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**TWENTY YEARS OF CRIMINAL JUSTICE REFORM: PAST  
ACHIEVEMENTS AND FUTURE CHALLENGES**

*The Scottish System of Juvenile Justice – From Welfare to Warfare?*

by

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*The Scottish Legal System*

In 1603 the Crowns of England and Scotland were united with King James VI of Scotland becoming King James I of the two kingdoms. In 1707 the Act of Union was enacted whereby the Parliaments of the Scotland and England were united and both countries were governed from the Westminster Parliament in London. Three matters were still kept within Scotland, namely the Scottish system of education, the Church of Scotland as the established church, and the legal system. Although the Scottish legal system in practice resembles that of England in many ways its roots are different – in the Roman-Dutch tradition as opposed to the Common Law tradition – and the court system is substantially separate and different.

The Supreme Courts in Scotland are, in civil jurisdiction, The Court of Session which sits exclusively in Edinburgh, and, in criminal jurisdiction The High Court of Justiciary, which, although based in Edinburgh, also goes on circuit to the main cities and towns. The judges of these courts, thirty-one men and three women, are the same individuals but are called Lords of Session in civil and Lords Commissioners of Justiciary in criminal. They wear purple robes in civil and red robes, faced with white crosses, in criminal. The chief judge is the same person and known as Lord President in civil jurisdiction and Lord Justice General in criminal jurisdiction. The “second in command” in both civil and criminal is the Lord Justice-Clerk. Both versions of the court have an original and appellate jurisdiction, with the High Court, in its original jurisdiction, dealing exclusively with heavy criminal matters.

Next below the Court of Session and the High Court of Justiciary is the Sheriff Court and then comes the Stipendiary Magistrates Court and, at the “bottom” rung of the judiciary, the District Court. We have never in Scotland been so attached to lay justice as our English friends but we still have lay justices in the District Court and a recent proposal that they should be dropped was abandoned. The Sheriff Court deals with the vast majority of criminal and civil business. There are 138 sheriffs in the six sheriffdoms of Scotland. We still

have a divided legal profession – solicitors (and, nowadays “solicitor advocates” who remain solicitors but have acquired right of audience in the High Court and/or the Court of Session) and advocates. All the judges of the Court of Session are members of the Faculty of Advocates. With the sheriffs the proportion is about fifty-fifty. The Stipendiary Magistrates (only 5, all in Glasgow) are solicitors.

The Court of Session has jurisdiction in nearly all civil matters (apart from very small claims) and exclusive jurisdiction in such exotic matters as Variation of Trusts and Judicial Review (now very fashionable). The Sheriff Court is the local court dealing with by far the majority of the criminal and civil litigation conducted in Scotland. The Sheriff Court has jurisdiction in almost all civil matters, with no upper financial limit. In crime the sheriffs, in addition to all the “community” disposals may sentence for up to five years in The Court of Session has jurisdiction in nearly all civil matters (apart from very small claims) and exclusive jurisdiction in such recondite matters as Variation of Trusts and Judicial Review (now very fashionable). custody when sitting in what we quaintly call “solemn” procedure (with a jury of fifteen) and, generally, up to six months when sitting alone in summary procedure.

In civil the sheriff may be appealed to the Sheriff Principal and to the Inner House of the Court of Session. Court of Session judges may also be appealed to the Inner House, whose decisions, thanks to a decision in the mid nineteenth century, may be appealed to the House of Lords. In criminal jurisdiction the sheriff may be appealed to the High Court in its appellate capacity as may a single High Court judge. There is generally no appeal to the House of Lords in crime but in very special cases where Human Rights are in issue, the High Court’s appellate decisions may be appealed to the Privy Council.

The Scotland Act of 1998 set up the Scottish Parliament which sits in Edinburgh. It has devolved to it extensive legislative powers. These include most of the areas of private law, including the law relating to children, and many aspects of the criminal law including the court structure and procedure but excluding certain areas such as Tax, Drugs and Road Traffic.

Our approach is similar to but separate from that of the English Common Law. We apply the concept of *stare decisis*, but tend to try to base our decisions on principle rather than strict precedent. As in England our court procedure is adversarial. As one of our great judges said in 1962: “We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points.”<sup>1</sup> Criminal prosecutions (with two exceptions in the last century where private prosecution was specially permitted) are always conducted by the State through the agency of the Crown Office, now called the Crown Office and Procurator Fiscal Service, with “solemn” cases running in the name of the Lord Advocate of the day and summary cases in the name of the local Procurator Fiscal.

### ***Emergence of the Hearings System***

Until the introduction of the Children’s Hearings system juveniles – persons under 16 – who were accused of all but the most serious crimes were tried in the “Juvenile Court” which was simply a modified version of the sheriff sitting alone in summary procedure.

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<sup>1</sup> *Thomson v Glasgow Corporation* 1962 SC [Session Cases] 36 at 51, 52 per Lord Justice-Clerk Thomson.

Charges of the most serious nature, such as murder, were tried under solemn procedure before a jury. There was growing dissatisfaction with this arrangement and in 1961 a committee was set up “to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control and, in particular, the constitution, powers and procedure of the courts dealing with such offenders, and to report.” The committee was presided over by Lord Kilbrandon, a Scottish Law Lord, and reported in 1964.

The Kilbrandon committee, having been charged with the task of considering the powers and procedures of the courts advanced recommendations which, surprisingly to some, involved the virtual removal from the courts of jurisdiction in cases wherein children were said to have offended. The Report stated at paragraph 71; “The shortcomings which cause dissatisfaction with the present juvenile court system (and this is no reflection on those who serve in such courts) seem to us to arise essentially from the fact that they seek to combine the characteristics of a court of criminal law with those of a specialised agency for the treatment of young offenders, proceeding on a preventive and educational principle.” The Committee proposed the setting up of what it called “juvenile panels” which would decide on the measures to be taken when appropriate grounds had been admitted or proved. The panel itself would be empowered to act if grounds were admitted but would have no power to “try” cases where grounds were not admitted. Where grounds were not admitted the matter would be sent to the sheriff who would hear to hear and decide upon the evidence and remit back to the panel if and only if the evidence was sufficient.

This was the far-reaching solution proposed to the jurisdictional problem the Committee problem it had identified. Its proposals for the grounds which should entitle a panel to exercise jurisdiction were even more far-reaching, even revolutionary. At paragraph 138 the Committee stated: “in our view, referral should be made for one reason only, namely, that *prima facie* the child is in need of special measures of education and training ... panels should be empowered to assume jurisdiction to order such measures for any child under 16 in respect of whom, on a referral, one or more of the following circumstances is shown to apply, namely, his falling into bad associations or moral danger; his being the subject of criminal neglect or an unnatural offence ... ; his having violated the law as to crimes and offences; his failure to attend school; his parent or guardian having abandoned him ... or who is of such habits and mode of life as to be unfit to have control of the child.” Note that “his having violated the law as to crimes and offences” is bracketed with, and indeed is buried in the middle of the classic “care or protection” grounds. In effect Lord Kilbrandon and his colleagues had in effect dissolved the concept of treating offending children (except for the most serious cases such as murder) as offenders. While nowhere using cliché, “Needs not Deeds” the report comes near to it in heading one of its sections; “The Needs of the Individual Child as the Test for Action.”

The Kilbrandon proposals were accepted by the government of the day and were substantially enacted in the Social Work (Scotland) Act 1968, the very name of which reflects the welfare approach. Our senior judges displayed no reluctance to accept both the procedural and the welfare aspect. Lord President Emslie (one of our strongest judges) had no difficulty in recognising, in a case in 1977, “that the ordinary codes of civil and criminal procedure do not apply”.<sup>2</sup> Lord Sutherland, also a strong judge, said 1988: “ ... the proceedings in front of the sheriff on referral are self-contained civil proceedings *sui generis*

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<sup>2</sup> *McGregor v D* 1977 SC 330 at 336.

in which it must be borne in mind at all times that the principal purpose is to ascertain what is necessary to be done in the interests of the child.”<sup>3</sup> In 1991 Lord President Hope said: “The genius of this reform, which the circumstances of the present case must not be allowed to detract from, is the separation of investigation of facts from disposal.”<sup>4</sup>

The “present case” to which Lord President Hope was referring was the famous “Orkney” case wherein children were removed from their parents by social workers on evidence subsequently regarded as inadequate. The procedures adopted in these cases was investigated by Lord Clyde who in his Report<sup>5</sup> recommended changes which led to the enactment of the Children (Scotland) Act 1995. This Act may be regarded as the high water mark of the welfare approach, with section 16(1) thereof providing explicitly, as the Social Work (Scotland) Act 1968 had provided by implication, that: “where a children's hearing decide or a court determines, any matter with respect to a child the welfare of that child throughout his childhood shall be their or its paramount consideration.”

### *A change of ethos and rhetoric?*

The government which had commissioned, and accepted, the Kilbrandon Report had been Conservative but by 1968 the party in power was Labour and it was Labour which was responsible for the Social Work (Scotland) Act 1968 itself. The Conservatives were in power when the Children (Scotland) Act 1995 was passed. Accordingly for nearly thirty years the welfare approach to juvenile “delinquency”, though the term was beginning to sound a bit old-fashioned, was bipartisan.

Labour again took power in 1997. Prime Minister Blair famously promised to be “tough on crime and on the causes of crime”. In 1999 Scotland’s Labour-dominated Labour / Liberal Coalition government seemed intent upon continuing the welfare approach. Indeed in 2000 the Scottish Executive (as the Scottish government called itself) responded to a proposal that there should be a detailed examination of the feasibility of extending the hearings system to 16 and 17 year olds by stating: “Accepted. The extension of the hearings system to include 16/17 year olds to the hearings system has implications for many agencies, including the hearings themselves, the Crown Office and the courts”.

However, although this proposal for examination of the extension of the hearings system was “Accepted” nothing further has been done about this proposal. What has been enacted is section 135 of the Antisocial Behaviour etc. (Scotland) Act 2004 which amends section 70 of the Children (Scotland) Act 1995 in order to allow hearings in certain circumstances to impose a ‘movement restriction condition’ (familarly known as a ‘tagging order’) on a child. This involves an electronic tag being fitted to the child and electronically monitored. The new provisions enact that such an order may be imposed where the long established ‘secure accommodation’ criteria of the original legislation are in place. These are:

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<sup>3</sup> *WW v Kennedy* 1988 SCLR [Scottish Civil Law Reports] 236 at 239.

<sup>4</sup> *Sloan v B* 1991 SLT [Scots Law Times] 530 at 548E.

<sup>5</sup> Lord Clyde’s Inquiry did not set out to address the merits of the individual decisions of the social workers but examined the procedures adopted and recommended changes - *Report of the Inquiry into the Removal of Children from Orkney* in February 1991 (Edinburgh, HMSO, 1992).

- (a) ‘that the child, having previously absconded, is likely to abscond and, if he absconds, it is likely that his physical, mental or moral welfare will be at risk, or
- (b) that the child is likely to injure himself or some other person’.

Does this development represent a withdrawing from the “welfare” approach? Not according to those attempting to implement it. A recent report from Glasgow City Council stated: “In addition to this monitoring and in accordance with the welfare approach of the Hearings System, any young person subject to a ‘tag’ also receives an intensive, multi-agency package of support of up to 50 hours per week that is tailored to their individual needs and risks. The resultant combination of both monitoring and support is known as Intensive Support and Monitoring Service, herein known as ‘ISMS’. The Scottish Executive funds the service directly, on a ‘per tag’ basis. Currently costs for an ISMS order are approximately half that of a secure bed”.

The report comes to two conclusions: “There has been no net-widening effect, and the young people involved with ISMS are the most serious and persistent offenders, and those most at risk of a secure placement or custody”; and, “ISMS has had a notable impact on the seriousness of offending and overall risk. Smaller but still positive changes have been observed in the frequency of offending. Attendance and compliance levels are excellent considering the intensity of support on offer and the fact that these are young people with chaotic lives and often a long history of non-engagement with services. Effective monitoring and supervision ensures both young person and community safety”.

It would therefore appear that there is a strong body of opinion that the answer to the question posed in the title to this talk – “From welfare to warfare?” – is in the negative. However a current Consultation document on a proposed Children’s Services (Scotland) Bill contains the following: “A small number of young people who offend in either a serious or persistent way will not engage voluntarily with services. When a young person’s behaviour is causing serious concern and they are posing a risk to themselves and others, action must be taken. We must ensure that it is clear that engagement with interventions put in place to change behaviour is not optional. Disorderly or offending behaviour is unacceptable and must change.” In the proposed bill the Ground for referral based on an alleged offence by the child is no longer buried (as it was in the Social Work (Scotland) Act 1968 and the Children (Scotland) Act 1995 amongst the classic “Care and Protection” grounds) but is promoted to top of the list Am I being unduly suspicious in detecting a change of ethos and emphasis?

I should perhaps add that most of this was written before a minority Scottish Nationalist government took over from the Labour / Liberal coalition which had been in power since the opening of the new Scottish Parliament on 1<sup>st</sup> July 1999 (Canada Day!). What the new government will do remains to be seen. We live in interesting times.