

Scots Criminal Law: A Hazy Introduction

By John Macfie

The law of Scotland is founded on the revealed law of God, insofar as it punisheth not only breaches of the moral laws, but also annuls all laws not agreeing with the Holy Scriptures.¹

There in a nutshell you have the pride, and humility, of the law of a small, fiercely independent, European nation, looking at its past, and at the same time forward and outward to other sources and places. Scotland, though united with England and Wales and Northern Ireland into the United Kingdom, has a system of both civil and criminal law wholly separate from its neighbours. Its criminal law is characterised by pragmatism, adaptability and independence of mind. Its practitioners are fiercely defensive of its virtues, but not slow to criticise its failings. It is separate from the criminal law of the rest of the United Kingdom, though many of the laws it administers are shared.²

Where does the criminal law of Scotland come from? It is rooted in the ancient laws of the peoples that populated the territories that are now Scotland: Celtic, Anglo-Saxon, Norse. Christianity and the laws of Biblical Israel added much, both in substance and scholarship.³ The ancient law of Rome exerted its influence through priestly or canon lawyers and, until the late 18th century, through the close connections between Scots lawyers and centres of the study of Roman law on the European Continent. Its core is the common law of Scotland, just as it has grown up. From the earliest times it was modified by statutes promulgated by kings and parliaments, a stream that has become a very torrent today as the parliaments in Westminster and Edinburgh tweak, twist and innovate at an unprecedented rate. Above all, Scots criminal law has been studied, considered and digested by generations of practitioners and scholars such as James Dalrymple, Lord Stair and George Mackenzie of Rosehaugh in the 17th century; Baron Hume and John Erskine of Carnock in the 18th; and, in the 20th, Professor Gerald Gordon, who was both a judge in Europe's busiest criminal court and Professor of Scots law at Edinburgh University. These 'institutional writers' (who

should preferably be dead before their writings are regarded as authoritative, supposing that if they cannot change their mind that is at least some help towards clarity) have striven to bring together, examine and to give intellectual system to a heterogeneous body of law, traditional and statute, that has just grown like Topsy.

How does it work? In former times the Crown and private individuals could seek redress in the criminal courts. It is still possible though vanishingly rare for a private criminal prosecution to be brought;⁴ but today the Lord Advocate and the Solicitor General for Scotland run the system as the Crown's prosecutors. Under them are the Procurators Fiscal, the Crown's local agents on the ground. When the police investigate a crime, they report their findings to the Procurator Fiscal, who must then decide whether and in what court to prosecute, or if they wish further investigations to be made. The most serious cases (such as murder and rape, but also other crimes that might warrant a long prison sentence) are tried before a jury in the High Court of Justiciary either in Edinburgh or on circuit throughout Scotland. Crimes warranting lesser sentences are tried before a Sheriff and jury, a Sheriff alone or a Justice of the Peace, according to their gravity. There is no right for an accused person, as in England and Wales, to elect for trial by a judge alone or a judge and jury — the Crown is master of the instance. High Court cases are presented for the Crown by independent advocates (*anglice* barristers) or solicitor-advocates known as Advocates Depute.

Scotland's criminal law is flexible. There is an inherent power in the law to recognise a new sort crime when it sees it, or at least to recognise new forms of established crimes. In England some forms of credit-card fraud, the selling of glue-sniffing kits to children, and the idea of rape being possible within a subsisting marriage all needed amendments to statute law to allow them to be prosecuted: the High Court, exercising its 'declaratory power' to find that things that waddle and quack are ducks, needed no such help, and just did it.

Scots crimes have their peculiar terms. For us 'manslaughter' is 'culpable homicide'. What Anglo-Saxon lawyers call 'concord' is 'art and part' and is given a rather different treatment. Our Judaeo-Christian heritage has left blasphemy, once a capital crime, still arguably alive, though not prosecuted these many years.⁵ Our inheritance of Reformed, or Protestant, Christianity has left traces of statutes prohibiting Sabbath-breaking and it may still be that disturbing a

congregation at worship is criminal. 'Theft-bote' (the taking of money by a judge to release an accused from the penalties of the law) and 'southrief' (resisting a Law Officer) have fallen out of use and we no longer threaten execution of a person over sixteen who beats or abuses their parent; but 'hamesucken' (the assault or beating of a person in his own home, the offender having entered it for that purpose) is unique to Scotland and still very much alive.⁶

Scotland has had cause to be proud of the integrity of its system of prosecution and of the protections afforded to accused persons in the process. If an accused (called the 'panel') is in custody pending trial, the trial must begin within 110 days of the indictment (the detailed formal charges) being served on him. There are no grandstanding opening speeches for the prosecution where the press, the public and the jury can be entertained and prejudiced by what one side or the other says they will try to prove by evidence: the Crown just gets stuck in to leading evidence of what happened. All essential elements of a crime must be proved by corroborated evidence, that is evidence from more than one source.⁷ The jury (of fifteen good persons and true, not twelve, so there is no chance of a hung jury) may bring in one of three possible verdicts: guilty, not guilty, or not proven. The origins of this are shrouded in mystery but it is a fine way for a jury to say 'We know you did it, but just can't be certain': conviction of any crime is a serious business for an accused person. On the other hand the jury may bring in a plain majority verdict: seven votes to eight is enough to hang you in Scotland, though not in England and Wales.

Whither Scots criminal law? No system exists in a vacuum. The current of European and international law moves Scots law as much as those of other lands. Volumes of legislation from London and Edinburgh are constantly moving the goalposts, not always for the better: politicians have quick reflexes and are mostly shortsighted. Devolution of legislative powers to the Scottish Parliament has returned a political centre to Scotland, and our elected representatives arguably have something to (re-)learn from our American cousins about the separation of powers.⁸ Like death and taxes, change is inevitable and sometimes for the good. One must hope that the people, their representatives and lawyers will work better together in future to preserve the best of it, improve the worst and, where nothing is necessary to be done, to do nothing.

References & Further Information

¹ Forbes's *Institutes: A Preliminary Dissertation*, cap. iii, tit. ii, in *An Introductory Survey of the Sources and Literature of Scots Law* (Edinburgh: Stair Society, 1936) p.237.

² '[...]the system of criminal law which operates in Scotland has remained entirely separate from that of England [...] [A]lthough there is now much common ground between England and Scotland in the field of civil law, their systems of criminal law are as distinct from each other as if they were two foreign countries [...] [Thus] a Scottish judge has no jurisdiction to grant a warrant which will be enforceable by a constable on his authority in England, and an English judge has no jurisdiction to grant a warrant which will be enforceable by a constable on his authority in Scotland'. *R v Manchester Stipendiary Magistrate ex p. Granada Television Ltd* [2001] 1 AC 300 at 304-305, *per* Lord Hope of Craighead.

³ The law of incest in Scotland is still essentially drawn from the Old Testament book of *Leviticus*, chapter 18.

⁴ e.g. the infamous Glasgow Rape Case, on which the then Lord Advocate made a [statement](#) to Parliament and on which [books](#) have been written.

⁵ The last person executed for blasphemy in Scotland was Thomas Aitkenhead in 1697, a twenty-year-old student whose execution was, to the shame of our national Church, urged by its General Assembly to curb 'the abounding of impiety and profanity in this land'.

⁶ It has been reported that since 2007 more than three hundred people in Scotland have been charged with this offence, and above twenty convicted.

⁷ Though Part 2 of the Criminal Justice (Scotland) Bill, currently before the Scottish Parliament, proposes to abolish this longstanding rule of law, chiefly in the interest of making convictions for sexual offences easier to secure.

⁸ See Aidan O'Neill, "Back to the future?: Judges, Politicians and the Constitution in the New Scotland", in *Juridical Review* (2013) p.45ff.