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Chapter 10

Sentencing and penal decision-making: is Scotland losing its distinctiveness?

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Introduction

It is widely argued that the practice of punishment is changing profoundly in western countries. Against a background of increasing public cynicism, fear of crime, heightened insecurity and a loss of faith in legal and political institutions, it seems that in the last two decades traditional penal values are being replaced by new ones (Garland 2001). This new penal world may well cause us concern. As voters demand better value for money from the criminal justice system, there appears to be less concern with the rights of the individual and more concern with system efficiency. So, increasingly, you can expect to be punished not for any offence you may or may not have actually committed, but for what predictive risk-assessment technologies calculate you may probably do. As public trust in the wisdom of judges and other professionals further declines, it seems that sentences will increasingly be decided not on the basis of an assessment of you as a person but in accordance with 'actuarial justice' using predetermined scoring systems (rather like how insurance company actuaries calculate probable risks to determine premiums). Sentencing in Scotland is said to be illustrative of these major global shifts. Is it?

This chapter examines the hypothesis that the basic values of Scottish sentencing (and associated penal decision-making) are changing. It asks if Scotland is losing its traditional identity (based on a tradition of humanistic penal values¹), and whether sentencing and penal practices in Scotland exemplify a trend towards international

convergence. In doing so, the chapter also raises issues about legal and social inequality and their inter-connection.

In order to test these questions the chapter examines the evidence in Scottish sentencing and penal decision-making of three fundamental shifts. First, from the value of protecting the individual from the power of the state to 'efficiency'. We will look at changes in how defence lawyers are paid and the impact of this on the protection of the individual accused by the state ('due process'). Is Scotland forfeiting its traditional commitment to 'due process' in favour of a rough-and-ready speedy throughput of cases ('efficiency')? Secondly, we will investigate whether Scotland is sacrificing its traditional dedication to welfare-based penal values to the altar of 'actuarial justice' (Feeley and Simon 1994), dominated by probabilistic calculations of the risk of future offending. Thirdly, we will examine whether or not the discretion of Scotland's judiciary as to how to interpret and apply the law and thus decide cases is being diminished by the rise of technocratic instruments. Before examining these three areas, however, let us briefly define what is meant by 'sentencing' and then place it in its Scottish legal and institutional context.

The ambit of sentencing

Sentencing is the decision as to how to allocate state-imposed punishment in individual cases. Judicial decisions in court are traditionally thought of as sentencing, but in fact there are a number of other processes which, in effect, decide or influence the allocation of state punishment. These include, for example, decisions by prosecutors whether and how to prosecute a case, decisions whether to offer diversionary out-of-court penalties as an alternative to prosecution through court, decisions of the accused individual whether and when to plead 'not guilty' or 'guilty' and to what, reports prepared to advise and assist judicial sentencing, as well as 'back-door' release arrangements from prison (see Chapter 11, this volume). All of these contribute to and are, in effect, a part of the sentencing process. For instance, prosecution chooses as to whether and how to prosecute a person and in turn their decisions how to plead set the agenda for judicial sentencing. This chapter is written for readers relatively unfamiliar with Scottish sentencing and penal processes, therefore some of its distinctive legal features will now be briefly outlined.

Sentencing in Scotland: England and Wales, it isn't!

Although a constituent part of the UK, Scotland's legal system is separate and distinct from the rest of the UK (see Chapter 1, this volume). Scottish criminal law, justice institutions and procedures have always been separate. For instance, in contrast to England and Wales, most cases are heard not by lay magistrates but by 'sheriffs', who are lawyers by professional background. Unlike a federal system (where serious matters are dealt with at national court level and other matters are required to be dealt with by the constituent states), there is no UK-wide sentencing system. Appeals directly about criminal law and justice are heard within Scotland and (unlike the rest of the UK), not by the the UK Supreme Court. In contrast to its counterpart in England and Wales (Ashworth 2005), the Court of Criminal Appeal in Scotland has (at least to-date) been relatively reluctant to issue Guideline Judgments which first-instance sentencers are obliged to follow. Neither does Scotland have the sentencing policy institutions of the kind developed in England and Wales and elsewhere (Ashworth, 2005, 2008). Save for murder, there are no mandatory sentences which judges must impose. Traditionally, the Scottish senior judiciary has been highly suspicious of developing any 'policy' on sentencing, arguing that the existence of any policy would undermine the principles of judicial independence and individualised justice in which every case is said to be 'unique' and dealt with as such. Similarly, the idea of any public position on 'tariffs' or 'going rates' for different kinds of cases has largely been eschewed (Hutton 2006). In short, it makes no practical sense to talk of 'the UK sentencing system'.

The long-standing separateness of Scottish sentencing law and justice is important for three reasons. First, the point is very often completely overlooked or misunderstood by otherwise excellent textbooks on criminology and criminal justice which treat England and Wales as synonymous with 'the UK' (see further McAra 2008; and Chapter 1, this volume). Secondly, there are obvious and fruitful comparisons to be drawn between these two close neighbours, which are broadly similar yet also quite distinct. Thirdly, it has been quite widely argued that until devolution in 1999 Scottish criminal justice had resisted many of the globalising trends towards 'efficiency', risk management and technocratic automation. Instead, Scotland was said to have 'retained a distinctively welfare approach' (Croall 2006: 589) and to have been 'relatively immune from the populist tendencies

that were rapidly infecting its southern neighbour' (Cavadino and Dignan 2006: 231; cited by Croall 2006: 590). However, it has been argued that since devolution things have changed and that Scottish criminal justice is losing its distinctiveness.

Is Scotland's distinctive sentencing identity being 'detartanised'?

In an important article, Lesley McAra (2008) has suggested that Scottish criminal justice may, as she neatly puts it, be being 'detartanised' (see also Chapters 1, 4 and 13, this volume). Rather than shoring up distinctiveness, devolution and the establishment of a Scottish Parliament (intended to democratise matters which had previously been dealt with by a small group of officials in the Scottish Office) has led to the greater politicisation of criminal justice and a degree of convergence with global trends (McAra 2008; Croall 2006). This chapter examines this thesis in the context of sentencing. Is Scotland's sentencing practice now converging with other broader global trends towards efficiency, risk-based punishment and the loss of judicial discretion to technology? Are small countries (like Scotland) being swept along with the tide of actuarial justice?

Much of the literature which has identified large-scale changes in values is inspired by evidence of significant change in policy, legislation and media discourse. Yet it cannot be assumed that policies, laws and the way the media talks about criminal justice filter down from 'the top' to everyday practices (Gelsthorpe and Padfield 2003; Tata 2007b). Sometimes they do filter down as intended, sometimes only partially; sometimes they are ignored or misunderstood (whether deliberately or through ignorance), and sometimes they work out in very different ways from that intended. For that reason we will now examine policy and actual practices in three case study areas: plea decision-making, pre-sentence reports and the use of information technology in sentencing.

From due process to efficiency?² Case study: plea decision-making

The 'due process model' of criminal justice is a short-hand term for a cluster of values and principles emphasising the need to protect each individual citizen from the abuse of state power. It is, after

all, the state which prosecutes the individual and seeks to punish him/her. Inspired by the classical liberal-legal suspicion of the state, due process is preoccupied with the vulnerability of the individual when confronted by the overwhelming might of the state. In the due process model the presumption of innocence is of paramount value. This means that the burden of proof lies with the state to prove the guilt of the individual. It is not for the individual to prove his/her innocence. According to this model the decision to plead 'not guilty' or 'guilty' must be made by the individual as a matter of free and informed choice, without pressure or intimidation of any kind. The individual has to be given a fair chance of defence against the potentially crushing weight of the state system. The 'efficiency model', on the other hand, is a short-hand term for cluster of values which stress the need for the state to get through its huge volume of cases as quickly and as efficiently possible. The efficiency model is preoccupied with resource pressures of time and money. Cases should not take up more time than absolutely necessary. Accordingly, where people might end up pleading guilty, they should be encouraged to do so as early as possible, and it is acceptable (even sensible) to encourage 'appropriate' pleas of guilty through rewards and incentives. This model emphasises the routine and standard character of cases.

Although a fully contested trial before a jury is the iconic image in the popular imagination of criminal justice, it is, in fact, statistically speaking a remarkably rare event. In common with other English-speaking countries, such fully contested jury trials in which prosecution and defence battle it out until the bitter end constitute less than 1 per cent of all cases prosecuted in court. Why is this? In Scotland there is no right for the defendant to choose to be tried by a jury and all such decision are taken by prosecutors, often as a matter of discretion (Moody and Tombs 1982). Only around 3 per cent of cases prosecuted are decided ('marked') by prosecutors as jury-triable. As in other English-speaking countries, around 97 per cent of cases prosecuted through the court are marked for 'summary' (non-jury triable) procedure and less than one tenth of these cases culminate in a fully contested trial (Tata and Stephen 2006). However, it is not the case that these summary cases have little at stake or should be regarded as 'trivial' (McBarnet 1981). The summary sheriff courts now have the power to imprison for up to 12 months and nearly nine-tenths of all custodial sentences are now passed in these courts (Scottish Government 2009). In other words, summary process matters: it may not be the stuff of courtroom movies, but

it has real consequences for those individuals called before it. From the perspective of public policy it is central, particularly in those cases in which a custodial sentence is a distinct possibility but by no means inevitable. Given that this chapter is looking both at policy and the typical, we will now mainly focus on summary process at the intermediate Sheriff Court-level and the decision as to how to plead.

Although not formally a sentencing decision as such, the decision of an accused person how to plead (guilty or not guilty or some combination of the two) is in practical terms a crucial part of the sentencing process for those who are convicted.

Plea decision-making

Since at least the early 1990s successive governments have been interested in making the Scottish criminal justice process quicker, simpler and more cost-effective. In other words, the aim has been to shift from the values of the due process model towards the efficiency model. Chief among the concerns has been to cut waste from the system by speeding up court cases and encouraging people who are seen as likely to end up pleading guilty to do so as quickly as possible. This brings the choice of the individual as to how to plead to the centre-stage of policy.

It is a fundamental principle of law that the decision as to how to plead belongs to the accused. No explicit or subtle pressure should interfere with that free choice. In this way, the role of the defence lawyer is not to interfere with that choice but to be 'instructed' by his/her client and legal advice is given only in the client's best interests. Changes to the ways lawyers are paid should not, therefore, affect how cases are handled and the overall flow of cases. However, this 'consumer sovereignty model' is rather wide of the mark. Tata and Stephen explain further:

[T]he empirical literature on the relationship between criminal defence lawyers and their clients around the English-speaking world has consistently highlighted the relative passivity of most clients [...] Moreover, the relatively weak social, educational and economic resources of most clients in summary proceedings coupled with the immediate stress and anxiety which the criminal process brings means that clients tend to be in a particularly poor position to take firm command of their defence [...] Earlier research [suggests that] many clients tended to have

some difficulty accurately explaining the charges against them (or indeed those amended charges to which they chose to plead guilty). Furthermore, clients tended to conflate legal culpability with moral culpability. Most clients were willing to place their trust in their defence solicitor and take his/her advice [...] These recent findings from Scotland provide further evidence that a simple market-style consumer-sovereignty model of client satisfaction and criminal legal services is flawed [...] Pleading decisions, therefore, may ultimately be taken by clients, but they are heavily influenced and guided by the advice they receive; and shaped by expectations and agenda setting which are mediated by their [legal] advisors. (Tata and Stephen 2006: 733)

Contrary to the portrayal in US TV dramas, extremely few summary cases in Scotland are defended by lawyers who are paid privately by their clients. Most such work is conducted by defence lawyers working in private firms which then bill the publicly funded arm's length government body called the Scottish Legal Aid Board (SLAB). What impact does this arrangement have?

In 1999 Scotland decided to move from a system in which defence firms itemised their bills according to the time spent and the type of work carried out to a new system of 'fixed fees' in which the defence lawyer's firm was to be paid an overall fee for completing the case. The idea behind the change was to make the system more efficient by discouraging defence lawyers from undertaking 'unnecessary' work, such as 'excessive' client contact and preparation and to save the cost of trials compared with early guilty pleas. Defence lawyers were to be paid a fixed amount depending on when the case concluded. Activities like case preparation and client contact were no longer to be paid as separate items. Proponents of the new fixed-fee policy felt that defence lawyers had been exploiting the system for profit ('milking the system', as it was often alleged). It was also believed that defence lawyers had a vested interest in prolonging cases, thus making the system less efficient. The government and SLAB believed that under a system of fixed fees defence lawyers would only undertake (and thus bill for) work which was truly necessary (Tata 2007a).

Did the change to fixed payments work as intended? An independent evaluation was undertaken which investigated the impact of the change in the payment system on overall legal aid spending, lawyer firm incomes, case preparation and management, and the trajectories and outcomes of cases (Tata and Stephen 2006; Tata

2007a). Overall, the policy had very mixed results. Detailed economic analysis showed that it did not cut spending. Those specialist firms which were prepared to work more intensively by taking on more cases than they did before and spending less time per case found they could make a very significant income from the new scheme. In that sense, it was suggested by some lawyers that the new fee arrangements permitted, even encouraged, a new kind of exploitation (or 'milking'), where defence lawyers were prepared to take on more cases. Overall, case preparation levels declined as a direct result of the new fee structure and this was not offset by systematic advance disclosure to the defence of prosecution evidence. (Previously the defence had subcontracted its own investigations.) Most damagingly of all to the policy, it had the net effect of postponing the point at which people pled guilty – the exact opposite of what was intended. This latter finding was partly due to another consequence of the policy: a reduction in levels of lawyer–client contact. Officials believed that, generally speaking, defence lawyers spent (and billed for) too much time in communication with their clients. By introducing fixed fees, lawyer–client contact was, in effect, financially discouraged. But this also meant that lawyers tended to have less time to speak to their clients to persuade them that pleading guilty at the earliest opportunity might be in their best interests.

A closely related factor in encouraging 'appropriate' early guilty pleas is the connection with certain forms of 'plea bargaining'. Plea bargaining (or 'plea negotiation') is an informal (and controversial) practice which exists in many (but not all) countries. Plea bargaining is an umbrella-term encompassing a range of practices whereby the accused gives up his/her right to trial and pleads guilty in (explicit or implicit) exchange for some perceived benefit (see, for example, Roach Anleu 2010: 154–62). There are two main forms of plea bargaining which operate in Scotland. First, 'charge bargaining' is a practice whereby the prosecution and defence agree which charges to amend or delete in exchange for a guilty plea by the accused person to the remaining charge(s). The second form is 'implicit sentence bargaining' whereby the defence offers a guilty plea in the hope of a reduced sentence compared with the sentence which would be passed for the same charge(s) if the person was to be found guilty after a trial. In Scotland sentence bargaining is implicit: the judge does not participate in any explicit discussions about the likely sentencing outcome if the individual pleads guilty and how this may or may not differ from the likely sentencing outcome if the individual is found guilty of the same charges after trial.

In Scotland implicit sentence bargaining, tends to be called 'sentence discounting'. Arguments in favour of sentence discounting centre around efficiency: that it accelerates the production of 'inevitable' guilty pleas and so frees up court time.

The most prominent argument against the idea of sentence discounting is based on due process values. The big question is whether people are 'induced' to plead guilty to charges they are not guilty of. This danger of inducement to plead guilty has traditionally weighed more strongly in Scotland than in England and Wales. For example, in the case of Strawhorn, the Scottish Court of Criminal Appeal made the point forcefully:

In this country there is the presumption of innocence and an accused person is entitled to go to trial and leave the Crown to establish his guilt if the Crown can. It is wrong therefore that an accused person should be put in a position of realising that if he pleads guilty early enough he will receive a lower sentence than he otherwise would receive for the offence. (*Strawhorn v. McLeod* 1987 SCCR: 413)

This did not mean that there was a 'ban' on discounting the sentence in implicit return for a guilty plea. Rather, it meant that there was to be no policy of discounting: it would all depend on the facts, circumstances and timing of the guilty plea in the individual case. Moreover, research which analysed the sentencing outcomes of a controlled sample of otherwise similar cohorts of cases suggested that there was no major and systematic practice of sentence discounting across the board in Scotland other than in certain categories of cases (notably sexual offences) (Goriely *et al.* 2001).

However, in 2003 the Court of Criminal Appeal in Scotland took the opportunity in the case of Du Plooy (*Du Plooy v. HMA* 2003 SCCR: 443) to issue a rare 'Guideline' sentencing judgment. Du Plooy has retained the permissive position of Strawhorn: sentencers may discount a sentence in recognition of an early guilty plea. The crucial change was to be one of greater transparency. The sentencing judge should state openly whether a discount is applied, how much it is and his/her reasons for choosing not to apply a discount (which can be up to around one third). The rationale for this new approach was based on a desire for greater efficiency: to accelerate guilty pleas (Leverick 2004). The logic is that in the course of time defence lawyers would come to know how to advise their clients because the lawyers would be able to predict what sort of discount the client should expect for

an early guilty plea and thus advise the client accordingly. However, knowledge of sentencing discount case law appears to be patchy. Moreover, some practitioners appear to believe that discounting is mandatory in all cases of an early guilty plea, while some judicial sentencers may harbour their own personal policies regarding certain categories of offences as not entitled to consideration of a discount at all (Tata 2007a). So the efficiency drive of sentence discounting can and does encounter countervailing local practices which may lead to inefficiency, such as 'unnecessary adjournments' as the result of perceived inconsistencies between judicial sentencers, known as 'sheriff shopping' (Summary Justice Review Committee 2004: 31 and 208–9).

This brief case study of plea decision-making shows that in recent years there has been in Scotland, at the level of law and policy, some discernible shift towards a more explicit emphasis on efficiency values. Readers familiar with several decades of criminal justice research from around the world will know that the heavy dependence of Scottish summary justice on guilty pleas is found in many other English-speaking adversarial jurisdictions.³ However, in reality there are, as McBarnet (1981), famously observed, 'two tiers of justice': the iconic fully contested but rare jury trial, and the daily grind of summary justice based on relinquishment of the right to trial in return for some benefit (real or perceived). It is central both to the practical operation and to the legitimacy of the 'adversarial' criminal process that the decision as to how to plead is seen to be freely made by the accused person. However, in practice that choice is limited by a range of dynamics which work in partnership with legal aid and sentence discounting changes (for good introductions see, for example, Roach Anleu 2010: 154–62; Bottomley and Bronnitt 2006: 128–42). Research from several English-speaking countries has shown that guilty pleas are also driven through a range of practices, including a professional and policy 'ideology of triviality' which regards the outcomes of summary cases as relatively inconsequential (McBarnet 1981), 'court workgroups' and the incentives to maintain inter-professional relationships (for example, Eisenstein and Jacob 1991), a pervasive culture of the presumption of guilt rather than of innocence (e.g. McConville *et al.* 1994; Mulcahay 1994; Sanders and Young 2007: 443–94), the deployment of judicial demeanour and displays of emotion (e.g. Roach Anleu and Mack 2005), the use of pre-sentence reports and associated processes to facilitate and maintain the 'closure' of guilty pleas (Tata 2010), and the deliberate use of adjournments by judicial officers to aid the facilitation of earlier guilty pleas (Roach Anleu and Mack 2009).

Recent changes to legal aid and sentencing discount law and policy have sought to add to these dynamics and so achieve a further 'rebalancing' in favour of efficiency values. While it seems that the summary courts in particular have long relied on a high rate of guilty pleas, what is new is that both legal aid and sentencing policy are now much more overt in seeking to encourage guilty pleas (wherever 'appropriate') and as quickly as possible. Where Scottish sentence discounting law and legal aid policy were previously features which could be drawn on to support adversarial due process values in both policy and practice, they now appear to be relatively supportive of efficiency values. Nonetheless, these law and policy changes do not appear simply to be implemented on the ground in a straightforward way, but rather mesh with existing practices which may contradict efficiency goals. Is this more explicit drive towards 'efficiency' also found in other parts of the sentencing process? For instance, are pre-sentence reports now more about risk-categorisation than about the individual person being sentenced?

From welfare to risk? Case study: pre-sentence reports

The prominent role of social work in criminal justice in Scotland is said to have been one of the key reasons for Scotland's distinctive maintenance of penal welfarism at least before devolution (McAra 2005; see also Chapter 11, this volume). Pre-sentencing reports are intended to inform, advise and assist the sentencing process. In Scotland such reports are known as Social Enquiry Reports (SERs). They place the convicted person in a broader context so that the judicial sentencer can be aware of the person's physical and mental condition, character, attitude to the offence and offending behaviour and assess the suitability of non-custodial sentences. Reports are compiled on the basis of at least one interview with the person and sometimes on the basis of inquiries to other agencies (for instance to check facts) and home visits.

Rather than being written by members of a national probation service (as in England and Wales) or by the employees of the sentencing court (as in the USA), in Scotland reports are compiled by generically trained social workers specialising in criminal justice and employed by local authorities. This may be significant in three respects. First, the fact that criminal justice social workers (CJSWs) are generically trained professional social workers may reflect and reinforce Scotland's relative commitment to penal welfare values.

Secondly, the fact that CJSWs are not the direct employees of central government may mean that they are more able to resist the latest media-fuelled whims of government policy. Thirdly, the fact that CJSWs are not employed by the courts can bring a penal-welfare perspective to the sentencing process which is different (though potentially complementary) to law's tendency to view offending as simply no more than individual rational choice. This difference can be a healthy thing. Welfare values explain offending by rooting it in the person's personal and social circumstances and also in the relationships with family members. In this way, SERs can, where relevant, contextualise the individual's offending within social conditions and serious social disadvantages, thus linking social and legal conceptions of justice together. This should not be the same thing as a 'sob story', but enables the sentencer to be aware of the impact of any sentencing decision not only on the individual, but also on their nearest and dearest, including children.

Are these qualities of penal welfarism being diminished by policy changes? Partly, in an attempt to enhance the quality and consistency of report writing, National Standards for criminal justice social work were introduced from 1991 (see Chapter 11, this volume). These require a greater focus not only on the person but also their offending behaviour and risk to the public. Thus has the job of CJSWs become more one of control than of welfare – more about deeds than needs? Interestingly, a major reason for the introduction of National Standards was to try to encourage the more sparing use of custody by sentencers. The thinking of successive governments has been that if sentencers are better informed about both the person before them and about the potential of non-custodial sentences to reduce reoffending they would be more likely to think twice about a custodial sentence for someone who is not a danger to the public (Tata *et al.* 2008; McNeill and Whyte 2007). Thus the strategy of successive governments has been to avoid seeking to develop an explicit sentencing policy (since that would be seen as 'interference' by the judiciary), but rather to try to make both reports and non-custodial sentences more credible in the eyes of judicial sentencers. National Standards have tried to make reports 'better' by making them seem tougher and more offence/risk focused and by downplaying welfare narratives. What has been the result?

A major research study was conducted over four years to assess the ways in which reports are written and how those same reports are then interpreted and used by sheriff court judges (Tata, *et al.* 2008; McNeill *et al.* 2009). The research⁴ focused on summary court 'cusp'

cases – those cases which are in the balance between a custodial and a non-custodial sentence, which are exactly the types of cases with which the policy is particularly concerned.

Through a range of techniques the intention of what report writers attempted to convey to the sheriff was elicited and then compared with how judges (and others) read, interpreted and used those same reports. Is government strategy of influence through advice and information working? Are report writers now concerned with risk assessment rather than welfarist values?

The research found:

- SERs are central to the sentencing process in ‘cusp’ cases. Given pressures on the summary courts, where a person pleads guilty and so there is no trial, reports are commonly seen by lawyers and judges as the main voice of the accused person.
- SERs are written in a form of code because report writers are expected both to provide an assessment and evaluation and yet not to be explicitly judgmental. SERs have to be ‘relevant’ to sentencing, but at the same time they must not appear to be ‘directive’. SERs are expected to be the main policy vehicle for the promotion of non-custodial sentences and yet they cannot do so explicitly. The result is that key messages in SERs are encoded. Often this works (i.e. the sentencing judge understands the code) but equally often the message is either skipped or interpreted very differently from that intended.
- CJSWs tend to reframe welfare values through the language of ‘risk’ and ‘public protection’. Moreover, CJSWs (and especially judicial sentencers) are unconcerned by actuarial risk assessment instruments. Even though both CJSWs and judges complained about risk assessment instruments (see also Tombs 2008), when it came to dealing with actual cases in practice both professional groups were resistant to such instruments.
- Although judicial sentencers greatly valued the presence of personal and social circumstance information so as to contextualise and humanise the person, in practice most (but not all) sentencing judges tended to skip-read that information and tended instead to focus on the end sections about the offence and the individual’s ‘attitude to offence and offending’. This approach to reading reports has two effects. First, it undermines the requirement that the report builds up a narrative assessment – thus, for example,

reports were sometimes criticised by sentencers because the conclusion lacked 'logic'. Secondly, it means that narratives about serious disadvantage are marginalised.

- A frequent criticism made by judicial sentencers of reports is that they are not sufficiently 'realistic' about sentencing and that this damages their credibility. However, from the perspective of CJSWs it can sometimes be very difficult to know what is 'realistically' on the sentencing agenda. Even in the same courthouse, different sentencing judges can take quite different approaches to what is 'realistic'. The problem for CJSWs is that they often do not know which judge will read the SER. In any event, there is also the issue of the ethics of altering the SER for a particular sentencer.

Thus in Scottish report writing 'old' narratives of penal-welfare appear to mesh together with 'new' narratives of risk. Furthermore, the risk discourse appears to have limited direct impact on sentencing decision-making and the policy of trying to encourage sentencers to use custody more sparingly through the provision of 'better' quality reports is undermined by the fact that what judicial sentencers want from reports varies. Thus report 'quality', as defined by judicial sentencers, is something of a moving target (Tata *et al.* 2008). Thus, while there has been clear evidence of a shift in law and policy away from welfare and towards actuarial risk-assessment, an examination of practices in actual cases suggests a more complex and 'hybridised' picture (McNeill *et al.* 2009).

Sentencing reform and the slow death of judicial discretion? Case study: the sentencing information system

Is sentencing discretion being diminished by a move towards managerial control and the rise of technocratic instruments? Some leading commentators have argued that Scotland exemplifies an international trend in which techno-rational instruments are taking over the traditional humanistic values of judicial sentencing (Tombs 2008; Franko Aas 2005).

In her widely discussed account of sentencing and the global rise of actuarial-style justice, Katja Franko Aas identifies a marked diminution of judicial discretion. Judges are, she says, losing status and control. Where once judicial sentencers were concerned with unique individuals they are increasingly being compelled to base

their judgments on actuarial logic. One of the most important forces driving this change is the rise of information technology and its logics of abstraction, remoteness and standardisation. All of this is leading, Franko Aas argues, towards a radically reduced and one-dimensional conception of justice about which we should be deeply concerned. In making this case, she frequently cites the introduction of a 'Sentencing Information System' (SIS) in Scotland as one of two main sources of evidence (the other being US federal guidelines), showing a fundamental shift not only in the discourse around sentencing policy but in sentencing practice itself. So let us briefly examine the history of the SIS (Tata and Hutton 2003; Miller 2004).

As seen above, unlike other western countries, sentencing in Scotland has, until recent years, been marked by an absence of any concerted attempts at reform and the use of the SERs outlined previously has been the main way in which successive governments have sought indirectly to influence the use of custody. There have been few attempts to introduce greater 'structure' and 'accountability' of the kind seen, for example, in England and Wales (e.g. Ashworth 2005, 2008). This might be taken to mean that Scottish sentencing and the Scottish judiciary enjoy higher levels of public confidence than comparable countries. In fact, that is not the case. As in other countries, research into public opinion and attitudes to sentencing shows similar levels of public cynicism about sentencing and justice. However, in Scotland as elsewhere this is at least in large part due to a lack of knowledge about normal practices (Hutton 2005; Anderson *et al.* 2002). So why has Scotland not experienced the kinds of fairly significant reforms to sentencing structures as other countries like England and Wales, the USA, Canada, South Africa, Australia? Space constraints limit us to examining just one initiative spanning the 1990s and early 2000s – a period when sentencing reforms developed apace elsewhere.

In the early 1990s, the Conservative Secretary of State for Scotland, Michael Forsyth, wanted to introduce mandatory minimum custodial sentences for certain types of cases (so-called 'three strikes' legislation). The senior judiciary at that time, concerned about such a move (or similar) developments which they believed might unduly restrict judicial discretion, responded with its own initiative: a Sentencing Information System (SIS) for the High Court. The idea was to harness database technology as a way of helping judges to pursue consistency⁵ in sentencing. Crucially, however, the SIS would be created by judges for judges: it was a way of helping the judiciary to regulate itself and be seen to be doing so. It was not something which would

be imposed on judges by outsiders. Unlike US Federal Guidelines, the SIS was never intended to be directive, but to help to inform the judge's decision-making process. In the spectrum of methods of sentencing reform, the Scottish SIS was to be 'light-touch'.

In 1993 the senior judiciary approached academics at Strathclyde University Law School for help and it was agreed to establish a feasibility study and to develop a prototype. Taking such a proactive initiative is unusual for the (Scottish) judiciary. It was prominently and favourably reported in the media and the government, which funded the project, was content to allow the judiciary to take a lead. The SIS initiative was also often cited in response to calls to restrict judicial discretion. The SIS was partly a way of heading-off political pressure to 'do something' about sentencing.

Implementation of the SIS was phased in during the 1990s and handed over to the Scottish Court Service (SCS) (which serves the courts and the judiciary) in 2003. At that time the SIS contained relatively in-depth information about 15,000 sentenced cases (including appeals) over the previous 15 years with information collected in a way agreed with the judiciary. The SIS is searchable in a way which affords the user a high degree of flexibility so that patterns of case similarity can be defined in a range of different ways (including both in aggregate terms and by examining individual cases). In other words, the SIS does not attempt to direct the judge to 'the correct' sentence, but rather offers a range of possible sentences. It was decided that, with the handover to the SCS, court clerks would take over recording of information. In the event, it became quickly apparent that the quality assurance processes recommended by the university team were not followed by the SCS and the entry of data after 2003 appears not to have been reliable. Foreseeably, the SIS appears to have been left to quietly wither away. Why?

Probably the most important reason was that immediate political pressure on the judiciary dissipated – the SIS had fulfilled a tactical role to see off political pressure. In contrast to south of the border, in Scotland immediately post-devolution judicial sentencing discretion was not on the agenda. During that time and due to changes of personnel at the apex of the judiciary, High Court judicial enthusiasm for the SIS began to cool, and as a result progress to full implementation slowed. Although the Sheriffs Association (which represents intermediate court judges) suggested to the Scottish Parliament that it would be useful for sheriffs to have something similar (Scottish Parliament Justice 1 Committee 2003) (as did the later Review of Summary Justice 2005), it was clear that the

senior judiciary of the High Court were now not so keen as their predecessors.

The key underlying issue, which was never properly resolved, was who could have access to the SIS. The university team recommended public access, proposing that if managed in the appropriate way such access need not be a threat to the judiciary but an opportunity to improve public understanding of sentencing. For example, the SIS data could produce occasional reports about the true patterns of sentencing for different kinds of cases (Tata and Hutton 2003). However, nervous about access beyond the judiciary, coupled with an awareness that it would be difficult in the long term to continue to deny access, the simplest thing (given that political pressure had dissipated) would be to hope the whole thing could quietly be forgotten. That is what largely happened during the mid-2000s. But by the end of the decade, the new minority Scottish National Party (SNP) Government was seeking to pass the Criminal Justice and Licensing Bill which would create a presumption against custodial sentences of six months or less, and to build on the work of the earlier judicially led Sentencing Commission by creating a Sentencing Council which would have the power to develop sentencing guidelines. Meanwhile, Labour and the Conservatives have gone further and committed themselves to an explicit policy of mandatory minimum sentences for certain offences (notably knife-carrying). All these proposals have been strongly opposed by representations from the judiciary. One of the arguments against such 'interference' is that there is currently a dearth of systematic sentencing information available, including about the extent of any inconsistency. It is hard to escape the sense that we may, to some extent, be witnessing a cycle of history repeating itself.

So rather than being a technocratic instrument signalling the loss of judicial status and power, the story of the Scottish SIS signifies the opposite. It shows the ability of the Scottish judiciary, at least so far, to head off, at least temporarily, the threat of 'interference'.

Concluding comments

This chapter has sought to examine the extent to which Scottish sentencing is being swept along with the tide of broader worldwide changes, by exploring three key areas. First, there have been attempts by successive governments (both before and after devolution) to achieve greater efficiency by explicitly encouraging guilty pleas

where 'appropriate', and a softening of the law and policy emphasis on the presumption of innocence. However, these attempts have met with mixed success on the ground. Secondly, we have asked whether Scottish sentencing is losing its distinctive emphasis on penal welfarism. Although headline policy has sought to achieve greater emphasis on 'risk' at the expense of 'welfare', evidence of a dramatic shift in pre-sentence reports is limited. This is not least because both CJSWs and judicial sentencers are somewhat suspicious of risk instruments and also because 'risk' is often invoked by CJSWs in defence of welfare narratives. Thirdly, the Scottish SIS does not exemplify the loss of judicial discretion and status. Far from it, the SIS was not imposed on judges but initiated and created by the senior judiciary to head off perceived political interference, and then quietly neglected when that threat was believed to have receded.

Does this mean that Scotland is retaining its distinctiveness and not moving towards the global? In headline policy terms we can find instances of convergence (e.g. the increasing emphasis in policy on risk-assessment instruments and a new Risk Management Authority, national standards for CJSWs, the attempt to speed up guilty pleas, a renewed interest in sentencing reform). So there is evidence of some policy convergence. But evidence of actual practices on the ground is much thinner and more complex. That is not to say that policy talk does not matter (it does), but that actual practices should be expected to differ, adapt or resist official changes. As elsewhere, in-depth study of actual practices reveals that there tends to be a difference between official discourse and the reality of practice on the ground (for example, Cheliotis 2006; Tata 2007b; McNeill *et al.* 2009). So there may be some globalisation of policy discourse, but we should not then imagine any simple trickle-down effect. This is more than saying that there is a big picture of globalisation with some little local variations. To build up 'the big picture' we also have to know what is happening on the ground rather than assume 'top-down' change is inevitable (McAra 2005; Tata 2007b).

Notes

- 1 In this context, 'humanistic penal values' include: treating people not as inert categories to be processed, but as unique individual human beings; humane treatment; the avoidance of unnecessary punishment; human (rather than mechanical) forms of decision-making based on both rational and emotional sensibilities; judgment based on wisdom rather than a

- strict or bureaucratic adherence to rules, policies or systems for their own sake; and, most importantly, treating people with respect as whole human beings of intrinsic value rather than as a means to an end.
- 2 Here the concepts of 'due process' and 'efficiency' are loosely borrowed from Packer (1964) which provides a simple way of starting to think about these issues.
 - 3 Briefly put, an 'adversarial' system is based on the idea that truth best emerges through a contest between two parties battling to put their side of the story.
 - 4 ESRC Award No. RB000239939.
 - 5 In this context, 'consistency' means treating similar cases similarly and dissimilar cases dissimilarly. Importantly, 'consistency' does not mean 'uniformity', i.e. treating all cases the same way regardless of their differences. Consistency is a matter of equality before the law. Simply put, the sentence should not depend on which judge you happen to get.

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Criminal Justice in Scotland

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