

Keeping Scotland Safe The contribution of criminal justice

A lecture given to the Howard League for Penal Reform in Scotland

Introduction

The last time I addressed a meeting of the Howard League for Penal Reform in Scotland was in March 1991. My subject on that occasion was “The Responsible Prisoner”, a subject which at that time was one of great importance within the Scottish Prison Service and in wider Scottish criminal justice circles. The meeting then was chaired by Drummond Hunter, who at that time, along with his wife Peggy, personified the Howard League in Scotland. I was delighted to learn that the League has decided to inaugurate an annual lecture series in Drummond’s name. I was very happy to accept the invitation to address you again 12 years on.

Context

I spent almost 20 years working in and around the criminal justice system in Scotland, specifically in the Scottish Prison Service, and have subsequently spent over 12 years doing the same in England. I have followed with interest the exciting political developments in Scotland over the last five or so years and am aware that these have extended into the criminal justice field. One only has to read the website of the Scottish Parliament, especially the work of the two Justice Committees to be conscious of this. The developments have affected the world of Scottish criminal justice at all levels, from the highest reaches of the judiciary to the policeman on the high street – and to the smallest untoileted cell in Barlinnie.

In respect of criminal justice, Scotland has inevitably been affected by changes coming not only from other parts of the United Kingdom, but also from Europe and beyond. In some respects one can now refer to a globalisation of criminal justice issues.

What is clear to anyone looking on from outside is that the Scottish tradition is quite different from that of England, politically, culturally and in its view of what constitutes society. In many respects Scotland has always been much closer to the wider European legal tradition and this has affected how it has dispensed justice. It is well worth remembering that in the present climate when Scotland has become subject to concerted pressure from other UK government departments.

As an aside, I was very conscious of this over the summer months when I followed the outcry over the children who were held in the Dungavel Immigration Detention Centre. (Ironically, along with many others in this room, I remember Dungavel prison as one of the jewels in the crown of the Scottish Prison Service.) One view of what had happened was that the Home Office was aware that the detention of small children in this way was likely to be a contentious issue among the chattering classes in the Home Counties and therefore locating the Immigration Detention Centre which was to hold children in the south east of England would be

likely to attract a great deal of criticism. If it were to be located north of Watford, these potential critics would be less likely to notice what was happening. What the Home Office, with little knowledge of Scottish culture, overlooked was the fact that the people of Scotland would have an even greater opposition to such a proposal.

One feature of English politics over the last ten years has been the creeping expansion of criminal justice legislation. Time was when we could expect one major piece of legislation sponsored by the Home Office in every parliament; that is, about every five years. No more. Since 1997 there have been 45 new pieces of Home legislation, all of them with criminal justice implications. A recent parliamentary question uncovered the fact that since 1997 661 new criminal offences have been created. And that does not include the raft which are included in the latest omnibus Bill currently before parliament.

To date, Scotland has not suffered so much from this rush to create new criminal laws. But one can detect signs that this political illness is beginning to creep north of the border. There is an obvious temptation for politicians when faced with a social problem to seek to resolve it by passing a new criminal law. "There is a concern about some form of social disorder or something of which we disapprove? No problem. We will pass a law which prohibits it and all will be well." I would caution against this response. It is not in the Scottish tradition to which I referred a moment ago. On this occasion Scotland has an opportunity to learn from what has happened in England. A sort of poll tax experience in reverse, except that this time there is an opportunity to take another path.

My hypothesis this evening is that criminal justice has a very narrow role to play in creating and nurturing a safe and just society. Certainly, it has an important role to play but, nonetheless, it is a narrow one.

Society has the choice of creating a greater or a lesser dependency on criminal and penal processes.

In the course of the last two weeks I have been in the United States and in Russia. There is a clear contrast between these two countries in what they expect the criminal justice process to deliver. I was in the United States to speak at a conference in New York on "Penal Reform: The Unfinished Agenda". There, a group of judges, lawyers, academics and human rights activists wrestled with how their country could break out of the penal gulag which has led, for example, to one per cent of all men, women and children in Texas, Louisiana and Washington DC being held in prison, to four or five million Americans being disenfranchised, not only during their time in prison, but for the rest of their lives. (No one is very sure whether the figure is four or five million; but what's a million here or there?) At that conference for the first time there was a feeling that Americans were beginning to look beyond their borders, outwards to the rest of the world, to wonder why things had to be so different in the United States, why in respect of the way it uses criminal justice in general and prison in particular the United States has become so abnormal.

In Russia, on the other hand, the atmosphere was quite different. Over the last decade there has been an absolute determination at the highest levels of government, especially within the Ministry of Justice, to leave behind the legacy of the Soviet gulag. The most dramatic demonstration of this has been a 20% reduction in the level of imprisonment. This has been achieved by a comprehensive and well targeted strategy of legislative changes, of changed processes and introduction of alternatives to prison. In a word, the Russians have realised that less criminal justice can lead to more justice.

The prison as a paradigm for my hypothesis

In the course of the work of the International Centre for Prison Studies we undertake projects in prison systems in many regions of the world. Currently we are working in Eastern and Western Europe, in Africa and in Latin America. All of this work allows us to observe how imprisonment is used in different countries and cultures. Throughout the world there are over 8.7 million people in prison. Half of them are in three countries: China, Russia and the United States. Prison rates are usually quoted per 100,000 of the total population. On that basis, the average rate of imprisonment in the world is about 140. In Western Europe the average is about 90, with England and Wales at the top of the league at 140. Scotland has the fourth highest rate of imprisonment in Western Europe, at 126.

In respect of their use of imprisonment, it is possible to divide the countries of the world into five groups. The first includes many developing countries, most of them formerly dominated by colonial powers. Many of these have no indigenous concept of imprisonment. The notion of taking large number of able bodied young men, who should be contributing to the economic and social good of the nation, and depriving them of their liberty in private places, where they become a burden on society and give little or no satisfaction to the victims of crime, is seen as very odd in these cultures. In many of these countries prison conditions are appalling and governments do not have the resources to make them decent and humane places. In a number of these countries one can find some of the most innovative ideas for developing other, more inclusive forms of justice.

In prisons in the second group of countries one finds a complete breakdown in good order. Prisons are places of violence and abuse. The prisoners, or rather some prisoners, are in control and staff only go inside the prisons in large numbers and fully armed. For the majority of prisoners, the prisons are very dangerous places. Many countries in Latin America fall into this category. Yet even there one can find a realisation that this state of affairs cannot continue and there is a determination to change and to introduce international standards.

Many of the countries of the former Soviet Union in Eastern Europe and Central Asia fall into a third group. In these countries there are terrible problems with overcrowding, which in the worst situations means three prisoners having to sleep in turns in one bed, and of ill-health, with 10% of all prisoners suffering from active tuberculosis. In the countries in this group there have been significant changes over the last five or ten years. There has been a determination to reduce the use of imprisonment, seeing excessive use of imprisonment as a negative reflection of the democratic values of society. I have already referred to Russia in the regard. It has been recognised that penal reform cannot be achieved in isolation from the rest of the criminal justice system. It can only be achieved if there is political will, if there is legislative change, if the other major elements in the criminal justice process, especially the judiciary and the prosecution service, are involved in the process and if the public and the media are re-assured that these changes will not threaten public safety.

The fourth block of countries are those which regard prison as a place of last resort, to be used only for those who have committed the most serious crimes or who pose a major threat to public safety. This group includes most of the countries of Western Europe, with prison rates of between 60 and 90 per 100,000. In these countries there is a determination that the criminal justice system should not be used to resolve social problems. It has to be recognised that even in these countries this consensus is being threatened by the way societies are responding to issues surrounding drug abuse. In some of these countries there is an increasing tendency to be drawn into what is known in the USA as the “war on drugs”, using prison as a major weapon in this “war”.

The final group includes those countries which actually appear to like prison. The foremost example of this group is the United States. At the recent conference in New York, to which I have already referred a senior American judge talked about “America’s love affair with prisons”. Increasingly in this group of countries prison is being used for reasons not directly linked with crime, nor with the reduction of crime, nor even with the punishment of crime. Instead it is linked to control of marginalised and impoverished groups in society. The prison is being used to deal with social problems, which should not come within the ambit of the criminal justice system; issues such as children who truant from school or young men who group together late at night.

The question which needs to be answered is, in which of these groups does Scotland wish to be? Where does Scotland stand? I suggest that the answer is that she stands at a crossroads. She needs to decide whether she is to be included in block four or block five. I thought of this last summer as I followed the debate surrounding the Scottish Executive’s consultation on the future of the Scottish Prison Estate. At first glance this appeared to be a purely technical debate. The name implied as much. The basis for discussion was “The Scottish Prison Service’s Estates Review”, suggesting that all that was at stake was the number of Scottish prisons and where they should be located. The position taken by the Scottish Prison Service in that paper was that its task was merely to respond to the predictions of statisticians and to the indications of parliamentary intentions; to ensure, in other words, that there were enough places for prisoners, whatever their number.

There was, of course, a slight complication in that these places needed to be decent and humane, in conformity with Article 3 of the European Convention of Human Rights. I should say in passing that Scotland is one of the few developed countries in the world where a significant proportion of prisoners do not have continuous access to sanitation and running water. Nevertheless, while allowing for this, it did appear that the issues to be dealt with were merely technical and managerial.

Except that they were not. They were much more fundamental than that. What the debate was actually about was what kind of society Scotland wanted to be. There is an oft-quoted aphorism which goes something like this: "If you want to discover what sort of values a country has, go and look in its prisons". You will know of references to this by Winston Churchill and Fyodor Dostoyevski. In similar vein, Nelson Mandela wrote, "A country should be judged, not by how it treats its highest citizens, but how it treats its lowest ones".

One can also make a judgement about the values a society holds dear by looking at the number of its citizens who are deprived of their liberty. As well as looking at how prisoners are treated, we should look at how many there are. By this measurement, Scotland does not do very well. In the late 1980s there was considerable concern and public debate when the prison population in Scotland passed the 5,000 mark for the first time. A few years ago it passed the 6,000 mark, although this time there was little public comment. The Scottish Prison Service is now planning for up to 8,000 prisoners within a few years.

What disturbed me most about the consultation paper produced last year by the Scottish Executive on the Scottish Prison Estate was that it was presented purely in managerial terms. It included no discussion about any social context, far less an ethical context. I can understand that the Scottish Prison Service, as an administrative servant of the Executive, might take that position; although I regretted that it chose to do so. I could not understand why the Executive chose not to discuss the wider implications of why it should be necessary to have such a high rate of imprisonment in Scotland. In Western Europe Denmark, Norway, Finland, Sweden, Belgium, Ireland, The Netherlands, France, Germany and Italy all have rates of imprisonment of less than 100 per 100,000. Only Spain, Portugal and England have rates higher than Scotland. Does this mean that the people of Scotland are much more criminal than those in similar countries? Or does it tell us something else about our values?

We are now planning for a prison population of 8,000, which will be the highest rate in Western Europe. But why stop there? Why not 10,000; why not 12,000? Indeed, why not go to American levels? Twenty years ago there were half a million people in prison in the United States. Any commentator then would have found it unbelievable that today there should be over two million. If Scotland were to go to that level, it would have over 30,000 people in prison. That is unbelievable, isn't it? Not necessarily.

The inexorable rise of the prison population in Scotland will only stop if society as a whole and politicians in particular choose not to go down that road. In November 2002 the heads of prison administrations from all Council of Europe member states, 45 countries stretching from Lisbon on the Atlantic Ocean to Vladivostok on the Pacific, met in Strasbourg. One of the issues which they discussed was prison overcrowding and how to deal with it. None of these senior prison administrators advocated the solution of building more prisons. Although they did not say so directly, they would have agreed with the dictum of Sir Alexander Paterson, a famous English Prison Commissioner in the early 20th century. He was a man of many aphorisms and one of them was, "Wherever prisons are built, the courts will fill them".

In their final communiqué the heads of the prison administrations noted that levels of imprisonment rarely have anything to do with levels of crime. Instead, they are a matter of political and public choice. They suggested that a society could choose to have a high or a low level of imprisonment depending on what sort of society it wished to be. Remember, these men and women were not academics in ivory towers or civil libertarians; they were senior prison administrators.

Let me give you two examples to demonstrate the importance of political and public will when it comes to rates of imprisonment. The first is the United States. Forgive me for mentioning it again, but when one discusses prisons it is hard not to. With about 5% of the population of the world, the United States has 23% of all its prisoners. I have already said that the number of people in prison in the United States has risen from

half a million to over two million in the last 20 years, despite the fact that for most of that period crime rates have been falling. This rise has been based on a series of political decisions, epitomised by clichés such as “three strikes and you’re out”, followed by “two strikes and you’re out”, “the war on drugs”, “zero tolerance” and “truth in sentencing”. I was reminded of the last phrase some years ago when I was in a prison in Illinois. I asked a prisoner how long he was serving. He replied. “2,000 years”. Then he added with a wry smile, “Of course, I hope to get parole after one third of that”.

This massive rise in the prison population has had several consequences. There have been consequences for the prison system; for example, with an increasingly aging prison population so that hospices are now having to be built for aged prisoners. There have been consequences for society. I have already mentioned that in Texas and elsewhere one per cent of all men, women and children are in prison. Prison populations reflect gross imbalances of race, of poverty and of marginalisation. There have also been fiscal consequences. For a number of years now the State of California has spent more on prisons than it does on higher education. It was able to do so without too much question in a time of economic expansion. Serious questions are now being asked about this now that the days of economic superfluity are over.

My second example of the importance of political and public will is Finland. In a number of respects there are many similarities between Finland and Scotland. They are both small northern European countries with concentrated urban communities, large sparsely populated areas and a tradition of strong welfare institutions. At 5.2 and 5.08 millions respectively, their populations are broadly similar in size. However, in one respect the countries are quite different. In December 2002 there were 3,617 people in prison in Finland, while in Scotland around the same date there were 6,424 prisoners. This means that Finland is well below the Western European average for imprisonment, while Scotland is one of the leading imprisoning nations. This was not always the case.

In the 1950s the Finnish rate of imprisonment, at 187 per 100,000, was one of the highest in Western Europe, four times higher than its Nordic neighbours. Over succeeding decades its rate of imprisonment fell significantly: to 154 in 1960, 113 in 1970, 106 in 1980, 69 in 1990 and 55 in 2000. This did not happen by accident. Rather, the decrease was the result of deliberate, long-term and systematic policy choices. In the first place, there was clear political will and consensus to bring down the prisoner rate. This involved key politicians, government officials and academics. The reforms were drafted and driven by a group of experts whose view of criminal policy was broadly similar. The judiciary was closely involved in developing these changes and in a number of respects sentencing practice changed in advance of new legislation. It should be noted that crime control has never been a party political issue in election campaigns in Finland. Finally, the role of the media has been of crucial importance, with a general absence of populist reporting on criminal justice matters.

In Finland courts have two basic sentencing options: the fine and imprisonment. A high proportion of convicted offenders are punished by a fine. If the court decides that a fine is not sufficient punishment, then a prison sentence is imposed. A sentence of imprisonment passes an important message to the convicted person and to the public. It also requires the judge to be quite clear in reaching a sentencing decision. However, once a sentence of imprisonment has been passed, various options kick in. If the sentence is up to eight months, there is an expectation that it will be converted into community service. All sentences of up to two years can be suspended with various conditions, such as attendance at a drug rehabilitation or similar course. In practice, 50% of all prison sentences are suspended.

Finland also has a simple structure for the administration of court sentences. There is a single Criminal Sanctions Agency, which administers all custodial and community disposals. The Agency has two goals:

- to contribute to security in society by maintaining a lawful and safe system of enforcement of sanctions
- to assist in reducing recidivism by endeavouring to break the cycle of social exclusion that reproduces crime.

It also has two central values, which are:

- respect for human dignity and justness
- a belief in the potential for individual change and growth.

The key consideration is that in Finland the criminal justice system is not regarded as a major source of social control. That is the task for other public agencies. The criminal justice system has a very narrow and regulated function in crime control.

Conclusion

This brings me to my conclusion and back to my original hypothesis that the criminal justice process has a very narrow role to play in creating and nurturing a safe and just society.

Over the last decade we have allowed criminal justice to expand into areas where it has no locus. Criminal justice systems can be used to underpin and to help to support the values of a society. They cannot be used as a substitute for these values. I suggest that we face a real danger of allowing this to happen.

Let me end with a quotation from William Omaria, who was Minister of the Interior in Uganda in 1995 when an amazing conference took place in Kampala on the subject of penal reform in Africa, a conference which first led me to consider that many countries in sub-Saharan Africa fall into my first group of countries in respect of their attitude to imprisonment. In opening that conference Minister Omaria said,

One day in the distant future, people will probably look back on what happens in most countries today and will wonder how we could do that to our fellow human beings in the name of justice.

Our hope in Scotland should be that that day will not be too long in coming.

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