Doing Justice:
Sentencing Practices in Scottish Sheriff Courts

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Abstract

This thesis is an examination of the sentencing practices of judges (known as Sheriffs) in criminal cases heard in the Scottish sheriff courts. Despite the importance of sentencing, there is little knowledge of how exactly Sheriffs deal with cases. In particular, little is known about why and in which cases they decide that a custodial sentence is appropriate in the context of summary court proceedings. This research aims to understand the rationales behind the Sheriffs' sentencing practice and, through this exploration, tries to examine how Sheriffs currently understand their role as sentencers.

To achieve this objective, I negotiated access with the Scottish Judiciary which allowed me to carry out my fieldwork during the winter of 2016/2017. I interviewed, observed and shadowed 16 Sheriffs in 14 different Sheriff Courts throughout the country. The observation entailed shadowing the Sheriffs during what is called the 'remand court'(RC). This is a day where they deal with all the criminal business - most of it on summary procedure - concerning sentencing diets. By the end of my fieldwork, I had observed Sheriffs dealing with more than 400 cases.

One of the key findings was to confirm the perception that different Sheriffs have distinctive sentencing styles. However, I also found that there were structural legal and non-legal factors that partially explained those differences. Critically, my findings stressed how the Sheriffs' practices are shaped by the distinctive local realities in which they practice. This contextualization of sentencing practices allowed me to explore how different social, economic and geographical differences impacted the Sheriffs' decision-making. Furthermore, through the observation of the Sheriffs in court and in their chambers, I was able to describe the routines behind sentencing practices. This allowed me to explore at which stages of these routines the Sheriffs' decision-making begins to differ from one another. As a consequence, I was able to outline two models of sentencing practices. The first one is a depiction of the observable stages of the sentencing process. The second one is related to the fundamental questions the Sheriff faces during the individualisation of punishment which allow us to highlight at which moment the different sentencing styles emerge.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Acknowledgements

This thesis is the final act of a very long journey that begun twelve years ago when I took the decision that I wanted to carry out a PhD. It took me eight years to start, first finishing my undergrad, qualifying as a lawyer, successfully completing a masters and acquiring enough academic and professional experience.

Nevertheless, what this PhD has taught me is that this would not have been possible without the guide, help and life lessons that a lot of people taught me. To acknowledge why I am here, and why I was able to write this work, means to thank those people who provided me with the support when I needed it the most. However, I also need to thank those who challenged me and pushed me to go beyond what I thought my limits were.

Bourdieu once wrote that the immigrant is "atopos", "absent both from his place of origin and his place of arrival". I moved to Scotland leaving everything behind; I arrived having nothing but my suitcases. I want to thank those I left behind, whose help made it possible for me to start the PhD: My mother, who never let me give up, and always pushed me to go for my goals despite my disabilities. My family who have always supported me, without whom I would have lacked the emotional support that I needed to go through the hardest moments. Legal scholars like Patricio Gonzalez and Fernando Londoño, who gave me the chance to be their teaching assistant and taught me so much about the "art" of being a lecturer. All the people I worked with at the Fiscala Metropolitana Centro Norte, that taught me so much about professional, intellectual and human matters. The prosecutors, the legal clerks, the technicians, who were not only colleagues but friends. There is so much of my understanding of the legal field and legal practices that came from of my experiences with them. Indeed, I would not be the person I am without their friendship. Godoy, Arancibia, Mayer, Meneses, Adasme, Vargas, Ledezma, Montes, the list continues. Also, I am very much indebted to my colleagues and staff of the former Unidad de Delitos Sexuales y Violentos and the Asesoria Juridica Unit. Anita, Sandra, Mauri, Karin, Pili, Donoso, Lautaro and again, I cannot list you all.

Because "no man is an Island", I have always been part of a community, even if I was not aware of it. The loneliness that is part of being an immigrant, the distance, the absence, shed new light on how much indebted I am to them. Moreover, spending four years studying the Scottish penal field inevitably made me constantly re-think my experiences in the Chilean field. The more I analyse and understand Scottish practices, the more that I look back and look at my Chilean experiences in a new light.

Before I left Chile, I was talking with Londoño who said to me that I should not worry, that I would not be alone, that I would find people that care about me and support me in Scotland as I had in Chile. And I did. I cannot thank my supervisors enough for all that have done for me. While this, again may sound like a commonplace, I mean it. Fergus, Marguerite and Fiona, I would have never done this research, if they were not there to support, guide and continuously challenge me to do better, to dare to do more. During the hardest moments of my PhD, when I started to lose faith that I was going to be able to carry my out my fieldwork during the long process of negotiation, they supported me and kept me going. It is not an understatement that I have learned so much from them intellectually and on a human level. Also, how can I not acknowledge the people I met at the SCCJR and the University of Glasgow? How can I not thank Tim McBride, Sarah Anderson, David Usman, Caitlin Gormley, Annie Crowley, Anna Schliehe, Neil Cornish, Kirsty Deacon, Tim Winzler, Grant McPhail, Cyrus Tata or Bridget Fowler? Again, this list is too short and omits many, but I would not have survived these hectic years without them. It will be hard to say goodbye. I also need to thanks to Niklas Cedenheim and Gabriela del Rio for their invaluable help and friendship.

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Abbreviations/Glossary of terms

Abbreviations:

- CJS: Criminal Justice System
- CJL-2010 Act: Criminal Justice and Licensing (Scotland) Act 2010
- CP-1995 Act: Criminal Procedure (Scotland) Act 1995
- CJSW-Reports: Criminal Justice Social Work Reports
- CPOs: Community Payback Orders
- DTTOs: Drug Testing Treatment Orders
- HC: High Court of Justiciary
- JoP: Justice of the Peace Court
- PiM: Plea in Mitigation:
- PASS: Presumption Against Short Sentences
- PFs: Procurator Fiscal
- RC: Remand Court
- ROLOs: Restriction of Liberty Orders
- SCC: Scottish Sentencing Council
- Sol.P: Sheriff Court's solemn procedure
- Sum.P: Sheriff Court's summary Procedure
- SP: Sheriff Principal
- SW: Social Workers

Note: Unless stated otherwise the term 'solicitors' will be use to encompass advocates, solicitors and solicitor advocates.

Glossary of terms:

- Scottish Sentencing Council: It is an independent, advisory body, which aims to prepare sentencing guidelines and promote the consistency in sentencing. It was introduced by the CJL-2010 Act and established in 2015.

CHAPTER 1: Introduction

Sentencing is one of the critical stages of criminal procedure. It is the moment where discussions on the philosophy of punishment or theoretical debates on sentencing purposes have to be translated into practical decisions for a given offence and a particular offender. While the continental law systems have criminal codes that establish mandatory sentencing guidelines, in common law systems, like Scotland's, the Judges have wide discretion in sentencing. That said, recently the trend among common law jurisdictions have been marked by the introduction of sentencing guidelines and attempts to limit judicial discretion. A Scottish Sentencing Council (SSC) was established in 2015 but Scottish Judges still enjoy of wide judicial discretion, at least when compared with their continental cousins.

At a macro level, because of the relevance that sentencing has for criminal justice, it is one of the critical dimensions that requires exploration in a socio-political context which, in Western countries, has been characterised by penal populism (Garland, 2001; Fassin, 2018; Muller, 2012). In this regard, against the punitive trend, Scotland has shown its unique character. Throughout the last ten years, the Scottish Government has made several efforts to reduce the use of imprisonment by the Courts (Mooney, et al., 2015; Scott & Mooney, 2016). Various policies have aimed to deal with this, including the introduction of Community Payback Orders (CPOs) and the presumption against short-term sentences. However, despite the intention of the Government, there is little knowledge of exactly how Scottish Judges, known as Sheriffs, deal with cases[1]. In particular, little is known about why and in which cases they decide that a custodial sentence (necessarily of no more than one year) is appropriate in the context of summary court proceedings. This Ph.D. research aims to understand the rationales behind the Sheriffs' sentencing practices and, through this exploration, tries to examine how Sheriffs currently understand their role as sentencers.

[1] In chapter five I am going to discuss in more detail the particularities of the Scottish Legal Field.

In order to produce scientific knowledge on sentencing, it is necessary, as a first step, to enquire into the nature of sentencing. As will be discussed in more depth in chapter two, some socio-legal research has been criticised in the past for neglecting the theoretical underpinning of social sciences research or for being a-theoretical (Cownie & Bradney, 2018, p. 44). More critically, I invoke the wise words of Bachelard, who warns us:

> '…in scientific life, whatever people may say, problems do not pose themselves. It is indeed having this sense of the problem that marks out the true scientific mind. For a scientific mind, all knowledge is an answer to a question. If there has been no question, there can be no scientific knowledge. Nothing is self-evident. Nothing is given. Everything is constructed.' (Bachelard, 1938/2002, p. 25)

Therefore, instead of taking for granted sentencing practices as something that is given, we need to ask: What is sentencing as a form of human action? And if we respond that sentencing is a social practice (Hogarth, 1971; Hutton, 2006; 2014), then we need to ask, what are 'practices', sociologically speaking? What does it mean for sentencing to be considered as a practice? Which are the sociological implications of considering sentencing a practice? I discuss different aspects of these questions in chapters two and three and, of course, again in chapter ten. In so doing, I turn to the sociological literature on practices to adopt a framework which allows me to study sentencing with the appropriate theoretical and methodological tools. In particular, as I will explain in chapter three, I adopted Bourdieu's theory of practice.

Once one has clarity on what sentencing is, the research question can be refined. Thus, the main question that I try to address during this thesis is: What is the logic of practice behind the sentencing practices of Sheriffs at the Sheriff Summary Court? This research question is indeed not neutral; the conceptualisation of practice is undoubtedly the one adopted by Bourdieu, and because of that, it has several methodological consequences, which will be discussed in chapter three and four.

To inquire about the 'logic of practice' of sentencing means to try to study the practices as it happens, and to try to understand the practical rationales

interplaying within their contexts. This involves understanding that the scholarly or theoretical conceptualisation of sentencing is different from the way that practitioners comprehend them and carry them out. This gap between the ‘law in books’ and ‘law in action’ from a sociological perspective involves breaking with the ‘illusion’ of the law and trying to observe the mundane realities of practice.

In addition, within this framework, the aims of the research are to try to grasp the rationale behind the Sheriff's decision-making and through that to grasp the penology of the everyday life. In other words, I aim to explore: Which are the observable routines of the Sheriffs during sentencing decision-making? Which are the contextual legal and non-legal variables that Sheriffs take into account while deciding which is the most appropriate disposal for a given case and offender? Which are the goals that the Sheriff is trying to pursue or achieve when they choose a particular disposal? And, finally, what does this process tell us about how the Sheriffs understand their role as sentencers?

Once one has refined the research questions and established clarity on the aims of the research, then we need to discuss methods: How can we produce knowledge to satisfy the epistemological implications derived from considering sentencing a practice? In chapter four, I discuss how I develop my research design and how the negotiation for access and the fieldwork itself ended up shaping my research in unexpected ways. While my original design aimed to use interviews and non-participant observation, the fieldwork allowed me to use shadowing or ethnographic methods to improve my study of the field.

An important methodological consequence of adopting a Bourdieusian framework is the role that reflexivity plays in the research. Following the tradition initiated by Durkheim and Bachelard (Celikates, 2009/2018), this theory requires the researcher to adopt an epistemic rupture with ‘common sense’ (Bourdieu, et al., 1973/1991). These breaks can only be achieved through the acknowledgement of the biases derived from the researcher's position in the social space (Wacquant, 1992). In my case, this means reflecting on my particularity as a researcher: a Chilean lawyer - with court experience for the Chilean ‘Crown’ - doing PhD research in Scottish courts in the post-Brexit UK. Thus, my position was

ambiguous. In one sense, I was an 'insider' because I am a lawyer and a former practitioner. However, I was also an outsider because on the one hand, I am a foreigner research student, and on the other, despite being a lawyer I am trained in continental law, not in common law. The effect of this reflexivity will be discussed throughout the whole thesis. The pervasiveness of reflexivity issues proved an interesting aspect of the research and provided me with a tool to try to balance the externalist and internalist position during my analysis of practices.

After reviewing the literature on sentencing, and exploring the theory and the methods used in this study, in chapter five I contextualise sentencing practice in Scotland. Here, I discuss several topics that help us to obtain a better understanding of the legal and non-legal variables that influence sentencing practice. I briefly examine both poverty and crime rates in Scotland. I also explore which penal disposals are most used by the Sheriff Courts, and the length of custodial sentences. I also offer a brief explanation of the Scottish legal field and its criminal courts.

In chapters six to nine, I present the findings of my research. In the opening findings chapter, I examine the temporal and local dimensions of practice: The when and where of sentencing and the connections between them. Then, in chapter seven, I deconstruct sentencing practice by discussing the observable bureaucratic routine that Sheriffs follow during the process. The discussion of this routine allowed me to analyse with the Sheriffs how they perceive other penal agents (defence agents, procurators fiscal (PFs), criminal justice social workers (SW), etc.), their relationships with them and how they deal with the information provided by them.

Then, in chapter eight, I study when and why the Sheriffs use custodial sentences, CPOs, fines and admonitions. In this regard, during my fieldwork, I was able to discuss with the Sheriffs the provisional decisions they prepare for dealing with some cases before entering the Remand Court (RC). Then, I observed them dealing with cases during the hearings. Finally, after the end of the RC, I was able to discuss with them how their perception of the case changed (or not) during the hearing and why.

In chapter nine, I shift the focus from the practices to the Sheriffs and I try to explore - with them - their legal habitus. Thus, I try to understand how the division of the legal labour in Scotland impacts in the way that lawyers understand the judicial role before and after being appointed. Furthermore, I tried to explore how the legal experience the Sheriffs acquired in the legal field before being appointed shaped the way they perform their role.

Finally, in the last chapter of this thesis, I use the Bourdieusian theoretical framework to analyse the different aspects of practice and of the legal field that I explored in chapters six to nine. The aim is trying to offer a rich analytical description of the sentencing process as I observed it. Also, and through the analysis of the data I collected, I try to offer a description of the logic of practice behind sentencing. I do so in an attempt to describe the rationale apparent in the Sheriffs' everyday penologies.

CHAPTER 2: Literature Review

In this chapter, firstly I examine the relationship between lawyers, criminologists and sentencing research. Secondly, I am going to explore how my legal background appears to fit into a broader trend of lawyers carrying out sentencing research in Scotland. Consequently, I will detail why I am approaching sentencing research from a penological perspective and what this entails. Finally, I am going to show how both quantitative and qualitative sentencing research seems to stress the need for a theorisation of what sentencing practice is.

2.1. Sentencing research: On Criminologists and Lawyers

One of the Scotland's most prominent sentencing scholars once confessed, in a seminar that I organised at the University of Glasgow, that he is never sure how to label his work. He explained that very often, criminologists tell him that his work is socio-legal but, in turn, socio-legal scholars tell him his research is criminological. This helps to illustrate the ambiguous relationship between the two disciplines when it comes to sentencing research. However, since criminology is an interdisciplinary science, interaction with others' approaches and perspectives is what one might expect. Also, sentencing, as a field of inquiry, seems to be a convergence point for the research interests of different disciplines.

Certainly, sentencing research has been historically linked to criminology. For example, as noted by Zedner et al. (2016 pp. xviii-xx) the first sentencing research studies in the UK were carried by criminologists. Likewise Kritzer (2010 p. 885) depicts similar developments in the US. The influence of criminology is still prevalent today; most of the sentencing research studies carried out In Scotland in the last twenty years were conducted by criminologists, or involved

criminologists among the researchers or were in the context of a PhD in Criminology (Tombs, 2004; Tata, et al., 2008; Jamieson, 2013; Brown, 2017).[2]

However, the most recent sentencing research in Scotland has been carried out by 'insiders' who were (former) practitioners. Both Jamieson and Brown are solicitors who decided to carry out a PhD in Criminology. Jamieson was a prosecutor, Brown worked for the Scottish Judiciary. This may not be a coincidence, but rather the consequence of historical developments in this field.

The intertwined relationship between legal scholars, criminology and sentencing research in the UK can be traced back to the establishment of criminology in the UK during the 50s (Garland, 2002). The 'founding fathers' of modern criminology in the UK, Grünhut, Radzinowicz and Mannheim were Juris Doctor (Hood, 2004; 2001). All were experienced legal scholars before arriving in the UK, and Mannheim had also pursued a remarkable judicial career in Germany before having to flee due to Nazi persecution (Hood, 2004). Grünhut and Mannheim were the first criminologists to carry out sentencing research in the UK (Ashworth, 2003; Grünhut, 1956; Mannheim, et al., 1957). Their research studies were followed by Hood, a disciple and collaborator of Radzinowicz, in his ground-breaking research studies at the Magistrates' court (Hood, 1962; 1972).

If we observe the research questions pursued by Grünhut or Mannheim, it is possible to note that their interest in sentencing policy in the juvenile courts was secondary to their concern with young people's offending behaviour (Grünhut, 1956; Mannheim, et al., 1957). However, the variation in court practices revealed by their findings stressed the need for research on sentencing disparities. Researchers like Hood (1962; 1972), and the Canadian criminologist John Hogarth (1971), quickly realised that to understand and explain sentencing disparity it was necessary not only to explore court practices but also to understand the judges themselves, their legal culture and the social implications of the law.

[2] While Brown's book was published last year, its content is based on his PhD Thesis which was carried slightly earlier than Jamieson's. At the moment of writing this thesis it worth to note that Brown's PhD thesis is under embargo until 2019.

In the US, these questions were not new. The interest of legal scholars in exploring the 'law in action' can be traced to the early 20th century. Consequently, in that jurisdiction, empirical legal research emerged as early as 1910s (Kritzer, 2010; Twining, 2009). By contrast, in the UK this field only became formalised as a 'discipline' or sub-discipline in the late 60s and early 70s (Thomas, 1997; Twining, 2009). This late development of 'socio-legal studies' in the UK, determined that 'criminology' is still used to 'brand' or 'label' most sentencing research. In turn, research on other legal practices outside the criminal courts has no label but 'socio-legal' (Partington, 2010, p. 1017). According to the Genn report, since criminology is an established discipline in the UK, at least when compared with socio-legal studies, it has been easier to fund crime-related legal research in criminological centres than in Schools of Law (Genn, et al., 2006).

The formalisation of 'socio-legal' research has also been challenging. On a purely theoretical level, compared with legal research in the US, what 'socio-legal' research encompasses has been more ambiguous. By the mid-90s, there was still no precise definition of what 'socio-legal research' meant (Thomas, 1997). From a more practical aspect, since most 'socio-legal' research was based in Law Schools, the empirical part of it represented a new challenge for legal scholars who, for the most part, did not have any experience or training in this kind of research (Genn, et al., 2006; Banakar & Travers, 2005). These growing pains were depicted in the mid-2000s by a Nuffield Foundation report, painting a bleak depiction of the field. However, as Twinning argued, while the problems described were relevant, the report was 'unduly pessimistic' (Twining, 2009, p. 242) as socio-legal research has continued to thrive.

According to Banakar and Travers (2005) an 'overwhelming majority of socio-legal researchers are based at law schools' (p. 2). This seems to explain why some researchers understand 'socio' as the study of the law through social sciences (Feeley, 2001; Silbey, 2013). In a similar approach, Lee (1997) stated that socio-legal research is concerned 'with exploring the processes of the law and the workings of the legal system' (p. 92) using empirical analysis, which is also similar to the definition used by the Genn report (2006) which refers to the empirical study of the 'law and the legal phenomena'. That said, the report

argued that it is empirical research that helps us understand 'the law better and an empirical understanding of the law in actions help us to understand society better' (Genn et al., 2006, p. 1). Tomlins (2016) also shared these views, but stated that the 'socio-legal' refers 'to the representation of law as a social phenomenon' (p. 35) which requires empirical social science research. Thus - despite the different nuances - there seems to be a shared approach among the various socio-legal researchers and the emergence of a disciplinary identity. However, sentencing research seems to continue to be 'owned' by criminology, at least in terms of its 'labelling'.

With this in mind, the anecdote I mentioned at the beginning of this section seems to reflect the ambiguity of sentencing as a field of inquiry in the UK. The relevance of this historical and structural issue lies in the question concerning the conditions of possibility that disciplinary contexts, orientations and locations produce. This is to ask questions such as: Who is carrying out this research? How? For Whom? or Why? These considerations require us to be reflexive not only about our habitus as researchers but also to critically assess the field of inquiry in which we are engaging, and from which positions we begin. I am going to explore briefly three aspects of these questions.

Firstly, we need to recognise reflexively that any research on the law and its institutions, particularly penal ones, is an inquiry into the field of power. These institutions cannot be thought about in isolation from the broader context of questions about the State, and its powers over individuals, which is, basically, what Foucault (2004/2009; 2004/2008) has called the problem of 'governmentality'. This means, for example, that any inquiry into legal or penal culture must not forget that the discourses, practices and the '***power-knowledge***' these cultures enable, is aimed at governing the conducts of others – as much as bio-political and sociological issues - and therefore there are power-relations in play. Sentencing research, therefore, is an inquiry into the '***question pénale***' concerning the 'legal-political rationality and the ways and means of administration and management of penal sanctions' (Sabot, 2012, p. 1).

A second issue that we need to consider is that, as Bourdieu argues, within the juridical field 'there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognised capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world' (Bourdieu, 1987, p. 817). Thus, society recognises in legal agents a specific 'power-knowledge' that gives them the 'monopoly of the right to determine the law. In a Weberian sense, if the 'state is the form of human community that (successfully) lays claim to the monopoly of legitimate physical violence within a particular territory' (Weber, 1919/2004, p. 107), the authority of the Judiciary derives from that monopoly, and it is the embodiment of it. A consequence of this is the authority of criminal courts to impose a punishment on an individual which may entail not only forms of physical violence but, as Bourdieu (2012/2014, p. 4) argues, also symbolic violence. In this regard, individual Judges are the embodiment of this Judicial Power, the incarnation of this social role. Thus, they possess diverse forms of social, legal, symbolic and cultural capital. In the case of Scotland, from what I could observe, they enjoy a status higher than most legal scholars. There should be no surprise then that, despite the fact that their role and practices have an essential impact for and on society, most of the time they can determine who may carry research on their practices and in which terms.

The third issue derives from the previous ones - which set the context – and concerns the power-relations within and sometimes against which sentencing research has to be carried out. The ambiguous relationship between legal scholars and criminologists hides the contested reality of sentencing research in the UK. In Bourdieu's terminology, legal scholars do not only have to compete with legal practitioners for the '***iurisdictio***'- the right to determine the law - but also with other social scientists for the right to explain the legal world. One may see the pervasive presence of lawyers doing criminological research in courts as a lack of interest by other social scientists in that field. However, it could be the case that the 'gatekeepers' are more willing to give access to legal scholars or lawyers than other social scientists.

Thus these questions of 'branding', which may seem superfluous, are a way to try to identify how these struggles are conditioning the production of knowledge

in this field. More to the point, the main concern is what Teubner calls ‘epistemic competition’. He argues that,

> ‘social sciences constructs are not only transformed or distorted but constituted anew if they are incorporated into legal discourse. They (...) are reconstructed within the closed operational network of legal communication that gives them a meaning quite different from that of the social sciences’ (Teubner, 1989, p. 749).

Teubner's Luhmannian argument is not at odds with Bourdieu's analysis of the scientific field (Bourdieu, 2001/2004; 1975; 1976; 1991b). Both of them seems to highlight, from different theoretical perspectives, the ‘hidden’ problems of the conditions of production of knowledge, which in this case involves epistemic competition.

Consequently, this is not just an argument in support of the relevance of reflexivity but also a reminder of how the conditions of possibility of knowledge of this field reveal a place of subtle or concealed disputes. Overall, this is nothing new for criminology; there has always been the risk of subversion or co-optation of criminological knowledge. The question remaining is how and where does my research fit within this contested field?

2.2. ‘*Et tu, Brute?*’ - The pervasiveness of lawyers

Brown (2017), the author of recent research on the Scottish Judiciary, argues that his work is the ‘first qualitative empirical examination of judicial sentencing in Scotland in over a decade’ (p. 227). If he is right, that means that Jamieson's research is the second and my own is the third. However, it is worth noting that there have been research studies on the Scottish judiciary in relation to specific aspects of sentencing practices throughout the last decade. Among them, noteworthy examples include interdisciplinary research on the use of pre-sentence reports in Scotland, which was carried out by Neil Hutton, Nicola Burns, Simon Halliday, Fergus McNeill and Cyrus Tata (Tata, et al., 2007; Tata, et al., 2008). It is worth noting that Halliday, Hutton and Tata, are legal scholars. More recently, a governmental report evaluating the Sheriff's perceptions of CPOs, Criminal Justice Social Work Reports (CJSW-Reports) and

the Presumption Against Short Sentences (PASS) was published (Anderson, et al., 2015). In this case, the research was commissioned by the Scottish Government and led by the research agency ScotCen. However, this report also credits Neil Hutton as an author.

Brown's assertion of the ten-year gap in sentencing research in Scotland is perhaps a veiled reference to Jackie Tombs' research and particularly to the reception it received from the judiciary. While I was seeking access, I was informally told by several Scottish scholars and also, off the record, by a Judge in my sample, that Tombs' paper titled 'Denying Responsibility' (Tombs & Jagger, 2006) was ill-received by the Scottish Judiciary at the time. Judges and legal scholars told me that the overt critical tone used by Tombs was problematic. Also, in the paper, the authors compared Judges' attitudes towards the use of imprisonment with offenders' attitudes towards their offences. It was implied that this created – or confirmed – the concerns the Judiciary had about research conducted by 'outsiders' and created tension in the relationship between the judges and academics. To what extent this explains the ten-year gap in Scottish sentencing research, I cannot tell.

However, the gap served as a 'deafening silence', because in all the years I have been in Scotland, it has been evident to me that there was, and still is, a wide interest in sentencing research by non-legal scholars. The real issue here is the problem of access and the tense relationship between academics and the Judiciary which historically – not only in Scotland but in the UK – has been a complex issue that hampers research (Baldwin, 2008; Hammerslev, 2003; Dhami & Souza, 2010; Tata, 2013). In any case, the interest in sentencing research in Scotland seems to be interdisciplinary as is obvious in the research study carried out by Hutton, Burns, Halliday, McNeill and Tata, which, despite aiming to research the quality and writing of the Scottish pre-sentencing reports, also tried to address certain aspects of sentencing practices (Tata, et al., 2007; McNeill, et al., 2009).

These considerations may suggest that the pervasive presence of lawyers in Scottish sentencing research is not arbitrary. It cannot be a coincidence that Brown, Jamieson and I are not only lawyers but also former practitioners. Even

though it could be argued that because I am not a Scottish lawyer I break the pattern, I am not the first foreign lawyer to pursue sentencing research in the UK. Furthermore, when I sought access, I introduced myself as a lawyer carrying out a PhD, not as a criminological PhD researcher. Likewise, the Judges in my sample during my interviews spoke with me as a foreign lawyer; implying that I was an individual that could understand the problems of the 'law in action' or the 'problems of the trade'.

Understanding sentencing as an interdisciplinary field of inquiry not only requires us to ask what criminological and socio-legal researchers bring to this particular research field, but also how a researcher's background affects their approach to the field. With reflexivity in mind, we need to ask what do (former) legal practitioners bring to their sentencing research (Bourdieu, et al., 1992). How does the 'legal episteme' (Teubner, 1989) influence the way we approach the field, design and carry out our research and analyse data. This reflexivity means challenging our own legal habitus, to look critically at the 'sense of the game' (Bourdieu, 1987; 1991a).

The reflexivity, in our case, has several relevant aspects. On the one hand, it means trying to escape what Teubner called the 'epistemic trap.' We risk a legal colonisation of sentencing research, transforming or distorting what social science offers us by incorporating it into legal discourse (Teubner, 1989). On the other hand, former legal practitioners are challenged by how close we are to the field we are studying. Furthermore, we need to be aware of how legal practice shapes our reasoning. For example, as Scharffs argues, practitioners 'are expected to know how and when, and in what manner and to what extent, to make arguments that would be considered fallacious by logicians' (Scharffs, 2004). However, the 'sense of the game' makes us blind to how often we use these fallacies and how much we are used to or willing to accept – uncritically and unquestioning - arguments that come from anyone who is recognised as an 'authority' in the juridical field. This allows satirical depictions of practices by legal scholars like this: 'Seventy percent of all legal reasoning is the logical fallacy of appeal to authority. The other forty percent is simply mathematical errors' (Gordon, 1990, p. 1000).

Thus, the process of 'objectivation of the subject of objectivation' (Bourdieu, 2001/2004) - in my experience - had required me to deal with the 'hysteresis effect' - the mismatch between the habitus and the field – (Bourdieu, 1972/1977, p. 78) in at least three relevant dimensions. The most obvious one is the fact that - since I come from a different cultural setting – my discordant habitus provides me with a double effect. On the one hand, it allows me to quickly objectify those practices that are alien to me and that in this field are taken for granted. However, in doing so, the hysteresis effect forces me to critically challenge the rationale of my own dispositions towards analogous practices in my own culture.

The other two aspects derive from the first, and from my background as a practitioner who also was a part-time lecturer. I bear different sets of dispositions from my positions in the Chilean legal and academic fields which mismatch with my current position as a PhD Student in the UK. This goes beyond the loss of the social status that follows from moving from a professional position to that of an immigrant student in the UK. My primary challenge during the whole process of designing, carrying out and writing my doctoral thesis has been to be able to recognise how the hysteresis effects determined certain decisions and approaches. In other words, my legal training in continental law, and my specialisation in criminal law produced a whole set of habitus regarding how I think about the law and how I 'think' about legal sciences. This means a way to think, to write, to quote, or engage with certain 'legal' commonplaces that are unknown in the UK. This has forced me to 'catch up' with the academic dispositions that are expected from a criminologist in the UK.

Let me also mention the differences between how criminal law scholars and how criminologists think about their field. More critically, during my fieldwork and particularly during my observation of the court proceedings the hysteresis effect played a crucial role in my study of the field. When I started my fieldwork the 'sense of the game' was alien to me, and the differences shook my own beliefs on how criminal law should be practised. By midway through my court observations, my habitus had adapted; I realised that I was enjoying the 'game' as if I were observing Chilean courtrooms. Thus, my legal practitioner habitus was trying to replace my 'new' role of researcher. Consequently, these

challenges have been present throughout all my research, including even now as I try to describe what I did.

In this manner, my research questions originate in what I perceived as a rupture between criminal law scholarship and legal practice in my country. Critically, the problem was the need to understand the construction of penality within the penal procedure; to uncover an understanding of an 'everyday penology' that emerged directly from the practices and not from legal theory nor penal philosophy. As I engaged with Scottish criminological literature, I realised that these questions were similar in nature and the political context ripe for this kind of research. Thus, my research was framed as an attempt to study penality through judicial sentencing practices. In the two following sections, I am going to explain these two aspects of my research questions.

2.3. Sentencing research as a study of penality

The influence of my legal training appears throughout my whole research. Spanish and German traditions heavily influence Chilean criminal law, theory and practice. This determined the original approach to my work, which I deemed a work of 'penological sentencing research'. However, soon I realised that 'penology', and penological, mean different things in different legal and criminological traditions (Snacken & van Zyl Smit, 2013). To avoid getting 'lost in translation', I am going to explain how I use the term 'penology'. Overall, this will set the background of my research questions and help me to outline this research.

I ought to say that while 'Penology' within the UK has been understood as the study of punishment, this field of inquiry has usually been limited to prison studies or the study of imprisonment (Scott, 2008, p. 7; Sparks, 2013). In some contexts the term has been reduced to administrative criminology, 'where penologist-technicians assist the administration' of penal sanctions (Snacken & van Zyl Smit, 2013, p. 4; Garland & Young, 1983). This exemplifies the epistemic competitions I mentioned above.

However, in 2010 Cavadino used a broad definition of penology that matches my own. He argued that it was the 'study of punishment, including the study of 'penality' (...) which encompass both concrete penal practices and also the ideas which people have about punishment' (Cavadino, 2010, p. 447). Within the UK, Garland proposed the use of a broader definition in the late 1990s, probably influenced by his readings of early continental criminology which, as Pifferi and Garland both argued, determined the emergence of a study of penality as a way to react to the 'new' criminological knowledge (Pifferi, 2016; Garland, 1985). Another potential influence on Garland's use of the terms may lie in his study of Durkheim and Foucault, who have explored and studied '***La pénalité***' (Durkheim, 1899; Foucault, 1975; 1981; 2013). In any case, by the late 1990s, Garland advocated for a wider use of the term penology, arguing that penology 'properly understood, is the more basic discipline. It is the study of the social processes of punishment and penal control, which is to say, of the whole complex of laws, ideas and institutions which regulate criminal conduct' (Garland, 1997, p. 181). However, twenty years later, as a recent book on the same topic points out, the concept remains ambiguous (Snacken & van Zyl Smit, 2013). This has prompted authors like Cavadino to discuss the existence of different 'penologies' in order to describe its varied uses in differing contexts (Cavadino, 2010).

It could be argued that Garland managed to successfully introduce the French notion of the 'study of penality' (Garland & Young, 1983; Garland, 1985; 1990; 2013; 2018a). In 2013 he explained that penality:

> '…has come to be the standard term used to refer to the subject matter of the sociology of punishment. It refers to the whole of the penal complex, including its laws, sanctions, institutions, and practices and its discourses, symbols, rituals, and performances. As a generic term it usefully avoids the connotations of terms such as 'penal system' (which tend to stress institutional practices but not their representations, and to imply a systematicity that often is absent) or else 'punishment' (which suggests that the phenomenon in question is primarily 'retributive' or 'punitive' in character, thereby misrepresenting penal measures that are oriented to other goals such as control, correction, compensation, etc.)' (Garland, 2013, p. 476).

Garland's interest in the notions of ‘penology’ and the ‘study of penality’ seems to respond to his efforts to institutionalise the sociology of punishment (Daems, 2008, pp. 38-40), which, by the early 1990s, had ‘not become a well-developed area of social thought’ (Garland, 1990, p. 11). Almost thirty years later, Garland is not only able to celebrate the expansion of ‘punishment and society’ scholarship but also to note that the field has normalized ‘as it developed the characteristic attributes of an established academic subject’ (2018a, p. 9). Moreover, Garland openly recognises that the sociology of punishment ‘initially grew out of critical penology’ (2018a, p. 14). As with any ‘new discipline’ that grow from another, Garland argues that the sociology of punishment has developed its own distinctive features that differentiate it from (other) penological approaches (2018a, p. 17).

However, the most relevant works in the sociology of punishment that appeared in the first decade of the 2000s, such as Garland's ‘Culture of Control’ (2001), Pratt's ‘Penal Populism’ (2007), Simon's ‘Governing through Crime’ (2007) or Wacquant's ‘Punishing the Poor’ (2009), appear to be top-down analyses rather than bottom-up ones. While these texts offer us a political, social and economic contexts within which practices like sentencing are carried out (Garland, 2018a, p. 20), they provide little insight into the ‘black box’ of street-level penal practices. This characteristic of the first wave of research studies that aimed to address the relationship between punishment and late-modern social change may be interpreted as neglecting micro-level research studies. Authors like Page (2013) have noted these macro-level approaches do not sufficiently explain how penal change and penal practices are shaped, experienced and reproduced within specific jurisdictions. Likewise, as McNeill et al. (2009) noted, there is a ‘governmentality gap’, this is to say ‘a lacuna in the existing penological scholarship which concerns the contingent relationships between changing governmental rationalities and technologies on the one hand and the construction of penality-in-practice on the other’ (McNeill, et al., 2009, p. 420).

As noted by Bosworth, et al. (2018) another issue of the ‘first wave’ was its focus mostly on imprisonment, neglecting other kinds of penal sanctions such as supervision or financial penalties. However, as Garland (2018a) argues, several of these issues are now starting to be addressed or are changing. Taking into

account all that I have discussed above, can we talk about a study of penality through sentencing? Can work on sentencing be labelled as sociology of punishment? And, more to the point, what does it means to study penality *through* sentencing?

Firstly, I ought to say that the heart of the matter lies in the focus of the research. As I stated above, I argue that sentencing can be the subject matter of different disciplines which may offer different perspectives. Consequently, I adhere to Garland's (2018a) position when he explains that 'boundary issues are best approached as pragmatic ones and that the scope of inquiry ought to be determined by the paths that our research questions open up rather than by any prior stipulations' (p. 17). This is also implied when Bourdieu talks of the need to distinguish between the '*modus operandi*' and the '*opus operatum*'. In this context, this means that we must understand that any inquiry does not start as a piece of science, there is an evolution that goes from 'on-going research' to 'already made science' (Bourdieu, et al., 1973/1991; Bourdieu, 1980/1990; 1997/2000; 2015).

Thus, as an '*opus operatum*', this research is influenced by the sociology of punishment as it is a micro and middle range exploration of penality-in-action. It is also influenced by criminology because it is an inquiry into a critical penal institution which not only allocates sanctions but also creates narratives of crime, criminality and offenders, which are later imposed upon the accused and on society. Finally, it is also inspired by socio-legal research since judicial practices and cultures are central to it. However, my '*modus operandi*' in this work-in-progress is quintessentially to explore penality as it is instantiated through judicial sentencing practices in the intermediate (Sheriff) courts in Scotland. As I stated at the beginning of this subsection, I designed this research with a penological approach in mind. This is to say, my specific scope of inquiry is aimed at exploring what I term the 'penology of everyday life'. I wanted to study how the philosophical theories and political discourses of punishment are not only 'enforced', but also shaped and subverted by street-level penal bureaucracy.

A second aspect that needs to be addressed is why I am focusing on the study of judicial practices, adopting a qualitative rather than quantitative approach. More critically, why do I stress the relevance of a theorisation of sentencing as a practice? And how is this approach relevant to both the study of sentencing and penality? The answer to these questions requires consideration of the current 'state of the art' in sentencing research in the UK and to a lesser extent in other jurisdictions. I am going to explore these issues in the following subsections.

2.4. From Quantitative to Qualitative approaches

As stated above, sentencing research in the US dates from early 20th century. Kritzer argues that three events explain the start of this long tradition: First, the development of judicial statistics, second, concerns about crime which prompted the first criminological sentencing research; finally, and probably most relevantly, the emergence of the legal realism movement (Kritzer, 2010). However, from the very beginning, empirical research was equated with quantitative approaches (Cane & Kritzer, 2010; Kritzer, 2010). Indeed, in the USA, there is a long tradition of quantitative sentencing research, particularly studies which try to explore sentencing disparities, and within them, racial disparities (Kritzer, 2010; Spohn, 2015). Although this does not mean that there are no qualitative or mixed methods studies on sentencing in the USA, it seems they have been less common (Cane & Kritzer, 2010). Furthermore, this begs the question of the extent to which quantitative approaches suit some legal scholars' legal positivism. In other words, we should inquire if lawyers choose to use these approaches not because they are the most appropriate way to study something but because these methods fit in with their general world view. In turn, this history also poses the question of to which extent qualitative interpretive research may be seen as 'weak' or 'bad science' by some legal scholars.

For example, Spohn (2009) argued that the two most common approaches used to explore sentencing decisions and to 'identify the factors that predict sentence outcomes' were the use of vignettes or mock sentencing exercises and quantitative research. She stated that the latter was a 'more common approach' which consisted of collecting data on actual cases from different databases and

then using ‘statistical analysis to isolate the effect of one factor (...) while controlling’ for others (pp. 82-83).

However, modelling sentencing decisions is difficult not only because of the difficulty of collecting adequate data that reflect actual sentencing practices accurately, but also because of the challenges of developing a statistical model that fits the nuances of the process. Consequently, reviews of the research studies that were carried out between the 1930s and the 1960s have revealed that most of them relied on flawed or suboptimal methods (Spohn, 2015; 2000; Hagan & Bumiller, 1983). Nevertheless, if we look at different reviews of past research what becomes evident is that statistical methods, techniques and models have continued evolving and growing in their sophistication (Pina-Sanchez & Grech, 2018; Ulmer, 2014; 2012; Spohn, 2015).

There seems to be some consensus of an overall improvement in quantitative sentencing research since the 1980s (Ulmer, 2014; 2012; Spohn, 2015; 2000). On the one hand, the work of sentencing commissions provided for the very first time ‘high-quality data which improved the quality of the statistical inquiries’ (Ulmer, 2014, p. 4759). On the other hand, a critical assessment commissioned by the National Academy of Sciences was crucial in pointing out the weaknesses of past research and making several suggestions about how this should be improved (Blumstein, et al., 1983) – recommendations which, as Ulmer argued, were taken seriously by researchers (Ulmer, 2012).

One aspect that was criticised was the lack of theoretical development in sentencing research. This started to change in the 1990s where different approaches were used to theorise sentencing decisions (Ulmer, 2012). For example, perspectives based on uncertainty avoidance and causal attribution in the judge's decision-making (Albonetti, 1991; 1997); interpretive theory of legal decision-making (Farrell & Holmes, 1991); focal concerns perspectives (Hartley, 2014; Kramer & Ulmer, 2009; Steffensmeier, et al., 1998); or the test of the liberation hypothesis (Spohn & Cederblom, 1991; Wu & Delone, 2012; Hauser & Peck, 2017; Hester & Hartman, 2017). The common characteristic of these theories or perspectives is their attempt to explain Sentencing decision-making, not practices. The particular aim is to explain how non-legal factors and

stereotypes may come into play affecting the outcomes. Thus, their goal is to offer a theoretical perspective to help interpret the outcomes of quantitative research studies. Other studies had focused on the relationships between the legal actors within a court, their internal organisation, their relationship with the community. Differences between states and within states were also recognised as relevant (Myers & Talarico, 1987; Einsenstein, et al., 1988; Flemming, et al., 1992).

Overall, the evolution of statistical approaches has improved our understanding of the variables that may shape sentencing decisions and provided us with evidence of patterns that may highlight unfair disparities based on race or social class (Spohn, 2000; 2015; Ulmer, 2012; 2014). As the models and statistical techniques become more complex the number of variables that can be measured and the interplay between them seems to keep growing (Pina-Sanchez, 2015). Also, the more we realise that non-legal contextual variables are relevant - not only those linked to the accused but also variables related to the internal organisation and culture of the court or the relationship with the community (Ulmer, 1997; Flemming, et al., 1992) - the more we come to see that the sentencing decision is only another phase of a larger process that shapes the penalities that are finally imposed on offenders (Spohn, 2015). Furthermore, these theoretical developments not only helped to enrich the modelling of these practices but also shined the spotlight on the complexities and dynamic nature of the variables influencing these decisions.

However, if we aim to better understand sentencing decision-making, we need to continue developing sociological, criminological and penological understandings of them. The theories that I mentioned above have several limitations derived from the fact that they are the by-product of an analysis of patterns and variables in the outcomes of sentencing practices. In other words, there are several limitations to our capacity to theorise sentencing decision-making by only studying its consequences (Ulmer, 2012). Therefore, the only way to improve theory and models is through qualitative explorations of the process (Hogarth, 1971; Hagan & Bumiller, 1983; Spohn, 2000; Ulmer, 2012).

Quantitative research approaches then are not a panacea; they have their own problems. For example, one of the key issues with quantitative approaches is the quality of the data used for the analysis. Until recently, the problem of accessing databases and the quality of them was one of the main issues hampering and limiting quantitative research in the UK (Dhami & Souza, 2010; Pina-Sanchez, 2015; Pina-Sanchez & Grech, 2018). In turn, qualitative research, as discussed above, has had to deal with negotiating access via gatekeepers and, even when doing their best, they can fail or be offered very limited access that may change the whole purpose or import of their project.

Consequently, when Ulmer or Zatz recognise the value of qualitative research, they are mainly arguing for the need for ethnographies or court observations (Ulmer, 2012, p. 33; Zatz, 2000). If we claim that quantitative methods cannot describe and explain court dynamics, this is a limitation that can also be extended to interviews, focus groups and mock exercises. While judges' views on their practices are valuable, they cannot offer any more insight into court dynamics than statistics; both are indirect post-hoc accounts of practice. This is not to say that their input is irrelevant; these different kind of data critically improve our global understanding of the court and sentencing process. However, if our main concern is judicial *practices*, the only way to explore these dynamics first-hand is through ethnographic research or court observation.

Within the UK, there have been several research studies that have relied on court observation or ethnographic methods (Baldwin, 2008). Not all of them explored sentencing; for instance, some focused on different aspects of criminal trials (Rock, 1993; Cammiss, 2006), but since the late 70s there has been a growing amount of research studies that have explored - directly or indirectly - sentencing through these methods (Carlen, 1976; Burney, 1979; Parker, et al., 1989; Flood-Page & Mackie, 1998; Morgan & Russell, 2000; Moore, 2003).

Despite the fact that some of these research studies are dated, most of what they describe seems to highlight the relevance of *non-legal* contextual variables, as suggested by the American sentencing research. For example, the management or internal organisation of the courts, the volume of cases and the times available to deal with them, are several variables that had an impact on

decision-making. Furthermore, these research studies seem to confirm Hood's finding that, while the background of judges is relevant, the ‘bench culture’ seems to have a more direct influence in the way they approach sentencing (Hood, 1962; 1972). In the particular case of lay magistrates, despite not being lawyers, these research studies seem to suggest that they, as a group, develop what Morgan and Russell called a ‘lay judicial culture’, as a way to differentiate their culture from district judges' ‘legal, judicial culture’ (Morgan & Russell, 2000). Consequently, it could be argued that judicial practices and judicial culture are not necessarily a sub-class of legal practices or legal cultures. This is to say that the nature of the social function exerted by the judiciary may be one that produces a distinctive culture and set of practices regardless of whether judges themselves do or do not have a legal background.

If quantitative research shows us the variables that may be shaping penality, ethnographies reveal just how complex the dynamics between those variables are. Moreover, court observation also provides us with an insight into not only the practices of legal agents but also their professional culture (Darbyshire, 2011). Along these lines, Hutton has argued the relevance of exploring sentencing as a social practice (2006) and initially suggested analysing sentencing using Bourdieu's theory of practice, which also means to explore the Judge's habitus and social capital within the legal field. However, more recently, he seems to have preferred Latour's Actor-Network theory and argued for a study of sentencing as a *cultural* practice (Hutton, 2014; 2016). Again, this requires us, as researchers, to theorise about the nature of sentencing practices and the judicial role.

There is no doubt that the study of sentencing is, or should be, one of the critical aspects of exploring and understanding penality. While the political climate, and the law that it produces, provides a legal framework within which penal institutions have to fulfil their functions, this does not mean that the latter do not (re) shape punishment. As Ashworth (2015) argues, it is too simplistic to reduce sentencing to the ‘allocation of criminal sanctions’, as this may lead people to believe that the law is the only variable that matters (2015, p. 10). Both quantitative and qualitative studies have shed light on the complexities of sentencing practices. Again, as Ashworth point out, the question

of how we should define ‘sentencing’ begs the question of who are the actors and the institutions that are involved in such processes and how they affect the outcomes (Ashworth, 2015). Moreover, the definition of sentencing begs the question of whether and how the different theories of the purposes of punishment are finally put into practice by judges. This is to say that the ‘flip-side’ of exploring sentencing practices is to examine the variables that are articulating and modulating punishment in a given place and time. Consequently, if we move towards the judicial culture, we need to retain a focus on understanding how the institutional, organisational or professional cultures alter, inform or modify the understanding of penality of penal actors.

Finally, from these qualitative and quantitative sentencing research studies emerges a convergence towards the idea that sentencing research must involve observing what is happening in court. Accordingly, a multi-method approach seems advisable to make sense of court dynamics and practices. However, the need for interpretative analysis of sentencing understood in a broad sense, requires having an appropriate theorisation that could provide an answer to what kind of social behaviour sentencing is.

2.3. Research studies in Scotland

As I have argued above, sentencing research in Scotland is restricted only to a few research studies, most of them carried out in the last two decades. In this section, we are going to focus on the four most recent studies since 2004.[3] This is not an arbitrary date; it was the year that Tomb's sentencing research was published (2004). There are several reasons why this work is relevant, however it is worth noting here that I will only explore two aspects of it. It was the first research study in almost a decade since Hutton and Tata's research on sentencing patterns in Scotland was published in 1995 (Hutton & Tata, 1995).

Tombs’ (2004) research was designed to be ‘compatible with an earlier study’ by Hough et al. (2003), that was carried out in England and Wales. Concerning the

[3] For a list of older research studies see Brown’s work (2017, pp. 6-8)

methods, Tombs stated that she used statistics, observation of decision-making in courts (she did not specify how many or what the observation entailed), focus-group and semi-structured interviews with thirty-four Sheriffs from sixteen different Sheriff Courts, five High Court judges and one stipendiary magistrate. The findings of her research were published first in a report (Tombs, 2004) and later on in several articles that analysed specific aspects of sentencing in Scotland (Tombs, 2009).

Tombs' primary goal was to explain the use of custodial sentences within a context where the prison population was rising in Scotland; despite that intent, she carried out court observations. Her work relies mostly on two sources: statistical data and the Judges' accounts of their sentencing practices. This seems to be simultaneously the main strength and weakness of her work. She managed to obtain a lot of insight into how the Scottish judges perceive and understand their practices; particularly about why sentencers use custodial sentences and which kind of cases they deem to be borderline (Tombs, 2004) between a custodial sentence and a community sentence. She went on to use this data to explore policy implications for reducing the use of imprisonment (Tombs, 2005), women's imprisonment (Carlen & Tombs, 2006), how judges justify the use of custodial sentences (Tombs & Jagger, 2006), a comparative analysis of sentencing practices between Scotland and England (Millie, et al., 2007), and an analysis of the judicial narratives used to impose a sentence (Tombs, 2008).

However, the main problem with her analysis is that it relies too much on the Judges' perceptions of their work. Despite the fact that Tombs stated that she observed 'decision-making in Sheriff Courts', the core of her analysis seems to be based on the interviews and focus groups she carried out. Moreover, her report seems to fail to differentiate between the different sources of data she collected. She does not provide any theorisation on what sentencing practices are or what they entail. The main consequence of this is that Tombs' interpretation seems to assume that the perceptions that the Judges' have of their practices offer an accurate depiction of them. As a consequence of this, when the Judge fails to explain her/himself satisfactorily, the response is construed as a way of denying their responsibility.

In addition, Tombs never reflects on the possibility that the interviews may be post-hoc reflections of practice. This has several consequences; for instance, there is minimal mention of the influence that other actors, such as solicitors or SW, may have on the Judges' decision-making. Furthermore, in a later work (Tombs & Jagger, 2006), there seems to be a contradictory depiction of these practices. On the one hand, she argued that the judges develop 'neutralisation techniques' that they use to distance themselves from their decisions to imprison. The problem is that some of these techniques entails routinization and role distance (pp. 811-813). Consequently, she depicts sentencing as an extremely routinised, detached and uncritical practice. However, when Tombs turns to analysing 'borderline cases', in the same article, the accounts she uses describes thoughtful decision-making (Tombs & Jagger, 2006, pp. 814-817). In other words, Tombs' lack of theorisation on what practice is leads her to see no apparent contradiction between arguing about a mechanical management of cases and a conscious and deliberated use of penal discourses. It is worth noting that I am not arguing that this may not be the case; I am pointing out that these claims require a more in-depth explanation which is not provided.

Tombs' critical criminological approach contrasts with more recent research studies carried out by Jamieson (2013) and Brown (2017). Both research studies addressed the question of the nature of judicial practices, which in turn requires a sociological theorisation and framework on what practices are. Jamieson uses a Bourdieusian framework and his theory of practice to explore the judicial habitus and culture of retired Judges through a 'biographical narrative research approach' (2013, p. 236). In turn, Brown's approach to 'practice' is inspired by the work of Flyvbjerg's on 'Phronesis' or 'practical wisdom' (2017, pp. 133-140).

In Jamieson's exploration of judicial culture, there is an acknowledgement of the 'cultural turn' in the sociology of punishment (2013, pp. 15-18). Furthermore, within the exploration of judicial culture, she recognises that judges, within their sentencing role, are bearers of a 'penal culture', which is a relevant aspect for the sociology of punishment (2013, p. 36). Ultimately, she stresses how vital the judicial culture is for penal reform and argues that we should understand it as a relevant 'field of penal inquiry' (2013, pp. 244-250).

Jamieson carried out unstructured interviews with twelve retired Sheriffs and High Court Judges; her primary goal was a reflexive exploration of their 'judicial lives' (Jamieson, 2013, pp. 236-237). Her inquiry relied on a narrative approach to explore her participants' experiences, views and practices as Judges. Thus, she focused on exploring judicial culture and how this influenced, shaped or explained their sentencing practices and political views on punishment and penal reform. Because of this, her work relies on Bourdieu's notion of habitus as a way to explain Judges' dispositions (Jamieson, 2013, pp. 94-130). Finally, Jamieson argued that the most important narrative in understanding judicial practices is the under-researched notion of 'judicial independence' (Jamieson, 2013, pp. 181-187). This notion, she argued, helps us to understand Judges' approach to 'discretion' in sentencing and, from a judicial culture perspective, it contains several dimensions that may explain these practices (Jamieson, 2013, pp. 232-233).

It is fair to say that her work managed to explore the penal culture of her participants. However, since her participants were retired at the time of her research, this insight may reflect a 'dated' judicial culture. Also, even if one disagrees with Tombs' interpretation of her findings, the actual responses provided by the Judges she interviewed seem to be consistent with Jamieson's findings. Moreover, as discussed below, some of the responses provided by the Sheriffs in both studies are consistent with the findings from my interviews and court observations.

In turn, Brown's exploration of Scottish sentencing practices seems to be an attempt to value the Judges' 'practical wisdom' in the exercise of sentencing discretion through his concept of 'Phronetic synthesis' and the relevance of 'principled judicial discretion' (2017, pp. 133-140). Building on the interviews he carried out with twenty-five Judges and Sheriffs, and the analysis of case law (from different commonwealth countries including Scotland), he builds an argument against the introduction of sentencing guidelines in Scotland (2017, pp. 176-194 & 227-228). Brown seems to aim to offer empirical research on Scottish sentencing practices as a way to both explore and defend them from

political reform. As a consequence of this, there is little engagement or dialogue analysing the criminological or penological impact of such practices.

The main problem with this approach is that it fails to critically assess the practices that he wants to defend. His use of Flyvbjerg's notion of 'phronesis' seems limited. It is true that Flyvbjerg's framework requires, and values, the experience of the agents. However, this does not mean an uncritical analysis of the practices this experience produces (Flyvbjerg, 2001; 2006). Consequently, while Flyvbjerg wants to go beyond the study of 'know-why' and 'know-how', he also wants to 'clarify and deliberate about the problems, possibilities, and risks that organizations face, and to outline how things could be done differently' (Flyvbjerg, 2006, p. 383). For example, he explains that the researcher:

> '…attempts to understand the roles played by single practices studied in the total system of organizational and contextual relations. If it is established, for example, that a certain organizational practice is seen as rational according to its self-understanding – that is, by those practicing it, but not when viewed in the context of other horizons of meaning – the researcher then asks what role this 'dubious' rationality plays in a further context, historically, organizationally, and politically, and what the consequences might be' (Flyvbjerg, 2006, p. 378)

These are the kind of questions that Brown's analysis fails to address. While I can agree with his criticism of thinking of Judges as 'metronomic clockwork men' (sic.); we cannot neglect that what lies behind sentencing reforms is not an attack on judicial practice but rather an attempt to *improve* sentencing. Moreover, at times, his argument seems to ask for a 'leap of faith' on Judges' capacity to impose fair sentences. In other words, the fact that one argues that sentencing cannot be mechanical and that legal experiences and judgement are relevant to its practice does not necessarily mean that all current sentencing practices are good. This is particularly relevant when the main data used to support his arguments are the Judges' accounts.

From a 'meta' perspective all three research studies are also, themselves, a reflection of the field. As I mentioned above, both Jamieson's and Brown's work pose questions about the relationship between lawyers, sentencing research, Scottish Academia and the Judiciary. This is to say that these research studies do

not only outline the practices of this particular field but rather, they, themselves, are ‘events’ we need to consider in the analysis of the Scottish penal field. In a Foucauldian sense, these works also beg questions of the conditions of possibility for such research.

Finally, the last research I am going to analyse is the study carried out by Hutton, Burns, Halliday, McNeill and Tata. This research aimed to explore ‘the communication processes between the producers of [pre-sentence] reports and their principal consumers’ (Tata, et al., 2008, p. 839). Probably because of this Brown does not consider it as a previous ‘sentencing research’. However, this is genuinely sentencing research. Firstly, it included extensive observations of sentencing, mock sentencing exercises and interviews and focus groups with sentencers about sentencing. Secondly, for what I could observe during my fieldwork, social work reports play a crucial role during the sentencing process, particularly at the summary court. Consequently, the production of these reports, the dynamics they create and the way that the different legal actors perceive and use them is an essential variable in the process.

The research was carried out between 2004-2005, and it was composed of four parts: (1) an ethnography of social workers’ routine production of the reports; (2) interviews with Sheriffs and observations of how they incorporated the reports in sentencing at two sheriff courts; (3) focus groups with Sheriffs on issues regarding the reports; (4) simulated sentencing diets with Sheriffs and Solicitors (Tata, et al., 2008, pp. 839-840). The findings of the research were published not in a single report but as different articles addressing different aspects of the study; the Sheriffs’ perceptions of the reports (Tata, et al., 2008); a description of the ethnographic technique used to ‘shadow’ the social workers while writing the reports (Halliday, et al., 2008); a study of these social workers as ‘street-level’ bureaucrats (Halliday, et al., 2009); and an exploration of the penetration of risk-management discourses in the social workers’ practices (McNeill, et al., 2009). Much of this work became very relevant during my fieldwork while noticing that several of my observations and interviews confirmed some of their findings and allowed to contextualise them within the Sheriffs' sentencing practices.

2.4. Sentencing: The practice of penality

In this chapter, I have tried to explain the background to this study and my research questions. I have argued that sentencing research in the UK is characterised by a theoretical, historical and practical relationship between lawyers and criminologists. The relevance of these links is the pervasive presence of lawyers doing criminological sentencing research. I have recognised that I do not escape from this trend, and therefore, I am aware of the need to be transparent on how my legal habitus may have shaped some of my research decisions and my interpretation of the data.

Consequently, my original approach to sentencing research was influenced by my legal understanding of penology and penological research. I have explained that this approach resembles what has been called the 'study of penality'. However, instead of looking at general or mid-range explorations of penality, I aim to explore the micro-level practices that shape it. The main goal is to continue exploring McNeill et al.'s (2009) 'governmentality gap'.

In this regard, when we look at quantitative and qualitative sentencing research, both seem to point out the need for an in-depth theorisation that allows us to understand and study criminal justice practices. Thus, it is not enough to try to explore sentencing decision-making if we are unable to theorise what these practices entail and the dynamics that interplay in shaping these processes. Thus, in the following chapters, I am going to explore an approach to theorising practice and how this framework will shape an understanding of penality within the sentencing process.

CHAPTER 3: Theoretical Framework

In the introduction, I argued that both the sociology of punishment - as its aim is a study of punishment - and socio-legal studies influenced my research design. Thus, the question that I aim to answer in this section is what 'socio' means within my research; how is the 'sociological' part of the study of punishment to be articulated, taking into account my research objectives and the field where my research is located? In other words, I aim to show how my understanding of the 'socio' is linked to adopting a specific social theory to study sentencing as a practice, informing the methods I used to explore and analyse it.

The chapter will be divided into four sections. In the first, I will explore what the 'socio' entails in my socio-legal research. Secondly, I will argue the need to problematize what sentencing is from a sociological perspective. I argue that sentencing, as a human activity, needs to be understood as a social practice. Thirdly, I explore the different possible theories of practice and why I have chosen Bourdieu's theoretical framework for my research. Finally, I examine and explain the Bourdieusian theory of practice and its implications for the study of sentencing as a practice.

3.1. The 'socio' and the 'sociological'

In recent years, the epistemological and methodological debates in social sciences have been influenced by the 'cultural turn' that took place in the 70s and 80s. According to Bonnel and Hunt (1999), this turn was not the 'discovery' of the relevance of culture for Anglophone social sciences, considering that this was already a central issue for Weber, Durkheim and, later on, Parsons (p. 27). They argue that instead, the turn reframed the role of culture in social sciences not only by restating its influence in the study of the 'social' but also in suggesting that culture influences researchers themselves (Bonnell & Hunt, 1999). In other words, the cultural turn also brought epistemological and methodological challenges, which had to be solved across and within different fields.

The ‘legacy’ of the cultural turn affected both ‘socio-legal’ studies and the sociology of punishment in different ways. Regarding the former, while the notion of ‘socio’ in ‘socio-legal’ already encompassed several distinctive approaches (Clarke, 2013; Feenan, 2013), the cultural turn widened the meaning of ‘socio’, introducing new questions regarding the scope and status of the ‘social’ in legal research (Silbey, 2013). Concerning the latter, Garland (2006) argues that the turn allowed the sociology of punishment a ‘new self-consciousness about cultural issues’ and also brought attention to new theoretical frameworks (p. 421). Moreover, while the work of Foucault had already been central to the sociology of punishment, the shift encouraged new ways of thinking about and studying punishment, and thus Geertz’s, Bourdieu’s and Elias' frameworks become sources of theoretical inspiration (Garland, 2006). As a consequence, the blurred line that distinguishes socio-legal studies from the sociology of punishment, at least when it comes to sentencing, became even more obscure.

The cultural turn poses sentencing researchers several epistemological and methodological questions that need to be addressed. The turn allowed researchers to reassess the way they were studying the legal field. For example, Silbey explained that those engaged in socio-legal studies were studying the law as ‘if it were a separate realm from society’ (Silbey, 2013, p. 25). However, the cultural turn suggested that the law could not be understood in isolation from the culture where it is produced. This does not mean to deny that, as a field, it has autonomy from the rest of social space, but this autonomy is a relative one (Bourdieu, 1986; 1991a). The law, legal agents and their practices are still part of social space, and thus determined by the web of relations that emerge in that space. However, seeing the law as if it were an autonomous social space may explain why, as Silbey (2013) argued, some socio-legal researchers were using the law's language as tools for their analysis, and thus, ‘relying on insufficiently theorised concepts’ (p. 25). Thus, the challenge for socio-legal researchers is to break with, using Teubner terminology, the legal epistemic trap (Teubner, 1989); the illusion of the autarkic autonomy of the legal field (Bourdieu, 1991a).

In turn, from the perspective of the sociology of punishment, as discussed in the previous chapter, much of the research in this field has aimed at the macro or

meso-level of analysis (Garland, 2018a). Thus, through the primacy of grand narratives analysis, the local contextual dimension has been neglected. This also linked to some analysis of the law in which its relative autonomy from the wider social structures was neglected or ignored. For example, Bourdieu argues that within the Althusserian-Marxist approach conceived laws as 'direct reflections of existing social power relations, in which economic determinations and, in particular, the interests of dominant groups are expressed' (Bourdieu, 1987, p. 814). The notion of relative autonomy of the legal field reflects the view that while political, economic or social structure affects the way the law is shaped, this does not mean that the law, and its practices, are just a mechanical reproduction of these influences. This would mean denying or ignoring the legal field's own rationales and the internal struggles to determine the nature and meaning of law and how it should be exerted. Furthermore, it would be to neglect the fact that legal actors have, themselves, enough capital to influence or shape practice in other social fields.

Thus, in this research, the 'social' and the 'sociological' aspects in my research require the use of the tools of social theory to help us understand sentencing as a *human* process (Hogarth, 1971) within the *social* space of the law and the *practices* it produces. This means problematizing sentencing as a social action, a practice, which obtains its meaning by fulfilling a social function within a specific field in a given social space and time.

3.2. Conceptualising sentencing?

Concepts like judicial intuition (Lovegrove, 2000) or sentencing craft (Tata, 2007), have been used to explain why and how sentencers arrive at what they feel is an appropriate decision. The problem is that they seem to require a 'leap of faith'. We need to trust that the judges are experienced enough and that this intuition or craft is the manifestation of their proficiency. I argue that this depiction of practice fails to provide an appropriate insight into sentencing itself. They are trying to grasp the judges' habitus, but they only seem to scratch the surface of it. This is so because the whole effort of trying to rationalise and describe practice while ignoring its temporal dimension is

frustrated by the practical logic of sentencing. In other words, they neglect the fact that the purpose of the logic of practice is to act in such a way that you quickly do what needs to be done without overthinking. However, these depictions of what sentencing is, which are based on the primary experience of scholars and practitioners, become an obstacle that it is necessary to surmount. As Bachelard argued '[p]rimary experience or to be more precise, primary observation is always a first obstacle for scientific culture' (Bachelard, 1938/2002, p. 29). This means there is a need to adopt a critical inquiry into the nature of sentencing which involves challenging our 'common sense' understanding of it. This also involves exerting a reflexive surveillance of our potential cognitive biases toward the subject of our research.

A different approach - in a Weberian tradition - would be to describe sentencing as the act by which the monopoly of legitimate violence is exercised by the embodiment of the state: The Judge. This depiction is helpful to show two social dimensions of sentencing, the structural and the agential. As a set of human practices that has several social implications, it is relevant to ask: What, sociologically, does it mean to sentence?

On one hand, it can be argued that it is a human action that is carried out by an individual who is exerting a specific role. Therefore, it is tempting to reduce the conceptualisation of sentencing decision-making to the discretionary powers of each judge to decide individual cases; this is to say, limiting it to the judge's agency. However, this account neglects the fact that the normative legal framework structures the judge's discretion. Moreover, it also overlooks what it means for sentencing, as human action, to be situated at the heart of the social and penal structures.

On the other hand, if sentencing is merely a social function which happens to be carried out by a judge, from a structural point of view the judge's agency is irrelevant. The penal system will carry out its punitive function regardless of the identity and agency of any judge or penal agent. Thus, from this approach, the law and the social, political, economic and governmental pressures behind it, determine and shape the penal function. The problem here is that this position

risks overstating the relevance of social and political forces in shaping the *practices* of judges.

Having said this, to conceptualise sentencing as a practice mean to study the structured, habitual and regular customs of allocating sentences by the penal-legal agents (judges) within penal-legal institutions (courts). Therefore, instead of studying the conditions of possibility of sentencing, I aim to examine how sentencing practices take place within a specific jurisdiction, within a particular type of court and a specific class of judges. This is to say, to carry out a micro-level analysis of the social actions and interactions that embody the social function of determining punishment in intermediate courts in Scotland. Thus, it becomes necessary to adopt a theoretical and methodological framework that allows us to go beyond the structure/agency divide and helps us to grasp the rationale behind sentencing.

3.3. Looking for a theory of practice

From a very early stage of my research, I conceptualised sentencing as a practice. This was the consequence of the confrontation between my legal experience – using Bachelard's terminology, my primary experience in the field; what I thought I knew - and the adoption of a sociological gaze. This epistemic rupture forced me to re-evaluate my legal knowledge and experiences from a different epistemological paradigm. Thus, I became aware of the limits of scholarly approaches in explaining legal practices, which, in my experience, obeyed a rationale that was not in the 'books'. On the contrary, legal practices aimed to deal with the practical problems the field posed. However, through the sociological gaze, I realised that while I could explain what I did, I failed to convey why I did it other than saying that it was an intuitive processes based on experience.

At the same time, I realised that sociological approaches were also struggling to grasp the logic of legal practices. If you focus too much on what agents say about what they think they do, but you do not observe them carrying out their practices, you risk missing the rationale you aim to capture by settling instead

for how practice is justified or accounted for by legal actors. Furthermore, you may be tempted to reduce practices to either arbitrary or mechanical actions. As Bourdieu (1994/1998)explained, this may happen ‘when, in the name of a narrow rationalism they consider irrational any action or representation which is not generated by explicitly posed reasons of an autonomous individual, fully conscious of his or her motivations’ (p. viii).

Therefore, from the outset I felt I needed a theoretical framework that was able to explain practices. At first glance, in socio-legal studies, there was no shortage of theoretical frameworks that were being applied to the field. For example, some works were inspired by the Giddens (Henham, 1990), Garfinkel (Vanhamme, 2009; Dupret, 2006/2011), Luhmann (Wandall, 2008), Bourdieu (Jamieson, 2013; Hammerslev, 2003) or Flyvbjerg (Brown, 2017). Moreover, some researchers, borrowing from the work of Flemming et al. (1992), had developed theoretical frameworks around the notion of ‘craft’ or ‘judgecraft’ (Kritzer, 2007; Tata, 2007) to try to understand the role of practical knowledge in sentencing (Roach Anleu & Mack, 2017; Young, 2012).

However, among them, the social theories that focus primarily on social practices are Bourdieu's Theory of Practice, Giddens’ Theory of Structuration and Garfinkel's Ethnomethodology. These theories aim to grasp the logic behind practice and, because of the epistemological position-taking required, they narrow down the list of possible methods that should be used to ascertain this logic. A common characteristic among them is a distinctive praxeological approach.

In the end, several reasons led me to adopt Bourdieu's work as a theoretical framework. Most importantly, I felt that given my background as a practitioner I needed a theory with epistemological foundations that could help me to break from the legal episteme in which I was trained. In other words, I needed theoretical tools that could help me to surpass the Bachelardian obstacle imposed by my primary experiences. Bourdieu's theory of practice deals with these issues at different levels. As a theory of practice, Bourdieu is not oblivious that the craft of science is also a practice. Thus, his theory starts with a critique of scholarly reason and the epistemological and methodological challenges that

‘practical logic’ poses to researchers (Bourdieu, 1972/1977; 1980/1990; 1997/2000). On a different level, Bourdieu's epistemic reflexivity is a ‘requirement and form of sociological work, that is, an epistemological program in action for social science’ (Wacquant, 1992, p. 38) and requires researchers to be aware of scholarly bias. Overall, Bourdieu's approach is both epistemological and methodological, which provided the tools that I felt I needed to explore sentencing.

3.4. Bourdieu’s Theory of Practice

It is essential to approach Bourdieu's oeuvre taking into account that he developed his theory in response to the theoretical, practical and methodological problems that his early fieldwork experiences posed to him (Heilbron, 2011; Sapiro, 2004). As Heilbron explains, Bourdieu’s early research in Algeria was not conceived concerning ‘any particular theory, specific method, or distinct research specialty, but in a language that was borrowed from French epistemological tradition’ (Heilbron, 2011, p. 191). This epistemological and methodological position-taking can be seen in the book he wrote along with Chamboredon and Passeron, ‘The Craft of Sociology’ (1973/1991). Thus, as Bourdieu explained, ‘good theoretical ideas can only be found through research itself’ (Bourdieu, 2013b, p. 15). This is to say that Bourdieu favoured the development of ‘research-based’ concepts; of a theory that was oriented by - and against - theoretical, methodological and practical problems. This approach pervades the critical texts of his theory of practice: the ‘Outline of a Theory of Practice’ (1972/1977) and later ‘The Logic of Practice’ (1980/1990). These are books in which he developed a critique of scholarly thought and practices before proposing his theory of practice as a method of surmounting the issues. Therefore, his theory of social practices is inevitably a critical approach to scientific practices or as he called it ‘scholarly reason’ (1997/2000), thus the relevance of reflexivity.

Bourdieu's theory emerged in a time when the French intellectual field was dominated by Sartre's existentialism and Levi-Strauss's structuralism. In a Bachelardian spirit, he positioned his theory against both of them. For Bourdieu,

both ‘schools of thought’ seem to be at odds. Simplifying in extremis, objectivist structuralism appeared to neglect the subject, which is a key aspect of existentialism which, in turn, seemed to neglect social structures and how they affect individuals. As a consequence of this, Bourdieu's work emerged as a way to overcome the methodological problems that both of these theories have in the practice of sociological research, as Wacquant explains:

> ‘A total science of society must jettison both the mechanical structuralism which puts agents ‘on vacation’ and the teleological individualism which recognizes people only in the truncated form of an ‘oversocialized 'cultural dope' or in the guise of more or less sophisticated reincarnations of homo economicus. Objectivism and subjectivism, mechanicalism and finalism, structural necessity and individual agency are false antinomies.’ (Wacquant, 1992, p. 10)

Thus, for Bourdieu, escaping this false dichotomy means seeing that objectivism and subjectivism are in a dialectical relationship. Hence, he proposes that it is necessary to adopt a ‘relational mode of thinking’ (Bourdieu, 1989, p. 16; Bourdieu, 1994/1998, pp. 3-9). In analytical terms, this is to say that the social world consists of objective relations which are, in turn, located in a social space. These relations are between the structure and the agents and between the agents and other agents (Bourdieu & Wacquant, 1992; Bourdieu, 1989). As Joly explains, this thought could be summarized in the following statement:

> ‘Human beings are situated in relation to each other and are, so to speak, programmed to be situated in relation to one another - to situate others and to be situated vis-à-vis others’ (Joly, 2018, p. 39).

Consequently, within this mode of thought, Bourdieu set out his philosophy of action or dispositions (Bourdieu, 1994/1998; 2013a) which is built on the foundation of three core concepts and the network or interplay of relationships between them: Habitus, Field and Capital.

Having said this, before offering a brief explanation of these concepts and how they interplay, it is necessary to deal with the issues Bourdieu highlighted in relation to the study of practice. I introduce the theory firstly through the epistemological and methodological issues that it attempts to surmount, aiming

to mirror the way that Bourdieu himself presented his theory. It is also an attempt to avoid -- from the perspective of a 'reader' or as he called it a 'lector' (Bourdieu, 1997/2000, pp. 53-54) - approaching theory as a canonised set of precepts which one must follow, oblivious to the fact that those very concepts emerged from fieldwork (Bourdieu, 1997/2000). This is to risk forgetting that the genesis of these concepts lies in Bourdieu's attempt to solve fieldwork issues, surpass the dominant theoretical paradigms and allow researchers to offer a reflexive interpretation of practices (Heilbron, 2011). As Bourdieu said, this risks conflating the 'modus operandum' - the theory in the making - with the 'opus operatum' - science already done (Bourdieu, 2015).

On this subject, the particular question 'How should Bourdieu and his oeuvre be studied?' has been the core of a recent intense debate in France between Fabiani (2016) and Joly (2018) concerning the critical assessment of Bourdieu's work, and thus should not be taken lightly. In this thesis, I have aligned myself with Joly's position, which warns us to avoid what Bourdieu called the 'lector's mistake' (2016; 1987/1990). This means that in our understanding of Bourdieu's work we need to avoid those approaches that are 'aimed at a type of 'reading' of social theory governed by the scholastic disposition, having its end in itself, foreign to all practical use' (Joly, 2018, p. 10). The position that I have adopted in this thesis is a practical one. As I argued earlier, I approach Bourdieu's theory of practice as a theoretical and methodological toolbox for the practice of the study of practice.

Therefore, in the following subsections I am going to discuss the epistemological and methodological issues of practice, then I will explain briefly Bourdieu's triad of concepts. Finally, I am going to use the Bourdieusian analysis of the legal field to show how the concepts come together.

3.4.1. The problems of practice

As stated above, Bourdieu's theory emerged from the issues he had to deal with during his study of practices in Algeria and Bearn. In this fashion, there are some critical epistemological and methodological issues that it is necessary to discuss

before studying his key concepts. In the following subsections, I am going to focus on three aspects: firstly, I will examine Bourdieu's criticism regarding scholarly bias and its impact on the proper study of practices. Then, I will explore the specific epistemological and methodological challenges that research on social practices entails. Finally, I will outline the relevance of the temporal and spatial dimension of practices.

3.4.1.1. 'Scholastic epistemocentrism'

The starting point is an epistemological critique of what he calls 'Scholastic epistemocentrism' (Bourdieu, 1997/2000, pp. 52-53). This is inevitably a methodological criticism, or, if you prefer, a criticism of scientific practice. For Bourdieu, the conditions that make it possible for scholars to think about the world - removed from its mundane problems - is both a source of liberation but also a constraint. He argues that there is the risk of incurring an epistemological bias in the 'universalising of a particular case, the vision of the world that is favoured and authorised by a particular social condition' (Bourdieu, 1997/2000, p. 50). This is to say, doing so risks a bias which researchers incur when they fail to analyse critically how their 'theoretical position' impacts their approach towards their object of inquiry. He uses Bachelard's phrase to illustrate this: 'the world in which one thinks is not the world in which one lives'[4] (Bourdieu, 1997/2000, p. 51).

If in his early writings he attacked the ethnocentrism he found in ethnology (Bourdieu, 1972; 1980/1990); in his later years, he highlighted that the source of this bias produces analogous problems in sociological practices. The effects of this scholastic bias, he argued, 'are all the more significant and scientifically disastrous when the people that science takes as its object are more remote from academic universes in their conditions' (Bourdieu, 1997/2000, p. 50). Thus, researchers may describe the world as it appears to them, this is to say as an object of contemplation, as a spectacle, oblivious to the fact that, for the individuals who belong to that world, this is the world in which they live. This is not just about failing to understand, or in this case to apprehend, the conditions

[4] 'Le monde où l'on pense n'est pas le monde où l'on vit' (Bachelard, 1940, p. 110)

of possibility of their practices: Rather, '[i]mputing to its object what belongs in fact to the way of looking at it (…) projects into practice (...) an unexamined social relation which is none other than the scholastic relation to the world' (Bourdieu, 1997/2000, p. 53). Consequently, researchers may project 'theoretical thinking into the heads of acting agents' (Bourdieu, 1997/2000, p. 51) failing to depict the practical rationales of those agents or the logic of practice at all.

As a reaction to these issues, Bourdieu suggests that we must 'objectify the objectifying subject' (Bourdieu, 1997/2000, p. 10). This means that researchers need to objectify *their* position in social space, deploying a socio-analysis the goal of which is to objectify the conditions that separate researchers from the observed agents and their practices. However, it is also to objectify the position the researcher has in the scholarly field, and how this also influences his or her relationship with the production of knowledge. Therefore, the main goal is to highlight 'how the social position and the structure of the field concerning objects of study shape knowledge claims' (Maton, 2003, p. 58).

This is the source of the distinctive approach Bourdieu takes regarding reflexivity as an epistemic stance (Wacquant, 1992). As Maton argues, this epistemic reflexivity is not easily achieved (Maton, 2003), nevertheless it is epistemic surveillance that helps us to be aware of our role in the production of knowledge. This should prompt a continuous assessment of the scholarly point of view we adopt while attempting to grasp the logic of (another's) practice.

3.4.1.2. The elusive logic of practice

Once we have 'objectified the objectifying subject', and we are aware of our scholastic bias and the need for epistemic reflexivity, we need to inquire how we can grasp the logic of practice. At first glance one is tempted to approach practices by taking them for granted. We can observe them, interview the actors and ask them for the logic, strategies or rationales behind them. We can try to measure the outcomes statistically. Thus, why should we problematize practices? However, it is necessary to return to Bachelard's epistemic obstacle, which Bourdieu follows in this aspect; it is necessary to break with 'common

sense', with our primary experience of that practice that may not allow understanding of what is behind the superficial observation of them. Thus, Bourdieu warns us that merely by taking practice as an object of inquiry, observing it, describing it and analysing it, the logic of practice eludes us; the 'very fact of thought and discourse about practice separates us from practice' (Bourdieu, 1997/2000, p. 52).

Part of the scholastic bias that I explained above is also rooted in the very nature of practices, which are 'opposed to the logic of thought and discourse' (Bourdieu, 1980/1990, p. 80). As discussed above, we may try to characterise practices just as mechanised routines or rather as a strategic game played by a 'homo economicus'. Bourdieu suggests that the practices lie in the dialectics between 'an organising consciousness and automatic behaviours' (Bourdieu, 1980/1990, p. 80).

To exemplify this, he uses the notion of 'games' (Bourdieu, 1980/1990). We can learn the rules of a game, but there is a difference between knowing the rules and playing the game. Only once we get used to playing the game can we develop a 'sense for the game'. For instance, Rugby players are very often required to make tactical decisions within seconds, which means having to choose within seconds or fractions of seconds what is the best or most appropriate action. These decisions cannot be characterised as a thoughtful assessment of all the available options, but they cannot be deemed a mechanical reaction either. Furthermore, good players adapt their game strategies as the game unfolds. Since rugby is a collective sport, some strategies require the involvement of a whole team, which has, within seconds, to grasp the tactic that is going to be used and adapt to the strategy that is deployed.

However, while we can, through observation, and maybe also statistics, try to grasp these practices, we lack the individual's account of these strategies. Yet when we do ask practitioners about their practices, when we make them reflect on what they do, we get post-hoc explanations of them. Bourdieu explains, 'Simply because he is questioned, and questions himself, about the reasons and the raison d'etre of his practice, he cannot communicate the essential point,

which is that the very nature of practice is that it excludes this question' (Bourdieu, 1980/1990, p. 91).

Thus, our starting point is to recognise that 'practice has a logic which is not that of the logician', and thus, we need to avoid affording it 'more logic than it can give' (Bourdieu, 1980/1990, p. 86). The logic of practical action is not a reflexive logic, but this does not means it is arbitrary or mechanical. The issue is that its rationale is different and eludes reflexive thought. Furthermore, even taking all these precautions into account, we still have the issue that 'the logic of practice can only be grasped through constructs which destroy it as such' (Bourdieu, 1980/1990, p. 11). This requires us to try to adopt approaches that can capture practice within its unique temporality and spatiality.

Given these epistemological and methodological difficulties, Bourdieu argues that 'science should make its aim not to adopt practical logic for itself, [but] to reconstruct that knowledge theoretically by including in the theory the distance between practical logic and theoretical logic' (Bourdieu, 1997/2000, p. 52). To do so, we not only need to adopt a practical gaze towards practice but to try to apprehend its rationale by its own logic. This means to understand that the researcher's position towards the practice object of their inquiry is that of spectator, not 'the position of an active agent, involved in the action, invested in the game and its stakes' (Bourdieu, 1997/2000, p. 54).

3.4.1.3. The problem of space and time

It is also necessary to try to approach practice in its context, which is to say 'on the spot', taking into account its social and temporal space, it is when and where. This is the contrast with scholarly practices, which are removed from the mundane world, taking place in an office, within a University, in a social space where introspection is favoured by the social, economic, symbolic conditions that allow scholars to think about the world. For example, when law students, or even lecturers, are faced with mock sentencing exercises, the academic task cannot be equated to real sentencing practices. It is not the fact that it has a pedagogical purpose, but also because its context, the temporal space in which the exercise takes place, cannot be equated to real practice. Ultimately, the

main difference can be reduced to one variable: the mock exercise will never be able to send an individual to prison.

As Bourdieu notes, practice and the actions that configure it, take place in a particular space and time. He argues that '[s]cience has a time which is not that of practice' (1980/1990, p. 81). Hence, we cannot truly understand how sentencing practice works if we do not take into account its temporality. This imposes a different time-frame to that which legal scholars experience, and one which is also different to the frame of 'case vignettes'. The Sheriff Court also has a 'tempo', time pressures, which are quite different from that of the High Court.

Time is one of the most defining aspects of sentencing practice at the Sheriff Court. As Bourdieu poses it: 'practice is inseparable from temporality, not only because it is played out in time, but also because it plays strategically with time and especially with tempo' (1980/1990, p. 81). Hence, it seems logical that these temporalities affect how practice is shaped; practice always has to be contextualised by both the amount of available time for accomplishing the goal but also by the desired time-span in which these goals are to be achieved.

Finally, once you become aware of all these issues, you have objectified yourself as an objectifying subject. This is to say, you have taken into account the elusive logic of practice and adopted a theoretical point of view on your theoretical approach to practice and embraced epistemic reflexivity. Only then you can finally approach the theoretical concepts of Bourdieu's theory of practice.

3.4.2. Theoretical Tools

Bourdieu's experiences in Algeria transformed him. He abandoned his idea of following a career as a philosopher, and his work as anthropologist or ethnographer changed, opening the path that would end in sociology (Heilbron, 2011; Bourdieu, 2004/2007). The pervasive mark that his research in Algeria left on Bourdieu can be seen in his theoretical works, both in the 'Equisse...' (1972)

and in the ‘Logic of Practice’ (1980/1990). The research practices and the theoretical concepts he created to surpass these difficulties are contextualised using his Algerian experience.

However, as Yacine notes, the young Bourdieu started his fieldwork without his conceptual framework, and thus, his early works are attempts to explain the practices that he studied (2008, p. 13). Bourdieu's back-and-forth with his ethnographic experiences can be seen in his book ‘The Bachelor's Ball’ (2002/2008) which contains three different studies on the same topic. Consistent with his distinction between modus operandi and the opus operatum, he offered in this book an account that explained the logic of its development, which shared his conviction that ‘the deeper theoretical analysis goes, the closer it gets to the data of observation’ (2002/2008, p. 1). This, in turn, also makes us realise the never-ending dimension of sociological analysis, which despite presenting itself as finished, is always an on-going work.

Ultimately, as Heilbron (2011) argues, on his return to France, Bourdieu would start developing his concepts separately. This general synthesis can be seen in the logic of practice. Thus, at least in its origins, both habitus and field were intended to explain different levels of analysis. In this case, habitus aimed to deal with the issues of practice, while ‘champ’ or field emerged in an analysis of the literary field during the 60s (Bourdieu, 2015, pp. 537-538). As stated above then, these theoretical concepts aimed to explain the elusive logic of practices, trying to address the dialectic between the objective and subjective approaches, both of which were deemed as insufficient (Bourdieu, 1972; 1980/1990; 1997/2000). Bourdieu's synthesis aims to address both the structure within the agent (Habitus) and the agent's actions within the structure (Field).

In this section, I am going to briefly discuss ‘Habitus’ and ‘Field’, and in the final subsection, I will use an analysis of the legal field to show how the concepts come together.

3.4.2.1. Habitus

The notion of habitus is part of a sociological tradition that tries to explain the socialisation of individuals; the processes by which we incorporate the cultural schemas of the society in which we are embedded (Fabiani, 2016). That is why Bourdieu explains that the habitus is the product of the incorporation of objective structures - the social space in which we are immersed. In other words, habitus aims to describe an 'objectivity of the second order' (Wacquant, 1992, p. 13) meaning that – through this process of internalisation - the social structures also live within the subjective mental schemas of individuals. Wacquant further explains:

> 'Habitus designates the system of durable and transposable dispositions through which we perceive, judge and act in the world. These unconscious schemata are acquired through lasting exposure to particular social conditions and conditionings, via the internalization of external constraints and possibilities. (Wacquant, 2008, p. 267)

Wacquant notes, that the theory of habitus is against structuralism. It acknowledges that 'agents actively make the social world by engaging embodied instruments of cognitive construction: but it also insists, against constructivism, that these instruments are themselves made by the social world through the somatization of social relations' (Wacquant, 2016, p. 67). Thus, habitus helps us to explain how we internalise culture, cultural practices, social structures, or if you prefer, the principles of vision - and division - of a given society. Also, this internalisation produces a system of dispositions for action. Bourdieu argues that the dispositions are consciously and unconsciously inculcated in the actors by other human beings or by the fact that actors are situated in the world. Thus, the process of incorporation of social structures can be through intentional pedagogical actions but also outside any explicit education (Bourdieu, 2013a, p. 87). Bourdieu proposes a distinction between a primary habitus and secondary habitus (1997/2000). The former is 'the set of dispositions one acquires in early childhood, slowly and imperceptibly, through familial osmosis and familiar immersion (...) it constitutes our baseline social personality as well' (Wacquant, 2014, p. 7). The latter concerns the 'acquisition of the specific dispositions demanded by a field' (Bourdieu, 1997/2000, p. 164). For instance, the specific habitus acquired through the pedagogical training that allows us to become lawyers, medical doctors or social workers.

The habitus, as a set of dispositions for action, is also a set of expectations; we can move within social spaces as 'a fish in the water' (Bourdieu, 2015, p. 216) because we know what to expect of others and anticipate their reactions to our behaviours. Overall, this allows us to develop practices with ease, within a rationale which is practical knowledge. However, habitus, both primary and secondary, is never static nor immutable. While it is true that the primary habitus sets a baseline through which we start to position ourselves within the social space, as we grow older and accumulate new experiences and our position within the social space and within individual fields (or specific subfields) change; so the habitus changes. Both the individual and the social spaces can and do change, and therefore, the habitus may also become maladjusted. Thus, the individual habitus is quintessentially malleable, due to this 'permanent revision' (Wacquant, 2016, p. 68).

As a final note, it is essential to understand that the habitus is 'not a self-sufficient mechanism for the generation of action: like a spring, it needs an external trigger, and so it cannot be considered in isolation from the definite social worlds (and eventually fields) within which it operates' (Wacquant, 2016, p. 69). Thus, we need to explore the notion of field before understanding how practices are produced.

3.4.2.2. Field

As I mentioned above, Bourdieu - borrowing from Cassirer - adopts a relational mode of thinking about the social world. Thus, to think of the 'social' in terms of relations means to think in a space of positions in which we can locate individuals according to their proximity or distance from one another. Thus,

> '[w]e can compare social space to a geographic space within which regions are divided up. But this space is constructed in such a way that the closer the agents, groups or institutions which are situated within this space, the more common properties they have; and the more distant, the fewer. Spatial distances on paper coincide with social distances.' (Bourdieu, 1989, p. 16).

Given that modern complex societies have undergone a process of differentiation, the notion of field, as a theoretical tool, allows us to construct an object for the study of specific aspects of it. Bourdieu argues that this process of differentiating leads to the existence of 'autonomous fields', which in turn produce different modes of knowledge of the world, different points of views. Moreover, the principle of division and subdivision and the specific mode of knowledge within a field, 'can only be known and understood in relation to the specific legality of that field as a social microcosm' (Bourdieu, 1997/2000, p. 99).

Thus, within this 'microcosm' the relations between the agents can be seen as a 'network'; a web of objective relations between the different positions each agent occupies in the field. In turn, the positions within the field are also objectively determined, defined…

> '….in their existence and in the determinations they impose upon their occupants, agents or institutions, by their present and potential situation (situs) in the structure of the distribution of species of power (or capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions' (Bourdieu & Wacquant, 1992, p. 97).

For example, within the Scottish legal field, the Judge, the PFs and the accused's lawyer all assume objectively determined positions. Each of them can only be occupied by one individual after they have satisfied the requirements to be appointed as such. However, while lawyers hold all of these positions, the way that this microcosm is organised ensures that some of them have a higher status within the hierarchy of the field. Moreover, the dominant positions can only be attained by agents that have acquired and accumulated what Bourdieu calls 'capital'. Bourdieu uses an economic term in order to explain that in different fields there are relationships of power among the various positions which, more or less, can be characterised using the notion of capital (Bourdieu, 1997/2000). Several fields operate in what appears to be a relative disinterest in the accumulation of economic wealth; the literary field or the academic field for example. However, even in these fields, we can observe that there are different kinds of interests, in and through which recognised forms of technical or cultural competence translate into a symbolic form of wealth. Thus, the accumulation of

this specific form of wealth, within a field, can be seen and understood through the economic notion of capital.

Consequently, the positions of the agents in a given field are not static; the agents' positions are related to the particular forms of capital in that field. The different hierarchies within the position of the agents are determined by the amount of capital the agent possesses. Therefore, the acquisition or accumulation of capital in a field means that agents can improve their position in that social space in relation to other agents. Thus, deployment of strategies for the agents to improve their position or to accumulate more capital impact the relations between the agents in the field. This is why Bourdieu describes fields as places of struggle. In other words, the way the agents invest their capital in the field or play the game may change their position in the power-struggle in this field. Hence, this also means agents in a field are determined by their actual positions but also by their potential ones. On the one hand, we have the relationship between the agents who dominate the field and the ways that they would exert their capital to preserve and reproduce the mechanisms of domination. On the other, there may be some dominated agents who will try to struggle to change the 'game' in their favour.

3.4.2.3. Habitus, Field and Capital

Finally, to understand how practices emerge within this framework, we need to understand the dialectical relationship between habitus and field. If the habitus is a generative matrix of practices, they will remain in a potential state until the agent is faced with recognisable problems posed to them by the field in a relationship with the position the agent holds in the field. In the relation between habitus and field, we can observe Bourdieu's attempt to surpass the objective/subjective divide. His theoretical tools help us to move beyond those conceptualisations of practices that either describe it as a mechanised action or put too much emphasis on the agent's discretion. What is implied in this position is an ontological and epistemological position that Bourdieu described as structuralist-constructivism. On one hand, it is structuralist because he recognises the existence of structures - in the social world - that are independent of the agents. On the other hand, it is constructivist in the sense that social genesis is

twofold, emerging from the interaction between individuals (and their habitus) and the social structures (and the fields) (Bourdieu, 1989).

Thus the relationship between fields is dual; the field determines the habitus as a set of dispositions for actions, but the habitus also determines the field. Since different fields have different rationales or internal laws, the individuals - who have paid the entry fee required to be considered agents of that field - must internalise the rules of that social space. In other words, the internalisation of ‘rules of the game’ produces a set of dispositions and anticipation for action that provide agents with a finite number of possibilities – or admissible - actions and reactions.

However, practices are not the outcome of the habitus alone nor a mechanical way of behaving within a field. Concerning the former, this is to say that the habitus is just a set of dispositions, a set of internalised potential ways to react to the problems posed by the field, but not practices themselves. Regarding the latter, fields impose upon the agents ‘rules for playing the game’. However, these rules do not determine their practices, nor prevent them from improvising new practices, rules or exceptions to the rules.

Consequently, the agent's practices will be the outcome of that interaction of a habitus with a field. An actor who has internalised the principles of vision and division of the field - thus, acquired a set of dispositions for actions – will deal with a specific issue or problem that is presented to them because of their position in that field. This interaction will elicit or trigger the set of dispositions that are internalised by the agents. However, the space of possible reactions will also be determined by the position that agents have within the field and the accumulated capital (or lack of it) at their disposal. Overall, then, between the dispositions, the problems and the positions in the field, and the ‘sense’ or ‘feeling’ for the ‘game’, the agent will be have to take a position regarding the more appropriate variant of possible practices they should adopt. If the agent's habitus is completely synced with the field, this will lead to a coincidence between the agent's positions and the kind of practices that the others ‘players’ expect from them. On the contrary, if there is a mismatch between the habitus and field, this will destabilise that agent and may elicit a counter-reaction by others agent's in the field.

Thus, a judge within the legal field and exerting their role within criminal procedure is required, at a precise moment, to sentence an individual. The field presents the judge with a specific problem, and does so because of the particular position the judge has in that field. Therefore, sentencing practices should be understood as a by-product of the dialectic of the finite possible decisions or solutions that are presented to the judge with the internalised matrix of action, based on his or her past experiences, which - according to the information that is provided to them - will determine their penological position-taking.

3.4.3. The legal field

In this final section, borrowing from Bourdieu's work, I am going to try to outline the 'Legal Field'. As Bourdieu explained, the legal field is

> '…a universe in which we play a certain game according to certain rules, in which one enters only if one has paid a certain entrance fee, such as having a specific competence, a legal culture, indispensable for playing the game, and a disposition with regard to the game, or an interest in the game (…) What a field requires, basically, is that one believes in the game and to concedes to the game that it deserves to be played, that it is worth the effort; the game '***is worth the candle***' (Bourdieu, 1991a, p. 96)[5]

In the following subsections, I am going to explore this definition.

3.4.3.1. Specific Competence?

The first question that this definition raises is: What are the specific competencies that we recognise as being held by lawyers? The legal field is a place of struggle for the *'iurisdictio'*, the right and the authority to determine the law (Bourdieu, 1987, p. 817; 1991a, p. 97). This competency, or should we say this legal and technical competency, is by no means limited to a social recognition of the knowledge that legal actors have about the law, it also involves the capacity to put the 'law in action'. This is to say that the constitution of the legal field - and

[5] The translation from French is mine.

thus the monopoly of the 'iurisdictio' - also means the formation of a market of legal services, which explains the high degree of intricacy of the division of juridical labour (Bourdieu, 1987, pp. 834-835; Bourdieu, 1991a, p. 97).

The legal services that lawyers provide are a set of techniques, a symbolic capital, that lies in words. As Bourdieu says 'Jurists thus have a capital of words, a capital of concepts, and they can contribute in this way to the construction of reality' (Bourdieu, 2012/2014, p. 331). This symbolic power can be seen through any court judgement, for example, during the sentencing diets. The words uttered by the sheriff, the sentence they impose on the accused is a 'form of authorised, public, official speech' (Bourdieu, 1987, p. 827). This is to say, it is collectively recognised by society, in those specific circumstances, as a legal competence; an 'auctoritas'; a symbolic power that allows the judge to create a reality in which the accused, now the offender, is going to be punished in the terms the judge has decided. As Garcia Villegas suggests, legal authority is a privileged form of power 'in terms of legitimate symbolic violence - monopolised by the state - which the state both produces and practices' (2004, p. 60).

However, this 'power of naming' is never the product of isolated lawyers nor the by-product of a radical nominalism; it is a product of a 'symbolic struggle between professionals possessing unequal technical skills and social influence' (Bourdieu, 1987, p. 827). These struggles are not limited to the right to determine what the law says. They also reflect the capacity to influence or shape legal practices, ultimately to know how to play the 'game' to achieve particular goals. Accordingly, legal agents, even those that have a high position in the field like judges, are constrained by the limits of what the legal 'game' allows. Any attempt to reshape the rules or produce a 'legal revolution' must be made according to the very same rules that you may want to change (Bourdieu, 1991a, p. 97).

Thus, despite the position that sheriffs occupy inside the courtroom their decisions are constrained firstly by the normative framework; secondly by the struggles of the other agents that aim to influence the decision and to whom the judges must listen; thirdly, by the supervision exerted by the appeal court. These variables restrict the spaces of possible choices that sheriffs have available to them and, accordingly, produce a corresponding space of impossibles.

3.4.3.2. Monopoly of the legitimate use of violence

It is also important to note the close relationship between the legal field, the State and the field of power (Bourdieu, 2012/2014; 1989/1996; 1994; 1988). What is particularly important for my analysis is that the sub-field of criminal law exerts a critical social function by rationalising the monopoly of physical and symbolic violence by the State (Bourdieu, 1994, pp. 3-4; García Villegas, 2004, p. 60). This is to say that criminal procedure legitimises, normalises and provides a rationale for the use of this violence in its different dimensions. However, the symbolic power of the sheriffs can only be exerted within a legal ritual that provides the force behind the words that are uttered. The judicial 'power of naming' can only produce its consequences if it is uttered in the proper manner, moment and place. Therefore, the ritual dimension of criminal procedure is also part of what provides the law with its symbolic power. More critically, as Miller argues, one of the legal functions of the ritual is to shape the identity of the individuals who take part in it (2005, p. 1189). Moreover, the symbolic nature of rituals does not mean that they cannot be violent. Rituals may involve symbolic violence and lead to physical violence (Miller, 2005), which is what may happen during criminal procedure.

The reference to physical violence needs to be understood in how penal institutions exert legitimised violence against the citizens. For example, the police are entitled to use force against individuals, even in cases in which that violence is not used to arrest citizens; imprisonment and carceral regimes are forms of violence in many different ways which are normalised continuously as a part of the reality of punishment (Fassin, 2018; 2011/2013; 2015/2017). Thus, the law and legal decisions play a critical role in normalising and legitimising the violence exerted by the penal institutions (in the case of the police) or by enabling and making possible the physical violence that can be exercised in the context of punishment (in the case of imprisonment). Thus, legal competency requires the ritual dimension to be able to legitimately and symbolically exert the 'monopoly of violence' in the social function of punishment by the state.

The judges' symbolic power is exerted through a ritual that aims to legitimise the decisions that are taken by the legal agents. As Tait argues, these rituals 'embody

and enliven the law' (2002, p. 471). Thus, within those performances, judges are not individuals but the embodiment of the state. The 'ritual' words must be uttered in the hearing at the courtroom and in the precise and specific opportunity that the legal ritual creates (Tata, Forthcoming). The higher the stakes, the more ritualized the procedure becomes. The best example of this is the criminal trial at the High Court. The jury, as lay people, are invited to exert the 'lawful judgment' by the accused's peers in a heavily ritualized procedure that aims to legitimize the verdict.

Simplifying the complexities of legal rituals, we can easily find two great moments in the criminal procedure: First, the culmination of the judicial process where a declaration of the guilt or innocence of the accused is uttered. Secondly, if the accused is declared guilty, a hearing where the punishment for that individual is announced. From a Foucauldian perspective, both rituals are the consequence of what he calls the 'inquiry' (*L'enquête*) (Foucault, 1974/2001; 2012/2014). He argues that this is a form of knowledge-power that aims to determine (or construct) the 'truth' of what happened (Foucault, 1974/2001), and, if and when the accused is declared guilty -by any means- it shifts into an inquiry into the 'nature' of the now 'offender' (Foucault, 2012/2014; 1981; Tait, 2002). Thus, the rituals are the communicative culmination of both of these processes and require to be carried out retaining at least the core aspects of the established rituals of justice. From these perspectives, judicial practices, and particularly sentencing practices, involve a symbolic dimension that further shapes and constrains the 'space of possibles'; meaning the range of possible actions or reactions the judges may adopt.

3.4.3.3. Legal Habitus

The ritual aspect and the consequences of the legal competence that society recognises in lawyers are the external manifestations of the internalization of the legal structures by the legal actors. As Bourdieu argued, lawyers 'can make others believe [in the law] only because they believe in it. If they contribute to the force of the law, it is because they themselves have been caught in the trap, notably at the end of the work of acquiring the specific belief in the value of legal culture' (1991a, pp. 96-97). These effects can be seen in the courtroom

particularly during solemn trials at the sheriff court or the High Court. The ritual solemnity imbues the process and forces the lay people, mainly when they are officiating jury duty, to be part of the illusion of the law.

Thus, the sociological question to ask is how do lawyers move from studying the law to believing in it? How can the legal epistemology become a set of legal manners, bodily postures, and ways to talk, ways to conduct the self and perform in court? To be a lawyer means not only to know the law but also to possess a set of dispositions that allow them to 'know-how' this knowledge can be put into practice within the legal game. However, all these considerations mean that to reconstruct the logic of practices, it is necessary to take into account the way that the agents, in this case the judges, acquire their specific legal habitus.

3.4. Bourdieu and sentencing practices

One of the critical aspects of my approach towards sentencing in this thesis was to acknowledge the need to inquire into the sociological nature of sentencing. In this regard, I stated that I conceptualise it as a social practice that fulfils the social function of punishment. However, this further requires us to discuss the theoretical, epistemological and methodological implications of this position-taking. One of my main concerns was the need to adopt a theoretical framework that could help me to attain an epistemic break from the legal episteme imposed by my past as a practitioner. In other words, to adopt theoretical tools that could help me in my study of the field, aiding me to be aware of my position on it and the potential biases I may have. As explained during this Chapter, I adopted Bourdieu's theory of practice because it recognises that research is also a practice, thus providing epistemic and methodological tools.

As a consequence of this, the discussion of the Bourdieusian framework is preceded by a brief discussion of the epistemic and methodological difficulties that the researcher faces when studying practice. This discussion influence the theoretical concepts of habitus, field and the interactions between them. Overall, this chapter outlines the methodological implications of this theory, and

highlights some issues that will be discussed in the next chapter. Furthermore, several aspects that are going to be discussed in the methods chapter, such as the problem of reflexivity and the methods used, are directly or indirectly linked with the conceptualisation of practice provided by Bourdieu. Thus, this and the next chapter have to be considered as two different aspects of the same process.

CHAPTER 4: Methods.

In this chapter, I am going to discuss the methods that were used during my research. The chapter is structured in four sections. In the first one, I am going to discuss the relevance of reflexivity as a starting point for research design. The second section deals with the long period of negotiation of access. In the third section, I discuss how the final research emerged from the negotiation for access. This section deal with several subsections such as sampling, ethics and most importantly the methods that were used: shadowing, interviews and passive observation. The final section deals with data analysis.

4.1. The research design: Reflexivity as a key aspect

From the outset of the research-design process, I was interested in exploring the sentencing practices of the Sheriff Courts in the wake of the commencement of the Criminal Justice Licensing (Scotland) Act 2010 (CJL-2010 Act). Among several reforms this Act rebranded community sentences as 'Community Payback Orders' and it introduced a presumption against short sentences of imprisonment. As will be discussed in more detail in chapter five, one of the goals behind this reform was to provide a credible alternative to short-custodial sentences. However, in the beginning - and influenced by my experience in the Chilean legal field - I thought that these changes could be measured easily by an in-depth study of written sentencing decisions. Unbeknownst to me was the fact that sentencing decisions at the Sheriff Court are rarely written down or transcribed. The few that are actually transcribed are due to an appeal or 'in cases where there is public interest or where the sentence may be complicated or controversial' (Judiciary of Scotland, 2018b).

To obtain a better understanding of the field, apart from reading existing literature on sentencing research, particularly in Scotland and England, I knew I needed to learn the 'law in action'. Thus, I randomly visited five Sheriff Courts to learn 'in situ' about the normal functioning of legal practices. I was able to observe a solemn procedure criminal trial and civil and criminal hearings. I also attended a trial at the High Court.

My first experience with the Scottish legal field was enlightening. I was observing the practices not only as a foreigner but also as a foreign lawyer. Before coming to Scotland, I worked for the Chilean Prosecution Service for almost five years. During the last three years before coming here, my position involved, among other duties, being instructed by the equivalents of procurator fiscals as a solicitor-advocate at the Appeal Courts. During the same period, I was a part-time criminal law instructor at two Chilean universities. Thus, my approach to the study of the Scottish field is that of an 'outsider-insider'. I came from a different culture, as a foreign researcher, but I am an insider in the legal field, within a legal culture of my own. I not only have experience with legal theory and criminology, but I also have experience investigating crimes, preparing them for trial and standing before the Chilean courts. Therefore, the legal practices I observed in Scotland felt both familiar and radically different. For example, the practices of solicitors or advocates performed at criminal trials felt the most familiar to me. Despite the different language and legal system, the examination techniques, the theatricality, the way the solicitors or advocates conducted themselves in court, were practices that I could relate to. I could identify myself with them.

However, during the time I have been in Scotland, I have never felt so alien to its society and culture than during my first time observing sentencing diets at the Sheriff Courts. I was not able to identify the source of this discomfort immediately. After a reflexive exercise, I realised that the 'cultural shock' lay in the way my legal habitus determines the way I approach and analyse social and political realities. As a lawyer, we are trained to believe in the law – in my case, the specific Chilean version of continental law - and thus, particularly in legal contexts, I was accustomed to 'seeing' how the behaviours of the individuals are determined by legal structures. Through the sentencing hearings, I was able to get a 'glimpse' of a socio-political structure that was completely at odds with my own culture. For example, the existence of a welfare state creates a network of relations, interactions, obligations, control mechanisms, etc., between citizens and the State and between citizen themselves. Some of these relations, like the role of the NHS in Scottish society, are unthinkable or unthought-of in a neoliberal society with almost no welfare state like Chile.

My attempts to try to understand this rupture were another of the reasons why Bourdieu's framework seemed to fit my needs. It helped me to understand practices theoretically and also provided me with tools for interrogating my legal practices and habitus. Moreover, through the advice to attempt a reflexive sociology, its theory helped to make sense of the rupture I faced. Thus, reflexivity forced me to assess how my past legal experiences, practices and habitus might have an impact on my study of the new field. And notably, given the otherness I was experiencing, I wondered how this could be used to improve my approach to the new field and, in particular, my research design.

As I explained in the previous chapter, Bourdieu asks researchers to bear in mind how their habitus and their position in the field may affect their analysis. Wacquant argues that Bourdieu's approach to reflexivity has three key points:

> 'First, its primary target is not the individual analyst but the social and intellectual unconscious embedded in analytic tools and operations; second, it must be a collective enterprise rather than the burden of the lone academic; and, third, it seeks not to assault but to buttress the epistemological security of sociology' (Wacquant, 1992, p. 36)

Hence, reflexivity has to overcome three kinds of bias: (i) the social origins and coordinates of the individual researcher; (ii) the position that the analyst occupies in the microcosm of the academic field; (iii) the intellectualist bias, the risk of collapsing practical logic into theoretical logic (Wacquant, 1992, pp. 39-40). Consequently, when I had to deal with what my legal habitus meant for my research, I had to consider questions that I never thought of before. For example, how my legal habitus - the legal training received - has shaped my own views on penology and judicial practices and how this habitus made me take for granted important penological questions. In turn, this led me to realise that, despite the fact that my research was not a comparative study on sentencing, as a foreign researcher I was facing some of the methodological issues that emerge in such contexts. The most evident problem was the risk of incurring an ethnocentric bias (Bourdieu, 1997/2000) by overstating similarities or neglecting differences. This was so because the rupture I felt was so powerful that it could

only be understood as a manifestation of the extent to which my legal training and experiences were unconsciously determining my vision of the field.

Having said this, it is important to stress the difficulty of trying to convey the rupture I felt. Before attending the courts, I had read as much I could about criminal proceedings in Scotland, about common law, about punishment in Scotland. Thus, I was aware of the differences that I might find and, I thought, I was prepared to deal with them. However, written words can hardly provide you with an understanding of a reality which you have never seen. That's why ethnocentric bias is so common; we use what we know to try to understand the unknown, we 'fill the blank spaces' with whatever we have already experienced (Bourdieu, 1997/2000).

I also want to stress that the otherness I felt in court was both a source of external and internal insight. The more I interrogated the Scottish field, the more I challenged my legal habitus. Thus, the rupture gave way to a double gaze, one that looked onwards while looking inwards. To learn what is possible and impossible in a new field led me to critically reassess what is allowed and forbidden in mine. When you are trained as a lawyer - and led to believe in the law or normative systems - you internalise the idea that some practices should only happen in a precise manner or never happen at all. Thus, when you are confronted with a field in which those forbidden practices are ingrained, they are standard, and the field 'works', then you are faced not only with structural differences but also with core epistemic ones. Which is to say when you are led to believe that the field can only exist if specific rules are observed, and you learn a new space in which none of this is true, this indeed reframes the way you think about legal fields.

To make things more complicated, I tried to deal with this sort of dual inquiry (external and internal) by attempting to retain or adopt a sociological gaze and thus trying to exert reflexivity or, at least, epistemic surveillance of my legal habitus. More critically, while my study of the new field helped me to challenge or deconstruct my legal habitus, I realised that I needed to be careful because I could still - inadvertently - 'fill the blank spaces' of my analysis using my legal experiences to make sense of it. In this process, embracing otherness, and thus,

embracing the rupture, helped me to try to sustain a kind of epistemic surveillance through a conscious break with my primary previous experiences.

It worth noting three final things. Firstly, reflexivity is not something you achieve; it is a constant process. Secondly, my three supervisors played a vital role in guiding me and helping me to analyse and challenge my predispositions critically. Their intellectual support was essential in the development of a sociological way of thinking about both my habitus and the field. Finally, all these considerations do not mean that I have not relied on my legal experiences or have not been influenced by them in my research. They did, in very different ways, help to design the research and particularly affected the way I approached negotiating access. They also played a role in the way I engaged with Judges during my fieldwork, and more widely with the literature on sentencing. However, what reflexivity did was make me aware of the necessity of being cautious about how these experiences, this habitus, the former position I had in the Chilean field, may impact upon my research.

4.2. Negotiating the research design

From the very beginning, one of my main concerns in designing my research was the issue of access. Actually, one of the reasons why I decided to carry out my fieldwork in Scotland was the naive assumption that it would be easier to get access here than in Chile. After my first review of the English and Scottish literature I realised my mistake. If anything, the panorama described by the literature depicted a more hermetic judiciary than the Chilean one. During the 1980s and 1990s, some researchers had provided different accounts of the difficulties that they had faced in getting access or, even worse, of access being denied or withdrawn. In the particular case of Scotland, the lack of research studies in this area was a ‘deafening silence’ that alerted me that something was happening. Several researchers who I met during my first two years in Scotland confirmed that there was a lot of interest in sentencing. However, they also told me that the relationship between scholars and the judiciary was uneasy.

After reading Scottish literature and talking with several scholars and a few practitioners, I arrived at the view that this tension existed and was very complicated because it seemed to involve - and sometimes to conflate - different problems. On the one hand, I noticed that some practitioners seemed to see criticism by legal scholars as unfair, wrong or biased. In brief, there was the presumption that legal scholars do not grasp what real legal practice involves. Later on, I would understand that in Scotland practitioners and legal scholars have a very different relationship with each other than they do in Chile. On the other hand, in addition to a field that has been - both in Scotland and England (Baldwin, 2008; Ashworth, 2003) - hermetic and disinclined to be an object of research study, a critical paper published by Tombs and Jagger (2006) had made this tense relationship worst. Or at least that was what several practitioners and lecturers told me or implied to me during my first year in Scotland. However, I also realised that despite the interest in sentencing, the perceived tension might have made some researchers refrain from carrying out research on sentencing under the assumption that they will not get access, and thus making it harder to make sense of the reasons behind the lack of research.

Overall, I felt I needed to understand the extent of these tensions to be able to 'read' the field appropriately. I had to prepare a research design that would not only allow me to explore practice but, at the same time, address any concerns the Judiciary may have. Thus, I started working, making certain assumptions based on my perception of the field given what I had managed to learn. For example, I perceived that practitioners distrusted the capacity of researchers to depict practice accurately. I realised that this distrust mirrored similar differences between scholars and practitioners in Chile. I also became aware that some areas within the criminal justice system, such as juries, were out of bounds for any researcher. Luckily for me, sentencing did not seem to be one of them.

Nevertheless, one of the issues I thought could impair access was what I perceived as a more 'political issue'. At that time, 2014-2015, in the wake of the introduction of the SSC[6], the issue of sentencing disparities was a very sensitive

[6] I am going to discuss the introduction of the SSC in more detail in chapter five.

topic. I felt that if my research could be seen as an indirect way to measure disparities in sentencing then that may reduce my chances to get access. Thus, despite the fact that sentencing disparity could have been a measurable variable, I consciously limited the scope of my design leaving it out. My reading of the legal field was that incorporation of sentencing guidelines was not a popular idea among judges, and therefore any research measuring that variable may not secure access.

Therefore, my strategy was to develop a research design that was flexible, to guard against the possibility that during negotiations with the judiciary I would be forced to drop certain aspects of it. Consequently, I decided that the core aspect of the research should be one-on-one interviews with the Sheriffs. However, I was concerned that interviews would not allow me to measure practices accurately. Research based only on interviews, even if I managed, as Tombs (2004) did, to carry out mock sentencing exercises, would provide evidence only of the Judges' perceptions of what they do.

One of my supervisors suggested I consider what now seems obvious - using ethnographic methods or at least passive observation of sentencing proceedings. However, at that time I was not confident in making ethnography the core of the research design for two reasons. First, I thought that the Judiciary might not agree with what this kind of method requires; secondly, at that time, I was also worried that my hearing disability could hinder my ability to use this method. While the use of hearing aids allows me to get along in an 'able-bodied world' without difficulties, during my first visits to the Sheriff courts, I realised that, at least from the public galleries, it was hard for me to grasp what was said. While the voice of the Sheriff and the Sheriff Clerk could be heard clearly most of the time, solicitors tended to speak at a moderate to lower volume. In addition, very often they positioned themselves facing towards the Sheriff and, thus, speaking with their back to the public gallery. I learned that understanding what they said is hard even for native Scottish people without impaired hearing.

It is important to stress that, for me, this was one of the crucial moments where the support of my supervisors was vital. The difficulties that I have described above were undermining my confidence. I became quite pessimistic, and I was

terrified that I did not have what was required for doing this empirical work. I was seriously worried that my limitations, the fact I was foreign and my hearing disability, would make me fail. However, my supervisors did not allow me to quit and forced me to challenge those fears. Ultimately, they were right. I did have what was required to carry out the research, and the observational part of my fieldwork proved to be a critical aspect of my research.

It is worth mentioning at this point, that there are currently 39 Sheriff Courts in Scotland. These courts are organized under six judicial districts called 'Sheriffdoms' and headed by a 'Sheriff Principal' (SP). The Sheriffdoms are Glasgow and Strathkelvin; Grampian, Highland and Islands; Lothian and Borders; North Strathclyde; South Strathclyde, Dumfries and Galloway; Tayside, Central and Fife. During the research design process, I requested statistical data relating to criminal proceedings from the Justice Analytical Services of the Scottish Government. This unit annually releases a report called 'Criminal Proceedings in Scotland' which contains data on the size of the business, which kind of sanctions are imposed, on which offenders, etc. Nevertheless, the published data does not include individual information by Sheriff Court or Sheriffdom. These datasets were provided. I also looked at other data such as crime rates, population density and deprivation indexes. With that data, I decided to request three Sheriffdoms which - according to the data I examined – would ensure that I had the chance to visit almost every kind of local reality existing in Scotland. I discuss the sampling in more detail below.

Regarding the methods, I particularly asked for two things: On the one hand, to carry out interviews with at least twenty-five Sheriffs. On the other, permission to visit one Sheriff Court per Sheriffdom on a daily basis during two to four weeks and observe the criminal proceedings. However, because the Judiciary required that the request should be brief, I was expecting to discuss the details later, during the negotiation process itself.

The actual negotiation was a very lengthy process. Following the guidelines contained in the 'Research access to courts and judicial holders' guidance (The Scottish Judiciary, 2017) the proposal was submitted to the office of the Lord President. At that time the Lord President's office was vacant, and thus my

request was sent to the Lord Justice Clerk – deputy to the Lord President - who was, at that time, Lord Carloway. The research request was submitted on 19 October 2015. On 22 November 2015, my supervisors and I were informed that the Lord Justice Clerk had discussed my request with staff from the Lord President's Private Office and the Secretariat of the SSC. They invited my supervisors and me to meet and discuss my research proposal. This meeting was held on 11 January 2016. A further meeting on 16 February 2016 was arranged to allow me to explain the methodological aspects of my research with the Principal Research Officer of the SSC Secretariat. It is important to note that SSC was going to have its first meeting in December 2015. Also, the Lord Justice Clerk is the head of the SSC, and thus, this explains why the SSC's secretariat was involved in considering my request for access negotiation.

Consequently, during the second meeting of the SSC held on 7 March 2016, my proposal was briefly discussed. According to the minute of that meeting:

> 'Andrew Bell updated the Council on the research proposal from Mr Javier Velásquez, provided at Paper 5.1, and provided recommendations. The Council noted the research proposal and the Secretariat would keep members informed of its progress' (Scottish Sentencing Council, 2016, p. 6)

After this meeting, the SSC sent my request back to the Lord President's private office. At this point, Lord Carloway had been appointed Lord President, so, again, in this capacity he dealt with my proposal. On 20 April 2016, I was informed that Lord Carloway authorized my research, subject to 'obtaining approval of the relevant Sheriffs Principal in relation to the carrying out of the research in their Sheriffdoms'.[7]

During the same period, I prepared request letters to the three SPs. By the end of June 2016, I was informed that the three SPs had agreed to meet me to discuss my research request. This meeting was held on 16 July 2016. As expected, they suggested some changes to the proposed research design, which I am going to discuss in detail in the next subsection. During the meeting, they informed me that even if they agreed to the research, they could not force

[7] Private communication with the Lord President, dated 4 May 2016.

Sheriffs to take part in it. They also asked me to send them a draft of the semi-structured questions I intended to discuss with the Sheriffs so that they could consider this before making a decision.

In August 2016 – around ten months after I made my first access request - I was informed that the three SPs had agreed to authorise me to carry out the research, and they also reported that some Sheriffs had decided to take part in it. For two Sheriffdoms (which I am going to call Sheriffdom A and B), the SPs appointed a Sheriff Clerk to help me make arrangements for my visit to the different Sheriff Courts. Thus, the participant sampling was carried out by the SPs, and therefore I had no control over it. They informed me they would personally contact potential Sheriffs, but could not ensure they would accept to take part in my research. Nevertheless, the sample of Sheriffs meant that - within the two jurisdictions - I visited all the Sheriff Courts in those Sheriffdoms except one.

However, for the third Sheriffdom (Sheriffdom C), despite the fact that I was told that I was allowed to carry out my research, they did not contact me. Consequently, I waited until I made all the arrangements with the other two Sheriffdoms and I began to fear that the authorisation granted for Sheriffdom C would be revoked. Thus, I contacted the SP of Sheriffdom C and requested to carry out my research in three Sheriff Courts. Given the profiles of the Sheriff Courts I had already been granted permission to visit, I asked for access to courts with profiles that were not represented in my sample. The SP agreed to allow me to attend two of these Sheriff Courts.

Finally, during October 2016, when I was already in the middle of my fieldwork, I submitted a new request to the Lord President asking for his authorisation to explore two more Sheriffdoms. Due to the positive experience I had with the SPs of Sheriffdoms A, B and C and the successful fieldwork I had been carrying out, I decided to incorporate new Sheriff Courts. I thought that the access I had already been granted could ease a new request that could allow me to enrich my sample.

On 22 November 2016, I obtained his approval, under the same conditions as the first request. Consequently, I wrote letters to the two SPs. One SP declined to authorise my research arguing that this particular Sheriffdom was over-researched. The second SP first asked me to postpone my request until March 2017, which I did. I re-submitted my application, but I never obtained a reply. Thus, I decided not to pursue any further applications.

4.3. The final design: methods in action and the 'sample'

As expected, the negotiation with the SPs led to adjustments to the proposed research design. Firstly, they informed me that they were of the view that given that Sheriff Courts deal with civil and family law cases I would only need to attend court on the one day the Sheriffs deal with criminal business. This meant that an ethnography - as traditionally understood (Murchinson, 2010; Fetterman, 2010; Campbell & Lassiter, 2015) - was off the table because I would not be able to visit the same court nor observe the same Sheriffs for an extended period. Following this, I enquired, due to my hearing problems, if it could be possible for me to observe the hearing from the jury box. They told me that I should make these arrangements with the Sheriff Clerk of the courts I visited.
Concerning the interviews, since I would only be visiting on one day, I was warned that the Sheriff might have little time to talk with me if they had any time at all. Then I asked if I could use mock sentencing exercises, but the SPs rejected such an idea. I was told by the SPs that those exercises do not capture the complexities of sentencing, and thus, it would not be advisable for me to use them.

Nevertheless, the fieldwork itself changed everything. Given the negotiation with the SPs, the methods were discussed under the assumption that my visit to the court would be limited to observing the hearing and, if and only if the participant Sheriff had time, I would be able to interview them. Consequently, I planned to use a mixed-method approach using passive observation of the sentencing hearings and semi-structured interviews.

However, this design - where the two methods complemented each other in different stages of the fieldwork – could only be carried out in four of the sixteen visits to the courts. During the other twelve visits, the arrangements adopted by the Sheriffs to manage my visit forced me to redefine my methods. This was not because they imposed further restrictions; on the contrary, they allowed me to stay with them throughout the day. Thus, the methods merged organically, interviews overlapped with passive observation. Also, this change meant that I was not only able to observe the Sheriffs in the courtroom, but I was also able to see how they deal with their work in their chambers.

In the following sections, I am going to explore briefly the methods that were used, given these changes. I will also explain, briefly, why I opted not to use statistical data. Finally, I am going to explain the strategic decisions and limitations of the sampling process and then describe the profiles of the participants, their courts and their Sheriffdoms.

4.3.1. Concerning the Sample

As explained above, there are thirty-nine Sheriff Courts in Scotland and they are organized in six Sheriffdoms, as you can observe in table (1). I requested access to courts in three of the six Sheriffdoms.

Table (1): List of Sheriffdoms and Sheriff Courts.

Sheriffdom	Sheriff Courts	Number of Courts In Sheriffdom
Glasgow and Strathkelvin	Glasgow Sheriff Court	1
Grampian, Highlands & Islands	Aberdeen Sheriff Court and Justice of Peace Court - Peterhead Sheriff Court and Justice of Peace Court- Banff Sheriff Court and Justice of Peace Court- Elgin Sheriff Court and Justice of Peace Court - Inverness Sheriff Court and Justice of Peace Court- Tain Sheriff Court and Justice of Peace Court- Fort William Sheriff Court and Justice of Peace Court- Wick Sheriff Court - Lerwick Sheriff Court - Kirkwall Sheriff Court - Stornoway Sheriff Court - Lochmaddy Sheriff Court - Portree Sheriff Court	13
Lothian & Borders	Edinburgh Sheriff Court and Justice of Peace Court - Livingston Sheriff Court and Justice of Peace Court - Selkirk Sheriff Court and Justice of Peace Court - Jedburgh Sheriff Court and Justice of Peace Court	4
North Strathclyde	Oban Sheriff Court and Justice of Peace Court - Campbeltown Sheriff Court and Justice of Peace Court - Dunoon Sheriff Court and Justice of Peace Court - Greenock Sheriff Court and Justice of Peace Court - Dumbarton Sheriff Court and Justice of Peace Court - Paisley Sheriff Court and Justice of Peace Court - Kilmarnock Sheriff Court and Justice of Peace Court	7
South Strathclyde, Dumfries & Galloway	Airdrie Sheriff Court - Lanark Sheriff Court and Justice of Peace Court - Dumfries Sheriff Court and Justice of Peace Court - Stranraer Sheriff Court and Justice of Peace Court - Ayr Sheriff Court and Justice of Peace Court - Hamilton Sheriff Court and Justice of Peace Court	6
Tayside, Central & Fife	Falkirk Sheriff Court and Justice of Peace Court - Stirling Sheriff Court and Justice of Peace Court - Alloa Sheriff Court and Justice of Peace Court - Dunfermline Sheriff Court and Justice of Peace Court - Kirkcaldy Sheriff Court and Justice of Peace Court - Perth Sheriff Court and Justice of Peace Court - Dundee Sheriff Court and Justice of Peace Court - Forfar Sheriff Court and Justice of Peace Court	8

As you can observe in table (2) below, the busiest Sheriffdoms in the last four years are Tayside, Central and Fife followed by Glasgow and Strathkelvin. On the opposite side, the Sheriffdoms with the lower number of cases are Grampian, Highlands and Islands followed by North Strathclyde. There is a correlation between the size of the business and the population density of the areas encompassed by the Sheriffdoms. The population density also affects the size of the territory included in the Sheriffdom. For example, Glasgow and Strathkelvin Sheriffdom is the smallest territorially but one of the busiest ones because of the high population density in Glasgow - the biggest city in Scotland. On the contrary, Grampian, Highlands and Islands Sheriffdom includes the larger masses of territory in Scotland, but, at the same time, it is one of the jurisdictions with the lowest population density of all the Sheriffdoms.[8]

[8] The characteristic of Scotland will be discussed in depth in chapter five.

Table (2): Total sanctions imposed per Sheriffdom (From 2012-2013 to 2016-2017) and the percentage that number means of the total amount of sanctions imposed that year.

	2012-13		2013-14		2014-15		2015-16		2016-17		% Average
Glasgow City	12,451	19.34%	11,709	18.47%	11,413	17.64%	10,942	17.04%	10038	16.67%	17.83%
Grampian, Highlands & Islands	8,995	13.97%	8,675	13.68%	8,919	13.79%	9,180	14.29%	9,458	15.70%	14.29%
Lothian & Borders	8,320	12.92%	9,597	15.14%	10,559	16.32%	10,329	16.08%	9,117	15.14%	15.12%
North Strathclyde	9,767	15.17%	8,946	14.11%	8,766	13.55%	9,440	14.70%	8,526	14.16%	14.34%
South Strathclyde, Dumfries & Galloway	10,897	16.93%	11,203	17.67%	11,042	17.07%	11,401	17.75%	10,825	17.97%	17.48%
Tayside, Central & Fife	13,917	21.62%	13,256	20.91%	13,966	21.59%	12,918	20.11%	12,243	20.33%	20.91%
Total Sanctions Imposed	64,347		63,386		64,665		64210		60,207		

Thus, the strategy behind the sampling of the three Sheriffdoms took account of two factors. Firstly, given the density and territorial differences existing in Scotland, I chose Sheriffdoms with Sheriff Courts that could reflect the different realities of Scotland, both concerning low or high density jurisdictions and also regarding rural, urban and mixed rural-urban jurisdictions. Secondly, I was also interested in visiting courts with different volumes of business. Thus, I managed to visit small courts (those with only one or two resident Sheriffs) and also larger Sheriff Courts with several resident Sheriffs.

Nevertheless, once I was granted access to the Sheriffdoms, I started to lose control of the sampling process. Although I was able to ensure the diversity of the sample regarding density, rural vs urban profiles and regarding the size of the business and court, it was the SPs who invited my participants to take part in the research. Thus, I did not know if they asked all their Sheriffs or if they sent the invitation only to specific Sheriffs. Thus, it seems evident that the sampling process has limitations, I do not know how the SPs went about identifying participants. I will discuss this issue in more detail at the end of this section.

That said, I was able to visit fourteen Sheriff Courts which means that I visited around thirty-six percent of all the Sheriff Courts in Scotland. To protect the identity of the Sheriff, Courts and Sheriffdoms I visited, I will not provide more details about the profile of these courts. Otherwise, I risk revealing features that may allow the reader to deduce the Sheriffdoms where I carried out my research, which may undoubtedly lead them to infer which courts and Sheriffs took part in the research.

Regarding the Sheriffs, I interviewed sixteen Sheriffs across the fourteen courts, meaning that I visited two Sheriff Courts twice. Among my sample, there were thirteen Sheriffs, two Summary Sheriffs and one retired Sheriff who was working in a part-time capacity. According to the data provided by the Scottish Sheriff Courts, at the time of initiating my fieldwork - September 2016 - there were one hundred and forty-two appointed Sheriffs, fifteen Summary Sheriffs and thirty-nine part-time Sheriffs. Thus, my sample of sixteen Sheriffs represented eight percent of the total number of Sheriffs at that time.

The sample also varied regarding the profile of the Sheriffs; from those with less than five years of experience in the office to some that had more than eight years of experience. Only four of my participants were women; this is to say twenty-five percent of my sample. According to the list of appointed Sheriffs on the Judiciary of Scotland website in September 2016, only twenty-seven of the one hundred twenty-seven Sherriff that were in office at that time were women, or 21%. Thus, the proportions were similar. As a final note, the sample encompassed Sheriffs that before being appointed had been solicitors, solicitor-advocates and advocates.

Having discussed the process, one question must be addressed: are these Sheriffs representative of the population of Scottish Sheriffs as a whole" (in terms of providing an account of sentencing practices that can be generalised beyond the Sheriffs that you did interview)? While this was one of my concerns during the sampling process and before starting the fieldwork, I think that my sample it is representative of at least of the various rural, rural-urban and small to mid-size urban jurisdictions. The only local realities that my sample lack was from large urban courts. It is worth noting that if there was an attempt by SPs to influence the composition of the sample this was limited only to the Sheriffs but not to the courts I visited. This was so because I was allowed to visit almost all the Sheriff courts from two Sheriffdoms (A and B) and I was granted access to the specific courts I requested in the third jurisdiction (Sheriffdom C).This is important, because, if the SPs attempted - consciously or not - to restrict my access to certain Sheriffs, this was limited to the number of resident Sheriffs in those courts. For example, I visited a few Sheriffs court with only one, two or three

resident Sheriffs. Thus they had limited to no option in terms of which Sheriff to pick.

Even if an attempt to influence the sample of my participants was made, I think any effects of this would have failed because the backgrounds, profiles and sentencing styles of all my participants were so diverse and seems not to follow any pattern, which makes any bias in their selection seems unlikely. Furthermore, in Sheriffdom C the SP allowed me to interview the Sheriffs of the Sheriffs Court I requested and, as stated above, in Sheriffdoms A and B, there was a limited number of Sheriffs in the Sheriffdom.

Finally, even if there was a deliberate attempt to depict an idealised image of practice, the observation of RC proved a handy way to triangulate the data and ground it in real practice. In this regard, the RCs that I observed were characterised by their unpredictability. Some cases challenged the Sheriffs in different ways, even without factoring in the behaviour of the other penal actors and the public that attended the hearings. In other words, if there was an attempt to offer a specific depiction of what practice is, the RC forced the Sheriff to exert their role as they usually do.

4.3.2. Ethics

Before it could commence, my research needed to be approved by the College of Social Sciences Research Ethics Committee at the University of Glasgow. Due to the long process of negotiation, I only submitted the ethics application after I obtained the authorisation from the Lord President. Since my aim was to explore how an exceptionally powerful occupational group – Sheriffs - understand their purposes, roles and tasks, the topic was not considered to be particularly personal or sensitive (since it concerns their performance of a public duty). Furthermore, my research population cannot be considered vulnerable (in general). Therefore, it was regarded as low-risk research. My ethics application was submitted on 11 May 2016, and approval was granted on 8 June 2016

Due to the relatively small number of Sheriff Courts and Sheriffs, I took a number of steps to secure the anonymity and confidentiality of my participants. Due to the relatively small number of Sheriff Courts and Sheriffs, when reporting my findings, I avoid any direct or indirect reference that might lead to disclosing the identity of my participants. Moreover, on a more logistic level, the data containing the audio recordings and interview transcriptions was kept on an external hard drive. Whenever it was not used, the hard drive was stored in a steel pedestal which was kept locked. This was located in a room at the University which could only be accessed with a key. The consent forms with the name of my participants were also kept in a different lockable pedestal, in a different room, which also required a key for access.

In this thesis, I have tried to protect the anonymity of my participants by the use of neutral pronouns ‘s/he’ or ‘herself/himself’. Also, in chapter nine, where I examine career trajectories of Sheriffs, I chose not to analyse the career trajectories of my research participants. Instead, I used the biographies of recently appointed individuals – all of whom were appointed after my fieldwork concluded. In this way I was able to ensure that I did not expose my own participants to the risk of being recognised because of their past trajectories.

4.3.3. Methods in the fieldwork

The lengthy process of negotiation, the many meetings, and my informal visit to some Sheriff Courts, made me pessimistic about gaining anything other than minimal access to the judiciary. Thus, after the negotiation with the SPs, I thought the fieldwork would be restricted to brief observations and post-hearing interviews.

In practice, in twelve of the sixteen courts I visited, after arriving at the court I was escorted to the Sheriff's chambers where I was able to talk with the Sheriffs before the hearing. Thus, I stayed at Chambers until the Court Officer came to inform the Judge that the courtroom was ready. Then, we walked through the maze of internal corridors of the Sheriff Courts towards the courtroom. I was

always asked to go in alone. Once I took my seat, generally in the jury box, the court officer would come into the courtroom, while the Sheriff waited outside. They would observe the courtroom and if everything was ready, say ‘All Rise’. While everyone rose from their seat, the Sheriff would make their entrance. The sentencing diets lasted all morning, in some occasions there was no break until lunch time, in others the Court adjourned briefly. When that happened and the Sheriff left for their chambers, I was invited to follow them, and thus, I was able to talk with them for a while on or off the record. When the lunch break came, in seven courts I had lunch with the Sheriff in their chambers or a restaurant near the court. On two of these occasions, other resident Sheriffs had lunch with us. In the rest of the courts, I had lunch alone and then came back to the court to observe the last hearings of the day. By the time the criminal business of the day was done, the Sheriff left the courtroom and I was invited to follow them and had a final chat with them in their chambers.

This brief description of several of my visits to Sheriff Courts during my fieldwork aims to illustrate how flexible and organic the whole experience was in some courts. There was an overlap between the interviews and the observation to the extent that, for me as a researcher, they seem to blend or merge. Because of the dynamics of the fieldwork in those courts where I was granted more access than expected, the method was something other than just interviews and passive observation. This is not to say that I did not interview the Sheriff or observe the hearings in those cases but rather that I also did something else: I adopted shadowing methods.

And because it was much more than just those two methods, it required me to quickly adapt to these dynamics and be able to process what I was obtaining from the fieldwork. I had to make sense of the new position that opened up for me as a researcher, and for them as the subject of the research. For example, these new dynamics led me to be reflexive regarding the ‘Hawthorne effect’ (McDonald, 2005, p. 459), and other methodological issues, as discussed below.

4.3.3.1. Shadowing?

In a strict sense, I did carry out interviews with the participant Sheriffs, and I did observe them during sentencing hearings. However, as I explained above, the dynamics of my experience in some courts transformed the methods into something else. In a sense, this was so because both interviews and observation become ingrained in an indivisible method, which was characterized by myself being there. I was able to follow the Sheriffs during the day, occasionally just talking, but at other times interviewing them or just observing how they worked in and outside the courtroom.

However, to be subjected to this dynamic meant that 'on-the-record' interviews were constantly interrupted. Sometimes, I was able to carry out short interviews while the Sheriff and I were waiting in Chambers for the hearings to be resumed. Between the to and fro from the Courtroom to Chambers it was very hard not to lose 'the thread' of what we discussed. In addition, there was a close link between the discussion of practice and the cases the Sheriff was dealing with that day. Thus, every time we came from the courtroom there were more and more aspects of practice that I wanted to discuss. One critical dynamic that emerged - that could not be characterised as interviews or passive observation - was the possibility of discussing with the Sheriffs some cases both before and after the hearings; being able to listen to the Sheriff's first impression of a case before going to court and then their thoughts after coming back from the courtroom, in a context in which I was also able to observe the hearing itself and how the case was dealt with. Overall, this dynamic allowed me to grasp the practice in its contexts and in a more organic way.

In a sense, my experience in these twelve courts seemed similar to the method used by Darbyshire (2011) in her ethnography of judges: shadowing. To shadow is 'a research technique which involves a researcher closely following a member of an organization over an extended period of time' (McDonald, 2005, p. 456). This description fits what I did by spending the day with some Sheriffs. Nevertheless, it is more accurate to say that I used shadowing methods not that I carried out a shadowing or an ethnography, due to the fact I only observed or followed the Sheriff between one and three days. And, as discussed earlier both ethnography (Campbell & Lassiter, 2015; Fetterman, 2010) and shadowing (McDonald, 2005;

Czarniawska, 2007) – at least as traditionally understood – require a more extended period of observation than the one I was allowed.

In brief, confronted with an unexpected change in the fieldwork I realised that the shadowing method used by Darbyshire (2011) was very useful considering the new circumstances I was facing. It is important to highlight that I had to quickly adapt myself to the challenges that this opportunity posed; particularly concerning how the shadowing dynamic changed the structure of the interviews and incorporated other variables through the different kind of interactions that my presence there elicited.

Having said that, the same reflexivity that led me to realise the dynamics required me to reconsider the relationship between my participants and me. As Bourdieu explains, a 'research relationship from most of the exchanges in everyday life, it remains, whatever one does, a social relationship. As such, it can have an effect on the results obtained' (Bourdieu, 1993/1999, p. 608). Thus, I had to take into account the Hawthorne or observer effect. This methodological issue means that the presence of the researcher alters the 'very nature of the work they are trying to describe' (McDonald, 2005, p. 459).

Regarding the passive observation of the court hearings, I was confident that my presence would have no impact on practice. For starters, to suggest that a Sheriff would act differently in court because of the presence of a researcher would be overstating the power that a researcher has when interviewing a member of a legal elite. Moreover, Sheriffs are always under pressure from different social actors who may want them to decide a case in one way or another. This is to say, if there could be a Hawthorne effect, it would be most likely in the presence of individuals who have a level of capital that can match the capital of the Judges, like press members. This is not because the court reporters have, individually, much capital - most of them were from small and local news outlets, with a limited audience. Rather it is because Sheriffs are aware that, very often, the big news outlets - such as the Daily Mail, Daily Record, the BBC or even the Sun - reproduce the news from these local news organisations, allowing the report to reach a much wider audience and raising

the possibility that the Sheriff's decision-making could become widely known, potentially exposing him/her to fair or unfair criticism.

The presence of an immigrant researcher may have been the least of their concerns, when dealing with complex cases. Also, even if they were - unconsciously – concerned about having me observing their practice, the scale of the business and the pressures that it put on them may, again, have made me a lesser concern. This is to say that there were so many things going on that my presence was likely overshadowed by the demands of the business.

Nevertheless, the opposite was true concerning my presence in the Sheriff's chambers. Despite the fact that it allowed me to have a better rapport with the Sheriff and contextualise the material dimension of the Judges' practices, my presence did alter their routines. It would be naive on my part to think that my observation of them in chambers is not tainted or influenced by my presence. However, even though I was there, the Sheriffs were still required to sort out some practical issues and thus I was able to observe them dealing with paperwork and other bureaucratic tasks. More importantly, I was able to observe them interacting with court staff and others resident Sheriffs. Therefore, while I cannot and will not claim that my presence in chambers led me to an observation of their practices 'in chambers', the organic experience of this 'shadowing' did allow me to understand the materiality of their practical universe.

4.3.3.1. Interviews

As argued by Brinkmann and Kvale (2015, pp. 125-135), the process of designing interviews has to be preceded by a thematising stage. In this regard as discussed in chapter three, I made several theoretical decisions (related to the discussion in the preceding chapter about sentencing as practice and the use of the Bourdieusian framework) - which had an impact on my approach to the design of the semi-structured interview. The most critical issue I faced was, how to construct an instrument that could elicit responses that would allow me - as a researcher - to grasp what is beneath post-hoc explanations of practice. Thus, the conundrum was how to introduce questions that could prompt responses that

could discuss practice as such and avoid 'textbook' responses. However, as I stated above, during the negotiation process I was required to submit my questions for the approval of the SPs before they would grant me access. Thus, there was three different aspects that worried me: methodologically, political and ethically.

On a methodological level, the challenge was to think about how to elicit an insightful discussion with the Sheriffs about their sentencing practice without knowing the level of access that I was going to be granted. At the time that I had to design the interview schedule, I was not even sure that I was going to be able to obtain much information through observation of the hearings. On a political level, this posed two different problems. On the one hand, if the Sheriff Principals were to find the interview schedule inappropriate, inadequate or irrelevant that could hinder my access. On the other hand, if the schedule was not objected to, my concern was that it could bind me and limit the scope of my research. While I did present the interviews as semi-structured, the control exerted over the questions - and the implicit approval of the topics - implied that I should remain within those areas of inquiry. Finally, there was an ethical issue. If I was granted access, it was very likely that the document was going to be used by the SPs during the sampling process. Thus, the sampling process would be influenced by the interview schedule, and some participants may have wanted to take part in the research (or not take part in it) because of the topics contained in the schedule. Overall, I was aware back then that these problems and concerns are part of the usual challenges faced by researchers interested in carrying out research with elite subjects (Cochrane, 1998; Harvey, 2011; Mikecz, 2012). However, the fact that you can expect these problems does not make them less challenging, especially when the negotiating process took so long, as happened in my case.

Taking these issues into account, I turned to my pilot observations of the Sheriff Courts, to the Scottish literature on sentencing and penal sanctions (Tombs, 2004; 2009; McNeill, et al., 2009; Tata, et al., 2007; 2008; Jamieson, 2013; Schinkel, 2013) -, to the statistical reports, and to Bourdieu's framework. I used these different sources of information to think about the pivotal axes that make sentencing possible both at a theoretical and practical level. I tried to

understand which are the fundamental aspects of sentencing that can be tackled both theoretically and practically? Thus, I focused on axes that could be understood at both levels.

The schedule was designed around six main topics: how the Sheriffs understand their sentencing role; how they describe their sentencing decision-making; how they explain the use of the various disposals available to them; what is the meaning and purpose of their penal practices; what is their perception of their practice and, finally, their perceptions regarding the issues of recidivism and non-compliance. Additionally, and to be able to grasp the Sheriffs' legal habitus, I also asked them about their legal background and how they decided to become Sheriffs.

The research questions were framed in a more abstract rather than practical way. On the one hand, I was expecting that the observation of the hearings would allow me to link the questions with real cases and situations, which in turn would lead me to discuss practice in context. On the other hand, I was also aiming to structure the topics and questions in such a way that from a single reading of it the Sheriffs could understand what I wanted to discuss with them. In this regard, the interview schedule served different purposes. It not only served as a guide for the semi-structured interviews, but it also helped me to gain access. One of the critical aspects of any process of acquiring access, but which has a particular dimension in elite research, is to be able to gain the trust of the gatekeepers and participants (Mikecz, 2012; Harvey, 2011). In the context of sentencing research in Scotland, this involved focusing only on the sentencing process and avoiding topics that may be sensitive, such as disparity in sentencing (Tata & Hutton, 1998; Tata, 2013; Brown, 2017).

The interviews were intended to last around one hour. However, by the end of the fieldwork I had around twenty-four hours of audio recordings. On average the interviews lasted around ninety minutes; fifty-eight minutes was the shortest one and two hours the longest. Nevertheless, in those courts where I 'shadowed' the Sheriffs, the total length of the recordings was the sum of several short interviews. As I mentioned in twelve courts, I used shadowing methods and in

four courts - those in which I was not allowed to shadow the Sheriff, but I did spend all day observing the hearings - I carried out interviews in a strict sense.

As Bourdieu argues, interviews are inevitably a 'social relationship' and thus the way we present and conduct ourselves in them has an impact on them. In this regard, Bourdieu warns us that interviewers have to 'reduce as much as possible the symbolic violence exerted through 'this relationship' (Bourdieu, 1993/1999, p. 609). Thus, the interviewer could not forget the power that he/she can exert within this privileged position they have as an interviewer. However, within elite research, how does this relationship 'translate to the context of elites'? (Cochrane, 1998, p. 2124).

As Smith (2006) warns us, the power relationship in the context of interviews cannot be seen or understood naively. This is to assume, that because the interviewed is part of an elite, he/she will automatically exert power over the power-less interviewer. Smith is right to remind us of that Foucauldian explanation of power. He argued that 'in human relations, whatever they are (...) power is always present: I mean the relationships in which one wishes to direct the behaviour of another. These are the relationships that one can find at different levels, under different forms' (Foucault, 1987, pp. 122-123). This to say that within 'elite research' the power relations between interviewer and interviewee are different to how they are traditionally conceptualised. This cannot be simply equated on the predominance of one over the other (Smith, 2006). Interviewers also have some power.

Therefore, one of the critical aspects in establishing this relationship was to develop a rapport of trust (Cochrane, 1998; Mikecz, 2012; Harvey, 2011). Fielding argues that elite subjects 'are alert to status and expect to be interviewed by individuals of similar standing who are knowledgeable about legal work' (Fielding, 2011, p. 99). As I explained earlier, due to the fact that the situation between scholars and practitioners seemed tense, I introduced myself as a Chilean lawyer researching Judges. Interestingly enough, other former practitioners doing a PhD seemed to present themselves as legal practitioners as well, for example, Brown (2017), Jamieson (2013) and Nir (2018).

Before starting the negotiating process, I realised that I had little knowledge of the judicial culture in terms of the presentation of the self. Thus, I opted to go full 'Chilean-lawyer' during the whole process and even the fieldwork. This meant that I presented and conducted myself as if I were doing the research back home. However, I quickly noticed that my suits were unsuitable for the Scottish winter. I spent around £700 on a good suit, shirts, ties, trench-coat, an appropriate shoulder bag, and good leather shoes. I shaved before every visit and kept my hair short.

In brief, I tried as much as I could to offer a presentation of the self that could be seen and recognised as a lawyer. Retrospectively, I can say that I blatantly failed to present myself as a lawyer. The Chilean legal habitus, the presentation of the self-linked to that habitus is entirely different to the Scottish one. However, the fact that I presented myself in my legal-cultural terms - rather than trying to imitate a habitus which I was not aware of - allowed Sheriffs to construct me as something else than 'just' a researcher, which was my goal.

Thus, most of the Sheriffs who I shadowed constructed me either as a continental criminal lawyer (they used many references to French criminal law which I understood) or as a law student. The relationship with the Sheriffs I was not able to shadow was a bit more distant. However, in all my interactions they eventually reach a point when they decided that I could be trusted, at least to the point of offering insightful responses, even when they considered some questions obvious. As a consequence of this, in one way or another Sheriffs constructed me as a lawyer and treated me as such. I made efforts to keep our conversation focussed on what their practices entailed, and thus, I used my own experiences as a practitioner to continue the discussion on that level. Despite this, there were some occasions when some Sheriffs, I noticed, wanted to 'move up' to more normative discussions.

Ultimately, the interactions were paradoxical. Since I am no longer in Chile, my social position as a Chilean lawyer is worthless, valueless; it has no symbolical meaning, nor social relevance in Scotland. However, during my interactions with the Sheriffs, most of them recognised me as a lawyer. This was either because they took me at my word that I was one, or because of the way that I framed the

questions that I put to them. Thus, in those interactions, the recognition provided, temporarily, a social position that I lacked outside the interview or shadowing. A position that allowed me to discuss specific topics with a certain level of mutual understanding. However, in other aspects of the interactions, my distance, my foreignness, became apparent and allowed me to ask self-evident and basic questions that would have delegitimised a Scottish lawyer.

In other words, the recognition of my foreign positionality gave me certain power over the relationship generated in the interview. It gave me the power to ask certain questions, and furthermore, it allowed the Sheriffs to open up with me, trusting that I would not use what they said against them. Thus, as Smith and Foucault argued, in some dimensions I did have some power over them. Some of them, the 'younger ones', in particular, were more concerned about saying things that would not be seen as inappropriate. The older ones were more straightforward, seeming to care less about what I could do with what they told me. This tension was obvious when I asked their permission to turn the recording machine on or off.

As a final note, the Sheriffs' recognition of me also affected my distance from and within the field. After a while, my legal habitus began to adapt to the Scottish field, and thus, the more insight I obtained from the Sheriffs and the observation, the more sympathy and empathy I felt for them, as practitioners. Thus, it began to be harder to keep my reflexivity and my sociological gaze. By the end of my fieldwork, I realised that my observation of the hearings was starting to change. Sometimes, I followed the hearings like a fan following a rugby or football match, rather than a sociologist observing these rites. This issue forced me to reposition myself and to reassess my position as an observer.

Given that my deadlines were tight, I decided to send the audio files to a transcriber who had worked with the Scottish Centre for Crime and Justice on previous research studies. No special funding was given for this, so I spent my savings. Instead of sending all of them at once, I decided to listen to all the interviews and take notes, before sending them to the transcriber. This allowed me to 'relive' the fieldwork and was the first step I took into data analysis. The

whole transcription processes lasted three months, from December 2016 to February 2017.

4.3.3.2. Passive Observation

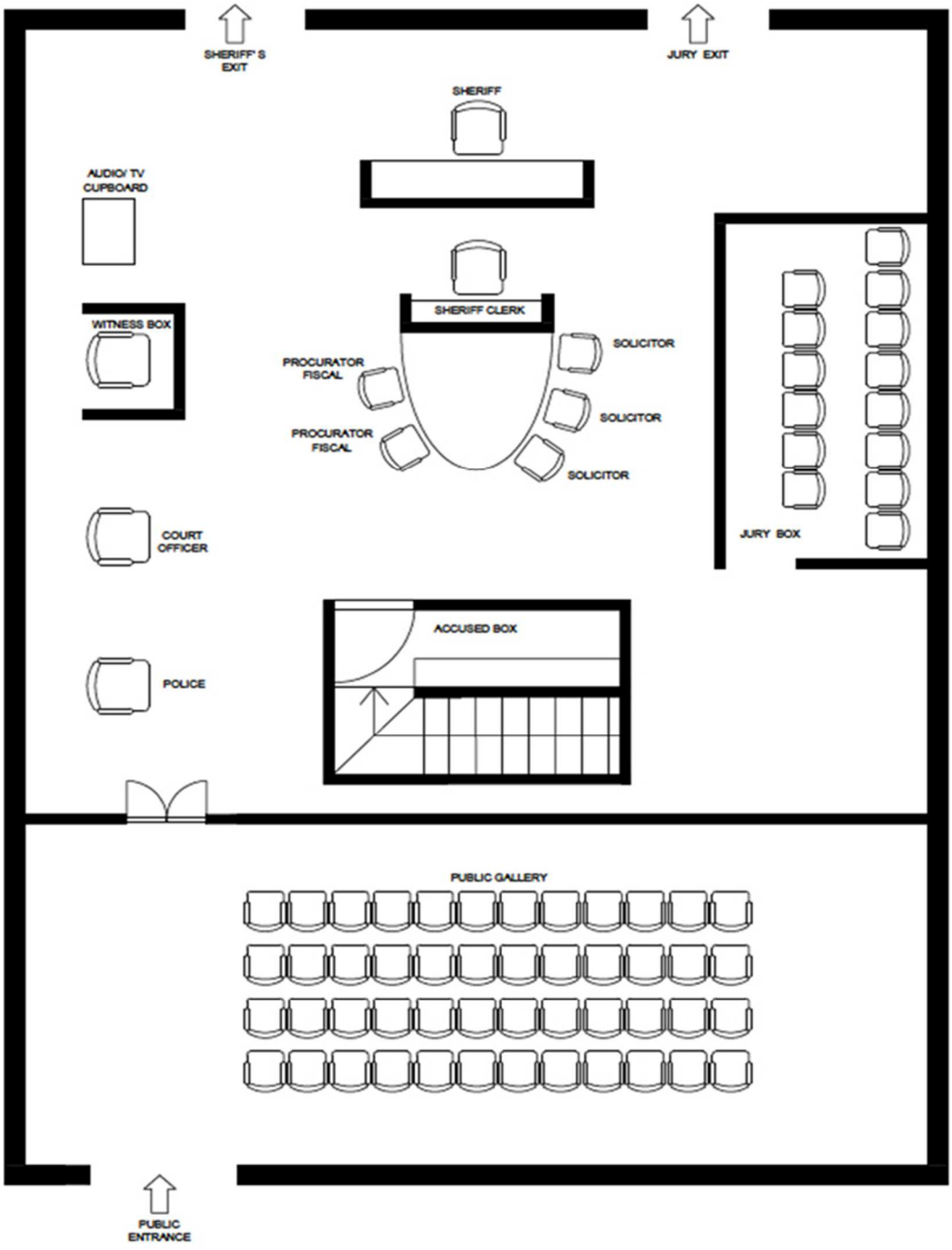
The observation of hearings took place in a similar way in almost all the Courts I visited. In thirteen courts, I was allowed to sit in the Jury Box which gave me a side view of the interactions between the Sheriffs and the other court professionals. In two courts, the Sheriffs let me sit next to them. In one Sheriff Court, I was told to sit in the 'press box' which was next to the 'public galleries'. As I mentioned earlier, while I was designing the research I visited some Sheriff Courts and observed hearings from the public galleries.

Because these were sentencing diets, all the hearings I observed took place without the presence of juries. Thus, the jury box was either empty or used by the Court Social Workers and members of the press. Very often the former used the seats next to him or her for piles of reports of the cases that would be heard that day. The latter very often arrived and stayed only until the hearing they were interested in, taking notes of what the Sheriff said in small notepads. Diagram (1) depicts a 'generic' layout of Sheriff Courtrooms. Despite the fact that no two courtrooms are identical, all of them were variations around the same layout I have provided. In a certain way, to be seated in the Jury Box was a paradoxical position. On the one hand, everyone in the room could see me. On the other, since I was only observing - and sometimes taking notes - the 'action' or 'legal drama' very often made me 'invisible' or irrelevant.

From the Jury Box, I was granted a perfect view of the whole courtroom, and it allowed me to follow the dynamics of the hearings, observing the Sheriff and legal actors in 'action'. If I had any fear that my presence might affect the hearing, these were soon dispelled, as the intensity of the business made all the actors - Sheriffs, prosecutor fiscal, solicitors, social workers, court officers, clerks, etc. – become absorbed by the 'game'. This was evident when there were issues - which was often - that disrupted the flow of the business and revealed the more human nature of the practices at the Sheriff Court.

The court observation was affected by two variables: the size of the business and the capacity of the legal actors to deal with it swiftly. For example, in one court a relatively small quantity of cases took longer than expected due to the inexperience of a trainee prosecutor fiscal. In another court, due to traffic disruption, the court started later than usual, and this delayed the court schedule leading to it finishing very late. On average the observation lasted between five to seven hours. It usually began between nine or ten in the morning, extended until twelve or one in the afternoon, when the hearings stopped for a lunch break. The hearings resumed again around two or three until the business was over. As a final point, I was allowed to take notes in the field which I later used to supplement the interviews transcriptions for my data analysis.

Diagram 1: Generic Sheriff Court Layout



4.3.3.3. **A note on the non-use of statistics**.

Initially, another way I wanted to triangulate the data obtained during my fieldwork was using statistical analysis available on judicial practices. Every year the Scottish Government publishes a report entitled 'Criminal Proceedings in

Scotland'. While the first official statistics can be traced back to 1928, since 1980 these reports have been published on an annual basis. Currently, these reports are produced by the 'Justice Analytical Services' division of the Scottish Government. Thus, this seemed to be a relevant database in which to look for patterns in sentencing.

Since the reports that are published contain only aggregated data of all the courts in Scotland, I contacted 'Justice Analytical Services'. I asked if they could send me disaggregated data by Sheriffdom excluding Justice of Peace and High Courts, which they kindly agreed to do. Furthermore, to better understand the nature of the data, I met with them on 9 February 2016.

During the meeting, they informed me of several aspects of the data that I had until then – not appreciated. Contrary to what I thought, the data comes from a 'Criminal History System (CHS)' which is a database managed by Police Scotland. In the annexes of the 'Criminal Proceedings Scotland', it is explained that this is a 'central database used for the electronic recording of information on persons accused and convicted of committing a criminal act' (Justice Analytical Services , 2018, p. 80). While the data is held and managed by the Police, the Crown Office and Procurator Fiscal Service[9] and the Scottish Courts and Tribunal Service feed the CHS from their internal database. Thus, this data does not come directly from the court system, but rather in an indirect way.

However, other issues led me to decide not to include these statistics as a method for analysis and only as a mere reference for understanding the field. The way the reports have been organising the data relies upon several technical decisions that do not reflect legal practice. For example, there is a division between 'Crimes' and 'Offences' which makes sense for continental criminal law but has no legal basis in the Scottish penal system. Furthermore, there were some issues related to the way the data has been recorded by some courts and, as I am going to explain in the findings chapters, some sentencing practices that were not reflected accurately by the statistics.

[9] In Scotland, the public prosecutor is called Procurator Fiscal.

Therefore, I opted to use the statistical data provided only as a reference that could allow me to get a 'flavour' of the field but not as a method to triangulate the data.

4.4. Data analysis

As I explained in the previous chapter, Bourdieu's theory of practice provides ontological and epistemological positions that influence the analysis of the data. Furthermore, Bourdieu's theory emerged from his earlier fieldwork and was constructed taking into account his empirical work studying social practices. Thus, from this perspective, the theory of practice is not only a group of concepts that inform data analysis (Layder, 1998) but rather it is also an epistemological position that helps us to make sense of the data we are exploring.

The transcriptions of the interviews were analysed using the qualitative data analysis software NVivo 11. The notes of the fieldwork observations were analysed manually. As I mentioned above, before sending the audio recording to be transcribed, I listened to them again to start to familiarise myself with the data. Thus, I began a process of coding through the identification of themes, using both an iterative process that came from the analysed data and an 'aprioristic' approach provided by practice theory (Ryan & Bernard, 2003, p. 88). Subsequently, I started to index and sort the themes, which provided me with 'trees of nodes' that discussed different micro-aspects of the sentencing practice. For example, a main node aimed to explore how the Sheriffs described their sentencing process (Node: 'sentencing process') and another one aimed to explore the interactions between Sheriffs and other legal agents (Node: *otros agentes*). It is worth noting that some of the nodes were named in Spanish and others in English. I think this reflected also the internal or subjective process of trying to understand the data through a contrast between the field I was studying and the Chilean field.

The next phase was trying to make sense of the analysed transcriptions in terms of practice. Once again this was an iterative process from the theoretical and

methodological implications and what had emerged from the data. In order to understand the relationship between my data and the theory, Layder's adaptive theory (Layder, 1998; 2013) – which is a theory of data analysis – was very helpful to the process. The more critical aspect of this part of the analysis - as Layder warns - was to be able to understand how the theoretical concepts are aimed to 'guide the analysis, not to determine or preconceive it' (Layder, 2013, p. 134).

The challenge, at this stage, was to inquire how the different themes and the 'trees of nodes' could be pieced together as a practice. This is one of the more tricky aspects of Bourdieu's theory of practice, because, 'the logic of practice can only be grasped through constructs which destroy it as such' (Bourdieu, 1980/1990, p. 11). The process required a further immersion in the data, which also produced some new nodes and the re-sorting of some trees of nodes.

From this process, the first three findings chapters emerged. The first findings chapter aims to reflect the locality and temporal dimension of practice. The second findings chapter seeks to explore the sentencing process through the interactions between the sheriffs and the other legal agents. Finally, the third findings chapter focuses on the decision-making itself, through the analysis of the use of different disposals. Therefore, through the process of making sense of the themes and 'tree of nodes' as pieces of practice, I was able to outline three different dimensions of sentencing that, if they are read together, attempt to provide an organic depiction of it. The final stage of the data analysis required, again, an iterative process between theory and the empirical data, aiming to set the grounds for an interpretative explanation of the Sheriffs' logic of practice. From this analysis, and shaped by the three previous findings chapters, the fourth findings chapter emerged.

4.5. Conclusions

In this chapter, I have described the process of my research design, and its evolution during the negotiation process and fieldwork. In this regard, I continued with some of the discussion from previous chapters linked to the

epistemological and methodological dimensions of research in practice. In particular, I examined the role that my positionality as a foreign lawyer researching in Scotland played in this research. After a long process of negotiation, the access I was granted, and the dynamics emerging from the fieldwork, allowed me to use mixed methods to explore sentencing practices better. In the next chapter, I am going to briefly examine some important aspects of the Scotland field, to contextualise this study.

CHAPTER 5: The Scottish Legal Field

In this chapter, I have tried to contextualise or at least explain some aspects of the Scottish field that are relevant for my research. In the first section, I discuss how this small nation has developed a unique identity both in the legal field but also in a more politically understood dimension of the criminal justice system. Section two deals with the relationship between poverty and crime. Then, sections three and four deal with a structural depiction of the Scottish field, where I explain the different criminal courts and criminal procedure at the Sheriff Court. Sections five and six focus on the actors, explaining how individuals become part of the legal field and, in particular, how you become a lawyer and how you become a judge. Finally, sections seven and eight present statistics on the use of disposals and the length of sentences.

5.1. A small nation with a unique identity.

Scotland is a relatively small nation; recent reports estimate its population to be around 5,424,800, which is a historical record high (NRoS, 2018, p. 2). However, the most populated areas in Scotland can be found in the so called ‘central belt’, which encompasses, roughly, from the Council of North Ayrshire and Inverclyde in the West to the councils of Fife and East Lothian in the East. The average for Scotland is 70 people per square Km, however, at the extremes, we can find 3,555 people per sq. km in Glasgow and 9 per sq. km in Na h-Eileanan Siar. The density in the northern areas like the Highlands or the Islands, and in the south, in Dumfries and the Scottish Borders, is lower than the national average (NRoS, 2018, p. 25). This has several consequences for the Scottish Criminal Justice System, for example, more than a third of the Sheriff Courts in Scotland, are located around the central belt.

On a political dimension, it worth noting that since the Acts of Union of 1707 Scotland has been part of the United Kingdom. One of the most pervasive consequences of the union was that the Scottish Parliament was replaced by a Combined Parliament for Great Britain that has sat in Westminster ever since. However, the fact that, historically, Scotland has had a lower population than

England meant that the ‘Treaty of Union’ created 45 Scottish constituencies, each with a Member of Parliament in the House of Commons, and 16 Scottish members of the House of Lords – in both cases, much fewer than the number of seats England has. This reduced the amount of self-determination of Scotland in the union. Nevertheless, under Article 19 of the Treaty of Union, the Scottish legal and judicial system remained unchanged, and as a consequence of this, the treaty ensured that Scots law would remain the law of the land in Scotland. That said, under the Union, the UK Parliament became the legislature that makes the laws.

Thus, while Scotland is part of the UK, its legal system and law has evolved in a legal order that - despite similarities to and some influence of the English law - ‘has assiduously cultivated the belief in a special historical relationship with the community and the Scottish personality’ (Farmer, 1997, p. 184). Thus, when one stresses the uniqueness of Scots legal order, this not only involves a unique normative tradition, but a wider legal field that encompasses the evolution of unique legal and judicial institutions on one side, and a legal culture and habitus of its own, on the other (Farmer, 1997; Tata, 2010).

More recently, 1997’s devolution referendum - which led to the creation of the Scottish Parliament in 1999 - and the devolution of powers it entailed, has made possible a debate on the distinctiveness of the Scottish criminal justice system, particularly when compared with England and Wales. According to some of these accounts (McAra, 2008; Mooney, et al., 2015; Scott & Mooney, 2016), the Labour-Liberal coalition Scottish Governments between 1999-2007, during the Premiership of Tony Blair and New Labour, ‘de-tartanised’ the Scottish CJS. The Scottish Government’s policies relating to the CJS became more aligned with the ones in England. Conversely, since 2007 and under the premierships of Alex Salmond and Nicola Sturgeon from the Scottish National Party, they argue that Scotland has experienced a ‘re-tartanisation’.

Tata (2010), has argued that while it is true that the ‘de-tartanisation’ introduced several changes to the judicial practice (the use of risk assessments, for example), this had a limited effect (Tata, et al., 2008; Tata, 2010; McNeill, et al., 2009). However, his argument could be equally applied to the ‘re-

tartanisation' process. This is so because the main argument here is the capacity of practitioners to, at some limited extent, resist or adapt those changes or reforms that do not reflect their current practices. In other words, the resistance may be less because of the existence of a 'Scottish' identity but rather because public policies fail to understand the particularities of a given field and its practices. This is what McNeill et al. (2009) calls the 'governmentality gap' - the 'contingent relationships between changing governmental rationalities and technologies on the one hand and the construction of penality-in-practice' (p. 420).

One of the direct consequences of the process of 're-tartanisation' for sentencing was the CJL-2010 Act. This piece of legislation encompasses a broad range of issues. For the current study, three aspects of this law are particularly relevant. Firstly, the act introduced the SSC, the main objectives of which are to (a) promote consistency in sentencing practice, (b) assist the development of policy in relation to sentencing, and (c) promote greater awareness and understanding of sentencing policy and practice'. Secondly, section 17 introduced a presumption against the imposition of a custodial sentence for a term of three months or less. Thirdly, the Act rebranded community sentences as CPOs and reshaped the legal mechanics of imposing them. In other words, instead of having different regulations for probation or unpaid work, the new framework unified the provisions altogether. This allows Sheriffs to tailor orders according to what they may see fit and mix different community sentences, simplifying this process. As Hutton and Tata (2010) explained, these changes obeyed to a twofold aim of the Scottish Government: to reduce custodial sentences and promote the use of community sentences. In particular, these changes were aiming at persuading Sheriffs to use community sentences as an alternative to imprisonment.

In a political context where penal populism is common, at least among common law countries, this act was quite progressive in some aspects. More importantly, as I see it, the SNP government in Scotland has undoubtedly taken the re-tartanisation of criminal justice seriously in attempting to craft a Scottish criminal justice system that has a distinctive and more progressive approach than its neighbour in the South. Therefore, one of the aspects that inspired my

research was to explore how the aspects of this Act - that aimed to change sentencing - had impacted practice. In other words, to address the 'governmentality gap' between the intentions of the Government and the Scottish Parliament to change sentencing and the real impact that the act had in sentencing practice.

5.2. The Scottish Penal Field

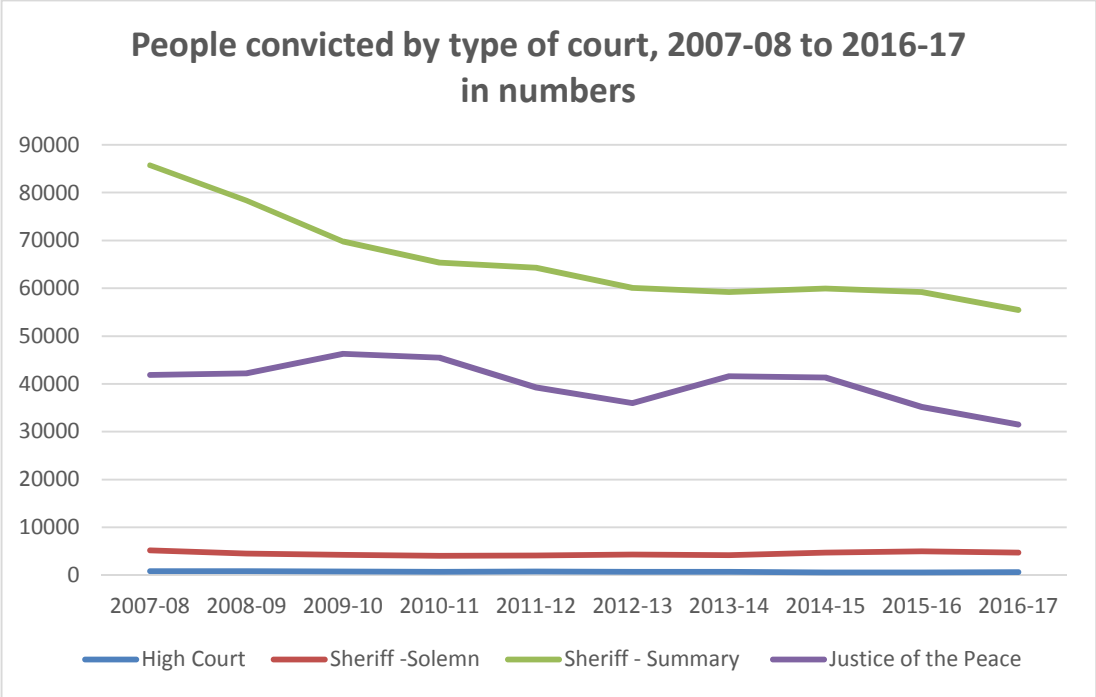
In this section, I am exploring different aspects of the uniqueness of the Scottish legal field. Firstly I am going to explain the hierarchy of criminal courts and their sentencing powers. Then, I shall discuss criminal procedure at the Sheriff Court. Next, I will offer a brief description of the paths to becoming a lawyer in Scotland. Finally, I will discuss how one can become a Judge, and in particular a Sheriff, within this field.

5.2.1. Criminal Courts in Scotland and the Sheriff Court

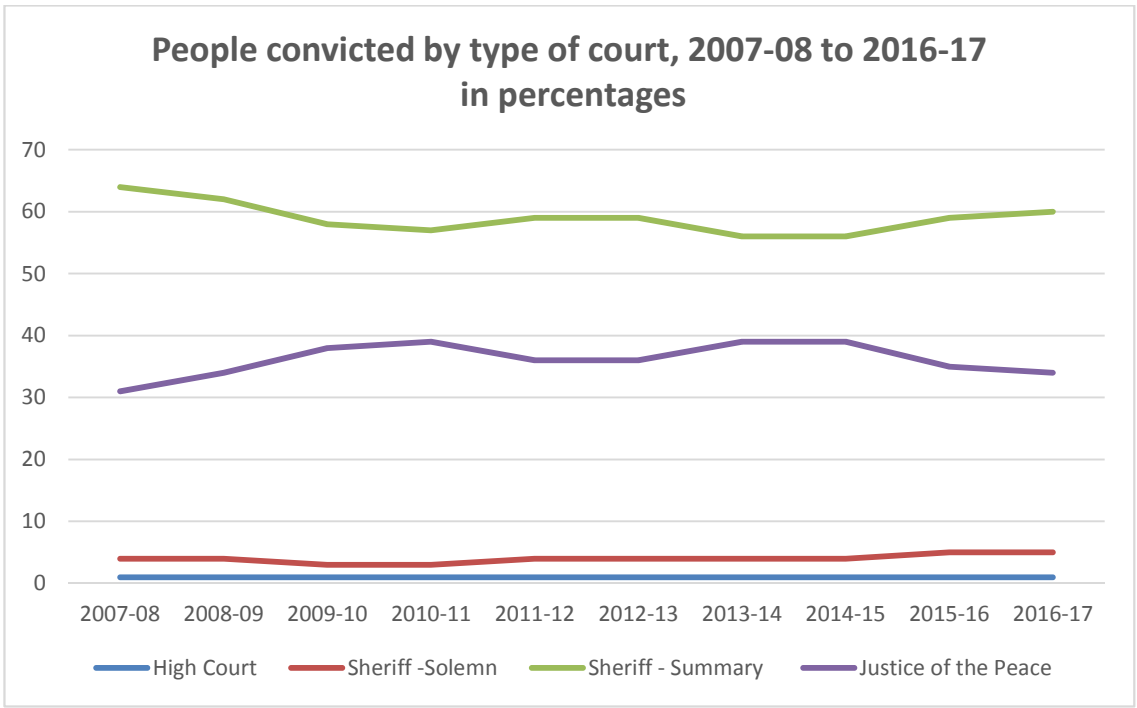
There are currently three criminal courts in Scotland: the High Court of Justiciary (HC), the Sheriff Court, and the Justice of the Peace Court (JoP). The basic corpus of Criminal Procedure in Scotland can be found in 'The Criminal Procedure (Scotland) Act 1995' (CP-1995 Act) and the 'The Criminal Procedure Rules 1996'. The High Court deals with the most serious offences such as murder, rape or any offence that the prosecution – or in specific cases the Sheriff Court - think is serious enough to be tried by them. Trials are carried out before a single Judge and a jury of fifteen laypersons. As a consequence of this, the HC only deals with a relatively small number of cases. As the graphs 1 and 2 show us the percentage of people convicted in this court is less than 1% of all the cases that are brought to the courts. The Sheriff Court is the busiest court in Scotland, and during the last ten years between 60-68% of convictions in Scotland were imposed by this court. Finally, the JoP deals with less serious crimes, such as speeding, careless driving and some cases of breach of the

peace. It is the second busiest court in Scotland, and during the last decade they have imposed annually around 31-34% of convictions.

Graph (1) People convicted by type of court, 2007-08 to 2016-17 in numbers (Scottish Goverment, 2018a)



Graph (2) People convicted by type of court, 2007-08 to 2016-17 in percentages (Scottish Goverment, 2018a)



As shown in diagram two below, while the High Court has the broader sentencing options, the JoP has more limited options and powers. It worth highlighting as Graph 1 and 2 show us that most of the convictions come from the Summary Sheriff Courts (which can impose custodial sentences up to a year) and the JoP. Together they account for the 94% of all the convictions imposed in the year 2016-17. Thus, this shows the relevance of exploring the lower courts.

Diagram (2) Sentencing Powers of the Scottish Criminal Courts (CP-1995 Act)

High Court	Sheriff Court (Solemnn Procedure)	Sheriff Court (Summary Procedure)	Justice of the Peace Court
•Custodial Sentence: Up to life. •Supervision: Up to 3 years. •Unpaid Work: Up to 300 hours. •Fines: Unlimited	•Custodial Sentences: Up to 5 years. •Supervision: Up to 3 years. •Unpaid Work: Up to 300 hours. •Fines: Unlimited.	•Custodial Sentences: Up to 12 months. •Supervision: Up to 3 years. •Unpaid Work: Up to 300 hours. •Fines: Up to £10.000	•Custodial Sentences: Up to 60 days of imprisonment •Supervision: Up to 3 years. •Unpaid work: Up to 100 hours. •Fines: Up to £2500

5.2.2. The Criminal procedure at the Sheriff Court

At the Sheriff Court, there are two different procedures to deal with offences. Solemn procedure, in which the Sheriff will sit during the trial with a jury of fifteen laypersons, and summary procedure, in which the Sheriff sits alone. As outlined in diagram 2, the different procedures limit the Sheriffs' sentencing powers in different ways. As noted above, solemn procedure is used for more serious offences, which in practice translates to fewer cases. In 2015-16, of all the Sheriff Court Criminal business only 7% were solemn cases.

It worth noting that the Sheriff's sentencing powers have changed over the last twenty years. Until May 2004[10], under solemn procedure, the length of custodial sentences could not exceed three years. Also, until December 2007[11], under summary procedure custodial sentences were limited to a maximum of three months (or six months for re-offenders). Finally, the Court Reform (Scotland) Act 2014 created the Sheriff Appeal Court, which now hears appeals from summary proceedings and bail decisions solemn proceedings.

[10] Section 13 Crime and Punishment (Scotland) Act 1997

[11] Section 45 Criminal Proceedings etc. (Reform) (Scotland) Act 2007

Concerning procedure, the prosecution first presents a document that outlines the charges against the accused. Under solemn procedure, this document contains a brief narration of the basic facts of the offence and is called an 'indictment'. Under summary procedure, the document is called a 'complaint', and it only contains the name of the offences. The accused might be summoned to the court, or appear from detention if he/she was arrested. At court, the prosecution reads the charges, and the accused has the opportunity to submit an early plea and accept the charges. If the accused does plead guilty, the case moves to the sentencing stage. If the accused submits a not guilty plea or makes no plea, the procedure moves forward to discuss if there are concerns that the accused might commit new offences or flee in the period leading up to the trial. If there are no such concerns, the Sheriff is likely simply to ordain the accused to appear in court. If there are concerns, the Sheriff is likely to either impose a bail order on the accused or place him/her on remand while awaiting the trial diet. Then the hearing will be adjourned, and a new hearing, very often an intermediary diet, will be set to deal with pre-trial matters. The accused can submit a guilty plea even during the trial diet.

Under Scottish criminal procedure (see section 196 of the CP-1995 Act), an accused who pleads guilty will normally receive a 'discounted' sentence. The earlier the guilty plea is tendered, the greater the reduction in sentence is likely to be. In addition to this formal system of sentence discounting, the prosecution may negotiate informally with the accused's lawyer to drop some charges in exchange for a guilty plea in others (or accept a guilty plea in relation to a lesser charge).

In any case, whether the offender pleads guilty or is found guilty, before passing sentence the Sheriffs can, and very often do, defer a sentence for backgrounds reports. There are also several circumstances when the Sheriff *must* ask for CJSW-Reports. These include, for example, when the Sheriff is considering a custodial sentence but the offender has not been previously sentenced to

imprisonment[12] or is aged over 16 and under 21.[13] Likewise, if the Sheriff is considering imposing a CPO, they are also required to ask for a report to assess the suitability of the offender.[14] In these cases, a new hearing is scheduled in order to provide sufficient time for the reports to be prepared. These rules apply to both solemn and summary procedure cases.

As I will explain in more detail during the next chapter, whenever the Sheriff defers sentence, regardless of whether it is under summary or solemn procedure, all deferred cases are subsequently dealt with together in what is called the "Remand Court". Without prejudice of discussing this process in more detail in the following chapters, I am going to outline briefly how the sentencing diets play out. After the reports are prepared, and the procedure resumes, the Sheriff may or may not want the PF to provide a summary of the facts. Afterwards, the defence solicitor can present a plea in mitigation, in which, on behalf of their client, s/he can try to persuade the Sheriff to consider any mitigatory circumstances. As I will discuss in more detail in chapters seven and eight, the plea often involves suggesting that the Sheriff might impose a non-custodial sentence. After the Sheriff has read the report, heard the PFs and the solicitors, s/he will be ready to impose a sentence.

5.2.3. Becoming a Lawyer

In the Scottish legal field, there is a clear division of juridical labour. On the one hand, you have legal scholars who pursue an academic path by the acquisition of educational titles which will secure them a specific position in the academic legal field. On the other, you have (real) lawyers who are required to pursue particular paths within a legal hierarchy that, to a certain extent, reproduces a social hierarchy among the dominated ‘fractions’ of the dominant class (Bourdieu, 1991a; 1986; 1979/1984). In this manner, the ‘entrance fee’ is different depending on the path that individuals want to -or can- follow.

[12] Section 204 CP-1995 Act

[13] Section 207 CP-1995 Act

[14] Section 227B CP-1995 Act

The Scottish legal practitioner field is divided between Solicitors and Advocates (and more recently, Solicitor-Advocates). Solicitors are the primary providers of legal services in the Scottish legal market. The main difference between Solicitors and Advocates is that Solicitors do not have rights of audience before the High Court. Consequently, if a case has to go to the High Court or the Court of Session (the highest civil court), the solicitor will have to hire the services of an Advocate to represent the client before the Court. Alternatively, the solicitor can try to get 'higher rights of audience'; that is, to gain the right to appear at the High Court. However, becoming a solicitor-advocate requires undergoing a further qualification process. Overall, the requirements for becoming a solicitor or an advocate are onerous and the positions are not easily attained, especially by those from low income backgrounds. This does not mean that the composition of the legal field has not changed in the last decades, but such diversification that has taken place has not ended social stratification within the legal profession (Melville & Stephen, 2011).

As in other common law jurisdictions - in contrast to civil law ones – the Scottish legal field is oriented to practice. While this seems to be obvious, it depicts a stark contrast with the civil law traditions that depends more on a '*Professorenrech*' (Bourdieu, 1986, p. 6). This is a legal tradition where academic legal 'doctrine' and concepts heavily influence legal practices. Probably one of the best examples of this difference is the fact that in English the theoretical study of the 'law' is called 'jurisprudence', which implies a subordination of theory to practice. On the contrary, in continental jurisdictions, legal scholars have a legal competency of determining the significance and meaning of the law or legal statutes. Thus, there is, to a certain extent, a subordination of practice to theory. The primacy of practice, in the Scottish field, makes legal experience a key qualification not only to progress in the legal profession but also as a virtue and a symbol of distinction and recognition.

To become a lawyer in Scotland, you normally need to have a Scots law degree from one of the ten Scottish Universities that are accredited to provide the degree, which usually lasts four years. This degree is expected to comply with the syllabus prescribed by the Council of the Law Society of Scotland. Afterwards, applicants are required to obtain the 'Diploma in Legal Practice'

from one of the six Scottish Universities that are authorised to provide it, which lasts a further nine months.[15] If the applicants have managed to pay the fees and obtained appropriate grades successfully, they are now required to apply for an entrance qualification issued by the Law Society of Scotland to certify that the applicant is a fit and proper person to enter into a traineeship. The applicant is expected to find a law firm where they can be trained under the supervision of a Scottish-qualified solicitor over a period of two years. Luckily for the applicants, the traineeship is paid (Law Society of Scotland, 2018).

As I mentioned before, there are two different paths in the Scottish Legal Field. However, both of these require the applicants to obtain the qualifications I described above. The main difference is that after finishing the traineeship, applicants will be able to apply to become solicitors, whereas if they want to become advocates further steps are required. Among others things, they are required to undertake a further (unpaid) traineeship - called 'pupillage' or 'devilling'- for a period of eight or nine months (Faculty of Advocates, 2009). Another relevant aspect is how the field seems to be stratified by temporality. For example, to become a solicitor-advocate, a solicitor is required to have at least five years of court experience in the kind of court they are requiring rights of audience (Law Society of Scotland, 2018).

Advocates can apply to be considered for the appointment as 'Queen's Counsel' after thirteen years of practice (Judiciary of Scotland, 2014). As the Scottish Judiciary's guide for QC applicants describes it, 'Queen's Counsel is primarily a mark of distinction in advocacy' (Judiciary of Scotland, 2017c, p. 1). These examples are a recognition of 'legal ability and experience', which translates into having a 'high-quality practice based on demanding cases' (Judiciary of Scotland, 2017c, p. 2). This means an institutional recognition of the accumulation of a legal capital through years of successful strategies and investments in shaping a specific professional path within the field.

5.2.4. Becoming a Sheriff

[15] This requirement was introduced in January 1980 to 'compensate for the perceived deficiencies in apprenticeships' (Paterson, 1988, p. 88).

The statutory eligibility for the Sheriff's office can be found in the Courts Reform (Scotland) Act 2014. Section 14 (1) of the Act provides that an individual will qualify for the appointment if either that individual held judicial office immediately before applying or that person has been a solicitor or an advocate for at least ten years before the time of the application (Courts Reform (Scotland) Act 2014).

As I mentioned earlier, this Act reshaped the sheriff court, introducing a new hierarchy of offices. Currently the judicial offices are: (a) Sheriff Principal, (b) Sheriff, (c) Summary Sheriff, (d) Part-Time Sheriff, (e) Part-Time Summary Sheriff (s.14(2)). This Act also allows Sheriff Principals to reappoint retired sheriffs that have not yet reached the age of seventy-five (s.13) as Sheriffs, Summary Sheriffs or Part-Time Sheriffs. The Act also introduces the Sheriff Appeal Court, which further reshapes the sheriff judicial offices. All the Sheriff Principals, by the sole fact of being such, hold office as Appeal Sheriffs (s.49) and the Act also allows the appointment of Sheriffs - with at least 5 years of experience being a Sheriff - as Appeal Sheriffs. However, this appointment does not mean that they cease to be a Sheriff but rather they will ‘continue to act in that capacity’ (s.50). Until the commencement of the 2014 Act, the only Sheriffs’ offices that existed were Sheriff Principals, Sheriffs and Part-Time Sheriffs (Sheriff Courts (Scotland) Act 1971).

Concerning the appointment procedure itself, after devolution and in accordance with section 95(4) of the Scotland Act 1998, Sheriffs are appointed by the First Minister of Scotland after consultation with the Lord President. In 2002, in order ‘to create a more open and accessible system’ (Judicial Appointments Board for Scotland, 2016) the Judicial Appointment Board for Scotland was introduced on an administrative basis. In 2008, to ensure its independence, the Board was given a statutory basis by the Judiciary and Courts (Scotland) Act 2008. The aim of the Board is to make recommendations of suitable applicants to the Scottish Ministers; it does not itself appoint any candidates. As I will discuss later in chapter nine, several of my participants were appointed long before the commencement of the 2014 Act.

5.3 Some statistics on criminal procedure

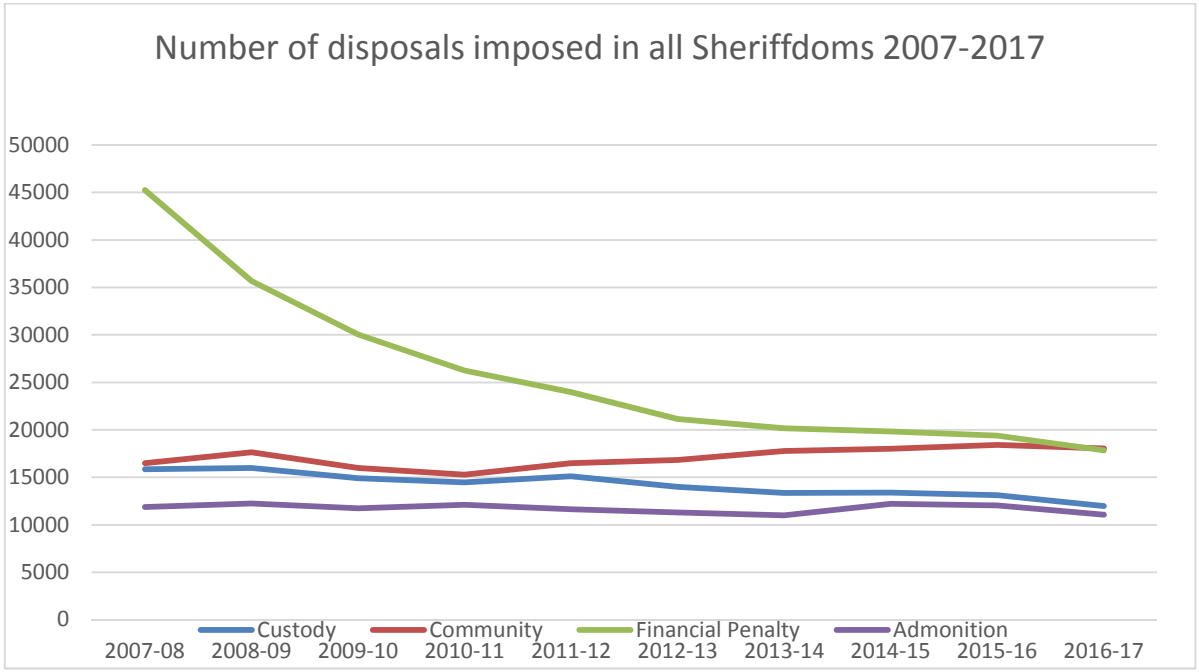
In this final sub-section, I am going to briefly discuss the statistics concerning two aspects of the Scottish sentencing field: The available data on the most used disposals and the length of the custodial sentences.

5.3.1. The most used disposals

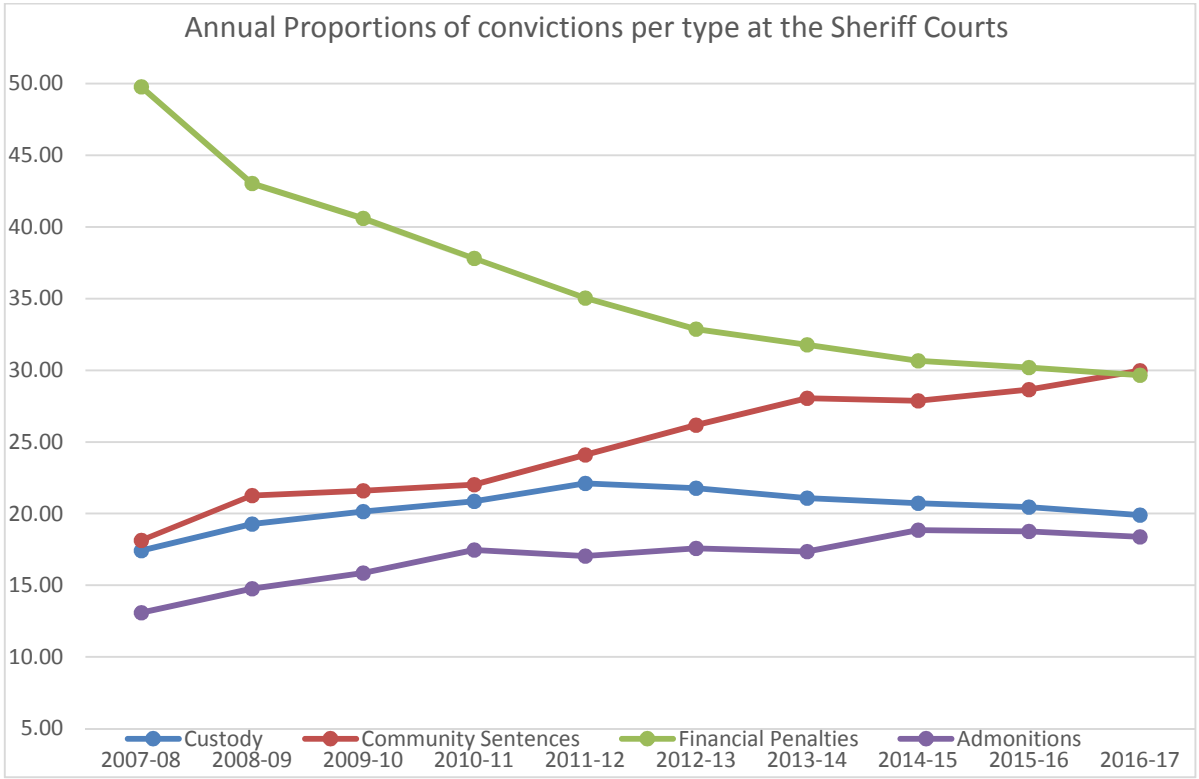
While Scottish Judges have several different disposals available, most of their decisions can be reduced to four disposals: custodial sentences (14%), community sentences (20%), fines (49%) and admonitions (16%) (Scottish Goverment, 2018a). These figures apply to the criminal justice system as a whole, but I requested data for the Sheriff Courts alone from the Scottish Government Statistical unit, which they provided. I used this data to outline graphs (3), (4), (5) and (6) below.

In graph 3, the evolution of each of the four disposals between 2007-2008 and 2016-2017 can be seen. While custody has remained at around 13-15% of all the disposals passed every year, the fall in the use of financial penalties has been mirrored by an increase in community sentences and admonitions.

Graph (3) Number of imposed convictions at Sheriff Courts level by type of disposals, 2007-08 to 2016-17



Graph (4) Percentage of imposed convictions at Sheriff Courts level by type of disposals, 2007-08 to 2016-17



Firstly, I took the different number of disposals imposed in a given year as seen in graph 3 above. Then, to compare and contrast, I calculated percentages for each separate disposal in that year. Finally, I used those percentages to produce graph 4 above. The main issue with using just the number of disposals imposed every year is that the total number of cases brought to court each year has been falling. In this regard, graph 4 offers us a better illustration of how sentencing practices have varied in the last decade. I discussed with the Sheriffs in which cases they used each of the different disposals and why and I report my findings in this respect in chapter 8.

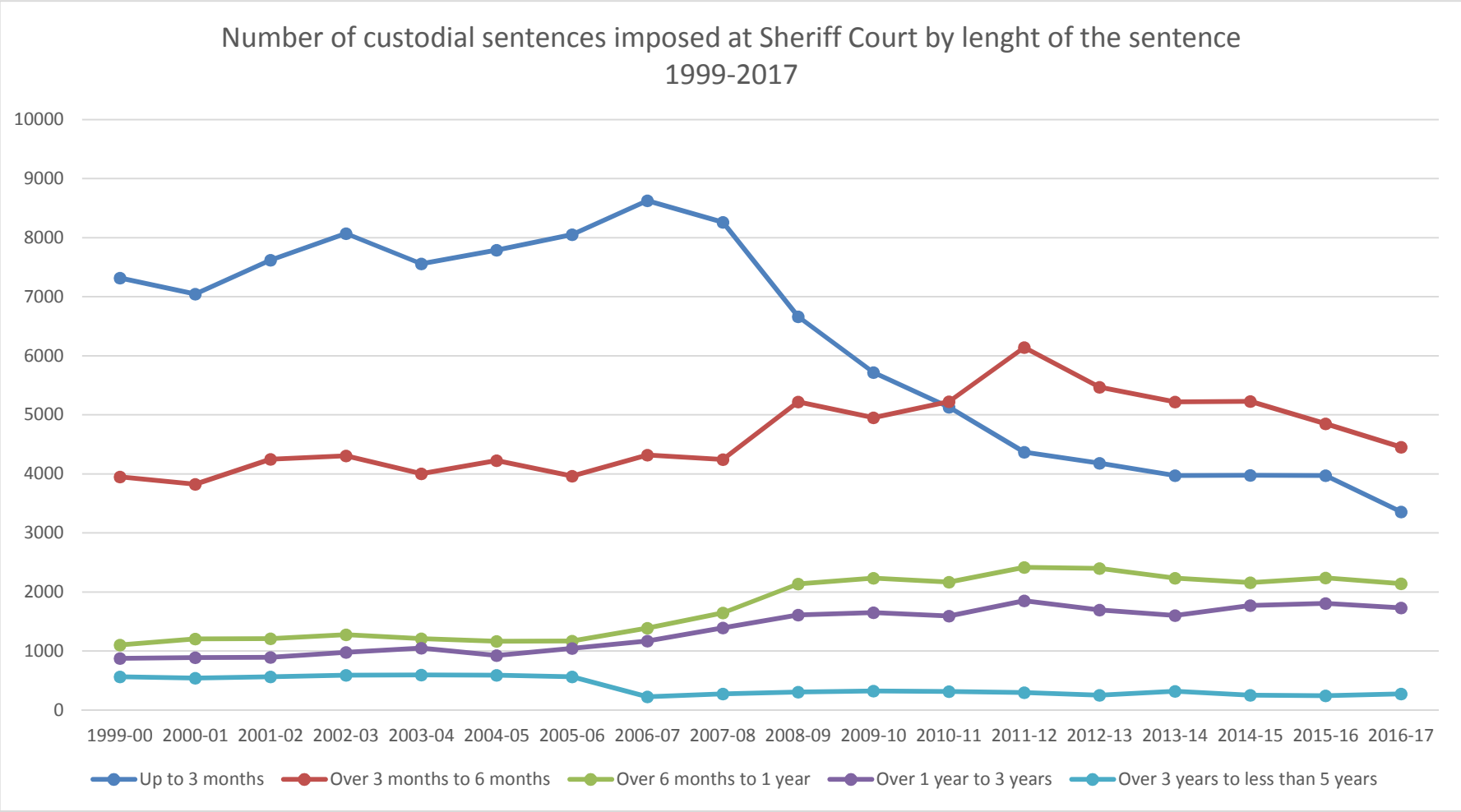
5.3.2. The length of the custodial sentences

A final point that is relevant is the evolution of the length of custodial sentences. In this particular case, I opted to use the available data since 1999-00 because I wondered if the statistics would reflect the changes in the sentencing powers of the Sheriff Courts. As noted earlier, the maximum sentence permitted under Sheriff Court solemn procedure increased (in May 2004) from three years to five years imprisonment and the maximum sentence permitted under Sheriff Court summary procedure increased (in December 2007) from three/six months to twelve months imprisonment. It worth noting that if an individual was sentenced for several different offences, the custodial sentence recorded would be the sum of the different offences, which may distort the records.

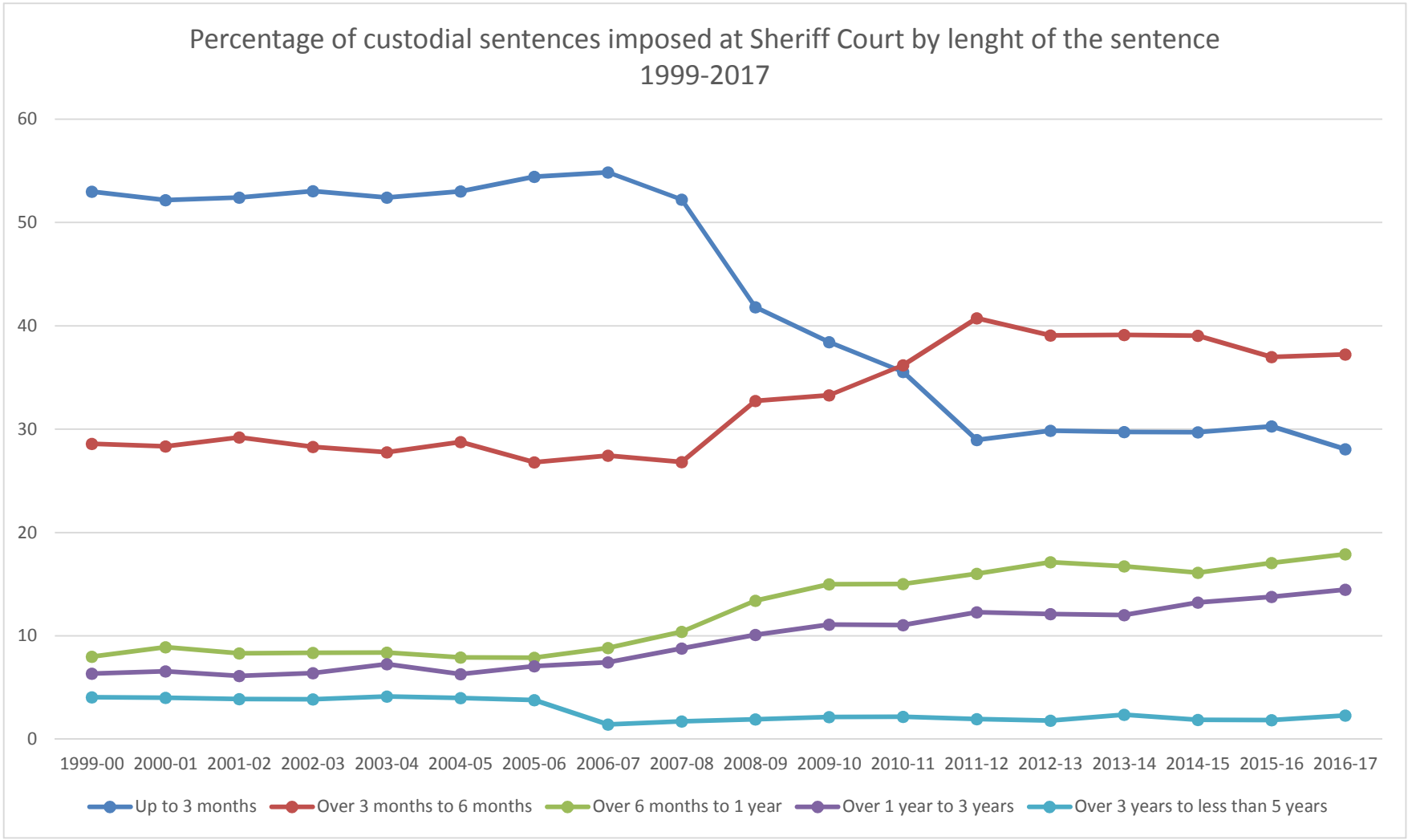
From the graph alone it is hard to tell if the increased sentencing powers under solemn procedure did impact on the length of sentences. However, the increased sentencing powers at summary level is accompanied by a decline in the use of short custodial sentences of up to three months. This is interesting because this trend began even before the introduction of the presumption against short sentences. During the same period, the length of sentences over six months and up to three years starts rising. Moreover, custodial sentences between three to six months start rising as sentences up to three months decline. This might be because Sheriffs started to sentence more harshly, but equally it might be because the prosecution started to bring more serious cases under summary procedure that would have previously been prosecuted under

solemn procedure. In any case, around 2011 when CPOs and the presumption against short custodial sentences were introduced, custodial sentences of up to three months declined but sentences of between three and six months and of between 6 months and 12 months increased.

Graph (5) Number of custodial sentences imposed at Sheriff Courts level by length of the sentence, 1999-00 to 2016-17



Graph (6) Percentages of custodial sentences imposed at Sheriff Courts level by length of the sentence, 1999-00 to 2016-17



5.4. Conclusion

In this chapter, I have tried to explain several contextual aspects that inform my research. Firstly, in section one, I noted that despite Scotland being a small nation and part of the UK, it has a unique legal identity. In section two I explored the different particularities of the Scottish Legal Field which set the context for my research study. This section was divided into four sub-sections. Firstly, I explained the structure of the criminal courts in Scotland. This section established the relevance of the Sheriff Courts in Scotland which, despite being a lower court, deal with 60% of criminal business. This is one of the reasons why I decided to focus on these courts. Then, I outlined the basics of Scottish criminal procedure, which set the normative context of the practices I observed. Subsections three and four provided a brief insight into the particularities of the division of the legal labour in Scotland. This entailed a brief analysis of how you become a lawyer and how you become a Sheriff. In this regard, as I will explore in chapter nine, I am going to discuss how this stratification of legal labour has a direct impact on the trajectories of Sheriffs. Finally, section three provided descriptive statistics on the most frequently used disposals and the length of custodial sentences. This informed by decision to focus on the use of only four types of disposal – custodial sentences, community sentences, fines and admonitions – as these account for the vast majority of disposals used in criminal cases in the Sheriff Courts.

In the next chapter, the first of three findings chapters, I will present the results of my study of practice. To do so, in chapter six I am going to describe the temporal and spatial dimensions of sentencing. In chapter seven, I examine how the Sheriffs perceive the other penal actors involved in the sentencing process. Finally, in chapter eight I explore the practical rationales behind the use of different penal sanctions imposed by the Sheriffs.

CHAPTER 6: Sentencing: Scenes, Sets and Schedules'

Each court I visited had similar organisational procedures that determined the 'where' and the 'when' that judges occupy in carrying out their decision-making. Through non-participant observation and relying on shadowing methods I was able to witness first-hand how sentencing takes place in time and place. The first aspect I noticed was that it is not possible to reduce these practices to the Sheriffs' decision-making, to remove these practices from their milieu. As a consequence of this, we need to explore them, taking into account their material dimensions and their local contexts (Flemming, et al., 1992; Ulmer, 1997; Ulmer & Johnson, 2004; Mack & Anleu, 2007; Young, 2012). Despite the fact that the temporal and spatial dimensions of practices are undoubtedly different aspects, they are intertwined in their phenomenological manifestation. Sentencing practices must be carried out in the appropriate place and at a specific moment. These material dimensions of practices are often forgotten or neglected, at least in some scholarly understandings of sentencing that reduce it to the mere allocation of a sanction.

In this chapter, I am first going to describe and explore the spatial dimension of practice, the place or places where it is carried out and what these contexts can tell us about sentencing. I will then move on to explore the temporalities of practice, and how the Sheriffs' perception of their decision-making process can shed some light on our understanding of it. In brief, this first findings chapter aims to set the 'where' and 'when' of sentencing, and thus provide a first introduction to the analysis of sentencing as a practice.

6.1. Place or places for practice?

To a certain extent, sentencing seems situated in both visible and hidden places. The ritual performance that takes place in the courtrooms seems only to increase the perception that there is a 'black box'; that is, there are aspects of

practices that are private and, because of that, obscure. In this section I am going to explore the notion of the 'places' of sentencing.

6.1.1. Courtrooms

The courtroom is the most obvious place of sentencing practices. It is quintessentially the 'locus' where the debate concerning the individualisation of punishment and the decisions that go hand in hand with it are taken. Moreover, it is the place where, at an appropriate time, the legal rituals are performed. It is the space within which the penal actors, with their gowns and outfits, carry out the legal practices that will determine the fate of the accused.

Every time I visited a court either the Sheriff or a Sheriff Clerk mentioned when it was built. In some cases, it was a plaque which provided me with such information. Most of the buildings I visited were old and had been constructed in the late 18th or early 19th century. Regarding the internal distributions of the courtrooms, I saw different variations of the same theme, even in the same courts. The main idea seems to be that everything in the room must converge upon the bench of the Judge, or rather everything seems to be organized around the Judge in order to make their duty easier. The Judge's bench is elevated over the rest of the participants. This not only reflects the authority that judges have in the courtroom, it also allows them to control with their gaze everything that happens within the court.

Just in front of the bench there is a table at which the clerk, prosecutor and solicitor or advocates sit. The clerk always sits in front of the Judge, but since the table is at a lower position s/he does not block the view that the Sheriff has of the room. They also sit with their back to the judge, and look to the rest of the participants in the same way the Judge does, but below them. In some procedures, s/he tells the accused and the public what the Sheriff had ruled, seemingly fulfilling a role as a 'court crier', which is sometimes odd because s/he often has to repeat what has just been said by the Judge. The prosecutors and the accused's solicitor or advocate sit on each side of the table, perpendicular to but turned to face the judge.

At the left side of the Judge are the seats that are designated for juries, although when the courtroom is not used for solemn procedures, which is most of the time, you may find them empty. In front of the judge, and after the table where the lawyers sit, is ‘the dock’, the place where the accused is meant to sit. The dock is a very strange place. Some courts have a glass screen that separates the accused from the public, but the glass often disrupts the ability of the public to hear what is said in the other part of the court. However, the front part of the dock is completely open, there is neither glass nor cage; nevertheless it is a very symbolic cage.

In many cases, the accused waits for their turn in the public gallery, and hence, when they are called they go into the dock, the whole act of getting into that space, puts them in the middle of the room under the eyes of everyone and makes them a (usually) silent part of the theatrical performance of justice. In some courts, this place is connected to stairs that lead to the ‘depths’ of the court, where the accused on remand or those just sentenced to custody are kept. Since there is no cage, there is always a police officer sitting silent and close to the accused in the dock in order to keep the accused and the public under surveillance.

Finally, at side of the room opposite to the bench, behind the dock, we find the public galleries. While theoretically the Sheriff court is public, meaning that anyone can go there and observe the procedures, it is somehow clear that the courtrooms are no longer designed for that. This is more evident in the new courtrooms or in larger city courts, where you can find very small courtrooms where the space for the public galleries has been reduced to a degree where it only allows the accused and other formal participants like interpreters or witnesses to sit. Furthermore, probably the only times that the public galleries get crowded is during the selection of the jury. For this reason, it seems to me that the new courts have several smaller courtrooms and one or two larger rooms for special occasions or trials.

6.1.2. A space for the ritual performances of the law?

This physical space creates the set and scene in which the ritual of justice takes places. This is a bureaucratic ritual which has a symbolic dimension in which each of the penal agents have a role. Symbolically they embody a social function: to punish those who have broken the law. In a Durkheimian reading, one can argue that the prosecutor, the solicitor and the Judge are the embodiment of the rationalizations of punishment. I am confident that we can use Foucault, Elias or even Žižek to explore the symbolic dimension of the legal ritual further. However, I want to highlight how the sacredness of the ritual inevitably clashes with the mundane bureaucracy that criminal business requires. In the case of summary procedure this certainly creates a tension between the bureaucracy and the symbolic dimension. The larger the volume of criminal business, the bigger the managerial pressure to deal with all the cases, and the more that the 'ritual' becomes eroded by the mundane requirements of bureaucratic practice.

However, at first glance the legal rituals at the summary court look like an audience-less performance. Despite the fact that justice is, or is supposed to be, public, the practice of justice seems to be extremely secretive. It is not only the fact that the acoustics in the court are bad, but furthermore, lawyers do not explain what is going on to the public or the accused. This is somehow paradoxical because criminal procedures are rituals that are performed because they embody a public function but they are exerted for the most part without public audience or attention. Moreover, as I have said, even though the courtrooms can accommodate the public, and the hearings are indeed public, in practice they are not intended for having an audience. Ultimately, the communication with the community is carried out via local journalists who attend the hearings looking for headlines and news for their media outlets.

It was not until I was able to observe a solemn procedure trial that I was able to understand the purposes of the performances. During trial hearings at the High Court and under solemn procedure at the Sheriff Court, the audience of the legal performances is undoubtedly the jury, and - more symbolically - through them, the real audience is the whole community. In other words, one can argue that the legal ritual and its performance is ordained to be a communicative

expression of the punitive power wielded by the prosecution and the Judge ‘over the head’ of the accused. In other words, there are two potential audiences for sentencing practices: the offender - the one who gets punished - and the community - the place where the offence took place.

Nevertheless, most criminal business dealt with by the Sheriff Court is summary cases, and in most of these cases - as Sheriffs mentioned and I observed - the accused pled guilty; thus no trial was required. Therefore, the legal ritual can still retain its communicative dimension, mainly through the process of uncertainty that begins with the guilty plea and ends at the sentencing diet. However, as argued earlier, the pressure of the business erodes the ritual forms, imposing a rushed temporality, and thus, imposing a need for swiftness that collides with the unhurried rhythm of ritual, legal forms. Interestingly enough in almost all the Sheriff courts, the courtrooms are the space for both solemn and summary procedure, and thus the situs is the same. This fact that should encourage the reproduction of the ritualist legal forms is jeopardised by the volume of cases or ‘the list’. The main consequence of this is that the hearings at the RC seem to be performed excluding both the offender - who is there - and the public - if there is any.

It is not that the procedures are too fast or mechanical, but rather that the whole procedure seems to require the presence of the accused without their understanding or participation in it. Hence, prosecutors, advocates and Judges discussed the case in front of the accused, many times in a low voice, not allowing the accused to understand what they are saying. Furthermore, if he actually can hear, the technical language used might be cryptic to him. In some courts the Judge rarely talks to the accused, and the only interaction that the accused has with the Judge is indirectly when the Sheriff Clerk tells him what the Judge has ruled. As a consequence of this, we have a public hearing without a public, which aims to communicate punishment while completely excluding the accused from the process. One might argue that it seems that Judges and lawyers perform their roles only for themselves, or most likely, that society requires the social and symbolic interaction but it does not require an actual, engaged audience.

6.1.3. Chambers and the other ‘places’ of sentencing

You do not need to observe sentencing diets for too long to realise that much has happened ‘backstage’. In most, if not all, cases the Sheriff had prepared beforehand; s/he had read the reports. The question that arises immediately is: has the Sheriff already made their decision before coming to the hearing? Is there a ‘black box’ when it comes to sentencing? In the next chapter, I am going to discuss in detail how the Sheriffs make sense of the information provided to them. However, at this point I want to highlight that the ‘backstage’ of the sentencing diet is equally important to what happens ‘centre-stage’.

The use of shadowing methods allowed me to interact with the Sheriffs in a more personal manner than would be permitted by interviews. Since I spent a working day with the Sheriffs, every time we came out of the courtroom we would head to the Judge's chambers. Their offices struck me as a very intimate space. However, this feeling may be elicited by my own experience as a former practitioner. During my time at the prosecution service, there were periods when I spent more time at my office working than in my home. Thus - while I may be accused of projecting my own experiences onto my participants - I felt that being allowed in their offices was, to a certain extent, to be permitted to enter into a personal space.

This feeling was reinforced, because whenever the Sheriffs were in their chambers, they took off their wigs and gowns. This seemingly innocuous action had a significant symbolic charge. Whenever they were at the courtrooms, the Sheriffs performed their judicial role but in the chambers, as they dressed-down, they stop ‘acting’. Each of them continued to be very formal, but they were no longer fulfilling the judicial role as they did at the court. This difference between the way Sheriffs conduct themselves at Court and in the Chambers is difficult to convey in words. However, it helps to illustrate the meaningful differences between the spaces; between the centre and backstage. What amused me was that sometimes a gown, a wig and a more theatrical

posture was enough to make me fail to recognise the person I interviewed just moments ago, now in the ‘role’ of Sheriff.

There was, therefore, a contrast between the judicial performance I observed at court - with their full outfit and their unique enactment - and the cordial and friendly manners they adopted towards me when we interacted in the chambers. In this regard, they would either treat me as a foreign practitioner, a law student, or a mixture of both.

I was aware that the more time I spent with the Sheriff's, the more comfortable they were with my presence and with the questions I posed. This, in turn, allowed me to observe them dealing with some of their more bureaucratic work, such as signing papers or dealing with police warrants. In a few cases I had to wait in another office while the Sheriff met a solicitor or a prosecutor concerning a case. More critically, in a few instances, I was able to discuss the cases with the Sheriffs before the hearing and see how they prepared for the RC. On one occasion one Sheriff invited me the day before the RC to be with them while they read the papers.

Thus, within the constraints of my methods, I was able to observe the place where Sheriffs prepared themselves for the RC. This preparation often consisted of reading the papers and making notes - as I will discuss in the next chapter. Sometimes, it also involved asking another Sheriff their views on a complicated case. Chambers were also a social space in which the Sheriff could talk with the court social worker concerning a report or trying to get an offender a place in a particular programme. On some occasions, if the pressure of the business caught up with the Sheriff, they confided to me that they took some of the papers home to read them there. Thus, from the perspective of an observer that only had access to the hearings, you could grasp that the Sheriff prepared for it. In the Chambers was usually where this happened, and thus, it was the place for the ‘black box’ of sentencing. I am going to discuss the details of these preparations in the next chapter.

6.1.4. Courts and their Communities

Another ‘place’ or ‘locus’ relevant for sentencing is the local realities of the court jurisdictions. In this dimension, ‘place’ means the social-geographic features of the communities that are encompassed by the jurisdictions boundaries. For example, the population density, the socio-economic composition of the area or if they are predominantly urban or rural entities. In this regard, since my fieldwork involved visiting fourteen different courts; this meant travelling to an equal number of cities and towns all around Scotland. Then, in every court I visited, I listened to a large number of offences that occurred within the jurisdiction. These narratives, I realised, required me to contextualise them within the landscapes and communities that I observed on my way to the court.

In a certain way, I recognised that I had to look at these cities and towns with the same forensic gaze I use to observe the communities under my jurisdiction when I was at the prosecution service. Those streets, those people, those places and the social spaces within which were the background of the stories I heard in court. The communities that Sheriffs had in mind during our conversation of their practices; where both the victims and offenders, belonged. Therefore, understanding the Sheriffs' perception of their jurisdictions, the context where their court was located, became critical.

This knowledge of the jurisdiction which is the consequence of the resident Sheriffs being in the same court for several years also provides a unique knowledge of the individuals that live in that community. Although, as (Sheriff#1) explained, you do not know ‘...all of the community obviously, but the people that I deal with obviously I know them, I know the backgrounds’. This is particularly revealing because not only by reading a charge, but also reading a name, in some cases, a Judge may have an idea of who committed the offence, his or her background and what could or should be done. As two Sheriffs that have spent several years in his court explained:

> ‘...I do sometimes wonder if I know individuals too well. Whether it’s better or not… I personally think it’s a strength, I think it is better. I think it means that I can deal with cases more appropriately (...) The idea that a local resident Sheriff can be

> truly independent in the academic sense, intellectual sense, is unrealistic. It's always been the case that certain individuals, certain families will always come back again and again, and at a trial the Sheriff will know that the individual there has a string of convictions. So that's always been a fact of life. And at review hearings I may see an individual more than once, I'll get to know them quite well through their reports and through talking to them we discuss quite personal issues (...) On one or two occasions I have recused myself because I felt I know too much about an individual or I think I'll become too close to them. And I don't doubt my own ability to remain impartial but I might ask a colleague to deal with the trial and not me. I think that's only happened a handful of times, two or three times at most.' (Sheriff#5)

> '…this morning very many of these people who appeared I know from past experience, I've read reports, I know their mums. So of course that builds in to the knowledge bank that we bring to bear in sentencing. But I also know what matters to the community. I'm not going to distort my sentencing because of that, but of course that's another factor that I would bring to bear. So I think there are so many strands that have to be brought together in imposing any sentence on anybody. These are additional strands, I have that knowledge. I think it's beneficial. It has to be beneficial because [it is] sentencing an individual for an individual crime against a background of everything they bring with them. So the more I know about the circumstances in which a crime was committed, including what the public attitude or concerns are locally, yes, of course.' (Sheriff#7)

The two quotes above reveal to us how complex the practice for a Sheriff in medium and small communities can be in the long term. This also suggests, how the fact of reading the papers cannot be understood in isolation from the wider knowledge that a Sheriff has of their jurisdiction. This suggests that sentencing has to be contextualized by what experienced Sheriffs gain (and perhaps lose) from their time on the local bench.

What all these quotes tell us is how being on the bench, with the knowledge of the jurisdiction that this provides, very quickly sets a background for the studying of the papers, and by extension, for the way the cases are dealt with. This is not only limited to the knowledge of the most common offences, nor to getting to know repeat offenders. These experiences provide them with practical knowledge that allows them to create mental categories to help classify new offenders and offences. That said, none of this helps us to

understand the rationale behind their decisions. Even so, this is a start to helping us analyse practice as it happens rather than as it is theorized.

6.2. Time, tempo and the 'non-complex' complexity

As discussed in chapter three, time and the temporal dimension are a critical analytical element for the Bourdieusian analysis of practice. Bourdieu (1997/2000) warns us that the scholastic situation of the researcher 'implies, by definition, a particularly free relationship to what is normally called time' (p. 206), which may make us forget the unique temporality of human practices. It is a mistake to forget that sentencing is not the mere allocation of sanction in the abstract; to think that a mock sentencing exercise at a law school can retain, without no differences, the temporal and contextual dimensions of real practice.

If the courtroom is the place for practice, the sentencing hearings can only take place within that space and at specific moments. There is a 'time' for sentencing, and thus the court officers and the Sheriffs have to manage a court schedule, deploy time-management strategies to allow them to deal with the business without disruptions and within acceptable or tolerable timeframes. In this section, I am going to explore the different dimensions of time at the Sheriff Court.

6.2.1. The temporal disruption of the remand court

The Remand Court (RC) can only begin with the entrance of the Sheriff into the court which is always preceded by the cry of 'all rise' or 'court rise'. To say that the arrival of the Sheriff marks the beginning of the RC may seem obvious. However, there were situations that I observed that impacted on the availability of the Sheriff to start the RC at the usual time. For example, on the only two occasions when I could not make it into the Sheriff Court (SC) on time because of public transport disruption, the court too was affected. In the first situation, the Sheriff was already in Court and decided to push back the beginning of the RC. Otherwise, several accused would not have been able to make it on time. In the second case the Sheriff was also late because of the disruption, and hence the

court could not start because s/he was not there. When I managed to arrive there, a Sheriff Clerk informed me of this situation, and also told me that the Sheriff had just arrived, but he could not see me because he needed to read the papers before the court. Since it was a busy court, and it could not start before half past eleven, the RC did not finish until half past seven at night.

In a third court, although I arrived at the court early, again I was not able to talk with the Sheriff before the RC because s/he had not had time to read the reports. In this case, the disruption was the consequence of the Sheriff being taken away to deal with hearings at a different court, which ended too late and did not allow them to prepare adequately. In this case, the hearing started just half an hour late.

These particular situations we are describing, which were uncommon but not exceptional, lead us to important questions about the court's time management. Perhaps, it is in those situations where the court routines and their time-management fails that we can better observe the 'seams' or the limits of those practices. The core aspect of this issue is the level of preparation that a Sheriff is required to undertake before dealing with Sentencing Diets. As discussed above, there is a backstage for sentencing, and thus within this 'place' the Sheriffs have to find a 'time' for reading the papers and reports of the cases that are going to be discussed during the hearings.

These examples of infrequent problems show us the pressure of the business and the delicate nature of the court's time management to deal with it. Also, they highlight how a disruption at a specific moment of the routine, impacts not only that practice but also puts pressure on others' routines. This is the effect of how the different judicial practices seem to be stitched and sewn by a thread of time. In other words, the court and the judge have to allocate specific timeframes to deal with the judicial business on a daily basis. At the Sheriff courts, this means assigning particular days to deal with civil, family law and criminal cases. This routine depends on the skill of the Sheriff and the other penal agents to perform their role at court within the timeframes they have.

If these timeframes are disrupted, then it is not just one practice that is affected, it may impact negatively on other routines. For example, in the second case, the disruption meant not only a delay in starting the RC but also that it finished quite late, affecting the time the Sheriff had to prepare for the next day's civil court. In the third case, conversely it was a different judicial practice that took too much of the Sheriff's time that had an impact on the time that the Sheriff had to prepare for the RC.

Overall, the disruption allowed me to understand the temporal dimension with its limits and the tensions in the way that the courts and the Sheriffs try to manage their time to deal with the business. To a certain degree, it reminded me of my own experiences at the Chilean prosecution service and of the fact that within large penal institutions - at least those that have to deal with a large amount of business - bureaucratic time management seems always to be fragile and reactive.

6.2.2. The temporality of sentencing decision-making

In the last section I described situations where external issues disrupted the Sheriffs, the court routines and time management. In this section, I will focus on the Sheriffs' own perception of the temporal dimension of sentencing. The first thing I noticed - while talking with the Sheriffs about this issue - was how rich and layered the complexity of their perception of the temporality of sentencing was. Nevertheless, the most straightforward approach to their perception of sentencing decision-making is summarised in the following quote.

> 'Making decisions and having to make decisions quickly and clearly is the biggest challenge of the job and the biggest difference that I've realised. Not to just make a request to the court from one point of view, but as the Sheriff I have to hear both sides and make a decision that's got reasons behind it. So making decisions has been the biggest change to doing the job from seeing the job. And when I say making the decisions that also means justifying it when there are appeals that come in (...) making decisions and being able to justify them, and also being able to remind myself why I made that decision perhaps one or two weeks later is very important.' (Sheriff#10)

(Sheriff#10)'s account depicts a pressure for quick decision-making. It is worth noting that this account refers to the decision that is carried out inside the courtroom and thus, this refers to the rapid nature of the hearings as well. It is also worth noting how this perception invokes both a fast-paced process but one that requires the Sheriff to provide a decision that has 'got reasons behind it'. However, while discussing the differences between floating sheriffs and resident sheriffs, another dimension of this temporality appeared.

> '…this is one of the problems with Sheriffs who have to go round different courts, you get very little time to read cases. So you just turn up at court, read them very quickly, go into court, sentence them, come away again and you have nothing more to do with it. Whereas when you are resident somewhere you get much more of an opportunity to read things, to think about things, to talk to colleagues about it, to talk to the social workers. For example, if a floating Sheriff or an outside Sheriff had come in and read Peter's (*not actual name*) reports they might have thought 'well, he's just a nuisance, we'll send him to jail'. Whereas, well, you've just heard, we're going to try to get him onto the X Programme. We're going to try and get him doing something. And I think your experience as a Sheriff in all aspects of the work means that I think you take a much more holistic approach to sentencing. You become more aware of the effect that your sentence has on people.' (Sheriff#3)

(Sheriff#3)'s account seems to make a case for the difference in the sentencing practice of floating sheriffs compared to resident sheriffs, and one of the things that makes this difference is time. The latter have more 'time' to prepare and study the phases than the former. (Sheriff#10) reminds us that, nonetheless, this 'more available' time still requires the skill of being able to make quick decisions. This further suggests that there is more to the practice than 'quick decision-making'. Moreover, (Sheriff#10) seems to capture two different temporal levels of sentencing practice: on one hand the fast-paced time when the decision is taken, but on the other hand, if the sentence is appealed, the reflexive moment of defending it.

In a strict sense, the second part, dealing with appeals, is also a variable that reveals the complexity of the quick decision-making described above. As summarised by (Sheriff#9) 'knowing what the Appeal Court will tolerate' is a crucial part of judicial practice, in Bourdieu's sense knowing how to play the

'game'. Furthermore, as (Sheriff#11) explained, 'there's no point in me imposing that sentence as a general rule if you know you're going to be appealed'. Hence, the appeal court's views on sentencing are a relevant variable to balance when a (quick) decision has to be made – both in order to avoid an appeal and, if that fails, to ensure the High Court upholds your decision. The Sheriffs know they have a capital, a reputation, which, if they play it right, may make the High Court more prone to trust their instincts in cases where they adopt unusual (harsher) decisions.

Thus, the difficulty that (Sheriff#10) mentions is not just a fact of making a decision with the information that is provided to them but also to be able to make a good decision; in other words, a decision that not only had a rationale but also can be defended if it gets appealed. This pressure helps us to understand the preparation the Sheriff requires to be able to sentence within the timeframes that they are given. The question that emerges here is, does this pressure mean that the Sheriffs take a sentencing decision before going to the hearing?

> 'I don't make a decision before I go into court but I generally know if it's going to be custody. But quite often I've not seen the papers until I go onto the bench. I don't always read. I only dealt with about thirty cases today. I had read the two indictments, obviously, and there were four criminal justice social work reports and I had read them. But some of the cases that I dealt with today, I have not seen the papers until they were handed up to me. Because I don't need to. I mean, putting it bluntly, it's not exactly rocket science, this job. This is not a hard job.'(Sheriff#16)

This was a very honest depiction of the sentencing process of (Sheriff#16). If one wants to know if the Sheriffs make a decision before the hearing, methodologically, the question that remains would be: Is there a way to triangulate this information without relying on what the participants tell us? In this respect, the shadowing method became critical, since I was often able to be with the Sheriffs before the RC and to discuss with them their preliminary views concerning some cases. I saw some of them taking notes, and outlining potential sanctions. This, as (Sheriff#10) stated above, was to be able to justify the decision later if appealed. Thus, I was also able to observe how during the hearings, sometimes several times, the Sheriffs departed from the draft decision

they had prepared in the Chambers and imposed a different sentence or tweaked the one they had considered. Thus, from my observation, I could corroborate that to a great extent the Sheriff did not make the decision beforehand.

(Sheriff#16) acknowledges that it is necessary to have specific preparations, at least in more serious cases (indictments) or in the ones in which a report has been requested. Again, the context that is described alludes to the time constraints and the pressure of the business. Likewise, this Sheriff mentioned how in some cases s/he was only able to see the papers when they were handed to her/him. This was also something that I could observe in several courts. The consequence was paradoxical, there was a need to prepare, but the papers only arrived the day before or on the same day as the hearing. This pressure meant that Sheriffs had to prepare in the evening or night before the RC or the same day before the start of it.

Another relevant aspect of (Sheriff#16)'s explanation of sentencing is his/her phrase that sentencing is not 'rocket science'. However, at the same time when I talked with other Sheriffs and invited them to deconstruct and explain their own sentencing practices, the verbalization of all the different variables that they have to take into account in order to 'get the sentence right', as another Sheriff explained to me, made them describe it as hard or nuanced:

> 'We all said the most difficult thing in the job is sentencing. And particularly at our level because when you have this conversation with your senior colleagues in the High Court they sympathise with us and say 'yeah, it must be quite difficult because there are so many different sentencing options'. And so much fine-tuning that you need to do. Whereas in the High Court they say 'typically for us it's not a matter of what type of sentence, it's just how many years'. That puts it crudely, but it makes the point that by the time someone's in the High Court the chances of that person getting anything but a custodial sentence is fairly limited. Whereas in the Sheriff Court I think the latest figures show that something like 13% of offenders have a custodial sentence imposed on them, which means 87% are some other kind of sentence.' (Sheriff#6)

> '…when I was appointed a temporary Sheriff the only examination of your fitness was you had an interview with a Sheriff Principal, and clearly it wasn't the Sheriff

> Principal that you normally appear before. And I went up to X and had an interview with Sheriff Principal X at a point. And he said 'well, of course a lot of your practice is civil, how do you feel about crime?' (…) So I said 'I'm not too bothered about that, and trials. What does bother me a wee bit is sentencing' And he said 'no, you're quite right. Any fool can try a case but getting the right sentence, that's the trick.' And sentencing is a far more difficult, far more nuanced task than I think people realise. And certainly my view with regard to matters has changed, not hugely but there are changes. And it constantly is tweaking. And of course to some extent it's not just tweaked by your own views but also it's tweaked by what you think you can get away with with the Appeal Court.' (Sheriff#12)

There are important issues to highlight here. Firstly, is necessary to remember that the time of the practice is different to the time of (self) reflection. In other words, the temporality of the practice is reframed under the reflexive gaze. The complexity of the variables they take into account during sentencing does not change the fact that they are quick decision-makers. That's precisely the question; how do they manage all these complex variables and equally arrive at consistent decisions that have a practical rationale? This means that even if Judges describe to us what they do, they only convey a self-reflexive account of that process. They cannot convey to us this particular 'feel for the game' - that allows them to reach decisions with ease nor can they communicate through this kind of reflexive exercise the temporality of the practice.

6.2.3. The contradictory temporalities of sentencing

During my first interviews, inspired by the empirical work by Tombs (2004) and the theoretical work of Tata (2007), I tried to explore if the Sheriff perceived their sentencing process as 'intuitive and based on experience' (Tombs, 2004, p. 42) or they considered to be a more complex structured process akin to 'craftwork' using Tata's (2007) terminology.

However, through my observation and shadowing, I quickly realised that these questions, and the responses that they elicited, were not able to grasp practice itself. Moreover, these themes seemed to hide practice, instead of revealing it. The Sheriffs' answers did display an attempt to reconcile the seemingly 'contradictory' temporalities of sentencing. As discussed in the previous section,

they do not have much time to prepare for the RC, and they have to be able to take decisions quickly. Furthermore, they have to be able to get the sentence right, which means being able to satisfy the standards of the appeal court if challenged. We are also told that sentencing is nuanced and complex. However, from a different perspective, and in comparison with the floating Sheriffs, the resident Sheriffs have time to prepare, to use the local resources if required. It is noticeable that Sheriffs on the bench can navigate the complexities of sentencing with ease. As (Sheriff#16) said, sentencing is not 'rocket science'.

It is worth noting that a given practice can be challenging and at the same time easy to carry out by an individual with specific proficiencies and experience. However, this poses the question of what makes those individuals more competent than others? And which knowledge or skills make them proficient? This is where the discussion shed some light on the question of intuition or structured processes. The following quotes capture this paradox of a 'non-complex' complex practice:

> 'It's more intuitive, I think. I have a method in the sense that I will go through the procedure of reading the report, the complaint, and the previous convictions, and getting as much of all the circumstances as I can out of that. And that'll maybe start giving me a vague indication of where I should be going. But I don't think it's any more scientific than that. When I say it's intuitive, these things are filtered through experience of similar cases that you've dealt with, similar cases that you've seen, and similar cases you've heard of. So it's not as if I'm just coming to it (…) But the decision is not entirely intuitive, well, it is but it is filtered through this question of experience and guidance I've received in other cases from the High Court. Of course you take that into account. Appeal cases that I've seen, dealing with cases like that. Cases that I read when I'm preparing and I wonder what the appropriate range of sentences will be then I will research in the sentencing manual the day before, and there's one or two that I've done that in; researched the range of cases.' (Sheriff#4)

> '…the art of being a judge is one that brings in different elements of creativity, the more scientific side, and also simply that sense of judgement that comes from the core of your being as you as a sentient, rational authority placed by society in the position of exercising power over other people's lives. And ultimately it comes down to a question of judgement, what feels right, and sometimes you make decisions and although you can give reasons and do give reasons sometimes it is a matter of feel, of judgement, as to the right thing to do. And indeed if it wasn't that way, if you

> had to start and think and reason every single decision out you'd be working every night until midnight. You have to make a number of decisions quite quickly, for better or for worse.' (Sheriff#6)

The contradictions we mentioned earlier, and the complex process that these quotes try to reconcile, are not necessarily an obstacle for the understanding of sentencing. As discussed in chapter three, it is not unusual that practitioners may not be able to convey the rationales of their practice. Nevertheless, these quotes let us grasp, at least in a negative sense, the unique temporality of practice. In other words, what these descriptions of practice fail to convey is the temporality of the action of sentencing. However, the contradictory accounts, each of them true within the dimension they are describing, consistently offer us the image of a complicated process which is enacted, in part, under specific rules, following particular rationales, and yet also in part through an intuitive process. These depictions seem to be consistent with Bourdieu's theory of practice - as discussed in chapter three. The Sheriff's ease, or intuition, which is not arbitrary and seems to follow specific rules or rationales, suggest that there is a particular habitus, a mental schema that allows them to carry out these complex decisions quickly. In the following chapters, I am going to explore different aspects of sentencing practice that will help us to shed light on this issue.

6.3. The multiples places and temporalities of Sentencing

In this chapter, I have aimed to explain the 'where' and 'when' of practice. While these two dimensions are inseparable from real practice, the analytical and pedagogical exercise of exploring them alone provides us with a good introduction to the study of sentencing. It shows us how practice cannot be understood outside its spatial and temporal dimensions. This also allows an understanding of how both aspects are part of what constitutes this particular kind of decision-making. They reveal to us that sentencing - as a practice - is a social activity which cannot be reduced to the mere scholarly definition of

‘allocation of a sanction’. Another important aspect of this analysis is that there is not just one space nor time for practice but multiples ones. There is a multiplicity of actions which precede sentencing decision-making and make it possible. In the following chapter, I am going to explore how these other places and moments interweave between each other. Through this exploration, I am aiming to outline the habitus and field that can help us to understand the rationale of practice.

CHAPTER 7: Sentencing: Actors and Roles

During the sentencing process Sheriffs are provided with different kinds of information about the offence or the offender that they have to analyse and make sense of. There are four types of information that the Sheriffs receive: the 'papers', which contain the basic information about the case; the CJSW-Report provided by the SWs; the facts of the case offered by the PFs; and the PiM by the solicitors. In this chapter, I am going to examine the information they gather from these very different sources and how they make sense of it. In addition, concerning the information that is provided by penal actors, I am going to explore how the professional relationships with the SWs, PFs or solicitors may alter the way that Sheriffs use or understand the information provided by those agents.

The chapter is split into two sections. In the first, I explore the use of the papers. In the second, I explore the relationship of the Sheriffs with the penal actors that interplay in the sentencing process: SWs, PFs and Solicitors.

7.1. Preparation for the RC: Studying the 'papers'

During my observation of the RC, it was evident that even if the Sheriff did not know the facts of the offence, it was expected that s/he would already know the CJSW-Reports and some other details of the case. This implicitly meant that it was also expected that the Sheriff would have prepared themselves for dealing with the case beforehand. However, the way that the solicitors conducted themselves during their pleas in mitigation also implied that the Sheriff may not have prepared for the case in Chambers.

The effect of this contradiction over the S.Diets was paradoxical. It could be said that for the solicitors the Sheriffs were some kind of 'Schrödinger's Judge': they had to assume that the Sheriff both knows and does not know the case. Nevertheless, all my participants told me they prepare for the RC. The most common response can be summarized in the following quote:

> ‘You can’t do a remand court without preparing properly. If you were to just step on the bench and try and do a RC from scratch, which I’ve had to do and I know others have had to do, it’s awful, it takes all day.’(Sheriff#11)

While I was expecting Sheriffs' preparations may differ from one to another, through my observation, shadowing and the interviews, I realised that all my participants prepared for the RC in similar ways. As one Sheriff put it:

> ‘I turn to the charge, I look at the charge, I look at the PCs, [previous convictions] I look at the date of when the plea was tendered, when in the process, what about the procedure? Have any warrants been granted? Has there been delay? Has there been repeated trial diets? And if so, why? Is it because of some delay on the part of the defence, is the Crown to blame? Factor all that in. Having done that, I would then look at the report, I’ll read the report, and I’ll highlight any issues that I have in the report with a question mark, these are things I want to discuss with the Crown or with the defence agent to get a clearer picture. And that’s it. I actually have an idea when I’m going in of where I’m heading, that doesn’t mean that’s necessarily where I’ll go. But I’ll have a general idea.’ (Sheriff#7)

Even though this particular Sheriff described this account as a ‘functional’ depiction of the process, it was very revealing. This part of the process may be more relevant than it seems at first glance. For starters, the ‘papers’ contain the charge(s), the indictment in the case of the Sol.Ps, the accused’s criminal record, the records of all the diets in that case, and the CJSW-Report. In the event of an accused with more than one case, some Sheriff Courts accumulate or ‘roll up’ different complaints together. Also, the papers are not just records or information on a case, but rather they could be seen as the physical legal manifestation of the case.

It is worth mentioning that one Sheriff invited me the day before the RC to allow me to be present during the preparation of the next day’s cases, another allowed me to shadow them for three days. Hence, I was able to observe how they studied the papers. I was also able to see what the papers contained, and read several CJSW-Reports. In others cases, I was with the Sheriff at chambers when a CJSW-Report arrived belatedly. Thus I observed how the Judge had to read it quickly - take some notes - and finish his/her preparation for the

hearings that were going to start or will have to resume within minutes. Again, the themes here were time pressures and the capacity - a legal habitus - that allowed them to outline a sentencing draft or make decisions quickly. As a consequence of this, I argue that this preparation allows us to note that sentencing practice in the courtroom does not take place in a vacuum. It does not emerge from nothing, but rather it is already framed by the study of the 'papers'. Moreover, these accounts seem to describe a structural routine which appears to be imposed on individual Sheriffs. For these reasons, the study of the papers is a critical part of sentencing decision-making:

> '…actually the way I do it now, I get these papers first and then the reports come in gradually. So I've already seen the charge, already seen the record and when they pled. And I may, depending upon the record and the charge, have already formed a provisional view with regard [to] the sentence without seeing the report. And then the report comes in and it will either confirm that's the likelihood or not.' (Sheriff#12)

> 'I generally look at the complaint. I work out what they've pled to, when they pled. I work out whether they have failed to appear at any stage. I look at their record and then I look to see whether they've previously been sentenced to custody, or whether they're presently on any court orders for community service or Community Payback Orders. I then look at the charges themselves. I have a look at the report then, if there is one. I find it helpful as you go through that process, you begin to have some idea of the sentencing direction and what might be imposed (…) I do actually always, from my own management point of view, have a sentence down as to the ballpark as to what I'm thinking about. But of course I don't allow myself to automatically impose that without taking account of either the facts if I haven't heard them, or what is said on behalf of the accused.' (Sheriff#15)

The Sheriff's study of the 'data' contained in these documents implies that there is a practical knowledge which allows them to know which data to gather, and how to interpret and make sense of it. And critically it is a legal competency that allows them - with very little but specific information – to narrow down the possible applicable disposals, and outline a draft of sentencing for the given case. Hence, practice seems to be more structured that it appears at first glance. Although the routine neither imposes nor determines the way Sheriffs make sense of the data, it structures and manages the Judges' and the courts' time spent dealing with cases.

As a consequence of this - and continuing the analysis developed in the last chapter - this legal competency that Bourdieu calls Habitus, needs to be contextualised in its temporal dimension. The business pressures force the Sheriffs to study the papers, and to gather and weigh the data over a short period of time. Therefore, this legal competency acquires a practical dimension aiming to ease the preparation for the RC through the use of the habitus.

The fragmentary units of information contained in the papers do not provide any narrative or meaning by themselves. However, the three Sheriffs quoted above offer detailed accounts of which kind of data they are gathering. It is important to bear in mind that the papers contain only clusters of information, such as: (1) the charge, the kind of offence, without knowing the facts; (2) the details of the offender, age, sex and if they have a criminal record, before reading the report; (3) if the accused is ordained, on bail or remand; (4) a chronology of the case, which records the date of the offence, when the accused was arrested, charged and if they plead guilty or not, and when. As outsiders, we can tell that this data is relevant, but we can hardly tell how it could affect the sentencing outcome. This is so because we lack the legal habitus that constructs meaning within them. Even if we have legal knowledge, trying to predict the outcome of a sentence, without knowing the jurisdiction or the Judge, may be tricky: even for solicitors.

The data gathered is used by the Sheriffs to narrow down the potential scenarios that they may have to deal with, in the same fashion as a local doctor – a General Practitioner -- carrying out a differential diagnosis. By imposing pre-established categories or frameworks to the data, they are able to make sense of that offence, to draft not only a possible sanction but also to draft a potential narrative of how that offence and its offender should be legally understood. This is to say that the sentencing process can be perceived as a practice where the Judge has to put together clusters of information, from different sources, and make sense of them. But this construction of (legal) meaning is still incomplete. As I am going to discuss in detail in the following sections, the facts of the offence, the CJSWR and the PiM are the critical data that help the Sheriff to

move from a draft of a sentence towards a narrative of the nature of the offence and the offender. These narratives help the Judge to determine the 'right' sentence.

However, in order to obtain the maximum information from reading only the charge, you would need not simply to have legal knowledge, but also to know the legal practice of that particular jurisdiction, and more so, know the crime patterns of that locality. For example:

> 'I am relatively new, and very quickly, not even just recently, very quickly one sees similar kinds of case, similar people in similar circumstances, similar themes in terms of the problems that they are facing and experiencing, similar crossover between the family court here. So yes. But having said all of that those were themes and issues which were familiar to me from my previous role as a PF over many years. So they're not surprising to me in this role, I've seen these similar kinds of cases in a different context before.' (Sheriff#2)

> '…you get to know your area better, you get to know the particular problems that arise in that area, you get to know the trouble-spots. You get to know the particular illegal activities that tend to take place there. So in this area, drugs is a big problem and so is associated violence, sometimes very severe violence; attempted murder and murder. That's at the top end. And then lower down you tend to see a lot of offences involving disorder and petty assault, and most of it is associated with consumption of alcohol, and to a lesser extent consumption of drugs, and of course taking both.' (Sheriff#6)

In the first quote we can see how the past experience of a recently appointed Sheriff is brought into the current practice, helping to make sense of cases in a given locality. As discussed in chapter five, Sheriffs are expected to bring their professional trajectories as an experience that can make them better Sheriffs. I am going to explore this in more detail in chapter nine. The second quote reflects a different aspect of how sentencing is contextualised. It is implied in this description, that sentencing practice is not static, it can evolve through the acquisition of a better understanding of the local contexts. Although, indirectly this aspect of practice reveals an iterative relationship between the Sheriff, his/her sentencing practice and their local community. Communities are not static, and thus knowing a community also involves acknowledging its changes.

As a consequence of this, the influence of the local contexts may suggest a constant shaping and re-shaping of practice.

7.2. The Role of Social Workers, Procurator Fiscals and Solicitors

The sentencing process requires that different penal actors provide the Sheriffs with reports or specific information that helps them in their decision-making. SWs provides the CJSW-Reports, PFs information concerning the facts of the offence or the offender and the solicitors a PiM. In this section, I am going to explore both how the Sheriffs perceived these actors and the value or utility of the information provided by them.

It is worth noting that as much as the SWs, PFs and Solicitors' role is to inform the Sheriff, in practice each of them weave the data into narratives. In other words, they also seem to be trying to persuade the Sheriff to frame the offence and the offender within specific narratives. These narratives are the by-product of these legal agents' own practices, shaped by their institutional and individual roles within the criminal justice system. This does not mean that they 'invent' the data; rather, they interpret, construe and shape the facts to find meaning – and this calls into play their institutional roles or purposes.

Sheriffs are well aware of these considerations, even if they never articulate them. They know that they are the ones to make the sentencing decision, and they engage with the other legal agents and their narratives with caution and prudence. What I could observe inside and outside court, by shadowing the Sheriffs, was that these accounts are quite influential in the 'craft' of the sentence. However, my perception of these interactions is that, in most cases, the way that Sheriffs use these narratives does not match the expectations that their authors may have. Moreover, regardless of when the legal agents provide their input, the sentencing process seems to require the Sheriff to balance all of them together, as (Sheriff#3) explains:

> ‘What you need from the Crown is a very clear narrative of what has happened (…) From the defence point of view what are the mitigating factors? What prompted your client to do this? (…) So you’re trying to build up a picture, an entire picture. And from the social work department, if they’re doing a report, I like them… and the reporters here are excellent, SWs here are excellent, I want to know what is this person’s attitude to the offence? Because very often what happens is the solicitor will say ‘Oh, he’s very sorry and wishes it hadn’t happened.’ But when the SWs probes them you discover that well, he’s maybe not so sorry because he kind of thinks that victim might have deserved that because ‘after all she was shouting at me and she was abusing me so I…’ So I want to know all of that because that gives me greater insight into his mind-set.’ (Sheriff# 3)

In the next three subsections I am going to explore the Sheriff's views of these legal agents and how they use the data, narratives or information they provide to them. The analysis of these views is complemented with the data I obtained though my observation and shadowing.

7.2.1. Procurators Fiscal and the Facts

Whenever I asked the Sheriffs about their views on the PF's work, within the context of the sentencing diet, all the criticism was oriented not to the quality of the data that they provided, but rather the way in which it was conveyed. This was not a challenge to the veracity of PFs as a source of information, or to the narrative they provided, but rather a criticism of their performance before the court. The other set of criticisms is not about the PFs themselves but rather about Crown prosecution policies that affect the business brought to the court. However, I am not going to explore them in this section.

In brief, the ‘role’ of PFs in the sentencing process is subordinated to the moment they provide the narrative of facts to the Sheriff. (Sheriff#2) explained this to me, and I was able to corroborate that this arrangement was similar in every Court I visited, except where there was only one Sheriff:

> ‘I know in some courts in the past at least it would be practice for the accused to plead guilty and if reports were required the report would be obtained and then it would go to a court like today, but the Sheriff who presided over that court might not have dealt with those cases previously. And so he would then read the report

> like I've done today, but when he goes onto the bench they would hear the circumstances from the PF before sentence. I don't need to hear the circumstances because I hear them at the point that I call for the report. So I've already heard about these cases, and now I've got my report and the final part is I need to hear from the solicitors about their mitigation. Because they may want to draw out aspects of the report or…' (Sheriff#2)

As mentioned above, I was surprised by the fact that the information provided by the PFs was received in a similar fashion to how they deal with the information contained in the papers, as 'raw data'. I suspect this is so because of the way that the Scottish legal system is structured. A key aspect of Western criminal systems is that once you have a conviction or a guilty plea 'the facts' that support the charges are fixed, and cannot be subject to any further discussion. However, at least in the Chilean system the judges seem to be very critical of the prosecution narrative. Overall, I observed that the Scottish Sheriffs trusted the narratives provided by the PFs. Also, I could observe that there were professional relationships that could be closer or more distant.

From a critical point of view, this trust may provide the PF, individually, with a lot of influence over sentencing practice. This is to say that the way they construct and provide the narrative to the Sheriffs can make the difference between a custodial and a community sentence. However, this potential influence is watered down, at least at the Sum.P, by the volume of business. As I could observe in the different Sheriff Courts, the PF never provided a pre-crafted narrative of the facts of Sum.P cases. Not only that, but on several occasions, when they were required to offer the facts, some of them struggled to try to find the relevant information in the file that contained the complaint. The more the PF struggled, the longer the hearing was slowed down. Moreover, an unskilled PF could affect the whole rhythm of the RC, making it 'longer' than the Sheriff would have expected. As a matter of fact, any criticism from the Sheriffs to individual PFs was, very often if not always, aimed at this aspect of their performance in the court.

> '…poor Miss/Mr X got dumped with the court this morning, she had no preparation time at all, knew nothing about the cases. Some of them she might remember because she's appeared in them before but others she will remember nothing about

> (...) She is bad at reading the facts. I think that's possibly the worst (...) she's actually quite effective in many other respects but she's awful at that. You have to also understand that the information that the police give to the Crown is set out in a particular way and it's very difficult sometimes to put it across. Some people have that gift and some don't, and she very definitely doesn't. So the Crown quite often don't know what buttons to push, they're kind of reading it out as they go along, and little lights may come on in their brain about certain phrases and that's why they come out with them. And quite often what comes out is pretty disjointed and I quite often quiz them in the middle of it, 'hang on a minute, which person is this? Who is that?' and so on...' (Sheriff#11)

The first thing we need to highlight about this quote is how sympathetic and empathetic the Sheriff is with the PF. However, this attitude cannot be generalised to every relationship between Sheriffs and PFs. Instead, this quote is an example of how penal actors of different institutions have to learn to work with each other. Moreover, what is implicit, I argue, is that these relationships, for good or ill, will have an impact on the way Sheriffs react to the information provided by those actors. Conversely, Sheriffs can develop more distant relationships when they evaluate negatively other legal agents' performances. During my fieldwork this happened particularly with solicitors, which I am going to explore later in this chapter.

The situation described above also revealed that other legal agents' performances can disrupt sentencing. It shows how, if they fail to play the game properly, they hinder the flow of practice. At the core of these situations lies the temporal dimension of practice that I discussed in the last chapter. This seems to support the impression I got from my fieldwork regarding noticing that PFs showed a different level of preparation when they were dealing with Sol.Ps than when they deal with Sum.Ps.

However, this does not mean that the PFs, as individuals, are not influential. For starters, and even though this was not part of my research, I was able to observe some plea bargaining. When I asked a Sheriff about this, (Sheriff#16) explained:

> 'I don't know if it's correct or not. It is horse trading, isn't it? It's just to get a deal. People plead guilty to something that they've done, they plead not guilty to something that they've done, but that plea will be accepted just to get a deal. That

> happens all the time. Sometimes I am surprised at the deals that are taken, but I simply deal with what's been pled to, and I completely ignore what else was there. It's quite easy to do that. It's just the same way if I've got somebody in court on trial and I know because I recognise him that he's got three pages of previous convictions, I completely ignore that when I'm deciding whether he's guilty or not.' (Sheriff#16)

While this 'horse trading' was not an aspect I was aiming to explore in my research, by the end of my fieldwork, I realised how relevant it was for sentencing practice. This practice undoubtedly has to have an impact on the way that the facts are narrated and how the offence is framed. However, since most of the cases I observed were from the RC, and thus, were cases where the accused had already pled guilty, I could not explore the impact of this practice on sentencing in more depth. Nevertheless, I raise the issue here because it needs to be addressed, or at least acknowledged.

Another situation that showed me how influential the PFs could be, emerged during my shadowing of (Sheriff#2). While discussing the cases of the day s/he explained that:

> '…the third case is one which involved another threatening and abusive behaviour[16] in very different circumstances where a man approached a child in the street on two separate occasions. And on the first occasion invited her to go back to his house. And on the other occasion he didn't get so far as to say very much but he engaged in a conversation and the child's mother came and intervened and that was that. So that was a case of threatening behaviour. Very different circumstances because the inferences in that case are all drawn from the circumstances, and he also has a very significant record which involved other offences against children in the past…' (Sheriff#2)

Later that day when the case was called, the Sheriff asked the PF to provide the facts of the prior offences that may have been related to the present offence. However, the PF who attended the court that day was not the one who had appeared at the trial, and s/he had no such information. The issue that I was able to grasp was that during the trial the PF had contextualised the current

[16] Section 38 (1) of the Criminal Justice and Licensing (Scotland) Act 2010.

offence -the fact that the accused had talked with a child - with these past convictions. However, the criminal records that the Sheriff had did not contain any information about the facts of the offences.

The Sheriff was visibly upset because of this. S/he adjourned the case for later that day, and called the PF to her/his Chambers. I was asked to wait outside of Chambers, in the hall, during that conversation. When the PF left, the Sheriff explained to me, off the record, that the main issue was that s/he had been told that some of the past convictions were of a similar nature, and also, they had been deemed to have a sexual nature. However, without any source to corroborate that information, s/he explained, s/he could not take that into account at the moment of sentencing.

In any case, by the time the case was recalled, the PF informed the court that s/he had been unable to provide the information required by the Sheriff. The Sheriff complained about that decision but stated that since the prosecution had been unable to produce such evidence, s/he would exclude that information. S/he spared the accused from a custodial sentence, but imposed a weighty community sentence with supervision, unpaid work, a ban on talking with the victims or their family and on walking close to where they lived. The community sentence, in this case, seemed to me harsher than a short custodial sentence. Indeed, the lengthy period of supervision, stringent conditions and unpaid work may set up the accused to fail. However, it made sense, in a context where the primary concern was public protection. For that purpose, this disposal seemed more appropriate than a custodial sentence.

As I mentioned earlier, this case seems to outline the issue of trust and how what PFs say in court may influence the Sheriffs' sentencing approach towards a case. The argument that we have tried to build here is how the perception that the Sheriff had towards a legal agent may make them more receptive to the information provided by that particular agent, and through this, also more willing to hear and be persuaded. In the case we have just explored, part of the Judge's prior experience was working for the Crown. I am not arguing that this is

the only variable in play here, but it is relevant to note it. We are going to further explore and develop this argument in the following sections.

7.2.2. SWs and the CJSW-Reports

The Sheriffs in my sample value the input provided by SWs and their reports. In addition, I was able to observe that - in most of the Sum.P. cases - the CJSW-Report played a pivotal role during the PiM and the sentencing diet as a whole.

> 'I think they [SW] must be under tremendous pressure because you're calling for reports really in most cases now. And then when you put people on orders that's a huge commitment for the social work department to take on. I do think it's always been of a high standard, actually, the social work department, and what they give to the courts. Has it improved? I think probably. I think maybe better training now. And they are really dedicated, I find SWs will really do the very best they can for you, and it makes our job easier where they will highlight in a report what they think might be suitable and what would maybe work.'(Sheriff#1)

However, despite their mostly positive evaluation of SWs' work, (Sheriff#3) made me realize that this was more nuanced than I expected:

> 'I know certain Sheriffs who would never think of speaking to the SW, having the SW in, or having the SW tell me what he thinks a solution is. Some Sheriffs would take the view that that's dreadful, that social work is not there to tell me what to do. I don't have that attitude. X knows a great deal more about what's going on out there than I do. He knows more about these courses and about accommodation and what we can achieve for somebody than I do. So I have no hesitation in asking him to come in and say 'well, what do you think? What will we do?' (Sheriff#3)

The value of SWs' work may recognised in general, but there are still differences in the way that Sheriffs work with them. The tension that (Sheriff#3) described seems to be grounded in the 'ownership of sentencing' that Judges zealously protect (Tata, et al., 2008). The suspicion may be that SWs' sentencing suggestions are trying to shape the exercise of Sheriffs' discretion or, furthermore, that SWs claim to 'know better' than the Judges what should be done. The issue seems to emerge from the need to make a distinction between SWs providing a Sheriff with information that will help them to decide what is

best and the expectation that Sheriffs must follow what is suggested by SWs because it is the right thing to do. This distinction seems to be crystal-clear in theory but rather blurry in practice. This tension can be perceived in the response that (Sheriff#5) provide on this topic:

> '… occasionally I'll pick up the phone and speak to the SW. If there's something in the report that I'm not clear about or for example I might have it in mind to make some sort of community-based order but I'm not sure whether the individual will cope with it or I'm concerned that I might be setting up to fail then I might pick up the phone and just have a word with the SW and discuss it. So I don't do that a lot, and very often I will pick up the phone, they know me and we see each other quite frequently in court or at a review hearing (…) I may also say that I don't always do this but if what the SW tells me affects my thinking about the case then I'll tell the defence and I'll say to them in court 'I should let you know that I've spoken to the SW about this' and I'll tell them what's been discussed so there's no suggestion that there's been some kind of collusion between me and the SW about sentencing' (Sheriff#5)

(Sheriff#5) is still wary that a more collaborative approach with SW may jeopardise their judicial independence. In any case, these examples seem to suggest that the relationship between Sheriffs and SWs is evolving, but there are still tensions. (Sheriff#16) was an extreme example of these tensions, s/he even questioned the usefulness of the reports for their decision-making.

> 'if I need a report then I'll read the report. But generally I only get a report because I need a report to allow me to do what I've probably decided subject to any submissions that are made that I'm going to do anyway. For example if I have a serious assault charge before me and the person has either never been in custody before, or has never offended before (...) You cannot sentence somebody to custody without a report, if they haven't been in custody before or if they're under twenty one, or quite often if it's been a long, long time since they've been in custody you would say 'okay, I'll get a report.' (…) If I'm being honest there's nothing very much in them, most of it is a load of rubbish. But I need to get one. I find their structure awful, they're repetitive, the grammar is appalling, the spelling quite often is not very good. They work to a template so they just say the same things over and over again.' (Sheriff#16)

Therefore, the 'professional' and 'personal' relationships between the Sheriffs and the legal agents that provide them with information are a key aspect to

explore in order to understand how the Judges weigh the relevance of such information. And it would be fair to say that they are respected, but individually it is a kind of respect that has to be earned, and it is not automatically given. As a Sheriff explained:

> 'I have a court SW who I have enormous faith in, s/he's so experienced, so sensible, so willing, so committed. I also have participated in training days with social work. We now have new people coming in so I can't say I know them, but I have historically met most of them. I also read an awful lot of reports so I get a feel. We have a lot of young ones just now. I would place less reliance on what they're saying or recommending, but that's rare. Experience comes quickly to them because they're very, very busy.' (Sheriff#7)

Moreover, (Sheriff#8) explained that the relationship with the court staff and the legal agents 'depends on your personality,' hence you would expect that every Sheriff had, to an extent, a different approach. However, because of the hierarchy and structures of the courts, it seems also to depend on how the individual Sheriff understands their role as a Judge. This involves understanding the role not only regarding sentencing but also concerning the management of the Sheriff Court. (Sheriff#8) had his/her own views on this:

> 'I think it's important that we're all seen as part of the constitution of the court. We're all part of it, not just the Sheriff; the Sheriff is only one cog. It takes everyone to make it work. And if we all get on well together, great. We will disagree, and I will do things that they will not want me to do, but that's life.' (Sheriff#8)

This quote does not state anything new, that the relationship between the SWs and Sheriffs, seems to be a by-product of personal and professional relationships. However, these quotes seem to suggest that the SWs have to prove themselves through the quality of their reports. This finding seems to mirror previous research in how both SWs and Sheriffs perceive each other, and thus the tensions that exist within their professional relationship (Halliday, et al., 2009; Tata, et al., 2008; McNeill, et al., 2009).

However, this begs the question of what makes the SWs credible? I would suggest that there are two areas where SWs have to prove themselves useful and

proficient. One of them, which my sample of Sheriffs valued positively, was related to their knowledge, not of the case or the offender, but of the social and penal welfare network available in the jurisdiction. Within this kind of lore, if the SWs prove their proficiency, the Sheriffs did not challenge them; they recognised their expertise. This is a less 'controversial' skill that the Sheriffs expect them to have, and which has a lot to do with the way that any community sentence is weaved in practice.

The other aspect, which I think is the more critical one, is the set of suggestions that the SWs make at the end of the CJSW-Report. The way that the reports are currently structured tries to avoid any mistrust of SWs suggestions by making them analyse the accused's suitability for several disposals or CPO requirements, instead of offering only one-size-fits-all 'advice' on what should be done. This avoids the tensions we discussed above. However, by reading the suggestions, it is clear which of the requirements or disposals the SW may find more appropriate to the case. It is not straightforward, but it can easily be 'read between the lines'. This particular aspect of the report seems to be critical in the judgments that the Sheriffs make about the SWs capacity to offer 'realistic' assessment of the cases. For example, (Sheriff#7) talked about 'naïve SWs', (Sheriff#10) talked about how 'Social Workers are always optimistic'. These quotes suggest, *a contrario sensu*, that an 'experienced' SW should be able to provide 'realistic' suggestions. The problem is what does this 'realism' mean?

If we deconstruct the reports, we find a lot of information about the offender's life, their perception of the offence they committed, a risk assessment and an evaluation of their needs. However, the reports are not a 'neutral' collection of raw data; this information has been already processed beforehand by the SW. Hence, I would argue that, inevitably, the suggestions that the SW makes in the report are the consequence of the narrative that they create to contextualise the accused before the Judge. If we follow this argument, this means that the Sheriff may disagree with the narrative provided by the SW because it is too optimistic or does not reflect the seriousness of the offence or his criminal career. Moreover, as (Sheriff#10) explains:

> 'my only comment is that they take comments from an accused at face value. They might say, for example, he looks after his grandmother who has dementia. Now, that may not be very true. It may be true that the grandmother has dementia, but it may not be true that he looks after her. So sometimes the accused, as I'm sure is true around the world, will say and seize any fact that might be sympathetic to them or might help them. And if they mention that to a SW and then it's expanded on and it has a paragraph in a report then the defence lawyer will say 'look at page four of the report, he looks after his grandmother.' And before you know it a slight comment has become some fact that may or may not be true. And it maybe doesn't match. So sometimes I think the reports can be unquestioning of the information, but I've found in my time here, I've been here two years, that the reports are more realistic.'(Sheriff#10)

Therefore, even if the SWs are not 'naive', they could be misled if they are provided with false information. Thus, the Sheriffs expect that a 'seasoned' SW should be able to identify what is true or false, or at least, should be careful with which information is brought to the report and how it is conveyed in it. Conversely, these quotes imply that Sheriffs perceive young SWs as more prone to be gullible, and thus more easily deceived by the accused. Therefore, SWs must be able to prove to the Sheriffs that they can be 'critical', not easily misguided, with the information that they are provided.

The other level of discrepancy is not about the SWs' narratives, but rather about the suggestions they make. The Sheriffs use the reports, but they might use them to justify an entirely different decision to the one the SWs thought to be adequate for that accused. This is to say that the utilisation of the reports, sometimes, is less about Sheriffs not using them at all, and more about expectations of what should be done. This means that a Sheriff may agree with the narrative provided by the SWs, while at the same time taking the view that a different disposal is appropriate.

Having said this, and as I am going to explore in more detail in the next section, even if the credibility of the SWs is challenged, the solicitors base their PiM largely on these reports. This means that the narratives, and also the suggestions, proposed by the SW, come into a dialogue with the Sheriffs and the solicitors during the sentencing diet. Hence, the more influential aspect of the report is the narrative content of it rather than the suggestions. Even if the

Sheriff does not agree with the narrative, they still have to deal with the report, mostly because the solicitors use it, and also because it may be used as an argument for an appeal.

7.2.3. Solicitors and the Plea in Mitigation

One of the most interesting aspects of the 'plea in mitigation' is the pervasive presence of the CJSWRs, at least in the Sum.P. As I mentioned before, when a case is deferred for the preparation of background reports, it is expected that both the Sheriffs and the solicitors read the CJSWR before the hearing. The SWs' omnipresence is the consequence of solicitors grounding their pleas on the reports, and as authors, the SWs fix the debate over what is said, or not, in the report. Thus, this subverts the perception that the plea is a dialogue, of some sort, between the Sheriff and the Solicitor. Rather, it is a dialogue between the Sheriff, Solicitors and the SWs, even if the latter are usually only present in their reports.

During my observations, I noticed that several solicitors read parts of the report to the Sheriffs during the plea. Since most if not all my participants read the reports before the hearing, or at least prepared for the RC in some way, it seemed natural to ask them if it was helpful for them that the solicitor read to them passages of reports. Sheriffs #15 offered a plausible explanation of the rationale behind this practice.

> '…I suppose you've got to allow them to say something on behalf of their client. And if you cut them off and say 'well, don't address me on the report' I think that would be too harsh and you would be subject to criticism. I think you've got to allow them to highlight certain parts of the report. In my experience they don't read out the whole of the report, they maybe emphasise parts of it that are favourable to the accused. So I think that's a natural and expected thing, and I think it's quite appropriate for them to highlight things. They don't repeat it verbatim, the whole of the report.' (Sheriff#15)

However, other Sheriffs were more critical of this practice. For example, (Sheriff#4), in a dismissive tone, said: 'It's a style of advocacy, isn't it? It's not particularly helpful. It can be if they want to highlight a particular piece of the

report but often it isn't. Often it's just repetitive.' Moreover, Sheriffs #3 and #13 offered a yet harsher criticism:

> 'I hate that. I'll say to them 'I've read that.' If they start to do that I'll say to the agent 'I've read the report, I don't need you to read it to me again. Just go to the points that you want to make.' And they tend to do that here. You'll find today there will be very, very few long pleas. They'll get to the point quite quickly.' (Sheriff#3)

> 'Well, not reading the report is an important thing. If they just read the report I think that they've not actually done their job properly. Their job is to tell me beyond what is on the report why it is that a particular type of sentence would be appropriate.' (Sheriff#13)

Nevertheless, part of this criticism only makes sense on the assumption that the Sheriffs have read the report and paid attention to the same aspects that the solicitor wants to stress. However, as I explained before, I was able to observe a few situations where the Sheriffs were not able to read the papers beforehand. In other cases, I was able to witness how some Sheriffs had an in-depth knowledge of the background of an individual offender or case beyond those that a report could provide. Taking these considerations into account, (Sheriff#5) offered a very interesting response. This particular Judge was one of the Sheriffs who knew the background of some offenders very well, and still, he said:

> 'I think they know what I'm looking for. They know that I've read the report, and if I haven't, sometimes I don't have the opportunity to read the report, I might get it late. Usually I read them at home the evening before but sometimes I might have an engagement that would stop me doing the work at night, so I'll tell them, I'll say 'I've only had a brief read at this' so I'll ask them to draw my attention to any particular points that they think are important (…) They usually check with me, they'll say something like 'I take it that Your Lord/Ladyship has had an opportunity of reading the report' and then they'll pick highlights, like 'I draw your attention to the comment at page six that explains that he recently lost his mother and it's affected his mental health.' So they will do that but they don't laboriously go through the report, and if they did I would stop them.' (Sheriff#5)

These quotes made me think that if I were in the solicitor's shoes, I would have no chance of predicting whether the Sheriff was able to read and study the

reports thoroughly before going to the RC. I also came to understand, with the explanations provided by these Sheriffs, that from a practitioner point of view, the reports allowed the solicitors to offers mitigatory narratives without needing to prove them. In other words, by using the reports to ground their pleas, they were avoiding the Sheriff rejecting the plea on the ground of it being a mitigatory account without any basis or proof. However, all these accounts seem to suggest that Sheriffs expect, or need, 'something' beyond a mitigatory narrative based on what the reports say.

> '…a good solicitor is one who has taken the time, care, and trouble, not only to read the report but then to analyse that in terms of the expected factors which are likely to influence this particular judge in this particular case […] The worst type is not the person who is just ignorant and says 'it says this on page three, says this on page four, and here's the rubbish explanation.' The worst type of pleader is the one who spends a lot of time and effort advancing a completely unstateable proposition. A good example of this was last week, a man up on Section 38, so a breach of the peace, involving his partner and a hammer. And for some reason, it's beyond me, I don't know why, a Summary Sheriff had heard the plea and had deferred sentence for good behaviour. For a hammer. And they had a record as well. And so when they appeared before me, what I'd been urged to do was admonish the person. And that was a completely unstateable plea, because there's no way that anyone is going to admonish a man who is charge with waving a hammer in the face of his partner, and, oh, he's got a record' (Sheriff#6)

This narrative of the 'good' and the 'bad' solicitor; of the good, the mediocre and the worst type of 'pleader' not only reflects the Sheriffs' perceptions of solicitors, but it also reveals their sentencing practices. The main point here is the value of what the pleader does; the fact that the evaluation of the solicitor's performance is measured by its usefulness for the sentencer. It is not that the solicitor's role binds the Sheriffs nor that Judges are unable to sentence if a 'bad quality' plea was submitted but rather that they acknowledge that a good solicitor can improve their sentencing decision-making.

Before becoming a Judge, (Sheriff#6) had been a solicitor and then went to the Bar, becoming an advocate, hence this Sheriff had experience in courts at all levels. During my shadowing, I perceived that this particular professional background made this Judge very critical of the solicitors' performances in court,

which provided an insight into the role of solicitors in sentencing. Hence, for (Sheriff#6), a good submission:

> '… will be something like 'of course we recognise the seriousness of that, he has given this explanation. Now, Your Lord/Ladyship may well regard that explanation with some scepticism and I can well understand that, and I can well understand Your Lord/Ladyship being of the view that possession of weapons in public is a very serious matter, and I've advised my client that [a] custodial sentence is quite likely.' And so you've shown just by opening up in that way that you are on the same planet as the sentencer. You're saying in more or less clear terms 'I am working with you on the sentencing process and I'm not going to waste your time, I know your starting point because I know the law, I know sentencing patterns, and I know you. So I'm not going to waste your time but what I'm going to say from here on is going to be of benefit to you so listen up, My Lord/Lady.' (…) And then what a good solicitor will then, after having introduced that, start to tell you all the reasons why it is that whilst you couldn't be criticised for sending this man to the jail there is an alternative and you need to consider the alternative as a matter of fairness and as a matter of law. 'He's done this, he's done that, look at the work. Six months ago you would never have got him anywhere near an employment agency. We can tell that because if you look at the old reports, this is what it says. There's been a turnaround. That's been one important factor. There's another important factor here, his children. He's now got another child and he's engaged in a relationship. I can tell you, I have met the partner and I met the partner on the second occasion I engaged my client in relation to this hearing.' And all that tells me, A, he knows his client, B, he knows the case, C, he's being careful about it. And so the reaction of the sentencer is he has taken time, care, and trouble to produce this submission unconsciously or otherwise one thinks 'I'm going to pay even more attention than I might normally to the particular sentence that I want to impose' (Sheriff#6)

The questions of solicitors' performance allow us to explore what Sheriffs expect from PiMs. Interestingly enough, the theme of 'realism' appears indirectly here. The notion that the Solicitor must recognise the seriousness of their client's situation rather than tone it down. This implies that solicitors cannot be the mouthpiece of the client; that the client's views on their cases cannot replace the solicitors' professional opinion. Furthermore, it suggests that the key to persuading a Sheriff does not lie in a plea in mitigation that aims to offer a mellowed narrative of the offence but rather in one that recognises its seriousness but provides a plausible alternative to imprisonment.

Furthermore, in (Sheriff#6)'s account the realist approach by the solicitor seems to establish a minimum ground of trust; by not toning down the offence, the solicitor is presenting him/herself as a valid interlocutor, not one who would try to fool the Judge. Hence, 'good solicitors' should be able to recognise this requirement and adapt their performances, both in terms of formal style and content, to convey this and overall, to prove themselves worthy of contributing to the Sheriff's sentencing process.

While (Sheriff 6)'s quote above is ostensibly about the ideal 'Plea in Mitigation', it also implies that the relationship between the Sheriff and solicitors is a long-term one. This suggests that the trust relationship between Sheriffs and those solicitors that appear before them has to be developed over time and is not reduced to how they perform in one case. In other words, the solicitor who can consistently prove himself to offer a realistic assessment of his cases, through a process of building up legal capital, will be the one that will be trusted, and therefore, listened to.

More to the point, the content of the plea seems to be more important than the style. According to (Sheriff#6) 'good' Solicitors must prove they know their client. Does this suggest that they have to provide a narrative that goes beyond the report? Not necessarily, it means that, at the very least, they have to offer a narrative articulated enough to demonstrate proper knowledge of the accused and the causes of their offences. This raised an issue that was not part of my research but clearly had a huge impact on what I was analysing: the capacity of PFs and Solicitors to have enough time to prepare themselves for the Sum.P. From my observations, it was clear that both of them prepared thoroughly for Sol.P cases but struggled with Sum.P. In the particular situation of solicitors, this idea of a 'good solicitor' is hindered by the cuts to Legal Aid, which indirectly put more pressure on the Judge's workload:

> 'I thought the lawyers would always tell you what the law is and you then just decided. It's not like that, there are a lot of cases where you have to go away and look up the law. And that's got more as time has gone on because there's cutbacks in legal aid and lawyers can't afford to employ assistants anymore. So there's less

> preparation going on in a lot of the cases that we get which means it's on to the judge to do a lot more preparation and research work himself or herself.' (Sheriff#4)

> 'Legal Aid is a huge difficulty and there is a huge bureaucracy of Legal Aid (…) It's not enough for the lawyer to say 'I now have Legal Aid' that doesn't allow them to do everything that they need to do, to get a medical report, to get other reports to carry out certain enquiries and I think that that is underestimated. And I think many Sheriffs may not realise that if they've not done that work themselves, because they think that the reason for a case to go off, to be delayed, is simply for not a very valid reason, or because a lawyer has not filled in a form. But Legal Aid, I think a lot of the work there is carried out in offices and behind the scenes. I know that because I did that kind of work myself, I don't think that's obvious and I think solicitors do a very good job of hiding that' (Sheriff#10)

As (Sheriff#10) noted, not all Sheriffs will be able to understand what lies behind the scenes of solicitors' performances, either because they never were one or because they may be out of touch with what practice entails now. During my observation of the PiM, I perceived that these differences in judicial attitudes towards solicitors had a noticeable impact on the dialogical dynamics of the hearings. While all Sheriffs listened to the pleas attentively, the Judges that were less critical, or more empathic, with solicitor's practices were more prone to engage in a constructive dialogue of sorts. In contrast, the Sheriffs that during the interviews were revealed to have a more critical opinion of solicitors seemed to participate less in a dialogical exchange, but instead limited themselves to listening to what was said, and asking questions to clarify the solicitor's submission.

Overall, regardless of the attitudes towards solicitors and to what extent the PiM influenced the final decisions, my perception was that the Sheriffs' sentencing decision was never 'set in stone' before the hearing. Even in the cases where the solicitor's submissions seemed to fail to persuade the Sheriffs, the Sheriffs always seemed to use these submissions to tweak their decisions. It also seemed to me that Sheriffs used the PiM to weigh up the chance of the solicitor appealing their decision. In other words, even if the Sheriff was not persuaded, they still needed to use the submission to tailor their decision in a way that would reduce the chances of appeal.

What, then, does the 'process of persuasion' entail? (Sheriff#6) again offered me an insight into how s/he perceived that aspect of practice.

> 'Mr X has made some superb submissions to me where I have gone into court and I've made my notes down here and I'm just going 'two years, two and a half years.' And I've come out and I haven't sent him to the jail because I've been persuaded by the submission that there is actually an alternative and he's drawn my attention to things which although obviously I knew them, he's put them in a different light, he's woven together the different factors so as to lead to a different conclusion. In other words, the solicitor who has taken the time, care, and trouble, and who has the ability to improve their court-craft, and to put their court-craft at the disposal of their client is likely on the whole to get a better result than anyone else […] They are not wasting your time but they are saying 'there are more ways than one to look at this, and we'd like you to look at it this way.' So it is the process of persuasion, and that's ultimately what a pleader is trying to do, trying to persuade you, lead you to a particular end. Not many people can do that very well (…) So many decisions are just quite obvious. But there's that grey area in the middle, especially where there are complex facts to do with the case or to do with the person, or both, where you've then got material to play with and there is room for different competing views as to the right way forwards.' (Sheriff#6)

This notion of convincing a Sheriff that there is a credible and realistic alternative way to deal with the case seems to be at odds with the idea of cases where there is 'no alternative' to imprisonment. While it is true that the seriousness of the offence may lead a Sheriff to believe that there is no other option than imprisonment, as (Sheriff#6) tells us, a 'good' solicitor can offer a Sheriff an alternative narrative of the offence or the offender that may highlight a different way to deal with the case.

Furthermore, to what extent is the Sheriff's perception of having no other alternative the by-product of the failure of the solicitor (or the SWs) to persuade them of the appropriateness of other options? The case narrated by (Sheriff#6) is an example of this: if the solicitor had failed to convince the Sheriff of his interpretation, the Sheriff would have imposed a prison sentence under the assumption that there was no alternative. Hence, the notions of 'no alternatives' and 'grey areas' may work both as ex-ante and ex-post assessments of what was done in a case.

As explored above, Sheriffs prepare the cases by drafting a possible decision before coming to the court. This means that ex-ante they try to narrow the options they may have. However, these notions of ‘no alternative’ or ‘grey areas’ also work ex-post. If a Solicitor persuades a Sheriff in the opposite direction to the one drafted, the Judge may reassess the case and use the category of ‘grey cases’ to describe it, even if initially the Sheriff believed that there was no alternative to prison. The opposite is also true, the failure of the Solicitor to offer a credible and realistic option may work as a self-fulfilling prophecy, reaffirming the notion of lack of options, even if the Sheriff had doubts before coming to the court.

7.3. Outlining a sentencing practice

In this chapter, through the exploration of the different sources of information provided to the Sheriffs, I have been able to offer a grounded glimpse of the sentencing process. Instead of attempting to reconstruct the mind of the Sheriffs, I focused on the mundane and bureaucratic stages with which they have to deal, the information they gather from those stages and the way they interact with the individuals who provide that information. In that way, I am not only describing the structural and visible part of the sentencing process but also highlighting the collective dimension of this process. Despite the fact that the Sheriffs is the one who has to decide, the complex interactions with the other penal agents offers a gaze of sentencing and the practices that form it as a collective and dialectical meaning-making of a narrative of the offence and the offender. As I am going to explore in the next chapter, these narratives need to be grounded and ultimately lead the Sheriff to pick only one among the different disposals available to them.

CHAPTER 8: Sentencing: Scripts and Sanctions

In the previous chapters, I explored the place and temporality of judicial practice. I also examined the way that the Sheriffs prepare for the RC and how the information provided to them by the legal agents influences or shapes their decision-making process. In this chapter, I try to make sense of how the Judges explain the use of particular disposals for specific cases; how they translate the information they receive into narratives of the offence and the offender; and how these narratives prompt the use of disposals to pursue specific aims.

One aspect that appeared in the previous chapters, and is going to be further developed here, is the fact that there is no one-size-fits-all disposal for all cases. However, it is suggested that there are 'default' disposals for some groups of offences or specific categories of offenders. That is to say, specific pre-established categories help Sheriffs to make their decision with ease. This offers an explanation as to how the Sheriffs, provided only with a charge or a group of charges, can determine some 'default' sanctions. However, from the data collected during my shadowing, I noticed that these only work as an operational starting point for the decision-making process or, if you prefer, as part of an ongoing dialectical process. The Judges, regardless of their sometimes critical perspectives on SWs and Solicitors, were willing to be persuaded if the arguments were compelling.

As discussed in chapter five, the data provided to me by the Scottish Government Statistics Unit show that between 2007-2008 to 2016-2017 on average the proportion of sentences by type at the Sheriff court were: 20% Custodial Sentences; 25% Community sentences; 36% financial penalties; 18% admonitions and 1% of other sanctions. Thus, in this chapter, I am going to focus on these four different types of sanctions which together account for 99% of all the disposals that are imposed each year. Thus, in section one I am going to explore the use of the custodial sentence. Then, in section two, I am going to examine the use of the non-custodial sentences. First, I explore the use of CPOs; then I explore the CPOs Reviews briefly. Finally, I examine the use of fines and admonitions.

8.1. Custodial Sentences

The first thing I noted while discussing this topic with the Sheriffs was their use of language. Sometimes Sheriffs said that there 'was no alternative to the imposition of a custodial sentence' (Sheriff#9); that sometimes there were situations 'where you just have to impose a short custodial sentence' (Sheriff#1); or that there will be offenders 'and offences which merit nothing other than a custodial sentence' (Sheriff#3). Thus, the rhetoric of the Sheriff while talking about custodial sentences was both conveying the notion of a 'last resort' but, as if this were inevitable, echoing the legal test contained in section 204 of the Criminal Procedure (Scotland) Act 1995 which states that no custodial sentence should be imposed unless the 'court considers there is no other method of dealing' with an individual. When I inquired about this particular use of language a Sheriff told me:

> 'I suppose there are situations where you feel compelled to, in that you feel there is no other proper choice. But in the summary court, and the Sheriff Court, there would always be another option, but it might be an option which… I can't think of a situation where you would be compelled to but I think what you would often express is a feeling that you have no other proper option or you would fail in your duty if you didn't.' (Sheriff#2)

This quote seems to hint that the rationale behind the imposition of custodial sentences goes beyond the scholarly debate on sentencing purposes, or at least that there is a more complex rationale than that. This is to say, that beyond the goals pursued by imposing any disposals this quote seems to reveal an underlying discourse of a judicial 'duty', a role of the Sheriff as a sentencer. Thus, to understand the use of any disposals in practice, there is a need to understand how Sheriffs articulate their role and try to fulfil their self-perceived duty through sentencing purposes. I will return to this issue in the following chapter. Having said this, we must consider in which cases a custodial sentence is appropriate.

> 'To me custody is more likely where the record tells you that custody is the only option because a person has simply not taken up the other opportunities, or if

> there's been extreme violence, for example with a weapon, or extreme violence that's involved kicking to the head' (Sheriff#10)

Concerning the first set of cases, a more nuanced and complex scenario was found. It is not just about recidivism, but instead, failing to comply with the conditions of a CPO, and thus with being labelled as a non-complier. The second group of cases seem to be very straightforward, violent offences. I am going to explore each of them briefly.

8.1.1. Regarding violent offences

When I talked with my participants which kind of offences were very likely lead to a custodial sentence, the common response was 'violent offences'. At first glance, it seems like an unproblematic criterion. However, then one wonders how violent can the offences prosecuted under Sum.P be? During my fieldwork, almost every Sheriff used a paradigmatic example to illustrate the kind of violence they have to deal with; an assault that involved the accused kicking the head of the victim.

I was able to corroborate the pervasive nature of this offence because I was able to hear several complaints where the facts were, substantially, the same in almost every court I visited. Also, at least once, I could watch the dynamics of one of these assaults through CCTV footage that was exhibited during a hearing. Having said that, most of these offences started with a fist fight or a scuffle, between victim and offender, and finished with the victim falling to the ground. In that moment, the offender takes advantage of the defenceless victim, and kicks them in the head.

Most of the Sheriffs were not comfortable knowing that these kinds of cases were being brought to Sum.P. by the PF's office. I arrived at the view that at least part of this reaction was related to the fact that during their experience as Lawyers and part of their career as Sheriffs these kinds of cases were never brought to the Sheriff Court under Sum.P. Let us recall that - as discussed on chapter five - on the 10th of December of 2007 the maximum length of custodial sentences that a Sheriff could impose at Sum.P was raised from, three and six

months to twelve months. This change may have had two relevant impacts on the use of custodial sentences at the Sheriff Court. This change is relevant because it allowed the PF's office to bring more serious complaints to the Sum.P. On one hand, this subverted the legal habitus because it changed the 'rules of the game'. In other words, this change altered the core practices to which the agents' legal habitus were synced, thus requiring them to adapt to 'new rules'.

> 'I remember as a solicitor we had a kind of working rule that said if you kick to the face its jail. That was the kind of working assumption. Or if a person uses a weapon then it's jail. I'm quite surprised at the kicking to the head that it's not solemn, it is summary (…) And I think those who have ever seen that on a town centre CCTV can be quite shocked when they see stamping or kicking in the head, and how casual it can be, like kicking a football almost, or stamping as if they're trying to burst a balloon. It's horrible to see.' (Sheriff#10)

> 'I think there are cases which appear in the summary courts here which should not be appearing in the summary courts, they should be on indictment (…) I think there are some quite bad assaults that end up in summary complaints. I've got a case in X next week that I've got to sentence on which is the old Scottish crime of hamesucken[17] (…) And this one that I'm dealing with is on a summary complaint, so the maximum sentence that I can impose is twelve months. And personally I'm of the view that it's worth more than twelve months but my hands are tied because The Crown has put them on a summary complaint' (Sheriff#16)

These quotes above illustrates – indirectly - how the field has changed and thus by bringing more violent cases to the Sheriff Court, how the new offences have to be dealt with under Summary Complaint. It worth noting that if a Sheriff at Sol.P. thinks that their sentencing powers are inadequate given the circumstances of the case, s/he can remit the case to the HC so sentencing could be deal appropriately with broader sentencing powers[18]. However, Sheriffs cannot remit cases at Sum.P. which further explains (Sheriff#16)'s frustration. The indirect consequence of this is that, if you increase sentencing powers and bring more serious offences, the previous framework used to determine the seriousness of the offences is subverted. This means that the old 'players' have

[17] As explained to me by Sherif#16, it is an old Scots law offence which consists in breaking into the victim's house and assault him or her there.

[18] Section 195 of the Criminal Procedure (Scotland) Act 1995

to try to create a new framework to judge the seriousness of the offences. Of course, this requires Sheriffs to tweak their legal habitus - which is now out of sync - until they find a satisfactory way to adapt their practices accordingly with the new strategies that the new 'rules' allow.

Another issue of sentencing violent offences at SumP. is that even if you have adapted your practice to the fact that this kind of assault is brought under Sum.P., sentencing still requires a nuanced analysis of the circumstances of the case. This is particularly important because within a penal system, the seriousness of one offence is always determined with reference to the rest of the offences that are dealt with at the same level. (Sheriff#9) offered an interesting analysis of the ambiguity of these kind of offences.

> 'You see, that's a consequence which may not be at all related to the gravity of the actual assault. I have known people, let's take kicking to the head, to be kicked in the head and get up and walk away from it (...) On the other hand there was another occasion when I was a prosecutor and I was called out to a murder, it was being treated as a murder, eventually pled guilty to culpable homicide. Two brothers fell out and they're both standing up, squaring up to each other, one of them kicks the other in the head and killed him with one kick because it tore an artery. So the consequence isn't necessarily related to the extent of the violence, they both have to come into the calculation, they both have to be thought about.'(Sheriff#9)

This quote reveals something interesting, once you adapt yourself to these new serious offences, you will still need to take into account the different ways that violence, and its consequences, can take form. However, if a custodial sentence is imposed on the basis that it was a serious offence, what is the sentencing purpose in such cases? How is the notion of 'serious offences' translated or operationalised in judicial practice? For example, while talking about cusp cases, (Sheriff#12) offers an interesting insight:

> 'I think there are certain offences on summary complaint, because solemn stuff because it's more serious you're always likely to be imposing custody, it's always a realistic option. But I think in the summary cases, and I often say this, if you look at the offence and you think 'no, you can't do that.' I think if you pass that test, (…) what's in mind is that behaviour shouldn't be tolerated, and that behaviour should

> be deterred. And I think people are influenced…. Let's not get too carried away with our importance, but I think there is a degree that the word gets round. I know they say custody isn't a deterrent, and I can understand where they're coming from there, but if you ask anyone who comes into a criminal court and has been convicted of an offence what is the disposal they don't want, 99% of the time, and that's their liberty taken away. So to that end it has to be a deterrent. For these things I just think sometimes you've got to make the point'.(Sheriff#12)

This notion of behaviours that should not be tolerated resonates as well in the following quote where I discussed with (Sheriff#1) a Sol.P case and his/her decision to impose a custodial sentence in that case.

> 'So this shopkeeper was shielding his young boy behind him while this man was like this with a knife over him. And it was just awful. And it fell away to trial and when he was convicted I sentenced him to five years imprisonment because he had a very bad record. But also that kind of case you would be sending somebody to prison. So violence like that, you're conveying that that sort of violence is totally unacceptable in our society. People are entitled to get on with their work, go to work, without fearing that somebody is going to come in with a knife and assault them. So that is a clear message to society and to the accused that this behaviour will not be tolerated.'(Sheriff#1)

Therefore, violence is not a criterion for seriousness because of its nature but instead because it is deemed as the paradigm of the kind of behaviours that cannot be tolerated. As a consequence of this, the seriousness of the offence is being treated as coterminous with intolerability. This is relevant because of the implicit assumption that passing something other than a custodial sentence implies tolerance of rather than punishment of the offence.

8.1.2. Recidivism and Non-Compliers

In this section, I am going to explore why the Sheriffs may impose a custodial sentence for offences that not seems to be serious, accordingly to what was discussed above. For instance, consider this quote:

> '…another reason why you will impose custody is that the record of an accused, leave aside the offence, gives a pretty good indication that they will not comply

> with a Community Payback Order. The record and maybe the content of the criminal justice social work report. Now, in those circumstances, if I think from the combination of the record and the criminal justice social work report someone is most unlikely to perform a Community Payback Order I'm not going to waste my time in imposing a CPO (…) You're far better for everyone to say 'no, this offence merits custody because of a combination of the circumstances, of the offence, your personal circumstances, and your inability to perform any community-based disposal' (Sheriff#12)

The boundaries of these groups of cases are hard to set. It is not solely about recidivism nor having old or recent criminal records. It seems to depend on how the narrative surrounding the offender and the nature of their offending behaviour is constructed. This seems to match Tombs and Jagger's (2006) conclusions that Sheriffs categorise offenders as 'redeemable' or 'irredeemable'. However, while this notion appears to explain some cases, it seems too simplistic to capture all the nuances that I was able to observe.

As I argued above, the 'starting point' in deciding a sentence for a serious offence, for example, an assault, will always be a custodial sentence. Nevertheless, after assessing the seriousness of the offence, I observed that Sheriffs move to a new 'stage' during the sentencing process and begins to consider the individual and particular circumstances surrounding the offence and the offender. As discussed in the last chapter we know that during this process sometimes a beneficial report and a good PiM may persuade the Sheriff that a different sanction could be more advisable in individual cases. However, that fact will not change that the 'default' option for those offences is custody. Conversely, offences that do not fall into the category of 'most serious' offences have a different starting point. Therefore, again the Sheriffs will have to sort out a hierarchy of offences. If the default for serious offences is custody, then for others it will be a CPO, a fine or an admonition.

> '… [often] you look at the case and it's quite obvious what should happen, this person must go to jail, it's obvious. It's an attempted rape, fine, five years. There's no alternative to that. A person on their third offence of carrying a knife in public, they have to go to the jail. On the other extreme, somebody who is a first offender and he's accused of using a bad word in a street. You're either going to admonish him or fine him a small amount. So many decisions are just quite obvious. But

> there's that grey area in the middle, especially where there are complex facts to do with the case or to do with the person, or both'. (Sheriff#6)

Therefore, when dealing with less serious offences, the Sheriffs have to ask themselves how to deal with this particular offender signifying a shift from the perceived seriousness of the offence to an inquiry about the nature of the offender. As a result; recidivism, past criminal records and breach of previous community sentences become negative signs, which may support a negative narrative about the offender's behaviour. It is worth noting that, because less serious offences are brought under Sum.P, this means that if a custodial sentence is passed it will be short, which further constrains the use of these disposals.

In light of this, these negative indicators alone do not mean that a short custodial sentence is inevitable. Rather, they require a broader contextualization of the offender and their offending behaviour; a narrative, as I have suggested. Drug Testing Treatment Orders (DTTOs) offer an excellent example of this ambiguity because they are imposed on individuals who have long criminal records and/or a history of failure to comply. The noted difference is the cause of their behaviour which is identified in the narrative; a drug addiction. These behaviours are often conceptualised as a mediating factor between the offence and the offender; thus the culpability of the offender for their offences is reduced.

However, this does not excuse the offenders if they fail to comply with the DTTO. This introduces a tension in the reviews of the DTTOs because Sheriffs are told that setbacks are part of the recovery process, which subverts the traditional logic that failing to comply should be 'punished'. Nevertheless, the question for the Sheriff then becomes, how many opportunities can be given to an individual? This is particularly critical because as (Sheriff#10) explains below, DTTOS are 'expensive' and thus if someone is not performing well they are taking away resources from others who might comply better.

> 'Once a person is on a DTTO it takes quite a lot for that to be cancelled, actually. And that's precisely because they often have a bad record, they have a record of

> non-compliance, they have other problems, there are ongoing difficulties. This man's record before the DTTO was imposed was he pled guilty to possession of drugs. This is his record, what we have here, breach of order, so he breached a previous restriction of liberty order, offending while on bail (…) Dishonesty offences to feed his drug habit, yeah. And that's it. But the man has quite a bad drug use problem. And at the moment what I see is that the order is not stopping that. And that's a problem for him and for everybody else because if resources are used to give him the order then they're being taken away from someone else who might really want the help. If he's not ready for it and is not interested in making it work, then…' (Sheriff#10)

While there is a recognition of drug related offending, this Sheriff appears to struggle with setbacks in recovery or treatment and what they may imply regarding the allocation of limited resources. Here we find a relevant rationale that may lead a Sheriff to revoke a DTTO: its expensive nature. This is to say, the lack of compliance in this context is less a problem of a contempt for justice -- because the criminal records and history of the individuals is widely known -- and more a problem of the proper allocation of public resources due to setbacks of the process. However, if the failure to comply cannot be explained by a mental health problem or drug or alcohol addiction, then these narratives make the offender entirely responsible for their acts.

> 'The repeat offenders who have had a chance on a Community Payback Order before and haven't taken that chance and have continued to offend, they're likely to face a custodial sentence. And there are fairly significant numbers of them, people who I've tried to keep within the community. Because there has to be a point at which there's a recognition by them and by the public that enough's enough. You've got to have an ultimate penalty otherwise it won't work.' (Sheriff#3)

Within this quote, using Tombs category of 'irredeemable' offenders, the stress is not on the offences, which in these cases are not serious. Instead the offender's behaviour is explained through a narrative that construes their actions as reflecting contempt for the court. This lack of compliance seems to be serious as the Sheriffs feels that it jeopardises the authority and credibility of the court.

> 'Now, the great difficulties Sheriffs have, I think, are the cases where there is an opportunity for a community-based sentence but the accused person just does not take it. And that creates problems because eventually something has to be done. If the Sheriff says 'okay then, away you go and don't do it again' then that brings the whole system into disrepute. Why should anybody follow a court order if there is no consequence? (...) Now, because of the nature of the thefts in this case, inevitably it would be quite a short custodial sentence, and that is the dilemma because many criminologists say short custodial sentences don't work, they don't rehabilitate. But sometimes community sentences don't work and don't rehabilitate either.' (Sheriff#10)

> 'But there are other cases where sheer persistence of offending, sometimes I will just give up and say 'you've exhausted every possible community disposal. You've left me with no option but to send you to jail.' Because there comes a point at which the credibility of the court order is called into question. If I keep giving somebody one chance after another to complete their Community Payback Order or their unpaid work there's a risk that they and others in court will think if you don't do it nothing happens, you just get sent to do it again.' (Sheriff#5)

During my fieldwork, I realised that several variables were at play here; however, I want to mention two which seem the most relevant across my interviewees. First, the perception that long-term recidivism of petty offences can be as disturbing for the community as one serious offence.

> '… In the grand scheme of things [Section 38 offences] it's not that serious, but if you were on the receiving end it would be a most unpleasant experience. And you can't have people going around doing that to folk who are just minding their own business or doing their own job. (…) [For example] shoplifters, folk with significant records who shoplift, of course it's a nuisance, of course at times you have to take a line with them, but folk who are going to the likes of Marks or Tesco and steal £50 of goods and are caught, even if they've got a significant record and may have served custodial sentences, likely to have served custodial sentences, if they accept responsibility I won't take their liberty away initially. I'll defer to try and…. If when they are apprehended and they turn round and are abusive to the store staff or are violent to the store staff, no, sorry, not interested. That's a person just doing their job, you're trying to intimidate them from doing their job. I'm not having that. And because they will have a significant record, no, I don't need a background report, I'm putting you away for that. I'm not having it.' (Sheriff#12)

Thus, even when dealing with petty offences, the Sheriffs may feel that they need to balance the needs of the victim or the community and the needs of the offender. The second rationale operating behind using (short) custodial sentences on these offenders appears to be related to the reputation of the court. Therefore, what is 'serious' is not the offence itself but what the offender's behaviour means, in the long-term, for the system. Which says that there is an equivalence between violent offences, as the paradigm of serious offences, and being perceived as an individual that deliberately disrespects the court's authority'. However, despite the imposition of a custodial sentence, the fact that the offence is not serious restricts the maximum length of the sentence, producing the contradiction described by (Sheriff#10) above.

Furthermore, some Sheriffs try to make sense of the use of short custodial sentences in these cases by stating that a particular sentencing purpose is satisfied in such case. For example, Sheriff#1 explained that imposing them on shoplifters, when everything else has failed, at least provides a temporarily relief to shopkeepers, and hence, explains this as some sort of incapacitation.

> 'Or there are definitely cases when you would feel a prison sentence is absolutely necessary to protect the community, always with the mind set in the summary context that it's for a relatively short period of time. So you're not protecting the community forever. But for that period of time at least you are. But it could just be that it's not because you need to protect the community, it's because you feel there is little other option which has any likelihood of being complied with or working, and the offence always has to be sufficiently serious to merit that.' #Sheriff2

Overall, the Sheriffs are aware that to resort to a short custodial sentence is an unsatisfactory solution. However, they seem to feel that they have no other option. From this perspective, there are several questions that emerge: How many opportunities is an offender given before resorting to imprisonment? Or how long should the sentence be?

Regarding the first issue, I could not observe a common practice. Whether a further chance is given to a non-complier – a 'breacher' – clearly depended on the offender's past criminal record and background. It was also affected by the

different ways the Sheriffs construed the offender. Therefore, similar offences may lead to different outcomes either because of the individual's background or depending on how many opportunities a Sheriff considers the offender deserves.

If they decide that a custodial offence should be imposed, then another issue emerges: determining the length of the sentence. Three factors seem influential at this stage: since we are talking of Sum.P cases, the Sheriffs could not impose a custodial sentence over twelve months or, for some offences, nine months. They also have to take into account the fact and timing of any guilty plea – as noted in chapter five, a guilty plea normally attracts a discounted sentence.[19] Finally, it is necessary to consider the mandatory early release from imprisonment when the offender has served half of their sentence.[20] These three legal factors constrain the Sheriffs if they want to impose a custodial sentence. In this regard, the third factor is the more problematic one. Legally Sheriffs should not take into account mandatory early releases. However, inevitably Sheriffs knows that any length of custodial sentence will be cut by half. All my participants but one told me that they did not consider this while sentencing. Instead, (Sheriff#8) told me:

> 'Well, I don't think you're meant to take into account, but subconsciously you must take into account because you know that if you give someone four months they'll be out in weeks.'(Sheriff#8)

Overall, these variables and the presumption against short-custodial sentences, have to be taken into account whenever a Sheriff wants to impose a custodial sentence at the Sum.P. This is to say that if, for whatever reason, a Sheriff wishes to impose a custodial sentence, these variables halve the length of any sentence that they impose. Thus, directly or indirectly, they have to take into account how they affect the sentence. Otherwise, the purpose that they seek with that disposal is subverted in practice.

[19] S. 196 Criminal Procedure (Scotland) Act 1995

[20] Part I of Prisoners and Criminal Proceedings (Scotland) Act 1993

8.1.3. Sentencing offenders with multiple cases

Another complex set of practices emerged when the Sheriff has to sentence one individual for several cases. For example, an individual is charged with a petty offence, like shoplifting, the accused appears in Court and pled guilty. Then s/he is ordained to appear to the court at subsequent hearings and the sentence is deferred for background reports. Before the next diet, the individual commits a new petty offence and is charged and, again, pleads guilty. This time the accused is bailed and the sentence is deferred for further reports. Now, it is very likely that the same SW has to prepare reports for both offences. Thus the two cases are dealt with together; this saves time and resources. The accused may, or may not, commit further offences during this time. The relevant point here is that by the time that the reports are prepared, and the sentencing diet is scheduled, the Sheriff has to sentence the offender on several cases, which may, in turn, contain several charges.

> '... I would have imposed a custodial sentence for that. But I would have saved these other two cases for later to give me the opportunity of imposing a community-based disposal on his exit from prison, which is what I'm going to do subject to anything I hear in court.' (Sheriff#5)

> 'if there are a number of offences I say we'll keep one open, you come back before your release or immediately after your release and we'll see if we can put something in place. For a person with perhaps three or four charges and if he's going into custody I would consider doing that, definitely.' (Sheriff#10)

These practices challenge the perception that there is a binary 'Prison/No Prison' rhetoric in the Sheriffs Courts. It also moves us away from a simplistic 'just deserts' approach to sentencing. As I explored above, it seems that some Sheriffs feel that there are some cases that deserve no less than a custodial sentence. From some of these Sheriffs' perspective, they are both satisfying a punitive and deterrent role. But it seems that they also aim to provide rehabilitative support *as well as* and after custody. The Sheriffs who use supervision in this way explained that they are not using it for public protection, but instead are using it to provide post-imprisonment support. It is very important to note that, when the Sheriffs do this at Sum.P they are creating

some sort of ‘supervised release order’ which is not available for people serving short custodial sentences at the Sum.P.

However, the same kind of practice could be understood and justified altogether differently by others Sheriffs.

> ‘So what I ended up doing was balancing it all out. I gave him thirteen months, I think, and I kept one back so that when he comes out, I’ve deferred it for six months so if you take account of the backdating, six months should be about the time he comes out. So we can look at putting some kind of arrangements in place so that the citizens locally are protected from him and this gives him a chance not to offend. It’s just trying to be realistic about it.’ (Sheriff#11)

(Sheriff#11)’s rationale is different. S/he putting the individual on supervision as a way to ensure some public protection. What is important to highlight here is how two different justifications nonetheless seem to converge in the same practice. Thus, it may be the case that for the individual on the receiving end of this practices the Sheriff's intention may be irrelevant.

Also, these practices pose the question of what is their impact on those individuals who are targeted by them. One can argue that regardless of the intentions of the Sheriffs, these practices may lead to net-widening; a measure that is aimed at help or protection may be setting some individuals to fail. As McNeill (2018) has recently discussed, while some individuals may be able to use that support as intended, and manage to stop re-offending, others may not. As several Sheriffs explained to me, beyond dealing with new offences or breach of CPOs conditions, they have little information on how the sentences play out. This is a critical point because, beyond sentencing, it is the quality of the supervision and support provided by the SWs which plays an important role transforming the Sheriffs' intentions into a reality that can either support individuals or keep them under surveillance to prevent reoffending. That said, as I will discuss later in this chapter, the CPOs reviews are changing this aspect.

What appears to operate here is the Sheriff's perception that imprisonment will not stop reoffending. It is a punishment, and it may satisfy retributive or

deterrent purposes, but it may indeed fail to help some offenders with ‘chaotic lives.’ Hence in cases when imprisonment is used to draw a line, to show the offender that there are consequences to their acts, the holding back of a case to allow the later imposition of a community sentence reflects that they recognise that what needs to be done is something else.

While not all Sheriffs were working with this rationale, I noticed that most of them developed practices along these lines. In a sense, the rationale behind these approaches is a practical logic that does not easily fits the scholarly definitions of sentencing purposes. Thus, we can try to put a label on them such as ‘rehabilitation’ or ‘incapacitation measure’, but this seems unsatisfactory because we would be imposing our biases and subjectivities to what we have observed and thus ignoring that they may obey to a rationale of its own. The other option is to accept that they contain a logic of practice which should be understood in its context, as being influenced by the scholarly sentencing purposes but never an application of them in a strict sense. Overall, the practical aim is clear: use the disposals to stop reoffending in one way or another.

Moreover, another important issue that arises from these practices is that they affect the way that the Sheriffs construe the offender. If the same Sheriff piles up different complaints, it is very likely that the narrative of who the offender is and the nature of their offences is going to be the by-product of all their recent offences considered as one. This means that despite the fact that the Sheriff will have to decide every case, I was able to observe, at least once, that the Sheriff may be of the view that a holistic response is required. This means, for example, the imposition of a short-custodial sentence in one case, leaving two cases ‘open’; one for imposing supervision after imprisonment, with another leading to admonition.

In these cases, the short-custodial sentence is not imposed because that particular complaint was too serious, but rather because it was a reaction to the accused's offending spree. Now, it is clear to me that these approaches make sense within the framework that I have described. However, the problem is that

some offenders move around, and therefore the offending spree may be distributed in different sheriff courts, which are very likely to deal with each case differently, despite being aware of their record or the existence of complaints in other courts. Thus, there is a question of fairness that has to be solved here.

8.2. Non-custodial sentences

It is too simplistic to reduce penal sanctions into a dichotomy of custodial versus non-custodial sentences. While it is true that, currently, imprisonment seems to be the harshest measure that the criminal justice system can take against an individual, this does not mean that the remaining sanctions do not have 'punitive bite'. Moreover, depending on the individual, a short custodial sentence may seem to some people as a lesser punishment than a CPO with a long period of supervision paired with unpaid work and conduct requirements.

If our goal as a society is to reduce the use of imprisonment, it is very easy to ignore the differences between the other penal sanctions and to put them all in the same bag and label them as 'alternative' sanctions. This raises several problems; the fact that 'non-custodial' sentences are perceived as less punitive than imprisonment does not mean that they are all the same sort or severity of punishment. For example, supervision may impose coercive surveillance and treatment requirements, and if the individual fails to comply, may lead to a breach and further punishment; restriction of liberty orders (ROLOs) are a compulsory limitation on an individual's freedom of movement; unpaid work deprives individuals of time, mostly through forcing them to work on someone else's behalf. Fines deprive individuals of monetary means. All the different penal sanctions involve a certain degree of deprivation of fundamental rights, each one in a particular way that may have a greater or lesser impact, depending on the individual's circumstances.

During the judicial practices that I observed, I noticed that the Sheriffs recognised the differences between and unique characteristics of non-custodial sanctions. Thus, they used different sanctions to achieve particular goals

according to the perceived seriousness of the offence and (or) according to specific offender's background. As I stated above, when we move away from serious offences, the accused's background becomes the critical aspect that determines the sentence s/he receives. Hence, I am going to continue exploring how this explains the use of the non-custodial sentences.

The discussion of the use of Community Sentences is ‘the other side’ of the debate for the use of short-custodial sentences for non-compliers. As I stated before, one of the questions was where to draw the line; when to give another chance; and when to impose imprisonment. Furthermore, there is another ‘border’ for community sentences: The kind of cases where a fine or deferred sentence for good behaviour are also suitable options.

The discussion of the use of custodial sentences above has also outlined how among non-custodial sanctions there is a flexible hierarchy. At least, as (Sheriff#6) explained, there are some offences in which the default starting point is a fine or an admonition. In the core of the ‘system’ remains the notion of seriousness. However, I noticed that every Sheriff articulated the hierarchy of non-custodial disposals differently.

8.2.1. Community sanctions

In the strict sense, for the purposes of this chapter, when I talk about community sentences I am mainly talking about: CPOs with supervision and/or unpaid work requirements, ROLOs and DTTOs. Beyond the ‘community’ aspect, all of them involve subjecting the offender to surveillance and control by State agents. The degree of disruption to the lives of individuals varies according to the particular aims and structure of the sanction. Therefore, there are two interesting questions I am going to explore together: How do Sheriffs perceive the different degrees of punitiveness? And, does this produce some sort of hierarchy among the different disposals?

Now, while it is true that, under the current legislation, both supervision and unpaid work are requirements of the CPOs, most of my sample of Sheriffs

discussed them as sanctions in their own right. Instead of mentioning how they tailored CPOs, they explained why they used supervision, unpaid work or another requirement in isolation or combination. In other words, despite the change in the law in 2010, they talked about CPOs as a legal reform that did not change their practice noticeably, but at the same time, they recognised that it allowed them to sentence in a more flexible way. Thus, instead of talking about the CPOs as a single penal sanction that can be tailored in one way or another, they talk about it as a legal framework for a variety of sanctions. The main consequence of this is that supervision and unpaid work retain their own identity as sentencing 'tools'; because of their perceived effects and purposes they are seen as stand-alone or as complementing each other.

The perceived purposes of supervision determine its perceived punitiveness. For example, when I discussed the different elements of CPOs with some Sheriffs, several of them told me that they do not see supervision as a punitive sanction. For example, when I asked Sheriffs if supervision had a punitive component, the answer was:

> 'No. The purpose of that is to address with the offender why they're offending and to see what changes can be brought about in their lives through sometimes education, and then other times through simple guidance and getting access to the right support so that those offences don't happen in the future, or if they do happen they're much less frequent. So I see that as being a protective measure. I think I used that word a couple of times. And on the whole a supportive measure. But it's compulsory so it's not as if they can just opt in or opt out as they wish' (Sheriff#13)

> '…there are really two types of order; there are the purely remedial ones, supervision, program requirement, mental health treatment requirement, and you just make the order that's needed to give that treatment' (Sheriff#9)

Thus, while Sheriffs recognise that supervision is compulsory, they do not perceive it as a disposal that seeks to punish the individual. That said, this lack of perceived punitiveness does not mean that they think they have to use it as the bottom-tier sanction. There seems to be a concern for the appropriate allocation of public funds, and finally, it also depends on whether the SW believes they can work with that person. Nevertheless, there is not an obvious

hierarchy between unpaid work and supervision. For starters, the fact that supervision is not perceived as punitive, while unpaid work is, has a very straightforward consequence for the application of sentencing discounts for those who plead guilty.

> '… supervision is something I don't discount. I don't think you can discount supervision. Supervision you're fixing the period of the point of view of what's going to benefit everyone and what's going to work. It would make a nonsense of it if I then discounted it. (…) supervision isn't a punitive element, the unpaid work is a punitive element. The supervision isn't a punitive element in my view. Supervision is trying to achieve something else.' (Sheriff#4)

> 'The unpaid work is usually an element of punishment. Sometimes it's not only punishment but it offers a discipline. It's something to get the person into a routine, a work habit. But more often than not it's an element of punishment. So again I structure the order very much according to the individual' (Sheriff#5)

Since supervision and unpaid work are perceived in such different ways, the practice of combining them becomes relevant. The goal is to create, per the addition of unpaid work, a more severe or harsh penal sanction, without sacrificing the 'protective' or 'remedial' purposes of supervision.

> 'I might take the view that the only thing that's required is a period of unpaid work as a sort of penalty and a discipline to mark the offence. But very often I'll couple that with supervision because there might be an alcohol problem or sometimes an attitude problem about offending that could be addressed by supervision. Difficult to generalise, I think it depends very much on the individuals. And it depends on what might be available in the way of resources to address the issue.' (Sheriff#5)

These examples seem to suggest that whenever the Sheriffs decided to impose a CPOs they do so through a process of individualization of punishment. In other words, they first seem to determine the characteristics of the offender and then try to combine the different CPOs requirements to fit the individual particularities of the offender and the offence. This assessment also involves a prognosis of offender chances to comply with these requirements. For example, when discussing the uses and limitations of ROLOs (Sheriff#12) explained:

> ‘Well, I would be inclined to say to you for youngsters, for folk who are in their teens, early twenties, generally the folk that we’re dealing with, won’t comply because they just can’t order their lives. For older folk I don’t think it’s a penalty. If I was told ‘you’re going to have to stay in between eight in the evening and eight in the morning’ I could do that. So I don’t think it’s a penalty. It’s something which I know is there but I very rarely impose it. Whereas unpaid work, that is an inconvenience to someone.’ (Sheriff#12)

However, this individualization of the sanctions is subjected to several limitations: the disposals that are available in one jurisdiction, the nature and limitation of those disposals and the resources that a Sheriff believes should be allocated for a given case. The latter is more explicit in the use of DTTOs where all the Sheriff are conscious that these interventions are expensive and there are limited spaces, but it is not the only case. As we move away from the central belt Sheriffs have to deal with more issues in terms of resources and viability of disposals:

> ‘the problem is that the local council requires to provide people who will supervise the work that is there to be done. And currently, and in my time here, that is a problem. So that means that it is difficult to supervise, it is difficult for people to get regular unpaid work, and it is very difficult for the work to be done within the specified period of time because under one hundred hours they are meant to do that work within three months. It never happens. Never happens because the government resources would require to be there to ensure that that was done. It’s a big problem in X because they have got many, many people who are on these community payback schemes. So you have to have resources, you have to have supervision, I think we are lacking in resources, and we lack the necessary supervisors. That’s a governmental problem. We are told ‘do not send people to jail.’ We give them an alternative but that alternative is not being marshalled properly and rigidly. Which means that if I say to someone today ‘Community Payback Order’, they may not start that for some months, and then it will take a long, long time for that to be finished.’ (Sheriff#8)

> ‘CPOs cost a lot of money. In this area they don’t have enough supervisors to supervise the unpaid work. So you might say you’ll do 200 hours within six months, no chance. They come back to you and say ‘can we have a three month extension? Can we have another three month extension?’ It’s not worth it. The government talks a lot but they don’t put the money into things.’ (Sheriff#16)

Thus, the sentencing purposes that could be pursued by a Sheriff have been restricted by these constraints. Sentencing purposes are also shaped by trying to balance the harm that the offence caused to the victims and/or the community on the one hand, and the attempt to help the accused to stop reoffending on the other.

> 'if someone comes up to you and swears at you and shouts at you and is abusive to you, and perhaps makes some sort of derogatory remark (…) that it is most unpleasant and for you, like me, you'd be unsettled by it. It's not a pleasant experience. And to be maybe punched or something like that. In the scheme of things, however, in the criminal justice system it's the lower end. So what you're trying to do is to balance the effect on the victim but at the same time giving someone who probably hasn't had much teaching so far as what the appropriate norms of behaviour are a chance to do something, or at least stop behaving in that sort of way.' (Sheriff#12)

The effect of the offence, but also the impact of the sanction on the community -- which may be used to offer some sort of public protection -- adds a layer of complexity to the sentencing process. Sheriffs have to balance the appropriate amount of 'punishment' required in the community sentence, along with the requirements that might be of more help for the accused according to their needs.

However, the presumption against short-term sentences up to three months, and the highly likely possibility that this will be raised up to one year in the near future, has led some Sheriffs to craft high tariff CPOs. This use of the CPOs could be characterised as a mechanism of "social defence" in which the harsh requirements of the community sentences transform it into a sanction that aims to incapacitate the offender within the community. If the offender fails to comply, s/he will be imprisoned; if s/he complies the offender will be under constant surveillance. Furthermore, the harsher the conditions, the higher the chances that the Sheriff, consciously or not, may be setting the offender up to fail. I discussed an example of this in the chapter seven (see section 7.2.1). However, let us say one final thing about this. The use of high tariff CPOs poses questions about proportionality, particularly because if the alternative to this

combined sanction is a short custodial sentence, we may reach the point where imprisonment is less harsh than the community sentence.

8.2.2. CPO Reviews

Since my focus was on sentencing practices, I did not expect that CPO reviews would be a crucial aspect of my examination of how the Sheriffs understand their role as sentencers. However, the RC observation of how the Sheriffs were handling the reviews, and later, our discussion on which goals they were trying to achieve, revealed a lot about how they perceived their function beyond the allocation of sanctions. For starters, it is important to stress that despite the fact that Section 227X of the CJL-2010 Act introduces provision for Sheriffs to order CPOs Reviews, it does not tell Sheriffs how they should be carried out. Section 227X (4) states: 'A progress review is to be carried out in such manner as the court carrying out the review may determine.' The practical consequence of this is that every Sheriff articulated the reviews so as to fit their practices and understandings of their role as sentencers.

For example, (Sheriff#5) saw the reviews as a way to offer positive support for the individuals that were undergoing CPOs. Instead of framing this support as control or surveillance, this Sheriff adopted a positive approach, similar to what Anderson (2016) (calls 'bearing witness to desistance'. In other words, this is an approach that reveals a Sheriff that understands sentencing not just as a mechanism for tackling reoffending but rather as a means to try to give individuals opportunities and 'tools' to help them to change their lives.

> 'I don't like to use words like compliance and obedience and so forth. I try to get to a point of discussing with people along the lines of saying 'you can't change what's happened in the past, you can affect the future. If you're serious about wanting to change then I'm here to support you and you've got a team round you who will support you.' So I try and get away as much as possible from the language of criminal justice, and much more focus on discussing good things that have happened, people's strengths, their assets. I love asking questions like 'what are you good at? Tell me something good that's happened since I saw you last.' (…) But yes, I take it more often than not as an opportunity to do a pep talk, to try and help individuals focus their thinking on the journey. I use that metaphor. Quite often I'll

> say 'just imagine where you want to be in five years' time if everything goes well.' (…) And you can trace that right back to the start of the journey right there in the room, and sometimes it works. Some people take it seriously. (…) But sometimes an individual is not engaging. And rather than saying 'you're not complying. You must comply otherwise you'll go to jail,' I'm more likely to say 'look, I can't force you to do this order but if you don't do it I'd be very unhappy to see you lose the opportunity. You're going to paint yourself into a corner, you might give the court no option but to take a more severe approach, and I'd be very unhappy to see that happen.' So I don't threaten them. In fact, I very often say to them 'look, this is not meant to be a slow route to prison. I'm trying hard to keep you out of prison, and so are these people, we need you to help as well.' So I'm very conscious of the language I use at these hearings. I think about it quite carefully. And always try and use positive language, focus on people's abilities, their assets, and talk about what they can do.'(Sheriff#5)

From all of my participants (Sheriff#5) was the paradigm of this approach; s/he made arrangements to hold the reviews as privately as s/he could. The rationale behind the arrangements is that because sensitive aspects are discussed openly, some Sheriffs are of the view that this should be held without the public.

Other Sheriffs carry out the reviews in open court which provides a place for brief but interesting interactions between the Sheriff and the offender. During the sentencing process, the Sheriffs rarely addresses the accused directly, or if s/he does the accused is supposed to listen not to talk back. However, during the reviews, some Sheriffs engage in a brief dialogue with the accused over their performance or struggles to comply. One particular exchange struck me when I was shadowing (Sheriff#9). The day before the hearing the Sheriff allowed me to observe him/her while preparing for the cases. S/he mentioned one case where s/he was worried about a person who was struggling to comply. S/he believed that the person was inevitably going to fail. Nevertheless, the next day, when the hearing started instead of talking about his/her concerns, the Sheriff said to the person that s/he was aware of their efforts to comply. The face of the person brightened; s/he thanked the Sheriff for this recognition and promised that s/he would continue complying.

In their own way, (Sheriff#9) recognised the need to support the struggles of some individuals to stop reoffending. However, others Sheriffs have a different

view of reviews. (Sheriff#6) seems to offer a lengthy explanation of this entirely different approach paradigmatically:

> 'If you impose a Community Payback Order, that's as an alternative to imprisonment usually. So if you are doubtful as to whether or not that order is going to work then I will often fix a review. (…) if the person has a record or if he's of a particular character and I think he's not going to perform the alternative then I will often set a review in four to six weeks' time and I'll say to him 'there will be a review, if I find in four to six weeks' time you haven't been performing then I will revoke the order and I will send you to jail.' So I believe in, wherever I can, certainty of approach. Because I think that if you give the impression that they will be allowed to breach the order and get away with it then for many offenders that's exactly what they'll do. And what I've found quite successful over the years is the approach which is a very blunt and robust approach, you might see me do this today, and I'll just say to them 'I will give you a Community Payback Order, I have my doubts as to whether you'll comply. We'll come back in six weeks' time, I will get an update and a report. Unless the report is absolutely perfect I will revoke the order, you will go to jail, do you understand?' And leave it at that. And when they come back then I will do as I say. (…) So in other words I'm adopting, quite consciously, I think, a very tough old-fashioned school teacher type approach. Or very strict parent type approach. And this is not rocket science at all, there's very little rocket science in any of this. So I'm saying to them 'I've got my eyes on you, I'm a tough cookie, I can do things to you that you won't like. You comply, you won't get a problem from me. If you don't comply you will have big problems.' And so it's rough and tough.' (Sheriff#6)

(Sheriff#6) contrasted dramatically with (Sheriff#5)'s approach. If for the latter, the role is conceptualised as offering support, for the former the role is performed through a 'tough, old-fashioned school' to ensure that people will comply. This approach seems to be more concerned with deterring individuals from committing offences rather than with the individual themselves.

Overall, the Sheriff's different attitudes and approaches to CPO reviews allowed me to see how they arrange the reviews in line with their sentencing styles. Moreover, implicit in these particular practices was the question of the role of a sentence. Do Sheriffs have to actively support offenders to stop reoffending or is their duty limited to ensuring that the law is enforced? (Sheriff#5) and #6's approaches provide us with completely different ways to respond to these questions.

8.2.3. Fines and Admonitions

As I stated before, fines and admonitions are the lower end of penal sanctions at the Sheriff Court, leaving aside absolute discharges. The criminal proceedings records tell us that these disposals combined are around the 60% of the all the disposals passed annually (Scottish Goverment, 2017).

There is a certain degree of hierarchy between supervision and deferred sentences in good behaviour. The latter works as a way to ask people to behave during a few months; if they comply then they are admonished. This 'suspended sentence' of sorts[21] works as a kind of minimum intervention. All that is required is not to re-offend. Thus this works as a bottom-tier disposal for people who have no criminal records or are convicted of petty offences. Conversely, CPOs are aimed at people who already have records or have committed a more serious offence or requires a more intensive support.

> 'I use them [admonitions] after I've deferred for good behaviour. So I usually say to somebody who has not got a record, or a very small record, 'I'm deferring sentence for good behaviour, and when you return if you've been on good behaviour I will admonish you.' So it's an incentive for them to be of good behaviour, and the offense is minor enough that if he can prove that he can keep up good behaviour for a certain amount of time then that's served its purpose, it's stopped them offending for six months. And it's somebody you probably wouldn't expect to ever come back again anyway' (Sheriff#1)

> 'And very often I might defer sentence in relatively minor offenses in a summary case, and if you defer sentence for six months if they have been of good behaviour I generally will admonish them then. Some cases, however, are such that the nature of it is such that admonition might not be appropriate, and they may be fined, for instance. There are some cases where you might defer sentence for somebody to be able to do unpaid work, either because they've got full hours, not at the moment, or that their physical status is such that they can't do it, they're injured or ill, but in six months' time they may be able to. You might put it forward for that purpose. But generally if it's deferred sentence for good behaviour there probably is more

[21] Technically, it is not a suspended sentence. It is a suspension of sentencing.

> expectation they'll be admonished, and probably statistically they will be.'(Sheriff#15)

It is interesting how (Sheriff#15) seems to establish a hierarchy between admonitions and fines. It is not hard to see why: While the former simply asks the offender to abstain from committing further offences, the fines involves a 'penal bite'. However, while fines are still the most used disposals, according to the criminal proceedings statistics throughout the last few years, their use has dropped drastically. The introduction of CPOs and in particular the use of unpaid work appears to be responsible for this trend. Sheriffs have replaced the implementation of fines with unpaid work in order to punish the accused who may be unemployed or 'living on benefits'.

> '…since they've brought in unpaid work as an alternative to a fine I tend to use that quite a lot because a lot of the people who appear here are on benefits and struggle to pay a fine, quite honestly. Also in domestic abuse cases, if I can use that as an example, I'd be very reluctant ever to fine because very often the people are still together. And if you're fining you're hurting the victim as much as hurting the criminal, because you're hitting the family pocket. So I would tend to use unpaid work as an alternative there rather than a fine as well.' (Sheriff#4)

> 'The point is that most of the people that are appearing don't have any money or they're on benefits. And the benefits are calculated as a minimum amount to live on. So if you take money from them for fines, either they're not going to pay it or if they do pay it they're going to be short of money. So I'm sometimes reluctant to impose a fine. (…) Road traffic matters almost invariably are fines, even if somebody's on benefits. It's almost invariably a fine because a custodial sentence or anything else is inappropriate.' (Sheriff#5)

To a certain extent, these practices seems to equate these fines with unpaid work; instead of imposing a monetary penalty, working time is taken away from them. Therefore, time and money are equated in this context. However, if an individual has the means; they may pay and then their sanction is done, while the breach of unpaid work would mean further trouble for the individual.

8.3. Conclusions

In this chapter, I have continued the examination of the Sheriffs' sentencing practice. If in the last chapter I focused on the way they deal with the information provided to them for their decision making, in this chapter I have focused on the decision-making itself. The exploration of why and when the Sheriffs use a custodial sentence, a CPOs, a fine or an admonition has allowed us to glean the practical rationale behind this decision. This study allowed us to note how different Sheriffs adopts different styles which implies a specific understanding of their role. In the next chapter, I am going to shift the focus towards the legal habitus that can help us to understand the development of the Sheriffs' sentencing styles and the way they articulate their perception of their role as sentencers.

CHAPTER 9: Or ‘Becoming and Being a Sheriff’

In the Scottish Legal system – as explained in chapter five - we can observe how practitioners are appointed as Sheriffs because of the ‘legal experience’ they have accumulated through several years of practice. The unique structural configuration of this specific legal field means that practitioners, regardless of the positions they occupy in the field, possess a specific legal habitus and capital. Thus, I am going to explore how legal experiences shape both the habitus and capital of my participants as practitioners.

This chapter is divided into four sections: Firstly, I am going to explore the career trajectories of some sheriffs, to illustrate the diversity of the background of solicitors or advocates that are appointed as sheriffs. In the second section, I discuss the responses of my participants in explaining why they decided to become a Sheriff. Thirdly, I will explore how their perceptions of the judicial role changed from being a lawyer to becoming a Judge. Finally, I discuss their articulation of the sentencing role.

9.1. Legal Experience

As discussed in chapter five, the Scottish legal field is split between solicitors, solicitor-advocates and advocates. Each of these different types of legal practitioner requires the acquisition of specific competencies and allows them to exert particular functions in the field. Before the introduction of ‘solicitor-advocates’ in 1994, there was a sharp division of juridical labour: Solicitors could only appear at lower courts and Advocates had the rights of audience for appearing at the High Court. Thus, at first glance, it seems easy to simplify the analysis of the legal habitus possessed by the Sheriffs into these two categories. For example, and discussed in chapter seven, in relation to the Sheriffs’ perception of solicitors’ performances, the Sheriffs who used to be advocates were more critical of these performances than the Sheriffs who used to be solicitors. This, in turn, seems to affect the way that Sheriffs examine and value the information provided by solicitors that appears before them. However, through the on- and off-the-record conversations I had with the Sheriffs about

their lives and trajectories, I realised how rich, diverse and unique the paths that they had followed were. Paths that – ultimately - led them to being appointed.

In my sample, eight of the participants had previously been solicitors and eight had previously been advocates. However, this objective distinction proved to be of little analytical use. As I mentioned above, it did help to understand some individual differences among Sheriffs, but it was impossible to attempt to outline a common trajectory for solicitors or advocates. Within each sub-group, my participants' backgrounds were very different from one another. If there is any common feature among their legal trajectories, it is the richness of their diverse experiences in the years before being appointed. Consequently, only during the last part of my analysis did I come to understand more in depth what (Sheriff#10) told me. S/he explained to me that only after working with a solicitor who had become a Sheriff had s/he 'realised that the route to becoming a Sheriff was open to people from many different areas'.

The uniqueness of the different trajectories introduced an obstacle. Since some of their career paths have very particular landmarks, analysing them may lead, directly or indirectly, to making my participants identifiable. To get around this issue, and to be able to provide examples of legal trajectories, I decided to use the brief biographies of recently appointed Sheriffs featured on the website of the Judiciary of Scotland. I am aware that this option to protect the anonymity of my participants entails a limitation: these examples will only account for more recent appointments. However, I am using them to help me exemplify and explain, indirectly, the differences that I found in my sample. While it is not perfect, I can do so because the patterns I found in my original sample, and the findings I present in this section, were similar.

I used the 'Google' search function within the website www.scotland-judiciary.org.uk. The keywords used were 'sheriffs appointed'. In order to further protect the identity of my participants, I searched for any related news published on the website after the 1st January 2017. This was in order to use biographies of Sheriffs appointed after I finished my fieldwork, thus avoiding any

possible indirect identification of my participants. The news provided brief biographies of the new Sheriffs that I am going to discuss below. Through this exercise, I was able to extract the biographies of ten Sheriff that were appointed between the 1st January 2017 and the 21st May 2018. All of them started their career qualifying as solicitors. However, four of them became solicitor-advocates. Only one of them came to the Bar and became an advocate, s/he also was appointed Queen's Counsel before being appointed to the 'shrieval bench'.[22]

There are three aspects that are worth mentioning here. Firstly, taking into account the biographies of my participants and the appointed Sheriffs I found published online, I noticed that most of the advocates had been solicitors for extended periods before coming to the Bar. Thus, they became advocates 'relatively late' in their careers, which affected the kind of positions that they may be able to attain within the field. The trajectories of the Senators of the College of Justice[23] offer an interesting contrast in this respect. Most of them became Advocates early in their career (Judiciary of Scotland, 2018a), and thus their trajectories allowed them to accumulate a specific kind of capital for an extended period. I am going to come back to this topic in the next subsection.

The second aspect is to highlight how the different trajectories among individuals who qualified as solicitors illustrate our depiction of the Scottish legal field. As we will see below, some solicitors invest time in improving their position as a solicitor or attain new positions as solicitor-advocates or advocates. Overall, this shows us how actors who share the same legal habitus can move through the field, accumulating specific kinds of capital, and attaining new roles and positions.

Finally, it is worth noting that the sample of ten Sheriffs whose biographies I obtained from the website of the Judiciary of Scotland have some particularities. Of the ten Sheriffs, seven had a background in the criminal

[22] This expression is another way to say that the individual was appointed a Sheriff.

[23] They are the judges who hear cases in the highest courts in Scotland, the High Court/Court of Session

justice system. Six of them spent part of or their entire careers at the Crown Office and Procurator Fiscal Service (COPFS). One of the sheriffs was the local head of one of the branches of the Public Defence Solicitor's office (PDSO). This was not the case in my research sample; my participants' backgrounds were evenly distributed among three categories: mostly criminal, mostly civil and ones with mixed or more nuanced legal trajectories.
Having said this, let's compare the trajectories of two solicitors who were recently appointed as Sheriffs.[24]

> '[Ms A.] is a graduate of the University of Strathclyde and has a LLM in Human Rights, jointly from the Universities of Glasgow and Strathclyde. Prior to her traineeship Ms [A.] undertook an internship in South Africa in a community law centre. Following a traineeship with [WL] Solicitors she was retained as assistant. In 1999 Ms [A] was Assistant and thereafter Partner with [X.] before becoming Chief Solicitor with [Y] National Park Authority. Between 2006 and May 2016, Ms [M.] was a partner in private practice, latterly with [Z] solicitors. She latterly sat as a member of the Parades Commission in Northern Ireland and a Judge for the First Tier Tribunal, Immigration and Asylum Chamber. Ms [A.] is currently a Summary Sheriff in Glasgow Sheriff Court as well as a Judge for the First Tier Tribunal, Social Security Entitlement.' (Judiciary of Scotland, 2017a)

> 'Mr [B] is a graduate of the University of Strathclyde and obtained a LLM in European Law from the College of Europe. Following a traineeship with [X], Mr [B.] became a Procurator Fiscal Depute in 2004. He was promoted to Senior Procurator Fiscal Depute in 2008, including a period as Acting Head of the Wildlife & Environmental Crime Unit 2014. Mr [B.] was a part-time tutor at the University of Strathclyde, in Public Law between 2005 and 2007 and in European Union Law between 2005 and 2015.' (Judiciary of Scotland, 2017b)

I selected these two biographies to exemplify the diversity of paths that can lead legal actors to be appointed Sheriffs. Thus, it is not enough to state that individuals have accumulated capital just by being solicitors; instead, these paths reflect different investments and progressions within the field. The particular investments made by individuals are significant because - we need to remember - Sheriffs are expected to be able to deal with civil, family and

[24] While these records are public, I still decided to anonymise the names of the Sheriffs and the names of private institutions.

criminal law alike. Thus, their biographies inevitably reveal to us that, depending on in which legal area they had specialised, they can have completely different strengths and weaknesses. More critically, their past legal experiences will influence their approach to the judicial role, and thus, help us to explain their different styles.

Another interesting aspect of these biographies is how lawyers seek to improve their legal careers beyond the specificities of legal practice. For example, they managed to attain positions that went beyond purely 'court practice'. For example, one sheriff was 'first tier judge of the Immigration and Asylum Chamber Tribunals', another was 'convener of the Criminal Law Committee of the Law Society of Scotland' (Judiciary of Scotland, 2017b), another was a 'first tier judge of the Social Entitlement Chamber tribunal' (Judiciary of Scotland, 2018c). Either way, by investing their capital in attaining roles in judicial-like institutions or being members of boards or committees for civil societies, their experiences were enriched beyond court practice. Some other lawyers had positions as tutors or part-time Teaching Fellows in Law Schools at undergraduate or diploma level. Let's consider the following trajectories of two solicitor-advocates.

> '[Mr C.] is a graduate of the University of Edinburgh. Following a traineeship with the (COPFS), Mr [C.] became a Procurator Fiscal Depute in 1997. Mr [C.] was then appointed District Procurator Fiscal, first for the Sheriff Court District of [X.] and then for the Sheriff Court District of [Y.]. In 2009 he was appointed Deputy Head of the High Court Division and in 2014 became Head of the Health and Safety Division, both specialist posts within COPFS. Since July 2017 he has been Assistant Procurator Fiscal.' (Judiciary of Scotland, 2017a)

> '[Ms D.], from Clydebank, graduated from the University of Aberdeen in 1983 and began her legal career as a COPFS trainee. Following time as a Procurator Fiscal she worked in London as a commercial solicitor with a large City law firm before returning to Aberdeen. She was an Associate in local firm [X] before setting up her own practice specialising in employment law and personal injury. She qualified as a Solicitor Advocate in 2005. She was appointed as part time Senior Teaching Fellow in employment law at the University of Aberdeen in 2010. She served as the local representative on the Law Society of Scotland from 1995 to 2000. Ms [D.] is currently a Summary Sheriff in Aberdeen.' (Judiciary of Scotland, 2017a)

These two biographies have similar starting points. Both trajectories started with a traineeship with COPFS, which led them to be appointed PFs. However, whereas Mr. C decided to remain and invest in a career at COPFS, Ms D. moved away and followed a more varied path. Nevertheless, in both of their career paths, we can see an attempt to go beyond court practices. Mr C., within COPFS, attained specialist posts, whereas Ms D. invested in a part-time career teaching law and also as a representative of the Law Society Scotland. Overall, the diversity of their backgrounds seems to suggest that one important way to accumulate legal capital during their careers was investing in positions and roles that enhanced their legal experience beyond court practice.

Given the formal hierarchical structure of the juridical field, from what I could observe and from what my participants told me, it seemed that High Court practice is regarded as a higher form of practice than that within lower courts. Let's remember how critical advocate-sheriffs were of solicitors' performance, as discussed in chapter seven. This aspect is implicit in the core difference between solicitors and advocates, and it helps us to understand why solicitors may want to reinforce or improve their position in the field by acquiring additional competencies or roles beyond lower court practice. However, what matters for this analysis is the diversity of the legal experiences attained by the agents during their legal careers, not the social perception of them. This is to say, what is relevant is to observe the richness of individual experiences, and how different they are from one another. Also, because of this, it is important to note the time spans of these backgrounds, some of them encompass fifteen, twenty or even thirty years of individual history in the field before being appointed. Therefore, what these paths tell us, beyond their uniqueness, is how important and influential these forms of experience are to the new Sheriffs' conception of what 'law in action' is. Consequently, they help us to understand why they have been appointed - because of the wealth of their accumulated capital in the field - but moreover, how these experiences are expected to make them good sheriffs, and therefore, how their legal trajectories are expected to make them good judges.

9.2. Why become a Sheriff

Before the introduction of the Judicial Appointment Board for Scotland in 2002 – as explained in chapter five - as Sheriff#1 explained to me, 'you didn't apply to become a Sheriff in those days. You were selected by the Lord Advocate'. Several of my participants mentioned that this meant that, very often, the Lord Advocate recommended the appointment of lawyers who were known to them or suggested to them. It was implied by some of my participants that, back then, advocates had a better chance of being appointed as a sheriff than solicitors. (Sheriff#14) told me that at least until the 1970s 'you could only be a Sheriff if you were an advocate'. Thus, it is fair to say that the appointment of solicitors as sheriffs has become more common throughout the last few decades. In any case, with the introduction of the Board in 2002 the field was reframed.

While exploring this topic with my participants, I obtained different responses from those Sheriffs who were solicitors and those who were advocates. Let's remember that in my sample two Sheriffs were QCs, six were advocates, one was a Solicitor-advocate and seven were solicitors. Overall, both solicitors and advocates talked about becoming a Sheriff in terms of a new stage in their career paths. (Sheriff#2) and #7, borrowing from a comparison with the French Judicial system, offered interesting analysis of how and when you can decide to become a Sheriff within the Scottish system.

> '[The Scottish field] It's not like the continental where you can actively pursue from the outset a career in the judiciary (…) So I suppose from the outset you can aspire to become a Sheriff but it's not actually a career path that you follow from the outset because it's a thing which traditionally is done later in your career and after you have considerable experience as a solicitor or an advocate. So, yes, I suppose that's right when I was a student I would have thought 'oh, that would be good' but it's not something that you're actively following early in your career in the way that you would in France, for example.' (Sheriff#2)

> '…there are basic rules in terms of how much experience as a lawyer one needs before one can apply to become a judge. We take the view that it's for a chosen few who have experience. Although I wonder if we are at the beginning of a more career-based judicial system (…) It's not the same thing because [in France] you go

> straight from university and learn to be judges, where we don't do that. We learn to be lawyers.' (Sheriff#7)

These explanations captured, to some extent, the different experiences my participants described to me. Becoming a Sheriff was a career path that would only 'open' if you had acquired enough legal capital and spent enough time in the field; thus, it is a position that is not immediately available for anyone at the beginning of their legal career, as it is in other jurisdictions like France. I noticed that there were differences in how solicitors and advocates described their personal experiences of this structural dynamic. Solicitors described becoming Sheriffs in terms of progression, a 'step forward' in their careers or a way to 'crown' them. Consequently, solicitors described being appointed to the shrieval office as a position they were more than able to fulfil accordingly to what is needed from that role.

> '…the person that I worked for became a Sheriff, and I was quite impressed by that as an opportunity some way down the line. And as I became more experienced in court I was attracted by the idea of making decisions in the court (…) I often found that it was good to give that information to the court to see all points of view, and I think it suited the skills that I brought to my job. And in particular I thought that as a lawyer I was always able to see all sides of the argument. (…) I felt that that was something that I was able to do and as I developed my own experience I was more attracted to making that neutral decision and assessing all points of view. So that was really what led to it.' (Sheriff#10)

> 'The honest answer to why did I become a Sheriff, because I was fed up appearing in front of Sheriffs who I didn't think knew as much about what was going on as I did. (…) And I was appearing in front of Sheriffs who didn't have a clue what was going on with these, because you would have a lot of Sheriffs who would have a background in criminal law, and they will all admit it, Sheriffs who have a background in civil law find it easier to adapt to criminal law than criminal Sheriffs do to adapt to civil law. And I was appearing in front of a significant number of Sheriffs who I was just thinking 'well, I could do better than that. [Laughs] That was rubbish.' So I thought 'I've had enough of this.' Which is why I applied. That is arrogance [Laughs].' (Sheriff#3)

However, advocates framed their appointments differently. Their narratives implied that becoming a Sheriff was not necessarily the most prestigious path

available for them to finish their career. However, they explained that this path offered them a better quality of life:

> '…I had a successful practice but I had got married during that time and I had had a child during that time, and I found that I was working very long hours, day and night, and I think that I wanted a change from that constant pressure of running your own business. And the other major reason for choosing to apply to be a Sheriff was because I thought that the job would be more interesting than what I was doing…' (Sheriff#6)

> '… I was getting older, and when you're at the Bar doing what I did you were working seven days a week every week. You might have had the odd Saturday off but you were working all the time. And as a self-employed person, of course, you've got no pension. And I just decided, it was a very difficult decision even to apply because I didn't really want to do it. I wanted to stay on my feet. But when I got offered the job I just thought 'just take it.' (Sheriff#16)

As stated earlier, in a strict sense, an individual can come to the Bar at any point in their careers, as long as they manage to fulfil the 'entry requirements'. However, as I explained, coming to the Bar 'too late' in their legal careers may limit the possible positions that can be attained by them. Since the accumulation of legal experience is translated in an objective requirement of having a specific amount of time spent in the field, coming too 'old' to the Bar becomes a disadvantage when competing for certain positions or developing specific paths. As (Sheriff#9) explained:

> '…many lawyers doing court work would aspire to the bench. I did not spend long enough in the High Court to have any reasonable prospects of being appointed to the Court of Session and High Court bench. I wasn't there long enough to become a QC, and was too old to be able to have that time...' (Sheriff#9)

Likewise, taking into account the space of possible positions that are attainable for advocates, becoming a sheriff was not necessarily the best prospect for them. As (Sheriff#5) explained bluntly:

> '…there was still a sort of notion back then, late 1990s, that being a Sheriff was a bit of an easy option. It was a job that an unsuccessful advocate could get if they weren't doing well at the Bar. There was still some of that thinking…' (Sheriff#5)

These responses appear to reinforce the relevance of the structural analysis of the field. It is interesting how the division of the juridical labour within the field seems to reproduce a stratification in it, which in turn, will determine the way they newly appointed Sheriffs approach the judicial office. As explored in chapter seven, this stratification has a direct impact on the way sheriffs interact with solicitors or advocates.

9.3. A new position in the field: Getting the 'sentence' right

Since Sheriffs are appointed from the pool of practitioners with at least fifteen years of experience, there is the implied assumption that their accumulated legal experience will be enough to carry out the judicial role from the outset. As (Sheriff#3) explained '…literally the minute you're appointed you're straight into court and you just have to pick it up and run with it'. This belief, I argue, is part of the legal habitus in the Scottish field; something that you not only just know but also take for granted, sometimes called 'common sense'. Consequently, some of my participants believed that they were prepared to carry out their role from the outset; for example, (Sheriff#7) said: 'Because I was an advocate I spent all my time in court so I probably had a better idea than many of how judges approach judging and how they put that into effect'.

A long trajectory of standing in court – appearing regularly before judges - will inevitably provide you with practical knowledge of what a Judge's role is. However, it does not follow that you will be able to carry out the duty flawlessly from the outset. If you agree that theoretical legal knowledge about solving legal cases does not make a legal scholar a judge, this means you do not become one just because you have legal experience. In Chile, we have a proverb which says '*Otra cosa es con Guitarra*', which can be translated as 'It is one thing to observe how the guitar is played, playing it is a completely different thing'. This is to say that we can internalise how a judicial role should be exerted, but that does not mean we will be prepared from that sole fact to perform it ourselves. For example, consider this quote:

> '…if you are around the courts for as long as I have been, and in general many Sheriffs have been, through private practice, you know what is expected of you. Of course, it's a bit of a culture change to be actually sitting on the bench and doing it (...) But it's your wealth of knowledge throughout your career that brings you to know what to do. But, of course, it's different at the beginning. It's all new and it's a bit strange. You actually making decisions on the bench. But once you get over that change of seat it's not particularly difficult.' (Sheriff#15)

During the last three chapters, I have described how sentencing practice is embedded in a series of routines, relations, and interactions that make it more rigid and structured than it can seem at first glance. Thus, to a certain extent, the difference that Sheriffs face when they are appointed is the difference between theory and practice. In other words, the legal experiences of the Sheriffs provide them with a theoretical knowledge of the judicial role but not necessarily with a grasp of what the practice of that role entails. Thus, becoming a Sheriff involves adapting to the practicalities of the role - to its foreseen and unforeseen constraints, which in turn are going to influence the way they solve - or have to solve - some cases.

> 'Because it's like I was telling you earlier, once you become resident somewhere you become much more involved in what's going on out there, and I know what programs there are out there for people, I understand, I know where the housing office is, I know where the homeless place is. I know where the benefits office is. Sometimes it becomes a bit insular, a bit enclosed, because sometimes you forget there's life beyond [X].' (Sheriff#3)

Consequently, there is a process of adaptation that the recently appointed sheriffs undergo to attune their legal habitus to their new position in the field. As (Sheriff#8) argued 'if you have done something completely different up until you're aged fifty-five and then on a Friday you become a Sheriff, and on a Monday you are presiding over a jury trial, it's not easy'. Herzog-Evans (2013, p. 44) calls this process of acculturation the 'Zombie effect' meaning a process of 'undergoing the process of acquiring' their judicial identity. In other words, this process it is not only about having to catch-up with those areas of the law in which your knowledge is out of date but it also means having to face a series of

practical problems that the new position in the field requires you to solve. For example, let's consider how the perception of (Sheriff#1) changed:

> '… there was more required of you than I probably thought was required of Sheriffs before I became one. I thought maybe it was quite a straightforward job. But once you're doing it you realise how demanding it is. It's very demanding. And I think also it can be upsetting at times. I think when you were either prosecuting or defence you would deal with some dreadful cases but you didn't have the responsibility for the outcome, whereas the judge has that, the Sheriff. And I'm thinking of sentencing, it's getting the sentence right. It can be quite distressing at times. I remember in one of these solemn cases three young men […] committed a dreadful attack on another man, and I had to send them to prison. And the night before, I knew I was going to have to send them to prison, I could hardly sleep because all I could think of was these boys being taken away in the prison van. And actually that night after I had sentenced them to prison I could just picture them getting their clothes taken off them and getting put into prison uniform. So that's something I never really appreciated before I became a Sheriff, the demands it would have on you, and how things like that would upset you.' (Sheriff#1)

This response was particularly interesting because throughout my fieldwork, Sheriffs rarely referred to the emotional weight of sentencing. However, during my 'shadowing' this aspect of practice was pervasive. The emotional toll of the role was the 'elephant in the room'. On the one hand, during the hearings, it was not uncommon for the human drama to unfold. Consequently, the mechanical or structured ritual was enveloped by something the accused said or did during the sentencing diet, like bursting into tears, shouting for mercy or interrupting the hearing to defend themselves. In one court, the Sheriff decided to leave the accused on remand. His first reaction was to cry, and suddenly assault the guards who were not able to restrain him. Two police officers who were there had to help them. While this happened, the Sheriff quickly left the courtroom, and the accused's solicitor asked us - the few people that were in the public galleries - to leave the room, which we did. Later on, during the interview, the Sheriff did not say a word about it, and I did not mention it. It was as if tacitly we both knew that it was better not to talk about it. On the other hand, I was able to observe the 'weight' of sentencing decision-making. Interestingly, I noted that it was two-fold, not just about the consequences for the accused but also to deliver justice to the victims or the community. Thus, I

observed all of my participants, to a greater or a lesser extent, often questioning themselves if they had 'got' the sentence 'right'.

> '…You become more aware of the effect that your sentence has on people. It has an effect on the individual, it has an effect on their family, it can have an effect in domestic cases, your disposal will have an effect on the whole family. It can have an effect on the community. So you become much more aware of that. And I think that as you become more confident you realise 'I understand there's another way to deal with this. And I know where I'm going with this. And everybody might think I'm being a bit soft putting this person on a Community Payback Order, but I know that's probably going to be harder for them but better overall for everybody because what I want to do is stop him offending.' So you become less worried about what other people will think about your sentencing and you become more confident that you are doing what you think is the right thing to do, and having the courage to do that.' (Sheriff#3)

The Sheriffs' concerns for 'getting the sentence right' was another aspect that was omnipresent during my fieldwork in one way or another. Contrary to what I was expecting to find, I realised that Sheriffs were always concerned with the fairness of what they were doing. On a formal level, the appeal court worked as a constraint on their decision-making:

> '…sentencing is a far more difficult, far more nuanced task than I think people realise (…) And it constantly is tweaking. And of course to some extent it's not just tweaked by your own views but also it's tweaked by what you think you can get away with, with the Appeal Court. Because I might have a view and say 'for this sentence you lose your liberty.' But there's no point in me imposing that sentence as a general rule if you know you're going to be appealed, it'll go to the Appeal Court and it's going to be overturned. You have to take cognisance of the decisions that the Appeal Court are making. You may not agree with them but you have to largely follow them.' (Sheriff#12)

Thus, to a certain extent, their concern to allocate a fair sentence seemed to lead several of my participants to adopt a flexible approach to sentencing. As (Sheriff#12) put it, a 'constant tweaking' of their practice, which involves a reflexive gaze towards their past and current legal experience. Jamieson (2013) sees this attitude as an attribute of the 'reflexive judge'; one that could be summarised by the following quote:

> '…those who are appointed to the full-time position will necessarily have quite a lot of experience of judges of various kinds and appearing before them. And (…) it is likely that they will have something of if not a role model, then at least examples, as you imply, of people who they would like to appear. And they have also probably more searingly ingrained in your brain examples of judges who they don't want to be. Because there have been some truly awful judges out there. The difficulty is this, that psychologically of course one may acquire bad habits on the bench without knowing it. And one may acquire the habits even of bad judges without being fully aware that you're doing it. So I think to become a good judge requires a conscious appreciation and a conscious reassessment, if not on a daily basis, certainly on a weekly basis, of who you are, what you've been doing, how well you did something on the bench and how badly you did things on the bench, and how you can do things better.' (Sheriff#6)

This 'dynamic' self-analysis elicited an interesting off-the-record dialogue with a Sheriff. The Sheriff and I spent the morning at court, where a custodial sentence was imposed. Later on, in chambers, the Judge asked me what I thought of that decision. I perceived that the Sheriff was concerned that the sanction could have been too severe. However, mechanically - my legal habitus kicking in - I explained that in Chile the sentence would have been longer, harsher. I doubt that my response was what the Sheriff was expecting. This spontaneous interaction struck me in two ways. For the first time, I realised - from the perspective of a former practitioner - how hard sentencing is. In Chile, the criminal code has a complete system of 'sentencing rules'; thus, everything is regulated. Consequently, in my experience, Chilean practitioners do not feel the same weight while sentencing, we apply the rules. If the outcome 'feels wrong' or 'unfair', this is the consequence of the flaws of the law not of our individual decisions. Hence I could empathise with and understand the constant 'tweaking' or 'self-analysis' to which some Sheriffs referred.

The second aspect that hit me was realising that - despite how Judges performed their role in court - in the chambers, they showed a vulnerability regarding an omnipresent doubt: did they get the sentence right? This doubt - that Sheriffs seemed to be resigned to experience sometimes - could not be reduced to their concerns around avoiding an appeal. As explored in chapter seven, Sheriffs engaged in a dialogical way with all the sources of information

that the other penal actors provided for them. However, the ultimate decision is theirs alone.

> 'The decision is mine at the end of the day. The Procurator Fiscal and the defence agent are there presenting the case as best as they can from their client's point of view. I don't really have anybody else. Yes, I've got colleagues I can bounce ideas off and say 'would it be a ridiculous thing if I did A, B, or C in these circumstances?' I can do that and get a response, and I think we all do that. But I can't say to the colleague 'what do I do here?' That's my job. So in that sense it's solitary.' (Sheriff#4)

What is interesting is that, to a certain extent, the adaptation required for the newly appointed Sheriffs seems never to stop. Whether because of intellectual inquisitiveness or because the constant dynamic changes of the legal field force them, tweaking sentencing practices seems never to end. Nevertheless, I realised that this reflexive effort was always determined by the 'position-taking' that the sheriff had adopted concerning sentencing purposes. This is the final aspect I am going to explore in the next section.

9.4. 'My approach is just to make a decision': Defining the sentencing role

I have argued that recently appointed Sheriffs have to learn and adapt to the 'rhythm' or 'pace' of work of their new position. However, even after they have internalised what 'hands-on' judicial work involves, this does not explain how they determine their 'judicial style'; how they define their approach to the judicial role. For example, regarding sentencing, this requires them to determine their practical approach to the application of sentencing principles and purposes. On this particular aspect of their judicial role, all the Sheriffs I interviewed were acutely aware that, overall, different Sheriffs had different styles. As I have been arguing in this chapter, this may be an obvious consequence of the diverse and rich backgrounds of the lawyers that are selected for the role. It is important to remember that this is a system where lawyers are appointed because of their legal experience in the field through which they are expected to be able to carry out the judicial role from

appointment. Therefore, unsurprisingly, sheriffs with different legal backgrounds develop different sentencing styles.

> '…all you can do is bring your own human experiences and experiences as a lawyer and experience of working within the criminal justice system and within the civil or justice system. All you can do is bring all of that to bear and balance everything. And that's why you will get so many different sentencing options for Sheriffs. Sheriff [X] (…) and I tend to sentence the same way. We tend to think the same way. But Sheriff [Y] would approach it a different way. There's no right and wrong answer to that, [s/he's] just bringing a different perspective to it than I'm bringing to it. (…) And they couldn't be criticised for that because that would be an acceptable sentence. I think you approach it differently.' (Sheriff#3)

I found the last part of this quote striking because it is often forgotten or taken for granted. If you can observe Sheriffs with different sentencing styles it is because sentencing itself, the penological aspect of it, allows it. In other words, given how broad sentencing principles and purposes are, different Sheriffs can apply different purposes and rationalities to similar cases. Their decisions will not be unreasonable so long as they are consistent within themselves; with what that principle demands. Consider the following quote:

> '…as you know every judge has their own sentencing styles. And what one tends to see from the literature, as you know better than me, is you tend to get in experienced judges internal consistency so that if you look at any one judge he or she will always tend to sentence this sort of case in this sort of way, that sort of case in that sort of way, so there is a certain degree of predictability.' (Sheriff#6)

The question that emerges from this analysis is: can we try to understand what is behind these sentencing styles? Can the observation of practice shed some light on this 'position-taking'? And what is the relation of these sentencing styles with the philosophy of punishment and the Sheriff's understanding of the sentencing role? The main issue of trying to understand this aspect of sentencing practices, as I have discussed above, is that if I asked the Sheriffs their views on sentencing purposes, they provided me with a 'handbook' response. However, this question elicited an interesting discussion with (Sheriff#16):

> 'I've never really been quite sure what the purpose is. It's public protection, it's punishment, it's an opportunity for retribution, it's an opportunity for reform. I don't know. That's such a huge philosophical, difficult thing.' (Sheriff#16)

Despite this response, this particular Sheriff's sentencing practices were not arbitrary. His/her practice contained a penological logic of practice. The Sheriff further explained that 'My approach is just to make a decision. Just this case has come before me, I have to make a decision. Just make a decision'. However, these two responses have to be contextualised with previous answers that this Sheriff provided. Earlier on - during the interview- we discussed if s/he shared the views of others Sheriffs - in small jurisdictions - of using harsher sentences as a deterrent, thus, trying to stop certain behaviours, the Sheriff said:

> 'It's the crime that I'm sentencing on. The crime and the person (…) Sheriffs don't actually impact. We don't change people's behaviour. And I can understand an argument for doing that, I'm not criticising any Sheriff.' (Sheriff#16)

(Sheriff#16)'s practice is quintessentially determined by what seems to be the 'obvious' purpose of sentencing: To allocate a sanction. This response that may seem like a platitude requires a more nuanced analysis. Even though sentencing purposes are a theoretical construct, they reveal that there are several different ways to approach the act of sentencing. However, while it is tempting to label this Sheriff as retributivist, that would ignore the fact that this Judge does not label him/herself as such. In this regard, when the Sheriff says 'It's the crime that I'm sentencing on' we need to try to understand this phrase in its practical context carefully. Through the observation of this Sheriff in court I realised her/his practices put the offence at the centre of their decision-making. The individual characteristics of the offender were only relevant if they were required to assess the suitability of the individual for a particular disposal. Therefore, within this model, as the old Latin phrase, goes, the Judge 'Punitur quia peccatum est' - the offender is punished because s/he has committed an offence.[25]

[25] This Latin phrase is often contrasted with 'Punitur, ne peccetur' which means that punishment is imposed to stop reoffending of that particular offender (rehabilitation/incapacitation/individual deterrence) or deter other people from committing offences (general deterrence).

(Sheriff#16)'s approach to sentencing helped me to better understand how several Sheriffs I interviewed articulated the logic of their practices. I was expecting to find a practical position-taking concerning the philosophy of punishment. This is to say, a personal position-taking influenced by their previous legal, political or religious experiences. Instead, I found something slightly different, but distinct nonetheless. The different sentencing styles seem to be linked to how the Sheriffs conceptualise their sentencing role. Their 'penological' practice is related to the question of what their sentencing role as Sheriffs is, rather than being concerned with the purpose of punishment in the abstract. For example, as (Sheriff#3) put it while explaining the use of custodial sentences: 'although you have discretion and although you have a role to play and this is your job, I have [a] duty to the public. We have a duty to the public, we're serving a public role here in enforcing the law that this country has created.'

Consider the following answer of (Sheriff#5), who -- regarding sentencing practices -- is on opposite end of the spectrum to (Sheriff#16).

> 'I think I was very conscious from the outset that I didn't really have a proper understanding of sentencing. I came from a mainly civil background as a lawyer (…) And I wanted to learn about that and to inform myself, and I did that by reading, but I also joined SASO, the Scottish Association for the Study of Offending (…) that has been invaluable (…) meeting police officers, social workers, prison officers, and talking about criminology, about criminals and sentencing. I am very consciously engaged with the criminal justice social workers, I started having meetings with them and just learning from them what they knew about addressing people's needs. So there's no doubt from the very beginning until now I've learned a huge amount. And my approach to not only sentencing but how I deal with people in court, both in the civil and the criminal courts, is influenced by that experience.' (Sheriff#5)

This Sheriff's path in finding the best way to exert their role, is, again, not articulated through the philosophy of punishment. Instead, the judge seeks out practitioners to understand the nature of sentencing, and therefore the nature of their role as a sentencer. This leads us to the most relevant aspect of this quote; the Sheriff states that s/he aimed to learn how to address 'people's

needs'. This phrase becomes a central aspect of this Sheriff's approach to sentencing in which the offender -- and the way of dealing with them as individuals -- becomes central. If (Sheriff#16) was an example of a role exerted according to the principle 'Punitur quia peccatum est', (Sheriff#5) is an example of an approach based in the principle of 'Punitur, ne Peccetur'. This is probably best exemplified in the next quote:

> 'There are certain individuals that I simply won't send to prison because they've got mental health problems or emotional problems and prison is simply not the answer. And inside myself, privately, I'm thinking 'this person has a problem but I can't solve it.' And sending the person to prison is not a solution. Society has a responsibility to find an answer. And if this person keeps offending then eventually society will realise that the responsibility is the community's to find a solution for some people. That's getting a bit political and a bit philosophical, but it affects my thinking.'(Sheriff#5)

As you may note in this quote, the Sheriff recognises that some offenders have problems s/he 'can't solve'. (Sheriff#5) was very interested in - s/he is a promoter actually - of 'problem-solving court' approaches. However, instead of articulating this position regarding the philosophy of punishment, s/he explained:

> 'I think that as a lawyer you have to have the ability to form a view about a problem and to stand by it. Your whole training is about looking at a problem and deciding what the answer is and justifying that with reasons. So I suppose from the very start of my time as a lawyer I've approached it that way. And actually becoming a Sheriff I didn't feel any great change. I found that I was applying the same reasoning, and as long as I'm happy with my reasoning then very often the decision speaks for itself. The reasoning leads you to a decision. So that hasn't changed, and I don't find it lonely at all.' (Sheriff#5)

Having said this, the argument I am trying to put forward is that despite the inevitable discussion on the philosophy of punishment linked to sentencing practices, the position taken by the Sheriffs is related to their practical understanding of what is required of their role. In a sense, both (Sheriff#16) and #5 are aware that they are 'called' to allocate sanctions. However, they do it differently because their legal experiences, their

professional trajectories, and their legal habitus have led them to adopt a different position towards how this role has to be exerted in practice. Nevertheless, these position-takings, however different they may be, are valid stances within the field. In other words, both ways of exercising the role lie within the boundaries of the acceptable ways in which the role can be performed. Where (Sheriff#16) believes that sanctions do not change offenders, (Sheriff#5) believes they can provide that opportunity. (Sheriff#16) therefore looks back at the crime; (Sheriff#5) looks forward to what punishment (or withholding punishment) may achieve.

The different articulations of the roles are certainly blurred in practice because, despite the distinctive styles, there are a finite number of outcomes available. Therefore, while is true that two different Sheriffs may deal with similar cases differently, it is also possible that two different styles may converge in the same outcome. Also, as explained in chapter five, the Sheriff's sentencing powers are bounded depending on whether the case was prosecuted using solemn or summary procedure. Moreover, these powers are further limited, for example, by offences with statutory maximums, 'restrictions on passing sentence of imprisonment or detention'[26] or 'presumption against short-term sentences'[27]. As (Sheriff#9) argued 'I don't have a discretion about which rules apply. I have a discretion within a limited area about what sentence to select'.

Ultimately, the different understandings of sentencing roles adopted by (Sheriff#5) and (Sheriff#16) are possible because both positions are contained within the limited number of possible ways that the Sheriff role can be exerted within this field. This is to say, that as contrasting as their approaches can be, both rationales - inasmuch they are consistent with themselves- cannot be deemed as incorrect or unfair.

From this dimension, all the sentencing practices that I observed from my participants were in a continuum between a greater or lesser use of custodial sentences. Those sheriffs who used fewer custodial sentences were those who,

[26] S. 204 – 204A - Criminal Procedure (Scotland) Act 1995.

[27] S. 17 - Criminal Justice and Licensing (Scotland) Act 2010.

for one reason or another, gave more chances to recidivist offenders or non-compliers; thus, they made more attempts to use disposals to help offenders and/or reduce reoffending. In other words, the differences were between the recognition of the needs of the offenders in sentencing -- and to what degree they were recognised. This correlated with how the sheriff used the CJSWRs. One sheriff, whose views about sentencing were closer to (Sheriff#16) understanding of the role, complained that the reports contained too much information. At the other end of the continuum, a sheriff who actively tried to help young offenders considered that all the information contained in CJSWRs was very useful for their decisions.

In conclusion, it is important also to note that the evolution of the normative sentencing framework in Scotland during the last few years has aimed to encourage the use of community sentences by the sheriff and to disincentivise the use of custodial sentences. Regardless of how political pressures are incarnated through these legal reforms, they have managed to shape sentencing practices. They have widened the scope of the possible ways to exert the role, subverting a *merely* punitive or robust approach.

9.5. Conclusions

In this chapter, I shifted the gaze from the practices to the Sheriffs themselves. The aim was to try to see how the legal habitus - developed by the Sheriffs during their legal careers - shapes the way they understand their judicial role. Critically, I tried to revisit with the Sheriffs the trajectories that brought them to be appointed Sheriffs. The exploration of how their perspectives change after being appointed or how their pasts influence their present practices aims to reveal how the past is always within the present; the path to *becoming* a Sheriff shapes the practice of *being* a Sheriff. Every time the Sheriffs use their past experiences as ‘knowledge’ to deal with the current issues, past becomes present.

CHAPTER 10: Being a Sheriff: Doing Justice

This thesis aims to grasp the logic of sentencing practices at the Scottish Sheriff Courts. The goal is to try to understand the penology of everyday life for Scottish judges; the practical dimension of sentencing decision-making. As discussed in chapter two and three, one of the challenges of studying sentencing is the need to conceptualise it theoretically. Thus, as explained earlier, I adopted Bourdieu's theory of practice which means conceptualising sentencing as a social practice. This framework has determined the way I have approached my subject, explored it during the fieldwork, analysed it and, finally, the way I have structured the last four chapters where I have examined the findings of my research. In these chapters, I have tried to grasp the logic of practice behind sentencing at the Sheriff Court. The final goal is to try to understand both the penological rationale behind these practices, and the way that Sheriffs conceptualise their role as sentencers.

In this chapter, I am going to synthesize my four different findings chapters, using a Bourdieusian theoretical framework. The structure of the analysis I am going to deploy in this chapter will be divided into four sections. Firstly, I offer an examination of the encounter between habitus and the field, which aims to explore the two aspects that set the structural context for sentencing practice as decision-making. Once I have described how the space for decisions emerges, I go on to examine how the Sheriffs position themselves penologically and how this impacts the way they exert the sentencing role. Next, I discuss how these practices reflect and express a penology of daily life. I will end with some conclusions and recommendations for research, policy and practice.

However, instead of starting the analysis by centring attention on the practices - as described in chapters six to eight - I am going to reverse the structure and begin by focusing on the agents and their habitus - as described in chapter nine. The reason is that this strategy acknowledges the ‘double’ nature of the habitus. As Bourdieu explained:

> '…it is important to know that there is, in my view, a key double relationship at the centre of any human action: this is, first, a relationship between the field and its agents, which can be described in deterministic, causal terms; and, second, a goal-focused relationship that comes to fruition through the relationship between an agent's dispositions and the field as it is, and which becomes a space of possibilities as a system of dispositions, a habitus, begins to assimilate it.' (Bourdieu, 2013/2017, p. 320)

Therefore, the analysis requires a gaze that folds over itself. Like a Celtic knot, in which an intricate pattern goes through the same points several times from different sides, outlining a complex set of lines that connect with each other, the Bourdieusian analysis of practices requires a similar movement.

Next, it is important to stress that the relationship between field and habitus is different from the relationship between habitus and field (Bourdieu, 2015). The former is the relation by which agents internalise the 'nomos', the rules of the field. Consequently, there is a first relationship in which the specific field conditions the habitus of the agents.

For my analysis, this relationship can be seen at two levels: in chapter nine, the Sheriffs explained their legal trajectories and how they adapted to their new position in the field. More critically, they told me that they were expected to know how to fulfil their new role because of their accumulated legal experiences as practitioners. This structural aspect of the judicial system in Scotland sets the second level of analysis, which is implicit. In other words, if the Sheriffs know -- or are expected to know -- how to fulfil the judicial role because of those experiences they internalised when they held a different position in the field, then the current practices I described in chapters six to eight are, at least partly, the reproduction of those past practices. Consequently, the shift from the description of the findings towards the analysis means a regression: to progress it is necessary to move back and only then is it possible to move forward.

Once this relationship (field - habitus) has been explored; we can progress to the inverse relation (habitus - field). In other words, the analysis has to discuss what this legal habitus entails, before considering how this specific habitus, faced

with the current field, generates a space of possible sentencing decisions. This means returning to the practices I described, but for now, I focus on how they outline a space of possibilities (and thus constraints upon) for action.

10.1. Summary of findings

In In this subsection, I aim to briefly summarise the findings examined in chapters six to nine, which I divided into two topics: the structural context of decision making and the habitus of the Sheriffs. The first three chapters - six to eight - focus on describing the materiality of the process I observed. Chapter six focuses on the 'When' and the 'Where'; chapter seven focuses on the 'How'; and chapter eight focuses on the decision-making itself. Chapter nine aimed to explore the specific legal habitus of the Sheriffs - as discussed in the first sections of this chapter. Thus, I am going to explore the interconnections between the four chapters briefly and see how they outline a 'space of possibles' (and impossibles) that shapes actions and processes for the Sheriffs. In other words, I aim to show how they reveal a larger picture when brought together. They depict a structural context in which the individual decision-making is embedded, which inevitably shapes sentencing practice. Consequently - before starting this analysis - I am going to proceed to summarise the findings of these three chapters.

In chapter six, I deployed the analysis of two aspects that are central to the study of practices within a Bourdieusian framework: time and place. Thus, in the chapter, through the exploration of these aspects of sentencing, I was able to discover a decision-making process that is framed and subjected to specific constraints derived from its temporal and spatial dimensions. Likewise, in the field, I found that sentencing takes place in several different places, each one with its own temporality. These spatial and temporal contexts - as I explore later in chapters seven and eight - are linked to each other forming a structured procedure. In brief, chapter six set the stage for the analysis of sentencing. It describes the 'when and where', before we explore the 'how' and 'what' of those practices.

In chapter seven, I focused on the different sources of information Sheriffs have to deal with. This analysis sacrifices the temporal context, to understand how and when Judges' interact with the information that is provided to them. However, this analysis requires a consideration of two aspects. On the one hand, the way Sheriffs weigh the information is highly influenced by the professional relationship they have with the actors who produce that information. On the other hand, this analysis allows us to observe how Sheriffs do not receive all the information at once, but rather, have to make sense of it in different moments and contexts. In brief, what is supposed to be a simple question - how do Sheriffs deal with the information provided to them for making their decisions - reveals a set of complex relationships. Thus, we see the Sheriffs and their judicial practices in interaction with the court's structure which requires them to carry out their role within specific temporal and spatial constraints. Furthermore, this analysis also indirectly reveals a set of interpersonal relations that illustrate the courtroom community and its effects on the decision-making process.

Chapter eight aimed to explore the outcomes of the sentencing process. Instead of asking my participants to talk about sentencing in the abstract or using mock exercises, I discussed with them the rationale behind the allocation of sanctions in real cases they dealt with on the days I visited their courts. This allowed a grounded analysis of the decision-making 'in action'. This approach allowed me to explore the practical rationale behind the use of custodial sentences, CPOs, fines and admonitions. In this regard, I discovered how the assessment of the seriousness of the offence seems to establish a hierarchy among the different disposals: more serious offences will be dealt with through imprisonment; less serious ones with a fine or admonition. However, in between, there is plenty of space for overlapping and grey areas that reveal a rich and dynamic use of practical rationales. This is particularly relevant when Sheriffs are faced with recidivists or individuals that do not comply with community sentences.

In the final findings chapter, I shifted the focus from practices to Sheriffs themselves. During the fieldwork and, later on, during the analysis of the data it became clear that to understand better the Sheriffs' habitus I needed to examine

it within its context. The chapter was divided into four sections: what kind of experience Sheriffs had before being appointed; then, why they decided to become a Sheriff; what was the process of adapting to their new role; and, finally, how did they explain their approach to their sentencing role. The chapter showed how their past legal experiences are a crucial factor in how Sheriffs constitute the judicial role. Unlike in continental systems, in which being a Judge is a part of a judicial career that requires specific training, in Scotland you become one because of your professional trajectory. Therefore, that experience is inseparable from the judicial identity, because it is the central core on which that identity is constructed.

10.2. Escaping the 'fog' of 'intuition'

One of the relevant aspects of the study of practices is trying to understand how - within the limited timeframes and the limited information given - agents 'know' how to carry out their practices. During my fieldwork, and particularly while discussing their practices (chapters seven and eight) and their past trajectories (chapter nine), I noted that Sheriffs explicitly and implicitly mentioned that their practices were grounded in the acquisition and possession of specific legal experience. This experience, as discussed in chapter seven, allows them to acquire - swiftly - an idea of the range of disposals that is appropriate for a case simply by reading the case papers. Some Sheriffs explained this ease as reflecting an intuitive process, thus establishing a connection with intuition grounded in experience or 'expert intuition'.

Responses of this kind were not unexpected. In recent research on sentencing in Scotland, when Sheriffs were asked to describe the sentencing process most of them stated that they saw it as an 'intuitive process', something that arose from the experience they had accumulated within the legal field. For example, Tombs (2004) asked her participants 'whether the decision-making process involved was primarily structured or more intuitive and based on experience' (2004, p. 42). All of her participants said that intuition did play a role in their decision-making. Even those who described sentencing as structured 'noted that intuition and experience also played a part' (2004, pp. 42-45). More recently Brown (2017)

explored the same issue. From his twenty-five participants, only two described sentencing as a purely structured process (2017, p. 184). Again, the majority of his sample recognised that intuition plays a primary or at least secondary role in their decision making (2017, pp. 184-191).

The question of what 'intuition' entails in sentencing, and moreover, what the use of the term is conveying is relevant not only for methodological and analytical purposes. In several common law jurisdictions, the description of sentencing as an 'intuitive' process is embedded within a 'wider' debate on the nature of sentencing (Brown, 2017; Hutton, 2006; 2016; Lovegrove, 2000). In brief, the issue revolves around the suspicion that instinctive approaches to sentencing may lead to 'inconsistency, both in outcome and principle, and make sentencing unpredictable' (Bagaric, 2015, p. 112). The underlying question in these debates concerns the introduction (or not) of guidelines, and thus a curtailment of judges' discretionary powers.

Australia is probably the jurisdiction that best encapsulates the different positions that this debate elicits. As early as 1975, the Full Court of the Supreme Court of Victoria delivered a decision in the case 'R v. Williscroft' (Edney & Bagaric, 2007). In the leading judgement by Justices Adam and Crocket, the sentencing process is described as an 'instinctive synthesis of all the various aspects involved in the punitive process'.[28] Thirty years later, in 2005, a new decision - Markarian v The Queen – 'affirmed the desirability - in the absence of statutory direction - of the instinctive synthesis approach to sentencing' (Edney & Bagaric, 2007, p. 23). For what matters here, Justice McHugh offered a new definition for this approach:

> 'By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.'[29]

[28] Williscroft [1975] VR 292, 300.

[29] Markarian [2005] HCA 25, 51

This way of understanding what sentencing should be has been met with criticism from sentencing academics in Australia (Hewton, 2010; Bagaric, 2015; Lovegrove, 2000). A full elaboration of this debate is beyond the scope of this thesis; however, as I said earlier, inevitably I have to mention this issue for three reasons.

Firstly, to say that 'intuition' is a 'method of sentencing' is to confuse the symptom for the cause, thus obscuring the real nature of the process. As I have argued in chapter three, the inability of judges to explain how they arrive at their decisions is predictable. From a sociological perspective Bourdieu argued that:

> 'An agent who possesses a practical mastery, an art, whatever it may be, is capable of applying in his action the disposition which appears to him only in action (…) But he is no better placed to perceive what really governs his practice and to bring it to the order of discourse (…) And there is every reason to think that as soon as he reflects on his practice, adopting a quasi-theoretical posture, the agent loses any chance of expressing the truth of his practice, and especially the truth of the practical relation to the practice'. (Bourdieu, 1980/1990, pp. 90-91)

In other words, one of the puzzling aspects of practices is that the 'knowing how' is not a 'knowing that'. As Ryle (1945-46, pp. 4-5) argued, 'knowledge-how cannot be defined in terms of knowledge-that and further, that knowledge-how is a concept logically prior to the concept of knowledge-that'. Nevertheless - as Boltanski (2012/2014; 2009/2011) and Celikates (2009/2018) warn us - this should not lead us to incur the methodological mistake of ignoring, neglecting or underestimating what agents can do and do tell us about their practices. Agents may not be able to convey with clarity what they do, but they are undoubtedly offering their first-hand perceptions of the process. If we neglect this, we risk increasing the:

> 'asymmetry between deceived actors and a sociologist capable - and, it would appear from some formulations, the only one capable - of revealing the truth of their social condition to them. This leads to overestimating the power of sociology as science, the sole foundation on which the sociologist could base his claim to know much more about people than they themselves know.' (Boltanksi, 2009/2011, p. 21)

Cognitive psychology research studies on expert intuition sheds light on this issue. For example, Simon explains that it is not unusual for 'experts' to describe their decision-making processes as intuitive. He argues that:

> 'In everyday speech, we use the word intuition to describe a problem-solving or question-answering performance that is speedy and for which the expert is unable to describe in detail the reasoning or other process that produced the answer. The situation has provided a cue; this cue has given the expert access to information stored in memory, and the information provides the answer. Intuition is nothing more and nothing less than recognition.' (Simon, 1992, p. 155)

This psychological account of how intuition works seems to converge with the sociological Bourdieusian notion of habitus. As discussed previously in chapter three, Bourdieu uses this concept to explain that agents are endowed with cognitive schemes and dispositions for practical action which are acquired or 'inscribed in their bodies by past experiences' (Bourdieu, 1997/2000, p. 138). These 'mental schemata' are acquired because '…cumulative exposure to certain social conditions instils in individuals an ensemble of durable and transposable dispositions that internalize the necessities of the extant social environment' (Wacquant, 1992, p. 13). Therefore, intuition seems to be how the Judges perceive a decision-making process which is grounded in their experience. Which is to say that using the concept of intuition seems to be a way to communicate the ease with which they carry out sentencing.
Secondly, the obscurity of the explanation further impairs the possibility of critical examination of sentencing decisions. As Hutton argued:

> 'The public is invited to place their trust in the office of the judge. Judges are uniquely qualified to deploy these mysterious cognitive processes and thereby to deliver just sentencing decisions.' (2016, p. 146)

Furthermore, some psychological research studies have tried to answer the question 'When can you trust an experienced professional who claims to have an intuition?' (Kahneman, 2011, p. 234). Recently Klein and Kahneman (2009) - who have studied this problem from different approaches - arrived at a consensus on a critical aspect of our current discussion: while intuition can arise from the development of expertise, the conditions for this to happen are quite

restrictive. Thus, as Kahneman (2011, p. 238) bluntly put it ‘there are many pseudo-experts who have no idea that they do not know what they are doing’.

In other words, having experience in one area does not mean that ‘expert intuition’ will necessarily lead to an appropriate solution. If the conditions for successful intuitive decision-making are not met, this can lead to biased decisions. This does not deny the value of experience, but it does mean that we cannot claim that the possession of experience automatically makes ‘experts’ good decision-makers. If we are going to make such claims we need to carry out research measuring the quality of their decisions. Otherwise, as Hutton implied, claims about intuition are nothing more than an ‘*argumentum ad verecundiam*’ - an appeal to authority.

The final reason why intuition is relevant is the inevitable consequence of the epistemological and methodological issues discussed above. While it is true that when Sheriffs are asked to explain their decisions, they offered post-hoc rationalisations, if you untangle these explanations - as I did in chapters seven and eight - they reveal some of the variables and cues that Judges take into account during their ‘intuitive’ process; for example, the age and gender of the offender or the seriousness of the offence. Their accounts tell us their perceptions of structural or local constraints that affect, restrict or limit their practices; for instance, the available resources and programmes for community sentences. Ultimately, even though these accounts do not allow us to understand the rationale behind the decision-making, the do at least allow us to grasp some aspects of the mental schemas that make these decisions possible. Thus, again, the challenge is to try to go beyond and beneath this ‘intuitive process’.

The next step - which I am going to explore in the following subsections - is to try to understand the acquisition of the mental schemas that make it possible for all Sheriffs to impose a sentence. For this analysis, the role of legal experience becomes crucial: how it is acquired, how it changes and adapts over time and how the constraints and possibilities of the field reconfigure it. Ultimately, the encounter between the habitus and the field is what allows us to

explore the Sheriffs' 'position-takings' concerning a penology of 'everyday life'. This penological position-taking implies and entails an understanding of the judicial role that involves goals and limitations.

10.2.1. Legal experience as a form of Habitus

When I started my fieldwork, I was unsure of my ability to 'escape the fog' of sentencing practices. I knew I was going to be able to interview Sheriffs, but would I have the chance to go beyond and beneath the 'intuitive process' or the 'black box' of sentencing decision-making? Having adopted a Bourdieusian framework - and thus having conceptualised and problematized sentencing as a practice - I was prepared for the methodological challenges of this task. However, I was unsure if the access that I was granted was going to be enough. As I mentioned in chapter four, shadowing became a crucial aspect of my research, providing me with the opportunity to observe different aspects of Sheriffs' practices. Moreover, the Sheriffs' openness to discussing, explaining and teaching me about their practices was also critical in dispersing the 'fog' of sentencing practices. During my fieldwork, the Sheriffs directly or indirectly mentioned the value of 'legal experience' as a way of explaining certain aspects of their practice. However, this notion seemed to work in three different ways.

Firstly, it was used to convey that it was their acquisition of 'legal experience'; that taught the Sheriffs the 'know-how' of legal practice in general and of sentencing in particular. In this sense, this practical knowledge - that they had internalised - allowed them to deal with cases 'intuitively' or at least with ease. However, the question that arose was 'what kind of practical knowledge is this'? One could be tempted to argue that what constitutes lawyers as such, what gives them their particular competency, is their knowledge of the law. But then there would be no difference between legal scholars and practitioners. As discussed in chapter five, the Scottish legal system is constructed around the notion that, to become a practitioner, you are required to acquire court experience. In this regard, the acquisition of court experience works as 'legal capital', which will allow you to progress in your legal career and acquire higher positions within the field. Within the Scottish system, one of the higher positions

you can attain, if you have accumulated enough legal capital, is to become a Judge.

Accordingly, on several occasions, while discussing their practices, the Sheriffs explicitly or implicitly alluded to how their professional trajectories provided them with the knowledge to perform their role - as explored in more detail in the last chapter. This may seem obvious but it is the direct consequence of Scotland's so-called 'recognition judicial system' (Georgakopoulos, 2000; Garoupa & Ginsburg, 2009; 2011). Thus, you become a Judge precisely because of your legal trajectory and the unique experience – the legal capital - you have acquired. Therefore, you are meant to bring this experience to bear in performing the judicial role well. Thus, to become a Sheriff - as discussed in chapter five - you are required to have at least ten years of court experience. In practice, most Sheriffs are appointed after fifteen or twenty years of legal practice.

This aspect of the Scottish Judicial system can be better analysed when contrasted with some continental systems like the French or Chilean judiciaries. In these jurisdictions, there is a judicial career system, where you are expected to become a Judge early on in your professional career and to progress *within* the judicial hierarchy (Georgakopoulos, 2000). For example, during 2018, two of the most renowned Judges of the Chilean Supreme Court retired after turning seventy-five years old: both their professional trajectories within the judiciary spanned fifty years. One of them started his career as a court clerk, the other as a lower judge in a rural court. Unlike the Scottish system, they were appointed very early in their careers, and thus, they were able to be promoted in several judicial positions until being appointed as Supreme Court Judges. Depending on how you see it, the advantage or disadvantage of this system is that because you enter into a judicial career almost as soon as you qualify as a lawyer, judges-to-be lack court experience in other roles.

This comparison immediately outlines critical differences in what constitutes judicial experience. The judicial career system relies on what you learn within the hierarchy; the recognition system relies on the court experiences you

acquired before becoming a Sheriff. This means that in the latter the Judge is someone who has experience of practicing different roles in the field. It is noteworthy that - as discussed in chapter nine – solicitors' and solicitor-advocates' trajectories before being appointed revealed a notably vibrant variety of different legal positions or roles. This inevitably means that their understanding of their judicial role will be built on the foundations of their experiences appearing before judges or being other kinds of adjudicators such as immigration judges. Thus, within a system like this, past legal experience cannot be ignored or neglected, nor is it possible to leave it out if we are aiming to understand judicial practices.

Furthermore, this experience will also have an impact on the way Sheriffs perceive the other penal agents - as we discussed in chapter seven. The court experience means that Sheriffs spent time in one or several different roles within their professional trajectories. This means that the Sheriffs may know first-hand the amount of work that a proper legal performance by a procurator fiscal or a defence agent requires. This knowledge has an impact on the way they perceive other legal agents once they have become a Sheriff. Critically – as discussed in chapter seven - I noted that Sheriffs that had been advocates were more critical of solicitors' performance than those who had been solicitors themselves. Consequently, their perceptions of solicitors' performance will affect the chances of a PiM successfully persuading the Sheriff to adopt a particular course of action.

Moreover, since sentencing is a process in which the Sheriffs need to rely on the information that other legal agents offer them - sometimes including information provided by the accused - the interactions between the Judges and the individuals that appear before them are as important as the quality of the information discussed.(Einsenstein, et al., 1988; Ulmer, 1997; Roach Anleu & Mack, 2015; 2017). For example, as seen in chapter seven, if a Sheriff is critical of the solicitors' performance, it is less likely that s/he will be persuaded by that lawyer's plea of mitigation. On the contrary, a good performance may convince a Sheriff to explore a different approach, for example, to give a recidivist a robust community sentence instead of a custodial sentence.

Overall, the connection between what was discussed in chapters seven and eight and the acquisition of legal experience seen in chapter nine seems clearer now. The discussion of how my participants became Sheriffs (chapter nine) allows us to rethink and contextualise the mechanisms that allowed them to internalise the set of practices described in chapter six to eight. In other words, how they acquired the 'know-how' that enables them to deal the criminal business of their courts with ease. From a Bourdieusian perspective, this is the acquisition of a specific legal habitus that provides Sheriffs with 'mental schemas' for practice.

The second aspect that is necessary to stress here is a direct consequence of the first: the constant 'return' to the past as a way to make sense and solve the problems of the present. In other words, legal experience constitutes cultural capital precisely because it provides the agents with a practical 'know-how'. As a habitus, past legal expertise is continuously brought to the present providing dispositions and schemas for practical issues faced by the agents. Critically, the habitus is not immutable nor static, the '[h]abitus change[s] constantly in response to new experiences. Dispositions are subject to a kind of permanent revision, but one which is never radical, because it works on the basis of the premises established in the previous state (Bourdieu, 1997/2000, p. 161).

Consequently, it is not possible to speak analytically of a break between 'legal experience' - acquired before being appointed - and 'judicial experience' - acquired during their tenure. The habitus can evolve, and new experiences adjust it, particularly in the case of the position of Sheriff attained by the solicitor or advocate within the Scottish legal field. During my fieldwork, the references to their legal experience referenced both that acquired before being a Sheriff and that acquired while being in the position. Moreover, it is impossible to separate them in practice because, for the agents, their past experiences are one; a continuum.

I argue that -- due to the structure of the Scottish judicial field -- the notion of a purely 'judicial habitus' makes little sense. Instead, I want to suggest that since

lawyers are appointed Sheriffs precisely due to their legal trajectories, and thus, due to their specific legal experience, they acquire and develop a legal habitus - which entails the sum of their experiences in the field. As a consequence of this, when agents attain a new position within a field, the set of dispositions that was well-adapted to their prior position in the legal field are 'out-of-tune' with what their judicial practices require of them, without being completely ill-adjusted (Bourdieu, 1997/2000; 1980/1990). As Bourdieu explained, in these cases the dispositions are 'at odds with the position that agent occupies. Such effects of hysteresis, of a lag in adaptation and a counter-adaptive mismatch, can be explained by the relatively persistent, though not entirely unchangeable, character of habitus' (Bourdieu, 2000/2005, p. 214).

However - and accordingly with what I discussed in chapter nine - Sheriffs can adapt and update their habitus to their new role. This is so because, overall, the new position they acquired is part of the same field, and thus, it requires them to use the very same 'mental schemas' that they had acquired, to deal with the legal problems they deal with before, but from a different 'perspective' and 'function'.

This interpretation of the field can be summarised as follows. When they are appointed Sheriffs, agents do not develop a new habitus; they come to their new position with their legal habitus (and accumulated legal capital). The experience they acquire while being Sheriffs, mainly by being confronted with the practical problems that arise from the field, builds on their past experiences and allows them to update, tweak or improve their practices. In other words, the emergence of their judicial practices and styles has to be understood as a process where they adapt their legal habitus according to the legal and contextual constraints and possibilities for action that they have to face in their new judicial position.

The final aspect that is necessary to stress here, again, stems from the past two points. The acquired experience as a solicitor, advocate, as a criminal or civil lawyer, etc. do not prepare Sheriffs adequately for the judicial role. It provides a legal habitus, but the judicial practices -- sentencing in this case -- as

explained earlier, stems from the encounter between the habitus -- the dispositions for actions and mental schemas -- and a specific space of possibilities (and therefore constraints) outlined by the field.

Hence, it is not enough to possess a legal habitus attuned to the field; it is essential to understand that practices emerge from an agent who already has internalised the 'sense for the game' and who is in the position of playing the game. More critically, the field, the rules and the constraints all create a space of limited possible 'moves', and this also becomes relevant to understanding these constraints. This is what I am going to explore next.

10.2.2. The Field

During my fieldwork I was able to observe the ordinary daily-life aspects of the internal court organisation, its bureaucracy, or the 'gears of the watch'. I realised that the courts' organisational matrix produced the 'mundane' conditions of possibilities for judicial practices; the space in which sentencing decision-making had to be carried out; in other words, the way that institutions impose a working process to its members outlines a space of possibilities and impossibilities for actions. For example, setting time limitations may encourage quick decision making over more deliberation and thus agents will have to adapt their practices to manage the time given to them to carry out their task.

Furthermore, it is worth stressing that whenever you outline a space in which, according to some rules, action has to take place, in the very process of determining the correct ways of doing it (the 'space of possibles') you are also establishing how it cannot or should not be done. This is to create a space of impossibles (Bourdieu, 1991a; 1992/1996; 2013/2017). This is the space that recently appointed Sheriffs face when they assume their new position in the field. They have been selected because it is presumed that they know how to perform the role. However, that does not necessarily mean that they have the know-how of the bureaucratic and mundane process that everyday judicial court-work requires. Thus, the emergence of judicial practice is situated in the

encounter between their habitus and the field that imposes on them a space of possible and impossible ways to exert their role.

It worth noting that despite my empirical work, I am unable to discuss the nature of the Scottish Sheriffs courts' organisation I observed. I cannot tell, for example, if these organisational practices obey a ‘new public management’ or ‘third logic professional’ mode (Vigour, 2015). This is because my analysis was focused on Sheriffs’ practices, and I was only limited to the observation of one of the several different judicial practices they perform on a daily basis. Also, I lack data to compare these practices with those carried out in the past (Hersant, 2017). Nevertheless, these findings do beg further research focused on exploring court organisational models at the sheriff courts (González, 2017).

In my fieldwork, my focus was the Sheriffs' practices as individuals, as decision-makers. Within that context, through the use of shadowing methods, I was able to observe how the courts' forms of work organisation structured the Sheriffs' practices. In what follows, I am going to discuss three different aspects of how the field determines sentencing practice. The following analysis relies heavily on what I discussed in chapters six, seven and eight. The description of the practice requires an understanding of the contextual setting where these practices are located.

First, - if we shift our analysis from ‘sentencing in books’ to ‘sentencing in action’, it is necessary to contextualise the interplay of both the legal and extra-legal factors that influence sentencing in everyday life. From what I could observe during my fieldwork - as discussed in chapters six to eight - I found a very structured and organised bureaucratic process in all the Sheriff courts I visited. Thus, regardless of how Sheriffs perceived their sentencing process subjectively, objectively I was able to observe that their working processes - i.e. the timeframes available to read reports, prepare for the hearings, etc. - were similar in all the courts. Therefore, the way that Sheriff Courts organise themselves to deal with the bulk of cases brought before them imposes on all Sheriffs a structured process - or bureaucratic routine - within which they have to deal with all the cases ascribed to them.

It is essential to bear in mind that despite the size of criminal business, Sheriffs also deal with civil and family matters and thus, the court business does not rely upon criminal cases alone. The court organisation at the Sheriff court is not specialised, thus the way the court deals with criminal business is embedded in a larger matrix of court organisation or management. This means that the court structure is organic and difficulties or changes in how the court deals with one kind of business may have an indirect impact on others. In brief, to truly understand the court organisation it has to be considered as a whole. While this was beyond the scope of my research, it is worth bearing in mind for the rest of the analysis. For instance, the temporal dimension of practice - explored in chapter six - is the temporal space in which Sheriffs are required to deal with both individual cases and all the cases on the list for a given day. However, it is also - indirectly - a part of the temporal space allocated for Sheriffs to deal with the criminal business, which, in turn, implies a distribution between the other different kinds of business.

Temporality becomes a vital aspect of this bureaucratic process. This has two sides, on the one hand, the prediction or assumption that any Sheriff can deal with a determined number of cases each day. On the other, the discretion every Sheriff has in how they deal with that number on that day. In other words, to take more time for dealing with one case or with all the criminal business means that you have less time to deal with something else, be that other cases or other kinds of legal business. In practice - as discussed briefly in chapter six - this can mean that Sheriffs may finish very early or possibly very late. This also means that, for example, a delay or disruption dealing with civil law cases one day may impede on the time available for a Sheriff to read the CJSW reports the day before the RC. Likewise, finishing the list of criminal cases too late one day will have a negative impact on the time the Sheriff will have to prepare for the next day's cases. The temporality of practice becomes an 'invisible' aspect that constrains sentencing.

A second issue derives from the first, and is related to how little control recently appointed sheriffs have over the organisational structure that is imposed on

them. As discussed above, they have their legal habitus, the accumulation of experiences, and thus, an idea of how the role has to be performed. However, because judicial practice does not occur in a vacuum, they encounter a thoroughly organised and structured bureaucratic backstage with which they have to catch-up. To clarify, this does not mean that the judicial structure determines the Sheriffs' practices, but rather that their role has to be performed within the space for action that the structural organisation outlines for them. Thus, judicial practices are the encounter of both worlds, between the legal habitus – the accumulation of legal and practical knowledge the Sheriffs acquired during their professional career in the field - and the space of possibles and impossibles imposed on them by the structural organisation of judicial practices.

Consequently, once the Sheriff has internalised the 'routine' and so long as they deal with all the cases, they are free to decide how to use their time better. This means, for example, they can manage how much time they want to spend on individual cases. A habitus synced to the field can adapt the processes but only within the boundaries allowed by the 'game'. More critically, if a law requires Sheriffs to exert a new function without establishing any clear normative regulation on how it should be carried out, Sheriffs will have to find a way to ground it; creating a practice during such a process. This was the case with CPO reviews discussed in chapter eight. Section 227X of CJL-2010 Act introduces the possibility to impose periodic reviews for CPOs, however, it left the practicalities of the review to the court. Thus, during my fieldwork, I could observe very different ways of carrying out these reviews. The different approaches depended largely on the ways the Sheriffs understood their role. I am going to discuss this in more detail in the next section.

The final aspect requires us to discuss how contextual factors may shape, or at least influence, sentencing. Quantitative research on sentencing has long emphasised the relevance of measuring so-called 'non-legal contextual factors', and thus, it has tried to address the 'localisation of sentencing' (Pina-Sanchez & Grech, 2018; Einsenstein, et al., 1988; Flemming, et al., 1992; Ulmer, 1997; 2012; 2014). Relevant contextual factors have included, for example, the court

caseload, local criminal justice resources, demographics of the area surrounding the court and local crime rates (Ulmer, 2014). However, as discussed earlier, several researchers have argued that these quantitative findings still require a further qualitative understanding of sentencing practices to be able to identify more accurately which variables are affecting sentencing outcomes and how (Hogarth, 1971; Hagan & Bumiller, 1983; Spohn, 2000; Ulmer, 2012). The description of the process in chapters six to eight helps us to understand better how contextual variables influence sentencing, at least at the Sheriff Court. For example, in chapter six I discussed the multiple spatial and temporal dimensions that shape the Sheriff's sentencing routines. Or in chapter seven, I explored how the interactions and professional relationships among the penal actors also impacts the Sheriff's decision-making.

The question of the impact of non-legal contextual factors also reveals how the court's structural organisation is a complex and interwoven set of practices that tries to keep a consistent approach despite local divergences. However, as I observed in the field, at its best, it can only minimise but not eliminate the influence of non-legal local factors. The issue is that, at least in Scotland (though this is also applicable to other jurisdictions), the court size and the territorial boundaries of the courts already considers an approximate number of caseloads. In other words, the number of Judges allocated to an individual court is not arbitrary; to a greater or lesser extent, it is based on a prediction of expected minimum and maximum workloads. Otherwise, you would be taking human resources away from the courts that need more Judges to be able to deal with heavy workloads.

The idea is simple, courts boundaries need to take into account the population density. In Scotland, for example, there is a correlation between population density and the extension of the Sheriff court's boundaries. More populated areas, like Glasgow, have smaller jurisdictions; while less populated areas, like the Highlands, have large ones. The rationale behind this is straight-forward; population density translates into a workload. Thus, courts need to organise in such a way that they can manage the size of the business. The consequence of this is straightforward, the structural organisation of Sheriff Courts tries to

minimise the impact of the size of the business, and it is very likely that this happens in other jurisdictions as well. Thus, while this variable does probably affect practice, if one does not realise that the court structure is organised taking this variable into account, then one may misconstrue how this variable influences practice or fail to recognise other factors with which it interacts?

Moreover, we cannot assume that Sheriffs or the Judiciary are unaware of the influence of non-legal contextual factors. At least during my fieldwork - as discussed in chapter eight - Sheriffs were aware, for example, of regional differences. One Sheriff in a rural court, knowing how a particular offence was dealt with in urban courts, decided to impose a harsher sanction than would have been imposed for the same offence in the urban court. The rationale behind this was that the Sheriff considered that since this offence was committed in a small rural community, the penal sanction needed to be deliberately harsher than in other places as a mechanism to deter others from committing those offences within that particular jurisdiction. Thus, the contextual variable was consciously used to ground the principle of the seriousness of the offence. Consequently, the impact of some non-legal contextual variables may be minimised or maximised depending on the Sheriffs' practices.

These considerations illustrate that 'sentencing in books' is radically different from 'sentencing in action'. The localisation of sentencing matters: it shapes, directly or indirectly, the practices that emerge from it. This means that an agent - trained and with the experience to carry out the role - faces contextual constraints that will require him or her to adopt a position regarding those problems. Therefore, practices emerge not from the decision-maker themselves, but rather as the consequence of the relationship between the agents and the specific space of possibilities and constraints that the field imposes on them.

10.2.3. Space for decision-making

The notions of habitus and field help us to understand how sentencing practices emerge between the encounter of an agent and structural constraints. As I

argued earlier, the dynamics between the two resemble a Celtic knot. The agent who has internalised the rules of the field becomes a player within that very field, adopting strategies and taking-decisions to deal with the problems that field presents to them. In doing so, their actions may reshape the field and these changes will, inevitably, affect the agents. It's a knot which passes several times over the same points outlining complex patterns that fold over one another.

Thus, we could say that the analogy means that one aspect influences another, which in turn, affect it by opening a new path of complex interactive relations. The argument that I have outlined in sub-section 10.2. is that sentencing cannot be understood as individual decision-making carried out by a Judge in isolation from their context, nor as the mechanical process imposed by the penal structure on the accused. In practice, sentencing practices emerge in the space that is the result of the encounter of the legal habitus of the Sheriffs and the social, temporal and material realities outlined by the field. This is to say, practices are developed by an agent who knows 'the rules of the game' and is able to play it within certain boundaries. Therefore the main difference between the 'sentencing in the books' and the 'sentencing in action' is the relationship between the Judges and the context of sentencing, which outline the boundaries of a space within which individual decision-making can be carried out.

This outlined space for decision-making is the space in which sentencing practices emerge. As discussed in chapters six, seven and eight, this space is subjected to different kinds of constraints, such as temporal limitations, the size of the criminal business, the available resources for community sentences, etc. More critically, at the summary procedure level, the outcomes are finite and determined. For example, without prejudice of a mandatory or statutory limit, Sheriffs cannot impose more than a year of imprisonment. Likewise, as discussed in chapter five, the most common disposals imposed by Sheriffs are custodial sentences, CPOs, fines and admonitions which together account for the 98% of the disposals imposed every year. Furthermore, in every court I visited I found that regardless of the different perspective on sentencing taken by the Sheriffs, the bureaucratic preparations for the hearings were similar. Thus, the Sheriff

received the ‘papers’ the day before the RC, read them, and prepared a provisional sentence which could change or not depending on what was said at the hearing.

Therefore, the encounter between the habitus and the field outlines a very structured space of decision-making. Even within the Sheriffs' different sentencing styles, the possible variations are narrowed down by the finite number of possible outcomes for each case. It is within this space where the logic of sentencing practices lies. This rationale of practice emerges in the strategies adopted by individual Sheriffs –their position-taking - in response to the problems and constraints that they face in their judicial role.

Finally, after having explored the Sheriffs' legal habitus and the field they face, the last aspect of sentencing practices I need to analyse is the Sheriffs' penological position-taking. As explained in chapter two, I am using ‘penology’ to refer to a rationale or a set of principles - linked to sentencing principles - that guide or explain the allocations of specific disposals to individual cases. However, I am not aiming to label Sheriffs using normative definitions from the philosophy of punishment or sentencing purposes, but rather trying to understand their penologies of everyday life. The natural consequence of studying sentencing as a practice is to frame penological positions within the logic of practice, which is entirely different from the scholarly understanding of sentencing purposes. This is what I am going to explore in the next section.

10.3.Position-taking and everyday life penology

It is worth remembering that my research aims to grasp the ‘logic of practice’ of the penology of everyday life. If sentencing can be considered a ‘human process’ (Hogarth, 1971) or a ‘social practice’ (Hutton, 2006), then from a socio-legal or criminological perspective it is necessary to ask what this entails. As discussed in chapters two and three, from a sociological perspective I have conceptualised sentencing as a practice, and thus, adopted Bourdieu's theory of practice to analyse it. Consequently, when you conceptualise sentencing as a practice, and thus, argue that it has a practical logic, that also means that the penology of

everyday life is a practical rationale, and thus ‘has a logic which is not that of the logician’ (Bourdieu, 1980/1990, p. 86). This means that ‘penology in action’ has a rationale that is not the based on the normative discussion of the philosophy of punishment or sentencing purposes. However, I have to recognise that before starting my fieldwork, and even during its early stages, I was expecting that Sheriffs *would* have an explicitly articulated penological discourse; the reality was more complicated than that.

While, during my fieldwork, I did find a few Sheriffs with a very well-articulated penological discourse, like (Sheriff#5), this was not the case for most. Sheriffs#7, #15 and #16 approached the penological dimension of their practices ‘intuitively.’ They could explain how and why they used specific disposals in several cases, but they did not have a conscious or deliberate discourse that followed from what they thought their role asked them to do. Again, everything I discussed earlier concerning the relationship between ‘intuition’ and practices helps us to understand these analytical obstacles. Taking these difficulties into account, the aim of the current level of analysis is trying to grasp Sheriff’s understanding of the sentencing role and their position-taking on how it should be performed – by using the encounter between the habitus and field as a starting point. This, in turn, helps us to understand the practical rationale behind their sentencing practices.

How can we understand the penology of everyday life? On the one hand, the question requires us to find a way to ‘escape the fog’ of an ‘intuitive rationale’. On the other, I was faced with the issue of how to describe these practical rationales without relying on normative ‘labels’, originating in from the scholarly world. The first thing I discovered was that Sheriffs are aware that there are different sentencing styles. However, during the interviews, they never criticised their peers' approaches. Instead, they explained they were more concerned about being consistent in their own practices. It took me a while to realise that the lack of a rigid framework allowed Sheriffs to adopt different approaches towards their sentencing - although always within specific limits. Thus, as I will discuss in more detail later, the differences between styles could

not be framed as ‘good’ or ‘bad’, because they were part of a range of potential approaches within the ‘space of possibles’.

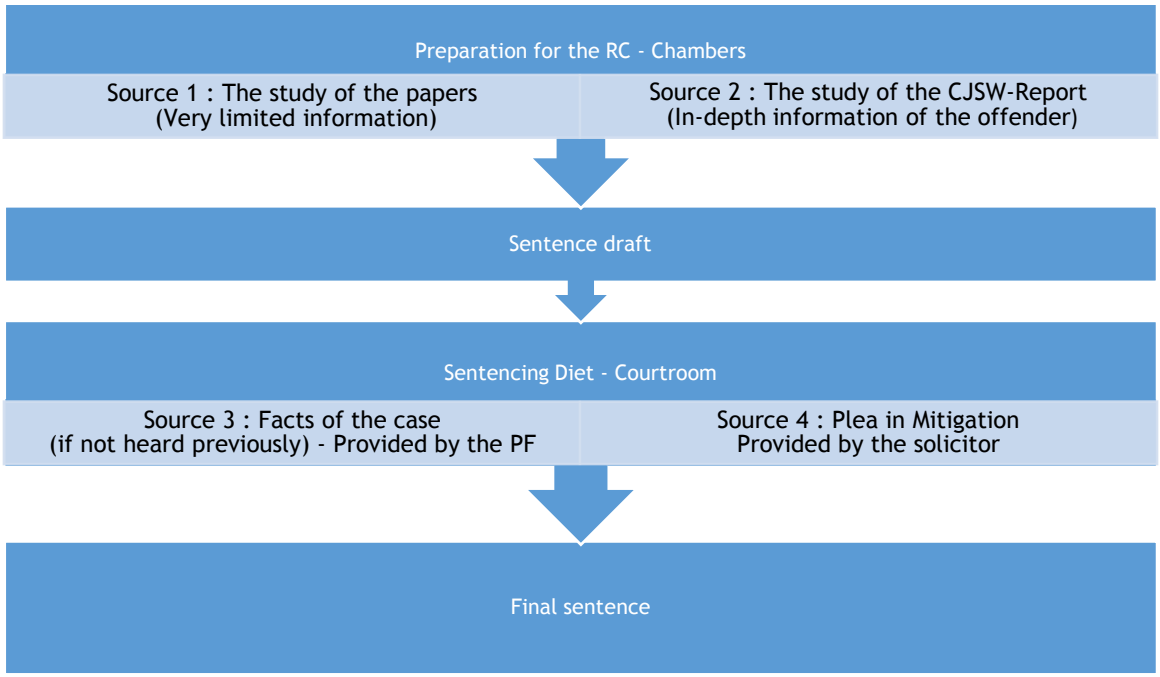
This is where what I described in chapter eight becomes central; the discussion of real cases with the Sheriffs and the observation of the hearings of those very cases. Through a discussion grounded in their practice of why they decided to impose particular disposals in specific cases, I was able to start to grasp parts of their penological approaches. I structured the discussion with the Sheriffs by analysing the use of one specific disposal at a time. Nevertheless, I faced a new methodological issue here. There is a thin line between discussing the rationale that led them to choose the disposal, and debating the purpose of that disposal. However, it is a critical difference that needs to be explored with caution.

10.3.1. The structured mundanity of sentencing

In chapters six and seven tried to offer a description of the mundane dimension of the sentencing process. This means that instead of the reconstruction of mental processes that we cannot see, I focused on what can be seen. In this regard chapters six, seven and eight aimed to discuss sentencing practice from the Sheriffs' observable working-process.

As it can be seen in diagram (3), the sentencing process as it can be observed - for explanatory purposes - can be simplified into two ‘moments’ and ‘places’. As discussed in more detail in chapter 6, the first moment is Sheriff’s preparation for the RC, which usually takes place in her/his Chambers. As explored in chapter seven, it is in this place - before the sentencing diets - that Sheriffs deals with two different sources of information: the ‘papers’ and the CJSW-Reports. Then, the second moment is the sentencing diet itself which takes place in the courtroom. In this place, the Sheriff has to deal with two further potential sources of information: the facts of the case and the PiM.

Diagram (3) The observable sentencing process



As explained in detail in chapters six and seven, this process is embedded within a case and time management frame within which the Sheriff has to be able to perform their role. Diagram (3) depicts a bureaucratic routine or working process that was common to all the Sheriffs I observed. Even in those cases where the Sheriff may perceive that his/her decision-making was an intuitive process, the routine was there. And the reason the working process was not considered as part of the decision-making is that the mundanity of it makes it be taken for granted. I was able to observe this very same working-process in the fourteen courts I visited, and with the sixteen Sheriffs I shadowed or observed. Furthermore, most of the time the process followed the same pattern, the Sheriff read the papers, then the reports. Afterwards - during the hearing - they hear the facts and then the plea.

Having said this, it worth stressing that this is a general depiction of working practices, and more often than not there were variations to this. For example, in some cases, Sheriffs did not hear the facts because they had heard them before. Also, one Sheriff used to read the report first and then move to the papers. Nevertheless, in most of the cases, this was the flow of the process of making sense of the information they require to arrive at an informed decision. And as

such, it is a good starting point to try to explore the penological rationales behind the sentencing practices.

10.3.2. An Everyday Life Penological Position-taking

Using the observable sentencing working-process as a starting point, I aimed to try to understand the practical rationales of the sentencing practice. The chart does not show us how the Sheriffs make their decision, but it does offer a window on the structure of the process and how it is followed, to a greater or lesser extent, by all the Sheriffs. As such, the exploration of the Sheriff's penological position-taking required - as I did in chapter six - to explore several aspects such as: which kind of data they received; when they make sense of it; how do they make sense of it; and how do they use it? Furthermore, the exploration of in which were the factors that the Sheriff considered to impose any given disposals - as discussed in chapter eight - allowed me to link the use of the data with specific outcomes. This also helped me to understand the relationship between the data provided to the Sheriff, how they make sense of it and the disposals that were finally imposed using that data.

From there I progressed to a study of the penological views of the Sheriffs. I found that only two or three of my participants articulated a clear position-taking towards the issue of philosophies of punishment or sentencing purposes. This did not mean that the other Sheriffs had no rationale behind their decisions. The difference is that the scholarly, philosophical, discussion on what punishment ‘ought to be’ was felt by some Sheriffs to be irrelevant for sentencing practice. Conversely, the absence of an articulated penological discourse did not mean a lack of a penological rationale in their practices. This allowed me to understand that there were different practical penological rationales. Furthermore, the Sheriffs had an internalised sense of their role as sentencers, but they never articulated the role in positive terms. On the contrary, it emerged in negative terms, mainly, by stating that they would fail their role if they did not impose a custodial sentence for serious offences. This allowed me to observe that the role - in its negative terms - seemed to be linked to a perception of the judicial function that was performed for the community.

If they were too lenient, they would be failing the community in their judicial duty as sentencers.

As a consequence of this, my attempt to try to reconstruct the Sheriffs penological position-taking through the study of their practices led me to outline the following process. Let's consider diagram (4):

Diagram (4) Proposed sentencing process

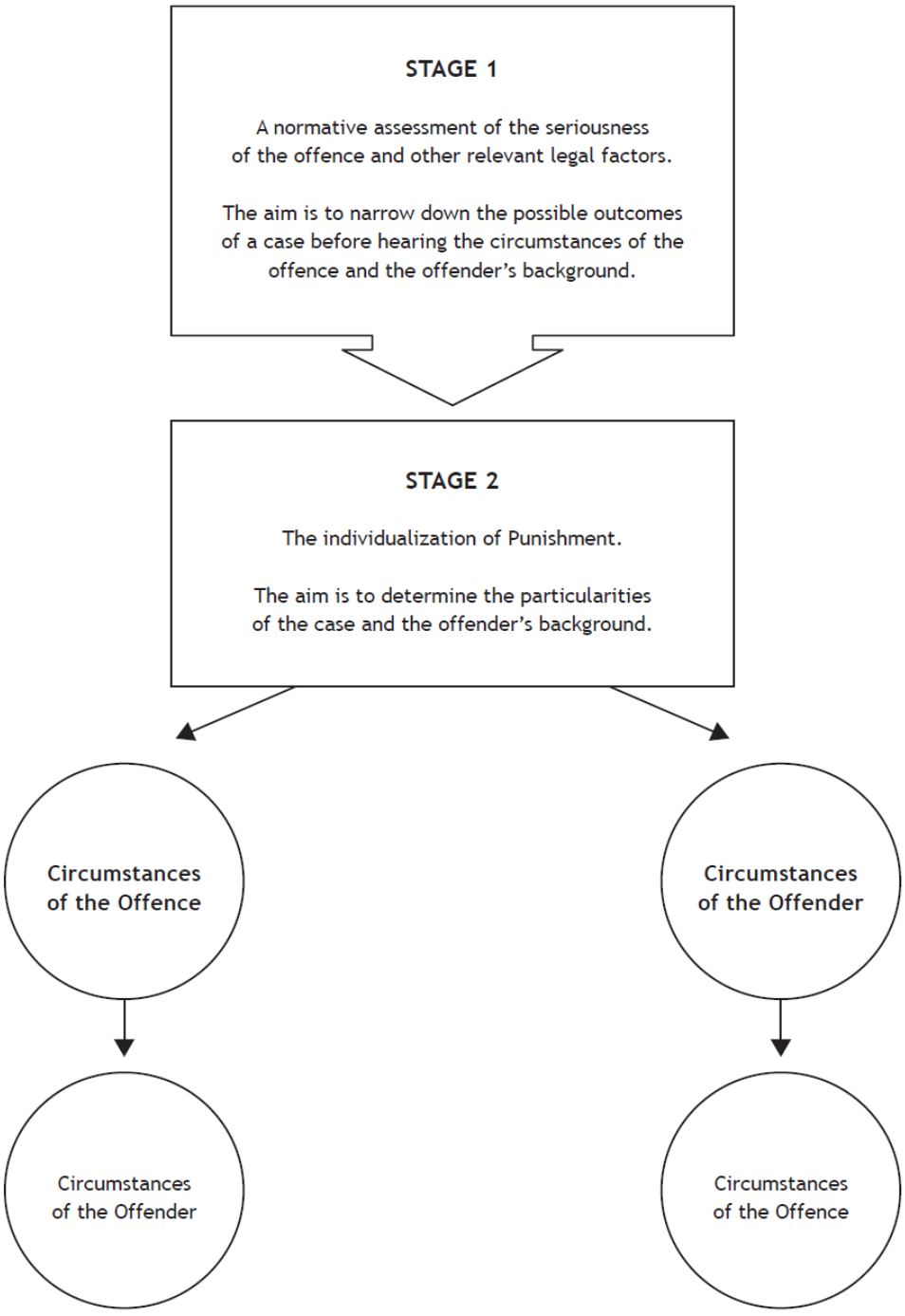


Diagram (4) aims to offer an explanation of the sentencing process using the observable routines and working-processes on the one hand and discussion about the imposition of specific disposals in individual cases on the other. Again, the shadowing method and the chances I had to discuss the same cases before and after the court become essential in the outline of this chart. It is important to stress that the chart aims to organise how the data provided to the Sheriffs is used. Therefore, this process is outlined from practice as it can be observed in the field.

The proposed flow is divided into two stages - which does not mirror the 'moments' of practice as described in diagram (3). However, the first stage is, indeed, linked to the first step of diagram (3), reading the papers. As discussed in chapter seven, solely by reading the complaint, the age and gender of the accused and if they have previous convictions, they can narrow down the possible outcomes for the case. As (Sheriff#2) explained in the last chapter, they can do so because they have internalised a 'whole body of common law setting out parameters as in what is an appropriate sentence'. Thus, the starting point for the Sheriffs is provided by their legal habitus (acquired knowledge of both the 'law in books' and 'law in action') that outlines 'parameters', 'rules' or limits around which they have to determine the 'appropriate sentence'. This works as both a starting point and a negative limit of their role. For example, despite the fact that the papers contain very limited and basic information, the information about age or the criminal records are critical for the 'restrictions on passing sentence of imprisonment or detention' of section 204 of the Criminal Procedure (Scotland) Act 1995.[30] These rules automatically reshape the decisional space that Sheriffs will have to deal with that case.

This first stage also involves a normative assessment of the seriousness of the offence. All penal systems are constructed around a hierarchy of offences which

[30] As it happens in other jurisdictions, Scots law has presumption norms against the imposition of a custodial sentence of young offenders. This presumption also applies to people who have never been imprisoned before. That said, this does not mean that the Sheriff cannot impose a custodial sentence, but instead that s/he will be required to call for backgrounds reports first and justify her/his decision in detail. In this regard, the Judge will have to explain why there was no other option but imposing a custodial sentence.

are assessed in relation to their perceived seriousness. The most serious ones are deal harshly, and this very often involves long custodial sentences or even death. In continental systems, the assessment is already contained in the law; criminal codes establish a range of sanctions for cases, creating a hierarchy. In the Common Law systems, like the Scottish one, the seriousness of the offence is not entirely determined by the law or tradition, but it is common to find laws that introduce statutory minimum[31] or maximum[32] penalty sentence for some cases.

In practice, the legal habitus of the Sheriffs allows them to outline a range of options by only knowing the charge and without knowing the facts of the case. The longer that a Sheriff has been in a particular court, they will learn what the most common types of offending behaviour are and, equally important, what are the prosecution's practices towards those offences. In other words, some offending behaviour may be more prevalent in certain jurisdictions, and the prosecution may consistently use the same charges to prosecute them. Thus - unless they deal with exceptional circumstances, which is always a possibility - by only reading the charge, Sheriffs can predict the seriousness of the offence and the decisional space within which they will have to impose a disposal.

The second stage is linked to the study of the rest of the sources of information provided to the Sheriffs by the SWs, the PFs and the solicitors; the CJSWR, the facts of the case and the PiM. In this regard, since this process depends on making sense of several sources of information, the process takes place both at Chambers and in the Courtroom. This second stage is - what in continental law is known as - the process of the individualisation of punishment (Pifferi, 2016; 2012; Plesničar, 2013). Pifferi defines this notion as ‘the idea that instead of being abstractly proportioned to offences, criminal penalties should be flexibly adjusted to criminals, their dangerousness, the likelihood of their rehabilitation, and their deviant inclinations’ (Pifferi, 2016, p. 17). This means the process by which a Judge - after taking into account the applicable law for a case in the

[31] For example, section 205B of Criminal Procedure (Scotland) Act 1995, that contains a minimum sentence for a ‘third conviction of certain offences relating to drug trafficking’

[32] For example, Sexual Offences (Scotland) Act 2009.

abstract - makes an assessment of the particularities of the offence and the offender's background to aggravate or mitigate the sanction.

It was in this part of the process that I detected emerging differences in Sheriff's sentencing styles. I used the shadowing and observational methods with the interviews to focus on how the Sheriffs individualised the sanctions. I quickly noticed that there were differences in the way that the Sheriffs made sense of the information provided by the reports. It took me a while to realise that these differences were not related to the quality of the information provided by the report, nor to the perception the Sheriffs may have of the SWs or their work. Instead, I noticed that the differences emerged from the extent to which Sheriffs considered the offender's background relevant to sentencing.

If you strip down the process of 'individualisation of punishment' to its core, you can see that - after Stage 1 - sentencing is a relational process between two principal axes: the offence and the offender. Where the Judge emphasises the offence, the individualisation process tries to find a sanction that matches the seriousness of it. Thus, the individual characteristics of the offender are only relevant in as much as they can provide information about the feasibility of the sanction. Conversely, where the emphasis is put on the offender, their personal characteristics or attributes or situations will be the primary determinant of the sanction. I am going to explore the implications and consequences of both paths in the following subsections.

10.3.2.1. The Seriousness of the Offence and the Role

The notion of the seriousness of the offence is a critical element for the sentencing process, and it plays a relevant role in both stages of the process I described. Nevertheless, we need to deal with several questions such as: 'how is this normative concept put in practice?' or 'how Sheriffs give it substance in practice?' At the more fundamental level, the Scottish judicial system relies on this assessment. Let's remember that the more 'serious offences' like murder or rape will not be dealt at the Sheriff Court but in the High Court. Thus, it was no surprise then that for my participants any offence that involves a violent

behaviour will be deemed serious, and, as a consequence, will be given a custodial sentence.

In this regard, the seriousness of the offence was very often linked to the imposition of custodial sentences. The rationale was that there was always a point at which an offence is so serious that there is no other way to deal with it than a custodial sentence. This rationale outlines how the Sheriffs perceive the limits of their role as sentencers, at least negatively: imprisonment was used as the last resort, to deal with the more serious offences; behaviours that should not be tolerated. Failure to comply with this will equate to failing in their role as sentencers. For example, as (Sheriff#2) explained in the last chapter: 'I would fail my duty if I do not impose a custodial sentence in serious cases'. Thus, it not only allows the creation of a hierarchy of disposals but also becomes a standard that the Sheriff cannot neglect.

Consequently, this way of understanding the 'seriousness of the offence' implies a relationship between the Sheriff and the community. It is the community you fail if you are unduly lenient. In other words, I realised that behind the discussion of what can be considered a serious offence there was a conceptualisation of their roles as sentencers that goes beyond a formal understanding of Judges as allocators of sanctions. By stating that serious offences deserve imprisonment, you are equally stating that others do not. As a consequence of this, the imposition of non-custodial sentences for 'less serious offences', is always determined in a negative reference towards imprisonment. As a result, the 'seriousness of the offence' and 'imprisonment' are the critical hermeneutic elements that inform all sentencing practices.

However, this does not mean that imprisonment is the default option for all offences. The hierarchy that exists ensures that different offences will have different starting points, 'default' options in line with their perceived seriousness. The Sheriffs' role as sentencers, therefore, operates as a negative limit, as the 'ultima ratio', 'the last resort (of force)'. However, as discussed in chapter eight, violent offences were not the only kind of offences that resulted

in a custodial sentence, which means that some other circumstances may be constructed as serious, and thus, as requiring imprisonment.

As I argued earlier, Sheriffs are not just influenced by their local contexts subconsciously, they deliberately relied on their local knowledge of the community for their decision-making. Thus, during stage one, they are aware of the role they play for the people living within their jurisdiction. Thus, instead of an assessment in the abstract, the normative notion of 'serious offence' was grounded according to local realities and the impact of violence on them. This inevitably meant that for some Sheriffs - as discussed in chapter eight - some offences were more serious if they took place in small and rural communities. Regardless of how consistent or justified this practice is, the consequence of it is that - while doing the assessment at stage one - the same offences may be deemed more or less serious depending on the part of Scotland they were committed in.

When we move towards stage two, the circumstances surrounding the offence or the offender may change the initial perception of its level of seriousness. This is the undoubtedly the effect of the individualisation of punishment. However, two circumstances completely subvert the rationale we described above working as an exception to the main principle described above. While the assessment of seriousness may vary according to the facts of the case it seems evident that some offences, no matter how bad they are in comparison with other similar offences, could never be equated with an assault. Furthermore, the notion of a hierarchy of offence in which the degree of perceived violence is used to order them implies that the default range of sanctions for some behaviours will never include imprisonment.

However, in practice, it is still possible to see that some individuals receive short or relatively short custodial sentences for non-serious offences. In this regard, recidivism of petty offences is one of the two issues that subvert the principle of the seriousness of the offence. I would also suggest this is one of the historical problems of lower courts, at least from the late 19th century (Velasquez, 2014; Pratt, 1995; Bottoms, 1977). It is worth noting that it is not

recidivism per se which creates a problem for the principle stated above, but rather a specific kind of persistent low-level criminality. Another issue which is undoubtedly linked to the first but by no means can be conflated with it: the persistent breach of CPOs conditions.

Concerning the first issue, my findings suggest two relevant problems: firstly, that despite the fact that the Sheriff Court deals largely with less serious offences, particularly at summary court, this does not mean that these behaviours cannot be perceived as disruptive or abusive. While anti-social behaviour and shoplifting are at the lower end of seriousness - they can be very upsetting or disturbing for the individuals who live within the affected community, and the Sheriffs acknowledge that.

Secondly, this has an impact on the construction and perception of which behaviours are tolerable at the Sheriff Courts. Indeed, there are 'black and white' cases as discussed in chapter eight, such as assaults that involved the accused kicking the victim in the head. Nevertheless, abusive behaviour also seems to be perceived as an accumulative notion. While one or two unrelated offences may be tolerated, long-term anti-social behaviour may be constructed by the Sheriffs as equally harmful as one single violent offence, and thus can lead to custodial sentences. Also, as discussed in chapter eight, in some circumstances recidivism is not related to past offences but rather to an offending spree which some Sheriffs deal by rolling-up cases, and thus, sentencing all the cases together in a holistic fashion. Thus, the seriousness of the 'offence' will be the sum of different offences that in isolation would be deemed as not serious.

Interestingly enough, there was a recognition by all Sheriffs that an offender could have setbacks, which would not automatically transform him or her into a 'lost cause'. DTTOs were a very interesting example of this; most of the offenders who were offered this option had a long history of offences behind them. Thus, when and why an offender could shift from being 'someone who deserves another chance' to someone – using Tombs & Jagger's terminology (2006) - 'irredeemable', was different depending on which one of the paths

described in Diagram 4 (i.e. the ‘offence’ pathway or the ‘offender’ pathway) the Sheriffs adopted. I will discuss this issue in more detail in the next subsection.

The second issue refers those individuals who persistently fail to comply with the conditions of the community sentences imposed on them. While one may assume that this phenomenon is linked to reoffending behaviour, this is not always the case. I observed several instances in which the individuals who committed a new offence while complying satisfactorily with a CPOs' conditions. I also was able to observe the opposite: individuals who had not committed a new offence, but kept breaching the conditions of the CPOs. The latter group of cases are often very problematic because their behaviour – breaching their order - cannot be framed as violent or even as abusive, they simply either fail or refuse to comply. These cases became a headache for some Sheriffs who did not want to use a custodial sentence - how could they when the offence was not serious? - but realised that they had to enforce the law and protect their credibility to the community and (potential) offenders. How many chances can they give to an offender who does not comply with the CPOs? This is why the ‘main ‘crime’ of ‘CPOs breachers’ is undermining the credibility of the judicial role even if they do not commit serious offences. Again, the path the Sheriffs choose at stage two will allow them to deal with this issue differently. However, the central issue is the same for all of them, there are only so many times that an offender can breach the CPO. How many opportunities are to be given, and under what circumstances, varies from Sheriff to Sheriff, but once labelled as a ‘breacher’, a custodial sentence is imposed.

In this section, I wanted to describe the relevance of the assessment of the seriousness of the offence. While this assessment is vital at stage one, it may be re-assessed at stage two: that is the usual consequence of the individualisation of punishment. However, within this rationale, one would expect that petty offences, no matter how serious within their context, would never land a custodial sentence. Nevertheless, that is the effect that the two exceptions described above produce in sentencing. They subvert sentencing practices that, at least prima facie, are built around a hierarchy of presumed seriousness.

Moreover, an external observation or statistical analysis of these practices may only reveal that an offender received a custodial sentence for a petty offence, missing the complex rationalities that I have described. Here I have tried to offer a more complex and layered construction of seriousness and, by extension of sentencing decision-making.

10.3.2.2. The axis

Once the normative assessment carried out in stage one has led to a range of possible disposals for a case, Sheriffs move towards a different level of analysis: an exploration of the circumstances of the offence and the offender. This is the core of the process of individualisation of punishment. Thus, after identifying a default range of options applicable to an offence - according to its presumed seriousness in the abstract – the Sheriffs need to see if the surrounding circumstances of the case and the background of the offender will modify their assessment, aggravating or mitigating it. Ultimately, this individualisation should lead them to find - within the range of options that they have already determined - the most appropriate one; one that fits both the offence and the offender.

However, it is at stage two that the different sentencing styles begin to diverge significantly. Consequently, by observing how they deal with the disposals, one may be tempted to classify Sheriffs as ‘rehabilitationist’ versus ‘retributionist’ or ‘progressive’ versus ‘conservative’ sentencers. Nevertheless, this would be to impose scholarly or normative labels on practical rationales or worse, to try to present their practices in line with our subjective appraisals, risking confirmation biases. Moreover, one can also be tempted to use the sentencing purposes as a way to classify the different Sheriffs styles, but this will contradict part of my findings. Most of the Sheriffs did not have an articulated discourse on sentencing purposes, and even if that were the case, their practices could never be reduced to one sentencing purpose nor a unique philosophy of punishment.

To carry out this analysis, firstly I had to be able to break with my epistemic obstacle, and instead of trying to put scholarly labels on the practices, I realised I needed to (re) focus on the description of the mechanics of the process. There, I could see that the practical rationale behind the differentiation I was observing could be traced to the crossroads that emerged at the stage of the individualization of punishment.

In some cases even adopting two different paths, the outcomes may be similar; the seriousness of a more serious offence can be mitigated or offset by something about the offender's attitude or circumstances, and a less serious offence can be aggravated. Equally, the fact that two Sheriffs prefer the same axis does not mean for sure that they will impose the same disposals, as I argued earlier; other variables, like their readings of their local contexts (such as whether the court is in an urban or rural location), may come into play and ensure critical differences. Yet, overall, despite the different outcomes that may derive from following one or other axis, these decisions are always framed within a ruled space with very limited choices available, which ensures a certain convergence.

In this regard, the decisional space that is formed between the legal habitus and the judicial field - that I have described in this and the findings chapters - allows Sheriffs to adopt a position concerning the axes freely and thus a practical rationale of the individualisation process. This decisional freedom tolerates different outcomes as far as they are consistent and fair within the logic of practice that exists behind the axis they have adopted. Nevertheless, from what can be observed at the courtroom or through the statistics, much of this rationale is hidden or is inaccessible. It does not help most of the time that the explanations the Sheriffs provide for their decisions in court does not reflect these practical rationales fully.

As explained earlier, it is hard to offer an example of the sentencing process, because it will inevitably provide a distorted image of practice. However, to illustrate the manner in which the axis operates, I am going to explain the relevant questions that both of the paths outlined in diagram (4) pose to the

Sheriffs. To do so, I am going to outline a scenario in which two hypothetical Sheriffs - A and B - deal with the same case.

Let us consider a single charge of assault - it does not matter if the case was brought under summary or solemn procedure. Let us say that both Sheriff A and B, at Stage 1, deemed the charge to be a serious offence. Thus, they draft a sentence thinking of custody. Let us remember that at this stage they have read the charge and they know the age and the criminal record of the accused. The next step is to focus on the circumstances surrounding the offence and the offender. Sheriff A will follow the path that stresses the circumstances of the offence and Sheriff B will follow the other path.

To take Sheriff A first, s/he is faced with the question of identifying the circumstances s/he has to weigh up in order to individualise punishment. Stressing the relevance of the offence means narrowing the factors to only those which may change the assessment of the seriousness of the offence. Consequently, Sheriff A will have to examine the facts of the offence and analyse if they mean the assault was more serious than previously thought. Any fact that is not directly connected with the offence is irrelevant. Thus, the circumstances of the offender are only relevant insofar as they are normatively pertinent. For example, the age and the gender of the offender, which is her/his attitude towards the offence are relevant aspects. However, other than that, any other biographical data that can provide a background of who the offender is or why s/he offends, is irrelevant unless it relates directly with any normative consideration that the Sheriff needs to take into account.

The other path will allow Sheriff B to consider a different and broader understanding of the relevant factors. In this regard, the centrality of the offender construes the process around the question that aims to tackle offending behaviour. Consequently, any information about the life of the offender that may explain why s/he committed the offence and if s/he will or will not re-offend is relevant. However, this inquiry will be restricted to the narratives and information that the CJSW-Reports and solicitors provide. Thus, Sheriff B will have to examine the seriousness of the offence in light of the circumstances that

may explain the offender's behaviour. This may allow the Sheriff to construct the ‘assault’ as the consequence of an individual who needs help to stop reoffending, as committed by an individual that has become a risk to the community, or as a ‘one-time mistake’.

In this section, I have tried to show how the stage at which the Sheriffs must individualise punishment allows two different paths depending on which aspect (the offence or the offender) is prioritised. In the next section, I am going to explore how these paths may help us to understand how the Sheriffs perceive their role as sentencers.

10.3.3. The Sheriffs’ sentencer role?

All that I have explored in this section, as the result of studying the Sheriffs' practices, has to end by acknowledging the role of the Sheriffs as sentencers. In a similar fashion to what happened with regard to the articulation of the philosophy of punishment, Sheriffs did not provide me with an articulated discourse on how they see their role. Nevertheless, the analysis of the sentencing process, as described above, was also linked with the Sheriffs’ practical understandings of their role as sentencers.

For example, during the discussion of the use of custodial sentences most of my participants offered a negative conceptualisation of the role. In other words, they never told me what they think their role as sentencers entails. Instead, they did tell me in which circumstances they felt they would fail in their duty if they did not impose a custodial sanction. As discussed earlier, the use of custodial sentences is linked to violent offences, long-term abusive behaviours and in some cases, non-compliance with community sentences. In the first two cases, the Sheriffs denoted that their role as sentencers was aimed at protecting the community from violence but also from other persistent but less serious offending that may cause distress or disrupt the community.

In this case, the articulation of what constitutes a limit of their duty as sentencers, allows us to note how the role is partly constructed in relation to

the communities that live within their jurisdiction. This was particularly interesting because all of my participants dealt with small or medium-size communities. As a consequence of this the Sheriffs managed to know very well, the community living within their jurisdictions and issues affecting them. They were also aware of some individuals, whose re-offending behaviour made them appear before the court constantly. Likewise, they very often raised this point to contrast their courts with the "big courts" in the "big cities" in Scotland, where the size of the business produces a distant relationship between the Sheriffs and the community.

This relationship with the community outlined an understanding of the sentencing role that goes beyond the formalistic scholarly understanding of sentencing as the mere allocation of penal sanctions. This shed a new light on my analysis of the Sheriffs' relationships with their local contexts. In other words, the findings on how non-legal contextual factors influence sentencing can be better understood if we know that Sheriffs thinks that their role as sentencers are carried out for the community. This may sound obvious because, as I discussed at the outset of this thesis, punishment is a social function. However, there is a vast difference in exerting the role for society as a whole, compared to carrying it out for - and within - a particular community.

The limitation of this analysis is that again I only obtained indirect glimpses - through my study of their practice - of the way in which Sheriffs understand their role as sentencers. Nevertheless, another aspect of practice that hinted at a particular construction of the role was the discussion of the use of non-custodial sentences. Some Sheriffs expressed their willingness to use the disposals available to them to provide offenders with a real chance to stop reoffending. The Sheriffs who did so were the ones who - at Stage 2 of Diagram (4) -preferred the path that put the offender at the centre of their individualisation process. Critically, this revealed that these Sheriffs construed their sentencing role partly around the idea of helping or supporting the offender to stop reoffending. Conversely, those Sheriffs who put the emphasis on the offence, differed starkly in their approach from those described above. For

these Sheriffs, such considerations were neither part of their role nor a proper function of the penal system.

I found it very interesting how these differences were linked to the question of what their role entails. As I explained earlier, all my Sheriffs, at least negatively, seemed to me to construct their role in relation to the community. This, particularly within the sentencing context, seemed to mean protecting the community from harm, which was the practical rationale behind not tolerating serious offences. Evidently, this means that their sentencing role is understood beyond the mere allocation of penal sanctions. However, as discussed in chapter eight, offences prosecuted in the Sheriff Courts are not necessarily particularly serious, requiring Sheriffs to articulate their practical decisions, and per extension their role, differently.

Furthermore, there is a grey area for offences that may at first glance be deemed serious but in respect of which, after contextualising them, a Sheriff can be persuaded to impose a community sentence instead. Thus, within this space of less serious offences, and in a context where the more recent penal reforms seem to encourage the use of non-custodial sentences by Sheriffs, this inevitably will require them to adopt a position on this subject. Thus, their position-taking appears to be translated into another aspect of what their role as sentencers entails.

Another example of these differences emerged in the way the Sheriffs grounded the CPO reviews. As discussed in chapter eight, some Sheriffs - those who put the offender as the central axis of their sentencing practice - used the reviews as a way to encourage offenders to comply with the conditions of their community sentence. It was equally an opportunity that some of those Sheriffs used to acknowledge or bear witness to the efforts individuals had made in attempting - or struggling- to comply with a CPOs. Ultimately, deploying an understanding of their role as sentencers, that considered that part of their duty was to tackling reoffending through providing offender support and help to address the causes of their disruptive behaviour. At the other extreme, those who put the offence as the central aspect used reviews as a 'sword of Damocles',

meaning that they adopted a disciplinarian approach, using it to convey to offenders that the Sheriff was keeping an eye on them and would impose a custodial sentence if they failed to comply. Again, this approach seemed to suggest a sentencing role that only cares about the offence and the sanction it entails. In this regard, the review is only used to ensure compliance.

In any case, the present study of sentencing practices only allowed me to get a tiny glimpse of the way in which my participants construed their role. However, this window seems to match the practical rationales discussed in the findings chapters.

10.4. Researching sentencing as an everyday penology

The penology of daily life at the summary sheriff court - outlined in this study - offers us a localised sentencing practice, or at least one influenced greatly by structural, legal and non-legal contextual factors. Also, by putting the 'seriousness of the offence' at the core of the practice, the Sheriff's role may be conceptualised as one focusing most fundamentally on the protection of communities. These two factors inevitably establish an important local connection between the community and the decision-making. What does this analysis mean for sentencing research studies? I am going to discuss briefly six different aspects that my findings highlight and how they encourage further research.

Firstly, this research highlighted the importance of having a better understanding of the Scottish legal field. This means being aware that, if the Sheriffs' appointment mechanism is based on the 'recognition' model of judicial organisation (Georgakopoulos, 2000), this structure influences their understandings of the judicial role and their practices, mainly because the past experiences of the Sheriffs help them to shape not just their role, but also their practices. In this regard my findings were consistent with Jamieson (2013) in terms of highlighting the relevance of understanding the career trajectories of the Sheriffs. However, Jamieson's work underplays the impact of the Judge's trajectories before being appointed. In this regard, research studies like those

by Hammerslev (2003) or Hilbnik (2007), or the classic works by Hood (1962; 1972) and Hogarth (1971) highlight the relevance of examining how the individuals became Judges and how that may influence their practices.

I suspect that in jurisdictions with a career judicial model - like most of the continental law countries - the influence of the institutions in which the judges are trained may be more important. In other words, I suspect that because Judges are trained within a particular institution and will have to acquire and conform to that institution's culture, norms and rules, it is necessary to know how that specific institution shapes the Judges' habitus. In Scotland, some of the relatively recent research on sentencing (Tombs, 2004; Brown, 2017) appears to be oblivious to these aspects; assuming the Judges are what they are without exploring where they have come from. This approach implies the recognition of Judges as holding an elite position, without asking why this is the case and what this means for practice. Moreover, the relationships between penal actors are also mediated by the previous positions occupied by the Sheriffs before coming to the shrieval bench. Thus, trying to understand judicial practices without a minimum understanding of how those judges became judges impairs the analysis.

A second aspect that my research emphasises, linked to the first, is the relevance of the court-community interactions in judicial decision-making. One of the limitations of my study was the inability to interview solicitors, prosecutors, social workers and court officers, even though I was able to observe them in court. During the interviews with the Sheriffs (as described in chapter seven), it became apparent that their interactions with other actors were central to the sentencing process. Tata et al (2008; Halliday, et al., 2009) have already explored some of these issues. In their research shadowing social workers, they were also able to interview and observe other agents, notably Sheriffs. Nevertheless, a more ambitious research study is required, if possible mixing court observations with the possibility of discussing court interactions and their practices with all the agents that take part in the process of a specific case. Of course, there is no single way to do this, but this kind of '360-degree' analysis is needed if we want to improve our knowledge of not only judicial

practices but also of other penal agents' practices in the criminal courts in Scotland.

The third aspect also arises from recent research studies in Scotland by Brown (2017) and Jamieson (2013): we need a re-examination of theoretical frameworks for and conceptualisations of legal and judicial practices. In recent years several researchers have provided us with theoretical discussions of or useful theoretical frameworks for research in the legal field, for example Tata (2007), Hutton (2006; 2014; 2016), Henham (2014), Dupret (2006) or Dezalay (2013). However, there still seems to be no consensus on the nature of sentencing. The problem is that if we take for granted the (social) nature of what sentencing is, our analysis of the phenomena may be thwarted by our weak understanding of its social dimension. In this thesis, I tried to address this issue through the conceptualization of sentencing as a social practice. While I do not mean to suggest that the adopted Bourdieusian framework is perfect, I do propose that sociological theories of practice offer us substantial theoretical and methodological tools for our analysis and should not be disregarded. Nevertheless, the inevitable next stage is using the recent research studies within the Scottish field to engage in an iterative debate concerning how both the methodological issues we faced in the field and our findings can help us to improve theoretical approaches.

The fourth aspect emerges as a critique of Tomb's research (2004). In her work, she took a narrow approach to trying to understand only the use of custodial sentences. However, my research suggests that the dynamic and complex process behind the imposition of sanctions makes such an approach problematic. On the one hand, you may end up over-stressing the use of custodial sentences by not being able to observe their use within the wider context of all disposals that are passed by Judges. On the other, you unnecessarily limit your analytical scope. In this regard, I suggest that further research should try to keep a focus on sentencing practices in the round, trying to better understand the rationale behind the imposition of all kind of disposals, as I have attempted to do in this research.

The fifth aspect, and no less important, is how my findings offer a depiction of the sentencing practices at the Sheriff Court as largely influenced by its context. As I argued above, there is a relationship between determining the seriousness of the offence and the perception of violent behaviour. This suggests that we should further study how Judges construct or 'read' violence in the context of small courts and explore the impact of anti-social behaviour in these communities. Recently Garland argued for the need to 'address the criminal violence that is so often intertwined with -- and used to justify -- penal violence' (2018b, p. 161). While this is an issue that is more evident in societies with high rates of violent crimes like the USA (Western, 2018; Miller, 2015), this does not excuse us from asking such questions.

As a matter of fact, because it is not so evident, it may be unexplored or neglected. For example, one of the findings of this research concerns the use of custodial sentences against offenders who have breached the conditions of their CPOs and are perceived as undermining the credibility of the court or against recidivists of less serious offences. These two categories of offenders – which often apply to the same individual – are framed as exerting abusive behaviours towards the community or the court, and thus are dealt with accordingly. Because of this, within a context where the political aim is to reduce the use of custodial sentences, neglecting these issues may cause well-intended reforms to produce unintended consequences. For example, the use of custodial sentences in the cases described above obeys a practical rationale that is not based solely on the seriousness of the offence. The extension of the presumption against short sentences is very likely to affect this practical rationale and may change practices counter-productively. This is to say, if Sheriffs, as discussed earlier, think these offenders deserve custodial sentences they may – instead of selecting a non-custodial option – actually impose longer custodial sentences, or alternatively, the prosecution may change their practice to ensure that these cases will be dealt with harshly. For example, they could start bringing cases to the solemn procedure instead to the summary court, where Sheriffs can impose custodial sentences up to five years.

The final aspects refer to the lessons that arise from the limitations of my research. I will briefly discuss four different limitations or practical problems I

faced. The first challenge of this research, which is also one of its limitations, was related to the inherent difficulties of carrying out research with elite subjects - the judiciary - within the UK. This meant a long period of negotiation, a short period of fieldwork and a lack of control during the final phase of the sampling process among other issues. Since I discussed these issues at length in chapters two and four, I am only going to add that the research would have benefitted from a longer period of court observation and shadowing. Likewise, it would have also benefited from interviewing the others actors involved in the sentencing process such as social workers or solicitors. Also, while the final sample of courts and Sheriffs reflected the varied social, economic and geographical differences within Scotland, it was indeed a limitation of this research that I was not granted access to either of the two biggest courts in Scotland. This limitation was undoubtedly relevant considering how most of my participants often compared their practice in opposition to what they believed the practice was in those big urban courts.

A second challenge related to the difficulties of balancing the social or sociological aspects of socio-legal research with the legal and normative ones. If, for example, I argued that Brown's work seemed imbalanced by focusing too much on the legal aspect, neglecting the socio, I think I may have done the opposite. I think one of the limitations of this research is that I focused too much on the social and sociological aspects of the study of practice and because of that I may have underplayed the impact of the legal or normative character of these practices. From the outset, this was one of my concerns because, despite being a lawyer, I am trained in continental law, not in common law. However, as part of the reflexive exercise required of a sociologist, I kept reassessing this issue during my research to try to avoid this bias. Nevertheless, I am not sure to what extent I succeeded in this, and in any case, this represents a potential limitation in the scope of my analysis.

From a more theoretical level, another limitation is inevitably derived from my use of Bourdieusian theory. As I argued in chapter three, of the different theories of practice, Bourdieu's work seemed to me to be the strongest one. This is so because it was a theory that emerged from practice itself rather than theoretical and scholarly discussions. In this regard, it is a theory that offers a

lot of epistemological and methodological tools for the researcher. However, to be "married" to a theory, as I was, means that my work will also be subject to the weaknesses and criticisms made of that theory. Being aware of them I tried to adapt and address them in my research. On the one hand, I decided to deal with some of the criticism that Boltanski and Fabiani direct to the concept of Habitus to improve my analysis of my participants' justifications of their practices. On the other hand, I incorporated psychological studies on expert-intuition, which enhanced my analysis of intuition and decision-making.

Nevertheless, by self-limiting my gaze to Bourdieusian scope, I have neglected to examine the field from a different perspective. This was a price I decided to pay, to avoid cherry-picking or biased interpretations which sacrifice epistemological and methodological rigour. Even so, I can recognise now that it may also be the fact that it fitted my legal habitus, which was more comfortable by following a set a normative epistemological and methodological rules, rather than a more open or flexible framework like grounded theory.

Finally, and linked with the previous limitations, is the issue of my position within the Scottish legal field. While the fact that I am a foreign lawyer may have allowed me to develop an externalist gaze into the field, at the same time was a limitation. For starters, I risked introducing an ethnocentric bias, judging the Scottish legal field through the lens of own my legal culture. Also, my position as outsider meant that I might have been unaware of social or legal cues that a native researcher may have been able to detect. To try to address this issue, the conceptualisation of reflexivity as developed by Bourdieu was very useful. However, in the end, this research is part of my study of the field which is influenced by my own set of habitus. I can only hope that what I have described and examined represents a truthful account of the complexities of the Scottish sentencing practices.

10.5. Conclusions and recommendations

What does sentencing at the Scottish Sheriff Courts entail? If I had to provide a short answer, I would say that it means doing justice to and within specific

communities. In this regard, one of the aspects of my analysis that surprised me most was the pervasive influence of community as an influence on sentencing practices. Since I lived all my life in Santiago, a city with a population over 7 million, and worked in one of the biggest prosecution services in Chile, the concept of community was to a certain extent alien to me. That is perhaps why I was surprised by how relevant local realities, even in the mid-sized urban jurisdictions, turned out to be for sentencing practices. Even though Sheriffs adopted diverse sentencing styles, all of them aimed at serving the local communities where their decisions took place.

I must confess that I was very sceptical about the notion of a unique identity of Scottish justice. I was willing to believe that the Scottish field could be more progressive than its neighbours in the south, but I thought that the idea of "tartanised penal justice" was an exaggeration. However, after living for four years in Scotland and going native to a certain extent, I do think that "doing justice" in Scotland, at least in the Sheriff Courts, has a unique Scottish identity. However, as I discussed throughout all my thesis, I am not sure that it is the romanticised and progressive identity that some people may prefer. For there is a difference between how Scottish sentencing is described and what sentencing in Scotland is.

Sheriffs construct their role in relation to the communities that live within the boundaries of their jurisdictions, this certainly gives rise to a localised and specific penal culture linked to those local realities. However, as I discussed above, there are different approaches, that diverge starkly from one another. Thus, if there is a consensus among Sheriffs that sentencing is for a community, there are different ways of understanding the best way of sentencing individuals. And, within the Scots law and its common law tradition, these different styles reflect different possible ways to exercise the sentencing role.

There seems to be a lack of public discussion on what sentencing entails. On the one hand, the Judiciary protect their judicial independence and have been reluctant to engage with academic research. On the other, the part of criminal proceedings that we can observe does not help us to understand the practical rationales behind sentencing. And this lack of understanding is detrimental to

both society and the Judiciary because it affects the intelligibility of their decisions. The sentencing practices that I found during my fieldwork seemed to be affected or influenced at least indirectly by the attempts of the Government to reform the Scottish Criminal Justice system. Nevertheless, as I stated earlier, these reforms seem to neglect "street-level" sentencing practices and their practical logic. And all the practices that I have described in all their complexities are undoubtedly relevant for achieving any reform, but they are not known because there is so little research in this field. Any discussion about the future of the Scottish penal field cannot ignore the current realities of practices.

Facing these issues, the only way to improve our understanding of the field and to discuss the future of it pragmatically is to continue enhancing our knowledge of penal practices. There is certainly a Scottish identity apparent in the sentencing practices I described because they are localised but also because they are the by-product of Sheriffs that are in turn the by-product of the Scottish legal field. However, is this identity what we want for Scotland? Should we improve it, change it or leave it as it is? So far, I cannot answer these questions, because the practical rationales behind the different Sheriffs' sentencing styles were consistent with very good reasons. The question is not which is 'better' than the other, but rather which reflects the penal system that we want to produce in the future? But then, any discussion of what the Scottish penal field ought to be is doomed to fail if it is not grounded in the complexities of real practices.

For example, if you approach the Scottish field with an abolitionist position, and you might argue, with very good reasons, that there should be no custodial sentences at the Summary Sherriff Court level. Would that be enough to reform practices? And the answer would be no that would not be enough. This is so because the field showed to me that even if one disagree with the use of custody with people that fail to comply with CPOs or with persistent petty offences, custodial sentencing practices emerged as a practical reaction to the problems caused by those disruptive behaviours. Thus, the more you look at the

real practices, the more issues and nuances you discover and then, the more complex any kind of reform becomes.

I hope my research serves as a way to keep encouraging researchers to look at the practices in the Scottish Legal Field. In this regard, future research should engage with communities in two different ways. First, it would be valuable to study the practices of the legal communities formed by the Sheriffs, lawyers, social workers and clerks that work within the court. Thus, research should focus on sentencing, and other court practices co-produced through the interactions of these individuals. Second, it would be equally valuable to study the more critical relationship between the small or midsized courts and their practices and the way they impact upon and are perceived by their communities.

Finally, any penological discussion on the future of Scottish sentencing practices cannot be carried out successfully without a proper understanding of everyday sentencing practices. My research joins a couple of emerging research studies in this area, but there is still a lot of work to do to better understand everyday practice. And after having the privilege of talking to and discussing with those practitioners, I am aware that there is a lot to learn from their experiences. Luckily, the increase in the number of research studies may improve the collaboration between the judiciary and socio-legal or criminological researchers.

Appendices

University of Glasgow

College of Social Sciences

Plain Language Statement

Title of Project: Doing Justice: Sentencing in Sheriff Courts
Name of Researcher: Javier Velásquez
Supervisors: Professor Fergus McNeill, Dr. Marguerite Schinkel and Professor Fiona Leverick

You are being invited to take part in a research study. Before you decide it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask me if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part. Thank you for reading this.

1. **Aims, purposes and outcomes of the project**

The Scottish judiciary, and sheriffs in particular, fulfil an important social duty: they punish offenders and symbolically restore 'peace' into the community. The uniqueness of Scots law also means a unique Scots approach to punishment, and hence a particular judicial culture. The aim of the proposed research is to better understand the practice, culture and identity of sheriffs in their sentencing role. The project, therefore, seeks to explore your views about the role of the sheriff – especially as it relates to sentencing – in more depth. Your experience and knowledge are invaluable in order to be able to understand the unique Scottish approach to punishment.

2. **Publications**

This research is conducted as part of a Ph.D. degree in criminology. Hence, the result of this investigation will be a Ph.D. Thesis. Part of it might also be converted into academic research publications, such as academic journal articles and books.

3. The research process

This research has been designed taking into account judicial workloads and with the aim of trying to disturb the regular labour of the sheriff courts as little as possible. If you agree to participate in the research, I will spend two weeks visiting your court. During this time, I will observe sentencing diets and I would hope to carry out an interview. The interviews are designed to last between 60 and 90 minutes, but they can be split into 2 or 3 shorter sessions if that suits you better. They could take place in your office after court proceedings have finished or if that is not convenient at any time or place that would suit you on court premises.

4. Confidentiality

With your permission, the interview will be audio recorded. The audio files will be kept in a secure server at the University of Glasgow. Any recording or note made of your interview will be accessible only to the researcher and his supervisors and to any transcribers used. Interviewees will not be identified other than by a number in any recording or any transcript. Any socio-demographic or personal information collected (relating to particular cases observed or information about judges) will be anonymised. Judges' identities will be coded, as well as the Sheriff Courts, the Sheriffdoms and any case observed in order to ensure full anonymity. No names will be used in any publication of this research. Nevertheless, If a court of law issues a warrant requiring us (the researchers of the University of Glasgow) to provide them with our data for its purposes, we would have to do so.

5. Data collection and storage

All the data, notes and any kind of paper will be stored in a secure cabinet at the Ph.D. researcher's office at the University of Glasgow. The audio files and any digital files will be kept in a secure password-encrypted computer. As stated above, the notes and audio files will only identify the participants by a number. The list with the numbers and real names will be kept apart, in an external hard-drive, locked in a different cabinet. This file will always be handled and kept away from the rest of the data to prevent any identification. Personal data of all participants will be destroyed no later than 5 years after the end of the fieldwork. The judiciary will be informed that the data is being destroyed. This lapse of time is to allow for the possibility of preparing a book or report, with the proper authorization of the participants and the Scottish Judiciary.

6. **Funding:**

This research is founded by a Scholarship from the Chilean National Scholarship Program (PhD Scheme) awarded by CONICYT (National Commission for Scientific and Technological Research).

7. **Ethics**

This project has been considered and approved by the College Research Ethics Committee on XX/xx/2016.

8. **Contact for further information**

The PhD researcher on this project is Javier Velasquez, j.velasquez-valenzuela.1@research.gla.ac.uk. The principal supervisor on this project is Professor Fergus McNeill, Fergus.McNeill@glasgow.ac.uk.

If you have any concerns or complaints about the research, please contact Dr. Muir Houston, College of Social Sciences Ethics Officer, **Muir.Houston@glasgow.ac.uk**.

Sample Consent Form

Title of Project: Doing Justice: Sentencing in Sheriff Courts
Name of Researcher: Javier Velásquez
Supervisors: Professor Fergus McNeill, Dr. Marguerite Schinkel and Professor Fiona Leverick

1. I confirm that I have read and understood the Plain Language Statement Sheet for the above study and have had the opportunity to ask questions.

2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.

3. I consent to interviews being audio-recorded and the audio files transcribed.

4. I consent to take part in the cases studies exercise.

5. I acknowledge that participants will be coded by number.

6. I understand that the data collected from this research will be stored securely with my personal details removed and agree for it to be held as set out in the Plain Language Statement.

7. I agree that the data collected in the course of this research will be shared with other genuine researchers as set out in the Plain Language Statement.

8. I agree to waive my copyright to any data collected as part of this project.

I agree to take part in this research study ☐

I do not agree to take part in this research study ☐

Name of Participant …… Signature ……..

Date ……

Name of Researcher …… Signature ……..

Date ……

Research Questions

1. **Background**

    a. Demographics (age/gender)
    b. Academic degrees
    c. Legally-defined qualifications (Solicitor/Advocate/Solicitor-Advocate/QC)
    d. When and why do you decide to become a Sheriff?
        i. Did you start as Part-time sheriff?

    e. **Transition question:** Did your perception of the sheriff's role change or evolve after you became one?

2. **Role/Social implications/Purpose**

    a. **Role:** In your [personal / professional] opinion, how would you describe the sentencing role of the sheriff to a foreign person from a non-common law country?
        a. **Alternative**: What is the Ethos of the Sheriff in his or her sentencing role?

    b. **Social implications:** In your opinion, to what extent is your roles responsive to the community or Sheriffdom in which you practice?
        a. Follow-up question: Do you think you have a good knowledge of the community that lives within your jurisdiction**?**
        b. **Follow up question:** In your [personal / professional] opinion, Does dealing with civil and criminal law cases provides you with a better knowledge of the problems or/and needs of the community that lives within your jurisdiction?
        c. **Follow up question:** To what extent (if any) does this knowledge influence or shape your sentencing role?'

    c. **Purpose:** Taking into account that sentencing purposes and sentencing principles can be contradictory at certain times, based on your professional experience, how do you resolve the tensions between them?
        a. **Follow-up question:** Is there any hierarchy between the different purposes and principles in practice? Or, in what instances might you consider that one purpose or principle becomes secondary to others?

b. **Follow up question:** How relevant are the individual characteristics and circumstances of the offender in solving these tensions?

3. Sentencing decision-making

a. How would you describe your approach to sentencing decision making? Could you briefly describe your working process when you pass sentence on an offender?
    i. Follow up question: Given your approach to sentencing decision-making, which, in your opinion, are the most important sentencing purposes and principles?

b. For you, as a sentencing decision-maker, what is the most valuable information in terms of arriving at the best solution for a given case?
    i. Follow up question: To what extent do you think that the procurators fiscal, the offenders' lawyers and/or social workers always provide you with the proper and necessary information required to make a fair decision?
    ii.

4. Disposals/ The meaning of punishment / Purpose of punishment

a. To what extent are the available disposals (custodial sentences, community sentences, fines, admonition, etc.) able to convey to the offender and society, the message implied by the sentencing purposes and principles we have discussed?

    i. **Follow up question**: Which is/are the sentencing purpose(s) that you aim to achieve by using a particular disposal?

    ii. **Follow up question:** Taking into account the different functions and purposes of the disposals (considering only admonitions, fines, community sentences (in a broad sense) or custodial sentences), based on your experience, how do they perform in practice regarding their effectiveness? (**And how do you define effectiveness?**)

    iii. **Follow up question:** How often do you get feedback, if any, about what happened with an offender in a given case?

b. Regarding the use of short-term custodial sentences: What is the main sentencing purpose of a short-term custodial sentence?
    i. **Follow up question:** Does the use of short-term sentences whenever 'no other method of dealing with the person is appropriate' mean community sentences are inadequate to deal with certain offenses or certain offenders? (**If so, which offences and which offenders?)**

c. There has been some discussion/public debate over the use of community sentences over custodial sentences and the need to promote payback or rehabilitation instead of retribution. To what extent do you think that this debate contains an adequate understanding of the complexities of sentencing?
    i. **Follow up question:** What sorts of nuances do you think are absent from these current debates?

d. To what extent do you think that community sentences (or fines), should be the primary sentencing response in summary cases in the sheriff courts?
    i. **If applicable**, in which cases is a short-term custodial sentence more suitable than a CPO? In which kinds of cases is it otherwise?

5. Offenders' Perceptions

Taking into account particularly the problem of reoffending: While dealing with offenders that have multiple previous convictions or a substantial record of non-compliance:

a. Are such offenders always likely to receive a custodial sentence (as opposed to a community disposal)?
b. What kind of information might make you inclined to give such an offender another chance at completing a community sentence?
c. Do you think that the different disposals available offer offenders real chances to rehabilitate themselves?

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