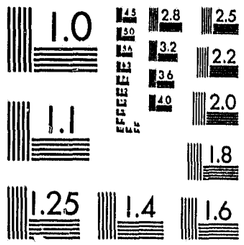

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The right to prosecute: a comparative study in which the systems in England, Scotland and Northern Ireland are evaluated and compared with that of the United States,

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THE RIGHT TO PROSECUTE

The right to prosecute has existed since the advent of man, although the earlier form was used more as a method of exacting revenge for some wrongdoing. However, throughout the years, it has become a system by which Society, using laws, precedents and administrative directions, protects the weak, punishes the wrong-doer and keeps the peace of the land by maintaining the right for an offended party, or the State in many cases, to prosecute the offender.

In order to discuss the right to prosecute, it is necessary to take a look at the formation of law as it has been practised and how, through the centuries, the system now in use has been formulated.

Law has been defined as 'a collection of rules of human conduct prescribed by human beings for human beings and has existed in one form or another since the strong dominated the weaker members of a tribe. In modern times, however, it can be more correctly

defined as 'Rules of Conduct imposed by a State upon its members and enforced by the Courts.' The State now makes the law, the object of which is to enforce standards of behaviour among citizens in the interest of peace and good order.[1]

Under the Romans, the Britons were treated as slaves with very few rights. However, the conquerors used a form of law that, towards the islanders, was purely a method of enforcing obedience. After the Romans left, the country was disunited, with the stronger members of the community taking over the leadership and administering a rough and ready form of justice until towards the end of the Anglo-Saxon period when some form of unity of Government prevailed. Prior to this the government was localized with communal courts such as Shire Courts and Hundreds which was a territorial sub-division of the Shire.

In 1066 William I conquered England at the Battle of Hastings, an event which he regarded as a 'trial by battle' and this he felt gave him the ownership of England, of which he promptly made gifts of large land areas to his lords and barons. As a result of this he established the feudal system of land tenure under which all persons possessing land did so as tenants or sub-tenants of the King. He also established a strong central government and

1. P.W.D. Redmond, Barrister.

a national judicial system.

THE FEUDAL SYSTEM

The system involved several points such as the land belonging absolutely to the Crown, and persons permitted to hold land as tenants paid by rendering services to the king such as providing and equipping soldiers. The tenants were generally the lords and barons who constituted the King's Grand Council. Beneath the tenants came the sub-tenants and they were expected to supply a service to the tenant. The lowest rank of tenant was a villein or serf who was tied to the land, could be sold with it, had to obtain his Lord's permission to marry and who had to perform the menial tasks involved in running the estate. Under thefeudal system the right to prosecute often extended in a downward or sideways manner with the Lord or Baron presiding over cases, and of course the right diminishing as one proceeded down the scale of tenant involved.

The feudal system, howver, enabled the Norman kings to establish efficient administration, and between 1100 and 1189, during the reigns of Henry I and Henry II, a definite attempt was made to establish a common legal system for the whole country. Royal Judges were sent regularly to all parts of the country to

settle disputes in the King's name and gradually these Judges extended their jurisdiction to criminal matters. It is interesting to note that even to this day, any custom which is referred to as being in existence from 'time immemorial' is presumed to have been in force since 1189.

THE WRIT SYSTEM

For a person to begin an action or commence a prosecution in a Royal Court, he first had to obtain a writ, i.e. a written command issued by the Lord Chancellor in the King's name ordering the defendant to appear in court. If there was no appropriate writ to cover the type of claim the plaintiff was making there could be no remedy.

In those times the majority of the populace were unable to read or write and it was necessary therefore for the applicant to obtain the services of a clerk or someone with some education. This of course was costly and would often deter a plaintiff from pressing his case. Thus the right to prosecute was often governed by the financial status of the person as well as his social position. This may well be the origin of the saying 'One law for the rich and one for the poor.' At first there was no limit to the variety of writs issued by the Royal Chancery, but the Barons, in order to

stop competition with their feudal courts,forced Henry III to forbid the issue of further new varieties of writ by virtue of the Provisions of Oxford in 1258.

It was soon realised, however, that many harmful restrictions had been imposed by the Provisions of Oxford and in 1258 Edward I passed the Statute of Westminster II or the Statute in Consimili Casu which provided that new writs could be issued to cover new types of claims, providing that they were similar to those issuable prior to 1258. This statute made possible the further development of Common Law with more scope for prosecuting actions in the courts.

After 1285, as the government became stronger, the Royal Courts increased in prestige and took over the business from the Shire, Hundred and Parish Courts applying local customary law. The Curia Regis or King's Council which had originally held the judicial power gradually delegated the administration of law to various courts. With regard to criminal matters, Courts of Assize toured the country, the Judges deriving their power from the King's Commissions of Oyer and Terminer (to hear and determine) and General Goal Delivery (to clear the prisons of persons awaiting trial). From the 13th. Century all appeals against decisions of the Royal Judges were made direct to the King, the'fountain of justice', head of the judicial sysytem. Thus the Court of the King's Bench had wide

criminal jurisdiction dealing mainly in appeals and civil actions such as trespass.

However, the time and pressure of business forced the King to pass these appeals to the principal Royal Officer, the Lord Chancellor. The Chancellor was the King's chaplain or 'keeper of the King's conscience', and as a priest tended to decide cases on the basis of morality and fairness rather than in accordance with hollow and technical rules of law.

ECCLESIASTICAL COURTS

One subsidiary court which dealt with the prosecution of members of the clergy and the hearing of matrimonial and testamentory matters in the Middle Ages was the Ecclesiastical Courts. By virtue of the Matriminial Causes Act 1857, the Divorce Court now deals with matriminial matters and under the Probate Act 1857 the Probate Court was formed to deal with testamentory cases. The Bishops Consistory Courts and the Archbishops Provincial Courts still have jurisdiction to punish clergy of the Church of England for moral offences. Criminal matters are dealt with by the ordinary Common Law Courts. There are two Provincial Courts in being, the Court of Arches in the Archdiocese of Canterbury and the Chancery Court of York in the Archdiocese of York.

MERCANTILE COURTS

Mercantile Courts dealing in commercial law were set up in market towns in order to prosecute offences concerning the trading practices at fairs or markets. One such famous fair was that of the Abbot of Ramsay at St. Ives, East Anglia formerly Huntingdonshire. The laws administered there were generally of a local or customary nature and were enforced by the merchants themselves. These courts were known as 'Pie Poudre' Courts, being a colloquialism of the French Pieds Poudres or 'dusty feet' as the people who attended them came straight from the fair with dusty feet.

In 1353 the Statute of Staple was passed in order to protect foreign traders who attended the markets situated in the eleven Staple towns of England which were decreed in the Statute and where dealings in wool, leather, lead and such like commodities were carried out. In those towns Courts of Staple were set up consisting of the Mayor, two Constables and two Alien Merchants.

When a foreign merchant was tried the jury was made to consist partly of foreigners, but these courts fell into disuse in the sixteenth century.

LIVERY COMPANIES AS PROSECUTORS

During the Middle Ages Livery Companies were formed with the general purposes of protecting particular trades and professions, training apprentices in their masters' craft and raising the standards of workmanship. These companies were generally situated in and about the City of London and one was required on being admitted to a Livery Company at the end of his apprenticeship to take an oath of loyalty to the Lord Mayor and was granted his Freedom to practise his trade in the City.

These companies became very powerful and were the source of revenue to the Exchequer. In turn they were granted at various times the title of Worshipful Company and certain rights by Royal Charter.

One such company is the Worshipful Company of Fishmongers who were formed in 1272 and granted its first Royal Charter by Edward I. A later Charter was granted by James I in 1605 which empowered the Master of the Worshipful Company of Fishmongers to appoint members of the Company to examine all the fish exposed for sale within the City boundary and to prosecute any person found selling bad or under-sized fish. In these modern days that prerogative is still being exercised and there are four members of the Company, entitled 'Fish

Meter Inspectors' attached to Billingsgate Fish Market and who keep a strict control over the standard of the produce and who prosecute an average 150 cases a year at the Guildhall Court where the statutes governing the sales have been infringed. It is worthy of note in these days of economic crisis that these prosecutions are carried out at the expense of the Livery Company and not the ratepayer or Corporation of the City.

REFORMATION AND PROSECUTION ASSOCIATES

In the late 1600's members of Society became alarmed at the spread of lawlessness and societies were formed in an attempt to put a stop to it.

The first society was named the Society for the Reformation of Manners and was first formed in 1691, and received the backing of the Lord Mayor and Aldermen of the City of London. It comprised many eminent citizens, Members of Parliament and Justices of the Peace, and this movement spread through the British Isles and lasted as late as the middle of the nineteenth century, when there is evidence of them in existence at Wandsworth, Lambeth and Barnet.

These societies employed watchmen and patrols for the

prevention of felony and for prosecution of felons, the cost of which was borne by the organisation employing the watchmen. In Acton the principal inhabitants led by a local bricklayer formed an association which taxed themselves to pay for a watchman and the prosecutions he brought. Thus we see how private individuals, alarmed at the rise of crime and the consequent loss to themselves, exercised their right to prosecute offenders and in some way led to the formation of the Police Service as we see it today.

PUBLIC COMPANIES AS PROSECTORS

With the Industrial Revolution and the coming of the steam engine a new avenue of crime opened and this was brought to prominence by the opening of the Liverpool and Manchester Railway in 1830 by the Duke of Wellington. September 15th. was notable for two events associated with the opening. Firstly, the Right Honourable William Hoskisson was killed by the Rocket, and there was a demonstration against the Duke of Wellington when stones were thrown at the train he was riding in.

The advent of the railway was not greeted overwhelmingly by everyone. Many objects were placed on the rails and even rails themselves removed. Inorder to prevent such happenings with the resultant dangers to life, a Police Service was formed with each

officer deputed to guard a stretch of the track. Each company, and there were many, had their own standard of recruit and uniform, and many were ex-soldiers. In 1839 a Royal Comrission sat and recommended that the railroad companies should be compelled to maintain a general and combined force of Constables. Thus the pioneer railway police have developed into today's Transport Police.

This then is a resume of the way in which the right to prosecute offenders has grown up through the ages. Thus the scope for the prosecution of offenders, created by our development has slowly and inexorably been broadened, the law allowing man the basic rights of justice to prosecute wrongdoers and to assist man to obtain that right of action. By taking a look at the historical aspect of this right we can see the thread of Common Law stretching back from Anglo-Saxon times when murder was contrary to Common Law, through the Norman Period of reform up to this very day when the offence of murder is still prosecuted by the right of Common Law. Nowadays our rights of prosecution in this country are generally defined in many statutes, but there is still a Common Law influence present and it is this which makes our legal system and our right to prosecute unique.

POLICE ROLE AS PROSECUTORS

The right for police to prosecute has long been criticised by Royal Commissions, Departmental Committees, Judges, Magistrates Clerks, Barristers and Solicitors. In this respect there are two aspects to be considered. Firstly, the right to initiate proceedings and, secondly, the right to conduct proceedings in the Courts.

Firstly, let us consider the office of Constable. It is of great antiquity, the first mention of it being in a writ in 1252.

The office of Constable developed through the Middle Ages, and in the mid eighteenth century it was well established that his duties were:-

(1) To keep a roster of watchmen, to ensure that they remained alert and vigilant during the hours of watching, to receive into custody any guilty or reasonably suspected person handed over to him by the watchmen. To keep such persons in safety until he should give bail or be brought before a Justice of the Peace.

(2) With regard to the pursuit and arrest of felons, peacebreakers and suspected persons, his duty was

to obey the Sheriff, to follow the Hue and Cry and to keep in safe custody any prisoner delivered to him until relieved of further responsibility by the orders of the Justices of the Peace or Sheriff.

(3) To serve precepts, warrants and summons and obey all the lawful commands of the High Constable and Justices of the Peace.

(4) Finally, with regard to inquiring into and prosecuting offences, he was bound to prosecute at the Assizes, Sessions of the Peace and in some cases before the Coroner.

This then was some of the duties of Police and sets out the fundamentals of the Police as prosecutor.

A modern definition of the Constable is that he is a citizen, locally appointed, but having authority under the Crown for the preservation of life, the prevention and detection of crime and the prosecution of offenders against the Peace.

Again, we have this presentment at the Courts spanning

some 700 years to modern times.

We have now established that our English Police System rests on foundations of about 700 years, designed with the approval of the people from many hundreds of years before the Norman Conquest. These foundations have been slowly moulded by the careful hand of experience, developing as a rule along the least line of resistance.

The English Police however, is not the creation of any theorist, nor the product of any speculative school. It is the result of centuries of conflict and experimentation.

Originally, the primary responsibility for preserving the Queen's Peace rested with the individual citizen. Later, much of this responsibility passed to Magistrates, to Parish Constables in the country, to Watchmen in the cities and boroughs and eventually to the Police Force as constituted today.

Nevertheless, even in modern society, the private individual still retains the Citizen's Right and duty under Common Law :

a) To go to the assistance of a Police Officer when called upon to do so in order to maintain law and order.

b) Himself to arrest an offender when certain well-defined circumstances exist.

Indeed, the constitutional responsibility of a citizen is fully illustrated in the 1929 Report of the Royal Commission on Police Powers and Procedure:

'The Police of this country have never been recognised either in law or tradition as a force distinct from the general body of citizens. Despite the imposition of many extraneous duties on the Police by legislation or administrative action, the principle remains that a Policeman, in the view of common law, is only a person paid to perform, as a matter of duty, acts which, if he were so minded, he might have done voluntarily. Indeed a Policeman possesses few powers not enjoyed by the ordinary citizen, and public opinion, expressed in Parliament and elsewhere, has shown great jealousy of any attempts to give increased authority to the Police. This attitude is due, we believe, not to any distrust of the Police as a body, but to an instinctive feeling that, as a matter of principle, they should have as few powers as possible which are not possessed by the ordinary citizen, and that their authority should rest on the broad basis

of the consent and active co-operation of all law abiding citizens.

The right of the Police to initiate proceedings stems from a general rule in English Law that any person may bring proceedings for a criminal matter, although he is not the victim of the crime or otherwise interested in it. (Duchesne v Finch 1912). This right of a third person to prosecute in a case inwhich he is not involved does not depend on other considerations. He will not, for example, be precluded from prosecuting the offender if the victim has no wish to prosecute, or if the victim has received compensation. (Smith v Dear 1903).

Therefore it is this power, enjoyed by all members of the public, which enables the Police to prosecute or initiate proceedings. A constable lays an information in his capacity as a private person and not a constable.

Currently, Police Forces employ Solicitors to advise and/or present cases brought to them. In many instances advice is sought by the Police from Public Bodies. Indeed, prosecutions in some cases can only be instituted by the Attorney General, the Director of Public Prosecutions, Board of Trade, the Commissioners

of Inland Revenue or even the Local Authority. Many such prosecutions are initiated by these bodies, but in most cases the offences involved are investigated by Police who are trained investigators but acting within the power of the laws conferred on them as Constables but also as citizens.

THE DIRECTOR OF PUBLIC PROSECUTIONS

Under norman circumstances the Police have the right to prosecute offenders but in 1908, the office of the Director of Public Prosecutions was created. He is appointed by the Home Secretary after consultation with the Attorney-General, from amongst barristers or solicitors of ten years standing. His staff includes thirtyfive qualified lawyers who may be either barristers or solicitors. When one of the Director's cases goes to trial in a higher court he must go outside his own staff for a barrister to conduct it. Furthermore, he does not have any investagative powers of his own, as do the larger American prosecuting offices, but must rely entirely on the Police.

By virtue of the Prosecution of Offences Act, 1946, the Director is empowered to undertake the prosecution of any offence punishable by death or any case referred to him by a Government Department in which he thinks that proceedings should be instituted.

Additionally, in other cases which he thinks are of importance or where difficulty will be experienced or for which any other reason requires his intervention.

At present there are fiftyseven offences which require the Director's consent to prosecute, such as sedition, espionage, murder, manslaughter, rape, misconduct by public officials and Police, counterfeiting and sexual offences against children.

THE ATTORNEY-GENERAL

Like his American counterpart, the Attorney-General is a member of the Government with responsibility to conduct its legal business and to oversee the Director of Public Prosecutions Office. In the main the litigation with which he is concerned is civil, but both through the Director of Public Prosecutions and in his own right has potentially a considerable amount of control over criminal cases. There are thirtyeight offences which require the Attorney-General's fiat, or consent before a prosecution may be instigated and include such offences as violations of the Official Secrets Act, bribery and corruption, treason, unlawfully possessing explosives and incest.

THE SCOTTISH LEGAL SYSTEM

BRIEF HISTORY

Scottish Law stems from King David 1 who reigned from 1124 - 1153. During his reign, Royal Sheriffs were appointed and became domiciled in various parts of the country. They administered Justice in the King's name and held court in their castles.

There were though, four crimes that were beyond their jurisdiction namely murder, rape, fire-raising and robbery. These four crimes were presided over by the 'King's Justices' who visited the Royal Sheriff's Courts to deal with these matters. In addition, they paid frequent visits to these Courts to ensure that the Royal Sheriffs administered Justice in accordance with the King's instructions.

The Sheriff's Court is still retained today and, as will be seen later, forms an important part of the Scottish Legal System.

The central feature of the Scottish Legal System nowadays is that the prosecution of all crimes comes under the control of the Lord Advocate and the Crown Office.

Criminal procedure in Scotland, as well as that in England and Wales, takes the form of an adversary procedure as opposed to an inquisitorial procedure. This means, broadly speaking, that the Court reaches a decision on the basis of the facts alleged and proven by the prosecutor, and defence lawyers who examine witnesses on their own legal arguments.

This is in contrast to the inquisitorial procedure where the Judge conducts his own legal research and himself examines the witnesses (it will be seen later that in Ireland they have a mixture of both).

The Lord Advocate is the principal Law Officer of the Crown of Scotland and is responsible for the prosecutions in the High Court and the Sheriff's Court. Since 1975 he has also taken responsibility for prosecutions in the District Courts. The Lord Advocate is responsible to Parliament for decisions whether or not to prosecute but otherwise need not give reasons for his decisions.

In practice, however, the Lord Advocate delegates most of the prosecution work to the Solicitor General and Crown Counsel who work with a small staff of officials headed by a Crown Agent. The whole central organisation is known as the Crown Office which is concerned

with the preparation of prosecutions in the High Court and the direction of the Procurator Fiscal's Office.

THE OFFICE OF PROCURATOR FISCAL

The Procurators Fiscal are the public prosecutors in the Sheriff's and District Courts. To be appointed Procurator Fiscal one must have been practising as a solicitor for at least five years and as I have previosly stated be ultimately responsible to the Crown Office.

All offences that are reported to the Police must, in turn, be reported by the Police to the Procurator Fiscal, who will decide whether the facts warrant a prosecution. He may call for further enquiries to gain additional evidence.

The Procurator Fiscal can interview witnesses himself and take statements from them. Applications for warrants are made through him and he also decides whether or not to oppose an application for bail.

When investigating an offence, Police discretion is only exercised in the initial stages, that is whether or not to report an individual and the specification of the crime or offence. In the

latter case the Procurator Fiscal may not agree and can alter, add to or reduce the charges proposed by the Police. The Procurator Fiscal therefore makes his own decisions under the direction or control of the Crown Office.

Although it is established that the responsibility for the investigation of crime in Scotland is that of the Procurator Fiscal, in actual fact, much of the preliminary investigation, especially in the large centres of population, is today increasingly conducted by the Police with only the Procurator Fiscal's general supervision.

DUTIES OF THE PROCURATOR FISCAL

He must pay attention to the following six points when contemplating criminal action:-

i) Whether the facts disclosed in the information constitute either a crime according to Common Law or Statute Law.

ii) If there is sufficient evidence to support these facts and to justify institution of Criminal proceedings.

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

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

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

(vi) Whether the case is more suitable for trial in civil court in respect that the facts raise questions of civil rights.

TYPES OF COURT

There are five grades of courts in Scotland:-

High Court

Exclusive jurisdiction in the common law cases of treason, murder, rape, incest, resisting a bailiff or legal officer and breach of duty by Magistrates. In addition, exclusive jurisdiction of the Statutory offences under the Official Secrets Act and the Geneva Convention Act, 1948.

Sheriffs Court

Exercises sole jurisdiction in both Solemn and Summary

proceedings. If Solemn must have a Jury. In Summary will sit alone. He has authority to deal with crimes committed within the District.

Justice of the Peace Court

Can only deal with summary procedures. These are mainly petty charges under Common Law and Statute. Their authority is restricted to the county or county city for which appointed.

Burgh and Police Courts

Established within various Royal Parliamentary and Police Burghs, this includes the Stipendiary Magistrates in Glasgow.

MODES OF ARREST

(i) Private Person - No person should be arrested by a private person without a warrant, unless in the interests of Justice to do so, e.g. eye witness or victim to a crime of violence.

Private prosecutions are very rare in Scotland. It is possible for a private person to prosecute if he has a personal and peculiar interest and obtains the permission of the High Court. In 1961, the High Court of Judiciary at Edinburgh, rejected an application

by a private person to prosecute the seller of the book 'Lady Chatterley's Lover' by D.H. Lawrence.

> 'Even in the rare case where a complainer would be justified in bringing such an application he must show not only a private interest but a personal and peculiar interest. He must show that he has suffered some injury beyond what others have suffered. No private complainer can be keeper of the public conscience or the guardian of the public conscience. (The Times, 4th. February 1961.)

(ii) Police Officer - Police Officers may arrest without warrant for offences where the power of arrest is given by Statute Law or where the officer has reasonable grounds to justify such action. e.g. injury to others, breach of the peace, offender in flight of crime. The longer the lapse of time since offence committed, the more difficult to justify arrest without warrant.

SOLEMN AND SUMMARY PROCEDURE

Solemn Procedure

The Judge sits with a Jury and cases within this category can only be tried in the High Court of Jurisdiction and in the Sheriff's Court. Trial proceeds upon an indictment and the punishment in the High Court may extend to death or life imprisonment. Sheriff's Court is restricted to a maximum of two years imprisonment.

Summary Procedure

Exercised by a Judge sitting without a Jury and is confined to Sheriff's Court, Justice of the Peace Courts, Burgh and Police Courts.

PROCEDURE OF ARREST

(a) Accused entitled to private interview with a solicitor prior to his judicial examination.

(b) Judicial Examination by the Magistrates should, if possible, take place not later than the day following the date of his arrest. The accused cannot be liberated until he has appeared before the Court. He cannot be bailed by a police officer.

(c) If accused is to be dealt with on Solemn procedure, he is entitled to legal aid regardless of his personal assets. This aid consists of the services of a Duty Solicitor in attendance

on examination, application for bail or appeal regarding bail.

(d) The accused's first judicial appearance is in private and persons present restricted to the essential parties, i.e. Magistrate, Clerk, Procurator Fiscal, accused, his solicitor and relevant police officers.

(e) Prior to entering the Court the prisoner or his solicitor should be handed a petition. This petition consists of:-

(i) Full details of accused.

(ii) Criminal charges against him.

(iii) Submission with the necessary warrants.

These warrants are:-

(a) To arrest and bring before the Magistrate for examination.

(b) To search his person and premises and place where he is found and to open lockfast places.

(c) To cite witnesses for examination prior to trial and the production of writs or other articles of evidence.

(d) After examination to commit accused for further examination or until liberated in due course of law.

(f) When accused appears before the Court his solicitor will merely intimate 'No plea - no declaration'. No declaration

will betaken where accused appears to be of unsound mind or intoxicated.

(g) At the close of judicial examination, the Procurator Fiscal moves to either commit him for trial or remand for further examination.

(h) If he is detained in custody and under 16 years, he is placed in care of the Local Authority. Between the ages of 16 years and 21 years, in a Remand Centre. If no vacancies, he may be temporarily placed in prison. Over 21 years, prison.

(i) If accused remanded in custody for further examination, he must appear within eight days of his last appearance.

In England we do not have such a high obligation when executing an arrest. On arrival at the Police Station, the prisoner is asked if he wishes anyone to be informed of his arrest (very few, in fact, take up the offer.) If he does, and it appears to an officer of the rank of Inspector or above that by informing that person justice would not be served, he may refuse to inform them. Likewise, if the prisoner requests a solicitor, that request may be refused but there must be substantive reasons for so doing.

CONCLUSION OF SCOTTISH SYSTEM

In England, where the Police or other investigating agency think there is sufficient evidence, who decides whether criminal

proceedings should be instituted? Criminal trial and punishment is clearly a form of State intervention. Trials on indictment in England are headed 'The Queen' or R v Accused's name, using the Crown as the symbol of the State. Hence it might well be expected that some public officer would be responsible for prosecutions.

In fact that decision is, in the main, made by the Chief Constable. (In only a few specific cases does the Director of public Prosecutions undertake the prosecution. These are mostly the more serious or ones involving great public interest.) If the Chief Constable requires legal advice in order to make that decision and his is one of the Forces that has its own legal department, all well and good. However, if his Force is like mine(Leicestershire) he will not yet have a legal department and a private solicitor's practice in the area will be asked to review the evidence purely to see if there is sufficient to justify a prosecution.

In Scotland, we see that not only does a comprehensive legal system work, but incorporates as an integral part of it, a structure which deals with the handling of all prosecutions. The Police are placed under an obligation to report offences to the Procurator Fiscal.

In these days of public accountability I feel that, in England

we have gone some way towards achieving a balance in fair prosecution but recent events may well dictate to us that some form of independant element is now absolutely necessary.

I am referring to the recent case at the Old Bailey of the two London Police Officers on charges of bribery and corruption. The public outcry following the case cannot be ignored. Following on immediately after this case has been the exposures, again in the media, that England's biggest Police corruption enquiry 'Operation Countryman' (into alleged bribery and corruption) was not fully investigated and persons involved are still serving in the Police Service.

A large proportion of these allegations are in respect of favours done or prosecutions not undertaken. Under the English System it can soon be seen that with the Police making the ultimate decision as to whether to prosecute or not, corruption can manifest itself. It is because the Police are totally involved in the process of prosecution that they are corruptable. These recent events have highlighted a certain amount of disquiet within the populace regarding the Police and prosecutions.

Has the time come then for us to develop a 'Procurator Fiscal' type person in England who would be independant of the Police, answer-

able to the Crown and responsible for all prosecutions?

THE IRISH SYSTEM

In Northern Ireland the legal system closely follows that of England. The question of prosecution is for the Chief Officer of Police, unless as previously stated, it is an offence which requires the intervention of the Director of Public Prosecutions or other agency. However there does exist in Northern Ireland today special powers of prosecution.

Because of these prevailing circumstances in Northern Ireland it was found necessary to introduce new legislation to make provision for the punishment of certain offences, the detention of terrorists, the preservation of the peace and to prescribe and to make other provisions in connection with certain organisations.

A new Act passed by Westminster and known as the Northern Ireland (Emergency Provisions) Act 1973 was amended by the Northern Ireland (Emergency Provisions) Act 1975. This legislation replaced the old Civil Authorities Special Powers Act of 1922. The Act provides that all offences connected with terrorism are to be regarded as scheduled offences which are heard before a Judge sitting with no Jury.

This rather unique situation, whereby a Judge carries out his duties in part in an inquisitorial capacity is referred to by the Police and legal profession in Northern Ireland as the 'DIPLOCK COURTS'.

Prior to 1973 acts of terrorism would be tried by a Judge and Jury. However, major difficulties were being encountered by the judiciary in achieving a conviction when it was blatantly obvious to everyone that the person charged and before the Court was guilty. The acquital rate in Northern Ireland was very high and terrorists were walking out of Court.

As a result, Lord Diplock was asked to investigate the situation. He found that there was a genuine reluctance by the public to serve upon Juries in terrorist trials (in many cases that reluctance turned into an absolute refusal). These Juries were being asked to condemn men who were members of a terrorist organisation and had probably killed several times over. Members of these Juries were asked to sit in open Court, thereby fully identifiable to all and pass Judgement. Is it any wonder that they were reluctant? These very terrorist organisations would not hesitate to take reprisals upon Jury members if the desired verdict was not reached. During his investigations he also found evidence of Jury members being threatened during trials, these threats directed both at themselves and families.

In all, Lord Diplock, for these and numerous other reasons submitted that the situation in respect of terrorists trials was extremely unhealthy. He proposed that in cases involving terrorism the facts be heard by a Judge sitting on his own.

The Act provides a power of arrest without warrant by a Constable or any person whom he suspects of being a terrorist. Such a person can be detained for a period up to 72 hours. An officer of the Royal Ulster Constabulary not below the rank of Chief Inspector may order such a person to be photographed, and to have his fingerprints and palm prints taken.

Further powers provide that any member of Her Majesty's Forces or any Constable may stop and question any person for the purpose of ascertaining his identity, his movements and what he knows of any recent incident. Failing to co-operate is an offence in respect of each matter.

Offences are created by being a member of a prescribed organisation or to abet or invite any person to become such a member, or to carry out any orders on behalf of any such organisation.

It also makes it an offence to collect any information which

is likely to be useful in planning or executing an act of violence or to be in possession of any record or document containing such information. It also covers the collection of information about Security Forces and persons holding judicial offices, Court Officers and Prison Officers.

These are but a few of the wide powers created by this Act of Parliament but in fact such cases where a person has been detained and charged, papers must be submitted to the Director of Public Prosecutions for direction.

The Act also provides for the detention of terrorists without trial. Where it appears to the Secretary of State that a person is suspected of having been concerned in any act of terrorism, the Secretary of State may make an interim custody order for the temporary detention of that person up to a period of 28 days from the date of the order. The case is them referred to a Commissioner who should inquire into the case and if it is found that such person should be further detained then a detention order is made authorising his detention for an indefinite period. His case will then be periodically brought up for review.

The above mentioned procedure only applies where a person is

known to be concerned in acts of terrorism but because of lack of evidence it is not possible to bring him before normal Courts of Justice. All other such offences are referred to the Director of Public Prosecutions for directions.

A SUMMARY OF THE AMERICAN SYSTEM

The essential functions of the prosecution are the same in England, Scotland, Northern Ireland and the United States. In each country prosecutors have three major tasks to perform. First, they must make a decision on whether or not to bring criminal charges against an alleged offender. Second, they must put the accusation into proper form and place it before the proper judicial authorities and thirdly, they must present to the Court evidence tending to establish the guilt of the accused.

In each country the prosecution is, theoretically, on an equal footing with the defence, with each side presenting its evidence to the Court, and the Court acting as an impartial umpire in reaching a decision based solely on the evidence presented to it by the parties. The Anglo-American systems place the entire burden of proving a criminal charge on the prosecution.

Despite these similarities, American and English methods of

prosecution are profoundly different. The key to the difference lies in the American District Attorney, a public legal officer whose job it is to institute and conduct all criminal proceedings. England has no comparable figure but as we have already established, Scotland does. Such prosecutions by the District Attorney are brought in the name of the People and are conducted by him acting as the People's agent or representative.

In describing prosecution in the United States, it is necessary to deal briefly with the three levels of government: federal, state and local.

FEDERAL PROSECUTION

The federal judicial system is divided into districts, each having its own trial court and its own United States Attorney. These courts are separate from the courts and prosecutors in each of the 50 states. The United States Attorney is always a lawyer appointed by the President and his job is to represent the Federal Government in both criminal and civil litigation thus undertaking the prosecution in federal court all federal crimes committed within his district. His selection and the selection of his assistants is largely a matter of political patronage. The appointment normally changes hands with each change in administration.

The United States Attorneys are not concerned with the great bulk of crimes committed within the United States. They handle only the prosecution of federal crimes, which are relatively few in number such as those involving inter-state commerce or the postal service. Ordinary crimes are a matter of state law, prosecuted in the state courts by state officials of two kinds: attorneys general and district attorneys. The attorney-general works on a state-wide basis whereas the district attorney on a local, usually a county basis.

STATE ATTORNEY-GENERAL

Each of the fifty states has an Attorney-General whose responsibilities in the criminal field are limited to a few crimes likely to have state-wide ramifications such as violations of certain taxing and regulatory statutes or situations where local law enforcement and prosecution have broken down because of corruption or incompetancy. The great bulk of offences are left to be prosecuted on a local basis by the District Attorneys.

DISTRICT ATTORNEYS

As previously stated, the key figure in American prosecutions is the District Attorney. He is virtually autonomous, his office not being administeratively subordinate to the states Attorney-General or any other official. He is usually locally

elected for a term of two or four years and the only prerequisites for his election or appointment being that the candidate is of voting age and a qualified lawyer. The office is a salaried post and dependant upon the volume of work he may appoint one or more assistants.

The growth of the office has been fragmented over the years and the present day District Attorney embodies within his own office many powers and functions which in England are distributed amongst a number of institutions. Amongst other activities:-

1. He and his assistants do much of the investigating work which in England is done by the Police. In serious cases he may accompany the Police investigators to the scene of the crime.
2. He has a degree of control over the 'Grand Jury' which itself has wide investigating powers, including the ability to compel prosecution witnesses to appear and testify before it. The District Attorney is invariably represented at sessions of the Grand Jury and so shares in all the benefits of this power. This gives him a great advantage in his enquiries which is not known to the Police in England.
3. He has the power on his own to arrest, move for punishment for contempt, detain as a material witness as well as seek to indict for perjury any recalcitant witness or suspect who impedes

his enquiries.

4. He has sole discretion and judgement whether to institute criminal proceedings or to refrain from doing so.
5. He has the prerogative to grant complete immunity from prosecution to any person he choses to exempt, regardless of the crime he has committed.
6. He is empowered to enter into a compromise or terminate a prosecution. There is no equivalent in England.

To ensure that the District Attorney has complete freedom of action most of the States have defined his powers in the most general terms, and only if he prosecutes either through malice or ulterior motive can he be sued for damages by the aggrieved person.

Supporters of the system in America and similarly in Scotland claim there is some advantage in having a single individual responsible for the whole process of prosecution but the political atmosphere in which the District Attorney exists creates the obvious danger that these great powers can sometimes be improperly used. Indeed, because of the manner of their appointment or election their job can change as the Government changes. As a result of their position, they must be subject, on occasions, to political pressures. Alternatively they can manipulate the law, as we have discovered

during our lectures, when as long ago as the 1820's criminal acts respecting the rigging of ballots at elections went unpunished on the directions of the District Attorney, albeit at times in consultation with his political master.

It is also pertinent to mention the strong influence, control and power they have over the Police. For instance, if a police officer witnesses a crime he may arrest the offender, either at the time or whilst he is in immediate flight. However, should the police officer only discover the whereabouts of the offender four hours after the crime he is not entitled to arrest that man. He must first apply to his District Attorney or in the case of a Federal Agent to his United States Attorney. In doing so he must convince that official that he has good evidence to prove the suspect guilty of the offence. In practice this can be done verbally, but the most surprising part is that the police officer has no power to decide for himself whether or not to effect the arrest.

Should the offender be in his home and the proceeds of the crime in his car, the American officer would require three warrants: a) to effect the arrest of the offender, b) to search the house and c) to search the car.

All three warrants are granted by his District Attorney or in Federal cases by the United States Attorney. To obtain search warrants the investigator must furnish proof that the proceeds of crime are in the offender's home. He must in practice produce a witness who has seen them. Mere suspicion based on information from an informant will not suffice.

Having satisfied the District Attorney or United States Attorney that the goods are in the living room the warrant to search will only authorise the search of that part of the premises. It would not allow a thorough search of the building. That, if it appears necessary, would require further warrants.

Having built up a case against a suspect, the police officer hands it over to the District Attorney or United States Attorney who decides whether or not to prosecute. The police officer is not entitled to offer opinions although it appears that in practice he usually does. This seems to depend on the relationship between the officer and his District Attorney or United States Attorney, who takes over the prosecution and also assumes authority for the case. The police officer, regardless of his rank reverts to the role of witness.

CONCLUSIONS

Responsibility for prosecutions lies at the root of any system of law enforcement, and to alter any of the systems discussed would mean a fundamental change in the relationship between the Police, the legal profession, the Courts and the Government Departments. That is not to say that such changes are to be avoided if there is a likely benefit. Few can deny that in England we enjoy a high reputation concerning justice, and possess one of the finest Police systems in the world. However in England at this present time there is considerable public concern over the question of how far Police powers ought to extend. Has the time arrived for us in England to develop an independant prosecution department and have a District Attorney/Procurator Fiscal type person who would assume all rights of prosecution?

Should that course of action be undertaken(there is in England at the present time a Commission sitting called the Royal Review on Criminal Preocedures who, amongst other things, are looking into this very subject), many policemen feel it would be a step in the right direction, as there is little doubt we do lose a certain amount of public support and respect because we are responsible for prosecutions. Indeed, confirmation of that very fact was highlighted in a recent survey conducted by the Police Review Magazine where

officers were asked to complete a questionnaire on the subject of which the ultimate result was a wholehearted recommendation that Solicitors be employed as Prosecutors.

In the light of the possible outcome of the Commissions Review we would tender to suggest that favourable consideration be given in England to the appointment of a legal Advocate using the Scottish system as a basis.

We justify that proposal upon the facts that the Scottish System appears to be one of impartiality, unbiased and free from political interference. Upon his appointment his role is one of permanent standing provided that the necessary safeguards, should he fail to carry out his duties satisfactorily, be built into his contract. He would be free from any political persuasion and answerable directly to the Director of Public Prosecutions and ultimately the Attorney General. They would however continue to assume overall responsibilites in respect of the prosecutions for major crimes and those of public interest.

An area of sèrious concern to us in the American and Scottish Systems is the apparent absence of the individual's right to take out a private prosecution. In England the situation is the

reverse in that everyone has a responsibility and a duty to enforce the law and apprehend offenders. This is one of the overriding principles on which the whole essence of English Law is founded.

Our researches also reveal some defects in the American Legal System, namely political interference, autonomy and the absence of private prosecutions, and similar considerations ought to be given in America to implementing a system based upon our proposals for the new English procedure.

To take the matter further, in this day and age of unification where we have international alliances like the North Atlantic Treaty Organisation, European Common Market and the European Court for Human Rights and the world is becoming increasingly smaller, thereby allowing organised criminals to operate internationally, has not the time arrived for representatives of the legal profession from both England and America to unite. Collectively they could be the forerunners of a written constitution for both countries encompassing a Bill of Rights and a legal system which would apply to both. Who knows, it could ultimately be implemented universally.

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