int).

[28] Bingham: *The Rule of Law* 37 – 38.

[29] Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 215.

Getting the Balance Right: the Scottish Perspective

The Public Interest

What do the public expect from their criminal courts? There is a significant degree of overlap or even conflict between the public interest in the administration of criminal justice and the right of an accused to a fair trial. Each of us has a personal interest in the maintenance of the rule of law. After all, nobody is immune from prosecution. There is a strong public interest in ensuring, so far as possible and practical, that an accused person is not unjustly convicted.[30] None of us wants to live in a society where such an unjust event is likely to occur.

The public will expect the court system to operate in a manner which fosters confidence and trust. There is a strong public interest in the investigation, suppression and prosecution of crime.[31] Court decisions which hamper the police or the prosecution service, by ignoring the realities of an investigation and the practicalities of the prosecution of crime, are harmful to the public interest[32] and ought to be avoided. One example[33] came before the High Court of Justiciary in Scotland recently. The police had obtained a warrant to search the accused's premises. After cautioning him, they found a mobile phone. The appellant admitted that it belonged to him. The police requested the PIN, which the appellant provided. The police found images of child pornography on the phone. The appellant maintained that he should have been given access to legal advice prior to being asked for his PIN. The court refused his appeal on the basis that, although there is a right to access legal advice, and to be informed of that right whilst in police custody,[34] a suspect who is not in custody is already free to access that advice. It would unduly hamper police searches if the police had to await the arrival of a solicitor before conducting a search under warrant. None of this causes an imbalance between the public interest and the right to a fair trial. The

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[30] *R* v *Stephen Preston* (1992) 95 Cr App R 355, Woolf LJ at 372; *Attorney General* v *Random House Group* [2010] EMLR 9.
[31] *HM Advocate* v *Cooney* 2022 JC 108 at para 32; *Graham v HM Advocate* 2019 JC 26 at para 42.
[32] *Miln* v *Cullen* 1967 JC 21, Lord Wheatley at 30.
[33] *McLean* v *HM Advocate* [2023] HCJAC 16.
[34] *Cadder* v *HM Advocate* 2011 SC (UKSC) 13; Criminal Justice (Scotland) Act 2016, s 32.

effective investigation and prosecution of crime may not be something which is in the direct interests of the accused, if he or she is guilty, but it is consistent with the overall fairness of the proceedings.

The public expect to be given physical access to the court proceedings, should they wish to observe them, and to be able to access to any written judgment, including any reasons and the identity of the parties. In Scotland, this is governed by the fundamental principle of open justice. Open justice has two key elements. The first is that proceedings are heard and determined in public. The second is that the courts should operate in a way which is accessible and transparent to the public.[35] In a democracy, where the exercise of public authority depends on the consent of the people governed, the openness of the courts to public scrutiny is a fundamental aspect of the rule of law.[36] It helps to ensure that the courts are carrying out their function properly and to promote public confidence in that. All of this is important not only to the public, but also to the accused.

For these reasons, the general rule is that all cases in Scotland are conducted with open doors[37], and without any restrictions on the entitlement of the press to report the proceedings,[38] except where the interests of justice demand[39], or statute requires, otherwise.[40] It should rarely be necessary to restrict the public's access.[41] Only the identities of children[42] or other vulnerable witnesses,[43] or information concerning national security[44] are routinely withheld from the public. In such circumstances, the public have countervailing interests which justify the withholding of the information. The maintenance of national security is clearly a matter of public interest. It is recognised that disclosure of the identities of vulnerable witnesses can discourage other victims from coming forward to report what

[35] *MH* v *Mental Health Tribunal for Scotland* 2019 SC 432, Lord President Carloway at paras 16 and 19.
[36] *A* v *Secretary of State for the Home Department* 2014 SC (UKSC) 151, Lord Reed at para 23; *The Rule of Law*, *supra* at 37 – 38.
[37] Although not literally, as is done in Canada.
[38] Either at common law or under the Contempt of Court Act 1981, s 11.
[39] *Sloan v B* 1991 SC 412, Lord President Hope at 442.
[40] see for example Adoption and Children (Scotland) Act 2007, s 109.
[41] *MH v Mental Health Tribunal for Scotland* 2019 SC 432 at para 24.
[42] Criminal Procedure (Scotland) Act 1995, s 47.
[43] *ibid*, s 271H(ea).
[44] see *Al-Megrahi* v *HM Advocate (No.2)* [2020] HCJAC 54.

happened to them to the police.[45] That is likely to have a depressing effect on the administration of criminal justice as a whole. In order to keep the interests of everyone in balance, where members of the public are excluded from the courtroom, or reporting restrictions are put in place, the media are, usually, still permitted access[46] and may report on the proceedings subject to any express, specific reporting restrictions and press ethics.

The Rights of Complainers

Following the enactment of the European Victims' Directive,[47] Scotland enacted domestic legislation which set out certain principles which must be applied to the treatment of complainers before, during and after criminal trials.[48] These include a statement that complainers, like an accused, should be able to understand what is happening in, and be able to obtain information about the progress of, court proceedings. They have a right to be treated with sensitivity and respect. They should be protected from secondary and repeat victimisation, intimidation or retaliation as a result of the proceedings. They are entitled to participate in the investigation and the proceedings where that is appropriate.[49]

More recently, I commissioned a cross-justice review of the management of serious sexual offence cases. The review was chaired by Scotland's second most senior judge, the Lord Justice Clerk, Lady Dorrian. The essential aim of the review was to improve the experience of complainers within the Scottish justice system without compromising the rights of the accused. The review reported in March 2021.[50] It made a series of significant recommendations for the reform of the system. The central recommendations were for the pre-recording of the testimony of complainers (that is in advance of trial), the right of complainers to anonymity, the right of complainers to independent legal representation in connection with applications to lead evidence regarding matters such as a complainer's

[45] *A* v *Harrower* 2018 JC 93 at paras 25 and 26.
[46] See Criminal Procedure (Scotland) Act 1995 Act, s 271HB.
[47] Directive 2012/29/EU of the European Parliament and of the Council.
[48] Victims and Witnesses (Scotland) Act 2014, section 1(3).
[49] See for example *RR, Petitioner* 2021 JC 167.
[50] Lord Justice Clerk's Review Group, *Improving the Management of Sexual Offence Cases*, March 2021 (https://www.scotcourts.gov.uk).

sexual history, and the creation of a national, specialist sexual offences court with a trauma-centred approach to the taking of evidence from complainers.

Some of these recommended changes will require legislative underpinning. The Scottish Government has now introduced the Victims, Witnesses and Justice Reform (Scotland) Bill to Parliament with a view to implementing those. I will come back to that shortly. The Scottish Courts and Tribunals Service, who are the courts' administration, has already made substantial progress in the creation of facilities to support the pre-recording of evidence of complainers outside the trial setting. The general rule has been and remains that the testimony of all witnesses should be led in the courtroom, or by live link, on the day of the trial. There are exceptions to this, in both civil and criminal cases.[51] On the civil side, the pre-recording of evidence has long been permissible where evidence is in danger of being lost, or where a witness is unable to attend owing to age, infirmity, sickness, or being abroad.

The taking of evidence outside of the courtroom in criminal cases, during a process known as a commission, was first introduced in 1980.[52] Since then, the law has developed to a point at which we now have a legal presumption in favour of pre-recording the evidence of children and[53] adult vulnerable witnesses. This change started in the mid-1970s when the court was given the power to exclude the public (but not the press) from the courtroom when a child was giving evidence.[54] In the 1980s, practitioners and academics began to consider in earnest the question of the potential effect of giving evidence on children.[55] In the 1990s the court was given power to use special measures, such as screens or the presence of a supporter, when children were testifying in court.[56] This was extended to other potentially vulnerable witness in 1997.[57] In the 2000s there was a considerable expansion of special measures and an extension of who might be classified as vulnerable.[58] Children were

[51] Rules of the Court of Session 1994, r 35.11.
[52] Criminal Justice (Scotland) Act 1980, s 32.
[53] The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, s 1.
[54] The Criminal Procedure (Scotland) Act 1975, ss 166 and 362.
[55] Sharp, *The Vulnerable Witnesses (Scotland) Act 2004 - a case of legislate now and implement whenever?* SCL 2009, Mar, 328-330.
[56] The Criminal Procedure (Scotland) Act 1995, s 271.
[57] Crime and Punishment (Scotland) Act 1997.
[58] The Vulnerable Witnesses (Scotland) Act 2004.

given an automatic entitlement to special measures. In the 2010s the age of the child was raised from 16 to 18.[59] A presumption in favour of special measures was applied to all other vulnerable witnesses.

Following the Lord Justice Clerk's review, we now pre-record the evidence of most complainers in serious sexual offences by default[60] unless the witness prefers to testify in open court. With young children, specially-trained police officers and social workers conduct a video recorded joint interview as soon as possible after a report is made. This captures their evidence at the earliest possible opportunity. Any further evidence is pre-recorded on commission,[61] at which the accused's lawyer will be able to cross-examine the complainer. This is done at the earliest opportunity in the proceedings. The thinking behind this approach is two-fold. First, it spares vulnerable witnesses the ordeal of appearing in the trial courtroom, thus assisting the most vulnerable to give their testimony in a non-intimidatory atmosphere.[62] It serves to vindicate the complainer's lawful expectation to be treated with sensitivity during the trial process. Secondly, the passage of time may cause memories to fade. Recounting a story a number of times to friends or relatives, police, lawyers, and in court can create a sense of entrenchment, or can alter the memory of the event. This approach captures the best evidence available; that is as fair to the accused as is possible. It is in the public interest. The accused's counsel can still test the complainer's evidence through cross-examination. No significant change has been detected in the conviction rate for sexual offences since we began taking complainers' evidence in this way as a matter of routine. There is no suggestion that there has been any negative impact on the fairness of the trial.

I have already mentioned that the identities of vulnerable witnesses in Scottish criminal proceedings are routinely withheld from the public (but not the media). That is

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[59] The Victims and Witnesses (Scotland) Act 2014.

[60] Lord Justice Clerk's Review Group, "Improving the Management of Sexual Offence Cases", March 2021 (https://www.scotcourts.gov.uk).

[61] Criminal Procedure (Scotland) Act 1995, s 271I.

[62] see the infamous Glasgow Rape Case. The Crown dropped the case despite the weight of evidence after the view was formed that the complainer was too fragile to attend court to give evidence (Macaulay, "*Private Prosecution: Revisiting the Glasgow Rape Case*", 16 January 2017, Journal of the Law Society of Scotland (lawscot.org.uk)).

rarely done by means of a formal court order imposing reporting restrictions. Rather the mainstream UK press are bound by a Code of Conduct which prevents them from reporting the identities of victims of sexual crime unless there is adequate justification for it and they are legally free to do so.[63] If there is likely to be significant public interest in a sexual offence trial, the court can use its formal powers at common law and under statute[64] to prohibit the publication of the identity of the complainer. The Lord Justice Clerk made such an order during the trial on sexual offences of Scotland's former First Minister, Alex Salmond.[65] That proved prescient, as two individuals were successfully prosecuted for identifying the complainers online.[66] Had the Lord Justice Clerk not made that order, those prosecutions could not have taken place. The individuals in question were not journalists. There could have been no regulatory consequences for them. This is an age in which anybody with access to the internet can broadcast to a potentially global audience. The Independent Press Standards Organisation's regulatory reach is not a complete solution. It is this lacuna which prompted the Review to recommend that complainers in sexual offence cases be given a legal right to anonymity. The Bill contains provision for automatic anonymity for victims of particular offences, including rape, human trafficking and the disclosure of intimate images without consent.[67] Any person, who publishes information which is likely to lead to the identification of another person[68] as a victim of a listed offence, commits a crime and is liable to imprisonment up to a maximum of two years. None of this should have any bearing on the fairness of the trial as far as the accused is concerned. To a complainer, it may mean the difference between deciding to report what happened, and refraining from doing so.

Before I explain the provisions of the Bill which provide for independent legal representation for complainers in connection with applications to lead certain evidence under Scotland's rape shield legislation[69], it might be helpful if I provide a brief history of

[63] Editors' Code of Practice (January 2021), Independent Press Standards Organisation, para 11 (www.ipso.co.uk); see also IPSO's Guidance on Reporting Sexual Offences (www.ipso.co.uk).
[64] Contempt of Court Act 1981.
[65] *HM Advocate* v *Salmond* [2021] HCJ 1.
[66] *HM Advocate* v *Thomson,* 25 February 2021, Unreported (Sentencing Statements (judiciary.scot)); *HM Advocate* v *Murray* 2022 JC 181.
[67] s 63.
[68] The complainer is entitled to publish such information.
[69] Sections 274 and 275, Criminal Procedure (Scotland) Act 1995.

that legislation, and the problems which we have faced in getting it to operate as it should. In broad terms, the shield prohibits the admission of any evidence regarding certain matters, such as a complainer's sexual, social or psychological history. It allows such evidence to be led, but only if it meets a cumulative and strict test of being relevant, specific in nature, of significant probative value, and likely to outweigh the risk of prejudice to the proper administration of justice. The provisions are designed to protect complainers in rape and sexual assault cases from irrelevant, intrusive and often distressing questioning in court. The provisions are a crucial means of securing the complainer's right to respect for her, and occasionally his, private and family life[70] and expectation of being treated with respect and sensitivity.

During my tenure as Lord Justice Clerk, from 2012 - 2015, one of my concerns was to correct the manner in which the rape shield protections had been operated by the courts. When I began in practice in 1977, there were no statutory restrictions on this type of evidence being adduced but there were common law rules on relevancy, a prohibition on evidence of character and the ethics of the Bar. All of these kept examination and cross-examination within reasonable bounds. Statutory provisions were enacted in 1985, but they were ineffective. The enactment of the current legislation ought to have produced a seismic change in the way that evidence of a complainer's history, in particular, their sexual history, was dealt with. However, for years, the provisions "consistently posed challenges, to both practitioners and judges alike, in determining their proper scope and application." [71] Confusion abounded regarding the basic rule that evidence requires to be relevant. Some judges applied the legislation as though it afforded them a general discretion to admit evidence based on what they considered to be fair, looking primarily at the rights of the accused.[72] Others adopted a hands-off approach to intrusive questioning. The low point of this was a case in which a complainer was questioned over a period of several days; the

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[70] Art 8 of the ECHR; Art 17 of the ICCPR. The freedom of the press under article 10 of the ECHR is a relevant factor to be weighed in the balance too (*A* v *Secretary of State for the Home Department,* at para 48) but it is not the focus of this paper. See also *Attorney General's Reference (No 3 of 1999)* [2010] 1 AC 145.

[71] *CH* v *HM Advocate* 2021 JC 45, Lord Turnbull at para 109.

[72] See *ibid*, Lord Justice General Carloway at paras 40 and 43.

opening so called questions to the complainer from a very experienced senior member of the Bar being:

> "you are a wicked, deceitful, malicious, vindictive liar? … And you have been for the last 20 years … And this is your last hurrah?"[73]

Over the past ten years, through a series of decisions, the High Court has clarified the full significance of the legislation and how it should operate. The legislation defines the parameters within which evidence must fit, if it is to be admitted.[74] There is little room for the views of the individual judge. Similarly, there is no scope for an application to be granted merely because the Crown has decided that it will not oppose it.[75] Properly operated, the rape shield provisions are a crucial means of securing the complainer's right to respect for private and family life[76] and her expectation that she will be treated with respect and sensitivity.

The legality of the provisions was challenged in the European Court of Human Rights on the basis that they were incompatible with the appellant's right to examine witnesses against him in accordance with his right to a fair trial under the European Convention.[77] Since the provisions give the court the power to refuse to admit otherwise admissible evidence, they do give rise to an interference with that right. However, the Court held that, so long as the restrictions do not render the right to examine witnesses nugatory, such as by preventing the accused from presenting his defence, they were legitimate.[78] Parliament was entitled to take the view that evidence of the sexual history and character of a complainer in sexual offences cases was rarely relevant to whether a sexual offence had been committed. Even where it was, its probative value was usually weak compared with its prejudicial effect. Parliament was entitled to find that a number of myths had arisen in relation to the sexual history and character of complainers. It was entitled to conclude that

[73] *Beggs or Dreghorn* v *HM Advocate* 2015 SCCR 349 at para 15, see also *MacDonald* v *HM Advocate* 2020 JC 244.
[74] *M* v *HM Advocate* (No. 2) 2013 SLT 380, Lord Justice Clerk Carloway at para 44.
[75] *RN* v *HM Advocate* 2020 JC 132, Lord Justice Clerk Dorrian at para 20.
[76] per Article 8 of the ECHR, which is built into the provisions (*RR, Petitioner, supra*, para 35).
[77] Art 6(3)(d).
[78] *Judge* v *United Kingdom* 2011 SCCR 241G at paras 27, 32 and 33.

these myths had unduly affected the dignity and privacy of complainers. Having reached these conclusions, it was well within the purview of Parliament to enact the rape shield provisions, as a reasonable and flexible response to the problem.[79]

Scotland has taken a more restrictive approach to the participation of complainers in criminal trials than is taken in some countries. In Germany, for example, a victim can take an active role by becoming a party to the prosecution.[80] Although there have been significant developments in complainers' rights in recent years, including a right to request an internal review by the Crown Office of a decision not to prosecute, that does not extend to allowing an external, or judicial, challenge to the decision of the Crown on whether to prosecute. The courts have no power to review such decisions.[81] However, recently, the court clarified that the Crown does owe a duty to complainers to present their views regarding an application to the court to lead otherwise inadmissible testimony, even if the Crown do not object to that application being granted.[82] A complainer in a rape trial asked the High Court to court to quash a decision of a trial judge to grant an application to allow an accused to lead evidence of the development of a relationship with the complainer, including references to messages and discussions in which the petitioner had expressed her sexual preferences. The complainer had not been told of the application until four months after it had been granted. The court held that the Crown must keep a complainer informed of the progress of a prosecution and enable her to present her views on any application, through the Crown, to the court.

The new Bill seeks to extend that position, and give complainers the right to have independent legal representation in such any application.[83] The courts have already recognised that a complainer has the right to be heard prior to the grant by the court of any order for the production of material which contains private information, such as medical records or a mobile phone, which engages that complainer's Article 8 rights to respect for

[79] *ibid*, paras 28 and 30.
[80] A private prosecutor (*Privatkläger*) or private accessory prosecutor (*Nebenkläger*) (European e-Justice Portal, Victims' rights in Germany (europa.eu)).
[81] *HM Advocate* v *Cooney* 2022 JC 108 at para 33.
[82] *RR, Petitioner, supra*, Lord Justice General Carloway at para 48.
[83] s 64.

her private and family life.[84] The Bill seeks to extend the complainers' right to participate in criminal proceedings only in a limited manner. That may have an impact on the evidence which the accused can lead at trial, but the same arguments regarding fairness, which have already been considered by the European Court of Human Rights, apply.

The last aspect of Scotland's criminal justice system which I would like to look at is sentencing. Whilst not strictly related to the fairness of the trial itself, sentencing is important to the overall question of fairness to the accused. It is obviously something in which the complainer will retain a keen interest. In Scotland, criminal sentencing is almost entirely a matter of judicial discretion. However, we have been gradually moving towards a sentencing guidelines system since 2015. There are now three guidelines approved by the High Court. The sentencing court must have regard to the guidelines,[85] and must give reasons if it declines to follow them.[86] The guidelines are not prescriptive. Rather, their purpose is to enshrine some important considerations into the decision-making process and to ensure a principled approach to the exercise of judicial discretion. Those considerations are intended to reflect what society reasonably considers to be important, as ascertained via public and governmental consultation.[87] The core principle is that all sentences must be fair and proportionate; meaning, among other things, that they are no more severe than is necessary in order to achieve the appropriate purposes in sentencing the individual offender.[88] Of relevance today is the public interest in expressing disapproval of offending behaviour, protection of the public, and the level of harm caused to the victim. These are factors which must be taken into account when calculating the headline sentence.[89] This is another means by which the court ensures balance between the competing interests.

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[84] *F* v*Scottish Ministers* 2016 SLT 359; *AR* v *HM Advocate* [2019] HCJ 81.

[85] Criminal Justice (Scotland) Act 2016, s 44.

[86] *ibid*, s 6(2).

[87] See Scottish Sentencing Council, Stage 4 - Consulting on the guidelines.

[88] Scottish Sentencing Council, *Principles and purposes of sentencing* at 3 (scottishsentencingcouncil.org.uk).

[89] Scottish Sentencing Council, *The Sentencing Process* at 7, 10 and 15 (scottishsentencingcouncil.org.uk).

Weighing In

The courts are the practical mechanism by which society accesses justice. If the courts do not function in a manner which is satisfactory to society generally, then satisfactory access to justice is not achieved. Today, society expects that the needs of complainers are taken into account by the criminal justice system. There can be public upset and outcry when the public perceive, rightly or wrongly, that that has not happened.

Balancing these countervailing interests is an art, not a science. Where there is a conflict between them, resolving it is not always an easy task. One size does not fit all. It comes down to doing justice in the individual case, as well as ensuring that justice has been seen to be done in the individual case. It can help to remind ourselves of the fundamental tenet of the criminal justice system:

> "…the common law of this free country is far less solicitous about securing convictions than about ensuring that every accused person shall have an absolutely fair trial."[90]

In a civilised and inclusive society, there is no doubt that the needs and rights of the victims of crime cannot be ignored by the courts. To do so would be to be blind to the reality of crime and the impact which it has on society. Fairness to the accused must remain at the heart of the criminal justice system. The impact of any measures, which are designed to serve the rights and interests of any other relevant person, must be weighed carefully in light of that central concern. That approach serves the interests of us all.

Lord Carloway
Lord President of the Court of Session
19 September 2023

[90] *Lord Advocate* v *Trotter* (1902) 10 SLT 258, Lord Stormonth Darling at 261.