

The Scottish Independence Debate: Class, Nation and the Politics of Criminal Justice

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In summer 2009, international attention was focused on Scotland's criminal justice system as never before. On August 20th the Justice Secretary Kenny MacAskill announced to an audience that stretched well beyond the borders of Scotland, his decision to release the man convicted of the Lockerbie Pan Am bombing in 1988. This decision was made on compassionate grounds, with MacAskill claiming that 'in Scotland, we are a people who pride ourselves on our humanity' as a 'defining characteristic of Scotland and the Scottish people'. MacAskill faced widespread opposition within the Scottish Parliament, the Scottish National Party (SNP) being a minority Government at that time, elsewhere in Scotland, the rest of the UK and not a little outrage in the US, the country with the largest number of nationals killed in the bombing.

What significance should we attach to this decision and the claims that were made about it? These are especially pertinent questions now, in the summer of 2014, with an Independence Referendum only a few months away. What might the future hold for criminal justice in Scotland - that is either in a full independent Scotland or in a Scotland with more devolved powers?

'Scottish Values'

To return first of all to the claims made by MacAskill above regarding humanity being a 'defining characteristic of Scotland and the Scottish people'. One of the most notable aspects of the Scottish Independence Referendum debate over the past two years is that issues of social justice have come to occupy centre stage. The SNP, both as Government and as the leading party in the vote YES for independence camp, continually speak of the possibility of Scotland becoming a fairer, more equal and more just society. Social welfare issues have been pivotal in the campaign for a YES vote. There are several interconnected reasons for this; it allows the SNP to draw a fault line between the austerity policies and welfare reforms of the UK Government, claiming that such policies would not feature in a fully independent Scotland. Further, it also marks within Scotland another fault line between the SNP and the Scottish Labour Party, the key pro-union party in the Better Together NO to independence campaign. The SNP have long battled with Labour in Scotland and on a number of issues appear to out-flank Labour on the left claiming that they, and not Labour, are the true inheritors and guardians of Scottish social justice - of Scottish social democracy.

In the independence debate the SNP and many of its allies in the YES campaign have made great play of the distinctiveness of 'Scottish values' underpinning policy making and the future direction and shape of Scottish society. The release in 2009 of the Libyan national convicted of the Lockerbie bombing represents but a notable example of how claims have been made for the uniqueness and inherent progressiveness of 'Scottish values'. Such claims have been widely criticised over recent decades and the evidence for them is ambiguous to say the least. However, there are two important factors that are entangled with these claims that cannot be so readily dismissed: the first is that even if claims of distinctive and egalitarian Scottish values are hugely problematic, their political potency should not be underestimated. The second factor, equally apparent, is that the political and policy making landscape of Scotland is distinctive in many ways from the rest of the UK, with two centre-left parties (of somewhat contrasting political traditions) dominating the political scene and the Conservatives largely a redundant force.

Criminal Justice and the SNP

Where does criminal justice fit here? On the one hand it is very difficult to identify a distinctive approach to criminal justice from the SNP. The SNP are a nationalist party, of a particular Scottish variant. There is little in the way of a clear or unique political or ideological tradition that informs their policy making, with neo-liberal and pro-market economic goals co-existing with a soft social neo-liberalism that promotes the public good of a fair welfare state and so on. As for criminal justice it is also difficult to identify the underlying themes that inform policy making in this area and relatively little discussion has been made in the independence campaign as to the direction and shape of criminal justice policy in Scotland in the future.

That criminal justice has not featured prominently in the independence debates should perhaps come as little surprise. It is after all, and this is often overlooked, a unique part of Scotland and Scottish history, and was one of the three pillars of Scottish civil society that remained under nominal Scottish control following the act of union that established the UK in 1707. In this regard, the law, criminal justice and policing in Scotland have always been Scottish. So unlike those key areas of the welfare state that are still reserved to the UK Government, for example benefits and employment policy, there can be no political demand to have them devolved to Scotland. In this respect they are safely Scottish! But are they 'safely Scottish'?

The distinctiveness of Scottish criminal justice over successive decades has been an issue of considerable interest to criminologists, not least in Scotland but also for those who have been concerned to undertake comparative analyses of criminal justice policy across the UK and beyond. In a wide-ranging debate over the past decade and more, claims have been made that criminal justice policy making in Scotland since the establishment of devolution in 1999 has become *less* uniquely Scottish. Here an argument that 'detartanisation' has taken place has been advanced. In the first two Scottish parliaments between 1999 and 2007, a Labour-Liberal Democrat coalition formed the Scottish Government and during that time it is possible to see the influence of UK New Labour concerns with anti-social behaviour, of managerialisation of many and different hues and the makings of moral panic around youth deviancy, particularly in relation to so-called 'Neds' (Non-educated delinquents). Scottish Labour as with its London-centred counter-parts made every effort to appear to be tough on crime, to be populist and punitive simultaneously. With the SNP coming to power in 2007 and then forming the majority Scottish Government in 2011, other arguments were made that there was a process of 'retartanisation' taking place. That these labels are in some ways problematic does not detract from the ongoing efforts to make sense of the dominant trends and themes in Scottish criminal justice today - something that is perhaps proving more difficult than many might have imagined.

Where does this leave us then with regards to where criminal justice might be heading in Scotland? To answer this we should return first of all to the claims made about Scottish values, fairness, equality and so-on. These claims, powerful they maybe, are by no means new. For much of the period since the 1960s, arguments have been made repeatedly that Scotland has a welfarist criminal justice system - not least in relation to the treatment of youth crime. Often claims for welfarism have been applied to Scottish criminal justice in general. However, this is a Scotland that has in place one of the lowest ages of criminal responsibility in Europe, at 8, and demands by campaigning organisations that this should be raised to at least 12 have gone unheeded¹. Alongside this Scotland also 'enjoys' one of the highest incarceration rates in Europe, only marginally behind England and Wales. If there has been welfarism in Scottish criminal justice over the years, it has long been a tough welfarism.

In recent years under the SNP there is mounting evidence that criminal justice in Scotland has taken on a harsher and more punitive approach - at least in some specific areas of policy. In 2013-2014

¹ While the minimum age of criminal responsibility is 8, following the 2010 Criminal Justice and Licensing Act, the minimum age for prosecution is 12.

there have been repeated criticisms and not a little controversy over the number of stop and searches conducted by the recently formed national police force, Police Scotland. In particular, young people in Scotland - including those under 10 - appear to be among the key target group, with the incidence of stop and search for young people in general four times higher than in England and Wales. In other areas the SNP has also fought long and hard to introduce minimum pricing for alcohol and have targeted alcohol consumption as a key factor in crime in Scotland. Alongside this, even more controversy, has accompanied another flagship policy of the present SNP Government - The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, which came into force on March 1 2012. Introduced to tackle sectarianism related to football matches, 'offensive behaviour' is identified as 'sectarian singing' and 'offensive' acts and language. Criminalising 'offensive' chanting and behaviour' at matches is, however, highly ambiguous: while there have been convictions under this legislation, a number of cases have been dismissed with judges, politicians and other observers claiming that the Act itself is ill-defined and amounts to the criminalisation of football fans.

The State, Class and Criminal Justice in Scotland

A key theme that underpins the policies considered above is that they are all targeted at the behaviour of working class populations deemed to be 'problematic'. The relationships between crime, justice and social and economic inequalities in Scotland are pronounced - for example, that imprisonment levels among people from working class housing estates far outweigh any other group in Scotland should come as little surprise. In other words, class biases are alive and well in Scotland as elsewhere - even if this is rarely made explicit, class being out of step with a dominant discourse that speaks of an undifferentiated 'Scotland' and a Scottish 'community', the Scottish 'nation'. Questions and issues of class and inequality are central to our understanding of crime and the future direction of policy in this area.

There are many issues thrown up by the possibility of independence for Scotland. Political rhetoric claiming that immigrants would be welcome in an independent Scotland is of course to be applauded - not least as it is in sharp opposition to policies being pursued by the UK Government. However, talk is cheap: what would immigration policy be like in an independent Scotland? How would 'undesirables' be defined - and kept out and illegal immigrants policed? Such questions extend to other areas of policy making that are currently under the jurisdiction of the UK state: would there be anti-terrorism legislation in place in Scotland? How would that work in practice? How would wider matters of the security of Scotland be dealt with? While perhaps unfair, the hard areas of policy making today often lie in the powers of Westminster - can we be so certain that a future Scottish Government, either SNP or Labour, would be so different? Claims of Scottish 'values' have done little to protect those who have been subjected to criminalisation, stop and search and other measures in Scotland today - never mind in the future. There are also other areas that throw up important questions: what is to be done about corporate crime, crimes of the rich and powerful - including rogue Scottish bankers? How will legislation tackle the scourge of wildlife crime that seems to go unpunished on an all too regular basis in the large privately owned Scottish landed estates?

In the wake of the urban unrest that occurred in several English towns and cities in August 2011, Scottish First Minister, Alex Salmond, dismissed claims that such events would take place in Scotland saying that Scotland was a 'very different place'. Scotland is different, it is distinctive in important respects and it is also has a criminal justice system that is unique. This does not however always translate as something that is invariably welfarist and progressive. The independence debate has in no small part opened-up the space for a discussion of what a future independent Scottish society could look like. There is much that is positive and to be welcomed in this debate but a central question remains about the nature of any future Scottish state. Scotland is not, currently, a 'stateless nation' - a claim repeatedly and mistakenly made. The criminalisation of working class youth is testament to that alone. While the ongoing constitutional debate centres on the imagining of a fairer Scotland with a

beneficent welfare state at its core, questions about the role of a Scottish state, its policing, legal organisation, military apparatus and practice pass almost without any comment as does the discussion of how order is to be maintained in an independent country.

Underpinning this are the class politics of punishment, and the location of the roots of criminal law in the maintenance and reproduction of a highly unequal society. This that we need to shift the focus of attention away from its current emphasis on working class crime to analyse the class politics of impunity for bankers, the wealthy, corporations and for the agents of law and order. While all too often the criminal justice system in Scotland is presented as in some way above and beyond politics, at its core it is a highly political system - understood in the widest sense of class politics. Where is the focus on these relationships and processes in the independence debate or in Scottish criminology and criminal justice?

These are among the key questions that must be asked now if a future Scottish criminal justice system is to become more progressive, and this means that the widespread inequalities of Scottish society, the privileges, wealth and vested interests of a cosseted few need to be challenged.

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