The peculiarities of the Scots

Peter Young examines some aspects of the criminal process, north of the border.

While most commentators and criminologists in the UK seem to be aware that Scotland has a separate criminal justice system, few seem to know that much about it; what its institutions are like, how they work or what policies are followed within them. My impression is that if 'outsiders' think about the Scottish system at all, then they do so in terms of a mixture of stereotypes and assumptions. The stereotypes portray the Scottish system as being highly punitive (the high use made of imprisonment) but a bit quaint (three possible verdicts in a criminal trial).

People have heard, I think, about the procurator fiscal, the main public prosecutor in Scotland, but seem not to know in any real detail how the fiscal works. Ironically, perhaps the Scottish institution that is best known is one which is not formally part of the criminal justice system at all. This is the Children's Hearing System the distinctive system of juvenile justice, which is part of the local authority social work services department. Although the Hearing has been in operation for over twenty years and has been quite extensively researched, my experience is that knowledge of it can not be said to bite very deep.

The study of the Scottish system therefore ought to be viewed as an opportunity not just to expand knowledge by learning about how one more system works - although this is inherently valuable in its own right - but also as an opportunity to refine and add to the explanatory agenda.

A different vocabulary

The conceptual vocabulary that is commonly used to analyse criminal justice in the literature is one derived almost entirely from the study of the two 'big' criminal justice systems about which most has been written - those of the USA and that of England and Wales. For example, most analyses of the police, the criminal courts and of prosecution are couched in terms which presumes that the procedures governing these key stages in the criminal process is best described by employing such concepts as 'due process' and 'adversarial system'.

The relevance of these concepts to the Scottish system is, however, a matter of real debate. While the trial in the Scottish system is clearly adversarial, the relevance of this concept to other stages of the process is open to doubt. This is because there are stages in Scottish criminal process which are designed to be inquisitorial in nature, taking the form of something more like the continental search for the truth of the facts of the case than of a contest. Many of the pre-trial procedures in Scotland take this form. The Criminal Justice (Scotland) Act, 1995, for example, requires the accused normally to attend an intermediate diet if the case is being decided by summary procedure, or a preliminary diet if it is being decided by solemn procedure. The point of these diets is to allow the sheriff to ask questions about the state of preparation of both the prosecution and the defence and ascertain whether there is any evidence that is shared. No plea needs to be entered and the sort of cross-examination of the accused permitted at the trial is not allowed. These procedures may take place in court but they can also be held in private. The style of committal for trial in court, a principle of adversarial systems, is conspicuous by its absence. An analysis of these procedures couched in terms of concepts such as 'due process' or 'crime control' would miss their point and style altogether and could lead to a serious misunderstanding of procedures which are a characteristic of the Scottish system.

The role of the fiscal

Similar issues surround the role and place of the procurator fiscal. The fiscal is a much more powerful agent in the Scottish system than is the crown prosecutor in England and Wales; the fiscal is in charge of police complaints, handles fatal accident inquiries and also has formal control of police investigations as well as

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receiving all reports from the police on crimes and making the decision to prosecute. The fiscal will also decide the procedure by which the case will be dealt; there is no 'right to trial' in the Scottish system in the sense of the accused being able to choose to appear before a jury. The office of the procurator fiscal is a well established one in the Scottish system and, as a prosecutor, dates back to at least the eighteenth century.

Significantly, however, there has been a sea change in practice in the last ten years. While, traditionally the fiscal prosecuted most cases on which a report was received, now about 45% of cases are diverted to a variety of alternatives all of which have greatly expanded the fiscals' power. The procurator fiscal now has quasi-judicial powers; the fiscal is able to offer fixed penalties, and fiscal fines as they are known, as well as warnings and diversions to social work and reparation and mediation schemes. In 1993 out of a total of 317,848 reports received by the fiscal, there were 46,496 fixed penalties, 16,469 fiscal fines, 14,742 fiscal warnings and 1,160 diversions; in 35,681 cases there were no proceedings; 183,638 persons were proceeded against in the courts for crimes and offences. These developments are interesting in their own right and mark a change in the culture of prosecution in Scotland as substantial as that brought about by the introduction of the crown prosecution service in England and Wales. The considerable expansion in the powers of the fiscal also places the fiscal service in a position that is directly comparable with public prosecutors in some of the systems of continental Europe.

A less punitive climate?

There is another aspect of the Scottish criminal process that is worth recording and this is its resistance to the drift toward punitiveness that has been such a predominant feature in the development of policy recently in England and Wales. This is not to say that a punitive rhetoric and stance has been entirely absent north of the border - indeed these have increased in the last few years with the appointment of a new Secretary of State - but more that it has not bitten so deep either at the level of political representation or at the level of institutions and policy. The reasons for this are complex but have to do with the different civic and political culture of Scotland, on the one hand, and with the distinctive institutional arrangements within the criminal justice system and for making policy on the other.

As successive general elections have shown, Scotland has quite clearly resisted the impact of Thatcherism and this has meant that the policies closely associated with it, including those in the criminal justice area, have, as a matter of practical politics, lacked appeal and failed to resonate. Also, and again as a matter of practical politics, successive governments throughout the twentieth century have effectively turned over large areas of domestic policy making in Scotland to a local policy making network. This includes The Scottish Office, that works through Edinburgh rather than London. The interaction of these two factors has created a 'space' within which distinctive Scottish policies have emerged. Indeed, in the area of law and order this space is reinforced by the constitutional settlement which established the UK. The Act of Union 1707 guaranteed the continued existence of three indigenous Scottish institutions the educational system, the church and the law. This created a geographic and metaphoric barrier within which policy making networks have been able to insist on policies designed only for Scottish conditions or else to argue that 'national' policies need to be adapted if they are to be effectively implemented here. There are numerous examples of both in the criminal justice area. The clearest example of a unique policy is still, probably, the Children's Hearing System but there are more recent ones which deserve to be examined.

A welfare philosophy

The more recent policies are those which have emerged in the area of social work services for offenders and in Scottish prisons. It is here that one can see most clearly the resistance to the drift to punitiveness.

In Scotland, social work services for offenders, including probation, community service orders and through care, are the responsibility of local authority social work departments. These arrangements were created by the 1968 Social Work (Scotland) Act which abolished a separate probation service in Scotland. This Act also introduced a generic social work philosophy, sometimes called the Kilbrandon idea, as the framework within which offending was to be analysed and services delivered. This institutional and ideological nexus has proved to be fairly robust and resistant precisely because it has continued to receive support from the policy making network, especially The Scottish Office Social Work Services Group but also other key players, including politicians. Though central government has increasingly met the costs of offender services since 1991, the underlying, broad welfare philosophy has prevailed even if it is now expressed in different terms. The emphasis on treatment has declined and there is now a focus on types of social work intervention that are seen to be effective in encouraging offenders to address the causes of their offending behaviour.

Effective interventions

This has had a considerable impact on such key documents as the National Objectives and Standards for Social Work in the Criminal Justice System. This document emerged slightly later (1991) than its equivalents in England and Wales but was significantly different in style. If the organising concept of the English document was the idea of punishment, then, in Scotland, it was effective intervention. The background problem was similar to that in England and Wales - how to encourage sentencers to make greater use of community sanctions - but the solution was different. In Scotland, sentencers were to be encouraged by convincing them that these sanctions were effective, not by recasting them in a more punitive form, but because, in the long term, they would lead to a fall in crime by tackling the causes of the behaviour. The policy thus was not 'punishment in the community' but social work supervision in the community.

It is important to realise that the spur for this policy in Scotland was the then Secretary of State Malcolm Rifkind, in an address to the Howard League (Scotland) in 1989. Moreover, this has remained the Government's policy in Scotland despite the replacement of the policy of punishment in the community in England and Wales by the yet more punitive policy of 'prison works'.

It is easy to overlook the significance of this difference and to presume that what happens in England and Wales must happen in Scotland. It is tempting to do this partly because most criminologists seem to have a tacit theory that what happens in big systems must happen in small ones sometime later. Such assumptions are not only factually wrong but also sociologically misleading. Different penal systems have different cultures and institutional arrangements and those must be analysed in their own terms if they are to be understood and explained.

I began by observing that the criminal justice system in Scotland tends to be perceived through stereotypes. The existence of stereotypes should, of course, immediately alert one that something is at stake. Stereotypes always have the role of policing the 'power-knowledge' relationship and masking deeper structures in knowledge and power. It is perhaps time, as the fashion goes, to begin their deconstruction. ■

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