

Scottish Criminal Justice:
Devolution, Divergence and Distinctiveness

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Abstract:

It has been claimed that paradoxically, following the re-establishment of the Scottish Parliament in 1999, Scottish criminal justice policy, hitherto more liberal and less punitive than 'south of the Border', became more closely aligned with London based policies (McAra, 2008). It has also been argued that the Scottish Nationalist Party (SNP) Scottish Government has, since gaining power in 2007, reversed that trend in a process of 're-tartanisation' (McNeill 2011). Closer examination reveals a far more complex picture. Based on interviews with key players and observers, this paper suggests that there is room for a more nuanced understanding of policy, policy shifts and reform in the years leading up to and following 1999. The Scottish example raises important questions about the impact of new legislative and executive institutions, the respective influences of civil servants, special advisors, politicians, local government, media, public opinion, and individual personalities on criminal justice policy, particularly in a small jurisdiction. It also raises questions about the relative importance of local, national, territorial and global influences on criminal justice policy of relevance to other devolved nations.

Keywords: Scotland, Devolution, Criminal Justice, Penal Welfarism, Policy Transfer

Introduction

One of the greatest anomalies which the creation of a Scottish parliament will put to rights concerns Scots law. Scotland is the only democratic country in the world with its own system of law but no legislature of its own to determine that law. [. . .] In future, it will be for the Scottish parliament to oversee and legislate for the Scottish legal system, the courts and the police. It will be able to undertake the long overdue tasks of bringing Scots law up to date, and of reforming the courts system.

(Scottish Constitutional Convention, 1995: 15).

In the context, in many jurisdictions across the world, of growing demands for (increased) regional and sub-national autonomy, the decentralisation and devolution of a greater number of policy making powers, the relationship between political and constitutional devolution and criminal justice policy making is of increasing importance. Arguably these issues are at their most significant in the contemporary, devolved United Kingdom, and in particular Scotland, given the uniqueness of the system of asymmetrical devolution enacted for Northern Ireland, Scotland and Wales in the late 1990s. But Scotland provides an even more unique case in that with the creation of the United Kingdom in 1707, law and criminal justice (along with education and the established church) were excluded from the legislation uniting the Scottish and English Parliaments. Scotland, therefore, kept its own distinctive legal and criminal justice systems, administered by distinctive Scottish institutions, for almost three hundred years prior to devolution, begging the question as to what differences devolution has made and is making.

This is not the place to offer a detailed historical account of the changes in criminal justice policy following the 1998 devolution settlement (Croall, 2012; Croall et al, 2010; McAra, 2008). Our concern is with the ways in which devolution has potentially opened-up spaces to create new forms of policy making. The historical uniqueness of many, but not all, aspects of Scotland's justice system is widely recognised. Has devolution enhanced such distinctiveness or has it worked in the opposite direction, diluting some of that uniqueness and bringing it closer to that of England and Wales in particular? Criminologists have debated the degree to which it has been 'detartanised' (McAra, 2008), losing its historical leaning towards welfare based policies in a shift to a more punitive system. Any such shift, or any counter-shift back to renewed distinctiveness and a less punitive approach begs the question of the extent to which Scottish criminal justice, or at least important elements of it, were ever based on welfarist principles (Munro et al, 2012).

It is evident that devolution has created a new terrain for the development of criminal justice policy, reflecting new democratic and policy making structures, greater levels of policy capacity as well as an environment which has increased scrutiny and debate. This environment is also more politicised and we have to remain cognisant of the linkages between criminal justice and other areas of policy development, not least social policy and social justice. Additionally, political and policy developments elsewhere in the UK have had varying impacts on Scotland and on Scotland's changing relationship with the rest of the UK.

This is in many ways a speculative paper, with the central objective of promoting more research and debate. The background to this discussion is first, the legacy of more or less intact criminal justice and legal systems throughout the period of Parliamentary union within the UK; secondly claims to the existence of, and emphasis on the role of, distinctive 'Scottish values' as helping to shape justice policy and thirdly, the impact of devolved politics and policy making since 1999. This is an area that has tended to be overlooked in much of the criminological and criminal justice literature. Similarly, in the social policy literature, with relatively few exceptions (Mooney and Scott, 2005, 2012), criminal justice has hardly featured in debates around policy divergences. Moreover, we do not intend to provide either a comparative analysis with other UK jurisdictions or to place our work within the wider theoretical context of control or risk analyses. However interesting such exercises would be, they lie beyond the scope of this paper. Our aim is rather to present a snapshot of some of the factors which affected reforms in key policy areas in the post devolutionary period and how these changes were perceived by participants and observers at the time.

Analysing the process of policy change is not easy. Public and social policy theorists have identified, to a greater or lesser extent, four factors that affect the development of policy: institutions, socio-economic processes, policy networks and ideas (John, 2003). They also

vary in the pattern of change in public policy they consider to occur. Some consider it to be evolutionary i.e. involving gradual change in path dependency fashion constrained by existing institutions and ideas but affected by a whole range of ongoing processes (Kingdon, 1995). Others view change in public policy as best described as punctuated equilibrium, that is involving quite significant changes that occur when the political or socio economic context changes quite markedly (Baumgartner and Jones, 2000). Others consider change as reflecting the interaction between external shocks to the political system and shifting coalitions between policy actors (Sabatier and Jenkins-Smith, 1993). In this paper we are not positing any specific public policy theory. Nevertheless we have taken an approach that sees the development of criminal justice policy in Scotland as no mere technical process but as one that recognises how politics intervenes at every step of the policy making process. Moreover whilst we are arguing that the political and economic landscape in Scotland, either within or without a UK context, has affected policy development, we are also suggesting that an approach that explores some of the more micro elements of policy making can help understand policy decisions and directions in criminal justice policy making during the first ten years of devolution.

This study emerges from our earlier work reviewing the development of criminal justice in the devolved Scotland (Croall, Mooney and Munro, 2011) and research conducted in 2012. The research comprised an updated literature review and interviews with key informants. The literature review examined existing research into directions in criminal justice policy in Scotland since devolution, an analysis of policy documents 1999 to 2007 to identify patterns of policy change, and a short examination of party manifestos in 2010 to identify how criminal justice was presented to electors by politicians in Scotland. This initial review was followed by in-depth interviews with thirteen key informants. Informants were chosen because they had been significant actors in the development of policy between 1999 and 2007, i.e. from the beginning of the devolution process to the election of an SNP government committed to pursuing a revised territorial settlement and possibly Independence.

Interviewees included elected MSPs , some with Ministerial responsibility, senior civil servants , special advisers to Justice Ministers and one respondent who had more than ten years experience as a reporter with experience of reporting on criminal justice, social affairs and human rights in Scotland. All had first hand knowledge of criminal justice policy, as well as insight into the issues and problems that the political elite and the electorate saw as important. At the time of the interviews they were all out of office or retired and this allowed a greater willingness to be fully open in their answers. Interviews were carried out face-to-face. They were taped and fully transcribed before analysis. The key informant method of research was chosen as it allows a relatively free exchange of ideas; allows interviewers to ask more complex questions and generally gets more detailed responses (Berry, 2002; Schostak, 2006; Tilley, 2006). Questions for the interviews were open ended and flexible but consistency was achieved through prior decisions that topics covered should include: respondent's role in the development of criminal justice policy, factors they felt affected the content and process of criminal justice policy development (including models from outside Scotland), perceptions of how the main political parties have approached criminal justice since 1999 and finally respondent's appraisal of future developments. Interviews were carried out over a four month period, each lasting around one hour. The interviews provided a rich account of institutional processes and perspectives that other research methods would find difficult to achieve. There was no intention to research the policy process in every aspect or even the full range of attitudes towards criminal justice policy in the Scottish political arena at the time of study. Nevertheless the interviews allow an insight into the key debates taking place at a time before debates on Independence took centre stage and highlight how politically driven changes have, alongside other shifts in the political composition of the Scottish and UK governments during the 13 years of devolution, worked to change the terms of the debate within which criminal justice, penalisation and policing is discussed and policies pursued.

Before proceeding to the chronology of justice policy, a few general comments about the particular context of Scottish jurisdiction are pertinent. Scotland's population of around 5.2

million are mostly concentrated in the relatively urbanised central belt. The policy network is small and well connected. Key players are often known to interested academics, and elites are more accessible. Many of our respondents knew each other and suggested that we contact other respondents. For one MSP, it is easier in a small country to find people as *'organizations whether legal institutions, pressure groups, academics or others ... know people's phone numbers, e mail addresses and probablyknow which bar they can bump into people'* (R6). Others saw the down side of this 'smallness'. Another MSP (R11) criticised small mindedness and cited the case of *'people giving evidence to Justice Committees with one eye on the minister for budgets and grants'*. This was said to *'stifle innovation'*.

Smallness does not imply any kind of unanimity of outlook, politics or culture: quite the opposite. This was expressed in the view that:

...there's a lot of baggage we carry around. Scotland is an enquiring, gossipy, prying, cynical place and that's our great weakness [. . .] that prevents us from being a progressive society, [. . .] as soon as you say I want to reform the prison service, all of a sudden you don't have to travel to London to complain, they're right on your doorstep. (R10).

Further, Scotland is by no means homogenous, and there was a perception of a very different mindset between the constituent parts of the country: most usually the East Coast (Edinburgh and its environs) is contrasted with the West (Glasgow and its hinterland) and both with the Highlands and Islands. It was known for example in the civil service that *'wherever your Minister comes from your policy will shift to there'* (R3).

Smallness does not mean inward looking. Devolution brought about constitutional changes, shifted the relationship between civil servants and politicians and a relatively new group of MSPs and Ministers. This provided a rich mix for exploring, if not implementing, change and alternatives. Frequent references to the exploration of key comparators such as the Nordic

states and penal reform in New York State were made by all interviewees. Nordic models were seen as analogous in some respects to Scotland (in the case of Finland, *'it is dark and cold and people drink a lot - people live in rural valleys'* (R3)) and some indeed noted some borrowing of Scottish precedents in Scandinavia. Ideas from elsewhere were not necessarily pursued because of critical political, historical and legal differences. The New York community justice model was explored in the context of individual states' ability to explore variations in criminal justice from the federal centre and in respect of community payback systems and alternatives to prison. These comparative examples were seen to locate criminal justice reform in the wider framework of social policy and defining Scotland's shifts as potentially different from those of the UK Government, although the period has been characterised as one where the politicisation of youth crime in particular indicated the strong influence of New Labour policies. One analysis of penal transformation in post devolution Scotland argues:

The new democratic structures that came with Devolution combined with a political capacity- building project and the availability of a politicised approach to law and order from England and Wales which could be easily translated to Scotland, together, explain change in Scotland.

(Morrison, 2011: 7).

Our interviews highlight these many different influences.

Pre devolutionary Scotland: Distinctiveness and Welfarism?

We are proud of our system of justice in Scotland. It has its faults [. . .] but we are justly proud of the way that the system in Scotland has developed, the traditions that have grown up over the years and the way in which it has been able to change and adapt to circumstances.

(Roseanna Cunningham, (SNP MP,) from Hansard. Debate on the Crime and Punishment (Scotland) Act 1997. 20.1.97. col 641.)

Roseanna Cunningham's assertion of pride is typical of comments from MPs of all parties during the period prior to devolution; a much repeated and unchallenged mantra. Most usually this position refers to the welfare focused Children's Hearing System (CHS), a claimed persistence of 'social work values' within a generic local authority based social service provision and a prison system characterised as rehabilitative rather than punitive. One example of this was the much hailed Special Unit in Barlinnie prison in Glasgow (1973-1993), in which intensive work with serious and violent offenders was said to have considerable success most notably with the offender turned writer and sculptor, Jimmy Boyle (Young, 1997; Croall, 2006; McAra, 1999; 2008). Immediately prior to devolution the editors of a major collection of articles could confidently claim that Scottish criminal justice had avoided the punitive excesses of many other jurisdictions (Duff and Hutton, 1999).

Proposed and actual changes which did reflect elements of managerialism and punitivism were seen as exceptions and as not fundamentally affecting the welfarist nature of the system. The ability of Scottish criminal justice to resist punitive pressures was generally attributed to geographical distance from the rest of the UK (Young, 1997) and the distinctive culture and policy network consisting of senior civil servants, Directors of Social Work and the Judiciary, who could tailor policies to Scottish conditions. Furthermore, argues McAra (1997), this welfarism reflected a 'civic culture' in Scotland, a stronger commitment to policies generally associated with 'old' Labour, and a greater commitment to welfare.

There is however a 'mythological' aspect to these claims (Munro et al, 2010), and, as in any complex social formation, punitive elements accompanied welfare ones. The CHS for example functioned against the backdrop of one of the lowest ages of criminal responsibility, eight years (Muncie, 2011). Prison policy was characterised by 'penal harshness and penal innovation' (Young, 1997) and Scotland, along with England, had relatively high rates of

incarceration (Tombs and Piacentini, 2010). Poor conditions and punitive attitudes permeated the system and the Barlinnie Special Unit experiment could be seen as an exception, as it was terminated in 1993 and never repeated (Cooke, 1989). Our interviews, which echo these themes, reflect this more nuanced picture as well as providing a number of different lenses through which it can be viewed.

Respondents familiar with the pre-devolutionary period confirmed the widely held perception that the Scottish system was distinctive, different, and generally assumed to be 'better' (R4, R7, R10). Indeed one former civil servant expressed some pride in examples of England copying Scotland, citing the Crown Prosecution Service adopting elements of the Procurator Fiscal System. At the same time, references were made to a 'powerful mythology' of the superiority of Scottish democratic intellect. To one respondent (R10), reflecting on an earlier view of Scotland as '*different, slightly softer, more progressive*', remoteness from London provided space for a Scottish capacity '*to fool ourselves on how progressive, socialist, left wing we are*'. Moreover, however keen politicians were to re-iterate these sentiments, it was recognised that that the former system had problems. In particular, pre-devolutionary policy initiatives did not seem to be able to forestall increases in the prison population similar to, but later, than the rest of the UK.

The geographical, political and cultural distance from London provided a space in which civil servants were widely acknowledged to have considerable influence over 'distant' politicians based in Westminster and largely absent Ministers (McAra, 2008; McNeill, 2011; Morrison, 2011). Indeed one respondent characterised pre devolutionary Scotland as having been administered by civil servants (R11). Ministers came from England on a Friday and '*virtually rubber stamped*' what the civil service had already arranged. This situation, in which civil servants could hold sway as long as they could '*manage their political masters*' was contrasted with the post devolutionary situation in which 'over 120 Scottish politicians' were here '7 days out of 7' (R5). Two Justice Committees were set up and civil servants had to give evidence to the politicians on these committees. Thus criminal justice policy came to be

carried out in the context of a changing political culture (Ryan 1999; 2003; 2004) and legislative opportunities were also important. Before devolution there was often a lack of parliamentary time for Scottish Bills, leading to the combination of several policies into 'portmanteau' Bills (R4), which could, according to a former civil servant, contribute to a level of stability, as Scotland *'didn't rush into legislation'* unlike the UK Home office who *'were able to legislate.... easily and so they zig zagged about in policy terms ... always changing things'*.

The assumption of a 'liberal consensus' as a distinctive culture permeating the civil service (R10), was also confirmed although it was suggested by one former civil servant that this chimed with several Conservative Home Secretaries' *'liberal 'with a small l'* approach; For instance Malcolm Rifkind, when Secretary of State for Scotland (1986-1990), publicly argued against the 'unnecessary' use of prison (R4). There was therefore no strong opposition to reforms such as providing greater resources for community service and attempting to limit the use of imprisonment. The punitivist rhetoric associated with Conservative Michael Forsyth's period as Scottish Secretary of State (1995-1997), in which uniforms for people on community service and 'Boot Camps' were proposed, was seen as exceptional and was blocked by the Edinburgh civil service (McIvor and Williams, 1999). To one former Minister (R10), this absence of opposition meant that if it wasn't a political issue, civil servants just carried on and maintained continuity.

The insularity of civil service culture from democratic process was matched by the conservatism of the judiciary and the wider legal profession. According to a former political advisor, Scottish justice was dominated by a 'cosy club' consisting of senior people in the justice system, the Law Commission, the Law Society and the Faculty of Advocates representing the Scottish Bar (R12). To one MSP (R6), the Scottish legal community, reflecting the smallness of the jurisdiction, was one in which people know each other by, for example, belonging to the same golf club or drinking in the same venues producing *'unspoken understandings between people which can be a disadvantage and an advantage'*.

This was 'challenged' by devolution, and having '*proper parliamentary scrutiny of justice matters [...] happen here in Edinburgh just down the road from where that legal community has its base*'.

In general terms, therefore, our interviews confirmed the *perception* of a distinctive and more welfarist criminal justice system prior to devolution. At the same time, the tension, present in all criminal justice systems, between welfarism and punitivism was evident. One crisis was the suicides of seven women prisoners in Cornton Vale women's prison in the mid 1990s, following which proposals were made, strongly supported by the Minister at the time, were introduced to drastically reduce the numbers of women in prison (McIvor, 2004; Tombs, 2004). Despite this, a lack of effective sentencing reform led to the numbers of adult and young women in prison increasing to the present day.

Devolution: the Early Years

The first two governments in the re-convened Scottish Parliament (1999-2003 and 2003-2007) were dominated by Labour-Liberal Democrat coalitions headed by a Labour First Minister and Liberal Democrat deputy. Respondents involved before and during these administrations contrasted the welfarism of the pre devolution period which continued through the years immediately following devolution and the later 2000s, generally regarded as a period of 'detartanisation' (Croall, 2006; McAra, 2008) when a more punitive turn was evident, and when the role of civil servants was modified.

The 'liberal-consensus' of the policy elite was inherited but challenged by devolutionary politics. For example, a former Labour special adviser (R12), recalled that Scottish Labour MSPs in the new Parliament were suspicious of the civil service, a '*very conservative lumbering organisation*'. If informed about peoples' feelings about (crime) in the 'schemes' (public housing estates) or the East End of Glasgow, '*civil servants were quite happy to just dismiss them*' and... '*would say they were wrong*'. The civil service was seen as an inherently hierarchical, conservative institution characterised by the tradition of the single

considered opinion delivered to a Minister rather than a range of policy options to the elected political leadership. One former civil servant (R4) talked of the perceived need for an incoming Justice Minister to respect the views of constituents rather than those of the 'elites in leafy suburbs' who had formed policy but were not really affected by crime.

The justice legislative priority for the first session of Parliament and the '*landmark legislation*' was major radical land reform abolishing anachronistic feudal tenures. To one former Minister: '*Everybody felt that we had to do this and it sent a signal and I think that was very much part of the identity building around the Scottish Parliament*' (R7). To another former minister, also important was the incorporation of the ECHR into Scottish constitutional arrangements '*which effectively makes Scotland's adherence to the convention on human rights more stringent than in England*' (R9).

Indicative of this more liberal nature was the policy emphasis, faced with the challenge of rising prison numbers and high rates of re-offending, on community sentences and the provision of options such as arrest referral and diversionary schemes designed to enhance early intervention and to reduce the risk of the offender progressing to imprisonment. Former civil servants reported that 'liberal and humane' individual ministers instinctively supported community service and the expansion of human rights (R3, R4). In the early phase, ministers were said to be '*more willing to listen to what we (the civil service) would put forward*' (R3) and a former minister (R13) reported considering a wide range of prison reduction policies, including weekend and overnight prisons. Political factors were also important. In the first administration, the Justice Minister, a lawyer, was also the Deputy First Minister, a situation which was said to give justice '*clout*' (R3) and community sentences received more funding because the Liberal Democrats had to '*get their way on some things*'. This was contrasted (R3) to the later period when community sentences were downgraded and the emphasis shifted to '*structures and a correctional agenda*'. One civil servant recalls going to Parliament being proud of a declining number of young people in custody but later

being *'absolutely slaughtered (by a Justice Committee) for being soft on young offenders'* (R3, R1).

The first session therefore was a period of relatively limited Parliamentary activity in this area but nonetheless one in which MSPs, according to a former minister, were *'finding that the kind of things people were bringing to them were much more around the criminal justice system - people felt that it wasn't working in their interests and there was all this stuff around low level crime - so there was a definite push [by 2003] to deal with some of that [...]and [...] to change the system'* (R9). At the same time, earlier reforms to community justice were, despite what was felt to be significant investment, not seeming to make any difference to offender outcomes.

A Punitive Turn?

Scotland is set upon the most radical reform of its criminal justice system for more than a generation...Devolution makes reform on this scale possible. The challenges we face in our communities and across our country make it necessary.

(Cathy Jamieson in Scottish Executive (2004): *Supporting Safer, Stronger Communities: Scotland's Criminal Justice Plan*: 6)

While many observers, including academics and those active in the non-governmental sector (Freeman, 2012; McAra, 2008), generally agree that even if the Scottish Government of 1999 to 2003 continued and indeed developed welfarist policies, the second Government (2003-2007) marked a break with the past and welfarist traditions. While it might have been expected that a Scottish Parliament move further away from England and Wales, most agree that policies became more populist. Hutton and Tata (2010: 274) claim that:

...rather than maintaining the distinctiveness of Scottish penal policy, devolution has led to the increased politicisation of policy and the imitation of populist policies seen in England and Wales.

Yet it is not easy to characterise Scottish criminal justice policy during this administration as taking a single minded punitive turn. There is no doubt that there was a more interventionist rhetoric and policy initiation such as anti-social behaviour orders (Law, Mooney and Helms, 2010), rising imprisonment rates and longer sentences (Tombs and Piacentini, 2010). Yet it was also a period of continuing therapeutic and rehabilitative practices in prisons and social work, more locally led community actions, more attempts to recognise communities affected by crime, greater focus on the needs of victims, substantial court reforms, innovation in violence reduction and moves to address the crisis in the physical prison estate that was 'in some instances, bursting at the seams or falling down around people' (R7). How do we understand the politics in all of this?

A headline grabbing youth justice agenda was prioritised and promoted by the new Labour First Minister and aspects of this merged with discourses on antisocial behaviour. However, it is important to recognise that the latter was also driven by the Communities Minister, a former community worker, whose constituency contains some of the most deprived areas in Scotland and respondents involved in this period overwhelmingly saw the anti-social agenda as reflecting constituents' concerns (R7, R12). An extremely important issue during this period was the proposed new single 'Correctional Service for Scotland' (CSS) in which responsibility for 'community justice' would become shared between prisons and social work. This attempted to address perceived failings in both agencies and, according to government advisers (R5, R12) was influenced by practice in New York. However, its proposed introduction was also reported as politically inept as prior to it being in the Labour Manifesto it had not been discussed and immediately ran up against entrenched defensive opposition from the agencies concerned. Without recounting the details of the eventual collapse of this policy it is useful to make a few observations.

First, our respondents did not consider that the CSS was an attempt to mirror the development, in England and Wales, of the single agency NOMS (National Offender Management Service) although the parallels are striking, and the party political advisor

responsible was seen to have close connections with London. Second, the CSS issue exposed tensions not just between the relevant agencies but between the established, experienced political (largely Labour influenced) institutions of Scottish local government (COSLA) and the fledgling Parliament. Thus according to one former adviser (R2), *'you have a relatively immature young government in Edinburgh trying to find its feet, you have the complication or added factor of it being a coalition, you have the historical local government role in Scotland which is politically and culturally for 20-25 years been the culture of opposition to national [Westminster] government'*. To this respondent, Local government perceived the new Parliament not as an ally but as a threat. Third, the civil service, taken by surprise by the manifesto proposal, were already undergoing a profound culture change in terms of direct working with Ministers and accountability to Parliament through evidence sessions in Committee. Fourth, there was a view that it was necessary for the new Parliament to establish itself by developing policies that upturned the status quo, simply because it could. For the same former adviser (R2) *'just as local government is afraid that Parliament is going to steal their bailiwick, you've got the Parliament saying we'd better do something - we'd better prove that we're worth having that whole slow process of getting devolved government'*. In the rush to legislate, change that could be accomplished without law making was overlooked. Lastly the saga exposed tensions between the new Executive and back bench MSPs especially in the Labour Party, many of whom had a background in local government politics, which resulted in a backlash rendering the proposal undeliverable.

Certainly the interviews we carried out highlighted the processes and tensions involved during this period and underlined the central role of politics in criminal justice policy. Social scientists are well positioned to study how the policy process influences the formation of criminal justice policy (Riddell, 2010). One analysis of crime control and community, for example, argues that the relationship between politics and crime control is 'somewhat difficult to characterise' (Hughes and Follett, 2006). They point out (2006: 164), for example, that:

...both supporters and critics alike of the New Labour project on the problem of 'anti-social youth' have tended to downplay the complexity of criminal justice policy in their efforts to characterize the local implementation of crime and disorder strategies, either as a managerial, evidence based and communitarian success or as a clear manifestation of a new institutionalized intolerance and populist authoritarianism.

In Scotland there is similarly no clear agreement about why the 2003 administration marked a turn towards more 'anti-social' community focused interventions and whether such a turn was progressive or regressive. To Morrison (2011), explanations vary and include views that criminal justice was used to build political capacity (McAra, 2008), that Scotland's politicians were following the New Labour orthodoxy (Croall, 2006) or that change occurred because of the creation of new democratic structures and closer political scrutiny (Munro et al, 2010). To some respondents parallels between the Scottish proposals and those in England and Wales, was co-incidental, as both jurisdictions faced broadly similar problems and were exploring policies elsewhere (R3, R9). One former Minister prior to 2003 (R10) commented that although attempts were made to develop distinctive Scottish measures such as free personal care for the elderly, constitutional issues were of less interest to the electorate from 2001-2005. To many respondents active at the time, including a former Justice Minister (R7), there was a shift to '*democratise*' criminal justice and listen to the needs and views of voters in those communities most affected by crime and violence.

Direct influence or pressure from London was generally denied although there was clearly contact and discussion between advisers and politicians on both sides of the border. To one respondent, policies did not emerge in a vacuum, although there was no attempt to 'lift' them (R2). The fact that several senior Westminster politicians were also Scottish was also felt to be significant, with Scottish politicians said to suffer from a sense of inferiority (R5). At the same time there was, from 2001 onwards, tremendous pressure to avoid any deviation from UK New Labour in any area of policy as it was feared that any obvious split would be exploited by the SNP (R5).

Criminal justice policy changes made in Scotland became incremental rather than the root and branch reform that some had hoped for and the end result was the criminalisation of ill-defined anti-social behaviours (although moderated in impact compared to England and Wales through opposition from within local government), and greater Governmental emphasis on reparation and protection of victims. Senior advisors (R2, R12) saw this as less of a definite punitive turn than an unfortunate consequence of policies that were developed for communities. Civil servants reported being 'taken aback' at the demonization of young people (R3, 4). Nevertheless one reflected that '*Scottish MPs and MSPs and Ministers came from the localities – quite different from the Westminster political elite – they actually understood that people living in some communities were having a really hard time from young people who were making their life a misery*' (R3). Thus the anti-social behaviour orders could be viewed as representing a 'community' focus – it was not simply a case of carrying out New Labour UK Government reforms – more a case of a Justice Minister who wanted root and branch reform that married social and criminal justice policy.

In the 'democratise' view the reasons given by our interviewees for the failure to proceed as far as was desired on prison reform and rehabilitation measures yet succeed on more punitive measures involved on the one hand, a Ministerial determination, continuing from the first Parliamentary term, to consult directly with local communities and to listen to constituents rather than to what were perceived as 'establishment' professional civil servants. On the other hand, amidst growing concerns about votes for Labour declining amid the proportional representation system and rising support for the SNP, that populist policies needed to be presented prior to 2007.

Whatever the case, our respondents reported a desire to preserve the distinctive aspects of Scottish Criminal Justice at the same time as making it work in the interests of constituents. To one former minister (R7) post 2003, '*we didn't have all the answers but it had to be appropriate to sit with the way our system worked rather than to change our justice system to accommodate to everyone else's*'. For one interviewee (R12), whilst this politicisation of

policy development was a positive feature of a devolved Parliament, election worries, existing power structures and local authority resistance halted the liberal and radical potential of the first Parliament and so, whilst *'we did go over the top at times'* in terms of the antisocial behaviour agenda, there was a real concern for change in the 2003-2007 Parliament.

That this second government was ambitious in its project of radical change is clear. That this was necessarily the most effective legislative programme to meet the objectives it set itself, is more questionable not least because this was still a relatively new parliament in a rush to prove itself. A former adviser (R2) recalled an alleged comment from the Irish Taoiseach on a visit to Edinburgh asking *'why are you running like this?'*

From Minority to Majority SNP Government: Re-tartanisation?

We are distinct from south of the Border, not simply in our judicial system, but because our society is distinct [. . .]. There are problems we need to address but actually there's a firm base to build upon and I've made it quite clear that many of the things that my predecessors did, we supported in opposition and I hope that they are grateful for that.

(Kenny Macaskill, quoted by Rhodes, 2007: 23).

The third Scottish Parliament elections in May 2007 led to the formation of a minority government by the SNP and the appointment of a new Justice Minister. A comparison of the justice elements of Labour and SNP 2007 manifestos does not suggest any substantial difference in terms of rhetoric or programme intention. Both recognised the futility of short term prison sentences for less serious, high volume crime and the importance of 'toughening' community sentence options as an alternative. Both avoided the delicate question of political interference in judicial practice by advocating the establishment of a

Sentencing Council or Commission. However, there was one significant difference in the parties' position. In its final session the second parliament had passed the controversial Custodial Sentences and Weapons Act which sought to enhance offender management by combining very short custodial sentences with post release supervision. Prior to the May 2007 elections, the subsequent Justice Minister had declared his intention to block these proposals.

Nonetheless our respondents felt that the new Minister had inherited the Labour in-tray and agenda and there was some satisfaction that these were being taken forward. Despite clear elements of policy continuity, there was a perception of change, which may be attributed as much to overall government priorities along with style and personalities, as substantive justice policy difference. The new Justice Minister was a lawyer widely perceived as knowledgeable about criminal justice and taking a liberal approach (R3, R10, R12). The SNP leadership and First Minister had an obvious focus on constitutional change and having established the tone of the administration as being essentially social democratic albeit with a neo-liberal approach to economics, there was little interest in specific policy areas including justice, other than that the SNP needed to convince voters that it was capable of running government competently. Speaking to the civil service in 2008 the First minister noted that *'it's important not to confuse legislation with activity'* (Salmond, 2008).

This change in tone was reflected in relation to criminal justice (McNeill, 2011). A clear, early rejection of the principle of prison privatisation, alongside an often repeated target to recruit extra 1000 police officers (in order to secure some Conservative support in Parliament), signalled a new, more positive relationship between Government and the uniformed justice agencies. Contentious areas of policy were 'kicked into the long grass' with the setting up of Commissions to investigate the workings of the anti-social behaviour policy and the Prisons Commission, charged with advising the government on the implementation of the CSW legislation (Scottish Government, 2008). Respondents noted a change in style both of working and in terms of attitudes to the media (R5, 12). This was partly personal to the

Justice Minister but also reflected a more strategic and organised approach to news management by the SNP than the Labour Party both in and out of government. Gone was the constant rush to respond and talk up criminal justice in crisis terms.

Perhaps the most obvious fracture was in the defeated Labour Party, marked by successive resignations and the appointment of a Justice spokesperson with no background in justice affairs. The subsequent Labour approach was perceived to be one which focused on knee jerk opposition and as contradicting the reformist dynamic of the second session and probably obscuring its putative achievements. Thus to one respondent (R2) the spokesperson *'fell very rapidly into [. . .] opposing everything that came up, no sense of history, no sense of continuity, no sense of context'* whereas another more diplomatically saw it as a *'question of presentation'* (R9).

The Prisons (McLeish) Commission report, *'Scotland's Choice'* (Scottish Government, 2008) set out in stark terms the choice the country faced between continuing to be a high imprisonment society or developing more constructive community justice policies. To do this limiting the use of short sentences was essential. This was enacted in a modified form by the Criminal Justice and Licensing Act 2010 an important wide ranging piece of legislation restructuring community sentences as Community Payback orders.

However, to the outside world, the defining event of this session was the Justice Minister's decision in August 2009, taken within his powers and according to recognised procedures, to release Abdelbaset al Megrahi, convicted of the bombing of Pan Am 103 over Lockerbie in December 1988, on the basis of advice that he was shortly to die from cancer (Ashton, 2012). The decision was controversial in a number of ways, but the clear nationalist point was the assertion that it was outside the competence of the UK Prime Minister Blair to have agreed a prisoner transfer protocol with the Libyan leadership in 2008 without reference to the Scottish government (Scottish prison policy was a matter for the Scottish Government only). Further, it was said at the time to reflect a Scottish concern with mercy (McNeill,

2011). This affair was not however a critical issue in the Scottish elections in May 2011 in which the SNP won a decisive outright majority. The Justice Minister remained in post until the time of writing: an extraordinary stability for such a high profile and possibly contentious brief.

Some respondents perceived a lack of radical reforms in criminal justice policy, despite the lack of any effective opposition, because '*constitution trumps all*' (R4) and that the SNP would be reluctant to do anything to damage its electoral chances at the Scottish Independence vote in 2014. It is perhaps significant that a strong outburst on the part of the First Minister and the Justice Minister immediately after the 2011 election turned, following the UK Supreme Court decision in *Cadder v HM Advocate* [2010] UKSC 43 on the jurisdiction of that court in relation to human rights matters which allowed, for the first time, an effective appeal in criminal cases outside the Scottish courts. There was a view expressed to us that there is a tendency for the SNP government to react negatively to anything impacting on policy if such emanates from London.

However, while space precludes the provision of details, there have been a number of major changes including merging, from April 2013, the 8 separate regional forces into the single 'Police Scotland' (Hendry and Fyfe, 2012; Fyfe and Scott, 2013; Scott, 2013; Fyfe 2013); unpopular (amongst lawyers) reform in the provision of legal aid; changes in the Children's Hearing's System (Mellon, 2013) new initiatives relating to serious, organised crime; forthcoming major changes in the delivery of community justice social work arising from the recommendations of the Angiolini Commission (Commission on Women Offenders, 2012; Angiolini 2013; Miller and McNeill 2013); major new legislation relating to victims and witnesses; the post *Cadder* Carloway Commission (2011) on the reform of Scottish criminal procedure including the abolition of the tradition of evidential corroboration. A major reform of civil justice is underway. Indeed the first edition of a new publication on Scottish Criminal Justice, *Scottish Justice Matters* (www.scottishjusticematters.com) had reform as its theme. This has taken place against a backdrop of falling crime rates in Scotland (Scottish

Government, 2013) consistent with the international 'crime drop' (Van Dijk et al, 2012), a rise in the justice budget during this period and the eventual compliance with the trajectory if not the detail of change by relevant institutional interests. It is possible to suggest therefore that rather than the constitutional question paralysing the justice agenda, it has been permissive. These changes, although not immune from media criticism in the tabloid and right wing press, have been perceived as less radical than those of the Labour led coalitions, more pragmatic, and aimed, as the example of Police Scotland indicates, at reducing costs. The extent to which they represent any 'retartanisation' is however debatable as is the extent to which they are distinctively 'Scottish', or can be located on a welfarist / punitive continuum.

Concluding Considerations

This paper has argued that in order to understand the development of criminal justice policy making and distinctiveness in a small jurisdiction such as Scotland, it is important to take into account both the wider political context and more micro level manoeuvrings. It is evident for example that a more nuanced approach than the albeit appealing use of wider narratives of 'detartanisation' and convergence with 'new Labour' policies, and subsequent 'retartanisation' with the emergence of an SNP Government is necessary. Scottish criminal justice, in common with most jurisdictions, has had to balance shifts between welfare and punishment, and indeed shifts within welfare and punishment in the wider context of pressures in all areas of public policy to look towards cost effectiveness. There is little especially 'Scottish' in this, nor indeed 'British'. What is distinctive is the mix of policies in the changing and developing context of devolution and political cultures. Moreover the 'smallness' of Scotland makes it easier to observe the role of events and personalities in this context.

While many of our respondents confirmed the widespread contrast between the 'liberal' approach to criminal justice before and immediately after devolution, and the more populist and punitive approach during the second Labour-led coalition administration of 2003-2007,

these perceptions tend to rely on a somewhat selective emphasis on the CHS and criminal justice social work. As argued above welfarism can be questioned, not least in view of the consistently rising rates of imprisonment before and after devolution (Tombs and Piacentini, 2010) and indeed, suggest Munro et al (2010: 269), what was exceptional,

was that the political governance of Scottish criminal justice prior to devolution was restrained, constrained and limited by the democratic deficit of the union settlement which allowed for the anachronistic dominance of values associated with liberal elitism, albeit that these were inclined in important respects towards penal moderation.

The 'liberal' culture of the civil service prevailed in the absence of systematic opposition or major crises (Morrison, 2011) and, in the words of one former Minister, criminal justice '*just kept rolling along*' (R10).

If welfarism can be questioned so too can any clear cut punitive turn or a slavish following of New Labour UK Government policies during the 2003-2007 Labour-Lib Dem coalition administration. Scotland, along with England and Wales, as well as other jurisdictions, faced similar pressures and looked at similar policy options, although these had to chime with existing Scottish policies and be politically feasible. Devolution did bring about a greater level of political involvement in criminal justice and respondents voiced a strong perception of the need to reflect constituents' concerns rather than those of the 'establishment', albeit that the perceived punitiveness of community or public sentiment can be questioned (Hancock 2004; Roberts and Hough 2013). Similarly, while the SNP in Government might have been expected to engage in some form of 'retartanisation' and did adopt a different tone, this could be seen as dictated by a general desire to avoid controversy and to be seen to be competent, and policy was also affected by the broadly liberal approach of the Justice Minister.

While these policies may not be distinctively 'Scottish', it can be argued that what is specific to this jurisdiction is the particular mixture of policies adopted within the institutional context of devolution. Exploring this, in a small jurisdiction such as Scotland, reveals the complex interplay between, at the local level, individuals, specific events, political considerations and culture, a criminal justice culture perceived at least to be welfarist, and broader national and international trends in penal policy. The role of individuals and events is not easy to capture when attempting to deploy theoretical and academic insights, but was important in the remembered histories of our respondents (R10):

one of the benefits of being small is that it is more manageable [. . .] in England it's huge [. . .] the scale means the dialogue is different' and also 'if you are a personality led ministry then [. . .] you make progress.'

Others openly speculated about whether welfare policies might have survived during the second Scottish Government if certain individual politicians had continued to be active and to many respondents the individual personalities and backgrounds of ministers did affect the direction of policy. An absence of 'crises' was seen to have provided space for the continuation of welfarist policies at specific periods, and, during the SNP period, perceived 'crises' or events such as the Megrahi and Cadder cases, while raising issues of the nature of 'Scottish' justice, did not fit easily within the conventional framing of welfarist and punitivist policies. One perceived 'crisis' was the continued evidence of sectarianism in and around Scottish football, leading to new and highly controversial legislation against 'offensive behaviour' in 2012. The way in which this has been implemented and policed has led to claims of a 'police state' and renewed punitiveness (Lavalette, and Mooney, 2013).

Some policies were also affected by the specific party political context of Scotland, with Labour's approach being influenced by the need not to depart too strongly from the New Labour UK Government, and, in opposition, to be seen to oppose the SNP, even to the extent of rejecting former policies.

A combination of factors therefore, contributes to any one jurisdiction's set of policies, albeit that these micro processes are played out in the broader context of penal culture –for example, policies had to be presented as consistent with Scotland's *perceived* welfare or democratic traditions.

Further significant questions, raised but far from resolved in this paper are the extent to which criminal justice policy is related to national identities and Nationalism, and, given the referendum on Scottish Independence in September 2014, the issue of connections between criminal justice policy making and nation building. A strong case has been made in the literature considering the relationship between nation building and social policy in the context of Scotland and other countries with strong separatist demands (Beland and Lecours, 2007; Law and Mooney, 2012; Mooney and Scott, 2012), that social policy has long been central to attempts to build nations, and not just in devolved or federalist contexts. The post-war UK settlement is a case in point in which the development of the welfare state was regarded as a national British project of reconstruction (Law, 2005; McEwen, 2002; Williams, 2011). In the devolution of the 2000s, nation building attempts could be seen in Wales, in an increasing desire to break-away from a perceived 'anglocentric' criminology to develop a more distinctive Welsh justice policy (Jones, 2012) and in particular, the unfolding of a 'dragonised' approach to youth justice (Haines, 2009). Few of our respondents linked criminal justice policy per se to either nation building or national identity – although the issue of land reform was identified as significant in this respect. Indeed there was a perception that the prioritisation, by the SNP, of constitutional issues and the need to avoid controversial criminal justice policies was a political consideration. The potential significance of criminal justice in relation to these issues therefore remains a question to be addressed.

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