

Criminal justice since 2010. What happened, and why?

Richard Garside considers the divergent policy developments within the three jurisdictions



There has been much discussion, over recent years, about the future of the United Kingdom. Should Scotland be a separate country? Or Wales? Would it be better if Northern Ireland formed part of an enlarged Republic of Ireland, or stayed as a region within the United Kingdom? The devolution of some powers to the Scottish parliament, and the Welsh and Northern Ireland assemblies, reflects these tensions: between political and economic union on the one hand, and the demands for local decision-making and control on the other.

When it comes to criminal justice the United Kingdom is, in crucial respects, already disunited. Three criminal justice jurisdictions currently cover the four United Kingdom nations and regions of England, Scotland, Wales and Northern Ireland: the combined jurisdiction of England and Wales, and the separate jurisdictions in Scotland and Northern Ireland. The Home Secretary and Secretary of State for Justice in the United Kingdom government for the most part hold formal responsibility only for criminal justice across England and Wales. The Cabinet Secretary for Justice in Edinburgh and the Minister of Justice in Belfast were responsible for criminal justice in Scotland and Northern Ireland.

During the period since 2010 policy across the United Kingdom's three criminal justice jurisdictions

has developed in often divergent, sometimes convergent ways. The developments across the United Kingdom have also unfolded at different speeds and at different rhythms. In a new report published by the Centre for Crime and Justice Studies – *The coalition years: Criminal justice in the United Kingdom: 2010 to 2015* – I attempt to capture these divergent and convergent movements; the different underlying rhythms of change and reform.

The UK Justice Review project

The coalition years developed out of the work the Centre for Crime and Justice Studies has been doing since the 2010 General Election, under the auspices of the *UK Justice Policy Review* project. Through this project we have tracked criminal justice developments across the United Kingdom. To date, we have published four reports, covering the periods May 2010 to 2011, May 2011 to 2012, May 2012 to 2013 and May 2013 to 2014. We currently have plans to produce these annual reports, and to organise annual *UK Justice Policy Review* conferences, right through to 2020.

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It is important to emphasise the UK in *UK Justice Policy Review*. The United Kingdom has three criminal justice jurisdictions: the combined jurisdiction of England and Wales, and the separate jurisdictions of Scotland and Northern Ireland. Much discussion, certainly among Westminster policy, lobbying and media circles tends to focus on criminal justice developments in England and Wales. At best this leads to a partial picture of criminal justice developments across the United Kingdom. At worst it tends towards a rather narrow parochialism. It is assumed that criminal justice developments in England and Wales are somehow representative of developments across the United Kingdom, or that developments in

Scotland and Northern Ireland are of no great interest at a United Kingdom level.

So there has been much debate about the establishment of Police and Crime Commissioners

(PCCs) across the 41 English and Welsh forces outside London. Far less, outside Scotland at least, has there been debate about the establishment of Police Scotland. Yet with the creation of Police Scotland, one third of the entire territory of the

United Kingdom is now under the oversight of just one police force. This has important implications for the United Kingdom as a whole, not just for those living in Scotland. There are numerous other examples – in relation to prisons and probation, court processes and legal representation for instance – where the United Kingdom is distinctly disunited when it comes to criminal justice arrangements.

A key purpose of the *UK Justice Policy Review* project is to track and describe criminal justice developments across the United Kingdom's three jurisdictions, drawing out where they are diverging, where they are converging, and where they are just different.

The importance of explanation

Description is one thing and is an important task. Explanation is something else. *The coalition years* aims to *explain* the divergent and convergent criminal justice developments across the United Kingdom since the last General Election, rather than simply seeking to *describe* them.

The underlying theme of *The coalition years* is this: that criminal justice reform is, at heart, a *political* project. I take seriously the different political contexts of criminal justice reform in the UK's three criminal justice jurisdictions, using these to explain why, for instance, we ended up with elected, local PCCs in England and Wales and a single national police force, overseen by an appointed board, in Scotland. Why probation remained a public service in Northern Ireland and Scotland during this period while it was being privatised in England and Wales.

In *The coalition years* I do not attempt a comprehensive account of everything that happened in the United Kingdom's three criminal justice jurisdictions since 2010. That

is a task for historians. Instead, I simplify a much more complex reality, foregoing a comprehensive account of *all* developments in the interests of gaining a general understanding of the underlying movements. I do this in two ways.

First, I focus on signal criminal justice developments in the areas of policing, punishment and legal aid.

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Across the three criminal justice jurisdictions there was major activity in the areas of police reform, prisons and community supervision, and the provision of criminal legal aid. I examine how criminal justice in these three areas developed in sometimes convergent, often

divergent, ways. Second, I seek to explain developments by reference to the distinctive underlying political priorities in each jurisdiction.

- In England and Wales, the government championed a competitive market in criminal justice services.
- In Scotland, the government placed the state, rather than the market, at the centre of criminal justice delivery.
- In Northern Ireland, the Executive sought to develop inclusive criminal justice arrangements less marked by their historic role in counter-terrorism.

These distinctive political approaches – the market in England and Wales; the state in Scotland; civil society in Northern Ireland – played a significant role in shaping the different approaches to criminal justice reform in the three jurisdictions.

Different rhythms

Policy developments across any area of government and any given state do not follow a simple annual cycle. A certain rhythm characterises the ebb and flow of the policy-making process. To reflect and capture this,

I divided the five years from May 2010 to May 2015 into four periods. A 'signal' event marks the beginning of each period and its transition to the next.

- Period One - 6 May, 2010 to 20 June, 2011: The signal event that inaugurated this period was the General Election.
- Period Two - 21 June, 2011 to 3 September, 2012: This period was inaugurated by the Prime Minister's press conference on sentencing reform, which signalled the beginnings of a shift in law and order rhetoric and policy.
- Period Three - 4 September, 2012 to 14 July, 2014: The United Kingdom government reshuffle that inaugurated this period marked a further shift in tone and approach, particularly with the replacement of Ken Clarke by Chris Grayling as Justice Secretary.
- Period Four - 15 July, 2014 to 6 May, 2015: A further United Kingdom government reshuffle at the start of this period signalled the lead-in to the 2015 General Election.

This periodisation is a heuristic device to aid understanding, not a rigid set of sharply delineated historical silos. Understanding the continuities across these periods is as important as distinguishing the different phases of government the periods signify. The periodisation also cuts across important milestones in the other UK criminal justice jurisdictions, such as the May 2011 elections in Scotland, Wales and Northern Ireland; the September 2014 independence referendum in Scotland and the December 2014 Stormont House Agreement in Northern Ireland. As I am concerned here with United Kingdom-wide developments, our periodisation follows the rhythm of developments at a United Kingdom government level.

Five years on from the last General Election, what has been going on in criminal justice across England and Wales, Scotland and Northern Ireland?

Austerity

First off, the financial context has been very different to that which prevailed under the Labour government. The coalition government placed deficit reduction – closing the gap between higher government spending and lower government income – as ‘the most urgent issue facing Britain’. The coalition’s chosen approach – often referred to as ‘austerity’ – involved reducing government spending, and doing so quickly.

Five years on, we can say that the government has failed to meet its deficit reduction targets. It has, though, had some success in imposing the public spending cuts it claimed were necessary to achieve deficit reduction. Total public expenditure across the United Kingdom grew, in real terms, by only six per cent between 2010 and 2014. This compares with a 28 per cent real terms growth in the four years to 2010.

Across the United Kingdom, spending on criminal justice grew, by around 17 per cent in the four years to 2010. In the four years to 2014 it fell, by around 12 per cent. The cuts were greatest in England and Wales, where the United Kingdom government had direct political control over criminal justice. In Scotland, where the United Kingdom government’s control was the most qualified, the cuts were the slightest.

In England and Wales, Home Office and Ministry of Justice budgets will have fallen by 19 per cent and 29 per cent respectively between 2010 and 2015. The *Scottish Spending Review* set out real terms cuts to the Scottish Justice Department budget of nine per cent by 2015, although in practice this did not happen. The Northern Ireland *Budget* proposed real terms cuts of some 13 per cent in Justice Department spending between 2010 and 2015.

Since 2010, criminal justice policy-making, across the United Kingdom, has therefore unfolded against a very different financial

background to the years of relative plenty under Labour. Austerity economics created the dull compulsion to cut and trim, within which a number of organisational restructurings and policy innovations became thinkable and justifiable.

What is most striking about the period since 2010 is just how different the responses to austerity have been across the United Kingdom’s three criminal justice jurisdictions. The common pressures of austerity did not, in general, result in common policy approaches.

To illustrate these differences I am now going to offer something of

a lightning run through some of the key policy developments in relation to four areas of criminal justice: the police, probation, prisons and criminal legal aid. First, the police.

Police

The creation of elected PCCs in the 41 police forces outside London has been the most well-known policing development in England and Wales. The role of PCCs in setting local police and crime objectives in their force area and holding the Chief Constable to account has been much discussed. Here I want to draw out the implications of the *Commissioner* part of their job title: ‘commissioner’ in the sense of the purchaser of services.

The Conservative-Liberal Democrat coalition government championed the role of localised commissioning as part of its reform of public services. A White Paper published in July 2011, entitled *Open Public Services*, stated that commissioning should be decentralised ‘to the lowest appropriate level’, such as community groups, neighbourhood councils, or, ‘local authorities and other elected bodies such as Police and Crime Commissioners’.

Police and Crime Commissioners now commission local victims services. Other possible commissioning powers that have

been mooted include probation and youth justice. They remain controversial and Labour has signalled it would like to abolish them if elected. The coalition government created PCCs in good part because they fitted in with its vision of the local commissioning of public services.

The 43 police force structure in England and Wales remained unchanged over the coalition government’s five years. In Scotland, the main development was the merger of the eight regional police forces into a single national force: Police Scotland. In place of an elected Police and Crime Commissioner, Scotland has a Police Authority, its members appointed by the Scottish Justice Secretary.

Why did Scotland centralise its police forces under a single national structure, indirectly accountable to the Scottish Justice Secretary? This reflected Scottish government’s preference for state-based, rather than market-based, approaches to the delivery of public services. It also reflected a shift in power from the Scottish local authorities, responsible for the eight regional Scottish police forces, to the central government in Edinburgh. The Police Scotland reforms therefore represented a dual movement: from local to central control, from democratic to bureaucratic oversight.

Criminal justice has only been a devolved matter in Northern Ireland since 2010. The major structural reforms to policing in Northern Ireland took place in the decade leading up to devolution, with the replacement of the Royal Ulster Constabulary by the Police Service of Northern Ireland in 2001.

Since devolution in 2010, the priority has been to embed an inclusive and community-based form of policing by consent, in which all parts of the still, very, divided Northern Ireland society have a stake. As a result incremental change has been the watchword.

Probation

The coalition government privatised the majority of the Probation Service in England and Wales in early 2015. Twenty-one community

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rehabilitation companies, dominated by private sector organisations, now deliver the bulk of probation work. A rump public sector organisation – the National Probation Service – retains responsibility for those interventions that are difficult to price in the market. This includes supervision of so-called ‘high risk’ clients. These individuals are unattractive to private companies because the costs and complexity of their supervision are potentially open-ended and thus difficult to quantify.

The coalition had two goes at privatising probation. Its first attempt, when Ken Clarke was Justice Secretary, envisaged a key role for the 35 Probation Trusts to commission probation services at a local level. This was in keeping with its vision of the local commissioning of public services. This approach did not so much as end in failure as never really get started. Its second attempt, initiated by the current Justice Secretary Chris Grayling, was successful, at least on its own terms. But it is a very different model. The 21 community rehabilitation companies deliver probation interventions under central contracts with the Ministry of Justice. Ken Clarke’s original vision of a diverse network of local probation marketplaces has been supplanted by a monolithic, centralised market in which a single buyer – the Ministry of Justice – contracts with a small number of providers.

The approach in Scotland has been very different. Probation work in Scotland sits within social service departments, rather than as a separate criminal justice agency, and is coordinated at a regional level through eight local government-dominated Community Justice Authorities. Under current plans these Authorities are to be abolished; their coordination work dissolving downwards into the 32 Community Planning Partnerships, which operate at a local authority level in Scotland coordinating the delivery of a range of public services. Overseeing and guiding this work will be a new statutory national body: Community Justice Scotland.

In contrast to the centralising moves of Police Scotland, we can see here a decentralising move in

relation to probation work, albeit with potentially firmer central oversight through Community Justice Scotland. In comparison with the market-based approach in England and Wales, the Scottish government is placing state and public bodies at the heart of the planning and delivery of community supervision. This is very much in keeping with the Scottish government’s current commitment to placing the state, not the market, at the heart of public service planning and delivery. It is a very different approach to that adopted by the coalition government in England and Wales.

The Probation Service in Northern Ireland has been largely untouched by the devolution of policing and justice powers to the Northern Ireland Executive in 2010. Indeed its current structure, which dates back to 1982, long pre-dates the Good Friday Agreement and the process that led to the establishment of the Northern Ireland Executive and Assembly. During the period of civil conflict the Probation Service in Northern Ireland adopted a stance of neutrality, with a strong commitment to community engagement. As a result, far from being a relic of the dysfunctions of the period of civil conflict, the Northern Ireland Probation Service has remained largely unchanged since devolution precisely because it embodies the values of partnership and non-sectarianism that the Northern Ireland Executive, collectively, is committed to promoting. This is a key reason why probation, unlike policing and prisons in Northern Ireland, has not faced any significant structural upheaval.

Prison

By 2010 in England and Wales, the market in private prisons was well-established, though dominated

by a handful of multinational companies that had some scope to set monopoly prices. The coalition government sought to achieve a greater diversity of suppliers by encouraging new market entrants, notably through the launch of a new privatisation programme. The programme failed. Of the nine prisons subject to market-testing in 2011, eight were under public sector management and one under private sector management. After a process that lasted over two years and cost millions of pounds, the final tally was as follows: eight prisons under public sector management; one prison under private sector management. So no change.

The lesson the coalition took from this failure was that the prisons marketplace needed restructuring. The new approach – which involved benchmarking public sector prison costs against the lowest costs prevailing in the private prison sector – has introduced new competitive

pressures into public sector prisons that, in the longer-term, have the potential to create new market opportunities. In the short-term, the coalition split off ancillary activities, such as building and estate management, from the core custodial

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functions. Building and estate management was privatised, while the custodial function largely remained in the public sector. This move from ‘vertical’ to ‘horizontal’ commissioning – from market-testing individual prisons to developing a market in whole service categories – has created a much greater range of opportunities for private sector involvement.

The Scottish National Party government in Scotland has rejected prison privatisation. The Scottish Prison Service remains a predominantly public sector operation. The Service commissions

from private contractors, including two private prisons and prisoner escort services. But the market mechanisms that now characterise the core operations of the prison service in England and Wales are absent in Scotland.

In Northern Ireland, the political position, and physical conditions, of the prison system has been something of a running sore. Unlike policing, which underwent major reform in the decade leading up to the devolution of policing and justice powers in 2010, the Northern Ireland Prison Service remained largely unreformed.

A prison review team under the former Chief Inspector of Prisons in England and Wales, Anne Owers, concluded in late 2011 that the Northern Ireland prison system was, 'intimately connected to its history'. The opportunity was there to create a public sector prison system that was 'a model of excellence rather than a source of embarrassment' it added. Failure to seize this opportunity would raise 'the possibility of a strengthened role for the private sector'. The market could not, however, resolve problems that at heart were political. This goes some way to explaining why the market-based approach to criminal justice championed by the United Kingdom government in England and Wales was so absent in the case of Northern Ireland. In relation to resolving the historical legacy and present day dysfunctions of the prison service, this pointed to a politically-driven and inclusive, not market-based, approach. With this in mind, a Prison Reform Oversight Group, comprising ministers, Department of Justice officials, criminal justice and civil society representatives was established in December 2011 to steer the reform process.

Legal aid

In contrast to policing, probation, and prisons, criminal legal aid developments across the United Kingdom's three jurisdictions have had a more convergent, than divergent, feel. This has included steps:

- To reduce fees to legal representatives;

- To limit eligibility for legal aid assistance;
- To require defendants to contribute to the costs of representation, and;
- Moves in the direction of price-competitive tendering of criminal legal aid.

In all three jurisdictions, legal aid was and is delivered largely by self-employed practitioners and legal companies. Cutting payments to external bodies such as solicitors and barristers is generally much easier than complex reorganisations of public services. This is a key reason why, under the dull compulsion of austerity, similar approaches have been adopted to criminal legal aid.

In conclusion

In the interests of offering a big picture overview I have narrowed my focus on three particular areas of criminal justice reform – policing, punishment and legal aid – the better to draw out the broad, underlying themes. I have sought to position the changes that were wrought on criminal justice institutions, in different parts of the United Kingdom, within the context of the respective political priorities and policy agendas of the different administrations.

In England and Wales, the government signalled its intention of deepening market mechanisms in the operation and delivery of policing, punishment and criminal legal aid. In Scotland, the government signalled an approach that placed the state, rather than the market, at the centre of criminal justice changes. The history of direct rule by London, and the shadow cast by the history of civil conflict, are critical to an understanding of criminal justice developments in Northern Ireland. The task facing the newly-formed Department of Justice was to continue the development of local

criminal justice arrangements, less marked by their historic role in counter-terrorism, and relevant to the future that the people of Northern Ireland aspired to.

With another parliament of austerity likely, the role of the dull compulsion to cut and trim will continue to make itself felt across the United Kingdom's three jurisdictions. The pattern of convergence and divergence in criminal justice policy-making is likely to continue.

Whether such convergences and divergences are a good or bad thing is something that is worthy of reflection and debate. There are certainly lessons, for all three jurisdictions, from the paths taken in each. But transfer of policy solutions from one jurisdiction to another – for instance, the adoption of a Police Scotland model in England and Wales, or the application of market processes to probation in Scotland or Northern Ireland – will always tend

towards modification and adaptation at most. The distinctive approaches to criminal justice pursued in England and Wales, Scotland and Northern Ireland are a response to specific challenges in those

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jurisdictions. They also reflect underlying governing priorities, philosophies, ideologies and imperatives. Such specificities are not replicable across what remain very different jurisdictions.

To return to my starting point, the process of criminal justice reform is, at heart, a political project, shaped by, and shaping in its turn, a complex array of economic, cultural, historical and ideological influences. It is this articulation of the political and the criminal justice, during the period 2010 to 2015, that I have sought to draw out here. ■

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