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Development Division
Justice

PROSECUTORIAL PROCEDURE IN SELECTED EUROPEAN COUNTRIES

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This paper is the second in a new monograph series published by the Planning and Development Division. Publications in this series will present descriptive and comparative papers on various aspects of the administration of the judicial system and other areas of departmental interest and activity. The papers are intended to be informative and to provide a constituent framework from which research can be developed or future planning undertaken.

This monograph provides a comparative analysis of prosecutorial procedures in certain Scandinavian countries, the Netherlands and Scotland and concludes with a summary of recent discussions concerning the prosecution process in England.

The prosecution system, particularly at the point of the decision to prosecute which is linked to the unfettered discretion vested in prosecution agencies, occupies a position of importance and influence in the criminal justice system. This fact promotes the system as a candidate for an evaluative study. Such a study is probably a prerequisite to the development of any system of diversion.

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1. INTRODUCTION

In a number of Scandinavian countries, in the Netherlands, and in Scotland there are prosecuting authorities who exercise considerable power over the police in instituting prosecutions and who also themselves operate what amounts to diversion programmes. This matter has also been the subject of some discussion in England, particularly in relation to the procurator fiscal, and in Northern Ireland a judicial system has been established which modifies that of England in the direction of a more independent public prosecutor.

As the power of a prosecutor to divert an offender out of the courts is dependent on his place in the judicial system as a whole, this matter as well as his relation to the police will be considered in what follows.

2. SCANDINAVIA

The Scandinavian judicial systems manifest a remarkable degree of uniformity. This is the result partly of historical development and partly of deliberate choice. Not only were Denmark and Norway effectually one country from 1380 to 1814, but any tendency, after the latter date, for either country to develop a uniquely national system was largely frustrated by the formation in the 1870s of the Nordic Council. Within this organisation the four Scandinavian countries work to ensure between each other a general judicial and legal uniformity. For this reason it is not intended to consider the systems of all four countries in detail. As Norway is the country concerning which most specific information is available, its system will be used as a paradigm of all Scandinavian systems.

Such differences as are significant will be referred to as appropriate.

(a) The Public Prosecutor

The supreme head of the public prosecution system in Norway is the Director of Public Prosecutions, who is directly subject to the King (in Council) and is thus independent of the Ministry of Justice. There are no political appointments at any level of the prosecution structure, all officers being civil servants. The State Director of Public Prosecutions has under his immediate command 12 State Attorneys or State advocates. All of these officers are lawyers and are appointed by the King.

The superior officers of the police also belong to the Public Prosecution Authority as do a number of their subordinates. The district commissioners of police and most of their subordinates are also lawyers. As the police force is a division of the Ministry of Justice, it thus is subject to a dual subordinate relationship. On the one hand it is subordinate to and takes its orders from the Ministry of Justice with regard to the execution of tasks of a purely police nature. On the other hand it is subordinate to and takes its orders from the superior instances of the Public Prosecuting Authority with regard to criminal investigation matters and as regards the decision as to whether or not punishable acts should be made subject to criminal proceedings. In most of the country districts the duties of the police are carried out by the sheriffs. The general subordinate administrative authority is vested in them within their district. Thus some rights and duties within the field of competence of the Public Prosecution Authority are also vested in them.

The decision to instigate criminal proceedings in cases involving certain particularly serious crimes, or those of great public concern must be made by the State Director of Public Prosecutions. In other cases involving crimes, the state advocate of the geographical jurisdiction in question will decide whether criminal proceedings should be instigated. (In Denmark in some minor cases the assistant public prosecutors have the right, without referring the case to the advocate, to decide whether or not proceedings should be instigated). With regard to cases involving misdemeanours the decision as to whether criminal proceedings should be instigated, will be made by the district commissioner of police. In the deputy police officials (and the other superior police officials) are vested other duties which, according to provisions of law, come within the jurisdiction of the Public Prosecution Authority. Thus such officials have the right of instituting criminal proceedings and requesting the court, in some circumstances, to issue warrants. They have however no authority to make decisions as to whether a sentence should be appealed. The sheriffs have the authority to decide, on their own initiative, that criminal investigations should be instigated only if they are not in a position to obtain directions from their immediate superiors.

In those cases where it is normally vested in the State Director of Public Prosecutions to make decisions as to whether criminal proceedings should be instigated, a decision to waive such a prosecution must be made by the King; and in cases where the decision to instigate criminal proceedings is vested in the State advocates a decision to waive prosecutions must be made by the State Director of Public Prosecutions. The district commissioners of police may, however, where the prosecution is vested in them, either

themselves decide, or leave it to a deputy to decide on their behalf, that criminal proceedings be waived, without having to submit the question to any superior instance. In such cases, rather than pass a formal decision to the effect that crimina proceedings be waived, the official in question will give a warning to the offender.

(b) The Court Structure

In Norway the lower court is composed of a judge and the two judges who are selected by drawing lots from a limited selection of such appointed lay judges. The judge and the two lay judges together determine both the question of guilt and of sentence. Though this structure is common to the lower courts of all Scandinavian countries, there is a considerable difference between that of their respective Courts of Appeal. In Norway these courts are composed of three judges and ten laymen who comprise the jury and decide the question of guilt. In Denmark the jury numbers twelve members and has only the same weight as that of the three judges combined. Sweden has no jury system, cases being decided in the Courts of Appeal by four legally trained judges, or by three such judges and two lay judges or assessors. In each country the Supreme Court acts as a court of appeal only.

No special courts have been established in Norway with jurisdiction to try criminal cases against young offenders. As with other criminal cases, they are dealt with by the ordinary courts of justice. Juveniles may be punished for punishable acts which they have committed after having reached the age of 14. If they are under 18 years of age, however, the public prosecutor will most

frequently decide to waive criminal proceedings in accordance with a special provision of the law to this effect, on the condition that a municipal juvenile welfare committee will decide on adequate measures with regard to the delinquent. If the case is nevertheless carried to the court, the latter may on similar conditions decide not to impose punishment on such young persons.

(c) Prosecutorial Procedure

In criminal cases there are ordinarily two instances only. In the first instance the case is adjudged either by the County or Town Court in question, or by the Court of Appeals, and in the last instance by the Supreme Court. It is within the jurisdiction of the Court of Appeals to deal with cases involving crimes for which the penalty may exceed imprisonment for 5 years. If the accused has confessed unreservedly to his guilt, and the reliability of the confession is considered corroborated by the circumstances otherwise prevailing, the case will come within the jurisdiction of the Court of Appeals, provided the maximum penalty which may be inflicted according to the penal clause in question exceeds imprisonment for 10 years. However, cases involving embezzlement, larceny, petty theft, fraud, and breach of contract, always come within the jurisdiction of the County or Town Court, regardless of the potential punishment. This applies equally to cases concerning crimes committed by persons under 18 years of age, provided the public prosecutor will not demand a more severe punishment than imprisonment for 2 years. Regardless of the above mentioned provisions the public prosecutor may always bring a case directly before the Court of Appeals as a court of first instance, if so considered expedient for particular reasons, or so requested by the

accused. On certain conditions, particularly mentioned by the law, such a request cannot be refused.

Preliminary or judicial examination, which occurs outside the main hearing of the case, is carried out by the lower court acting as Summary and Examining Court. This court may also pass sentence in a case where the accused person has given an unreserved confession supported by the available evidence, and where the accused himself consents to it. As a rule no witnesses will be called to give evidence in such a case. The sentence will be based upon the recorded confession of the accused, and on the police documents of the case. No formal indictment will be prepared and, as a rule, no representative of the public prosecutor will appear. The accused is not, in such cases, entitled to have the assistance of a State appointed counsel.

(d) Prosecutorial Discretion

The public prosecutor is expected to instigate criminal proceedings when he deems it possible to establish sufficient evidence to prove that the punishable act in question has been committed by the defendant. He may however invoke the rule of expedience or opportuneness. Thus it may be decided that criminal proceedings be waived (Nolle prosequi) if such particular circumstances are prevailing as to cause the public prosecutor to hold that circumstances are in favour of such a decision. Such an action is referred to as a suspension of judgement. Although the procedure has now been adopted in many European countries, it was first introduced by Norway in 1887. Originally a decision to waive criminal proceedings could only be made unconditionally, but through

later modifications of the legislation provision was made for the conditional abstention from prosecution, thus creating a method for the conditional suspension of punishment without conviction.

The Norwegian legislation does not restrict the application of the conditional suspension of prosecution categorically, but grants a wide discretionary power to the public prosecutor in assessing the "public interest" in individual cases. It is usually considered that the public interest in the institution of public proceedings against an offender varies with the gravity of the offence; the criminal prosecution is therefore far more frequently waived in the case of minor offences. The conditional suspension of prosecution is however, in fact, unrestricted with respect to the nature and gravity of the offence. It is for instance, widely used in the case of first offenders. The public prosecutor may also impose special conditions, within limits set by the law, according to the special circumstances of the case. These may include supervision for a probationary period where the offender is under 25 years of age, restitution for damage done, the finding of employment, or the joining of a temperance or abstainers' society. Offenders under 18 years of age may be handed over to the local juvenile or child welfare committee. These committees, which perform the function of juvenile courts in Norway, were established in every township in the country by a statute of 1896. The committees deal with neglected and delinquent children, and children in need of special care, generally, and have widespread powers over cases brought before them. Emphasis is placed on education, training, and reform rather than punishment. In the case of defendants under 21 years of age, the suspension of prosecution may be made subject to the condition that the defendant be committed to an educational institution for a

period not exceeding three years. In practice, this is not done except where an offender (or, if he is under 18 years of age, his guardian) gives his consent.

If the accused, or the person charged, is of the opinion that he is not guilty of a crime, with regard to which criminal proceedings have been waived, he may demand that the public prosecutor carry the case before the court, if he does not decide to withdraw the charge or the accusation made. In cases concerning misdemeanours the accused has no corresponding right.

(e) The Supportive Institutions

The child welfare committees are official agencies. The probation service is however essentially a private organization. It is under the control of the Federation of Norwegian Rehabilitation Societies. These societies were originally private charitable organizations founded in the nineteenth century. By means of legislation they were gradually given a place within the formal structure of the judicial system. They are staffed by a core of professional workers, who work full time and are paid by the government, and by part-time and volunteer workers. In 1976 10-15% of the societies' income still came from voluntary support, the remainder being contributed by the Justice Department. The work of these societies is essentially the same as that of our own Probation Service. The peculiar structure of this system has however, in recent years, led to some difficulties. There is a wish from within the societies themselves for more voluntary assistants. A shortage of staff has been seen as particularly disturbing in the area of preparation of social investigations or pre-sentence

reports. However, throughout the century there has been a continuing drop in the number of members of these societies, and of the societies themselves. It has consequently been felt that the function they perform should be taken over entirely by the government. Although the societies wish that they might retain some influence in the area of probation, and that use should continue to be made of lay resources, it is likely that the Norwegian system will eventually come entirely within the jurisdiction of the State.

The Danish probation service is virtually identical in its structure with that of Norway, being based on a system of lay charitable organizations, and heavily subsidized by the government. It is under the control of the Danish Prison Aid Association. In recent years Denmark too has found it increasingly difficult to find volunteers for this work.

The Swedish system differs from those of Norway and Denmark, in that it is entirely state controlled, though like them it is extensively staffed by volunteers. And like them it is finding increasing difficulty in recruiting individuals willing to do this work. Sweden has attempted to overcome this difficulty by adopting a more extensive training procedure than that of other Scandinavian countries, and by inviting offenders to nominate their own probation officers. Nevertheless, it is clear that the probation service will increasingly come into the hands of full time state servants. John P. Conrad, in fact, in his book Crime and its Corrections says, "it seems probable that a pattern of probation much along lines developed in England will eventually be adopted".

The relationship between the development of the public prosecutor's functions, in these countries, and the existence of voluntary rehabilitative organizations is not clear. But it is likely that the extensions of scope of the alternatives available relative to the use of suspension of judgement was dependent on, or at least closely related to the availability of the resources these societies provided. With their decreasing activities and the consequent staffing difficulties, a disparity between principle and practice would appear to have developed. This is apparently the case, in Norway at least, with the child welfare committees as much as with the probation services. Thus the referral of an offender for supervision to one of these organizations by the prosecutor has often resulted in no more than the recording of the referral on the part of the committee.

3. THE NETHERLANDS

As in all countries, the means, in the Netherlands, of controlling crime are determined largely by local social and historical factors. Conrad (ibid), commenting on the former, writes that, "The prosperous, but cramped, society of the Dutch can allow little tolerance for crime. Careful organization of a welfare culture has allowed as little as possible of the element of chance in the ordering of human affairs. With nearly twelve million inhabitants crowded into 12,850 square miles, a population density has been achieved in which people must be in their proper places. Effective measures must be taken to keep social deviation to a minimum and to maintain everyone's contribution to the common welfare at a high

level". (p.113). As in Scandinavia, and perhaps even more so than there, such a welfare culture is heavily dependent on the legacy of humanitarian and voluntary institutions founded in the nineteenth century and still providing the most significant supportive services for the courts. The role of the public prosecutor must be considered in this context.

(a) The Public Prosecutor

Criminal proceedings in the Netherlands, may only be instituted by the Department of Public Prosecutions, which has 180 Public Prosecutors. The Department of Public Prosecutions is composed of the Attorney General and the Solicitor General at the Supreme Court, the five Attorneys General and the Solicitors General of Appeal, the 19 Chief Public Prosecutors, the Public Prosecutors, and the Traffic Officers attached to the District and Cantonal Courts.

The Public Prosecutors and the Traffic Officers work under the supervision of the Chief Public Prosecutor who in his turn is subject to the Attorney General at the Court of Appeal for that district. They all come under the Ministry of Justice. Like other civil servants they retire at the age of 65. The position of Attorney General of the Supreme Court is different; he is independent and is appointed for life, though he is retired at the age of 70. The Attorney General (or one of his Solicitors General) is consulted by the Supreme Court in all cases brought before it. He thus gives his opinion on disputed legal questions. Only he has the power to institute, if necessary on his own initiative, an appeal to the Supreme Court in the interests of the law. The State is represented by the Attorney General and his Solicitors General at

Court of Appeal sessions. The Chief Public Prosecutor and Public Prosecutor fulfil the same function at District and Cantonal Courts; Traffic Officers deal in particular with the prosecutions of traffic offences in Cantonal Courts.

(b) The Court Structure

The public prosecutor functions within a judicial structure which devolves upon 62 Cantonal Courts, 19 District Courts, 5 Courts of Appeal and the Supreme Court. There are about 600 court judges. The Cantonal and District Courts are courts of first instance; with certain exceptions, appeals lie to the District Courts and the Courts of Appeal respectively. Each Court of Appeal is a superior court to a number of District Courts, each of which, in turn is superior to a number of Cantonal Courts. The most important function of the Supreme Court is that of a court of last resort in cases involving non-observance of procedural formalities or violation of the law.

Cantonal Courts have jurisdiction in criminal cases involving misdemeanours which do not lie within the cognizance of Distict Courts, e.g. fiscal offences and offences against economic legislation. (Dutch law recognizes two categories of indictable offence only: misdemeanours and felonies). Cantonal judges sit singly, except in the capacity of President of the Tenancy Division. The District Courts are courts of first instance in criminal suits pertaining to almost all felonies and to those misdemeanours not dealt with by the Cantonal Courts. They also have an appellate function in respect of appellate judgements given by the Cantonal Courts. District Court judges are assigned to one

or more divisions, in each of which either one or three judges sit. Courts in which the judge sits singly deal with appropriate civil cases, cases involving children (juvenile courts), criminal cases (the police courts), and indictable economic offences (the economic police courts). Juvenile courts deal with both civil and criminal actions. Criminal suits may be tried in the police courts only when the case is factually and juridically simple and the maximum sentence may not exceed six months imprisonment. There is no jury system in the Netherlands. The Courts of Appeal hear appeals from the District Courts. These courts also have divisions, in each of which three judges sit, although there are single-judge divisions for fiscal cases. The Supreme Court of the Netherlands in The Hague has several divisions, each consisting of five judges. It is the ultimate court of appeal against all sentences passed by inferior courts. The Supreme Court accepts the facts as having been established by those courts, its main function being to ensure that the law is applied uniformly.

(c) Prosecutorial Procedure

In some cases, persons suspected of having committed an offence may be remanded in custody by order of the magistrate for a period of six days, which period may be renewed only once. After the preliminary examination of the accused the prosecutor may apply to the Court for a warrant to hold him in custody for a further thirty days. It is at this stage of the preliminary investigation that reports on the accused can be requested from probation and after care organizations and from psychiatrists. The examining magistrate who conducts the preliminary investigation does not sit

on the bench that tries the case. On conclusion of the preliminary hearing the public prosecutor decides whether or not to prosecute further.

In Dutch law in general, the more serious offences, or felonies, ar dealt with in the first instance by a District Court, while less serious offences, or misdemeanours, come as a rule before Cantonal Courts. In juvenile law, too, more serious offences are brought before District Courts. But in a juvenile case a District Court has rather more extensive powers regarding misdemeanours. It has jurisdiction over a number of specified misdemeanours which in general can be seen as symptomatic of a young person being beyond control. In principle, proceedings against young offenders are brought before a juvenile magistrate. Certain cases are dealt with by a Tribunal, a bench of three judges, in juvenile cases always including a juvenile magistrate. An example is a case which in the initial opinion of the public prosecutor and the juvenile magistrate is so complicated that it merits dealing with by a Tribunal, or again in their opinion, the offence is of such a serious nature that a more severe sentence than six months imprisonment is called for. Although prisoners remanded in custody normally spend their time in a House of Detention, in the case of a young offender the home of his parents or guardian or some other fit place may be designated instead. A juvenile magistrate may also order a young offender accused of a felony to be placed in an observation centre to facilitate enquiries into his personality.

The handling of juvenile cases differs from cases tried under common law in one important respect namely that they are tried in camera. The central theme in juvenile law is the educative treatment of

young people. This is shown by the nature of the civil measures. But in juvenile criminal law, too, it is clearly the point of departure as explained above. This is also the reason why the public prosecutor frequently exercises his prerogative of waiving proceedings against a young accused, conditionally or unconditionally and in or after consultation with the juvenile magistrate. In this way he often clears the way for a civil measure in respect of a young person who has committed a punishable offence. And even if it gets as far as prosecution, trial and sentence, a court is not obliged to sentence the offender or to order a corrective measure. If the court considers it advisable in view of the trivial nature of the offence, the personality of the offender and the circumstances, it may order no sentence to be passed.

(d) Prosecutorial Discretion

The Department of Public Prosecutions has a considerable degree of independence. Dutch law recognizes the principle of opportuneness, as opposed to the principle of legality, as is the case in Scandinavian countries. This means that the public prosecutor is not bound to prosecute should an offence be made known to him except on the express order of a Court of Appeal (following a complaint of failure to prosecute), the Minister or the Attorney General at a Court of Appeal.

Not only may the public prosecutor decide not to prosecute; he may decide to defer giving a final ruling on the continuation of the prosecution, attaching conditions to this decision. Such conditional suspension of criminal proceedings originated in

practice and only subsequently received statutory recognition. The basis of this procedure is to be found in the principle, recognized by the Netherlands Code of Criminal Procedure, that the public prosecutor may dispense with the prosecution of an offender if such a course of action is warranted by considerations of public interest. The procedure may be adopted, at the request of the suspect and at the discretion of the public prosecutor, at the time of the preliminary judicial investigation into a punishable offence or when a person suspected of such an offence is taken into protective custody. The suspension of prosecution is made subject to such conditions as the public prosecutor may deem appropriate, and these may include the requirement that the suspect should be placed under probationary supervision. Where such supervision is required, it is exercised on exactly the same basis as probationary supervision applied to offenders under conditional sentence.

Supervision as an independent measure is primarily a civil law measure, and is regulated by the Netherlands Civil Code. Under the civil law, it may be used by juvenile court judges in cases where a minor is in moral or physical danger, and action may be taken at the instance of parents, guardians, relatives, the Minors' Protection Board, or the public prosecutor. Where this measure is employed, the juvenile court judge appoints a supervisor to give guidance and assistance to the minor and his parents (who are required to co-operate). Supervisors who are generally unpaid volunteers, work under the direction of the district juvenile court judge. In some centres supervision is entrusted to suitable voluntary organizations, and in particularly difficult cases, to salaried juvenile probation officers. The duration of supervision is determined by the judge and may not exceed one year, but may be

extended from year to year until supervision is automatically terminated when the juvenile reaches the age of 21. During the term of supervision the juvenile court judge may, if necessary, send the person placed under supervision to an observation centre, order detention as a special disciplinary measure, or place him in a foster home, a home for working young persons, or other such institutions.

(e) The Supportive Institutions

Dutch probation is involved with the three principal religious groups, Catholic, Calvinist, and Lutheran. Schools, universities, and philanthropic insitutions are tied to one of the three denominations. With probation the situation is even more complex. Six probation societies administer supervision and after-care of wards of the court, prison releases, and others under official or unofficial guidance after conviction of an offence. In addition to societies attached to the three major denominations, a fourth society was established by the Salvation Army; a fifth for the supervision of alcoholics; and a sixth, the Meyers Society, for the probation supervision of mentally disturbed delinquents. Except for the two specialized societies, a prospective client can elect assignment to whichever denominational supervision he likes.

Standards are set by the Ministry of Justice, which pays 90 per cent of all salaries, and the entire amount of all other expenses. Minimum eligibility for employment, training, research, and public relations are also determined by the central government. All administrative management of the central government's part in the programme is in the hands of the civil service, the qualifications

for which primarily stress legal training. Actual probation operations are conducted by personnel trained in social casework. This requirement is met with difficulty; although there are twenty schools of social work in the country, each with a three or four year post-gymnasium curriculum, and each enrolling between two and three hundred students, most case workers are women, and the turnover due to marriage is very high. Usually, Dutch women do not accept employment after marriage. The small size of the country, nevertheless, makes possible an intensive and co-ordinated training programme which offsets some of the recruitment and organizational handicaps.

The voluntary child care institutions and organizations referred to above are associated in group organizations according to their religions or philosophical basis. They work together in the National Federation for Child Care and Protection, which acts as spokesman for the voluntary institutions in dealing with the Government. These institutions are of two kinds, the Guardianship Societies and the organizations for family supervision. The Guardianship Societies place the children with foster parents or in voluntary institutions of which a number of different kinds are available, reception centres where they can be accepted on a short time basis, observation centres where a young person's character and personality can be assessed, educational and training institutions - a composite group including normal and mentally handicapped children and young workers amongst their clients, and unmarried mothers - and special treatment institutions for very difficult maladjusted children.

A supervision order under both civil and criminal law involves the appointment of a 'family supervisor'. This can be a voluntary worker or a social worker from a family supervision institution. The main responsibility of these organizations is to recruit, select and guide voluntary family supervisors. They also act as a liaison between the family supervisors and the juvenile magistrates. In addition, they offer aid and guidance to young offenders with suspended sentences or released on licence. They employ qualified social workers, who in recent years have increasingly been appointed as family supervisors, and a clerical staff. The Minister of Justice is responsible for seeing that the 99 guardianship and family supervision organizations maintain the standard set.

There is a Child Care and Protection Board in each of the 19 places where a District Court holds session. The idea of the Board is to form a child care centre in each district. The scope of their responsibilities is very wide. The Boards provide the Courts with information and act as a general child care documentation centre for the area. To this end they keep up to date with what is happening in child care in the whole area. They also encourage co-operation between the child care organizations in their areas. In almost all cases concerning parental authority and guardianship the Court is obliged by law to consult the Board. A child care measure under civil law, such as placing under supervision, taking into care or removal from home is usually ordered at the instigation of the Board. The Board also acts in an important advisory capacity in juvenile criminal cases.

4. SCOTLAND

The historical and political background of Scots criminal law and procedure has remained relatively stable since the beginning of the 18th century. Prior to 1603, Scotland was an independent kingdom and the Union of the English and Scottish Crowns in that year had little effect on the government of Scotland except to remove her king to London, with the result that more of the government was left in the hands of persons appointed by the King, one of the most important being the Lord Advocate. Scotland retained its own parliament until 1707 when the parliaments of England and Scotland were united to form the parliament of Great Britain. While this new body was the sole source of legislation, Scotland continued to maintain its separate legal system completely independent of that practised in England and in the realms of criminal law, widely different from the English system.

(a) The Public Prosecutor

Prior to 1587, most prosecutions were left in the hands of the injured party, although the King's Advocate, otherwise known as the Lord Advocate usually joined the prosecution for the King's interest partly in order to preserve law and order, and partly out of financial interest as any fines went to the royal treasury. The investigation of criminal proceedings was however in the hands of the victim. In 1587, the Lord Advocate was empowered by an Act of Parliament to instigate criminal proceedings 'although the parties be silent or would otherwise privily agree'. This power of the Lord Advocate to prosecute without the concurrence of any private party gave him an almost absolute right to decide who should be

prosecuted, and, in the absence of legal provision to the contrary, in which court the case should be tried.

The Crown Office is the central organization of which the Lord Advocate is in charge. Most of the prosecutorial work he delegates to the Solicitor-General, who like him is a political appointee, and to the Advocates Depute, of whom there are currently seven. The two Law Officers and the Advocates - Depute are practising advocates and are known as the Crown Counsel. As the headquarters of the administration of criminal prosecution, the Crown Office is concerned with the preparation of prosecutions in the High Court and the direction and control of the procurator fiscal service. The procurators fiscal are the public prosecutors in the Sheriff Courts. Before May 1975 the prosecutor in the District Courts was the Burgh prosecutor, (a local solicitor working generally on a part-time basis), or the Justice of the Peace Fiscal. However, since that date, the function of prosecution has been gradually taken over by the procurators-fiscal. The latter are full-time civil servants and are completely independent of the judiciary. They must either be advocates or solicitors and are usually solicitors.

As a Minister of the Crown, the Lord Advocate is responsible to Parliament for decisions whether or not to prosecute, but otherwise he need not give reasons for his decisions. S.H. Gordon comments, in The Criminal Law of Scotland, 'It is almost impossible to find out and to state the principles on which the Crown Office acts, and very difficult to predict their actions. For the decisions of the Crown Office are in the last resort administrative decisions .... they may be based on precedent and general rules, but the precedents and rules are private'.

The police force in Scotland is, for administrative purposes, under the control of the Secretary of State for Scotland, and for these purposes is divided into a number of districts each of which is headed by a Chief Constable. The police are bound to comply with any instructions the Lord Advocate may from time to time issue to any Chief Constable. In relation to the investigation of offences, the Chief Constable must comply with the instructions of the prosecutor. In practice the procurator fiscal frequently gives such instructions and there exists a very close working relationship with the police. The ultimate responsibility for the investigation of criminal offences lies with the procurator fiscal and not with the police. He is completely independent of the police who are subordinate to him, and subject to his control. The police do however have a certain limited discretion as to which cases to report to the procurator fiscal. As a general rule the police need only report cases where there is sufficient evidence to justify taking proceedings against a particular accused.

(b) The Court Structure

There are, in Scotland, two main courts, the Sheriff Court and the High Court of Judiciary. Broadly speaking the Sheriff Court deals with the less serious offences and the High Court with the more serious. In addition, lay summary courts called District Courts deal summarily (without a jury) with minor statutory offences.

Scotland has two types of criminal procedure, known as solemn procedure and summary procedure. In solemn procedure, the trial of the accused takes place before a Judge sitting with a jury of 15 laymen who may reach a decision by a simple majority. The offence

of which the accused is charged is set out in an indictment. In summary procedure the Judge sits without a jury. The offence charged is set out in a complaint.

The jurisdiction of the High Court extends throughout Scotland, and covers all categories of crime not specifically reserved to another court. It has concurrent jurisdiction with the Sheriff Court over most crime, but it has an exclusive jurisdiction over a number of important offences. There is no appeal from the High Court to a higher judiciary.

The Sheriff Court has both solemn and summary jurisdiction. Most prosecutions are brought as summary complaints before one of the sheriffs, and in contrast to civil proceedings, the sheriff principal does not hear appeals and acts only as a trial judge. The sentencing powers of the Sheriff Court are more limited than those of the High Court. The maximum periods of imprisonment which the sheriff can impose are two years in cases on indictment and three and sometimes six months in summary cases, depending on the statute contravened. Where the case merits more severe penalties, the sheriff can remit it to the High Court for sentence.

The District Courts, manned by lay justices, deal summarily with breaches of the peace and other minor offences. The maximum fine for a common law offence is one hundred pounds and the maximum period of imprisonment is generally 60 days. When, however, the court is constituted by a stipendiary magistrate, it has the same criminal jurisdiction and powers as a sheriff has in summary procedure. An appeal lies from the District Court to the High Court.

Each of these courts is a court of first instance and the decision as to which is the appropriate one to try an offender is in the hands of the procurator fiscal. If the decision is to prosecute on indictment, the indictment cites him to appear before two diets of the court. The first diet is the equivalent of judicial examination in the Scandinavian systems.

(c) Prosecutorial Procedure

Once a person is arrested, the control of the investigation passes to the procurator fiscal, who will also assume control of investigations of those serious crimes which are notified to him by the police before an arrest has been made.

In many cases the police release an accused person after charging him. They then give the procurator fiscal a report that the accused has been charged with a particular offence, and a summary of the evidence. If thereafter, the procurator fiscal decides to proceed with the prosecution he will cite the accused to appear at a subsequent diet of the court. If the person is arrested, then he is detained in the police cells overnight and is brought before the nearest Sheriff's Court in the morning after his arrest. The procurator fiscal (or his depute) examines the police file on the case and decides whether to charge the accused and, if so, whether by summary complaint or indictment, or whether to take no further proceedings and release him.

If the procurator fiscal decides provisionally that the offence is important enough to warrant prosecution on indictment, he brings a charge in a petition which is given to the accused. The accused

then goes before the sheriff for judicial examination. At the first or pleading diet, the accused states whether he intends to plead guilty or not guilty. A main reason for the pleading diet is to avoid as far as possible the unnecessary expense involved in the citation and attendance of witnesses and jurors if the accused wishes to change his plea to one of guilty. The accused has an opportunity to plead guilty at an early stage by serving a notice on the fiscal. Up to this point, all proceedings, unlike those in Scandinavian countries, take place in private.

At the second diet the trial proper takes place,.

(d) Prosecutorial Discretion

The standard text book on Scottish Criminal Procedure, by Renton and Brown, sets out the tests to be applied by the procurator fiscal when considering prosecution:

(i) Whether the facts disclosed in the information constitute either a crime according to the common law of Scotland, or a contravention of an Act of Parliament which extends to that country.

(ii) Whether there is sufficient evidence in support of these facts to justify the institution of criminal proceedings.

(iii) Whether the act or omission charged is of sufficient importance to be made the subject of a criminal prosecution.

(iv) Whether there is any reason to suspect that the information is inspired by malice or ill-will on the part of the informant towards the person charged.

(v) Whether there is sufficient excuse for the conduct of the accused person to warrant the abandonment of proceedings against him.

(vi) Whether the case is more suitable for trial in the civil court, in respect that the facts raise a question of civil right.

The commonest factors that will influence his decision not to prosecute are those covered by the third, fourth, and fifth tests. The courts have also added a guiding rule that prosecutors must use their good sense as regards the enforcement of statutory regulations which are out of date and unrelated to modern conditions. In practice procurators fiscal have taken this ruling a little further and will consider whether in the case of recent regulations of minor importance, the accused could be expected to know of their existence. They may also decide not to prosecute where evidence has been obtained by unfair means, although a mere technical irregularity will not debar a prosecution.

(e) The Supportive Institutions

The voluntary organizations into the hands of which offenders can be diverted in Scandinavia and the Netherlands do not exist in Scotland. Consequently such organizations as do exist are

Government agencies. The present situation is the result of the passing of the Social Work (Scotland) Bill in 1968 which implemented the recommendations of the Kilbrandon Report of 1964. This report was concerned primarily with children, and the consequent legislation moved juvenile offending out of the area of criminal law into that of civil law, as is the case in the Netherlands. Thus such offenders came within the scope of the new local authority social work departments. As a consequence of this move it was argued that what remained of the probation service would be too small to be viable and that probation officers, and work with adult probationers, should be absorbed into the local authority social work services. Thus the probation service in Scotland was scheduled to terminate in November 1969. This may well be the consequence of a tendency there to regard the probation service as a minor local authority service rather than as a service of the courts.

In Scotland, as in the other countries we have examined, the public prosecutor's discretionary powers are exercised predominantly in favour of juvenile offenders. An officer called a reporter has control of all cases involving offenders under 16 years of age, and works mainly through special tribunals known as children's panels. Anyone including the police may report a child to the reporter as in need of compulsory care. Where the police are obliged to refer a case to the procurator fiscal, the latter may nevertheless refer the child to the reporter. The policy is for every effort to be made to refer cases out of the courts to the reporter. The referral having been made, the reporter has absolute discretion in deciding whether or not compulsory measures are likely to be necessary. Should he decide that there may be such a need, then a children's hearing is called. This is a meeting of three lay panel members,

one of whom must be male and one female, to discuss with the child and family the reasons why there seems to be a need for compulsory care. The reporter's responsibility for a children's hearing is that of the administrative arrangements which includes obtaining a full written report from the Social Work Department and other such information as may be appropriate. The child and parents have a right to legal representation at a children's hearing but there is no legal aid available at this point. The decisions open to the panel are limited. It can decide that no compulsory help is needed. It can, however, decide that a child needs compulsory supervision in some form. This can be either supervision within the community or supervision in a residential setting. In the more usual use of the term, supervision is within the community and a social worker is appointed to help the child and parents. Supervision can be reviewed at the request of the social worker at any time; at the request of the parents or the child after three months; and it must be reviewed within 12 months or it automatically lapses. Having been imposed it continues until the child reaches 18, unless it is discharged earlier.

5. CONCLUSION

In view of the fact that the prosecutorial procedures operating in this country are derived from those of England, and that over recent years the question of discretion has been given considerable attention there, this paper will conclude summarizing a number of recent discussions of the possible role of a public prosecutor within that tradition, with particular reference to the Scottish system.

Although, in England, prosecutions are in the name of the Crown, this does not mean that public officials are the only persons who can prosecute offenders. The basic principle of prosecution is that it is open to any member of the public to institute criminal proceedings, there being no need for such a person to have any interest whatsoever in the subject matter of the charge. Thus, when 'the police' prosecute, the correct analysis is that some individual has instituted proceedings, and the fact that the individual is a public officer does not alter the nature of the proceedings. Most prosecutions, however, are in fact 'police prosecutions'. From their own knowledge, or from complaints made by aggrieved persons, the police decide that a criminal charge should, or should not, be made. The police, however, are answerable only to their Chief Constable, and he is answerable only to the law as interpreted by the courts. They in turn tend only to concern themselves with general policy for which the Chief Constable is responsible to the public, leaving individual police decisions under the control of the Chief Constable himself. How police discretion works in practice is by no means clear. "There is," says R.M. Jackson in Enforcing the Law, "a general reluctance to let information about policy in prosecuting be known to the public".

There are some magistrates' courts where a solicitor generally appears to take the cases that the police have instituted, but it is more common to find the police taking their own cases except when the importance or difficulty of a case is thought to warrant legal representation. Of the forty-five provincial forces in England and Wales, twenty-five have their own solicitor's departments, the others referring their cases to private solicitors or, in some cases, to the legal department of the local authority. It is

impractical for the legal department of a police force to assume responsibility for every prosecution in every magistrate's court throughout the district. In the majority of cases the decision to prosecute is left to the Chief Superintendent of the division, who will only refer to the Solicitor's Branch at headquarters the cases to be committed to the higher courts where counsel must be briefe , and any doubtful cases requiring legal advice. The function of the Solicitor's Branch is consequently, largely consultative.

The police may also consult the Director of Public Prosecutions. This latter is an official, appointed by the Home Secretary from barristers and solicitors of ten years' standing. His department has a professional staff of some thirty-five barristers and solicitors, and an ordinary staff from the civil service. The Director acts under the general direction of the Attorney-General with the approval of the Lord Chancellor and the Home Secretary. His main functions are giving advice if he thinks it right to do so to those who apply, whether government departments, police or others, and prosecuting in all cases punishable by death, in cases referred to him by government departments, if he thinks there should be prosecutions, and in cases which are particularly important or difficult. The police, also, must report to him certain offences that are specified in the Regulations; there is quite a substantial list, which includes many offences because they are serious or because they are difficult.

The actual steps in prosecuting are taken either by members of his staff or by a solicitor appointed by him. The Attorney-General nominates counsel who are to receive briefs at the Central Criminal Court (where they are called Treasury Counsel) and for cases at

Assizes. In relation to the total number of prosecutions, only a small proportion are taken by the Director. But he has an importance far greater than the number of prosecutions he conducts suggests, for he is, in fact, the co-ordinating and controlling element throughout all prosecuting. This comes about through the interlocking nature of the functions listed above. Because cases listed in the Regulations must be reported to him he will be aware of cases of any category which he wishes to notice. He can advise for or against a prosecution. If his advice against prosecutions is ignored, he cannot directly prevent proceedings, but he could report the matter to the Attorney-General who can stop a criminal case by entering a Nolle prosequi.

The reasons commonly given for requiring the consent of the Director are two-fold; first, to avoid prosecutions being undertaken in an uneven and inconsistent manner in different parts of the country; and second, to prevent the criminal law being applied in an oppressive and vindictive manner.

Although the Director does ensure uniformity of prosecution, and the police often consult him for this reason, the consistency of the directions given him through the Regulations by Parliament is not so obvious. The Attorney-General in 1958 wrote that "It does not seem to me to be possible to deduce any intelligible principle on which the legislative may be thought to have acted; the list is full of anomolies and absurdities".

This problem, together with that of the uncertainty of police discretion already noted, has given rise to some disquiet in England in recent years. P.K.L. Danks, for instance, writing in the

Justice of the Peace (vol. 11. no.1, 10/1/76, pp. 19-21) comments that "The disquiet at the present situation is that the police can both initiate and continue prosecutions. It would be idle to think that if the power to initiate prosecutions were moved from the police to lawyers, there would immediately be a vast difference in the use of the discretion to start a prosecution". In an effort to meet this difficulty, a report entitled The Prosecution Process in England and Wales, published in 1970, suggested that a system be created on the lines of that of Scotland, using an officer comparable to the procurator fiscal. Danks rejects this on essentially practical grounds, pointing out that such a change would entail the destruction of both the office of Director of Public Prosecutions and the prosecuting solicitors' offices. His solution is to increase the power of the prosecuting solicitor, perhaps renaming him the Crown Solicitor, and giving him a position parallel to that of Director of Public Prosecutions, leaving the latter much the same as he is at present. It is suggested however that the list of cases that must be referred to the Director could be reviewed so that the really serious cases still had to be referred to the Director, while the others could be referred to the Crown Solicitor. Danks also argues that it might be possible for the Crown Solicitor to be ultimately responsible to a Law Officer such as the Solicitor-General, as the Director is. He could be appointed by the Home Office and only dismissed with the consent of the Attorney-General. One of his most important functions would be to obtain a uniform use of discretion to prosecute which was acceptable to both the Law Officer and the Director.

These problems have also concerned the Government of Northern Ireland which in 1972 introduced a new system of prosecution into

its courts. This system was based on the report of the Working Party on Public Prosecutions, (The Mac Dermott Report). This report, (which appears unfortunately not to be available in this country) rejected the Scottish system, as unworkable within the existing framework, in favour of a system that approved the conduct of prosecutions by independent public prosecutors, meaning by 'independent' that the prosecutor should not be concerned with the investigatory or police work aspects of the case, and should be politically independent. For this purpose it recommended a Department of Public Prosecutions, under a chief officer to be styled Director but who would be more than, "as in England, simply the appropriate person to whom cases of peculiar difficulty are referred". In other than minor cases (where the initiation of proceedings would remain with the police), the decision to prosecute would be made by a member of the department, except where legislation required the consent of another officer such as the Attorney-General. The prosecutor's role was defined in detail in the Prosecution of Offences (Northern Ireland) Order 1972. This order provides for the consideration, by the Director, of all facts, information or documents brought to his notice, with a view to initiating or continuing any criminal proceedings, and requires him "where he thinks proper to initiate, undertake and carry on, on behalf of the Crown proceedings for indictable offences and for such summary offences or classes of summary offences as he considers should be dealt with by him". He is also empowered to act as prosecutor on behalf of other government departments. The question of the Director's liability to judicial control was not discussed in the order, but it seems likely to be based on principles drawn from the position of the Attorney-General and the Director of Public Prosecutions in England and Wales.

The possibility that the Scottish procurator fiscal system might be introduced into New Zealand has recently been considered by Mr J.D. Rabone, and we may conclude by examining briefly his arguments. He sees a number of reasons why the Scottish system might appeal in this country, amongst which may be noted the avoidance of any suggestion of partiality as when the police prosecute, and of the waste of reserves their engagement in this activity involves. He also points to the argument that advocacy is the job of professional lawyers. The main thrust of Rabone's argument however is concerned with two possible advantages of introducing a system of public prosecution, the first that a nation wide uniformity in prosecution practice would thereby be achieved, and the second that impartiality of judgement as to the appropriateness of particular prosecutions would result. He argues, however, that uniformity is already a fact as a result of the control exercised by the central police headquarters. And the fact that decisions to prosecute are usually made, not by the investigating officers, but by their superiors, ensures, he argues, that an appropriate standard of impartiality is maintained. There would appear then, in Rabone's view, to be no real need in this country for a public prosecution system. He further attempts to support this conclusion by arguing that the various forms which a public prosecution system might take would offer no satisfactory alternative to our present system. He rejects the use of lawyers as employees of the police, and of lawyers in private practice, and more importantly relative to our purposes, of a separate government department of prosecutors. It is argued, in the latter case, that, "there would be encountered ... the major consideration against the implementation in New Zealand of this alternative, namely public reaction to the wholesale substitution of public servants for

private practitioners as prosecutors in the Supreme Court. Whilst in Scotland procurators fiscal are civil servants and are part of a central administration, theirs is a recognised and publicly respected position with a tradition of independence in the discharge of their duties". Rabone sees the strength of the New Zealand system in the appointment of well known local practitioners, a fact which would appear to make the establishment of a centralized prosecutorial department wellnigh impossible. He refers for support to the argument of the Report on the State Services in New Zealand of 1962. That document states that "The practice of appointing a local practitioner as Crown Prosecutor or Crown Solicitor is now well established. It is popularly approved, particularly in the smaller provincial towns where the known personality and integrity of the Crown Solicitor plays an important part in gaining the confidence of citizens in the impartial and balanced administration of justice. We doubt whether an employee of a State organization, moving out from a central office into other districts, would command the same public confidence". In view, however, of Rabone's own admission, that the Report's fears, "may not have been borne out by the experience in the two centres where (the employment of a public servant) has since occurred", his argument cannot be considered proven, and the whole matter may perhaps be considered as yet an open question.

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