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Chalmers, J. (2002) *How (not) to reform the law of rape*. Edinburgh Law Review, 6 (3). pp. 388-396. ISSN 1364-9809
(doi:10.3366/elr.2002.6.3.388)

<http://eprints.gla.ac.uk/70308/>

Deposited on: 4th October 2012

How (Not) to Reform the Law of Rape

A. THE PROBLEM

In *Lord Advocate's Reference (No 1 of 2001)*,¹ a bench of seven judges of the High Court of Justiciary has held (with two judges dissenting) that the *actus reus* of rape "is constituted by the man having sexual intercourse with the woman without her consent",² and that force—or the threat of force—is not a necessary element of the *actus reus*.

The problem arose in the following way. In a trial for rape, the trial judge withdrew the charge from the jury on the basis that the Crown had not led sufficient evidence to prove that force, or the threat of force, had been used to overcome the will of the complainer. Following the decision, and the resultant media outcry, the Lord Advocate presented a petition to the High Court³ for a ruling on whether force was a necessary element of the *actus reus* of rape.

The decision of the High Court focused principally on two authorities. The first of these was the 1858 decision in *Charles Sweeney*,⁴ where a majority of the court had held that for a man to have intercourse with a sleeping woman was not rape, because this did not involve using force to overcome the complainer's will. It was, however, a separate crime, now referred to as "clandestine injury". The second was the earlier 1847 decision in *William Fraser*,⁵ where a majority of the court held that for a man to have intercourse with a woman by impersonating her husband was not rape.⁶ The judges in the majority in that case adopted different reasons for their decision—some holding that this was not rape because no force (or some equivalent, such as drugging) had been used, some because fraud as to identity did not vitiate consent, but a majority of the court took the view that it was sufficient for the *actus reus* of rape that the man had sexual intercourse with the complainer without her consent.

Those views were obiter, and did not bind the court in *Sweeney* (indeed, it is not clear that the *Sweeney* court appreciated their significance), and the decision in *Sweeney* remained binding. The question for the *Reference* court, therefore, was whether the decision in *Sweeney* could—and should—be overruled. By a majority of five votes to two, both of these questions were answered in the affirmative.

In the remainder of this article, the following propositions are advanced. First, the rationale(s) offered by the *Reference* majority for overruling *Sweeney* is weak and unconvincing. Second, a better justification for overruling *Sweeney* can be found by examining—and rebutting—the arguments presented in the dissenting judgments. Third, the *Reference* decision illustrates the inappropriateness of the court undertaking what is effectively a law reform project, a matter which should properly be the province of the Scottish Parliament. As a preliminary point, however, it is necessary to consider a basic issue of competence—was it actually open to the *Reference* court to consider overruling *Sweeney*?

B. THE DECISION

(1) Crossing the threshold: could the court overrule *Sweeney*?

It is accepted that a bench of the High Court may overrule decisions taken by a bench consisting of fewer judges.⁷ It appears that it is for that reason that a bench of seven judges—one

1 *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466 (henceforth *Reference*).

2 *Reference*, per Lord Justice-General Cullen at 476.

3 Criminal Procedure (Scotland) Act 1995, s 123.

4 (1858) 3 Irv 109.

5 (1847) Ark 280.

6 The decision itself was subsequently overruled by statute: Criminal Law Amendment Act 1885, s 4. See now Criminal Law (Consolidation) (Scotland) Act 1995, s 7(3).

7 See *The Laws of Scotland: Stair Memorial Encyclopaedia* (henceforth SME), vol 22 (1987), para 310.

more than sat in *Sweenie*—was convened for the *Reference*. *Sweenie*, was, however, arguably a decision of the Whole Court—save for the fact that the office of Lord Justice-Clerk was vacant at the time of the decision due to the death of Lord Hope. That raised the issue of whether decisions of the Whole Court can only be overruled by another Whole Court (if they can be overruled at all), a question which was raised but not decided in the case of *Sugden v HM Advocate*.⁸ The majority sidestep this issue, arguing that *Sweenie* should not be regarded as a decision of the Whole Court given the absence of the Lord Justice-Clerk.⁹ Lord McCluskey, however, argues that *Sweenie* should be regarded as a Whole Court decision, and that it cannot therefore be overruled “without introducing a new doctrine, not yet recognised in our law, that a long-standing decision of the Whole Court of the High Court of Justiciary can be overruled by a court of seven judges”.¹⁰

Lord McCluskey does not discuss the issue any further than this, and the remainder of the court avoids it altogether. It may be, as is suggested in the *Stair Memorial Encyclopaedia*, that the issue is of “little or no practical importance” given the small number of Whole Court decisions and the number of them which might call for future reconsideration.¹¹ In those circumstances, I shall do no more than make the following three observations:

First, Lord McCluskey argues that the fact that the office of Lord Justice-Clerk was vacant when *Sweenie* was decided does not affect its status as a decision of the Whole Court, observing that the Whole Court has on occasion sat without all the judges being present.¹² While that is correct, it may be that Whole Court decisions which were taken in the absence of one or more judges fall to be treated differently as far as the law of binding precedent is concerned.

Second, because there is no High Court decision on the binding effect of Whole Court judgments, it is submitted that it is open to any court sitting with more judges than a relevant Whole Court to decide that it is not bound by a prior decision of that court.¹³ The *Reference* court could, therefore, have decided this point if it had felt it necessary, not being bound by any prior decision on the point.¹⁴

Third, it is all but inconceivable that a Whole Court could be convened today due to the present number of High Court judges. Effectively, to hold that a Whole Court decision can only be overruled by another Whole Court (if at all) would render Whole Court decisions unreviewable, save by legislation. However, it appears to be accepted in both Scotland and England that any doctrine of non-reviewable binding precedent is undesirable. Hence, for example, the 1966 Practice Statement,¹⁵ allowing the House of Lords to depart from its own previous decisions, and s 2 of the Human Rights Act 1998, which provides that UK courts must “take into account” decisions of the ECHR organs, but are not bound by such decisions.¹⁶

8 1934 JC 103.

9 *Reference*, per Lord Justice-General Cullen at 475.

10 *Reference*, per Lord McCluskey at 490. Lord Marnoch reserved his opinion on this point: *Reference*, at 478.

11 SME, vol 22, para 309.

12 *Reference*, per Lord McCluskey at 490, citing *Sugden v HM Advocate* 1934 JC 103 and *Kirkwood v HM Advocate* 1939 JC 36. It is, incidentally, therefore unclear how a decision qualifies as a “Whole Court” decision if it does not require the participation of all the judges. Does its status as such depend upon the participation of a minimum number of judges? But if that is the case, and six judges constituted a Whole Court in *Sweenie*, should not the seven *Reference* judges constitute a Whole Court?

13 Cf, however, SME, vol 22, para 309, where it seems to be assumed that it would be necessary to convene a Whole Court to “decide on the power to review a Whole Court decision”.

14 It should not be assumed that a “lower” court is not entitled to decide that it is not bound by the decisions of a “higher” court. See *Farrell v Farrell* 1990 SCLR 717 (Sh Ct) (sheriff not bound by decision of an Outer House judge). Of course, one might argue that a sheriff should not automatically be regarded as “beneath” an Outer House judge, but equally, a court of seven judges should not automatically be regarded as “beneath” a Whole Court with fewer members.

15 Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

16 The European Court of Human Rights can, of course, review its own prior decisions. But there is no appeal from the UK courts to the European Court, and, if the relevant issue is decided against the interests of the State in the domestic courts, no method by which the State can ask the European Court to consider the issue.

If Whole Court decisions were held to be unreviewable, this would give a unique status to a very small number of relatively archaic (which is not, necessarily, to say incorrect) decisions. That would seem anomalous, and *prima facie*, undesirable—especially given that many of these decisions would have been taken at a point when the doctrine of *stare decisis* was not firmly established in Scots law.¹⁷

(2) The majority rationale

The general rationale of the majority decision is found in Lord Cullen's opinion, in which all of the other four judges in the majority concurred. It is not clear, however, precisely what that rationale is. Lord Cullen appears to advance two different bases for holding that force is not an element of the *actus reus* of rape.

The first of these bases is that *Sweenie* was simply wrongly decided. This conclusion is supported by four different propositions, as follows. First, despite *Sweenie*, it is clear that force was never required where the victim was legally incapable of giving consent (as in the case of a child under twelve or a mentally incapable woman). Second, in decisions subsequent to *Sweenie*, "the concept of 'force' was artificially extended to cases in which the accused had used no actual force but had used some means of putting the woman in a state in which she was incapable of resisting". Third, the degree of force (and resistance) required depended "on the situation of the woman". Fourth, in *Jamieson v HM Advocate*,¹⁸ the court had "defined the *mens rea* of rape by reference to the accused's belief that the woman consented".¹⁹

"These considerations", states Lord Cullen, "strongly suggest to me that *Sweenie* was wrongly decided."²⁰ It is not easy to understand this conclusion. Given that the second and fourth considerations both post-date *Sweenie*, they are hardly grounds for suggesting that *Sweenie* itself was wrongly decided. Indeed, it might be argued that they are themselves incorrect given *Sweenie*. The third consideration is predicated on the existence of a force requirement, and cannot, therefore, be prayed in aid of an argument that no such requirement exists. (It might be a basis for an argument about the practicality of applying a force requirement, but that is not the point which Lord Cullen is making.) The first consideration is the most important, but hardly conclusive—there is nothing illogical, contradictory or unworkable about a rule which holds that force is generally required but that an exception is made for certain categories of victim. (Indeed, Lord Cullen goes on to employ exactly this sort of reasoning, holding that underage and incapable victims are an exception to the general rule that sexual intercourse with consent is not rape.)²¹

It is probably in recognition of the weakness of these arguments that Lord Cullen goes on to invoke "wider considerations", which provide the second possible basis for the *Reference* decision. Arguing that the current law may not be "in accordance with a modern view of the rights of women, their relationship to men and their place in society", he concludes that "the law of rape [should] support the principle that whether there is to be sexual intercourse should depend on whether the woman consents, wherever and whenever she pleases".²²

This proposition is (or at least, should be) uncontroversial, but its invocation is disingenuous. First, the court produces no evidence to support the proposition that the decision in *Sweenie* was based upon an outdated view of the place of women in society, as opposed to the court's

17 On the development of *stare decisis*, see generally J C Gardner, *Judicial Precedent in Scots Law* (1936), ch 3; T B Smith, *The Doctrines of Judicial Precedent in Scots Law* (1952), ch 2.

18 1994 JC 88.

19 *Reference*, at 473–474.

20 *Reference*, at 474.

21 *Reference*, at 476. This is achieved through a rule that the absence of consent will be irrebuttably presumed where the complainant is underage or incapable. But that is a legal fiction, and if we are going to employ legal fictions here, we could just as easily employ an irrebuttable presumption that intercourse with an underage or incapable victim is forcible.

22 *Reference*, at 475; see also Lady Cosgrove at 481.

desire to construe narrowly what was then a capital offence.²³ Second, the criminal law already supports the principle invoked by Lord Cullen, for sexual intercourse without consent is indecent assault, which carries the same maximum penalty as rape. Indeed, Lord Cullen is adamant elsewhere in his judgment that the change wrought by the majority “[does] not involve rendering unlawful what is at present lawful”.²⁴ (If that were not the case, the change wrought by the majority could perhaps have been justified by invoking art 3 of the European Convention on Human Rights.)²⁵ If the outcome of the *Reference* is to be justified on the basis of such “wider considerations”, this cannot be on the basis that these dictate that non-consensual but non-forcible sexual intercourse should be a criminal offence (for it already is), but on the basis that it must attract the label “rape” rather than “indecent assault”. That is a more difficult argument to make, and neither Lord Cullen nor any other member of the *Reference* bench attempts it.

Perhaps most importantly, it is clear that the *Reference* majority is happy to accept that the court has a proper role as an engine of law reform. To quote Lord Cullen: “a live system of law should take account of contemporary attitudes and mores . . . a live system of law should be responsive to changing circumstances”.²⁶ It is, of course, true that criminal reform in Scotland has in recent history been the province of the judiciary rather than the legislature.²⁷ That might, however, have been expected to change in light of the devolution settlement. I shall return to this point later.

(3) The dissenting opinions

Both Lord McCluskey and Lord Marnoch argue that, even if the court is technically entitled to overrule *Sweeney*, it is inappropriate to do so. Their argument (I do not intend to explore the subtle differences between their positions here) has two stages. First, although the High Court can overrule a previous decision in order to correct an error, there is nothing erroneous about *Sweeney*. It decided nothing new, but simply re-affirmed the understanding of the law which was clear from Hume’s treatment of rape. Second, even if *Sweeney* had been wrongly decided, the decision has stood for too long to be open to review by the courts at this stage, and reform must be a matter for the legislature. I believe that a more plausible rationale for the *Reference* decision can be found by rebutting each of these points, in turn.

To address the first point: the minority’s interpretation of Hume (which is not expressly disputed by the majority) can be expressed in two propositions. These are: (a) Hume regarded force (or the threat of force) as an essential element of the *actus reus* of rape; and, as a corollary, (b) sexual intercourse without consent, in the absence of force, was insufficient for the crime of rape. The thesis which I intend to advance (briefly) here is that this interpretation of Hume is misconceived. In particular, proposition (b) is not the corollary of proposition (a), and it is not supported by a careful reading of Hume.

The first point to note is that Hume does occasionally talk of rape in terms of “no consent”. So, for example, after stating that “the knowledge of the woman’s person must be against her will, and by force”,²⁸ he goes on to state:

23 As suggested in *HM Advocate v Logan* 1936 JC 100 per Lord Justice-Clerk Aitchison at 102.

24 *Reference*, at 474. See also Lord Nimmo Smith at 482 and Lord McCluskey at 488. Cf Lord Marnoch at 478.

25 It is arguable that non-consensual intercourse is “inhuman or degrading treatment” within the meaning of art 3 of the ECHR, and that the State is therefore under a positive duty to criminalise the relevant conduct. This, in turn, raises a possible art 7 (non-retrospectivity) problem, but it may be that developments in the criminal law which are required by the ECHR are “reasonably foreseeable” and thus do not violate art 7. See *A v United Kingdom* (1999) 27 EHRR 611; *SW v United Kingdom* (1996) 21 EHRR 363.

26 *Reference*, at 475. See also Lady Cosgrove at 481. Cf Lord McCluskey at 490.

27 See C H W Gane, “Criminal law reform in Scotland” (1998) 3 SLPQ 101.

28 D Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, 4th edn by B R Bell (1844), Vol 1, 302. P W Ferguson has suggested that it may be significant that this statement “was repeated in Bell’s edition of the *Commentaries* published just three years before *Fraser*”. (P W Ferguson, “The definition of rape”, 2002 SLT (News) 163, at 163; see also *Reference*, per Lord Marnoch at 476.) The *Commentaries*

This doctrine must, however, always be understood in a reasonable, and not a captious sense. It is evidently no consent, to do away the guilt of rape, if the woman only discontinue her resistance out of fear of death, as when a pistol is clapped to her head . . .²⁹

Second, we must note Hume's use of the phrase "discontinue her resistance". For Hume, it was self-evident that any woman threatened with non-consensual sexual intercourse would resist the man concerned, meaning that it would be impossible for the man to have intercourse without the use of force. For Hume, proposition (b) would be a nonsense, because such a case was simply inconceivable. In taking this stance, Hume was simply reflecting views which were near-universal amongst lawyers (invariably, of course, male) of his time. To quote the New York Court of Appeals in 1874:

Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant?³⁰

The fact that Hume did not see the use of force as essential *in itself* for the crime of rape, but simply as an inevitable corollary of non-consensual intercourse where the complainer was an adult of sound mind and body, is shown by his reference to the case of *James Mackie*,³¹ where the complainer was "a poor cripple lame lass . . . unable to make any resistance". Mackie did not, therefore, require to use force to overcome the complainer's will,³² but was nevertheless convicted of rape—a verdict which Hume cites with approval. This also explains why Hume did not see force as essential in cases where the complainer was unable to give a valid consent to sexual intercourse due to nonage or mental incapacity.

It was not until the courts—both in England and in Scotland—were confronted with cases involving intoxicated or sleeping victims in the mid-nineteenth century that the issue of non-consensual but non-forcible intercourse received any detailed consideration.³³ (The question would also have arisen squarely in *Fraser* had the court been prepared to hold that fraud as to identity vitiated consent.) The *Sweeney* court, I would suggest, was not simply "applying" Hume's definition of the crime, but was considering a scenario which was not addressed in Hume's treatment of rape. The decision of the court broke new ground; it did not simply apply established law. Lord Marnoch is therefore incorrect to say that the *dicta* in *Fraser* "are clearly at odds with every other authority at about that time";³⁴ there is simply no other authority from that period which addresses the question of sexual intercourse which is both non-forcible and non-consensual, except for *James Mackie*, which is perfectly consistent

first appeared as two separate texts in 1797 and 1800. In the second and third editions (published in 1819 and 1829 respectively), Hume left the text essentially unaltered, but simply added in references to new cases and statutes by way of notes. (See the "Advertisement" which appears at the start of the third and fourth editions.) Bell then produced a further edition of the *Commentaries* in 1844 which were accompanied by a set of supplemental notes of cases decided from 1828 onwards. He did not edit the text of the *Commentaries* itself. In those circumstances, the fact that the statement was "repeated" in Bell's edition is of no significance whatsoever.

²⁹ Hume, 1, 302.

³⁰ *People v Dohring* (1874) 59 NY 374 per Folger J at 384.

³¹ (1650) Hume, 1.303.

³² It is true that Mackie could not have effected penetration without a modicum of force, but nor could have Sweeney. It is impossible (without violating the laws of physics) for penetration to be effected without the application of force by one party, but such a degree of force will not serve to satisfy any requirement of "force" in rape, otherwise such a requirement would be all but redundant.

³³ In Scotland, in *Sweeney*; in England, in *R v Camplin* (1845) 1 Cox CC 220; *R v Mayers* (1872) 12 Cox CC 311.

³⁴ *Reference*, at 477.

with *Fraser*. All this, I would suggest, provides a firmer basis for an argument that *Sweenie* was wrongly decided than that offered by the *Reference* majority.

If this is correct, and the proposition that sexual intercourse which is both non-consensual and non-forcible is not rape has no earlier authority than *Sweenie* to support it, as I would argue, the decision of the High Court to overrule *Sweenie* becomes *less* problematic than Lords McCluskey and Marnoch suggest. There is, nevertheless, something problematic about overturning a judicial decision which has stood for 143 years, and this brings us on to the second objection of the minority: that the decision in *Sweenie* has stood for too long to be open to review by the courts now.

This position is taken most clearly by Lord Marnoch: "in any legal system which recognises the authority of precedent as bringing continuity and certainty to the common law, there must surely come a time when settled law must simply be accepted as *being the law*".³⁵ The problem with this argument is that there are numerous occasions (as Lord McCluskey concedes) on which the High Court has taken it upon itself to correct errors in previous decisions, such as *Brennan v HM Advocate*³⁶ (abolition of a partial defence of voluntary intoxication in murder cases) and *Galbraith v HM Advocate*³⁷ (abolition of the requirement of "mental illness" as a foundation for the defence of diminished responsibility). Now, none of the previous decisions concerned had stood for as long as *Sweenie*, but once one accepts that a fifty-six-year-old decision³⁸ can be overruled (as in *Brennan*), it is difficult to see at what point there might "come a time" when the High Court must concede that an established decision is no longer open to review. Certainly, the Court of Session does not appear to have accepted the validity of such a stance, holding in *Commerzbank Aktiengesellschaft v Large*³⁹ that it could disregard a House of Lords decision which had stood for 153 years.⁴⁰

C. THE COURT AS A LAW REFORM BODY

(1) A preliminary point: anglicisation, again

In an earlier article in this journal, I observed that the effect of the Full Bench decision in *Galbraith v HM Advocate (No 2)*⁴¹ was to import (without acknowledgment) the English statutory definition of the doctrine of diminished responsibility into Scots law.⁴² In the light of the *Reference*, it appears that such unacknowledged borrowing is becoming a habit of the High Court. This can best be illustrated by a juxtaposition of two quotations. The first is from Lord Cullen's opinion in the *Reference*:

In my view this court should hold that . . . the general rule is that the *actus reus* of rape is constituted by the man having sexual intercourse with the woman without her consent . . . [and] mens rea on the part of the man is present where he knows that the woman is not consenting or at any rate is reckless as to whether she is consenting.⁴³

35 *Reference*, at 478. See also Lord McCluskey at 489, but his position differs in that he is not prepared to concede *arguendo* that *Sweenie* might have been wrongly decided.

36 1977 JC 38.

37 2002 JC 1.

38 *HM Advocate v Campbell* 1921 JC 1.

39 1977 SC 375.

40 *Hyslops v Gordon* (1824) 2 Sh App 451.

41 2002 JC 1.

42 J Chalmers, "Abnormality and anglicisation: first thoughts on *Galbraith v HM Advocate (No 2)*" (2002) 6 EdinLR 108.

43 *Reference*, at 476. A practice appears to be developing whereby the leading opinion in a Full Bench case will include a summary of the principal points which have been decided. See *Thompson v Crowe* 2000 JC 173, per Lord Justice-General Rodger at 202; *Galbraith v HM Advocate* 2002 JC 1, per Lord Justice-General Rodger at 21–22.

The second quotation is from the English statutory definition of rape:

... a man commits rape if—

- (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
- (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.⁴⁴

The similarity between the two definitions (aside from the fact that English law, since 1994, recognises non-consensual anal intercourse with either a woman or a man as rape) should be self-evident. In that context, it is instructive to consider another comment made by Lord Cullen:

The court was invited to consider the formulation of the requirements for the crime of rape which apply in the law of England and other countries in the British Commonwealth. I have not found this exercise to be useful or reliable. In this context the historical roots and concepts of another system cannot be assumed to be similar to those of the law of Scotland. Furthermore, the position in many other countries has been largely superseded by legislation.⁴⁵

Whether the anglicisation which I have noted is conscious or not, it makes a nonsense of Lord Cullen's rationale for declining to consider English material on the definition of rape. If Scotland is to adopt a definition of the crime of rape which is largely identical to that which applies in England, might there not be something to be learned from the way in which that definition has been interpreted and applied in that jurisdiction? If the High Court is to function as a law reform body (and the majority of the *Reference* court appears content that it should), it must take the responsibilities of a law reform body seriously—and that includes appropriate use of the comparative method.⁴⁶

(2) Law reform and “wider considerations”

As noted earlier, the *Reference* majority relies to a certain extent on “wider considerations” to justify overruling *Sweeney*. These are, indeed, the sort of matters which would normally be taken into account in any law reform project. But, as Lord McCluskey points out, the court is ill-equipped to take such matters into account. It cannot hear evidence, or invite submissions from interested parties.⁴⁷ The court's treatment of the “wider considerations” to which it refers is far briefer than would be expected in a law reform exercise, and no opportunity is afforded to the public to comment on the assumptions and arguments on which the court relies.

It is also unfortunate that the court does not consider the effect of abolishing the crime of clandestine injury, which is one effect of the *Reference* decision (as such conduct is now, necessarily, rape).⁴⁸ In the recent case of *Paton v HM Advocate*,⁴⁹ which is not referred to in

44 Sexual Offences Act 1956, s 1, as substituted by the Criminal Justice and Public Order Act 1994, s 142.

45 *Reference*, at 473.

46 Cf Law Commissions Act 1965, s 3(1)(f), which places a statutory obligation on the Law Commissions “to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions”.

47 *Reference*, at 485. Presumably, however, it would be open to the High Court to make some limited provision for such submissions by Act of Sederunt. Cf RCS r 58.8A, as inserted by Act of Sederunt (Rules of the Court of Session Amendment No 5) (Public Interest Intervention in Judicial Review) 2000, SSI 2000/317.

48 This is rather ironic given the number of occasions on which the existence of this crime has been statutorily recognised: see Criminal Justice (Scotland) Act 1995, s 28(1)(a); Criminal Procedure (Scotland) Act 1995, s 274(2)(c); Crime and Punishment (Scotland) Act 1997, s 48(6); Crime (Sentences) Act 1997, s 2(6)(d); Sex Offenders Act 1997, Sch 2 para 2(1)(a)(ii); Crime and Disorder Act 1998, s 86; Powers of Criminal Courts (Sentencing) Act 2000, s 109(6)(d); Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, s 1.

49 2002 SCCR 57.

the *Reference*, the High Court stated that “clandestine injury is a very unusual charge and cases tend to be exceptional and turn on their own particular circumstances . . . [it] is an offence which may be of an unusual character and may merit an unusual form of disposal, that is, a non-custodial form”.⁵⁰ The *Paton* court went on to quash a sentence of two years’ imprisonment and substitute an order for 300 hours community service. The court would doubtless have found this much more difficult to do had Paton’s conviction been for rape rather than clandestine injury, and it is not difficult to imagine the media outcry which might have resulted from a judicial statement that community service was an appropriate disposal where a man had been convicted of rape. As it was, the outcome of Paton’s appeal against sentence appears not to have been reported in any newspaper.⁵¹

Whether or not we choose to attach the label “rape” to a particular act is a decision with consequences. It affects sentencing decisions⁵² (although whether it should is another question). It may make juries more reluctant to convict,⁵³ which may be an argument for adopting a restrictive definition of the crime, or even abolishing it altogether in favour of a general offence of sexual assault, as has been done in some other jurisdictions.⁵⁴ None of these issues, however, receive any consideration from the court, which would not in any case have been able to take such radical steps as these factors might suggest. Nor does the court pay any attention to any of the criticism which has been directed at defining the offence of rape around the lack of consent of the complainer,⁵⁵ which any serious law reform project would have to consider.

(3) Further aspects which require reform

The requirement of force was not, it might be argued, the only defect in the pre-*Reference* law of rape. For example, it remains the case that the crime is limited to penile-vaginal intercourse. Anything else is not rape, but “merely” indecent assault. A man cannot, under Scots law, be raped.⁵⁶ A man who has sexual intercourse with a woman in the belief that she is consenting is not guilty of rape, however unreasonable that belief may be.⁵⁷

Not everyone would agree that these characteristics of the current law could properly be described as “defects”. Each of these propositions will find their defenders somewhere. But the *Reference* decision leaves them unaddressed. The case for reform, along with any case for the defence, has yet to find an audience.

How long will it be, one might speculate, before a trial judge causes controversy by directing a jury on the “unreasonable belief” rule, leading the Lord Advocate to refer the case to the High Court so that the decision in *Jamieson v HM Advocate* can be reconsidered?⁵⁸ And, it may be asked, is this an appropriate method of law reform in a mature jurisdiction? The *Reference* decision would seem to demonstrate quite clearly that the courts are not well-equipped to carry out law reform projects.

50 2002 SCCR 57 at 60.

51 This conclusion is based on a search of the UK Newspaper Stories database on Lexis, carried out on 24 June 2002.

52 In *Garvock v HM Advocate* 1991 SCCR 593, the court held that the fact the Crown could not prove that the victim had been penetrated with a penis as opposed to a blunt instrument meant that her attacker’s sentence should be reduced from ten years to eight. I doubt very much whether the reasoning employed in this case is capable of justification.

53 H Kalven and H Zeisel, *The American Jury* (1966), 250–251.

54 J Temkin, *Rape and the Legal Process* (1987), 118–119.

55 See V Tadros, “No consent: a historical critique of the *actus reus* of rape” (1999) 3 EdinLR 317; Sexual Offences: The Substantive Law (South African Law Com DP No 85, 1999), para 3.4.7.3 et seq.

56 Although see the peculiar case of *Ker* (1640), noted by G Mackenzie, *The Laws and Customs of Scotland in Matters Criminal*, 2nd edn (1699), 85.

57 *Jamieson v HM Advocate* 1994 JC 88.

58 Indeed, there are some subtle hints in the *Reference* decision that *Jamieson* is open for reconsideration. See *Reference*, per Lord Justice-General Cullen at 476 (“Standing the decision in *Jamieson* and in the absence of discussion of this topic in the present reference . . .”).

D. CONCLUSION

In a recent article on the unofficial Scottish criminal code project, Lindsay Farmer has argued that:

the publication of the draft code reflects the emergence of criminal law as an academic subject in Scotland. It seeks to follow the path marked out by other Anglo-American codification initiatives in respect of its political ends: wresting the control over law-making from the judiciary . . .⁵⁹

The choice of alternatives which Farmer presents—academic or judicial control over criminal law-making—is telling. The more natural assumption—that law-making is the province of the legislature—seems to find no place. And, indeed, that would appear to be the current approach of the Scottish Executive, which has shown little interest in issues of substantive criminal law (at least those which are not already codified in statute). Criminal law reform, it seems, can be left to the courts. We muddled through before the Parliament's creation. We may be muddling through for some time yet.

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(The author is indebted to Peter Duff, Christopher Gane and Fiona Leverick for their advice. The usual caveats apply.)

59 L Farmer, "Enigma: decoding the draft criminal code" (2002) 7 SLPQ 68 at 79–80.

EdinLR Vol 6 pp 396–401

The Progress of Article 1 Protocol 1 in Scotland

A. INTRODUCTION

The last year has seen a growing number of Scottish cases involving Article 1 Protocol 1 of the European Convention on Human Rights,¹ which provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest to secure the payment of taxes or other contributions or penalties.²

What is striking, although perhaps not surprising, is that it has been pled in cases involving diverse facts. This, too, has been the experience in England, where the subject-matter of cases has ranged from the rights of pawnbrokers to the liability of lay rectors for chancel

1 Henceforth "Article 1 Protocol 1".

2 For commentary, see R Clayton and H Tomlinson, *The Law of Human Rights*, vol 1 (2000), 1291–1343; S Grosz, J Beatson and P Duffy, *Human Rights: The 1998 Act and the European Convention* (2000), 333–356; Lord Reed and J Murdoch, *Guide to Human Rights Law in Scotland* (2001), ch 8; and D Rook, *Property Law and Human Rights* (2001), ch 4.