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INQUISITORIAL SYSTEMS OF JUSTICE

Three papers based on the proceedings of a seminar organised jointly by Justice, the National Association for the Care and Resettlement of Offenders and the National Council for Civil Liberties, held on 3 June 1978 at the Royal Commonwealth Society, London.

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INTRODUCTION

On Saturday 3 June 1978, a seminar on Inquisitorial Systems of Justice was held at the Royal Commonwealth Society, London, under the joint auspices of Justice, the National Association for the Care and Resettlement of Offenders and the National Council for Civil Liberties. The seminar, which was chaired by Sir Brian McKenna, was attended by representatives of a wide range of organisations who were later to make submissions to the Royal Commission on Criminal Procedure. Its aim was to provide factual information on the basis of which the advantages and disadvantages of our own and other countries' systems of pre-trial procedure might be evaluated.

Among the many questions on which the establishment of the Royal Commission has focussed attention are the following:

Should elements of the Scottish, French or German systems be introduced here?

What hazards exist in those systems?

Should we attempt to separate the functions of the investigator and the prosecutor?

Should the right to silence be waived in favour of interrogation by a judge or magistrate?

Should the role of the trial judge be confined merely to adjudicating on a case presented by two competing parties, or should the judge take part in the inquiry?

We hope that the papers contained in this pamphlet, which are based on the proceedings of the seminar, will help to ensure that the debate on these and similar questions is an informed one.

PRE-TRIAL PROCEDURE IN FRANCE

INTRODUCTION

French criminal procedure is based on the "inquisitorial" principle. The trial is inquisitorial in that the judge himself investigates the case in order to seek out the truth, rather than presides over a contest between the prosecution and defence. The inquisitorial nature of the system also characterises pre-trial procedure. The police and the prosecutor have far greater scope to interrogate and search, etc. as in theory they are charged with searching out the facts impartially rather than proving a case against an accused.

THE POLICE

Unlike Scotland and England, there are a number of police forces in France, all independent of each other. The two main police organisations are the *gendarmerie nationale* and the *police (or surete) nationale*. The *gendarmerie*, a military force of about 50,000, is under the control of the Ministry of Defence. It is responsible for military policing and for policing the civilian population in rural areas and in towns with a population of less than 10,000. The *police nationale* numbers about 90,000 and is the responsibility of the Ministry of the Interior. In both police forces there is a division into two classes - the *police judiciaire* and the *police administrative*. The former are responsible for investigating crime while the latter are charged with keeping law and order. If, however, a member of the *police administrative* saw someone committing a crime he would then act in the same way as a member of the *police judiciaire*.

The *partie civile* - the victim, or some person or organisation which has lost out as a result of a crime (such as an insurance company) can play a major role in French criminal proceedings. They can insist that the *procureur de la republique* institute proceedings (though he will make it known to the *juge d'instruction* if he thinks the proceedings are ill-founded). They can demand that a civil issue of compensation be determined at the same time as criminal liability, they can have access to the *dossier*, be present at the interrogation of the accused and be represented at the criminal trial.

THE COURTS

There are three types of court in France:

1. The *tribunal de police* - This deals with *contraventions*, the most minor category of crimes which constitute the largest amount of business in the French criminal courts. *The tribunal de police* is presided over by a full-time judge who cannot impose a prison sentence of more than two months.
2. The *tribunal correctionel* is presided over by three full-time judges and deals with *delits*, which are offences not punishable by more than five years imprisonment.
3. *Cour d'assises* - It is only in the *cour d'assises* that there is

any lay element in the French criminal courts. This is the forum which deals with *crimes*, the most serious offences such as murder and treason. It consists of three judges (a *president* and two *assesseurs*) sitting with a jury of nine laymen. But there is not the distinction which exists between issues for the judge and those for the jury as in England. In France the issues are not separated into fact and law, with law confined to the judge, but both judge and jury retire together to consider all matters of culpability and sentence.

THE PROCUREUR DE LA REPUBLIQUE & THE JUGE D'INSTRUCTION

The Procureur de la Republique

French criminal procedure cannot be understood without reference to the *procureur de la republique*, his relationship to the judges and the police. He is legally qualified, appointed by the Ministry of Justice, and ultimately responsible to the Minister of Justice. The term *magistrat* applies to both the judiciary and the public prosecutor. The two sorts of *magistrat* have equal privilege, status and salary. Interchange between the two branches is simple and not uncommon. In fact it frequently happens that a *procureur de la republique* with greater experience prosecutes in a case presided over by a judge less senior than himself. At the trial he enters the court with the judges, wears the same robes, sits on the bench and is entitled to put questions to witnesses. The defence counsel (the *avocat*) merely speaks from the well of the court and has to address questions to the witnesses through the judge. He has a central role in relation to the police. He keeps a personal *dossier* on all the senior officers in the *police judiciaire* in his area.

Pre-trial Investigation

French pre-trial investigation depends not only on whether the crime concerned is a *crime*, *delit* or *contravention*, but also in theory on whether the offence has been reported soon after its commission, such as a murder, or whether it concerns an offence committed some time before, such as a fraud that has only recently come to light.

If a *crime* or a *delit* is reported soon after its commission, the police and the *procureur de la republique* are entitled to pursue their investigations on the basis of *l'enquete flagrante*. This procedure is based on the theory that speedier methods are needed when an offence has only just been committed. If they are proceeding on the basis of *l'enquete flagrante*, the police and the *procureur de la republique* have greater powers. In practice the police frequently expand the definition of *flagrante* because of the wide powers they are then able to make use of. Where they cannot obtain consent for searches, seizures and detentions and they are unable to justify categorising the offence as *flagrante* they have to apply through the *procureur de la republique* to the *juge d'instruction* for authority to search, etc.

The police will report a *flagrante* offence to the *procureur de la republique* and he can then authorise the senior officers of the *police judiciaire* to search persons, vehicles and premises and seize any evidence discovered. The fact that an offence is *flagrante* will also give the police the power to arrest and detain a suspect *(garde a vue)*. This lasts for 24 hours initially and can be extended for another 24 hours by the *procureur de la republique*. During a period of *garde a vue* the suspect is not entitled to legal representation and throughout that period he can be interrogated. His answers to any questions will be noted and included in the dossier which is sent to the *procureur de la republique* and ultimately the *juge d'instruction* before the trial. If a person detained remains silent this will be noted for the *dossier* and can be commented on by the *procureur de la republique* and the judge.

If a person is improperly detained, for example if he is held and interrogated for longer than 48 hours, the only consequence is that the police might be liable to disciplinary proceedings. There are no rules excluding evidence of confessions obtained in such circumstances and in practice unlawful detention beyond the *garde a vue* period is common, as is the situation where the police demand that persons attend the police station for questioning without informing them that they can refuse. If the police have not finished their enquiries after the 48 hour period, they may bring the suspect before the *procureur de la republique*. The period in police custody after the *garde a vue* and before the suspect is seen by the *procureur de la republique* is known as *delai de transfer*. The police will pass to the *procureur de la republique* a report of the results of their investigation.

When the accused is brought before the *procureur de la republique* he is again questioned. He is not allowed legal representation, as the theory is that the *procureur de la republique's* questions are designed merely to elicit the truth to see whether there is a case to answer rather than to build up a case against the suspect. The responses to the questioning will be noted by the *procureur de la republique* and will be signed by the suspect. The *procureur de la republique* then decides what should be done further with the case. The alternatives open to him are:

(1) He may take no further proceedings and free the suspect. He can do so even if the police object but, if further evidence appears, the police are free to report the same suspect for the offence. Even if there is a case to answer, the *procureur de la republique* can indicate that in the public interest he does not think it is a proper case to prosecute.

(2) If he decides there is a case to answer and there should be a prosecution, he will advise the accused that he has a right to legal advice.

The *procureur* has great discretion, not only as to whether proceedings should be instituted, but also as to what form those proceedings should take. For example, if he feels that a case of aggravated burglary combined with an assault is, in the particular circumstances, not grave enough to be treated as a crime, he can direct it before the *tribunal correctionel* rather than the *cour d'assises* (which has greater sentencing powers) by formulating a simple charge of theft and common assault. (The process of treating a *crime* as a *delit* is known as *correctionalisation* of the offence as it then goes to the *tribunal correctionel.)* If he decides that the matter should be treated as a *crime*, the accused will have to go before a *juge d'instruction* for a judicial examination and control of the case passes from the *procureur de la republique* to the *juge d'instruction.*

In using his discretion as to whether to proceed on the basis of a *delit* or a *crime*, the *procureur de la republique* wields a great deal of power:

(a) This is where a system of plea-bargaining operates. A compliant accused can be sent before a *tribunal correctionel* and avoid the risk of a higher sentence.

(b) By treating a particular offence as a *delit* the *procureur de la republique* can ensure that the maximum penalty is effectively reduced. A few years ago there were a number of very contentious cases where *procureurs de la republique* correctionalised cases of rape so that the maximum sentence could be limited to five years imprisonment.

(c) By correctionalising a case, though the maximum sentence is reduced, the accused will be tried by a court containing no lay element. (Only the *cour d'assises* has a jury.)

(d) By correctionalising an offence, the *procureur de la republique* can ensure that he maintains control over the case. Whilst he has a duty to pass on a *crime* to a *juge d'instruction*, he has a discretion as to whether to involve a *juge d'instruction* in the case of a *delit*.

The Juge d'Instruction

Appointments of *juges d'instruction* are usually made from among the judges of the *tribunal correctionel*. He is independent of the court and the police. In theory he is also independent of the *procureur de la republique* but, due to the fact that he is often chosen by the *procureur de la republique*, can be taken off a case if the *procureur de la republique* does not approve of his line of investigation. Since he may sometimes be less senior that the *procureur de la republique* and since in practice they have many private discussions, this independence is often more illusory than real. Each *tribunal correctionel* has a *juge d'instruction* and in Paris there were 68 in 1975. Where there is more than one *juge d'instruction* attached to a court, it is officially the duty of the President of the court to assign the case to a particular *juge d'instruction*, but unofficially the *procureur de la republique* will often choose. All cases that the *procureur de la republique* considers should be dealt with as a *crime* are referred to the *juge d'instruction* but the *procureur de la republique* has a discretion

whether to refer a *delit*. In 1971, 14.5% of all *crimes* and *delits* were sent to a *juge d'instruction*. *(Goldstein and Marcus, Yale Law Review, vol. 87, 1977.)*

The *juge d'instruction* takes responsibility for the collection, examination and investigation of all evidence relating to the case which has been referred to him and decides whether it should go to trial. All the evidence goes in a dossier which is available to the *partie civile*, the *procureur de la republique* and the representative of the accused. (If the accused is not represented he cannot see the dossier.) The *juge d'instruction's* investigations are supposedly secret, but restrictions on revealing information that has emerged in the proceedings do not apply to the accused, the *partie civile* or the *procureur de la republique*, who are all able to divulge facts. The press may also interview witnesses and report such matters as the accused's previous convictions. If the accused has not already been arrested, the *juge d'instruction* has power to issue a warrant for his arrest and authorise his detention in custody.

BAIL

When considering the question of bail the *juge* rarely goes against the suggestion of the *procureur de la republique*. It is commonly stated that the chances of getting bail in France are only a fraction of what they are here. Moreover, detention in custody is likely to be longer than it is here. Though outside Paris the courts are less congested, the average length of pre-trial detention for an accused in the capital is between eighteen months and two years. (It must also be noted that because of the low rates of acquittal in France a suspect is much less likely to spend time on remand in prison, only to be acquitted subsequently.)

PRE-TRIAL EXAMINATION

The accused will have been examined by the *police judiciaire*, the *procureur de la republique* and, in a case referred to the *juge d' instruction*, he will undergo further examinations before trial. At the first examination by the *juge d'instruction* he is still not entitled to have a lawyer present. This questioning will be fairly restricted, the *juge* confining himself to verifying the identity of the accused and allowing him the opportunity to challenge any statements he has made previously. Thereafter the *juge d'instruction* can examine and cross-examine the accused with great thoroughness as many times as he feels necessary. At these examinations the accused is allowed to have a lawyer present, as is the *partie civile*. The *juge* will examine other witnesses as well, on summons, and may confront the accused with witnesses whose evidence conflicts with that of the accused. He can ask the accused and witnesses to draw plans, re-enact certain parts of their evidence, and both the *partie civile* and the *procureur de la republique* can suggest questions for the *juge* to put to the accused.

If witnesses refuse to answer questions they can be fined; if the accused refuses to answer questions it will be noted and commented on at his trial.

The *juge* can order further searches and require the testimony of further witnesses. The aim of his investigations is to build up a complete picture of the facts to present to the court.

Not only does the *juge d'instruction* build up a *dossier* of the facts, he must also prepare a *dossier du personalite*. This will include details of the accused's family background, his education, his work record, military service, previous convictions. Character evidence will be obtained by summonsing parents, teachers, employers, friends colleagues. (A spouse cannot be summonsed.) All this, together with the report of any psychiatric examination which may have been carried out on the accused, will be available to the *partie civile* and the *procureur de la republique* and is, if the *juge d'instruction* decides there should be a trial, sent to the court. In the *cour d'assises* the jury do not have access to the dossier and therefore it is left to the trial judge to call witnesses to give oral evidence as to what is in the dossier or simply to put it to the accused by reading it out at the trial.

AT THE TRIAL

The *dossier*, compiled by the *juge d'instruction* in the case of a *crime* and by the *police judiciaire* and the *procureur de la republique* in the case of a *delit* or a *contravention*, can in complicated cases run to hundreds of files. In theory there is no such thing as a guilty plea, but in practice there is no more than a perfunctory procedure if the accused indicates that he will not be challenging the evidence in the *dossier*. The *dossier* forms the basis of the judge's rigorously inquisitorial approach in contested trials. Witnesses will be called by the judge and the accused will be asked to give his explanation of why his evidence differs from theirs. In theory the defence counsel (the *avocat*) is not allowed to put questions to the witnesses and must suggest questions to the judge, but in practice many judges allow *avocats* to put their questions direct.

There are virtually no rules of evidence and anything, except hearsay, which throws light on the case or on the accused can go in the *dossier*. There are no rules as to corroboration. The judge (and the jury in the case of *crimes*) can convict on the evidence of one witness alone. The test is whether they have an *"intime conviction"* (an inner conviction) of the accused's guilt.

THE ONUS OF PROOF

In theory an accused is innocent until proven guilty, but this presumption

is greatly weakened in practice by:

(a) the possibility of press reporting prior to a case such matters as previous convictions;

(b) the fact that in the *tribunal de police* and the *tribunal correctionel* there are only professional judges who will have read the *dossier*, which is essentially the police case;

(c) in the case of a *crime*, juries are influenced by the fact that the case only comes to court after a thorough examination by a *juge d'instruction*, who is officially regarded as neutral.

PRE-TRIAL PROCEDURE IN GERMANY

INTRODUCTION

German criminal procedure, like the French, is based on the inquisitorial principle. It shares many characteristics with the French system and for that reason we do not concentrate on it in great detail but merely give a brief outline and mention a few points where the two systems differ.

THE COURTS

Very minor offences are heard in courts presided over by a single judge. More serious crimes are heard before a mixed panel of lay and full-time judges, the lower court (the *Schöffengericht*) consisting of one professional and two lay judges. The *Grosse Strafkammer*, which hears the most serious cases, consists of three professional and two lay judges.

The method of selection of lay judges varies from region to region, but it appears to lie somewhere between our systems for selecting Justices of the Peace and jurors. Nominees are taken from political parties, people can volunteer, there are disqualifications for former convicts and clergy, and in one district of Berlin the police are able to scrutinise the list of potential lay judges and strike off those *"whose devotion to the constitution and democracy"* is considered suspect. (John H. Langbein, *Comparative Criminal Procedure: Germany*).

The lay and professional judges all sit together in the court forming a single panel and at the close of the proceedings they all retire together to consider all questions of law, fact, culpability and sentence. They are not, however, allowed to see the dossier which the president of the court will have studied in advance and which forms the basis of his conduct of the proceedings.

THE PROFESSIONAL JUDGES

Unlike in England, where judges are selected from among practising barristers, being a judge in Germany is a career picked on graduation from law school. Like that of a public prosecutor, the career of a judge is essentially that of a civil servant. He is appointed by the Minister of Justice to whom he is ultimately responsible, but after two years sitting as a judge he can only be dismissed by a commission of senior judges.

THE PUBLIC PROSECUTOR

The public prosecutor is a civil servant and, as in France, has equal

status with the judiciary. He decides whether the evidence he receives from the police justifies preferring a charge, and in what way the offence should be tried. Formerly the German system included the equivalent of a *juge d'instruction*, but examination by this method was so rarely used that in 1975 it was formally abolished. The public prosecutor, therefore, has overall responsibility for pre-trial criminal procedure. It is to the police that crime is initially reported and in minor cases the police will pursue their investigations until their conclusion. In such cases, the first that the public prosecutor will hear of a crime will be when he receives the completed case file from the police. He will then decide whether proceedings should be brought. If he sends the case for trial there will have been no investigation other than that of the police and no overall supervision of the police conduct of that investigation. In more serious cases the public prosecutor might be informed by the police when the offence is reported and himself play a part in the investigation and supervise compilation of the dossier. But his intervention will only be in a minority of cases. A study of 5,500 cases revealed that in only 41% of the most serious categories of crime and only 28% of less serious crime did the public prosecutor perform any act of official investigation. And many such interventions will be merely formal steps such as police application to the public prosecutor for an arrest warrant which the police must ask for even after the arrest has been made.

In theory the German prosecutor has no discretion, and where there is sufficient evidence to justify a charge must institute proceedings. The true picture is very different from this and for a number of reasons the public prosecutor might proceed no further in a case where there is ample evidence. For example, the public prosecutor might merely warn a middle-aged shoplifter if it is his first offence. There is also a system whereby the public prosecutor will not proceed if, in the case of a first offender, the accused pays a sum to a charity on a list approved by the court. Defence counsel will visit the public prosecutor in such a case, suggest such a course of action and negotiate the sum. To some this appears to be an admirable method of keeping first offenders out of the criminal courts and subsidising good causes; to others it appears very unjust as it is clearly a method more able to be used by the rich than the poor. But whatever view is taken, it is clear that this is a sort of plea-bargaining - something which in theory does not exist in German criminal procedure since there is no such thing as a guilty plea.

But this is not the only sort of situation in which plea-bargaining operates. One of the functions of the public prosecutor is to propose to the court an appropriate sentence. This gives him the power to ask for lower sentences for compliant defendants who indicate in advance that they will not be challenging any of the evidence in the dossier.

PRE-TRIAL INVESTIGATION AND THE TRIAL

Supervision of police investigation by the public prosecutor in all but

the more important cases is slight. Most searches are carried out without warrant, the majority of arrests and detentions are with the *"consent"* of the person concerned and the vast majority of interrogation of the accused is carried out by the police. Nor is challenge of police conduct at the trial a practical possibility. The results of all interrogation are admissible unless the interrogation was under *"coercion"*. All evidence, even that which has been obtained illegally, is admissible. An accused's remedy against unlawful police conduct is to take civil action, in which the chances of success are slim, or make a complaint under police disciplinary procedure. The police will include such matters as previous convictions in the dossier and no evidence is inadmissible, except hearsay. The German so-called *"privilege against self-incrimination"* is by no means the equivalent of our right to silence: it means little more than that an accused will not be prosecuted for contempt of court if he fails to answer the judge's questions. If the suspect remains silent in the police station this will be noted and can be commented on by the public prosecutor at any subsequent trial. And remaining silent in court is one of the ways in which an accused can indicate that he will not be challenging anything in the dossier - an informal *"guilty"* plea.

The standard of proof which has to be reached for a conviction is the same as in France. The German equivalent of the French judge's *"intime conviction"* is his certainty on *"free evaluation"* of the evidence.

THIRD PARTIES

There used to be a procedure in the German criminal system whereby the victim could appear and civil questions be tried at the same time as the criminal action. But this *"doctrine of adhesion"* (of the civil to the criminal claim) no longer exists as the procedure fell into disuse due, among other reasons, to the reluctance of the criminal courts to assess damages.

PRE-TRIAL PROCEDURE IN SCOTLAND

INTRODUCTION

Criminal procedure in Scotland is often said to be a *"half-way house"* between the so-called inquisitorial systems of the continent and the English procedure. The role of the courts and the judges is more or less the same as south of the border, but the Scottish system's distinctive features lie in the work of the Crown Office and the Procurator Fiscal, in their relationship to the process of investigating suspected offences, in their deciding whether to prosecute and in their presenting cases to the courts.

THE POLICE

Formerly separate police forces were based in each county and each large town and city; but due to recent amalgamations many of the smaller forces have disappeared. As in England and Wales, each police force has a Chief Constable and as a whole the police come under the control of the Secretary of State for Scotland. Their powers to arrest, search and to interrogate witnesses and suspects all vary slightly from the powers of the English police and their role differs in one essential respect, namely their relationship to the Procurator Fiscal.

THE LORD ADVOCATE, THE CROWN OFFICE & PROCURATOR FISCAL

The Lord Advocate

The Lord Advocate is the senior law officer for Scotland - equivalent to our Attorney General. His appointment is political and, as well as advising the Cabinet on legal matters affecting Scotland and supervising the drafting of Scottish Bills, he has overall responsibility, through his staff in the Crown Office, for the conduct of prosecutions. In the most serious cases the Lord Advocate will conduct prosecutions personally, or responsibility will be taken by one of the small number of Advocates Depute, who are qualified advocates appointed personally by the Lord Advocate to conduct prosecutions. (It is only in recent years that these appointments have ceased to be political.)

The Crown Office

This office of the Lord Advocate's permanent staff is headed by the Crown Agent. Appointments to the Crown Office are made from the Procurator Fiscal service.

The Procurator Fiscal

In the 16th century the Sheriff in the Sheriff Court (at the time

roughly equivalent to the English magistrates' court) was both judge and prosecutor and the Fiscal was employed by the Sheriff to collect the fines imposed by the court. In the 17th century the prosecuting function of the Sheriff was taken away. By the middle of the 19th century the Procurator Fiscal became responsible to the Lord Advocate, rather than to the Sheriff, in whose court he was prosecuting. The Procurator Fiscals are whole-time legally qualified civil servants and are now completely independent of the Sheriff. Depending on the volume of work in the Sheriff Court at which he works, the Procurator Fiscal might have a staff consisting of Assistant Fiscals, Senior Deputes and Deputes. There are now 203 lawyers in the Procurator Fiscal Service, with 562 supporting staff. The Procurator Fiscal operates under the instructions of the Crown Office on matters of general policy as to the exercise of his discretion. For example, through the Crown Office the Lord Advocate has laid down that no prosecutions should be brought against homosexual activities performed by consenting adults in private, though this is still a criminal offence.

The powers and duties of the Procurator Fiscal are wide and varied and include among others, elements of the responsibilities of an English chief constable, coroner, official of the Director of Public Prosecutions' office and police prosecuting solicitor. They are in summary:

(1) The responsibility for investigating all criminal offences committed in his district. In the first instance most inquiries are made by the police, who report the results to the Procurator Fiscal.

(2) The responsibility for investigating all sudden, unexpected or suspicious deaths.

(3) The conduct of the prosecution of all cases taken in the Sheriff Court (either on summary complaint or trial on indictment before a jury). This includes a discretion as to whether or not to prosecute, and in the first instance, in the absence of any statutory provision, a discretion as to whether or not an offence should be placed before the summary court, or tried on indictment (although before a case may be placed before the court on indictment, the instructions of Crown Counsel must be obtained, so that a decision by the Procurator Fiscal to place an accused on indictment is subject to review). In the course of the trial he has a discretion to abandon the proceedings permanently or temporarily, which has the effect of terminating the trial. If the accused is convicted, the Procurator Fiscal may move the court not to sentence the accused; this is binding on the court.

(4) In High Court cases, the Procurator Fiscal investigates and prepares the case for trial (including examining all the witnesses); attends to the preliminary procedural steps and

first calling of the case in court; and assists Crown Counsel at the trial, where he acts as the *"instructing solicitor"*.

(5) Deciding in the first instance whether or not an appeal should be taken against any verdict in the Sheriff Summary Court (although this decision is subject to confirmation by Crown Counsel) and drafting answers against any appeal lodged by the accused in the Sheriff Court (whether summary or indictment).

(6) Presenting evidence at all fatal accident inquiries.

(7) Investigating all fires and explosions where there is substantial damage or suspicious circumstances, and investigating all other unusual or suspicious occurrences.

(8) Investigating all complaints made against the police, especially where there is a suggestion that a police officer has been guilty of a criminal offence.

(9) Investigating *"Ultimus Haeres Estates"* - i.e. where a person dies intestate leaving no known heirs, and the estate is due to fall to the Crown.

(10) Dealing with all articles found as "*treasure trove*" - i.e. if anyone finds treasure or articles of antiquarian interest, it is his duty to notify the Procurator Fiscal.

(11) At a local level, to give legal advice concerning criminal matters to the police, customs and excise, the post office, government departments and officials, and a large number of official and semi-official bodies and persons on whose behalf the Procurator Fiscal conducts criminal proceedings.

The function of the prosecutor is not, in theory, to secure a conviction, but to help the jury arrive at the truth and assist the court to see that justice is done.

> *He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. It is not his duty to obtain a conviction by all means, but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible and to see that the jury are instructed with regard to the law and are able to apply the law to the facts. It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction.* (Kenny - Outlines of Criminal Law).

However, views differ as to whether in practice the Fiscal performs such a neutral role. It is often said that, once he has decided to bring a prosecution before the court, he has a vested interest in

seeing it succeed. Whilst his role is that of a prosecutor, his function is separate from that of the investigator, which is largely carried out by the police. He would therefore have no vested interest in bringing a particular suspect to court.

The rate of acquittal by juries in Scotland is lower than that in England, despite stricter rules of evidence in Scotland - 30% as against 50%. It is not certain how far this difference is due to the more effective weeding out of inadequately substantiated cases or to a greater willingness of juries to infer from the fact that the independent Procurator Fiscal has seen fit to prosecute.

THE COURTS

The Scottish court system differs considerably from that of England and Wales. There are three courts with original criminal jurisdiction: the High Court of Justiciary, the Sheriff Court and the District Court. District courts were established in 1975, replacing a variety of minor courts; normally lay magistrates sit, but there are some stipendaries. These courts are much less important in practice than the magistrates' courts are in England, having a much smaller proportion of the total caseload and much smaller maximum penalties at their disposal (£50 fine and 60 days imprisonment). But their importance is likely to grow since their integration into the system of prosecutions, and since criminal legal aid became available (both in 1975). The Sheriff Court is presided over by the Sheriff, who is a professional legally qualified judge; the Court also has extensive civil jurisdiction and it is more common than in England for the Sheriff to alternate between civil and criminal cases. Cases in the Sheriff Court may be tried either by summary or by solemn procedure (with a jury). Assuming that the choice is not determined by statute (as, for example, where an offence is triable only summarily) it is for the Procurator Fiscal to decide the mode of trial - the accused has no rights of election for trial by jury. The maximum penalty (again subject to the maximum fixed by statute for the particular offence) is determined according to the mode of trial - for solemn procedure it is two years' imprisonment. The most serious cases must, and the more serious may, be tried in the High Court of Justiciary before a judge and jury. The High Court goes on circuit and has exclusive jurisdiction to deal with treason, murder, rape, incest and breach of duty by magistrates.

Appeals in all cases lie to the Court of Criminal Appeal, which is part of the High Court.

PRIVATE PROSECUTIONS

Private prosecutions are for practical purposes extinct in Scotland. A private individual will only be able to bring criminal proceedings if he secures either the consent of the Lord Advocate or Criminal Letters from the High Court. It is a condition for either that he is the direct victim (or possibly a relative of the victim) of the offence. Only two applications for Criminal Letters have been recorded in the past twenty years, both unsuccessful. Thus the Lord Advocate and the

Crown Office have an effective monopoly in determining the scope of the criminal law, since a decision that, say, blasphemy will not be charged as a crime has the same effect as repealing the law of blasphemy.

THE CRIMINAL INVESTIGATION

The primary responsibility for criminal investigation is that of the police. It is to them that crime is reported - they go to the scene of the crime; they interview witnesses and gather evidence, and it is they who arrest a suspect and take him into custody. It is only in the most serious cases, such as murder, where the Procurator Fiscal will intervene and take general charge of the investigation. In such a case he would visit the scene of the crime, give directions to the pathologist and direct the course of further enquiries.

The police are entitled to ask questions of anyone in connection with an offence, including the suspect. As in England, there is no obligation to answer questions and no power to detain short of arrest, but as in England many people find themselves in a police station being questioned because they do not know they are entitled to refuse. Neither is the law absolutely clear on the distinction between being arrested and being free to go.

> *There is, however, some uncertainty as to the distinction between a person who is in police custody and one who goes or stays with the police voluntarily. That some clarification of this is necessary can be seen from the cases of Muir v. Hamilton Magistrates and Swankie v. Milne* (*Criminal Procedure in Scotland. The Thompson Committee Report*, Cmnd. 6218, 1975)

The rule in Scotland is that an arrest must be accompanied by a charge. The police are not entitled to arrest a suspect until they have sufficient evidence to charge him. Evidence sufficient to charge means evidence sufficient to report to the Procurator Fiscal.

The accused will be charged in court on a writ at the instance of the Procurator Fiscal and not on the police *"charge"* but a police charge is nevertheless a vital step in pre-trial procedure. To effect an arrest, then, the police require more than reasonable suspicion. In practice, however, it is customary for the police to detain potential witnesses or suspects without arresting them. Because the practice of detention, though frequent in practice, is not recognised by law, there are no rules governing it. The detainee has no right to see a solicitor and there are no rules governing any questioning he might undergo.

If the police require a warrant to search they must approach the Procurator Fiscal who will then, if he thinks it justified, apply to the Sheriff for the warrant.

Previously it was common to bring accused persons before the Sheriff for a judicial examination, but this practice was discontinued in the late 19th century. Neither does the Procurator Fiscal have a part in the interrogation of the suspect, which is conducted entirely by the police. There are no Judges' Rules in Scotland, but the interrogation is constrained in a number of ways. The trial judge has a discretion to declare inadmissible evidence of incriminating verbal or written admissions if they were not made voluntarily and the interrogation was unfair. But, as in England, it is by no means possible in Scotland to predict when a confession will be admitted and when it will be rejected; as the Thompson Committee states:

> *(discussion of) the law of interrogation is made difficult and confused because of an excess of inconsistent authority.*

However, it appears that there are substantially fewer allegations of *"verballing"* by the police in Scotland. At a seminar at Bramshill Police College in 1978, Glasgow Procurator Fiscal Mr. J. Sheen attributed this to the fact that at trials the prosecution are forced to place less reliance on an accused person's confession, due to the rule that no person who maintains a plea of not guilty can be convicted in Scotland on his statement alone.

THE DECISION TO PROSECUTE

Having arrested and charged their suspect, the police send a copy of the charge and the relevant supporting papers to the Procurator Fiscal who decides (with reference to the Crown Office if it is a complicated or difficult case) whether to prosecute. The Procurator Fiscal might, instead of deciding to prosecute, require the police to obtain further evidence and indicate what that evidence should be. Eight per cent of all applications by the police are turned down. While it is possible to re-start proceedings with a fresh application to the Procurator Fiscal, this is virtually unknown unless new evidence has come to light. The 8% figure does not indicate the full impact of the Procurator Fiscal's veto, as cases known to be of a kind where it is policy not to prosecute will simply not be put to the Procurator Fiscal (as presumably happens with a Chief Constable's standing policy in England). The only remedy of a person aggrieved by the decision not to prosecute is to take the matter up with the Lord Advocate, who may instruct the Procurator Fiscal to report to him. Thereafter the final decision as to whether or not to prosecute rests with the Lord Advocate. In most cases the police will already have formulated a draft charge and included it in the papers, but the Procurator Fiscal may revise it. It is also the Procurator Fiscal's responsibility to decide (where statute does not dictate the mode of trial) whether the proceedings should be summary or heard on indictment before a jury.

BAIL

The Procurator Fiscal also plays a role in determining whether bail should be granted to the accused or whether he should be remanded in custody. If the Procurator Fiscal opposes bail the Sheriff will, in practice, normally accede to his demand for a remand in custody. An accused cannot appeal against refusal of pre-trial bail, though the Procurator Fiscal can appeal to the High Court if the Sheriff decides to grant bail. Until the Procurator Fiscal's appeal against bail is dealt with by the High Court the accused remains in custody. However, when a bail decision is made after full committal has taken place, both parties have a right of appeal.

The 110 Day Rule

There is no habeas corpus in Scotland and the 110 day rule is therefore important in ensuring that unconvicted persons do not spend undue periods in custody. Where an accused is detained in custody, unless he is brought to trial and the trial concluded within one hundred and ten days of the date of his committal, he is forthwith released and may not be prosecuted for the offence with which he was charged. The only exceptions are where the delay is due to the illness of the accused, the absence or illness of an essential witness or any other sufficient cause for which the Procurator Fiscal is not responsible, in which case the court has power to detain the accused further in custody. If the prosecution feel that they will be unable to complete matters before the 110th day and do not want the charge to be extinguished, they have to release the accused on unconditional bail. The one hundred and ten day rule is strictly applied and operates even in cases of murder. The defence, however, may apply to have the period extended, as they may wish to do in a complicated case where they would have to choose between going to trial when they are not fully prepared or extending the custody beyond 110 days to allow themselves to complete preparations for the trial.

Among its effects the 110 day rule means that severing of charges is more frequent than in England, and minor cases often take longer to get to trial than they otherwise might as more serious cases *"jump the queue"*.

PRECOGNITION OF WITNESSES

Precognition of witnesses is the Scottish equivalent of taking a witness statement. In summary cases where the Procurator Fiscal will be the advocate in the Sheriff Court or the District Court, the Procurator Fiscal will not himself precognose the witnesses but will rely on the police precognitions. The precognition itself can never be used in evidence.

A distinctively inquisitorial feature of the Procurator Fiscal's role and one which has come under criticism recently is his power to precognose defence witnesses (by summoning them to his office) as well as witnesses for the prosecution. In particular, because of the shortage of staff in the Procurator Fiscal's service and the pressure of work, precognosing of witnesses - both defence and prosecution - is often carried out by

the police, usually the police who were concerned with the investigation leading up to the prosecution. To that extent, therefore, the police and the Procurator Fiscal are able to determine the accused's case in advance of the trial.

END