Interview with Sheriff Andrew M. Cubie – Glasgow Sheriff Court, the Judiciary of Scotland

By

Ross Deuchar and Allan Moore

The Judiciary of Scotland

Historically in Scotland, prosecution of crime was in a large majority of cases similar to the process that would be observed in the civil courts today, in that the injured party would prosecute the offender for the harm that offender had directly caused to the victim (Lord Normand, 1938). As Lord Normand went on to explain in his dicta however, the development of a form of public prosecution for crime can be traced back to the Sixteenth Century for certain crimes against the State for which "in these cases the right of the Lord Advocate to prosecute as the King's Advocate was recognised" (Lord Normand, 1938, 345). In the contemporary Scottish criminal justice system, the Lord Advocate remains the most senior law officer in the country, assisted by the Solicitor-General, with all serious indications of criminal conduct charged against an accused person filtered by crime investigators, predominantly Police Scotland, through the office of the Crown Office and Procurator Fiscal Service (COPFS), which is led by the Crown Agent (Gane and Stoddart, 1998).

The role of the Lord Advocate has been the subject of some controversy in recent years in Scotland as it historically appeared *prima facie* to breach the constitutional separation of powers between executive, legislature, and judiciary. As outlined by Seaton (2001), the role of the Lord Advocate at that time "combines the role of government minister, chief prosecutor and, by convention, judge-maker" (p.40), with overlaps in particular between executive and judiciary that called the independence of the judiciary into question. This was addressed initially by way of the creation of the Judicial Appointments Board for

Scotland in 2002, who make recommendations for appointments to the judiciary, though until 2008 the board had no official legal standing and powers of appointment still technically rested with the Lord Advocate. The Judiciary and Courts (Scotland) Act 2008 (hereafter referred to as the 2008 Act) then officially, though indirectly, abolished the judicial appointment function of the Lord Advocate, where in section one it sets out that judicial independence must be guaranteed, and amongst other named roles the 2008 Act explicitly states that the Lord Advocate "must not seek to influence particular judicial decisions through any special access to the judiciary". (S1(2)(a)).

The 2008 Act then confirms in chapter one section two that the Lord President is the head of the Scottish judiciary, with a number of key functions including the general running of the business of the Scottish Courts (S2(2)(a)), representing the judiciary and its views orally and in writing when necessary to the Scottish executive and legislature (S2(2)(b) & (c)), ultimately for welfare, training and guidance of judicial office holders (S2(2)(d)), and investigation and determination related to alleged poor conduct of judicial office holders (S2(2)(e)).

Crucially in terms of providing full clarity on the role of judicial appointments then, the 2008 Act in chapter three provides a statutory basis for all recommendations for judicial office appointment to originate from the Judicial Appointments Board for Scotland previously discussed (S9(2)(a)), as well as giving further statutory powers for the Board to provide advice to the executive on matters of judicial appointments (S9(2)(b)). Section ten of the 2008 Act then provides an extensive list of all judicial office holders that the Board has the power to recommend appointment to, which includes those that the Lord Advocate previously held authority relating to. As such, whilst the Lord Advocate still has an explicit named responsibility to give support to the judiciary under S1(2)(b) of the 2008 Act, the

large majority of their overlapping role has now been removed, which helps to strengthen the constitutional separation of powers discussed previously.

Returning then to the subject of prosecution, and should the office of the COPFS make a decision to prosecute, this is on either a summary or a solemn basis, where the seriousness of the offence will frequently direct the procedure that is then followed (Gane, Stoddart and Chalmers, 2009) The majority of offences being less serious in nature predominantly follow the summary procedure for which the trial takes place in front of the judge alone, with the solemn procedure where the hearing is in front of the judge and jury reserved for matters involving more serious allegations of criminal conduct including murder, rape, and treason.

The hierarchy of criminal courts in Scotland from lowest to highest is the Justice of the Peace Court (until the passing of the Criminal Proceedings etc. [Reform] [Scotland] Act 2007, and in practice for many until 2010 these were known as District Courts), the Sheriff Court, and the High Court of Justiciary. Trials in the Justice of the Peace Court are always summary in nature, taking place in front of the Justice of the Peace, who is a lay person of good standing equipped to make decisions on matters of fact, aided by a legally qualified clerk of court on matters of law. Approximately a third of all criminal cases in Scotland are heard at this level (Scottish Government, 2015), and involve petty offending such as road traffic offences, ordinary assaults and minor or low value thefts (Gane, Stoddart and Chalmers, 2009). In terms of disposal, a Justice of the Peace has the power to order a custodial sentence of up to 60 days in prison or a fine of up to £2,500. Should either the disposal required warrant a greater sentence than that under the powers of the Justice of the Peace, or if the criminal conduct is of a more serious nature, then the case ought to instead be remitted to the Sheriff Court.

A Sheriff in Scotland is a courtroom judge, rather than in several other jurisdictions where the sheriff might be a role within investigation and law enforcement. The Sheriff Court is where the majority of criminal cases are heard in the country (Scottish Courts and Tribunals, 2021). Geographically in this regard, Scotland is broken down into six Sheriffdoms, with a Sheriff Principal appointed in charge of each of those Sheriffdoms in order "to secure the efficient disposal of business in the sheriff courts" (Scottish Courts and Tribunals, 2021). The Sheriff Principal has "advisory, consultative and ceremonial functions as well as some powers of appointment" (Judiciary of Scotland, 2021), making their role partly judicial and partly administrative in nature. Unlike the Justice of the Peace, the Sheriff is a judge who is legally qualified and must have at least ten years of experience as either an advocate or a solicitor before they can be appointed to their role as Sheriff (Courts Reform [Scotland] Act 2014 S.14). Sheriffs may preside over both solemn and summary hearings (with the exception of the Summary Sheriffs, who on a self-explanatory basis by virtue of their job title may only preside over summary cases). For all summary cases heard before the judge alone, the maximum disposals on offer to the Sheriff are up to twelve months in prison or a fine of up to £10,000.

For more serious criminal matters that are held on a solemn basis where the judge sits with a jury of fifteen members of the public, they have the ability to give a maximum sentence of up to five years' imprisonment or an unlimited fine. Sheriffs also have the power to order a range of alternative disposals including community payback orders and probation, and have the power to suspend a sentence for a period of time to ensure that the guilty party remains within the law or risks being brought back to court to then serve their sentence in custody (Judiciary of Scotland, 2021).

For those most serious offences such as murder, rape or treason, or those cases that are likely to necessitate a greater sentence than that which can be ordered by the Sheriff

Court by virtue of their seriousness, the High Court of Justiciary is the highest court of first instance in the country. In addition, any allegations of breach of duty by a serving judge in the Scottish judiciary would be heard in the High Court (Gane, Stoddart and Chalmers, 2009), an indication of the seriousness with which such a breach of public office is treated in the country. Cases in the High Court of Justiciary are exclusively solemn in nature being heard by a High Court Judge sitting with a jury of fifteen members of the public, and with maximum disposals of up to life imprisonment or an unlimited fine.

Beyond the courts specific to the Scottish jurisdiction, there are other courts and dispute resolution procedures that it is necessary to explain. Whilst it is important to note that the Justice of the Peace, Sheriff, and High courts conduct close to a hundred percent of Scottish criminal cases, there are on occasion circumstances that necessitate referral to courts and other dispute resolution mechanisms from outside of the Scottish geographical jurisdiction. The first of these to highlight is the Supreme Court of the UK. As certain laws are reserved for the UK Parliament and not fully devolved to Scotland under the terms of the Scotland Act 1998 (as amended), then should a devolution issue (a dispute or lack of clarity over whether or not an exclusively Scottish Court has the legitimate authority to pass judgment on a matter, of if legal authority rests with a UK court due to the area being reserved to the UK Parliament at Westminster) be raised before any of the criminal courts in Scotland, this must then be heard initially within the High Court of Justiciary by a panel of two or more judges, then if agreed to be a *prima facie* case will give leave to appeal to the Supreme Court (Supreme Court of the United Kingdom, 2013). Should the High Court refuse to give leave to appeal then the Supreme Court itself can give such leave if the issue is "seriously arguable and sufficiently important to justify a hearing of the appeal" (Supreme Court of the United Kingdom, 2013, 3)

Secondly, there are some criminal law related areas, predominantly in the area of criminal procedure in Scotland, that until the 2021 fell under the jurisdiction of the Court of Justice of the European Union (CJEU), in particular with the use of European Arrest Warrants whereby a warrant may require an executing EU Member State to extradite a suspect to a requesting Member State to stand trial for a serious criminal matter. Whilst the UK (including Scotland) officially left the European Union in January 2021, and thus ended the jurisdiction of the CJEU according to the terms of the withdrawal agreement, cooperation between the UK (including Scotland) is still necessary, particularly when dealing with matters of cross-border criminality or when extradition may be requested of or by the UK (including Scottish) authorities. Part three of The UK-EU Trade and Cooperation Agreement, signed in December 2020, covers 'Law Enforcement and Judicial Cooperation in Criminal Matters, with 138 Articles covering different areas that the UK (and Scottish) authorities, including the judiciary, will be required to cooperate on. In the summary document produced by the UK Government, this clarifies that the processes to replace the EU Arrest Warrant are "streamlined extradition arrangements, akin to the EU's Surrender Agreement with Norway and Iceland" (Summary p.27 at 147) and that the agreement "provides for direct transmission between judicial authorities, limited grounds for refusal and time-limited processes" (Summary p.27 at 148), the wording of which places a combination of interpretation and obligation on the judiciary when faced with an extradition request under the terms of the agreement. As such, clearly it is possible that disputes may arise and require resolution.

Previously this is where the CJEU would have had authority, however under the terms of the 2021 cooperation agreement, paragraph 158 of the agreement summary clarifies that the new dispute resolution process is a political rather than judicial one, and explicitly notes that the CJEU is not a part of the new arrangements. Paragraph 172 then sets out that where political discussion reaches an impasse or breaks down that an arbitration panel will

then make a decision on the correct course of action, and if the panel find that any party has breached its obligations or has acted unreasonably "the Party at fault must either rectify the breach, or agree to provide suitable compensation. If it does not do either, then the other Party can suspend obligations in response to any imbalance identified." (p.31 at 172) All of this is set out in more detail within the full text of the agreement under title thirteen, where article four on 'Dispute Settlement' specifies that the first stage of the dispute would be facilitated through the framework of the Specialised Committee on Law Enforcement and Judicial Cooperation and when difficulties arise or agreement cannot be reached, the dispute can be referred upward, or even seized by the European Union's Partnership Council. Each of the committee and council may make a decision that the disputing parties, including the respective judiciaries, are then bound to adhere to. As such, although neither the Specialised Committee on Law Enforcement and Judicial Cooperation, or the Partnership Council have a strict hierarchical authority over the UK (including Scottish) judiciary, there is a reality that the failure by domestic authorities, including the judiciary, to act within the intended scope of the UK-EU Trade and Cooperation Agreement 2021 may result in sanctions being enforced by an EU Member State against the UK (and vice-versa), which does at least to some extent create a hierarchical arrangement in practice between the arbitration panel(s) and the UK (including Scottish) judiciary.

Finally, there is the European Court of Human Rights (ECtHR) (unaffected by the UK's withdrawal from the European Union) for which the European Convention on Human Rights was embedded within UK Law through the Human Rights Act 1998. In order to meet the obligations of the Convention and Act, the entire State including the Judiciary must at all times act in a manner that is compatible with the provisions of the Convention. Should a serious allegation of breach of human rights be made, contrary to the convention, and the affected party not be satisfied that the issue has been appropriately decided through the

Scottish courts system, then in a similar manner to a devolution this may be appealed initially to the Supreme Court of the UK, and then ultimately to the ECtHR. It is important to note however that whilst signatory States are expected to abide by the decisions of the ECtHR, the legal position is that judgments of that court are *inter partes* (binding between the parties to the case) rather than *erga omnes* (binding on everyone) and as such States are not under a strict legal obligation to apply a set principle on a universal basis even where it would be advisable to do so.

Glasgow Sheriff Court and Justice of the Peace Court

Glasgow Sheriff Court and Justice of the Peace Court opened in 1986, and is officially the busiest court in Scotland, dealing with Criminal and Civil cases for the Glasgow and Strathkelvin Sheriffdom (Scottish Courts and Tribunals Service, 2021) With this being the case, interviewing one of the Sheriffs based at Glasgow Sheriff Court and Justice of the Peace Court allows for a number of insights based upon experience of the range of issues that will be encountered by members of the judiciary across the country.

The Interview

As a member of the Judiciary of Scotland since 1997, Sheriff Andrew MacInnes Cubie was born in 1963 in Glasgow, Scotland. He was brought up in Paisley, Renfrewshire (a large town bordering the city of Glasgow to the east) and then Cambuslang, Lanarkshire (a medium-sized town on the south-eastern outskirts of Glasgow). My father was a Church of Scotland minister; my mother taught Latin and Greek in both state and independent school, finishing as a depute head teacher at an independent school. I would describe my upbringing as comfortable and stable. Sheriff Cubie has a brother who trained as a psychiatric nurse and now works in counselling, and a sister who moved from midwifery to primary school teaching. He was privately educated from ages 9-17, and later gained a first-class Honours Degree in Law and a Postgraduate Diploma in Legal Practice from the University of

Glasgow. Cubie married in 1987, and his wife was originally a solicitor in a private practice and is now works as a civil servant. Together, they three children, two boys and a girl – all three are graduates. Cubie's older son works in the Public Relations sector in London, his younger son recently gave up a job in Business Support to study for a Postgraduate Law qualification, and his daughter is (at the time of writing) finishing her qualifications as an Accountant in London.

Sheriff Cubie's thoughts, philosophical orientation, theoretical underpinnings and sentiments are influenced and shaped by his history and experiences, as well as the culture, history and practices of the Judiciary itself. Our interview with Sheriff Cubie was conducted between 4.45pm and 6.00pm on Thursday 23rd May 2019 at his Chambers located at Glasgow Sheriff Court, Carlton Place, Glasgow, Scotland. Glasgow Sheriff Court is located in the Gorbals (Laurieston) area of the city on the banks of the River Clyde and is part of the Sheriffdom of Glasgow and Strathkelvin.

The face-to-face interview was conducted in a very permissive atmosphere that was devoid of any real interruptions, and in a pleasant, relaxed manner in keeping with the personality of Sheriff Cubie. Sheriff Cubie is a very warm individual who belies conventional thought that Sheriffs tend to be upper- to middle-class, serious and aloof in personality. Sheriff Cubie has a relaxed and engaging personality and was clearly very pleased to take part in the interview for this project. During our discussion, he never appeared distracted or disinterested and was quite willing to be candid about his views, perceptions and ideas. The following sub-sections summarise the information he passed on to us during a 75-minute interview which focused on the following elements: *career; personal Judicial philosophy; problems and successes experienced; theory and practice; transnational relations*; and *general assessments.*

Career

As above, Sheriff Andrew M. Cubie completed his Law degree at Glasgow University in the 1980s and went on to do his traineeship with a firm called Livingstone Brown in the city of Glasgow. He then became an Assistant Solicitor within another Law firm, almost exclusively focusing on civil court work. During this period, he was often appointed as a Curator in childcare cases, was the first person to be accredited as a specialist in both child law and family law by the Law Society of Scotland and was also a Solicitor Advocate. He was subsequently appointed as a temporary Sheriff in 1997 until 1999 at which point the office of 'temporary Sheriff' was disbanded. Thereafter, in 2003, at the age of 40 Sheriff Cubie was one of the first group of people who applied, required to be interviewed and produce referees' letters in order to be appointed as a Sheriff by the Judicial Appointments Board in Scotland. Initially in taking up office, he was a 'floating' Sheriff, with territorial jurisdiction within the whole of Scotland. However, he was quickly then seconded to Paisley Sheriff Court [as above, close to Glasgow] to cover sickness absence. A year later, he gained a permanent post at Stirling Sheriff Court, a small 'two man' court, where he remained until 2010. Then, in 2010 Sheriff Cubie moved to Glasgow Sheriff Court.

In 2014, he was seconded to become the Depute Director of the Judicial Institute for three years – a body set up to train all Scottish Judges and with occasional contributions from and participation by Justices of the UK Supreme Court – based in Edinburgh. Finally, once he had returned from secondment in April 2017 Sheriff Cubie was appointed to the Sheriff Appeal Court (an additional appeals court established in 2015 which can hear summary criminal appeals from both the Justice of the Peace and Sheriff Courts in order to ensure that only the most serious appeals are required to be heard at the High Court of Justiciary) and then in November 2018 became a temporary Judge of the High Court and Court of Session.

RD/AM: **As your career as a judge has developed, what has surprised you?**

AMC: On first entering the Judiciary, I was surprised to find myself becoming part of what I describe as a 'community of uncertainty'. Although I initially felt that that I was experiencing

the ‘imposter syndrome’, I found it comforting to that my colleagues – including the most senior High Court Judges – also admitted a certain degree of diffidence about their own opinions and judgements from time to time. In addition to this, I was immediately struck by the constantly high volume of business that occupies the Judiciary in Glasgow and the continually high degree of diligence required to undertake the role of Sheriff. However, overall I continue to find the job to be extremely rewarding. In particular, I have found that being in different courts, being at the Judicial Institute, and sitting in the Appeal Court and the High Court interesting and motivating. Whereas in private practice I increasingly found the administrative and management roles and expectations took me away from the legal work I loved, within the Judiciary, I have been able to focus sufficiently on legal work that has kept me highly engaged. Accordingly, I feel privileged to hold the position that I do.

Personal Judicial Philosophy

RD/AM: What do you think should be the role of the judiciary in society?

AMC: The role of the Judiciary is fundamentally to ‘regulate society’. According to Robert Reed, an eminent Scottish Judge who has just been nominated to be President of the Supreme Court of the United Kingdom, the courts are not just there for individual litigants but for everyone. I believe that the courts are there to represent ‘the kind of fairness, independence, the kind of protections that people are afforded in a democratic society, to know that they have the opportunity to go to court and vindicate rights they have or be protected from over-action by the State’. In other words, the Judiciary should be viewed as the barrier between the State and the individual within the context of the criminal justice system.

The Judiciary also has the purpose of allowing witnesses, litigants and accused to effectively participate in any process in which they are involved. Scotland has not always been good at upholding this element of the Judicial role, however, Judges are now increasingly becoming more aware of the fact that their role is not just to be a ‘referee’ that says ‘well, get on with it

and as long as you stick by the rules …' At the instigation of the current Lord President, First Instance Judges have increasingly become emboldened to intervene where there are unclear, repetitive or insulting questions of witnesses and to seek to protect the dignity of witnesses more overtly. I am at pains to ensure that the type of repetitive, insulting questions that would have been prominent before are no longer permitted. I believe that the role of the Judge has increasingly been enhanced in relation to intervention.

RD/AM: How should the role of the Judiciary evolve/change?

AMC: I do not particularly feel inclined to engage in 'blue skies thinking' in relation to how the role of the Judiciary should evolve or change. However, I believe that there have been cases in the past that have got out of control because of the inability of the Judge to say 'no, that's enough witnesses, that's enough productions, that's enough days of evidence'. Rules have gradually come in within both Glasgow Sheriff Court and the Court of Session that have allowed the Judge to limit things a little more. I am a 'big fan' of the empowerment of Judges at first instance to, for example, say 'why do you need 17 witnesses? Seven of them are saying the same'. I feel encouraged by the current direction of travel within the system that is gradually enabling Judges the power to limit the number of experts and witnesses.

The Scottish system is gradually adopting very useful approaches, and recognising the role for the Judge in case management. However, I feel that there is no point in allotting time in court if there is inadequate preparation time for Judges to become familiar with cases. With reference to the American model of preliminary hearings, I believe that there is more scope for an 'interventionist role and more steps to being taken at preliminary hearings'. While I remain fundamentally attracted to and supportive of the Common Law tradition of the trial, I also believe that components of investigation and questioning could be conducted at an earlier stage, allowing the trial procedure to be more focused.

RD/AM: What organizational arrangements work, and which do not?

AMC: I will answer this question by making reference to the role of the Sheriff Principal and the potential influence that Sheriffs might have on policy – while also recognising the small jurisdiction within Scotland and the limitations on developing a more elaborate framework.

If you were going to invent a legal system, you wouldn't have … the office of Sheriff Principal. It's a kind of outlier because he's a cross between an administrative head and a Judicial head but the arrangements always worked for me. And it's not as if I have a blueprint in my drawer of what I think the Judicial system should look like. One thing I'm conscious of is that … I think some people felt that the influence that Sheriffs had on the Sheriff Association was perhaps slightly compromised on the basis that instead of being someone independent sitting apart from the Judges and the Justices of the Peace, we are part of the same organisation and so Sheriffs will be appointed to the SCTS [Scottish Courts and Tribunals Service] board and various committees. Rather than sitting apart and perhaps having a voice. But, a bit like what the Chinese diplomats said about the French Revolution, it's far too early to tell whether in fact it's made a difference to the kind of influence that Sheriffs can have on things like policy … one of the realities of the situation is in a small jurisdiction where there only are two hundred professional Judges, you can't have too elaborate a framework and it seems to work. I think there are issues sometimes about … it would be helpful to have better separations, but for me it works.

I very much believe in the need for good lines of communication and 'cross fertilisation' between Judges and other agencies. For example, I have initiated this myself in the past in the following ways:

I've always been a fan of demystifying the Judiciary. So when I was in Stirling I spoke to the local members of the Children's Panel. I spoke to the local criminal justice social workers. I went to visit Cornton Vale [a women's prison in the central belt of Scotland]. Now a colleague of mine felt that all of these had the potential to compromise you if you were

then making decisions … that were against the interests of some of the people you'd gone to speak to. But that seemed to me to be just a kind of occupational hazard of a Judge. And I thought that it was good to go to meet, for example, the Children's Panel members to say, 'I'm the person that overturns your decisions, you know, when the appeal is. But I want you to know a little bit more about my background so that you can see that we're not detached from reality. And that a lot of my work', I was able to say as a solicitor, 'is doing work with the Children's Panel. So I have an understanding of how it works.' And I found that these were useful. I didn't feel compromised by them and I've spoken at things like Tulliallan [home of the Scottish Police College] and I've spoken to The Robertson Trust about sentencing. Sometimes they can be quite challenging meetings because you'll speak to a room full of people for whom any imprisonment is anathema. And they're saying, 'well it doesn't work so, you know, how can you justify imprisoning people?' And it's interesting and challenging but I think it's good to be out there and to be kind of visible.

RD/AM: How difficult is it for judges to relate to the living and social conditions of those from economically deprived backgrounds who appear before them?

AMC: I believe that I am not completely divorced from these realities, having had many years of exposure to the social issues experienced by those who appear in front of me during my professional working life prior to becoming a Sheriff. I think what you have to bear in mind is that my background, for example, I'm privileged in the sense that I was sent to a fee-paying school, my parents were both professionals. My father was a minister which gave you a little bit of an insight into some of society's [issues] … doing a children's referral, I dealt with people who had from the time I started as a solicitor to when I became a Sheriff, all sorts of difficulties, all sorts of social drawbacks. I visited houses when I did reports [on] cases … so although we've not lived the experience you're not divorced from it. So it's not as if that when I was appointed as a Sheriff, my butler brought up my coffee and said, you

know, ‘the car’s ready for you Sir’! … I would say almost without exception, the people who go into Judicial office have had exposure to the difficulties of people who have social problems and mental health problems and economic problems and housing problems because they form part and parcel of the constituency that you’re dealing with.

I am strongly of the mind that misconceptions abound regarding Judges being divorced from reality and unable to relate to those who live ‘in the real world’. For example, Judges cover issues related to the research on ‘adverse childhood experiences’ within their training, and how Judges generally have a good appreciation of the social pressures and disadvantages facing people involved in the system.

Problems and Successes Experienced

RD/AM: In your experience what policies or programs have worked well?

AMC: In terms of problems and successes experienced within the Judiciary, I am of the belief that the introduction of drug treatment testing orders, the alcohol court in Glasgow and other problem-solving courts in Scotland have been welcome initiatives. In addition, the introduction of community payback orders (created through the Criminal Justice and Licensing Scotland Act 2010 where a Justice of the Peace or Sheriff may make an order for an individual who otherwise would face imprisonment, to instead divert from a prison sentence and instead carry out unpaid work or some other activity that benefits the community) has been a positive move in his mind, which can sometimes enable ex-offenders to go on to do apprenticeships and to ultimately secure employment. Fundamentally important in the latter, is the role that Third Sector agencies play in terms of recognising the ‘valuable resources from people who are being diverted from a life of crime’. For example, I have recognised that prison is a disposal of last resort which affords limited opportunity for rehabilitation and therefore the issuing of custodial sentences is never easy for me. Further, although steps are being taken in the right direction – more work needs to be done in terms of ensuring that more people benefit from community-based disposals.

Instructively, I very much welcome the kind of lifting our head up to think, 'well, what other imaginative ways do we have of dealing with offenders because…' and I think it's axiomatic that prison doesn't work. We still have a high prison population, some people need to go to prison but we haven't, I think, quite worked out what other options would allow more people to benefit from community-based disposal. But I think there's lots of steps in the right direction … that I welcome because I mean lawyers will sometimes say, 'oh it'd be easy for you to send them to prison'. It's never easy to send someone to prison however well merited it is. You're always conscious of the consequences for them and for the extended family and so on.

I am heartened to see that more through-care support emerging in Scotland, which enables people leaving prison to maintain relationships with prison staff who help to guide them towards positive destinations in the community.

RD/AM: What would you consider to be the greatest problems/challenges facing the court at this time?

AMC: In terms of current challenges and problems within the courts, I believe that there are always issues with resources and the lack of preparation time for Judges. However, at the same time, I recognise that these particular challenges are not acute. Recruitment and retention of Judges is as an emerging issue, although not one that is as prevalent as it currently is in England and Wales. As it relates to the new sentencing guidelines in Scotland *[issued by the Scottish Sentencing Council in January 2017 and applying to all offender aged 18 and over who are sentenced on or after 24th April that year, regardless of the date of the offence],* this is a positive response by the Judiciary of Scotland. These guidelines are useful in terms of enabling openness and transparency and keeping the public abreast of how sentencing decisions are made.

I welcome it because I think sentencing guidelines are useful. And I think many Scottish judges will, from time to time, look at the English sentencing guidelines which are very comprehensive, sometimes quite difficult to follow but helpful to set parameters. The observations in relation to the initial guidelines are, you know, many judges would think, 'well that's what I do anyway'. But, of course, that's not the point. It's about letting the public know that that's what judges do. So you don't just say, 'what will I do? … oh two years', there's a whole lot of different factors that have to be looked at and weighed in the balance. I think it's just out to the Judiciary at the moment, they're looking for assistance with the guidelines. I think that's great and I think … the range of sentencing … is an area where it is a really useful input to come from Judges that doesn't impact upon their independence but we can bring useful material towards the likes of the Sentencing Council and ultimately the Government about what we see working and not working and what we would like to see more of.

On the other hand, Judges are still unable to have the flexibility to send someone to prison while also issuing extended sentencing that includes an order for the accused to undertake a particular personal development training course upon his/her release. For example, there was one particular case where Sheriffs were unable to combine the focus on issuing custodial sentences to sex offenders as a deterrent with the need for supporting them post-release.

As it happened today, I was looking at a case from a couple of years ago where in three separate cases, Sheriffs sent someone to prison and gave them what's called an extended sentence in order that they could complete training in relation to accessing child pornography. And the Appeal Court said, 'no, that's not what an extended sentence is for, that's to do with risk'. But at the same time we quite see the force of why the Sheriffs were saying, 'they need to go to prison as a deterrent but they also need some help', but you can't

do both. So there are still areas of sentencing where … we could finesse things and we could have a little bit more flexibility because sometimes that kind of combination, a sentence of imprisonment and then a community payback order with some kind of offenders' supervision or programme requirement, would be the right thing to do but we don't have the tools to do that. But, that's where Judges can usefully inform the discussions that take place.

RD/AM: In all these, will you consider the changes to be easy?

AMC: In terms of identifying things that would be easy to change in the Scottish Judiciary, I have not come across any major structural or administrative problems in the Scottish system to date.

Theory and Practice

RD/AM: What should be the relationship between legal theory and practice in the courtroom? Are these links strong enough in Scotland and what the relationship between these areas should be?

AMC: I believe there is a good link, that Scotland has a mature legal system with a degree of flexibility as a defining feature of Common Law. I think there is a good link and I think because we are in a mature legal system, the application of the theory to the cases that are brought before us, it works reasonably well. And again I suspect that kind of question is probably more designed towards Judges who work in a system with a code where it can sometimes be … more difficult to fit things in easily to the code but I think we have quite … a flexible living law … I think there is a kind of flexibility and I don't think that it's been undermined by the kind of human rights need to have, 'oh there needs to be a recognisable offence'. So I think we're flexible, that's one of the advantages of the common law system. Most Judges that I know in Scotland do a great deal of prior reading and preparation ahead of court cases.

RD/AM: Does legal theory tends to sit well with the role of statutory interpretation?

AMC: I think that's difficult and I think that in the Sheriff Court, statutory interpretation is under-developed … I've had a couple of interesting discussions with my now retired colleague who said, 'I think it's the single most important thing that we should be doing as Judges because everything comes from statute but hardly anyone ever comes and says, "we have these conflicting views about what the statute is".' On the other hand, the dovetailing between Common Law and Statutory Law is not as well developed as it could be. For example, **t**here's not quite the dovetailing between the Common Law and the Statutory Law. Free agreement meaning consent, the cases don't necessarily read across. So that is in the process of being resolved. I think one of the disadvantages of a small Jurisdiction is we don't have enough cases coming through the High Courts to refine things quickly.

Building further on the issues that can sometimes emerge as a result of a small Judiciary, most Senators have good lines of communication with the Scottish Law Commission and also between the Law Commission and the Judicial Institute and the Judicial Institute and all of the Judges. However, I believe that the relationships between the Judiciary and the Universities in Scotland are 'drastically underdeveloped', whereas in some other countries there tends to be a very good communication flow between Judiciary and academia whereby some people are both Judges and Professors. I also believe that there is still a slight 'silo mentality' in Scotland whereby people are either Judges or academics, although there are some cross-overs. "Although many Judges and Sheriffs will lecture at Universities and be involved … I mean I'm an external examiner at a couple of Universities but I'm not having discourse … about things and now I think about it, that could definitely be developed because I don't think we have … somewhere for that to happen … and I think there would be value in that. I mean there's the Scottish Universities Law Institute … there are relations but there's not a formal interchange of … good lines of communication."

RD/AM: What holds collaboration or interactions back?

AMC: I believe that collaboration and/or interactions are held back by a lack of momentum in Scotland; a slowness to recognise the value of Judicial collaboration with other agencies. For example, I think we've been slow to recognise the value … of having relationships with different groups … I was asked to sit on the Youth Justice Council when I was at the Judicial Institute and the Lord President said, 'I don't think it's appropriate for a Judicial office holder to be part of that' because effectively what he didn't want was for them is to say, 'and we have the badge of the Judiciary having supported it'. So, there are still … sensitivities, if you like.

RD/AM: What kind of research, in what form, on what questions would you find useful for practice? If not very useful, what could or should theory builders do to make their products more useful to you?

AMC: In relation to my own ongoing professional and scholarly development, I see myself as a 'magpie' in terms of what I read. For instance, I often study American, Canadian and Australian cases and also follow various blogs on the internet. I must also pay tribute to the newly formed dedicated Sheriff's library in Glasgow, staffed by librarians who are trained researchers. These librarians are now able to source useful information for members of the Judiciary at any time. As it relates to supplementary research that I might carry out, outside of what is required for individual cases, I conduct research on sentencing and on dealing with unrepresented parties in order to maintain a freshness to my training of Judges within the Judicial Institute in Scotland.

"I suppose it's whatever peaks my interest. I mean it's slightly unrealistic or I'm slightly exceptional in the sense that my time at the Judicial Institute meant that sometimes we would be thinking of what would be a good angle to take on a new topic. One of the problems about training Judges all over the world is refreshing the same topics. So if you're going to talk to Judges about sentencing they'll say, 'well I did that two years ago so what's

new?' So you need to find ways of doing that. And that meant that I spent time looking up things, one example where there's a lot of material from all over the world is in dealing with unrepresented parties and different approaches that can be taken. So you would read academic articles about how courts have dealt with unrepresented parties and whether it's fair or not and … you know what it's like on the internet - one thing leads to another. They refer to an article as a reference to it that you look at that and it takes you to something else. So I'm interested in law but I haven't restricted myself to particular areas."

Transnational Relations

RD/AM: Have you, in your organization, been affected by developments outside the country (like human rights demands, universal codes of ethics, practical interactions with judges or justices from other countries, personal experiences outside the country, new crime threats, etc.)? And how?

AMC: Scotland can be slightly 'inward-looking' and some elements of Scotland's system [such as the need for corroborating evidence as a cornerstone of Scots law] places Scotland 'out on a limb' compared with other countries. I don't think we're insular because I think that's a pejorative word but I think we're quite inward looking. And I think a lot of Judges were surprised, maybe not academics, when we looked at the whole corroboration review (in Scotland, corroboration of the *facta probanda* in all criminal cases is a requirement in order to achieve a legally acceptable sufficiency of evidence. This requirement for corroboration was formally reviewed in 2011 in Lord Carloway's Report on Criminal Law and Practice, and although a formal recommendation of the review was for corroboration to be abolished as a legal requirement, to date the requirement is still in force), to discover how few countries have corroboration because you tend to think, 'well everyone does much the same thing' and we're kind of out on a limb on some things. And I don't think … that's terribly developed. We're getting a lot better at it and … there's examples, sentencing of young people's a good

example, where [name withheld] as Lord Justice Clerk has said, 'look at this case from the Supreme Court in England, look at the American cases.

Here are the reasons why young people have to be treated differently'. So we're better than we were but there's certainly not a free flow, I would say, of information and foreign jurisprudence informing Scots law. In spite of what might be seen as the slightly parochial nature of Scotland's legal system, I also feel that Scots law is held in high regard in many other international contexts, meaning that Judges from different parts of the world often want to come and learn from the Scottish system. In particular, I believe that Judges come to learn lessons about 'fairness, case management, about equity, about Judicial review'. However, I still believe that the Scottish Judiciary could contribute more transnationally than it currently does.

RD/AM: What is the extent to which the Scottish Judiciary is having to interact more with other national jurisdictions in light of the increasing focus on transnational crimes including people trafficking, organised crime and terrorism?

AMC: It is mainly the prosecuting authorities who would take evidence in commission from someone who had been trafficked from somewhere like Slovakia and the trial that would proceed would be a Scottish trial, perhaps with evidence captured from abroad but still focused on the application of Scots law. I am of the view that these cases work well, and that the Extradition Sheriffs tend to have good relationships with the authorities in other countries in relation to the provision of information. But at the end of the day, all decisions are still made on the basis of Scots law.

RD/AM: Have those interactions been beneficial? What kind of external international influences are beneficial and which ones are not as much so?

AMC: In terms of external influences that have been beneficial to the Scottish system, my answer is premised by making reference to the way in which international insights and

practices can sometimes simply be drawn upon as a means of fortifying Judicial decisions in Scotland.

For example, the legislation that affects the rape trial I'm dealing with, again they've looked at the Canadian way of looking at it, they've looked at other Commonwealth countries in the context of defining free agreement which is what consent is. But usually in the sense of seeing we are fortified in the view we've reached because they've done the same in Canada and they've done the same in New Zealand. So there are influences but they're kind of peripheral rather than mainstream. We're not saying we adopt this approach because it's better than ours. We're saying our approach is good and we're fortified in that view because it's been adopted by other people but … I think it's good because I think again we have been slow to look to the wider world to see whether it could help us with Jurisprudential issues that hadn't maybe been developed enough and we're doing that now in a way that I welcome but it's not a guarantee.

RD/AM: How have developments after the terrorist attack on the USA on September 11 2001 affected your work?

AMC: This has not particularly affected the infrastructure thus far, but that the threat associated with organised crime has. For instance, citing the recently concluded trial [at the time of writing] where Lord Mulholland QC [Senator of the College of Justice] had convicted six men guilty of an organised crime-related murder plot in Glasgow to a combined custodial sentence of more than 104 years, I must point to the high security alert that had to be put in place.

Every day there was really intense security at the High Court of Judiciary. They closed the roads to bring people back and forward and when the people were first appearing at Glasgow Sheriff Court on petition, we had [armed police officers] on the roof and this kind of thing. So we were aware of the presence of and need for that kind of heightened support

but ‘touch wood’, terrorism hasn’t really been a factor in changing how things are done … I think there’s a concern about weapons … and whether or not … there’s a risk to the Judiciary but historically that hasn’t really been a feature of Scotland … where the Judiciary have been regarded as targets. And now that could change, no-one’s complacent about it but the intelligence, as I understand it, is that we’re not likely to be a target for anything if anything were to happen.

General Assessments

RD/AM: Are you basically satisfied or dissatisfied with developments in law and legal procedure in your system?

AMC: I have a positive outlook on developments, but also believe that on some occasions in recent years’ legislation has been introduced that has the capacity to criminalise people simply on the basis of demonstrating political proactivity and establishing public reassurance. It’s quite simplistic, but looking at it from the point of view of case management then I think all of the developments - criminal and civil - have been good for the efficient disposal of business and for a more … proactive role, though I don’t like that word, from Judges. So I welcome that … I mean some laws work and some don’t.

You’ll be aware that the Offensive Behaviour at Football [and Threatening Communications (Scotland) Act 2012] *[an Act of the Scottish Parliament which created new criminal offences concerning sectarian behaviour at football games, but which was subsequently appealed in April 2018]* - there’s a lot of criticism … from a personal point of view I felt that they were criminalising things that were already criminal. Every component of it was already there. And I’m not sure whether it worked because football fans felt that they were being picked on. Including a number of people who were never going to be in trouble. And I think there there’s a slight concern about the need to criminalise things that are already criminal. Sometimes there is a political drive in Scotland to ‘do something’ that the

law already regulates. Fundamentally, I am of the belief that this is not necessary since Scots law has sufficient flexibility and adaptability in its own right.

RD/AM: What are the most likely developments you see happening and which would you like to see happening?

AMC: Looking to the future, I welcome the Sentencing Council's attempts to create a proper, transparent framework around the sentencing of sexual offences and the sentencing of young offenders in Scotland. In terms of the most prominent thing that might be needed to improve the Judicial system in Scotland, I believe that the continued harmonising of the rules of the Civil Court procedure is essential. *"Well I suppose, it's not a burning need but the starting pistol having been fired in relation to the Rules Rewrite project which is to harmonise the rules of the Civil Court procedure, it's a pity that it has … stalled slightly but I mean I understand entirely the reasons that people have had to be deployed because of things like Brexit but … I had hoped that we would have made more progress by now in relation to a harmonised set of Court rules which had enhanced case management powers. And it would be good to think that that will not lose momentum."*

In closing, I must make reference to the ethos of traditionalism within Scotland by describing a recent visit by members of the Thai Judiciary. *"We had a group of Judges from Thailand that came to visit us at the Judicial Institute and they were absolutely fascinated. They walked in Parliament Hall and there's a big picture of the Benching Bar in 1898. And then they went into the High Court and everybody was wearing the same clothes and they were absolutely fascinated that nothing had changed. A few more women, but other than that wigs, red jersey, the same court building."*

Conclusion

Throughout the interview, it became clear that Sheriff Cubie was satisfied in the way that the role of the Sheriff has developed, with the evolution of the law over the course of his career

being generally positive in nature. This seemed particularly so with regard to the development of approaches to case management and with the esteem Scots law is held in internationally. He did appear less satisfied with the development of the range of named offences for which the pre-existing criminal law already covered, although he accepts that development of the law in specific areas for political popularity is a reality.

An interesting theme that emerged was that whilst Sheriff Cubie believes that Scotland has a mature legal system that is somewhat flexible, he equally noted that there was comparatively little discussion surrounding statutory interpretation, which could have the effect of rendering some laws more rigid than they otherwise might be. Another interesting theme related to the relations between the Judiciary and other bodies and institutions, where Sheriff Cubie was very open in his opinion that much more could be done both in terms of transnational relations, and particularly between the Judiciary and academia where relationships are underdeveloped in spite of clear potential to work together. Finally, and importantly, Sheriff Cubie was clear in his rejection of the somewhat widespread misconception that members of the Judiciary are not in touch with ordinary society. His explanation of the significant experience that all Sheriffs must have gained prior to their appointment to Judicial office working with the whole spectrum of society, ensuring that even if a judge has come from a comparatively privileged background that it is not possible for them to have escaped contextual understanding of the problems faced by those they eventually pass judgment on, is a passionate and compelling one.

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