

COUNCIL OF EUROPE STUDY VISIT TO EDINBURGH - 1978

PAPER ON

THE ROLE OF THE CROWN OFFICE IN THE SCOTTISH
SYSTEM OF CRIMINAL PROCEDURE

BY

MR W G CHALMERS, CROWN AGENT FOR SCOTLAND

Before I begin to attempt to explain the role of the Crown Office in this production I think that it would be advisable for me to set the scene and say a little about the dramatis personae.

The scene is of course the criminal courts and they consist of a three-tier structure comprising the High Court of Justiciary, the Sheriff Court and the District Court in descending order of importance. In addition there is one Appeal Court, which you will see in action tomorrow. It deals with appeals from all the courts of first instance, which I have already mentioned. The total case-load of prosecutions in 1977 was approximately one-quarter million which is high considering that Scotland has a population of only 5½ million. The total number of appeals heard in the same year was 1,450. There are 21 judges in the High Court of Justiciary headed by the Lord Justice-General and the Lord Justice-Clerk.

The Sheriffs who sit in the Sheriff Court are all legally qualified but the Justices who man the bench in the District Courts do not require any legal qualifications. Most of the crimes which are prosecuted in the High Court are at common law - not used here in the same sense as in English law - and there is at least in theory no limit to the sentence of imprisonment which may be imposed.

Where the prosecution is for a statutory offence the statute prescribes the maximum penalty. All trials in the High Court proceed before a jury. This is not so in the Sheriff Court where only a small proportion of the trials proceed before a jury and most cases are decided by a Sheriff sitting alone. When a case is taken before a Sheriff and jury the maximum penalty which the

54869

Sheriff may impose for a common law crime is two years imprisonment while in summary cases the penalty is restricted to three months imprisonment or in exceptional cases six months. The District Court maximum is sixty days.

Turning now to the actors I must right away confess that we have no leading lady - a few in supporting roles, but not yet anyone who has achieved one of the top posts. The head of the prosecution system is the Lord Advocate, who is a member of the Government and who is answerable to Parliament, but to Parliament only, for the conduct of prosecution in Scotland. Although he is a Government Minister he is - like the Attorney General in England and Wales - completely independent in relation to his prosecution function. No-one can force him to prosecute or not to prosecute in any case. In 1938 Lord Normand who was then the Lord Justice-General of Scotland wrote:

"The initial importance of the responsibility of the Lord Advocate to Parliament for his official conduct is obvious; for there is no other effective check upon his powers.

But it is equally important, if the administration of **NCJRS** justice is not to be corrupted by political and party considerations, that the public prosecutor should **FEB 26 1970** exercise his powers judicially and that he should not be interfered with in his duties by the executive **ACQUISITIONS** government for political reasons."

The position remains unchanged today. The court may of course require an explanation for conduct in a particular case before it eg, if there has been excessive delay.

The Lord Advocate has many other functions. He is the legal adviser to the Government in relation to Scottish affairs. He sues or is sued on behalf of Government departments. He is responsible for the Scottish parliamentary draftsmen. He is the Minister responsible for the Scottish Law Commission. And lastly, but certainly not least so far as the demands upon his time are concerned, the present Lord Advocate is the Member of Parliament for Leith, one of the Edinburgh constituencies.

Because his parliamentary duties require his presence in London

for most of the week during the periods when the House of Commons is sitting, the present Lord Advocate, Mr King Murray, is not able to deal personally with much of the prosecution. His appearances in court are somewhat few in number and the same can be said about the junior Law Officer, Lord McCluskey, the Sclicitor General for Scotland, who has spent much of his time recently on the Government Front Bench in the House of Lords trying in vain to convince his fellow peers of the merits of devolution for Scotland. The bulk of the criminal work, which I shall explain later, therefore falls on the ten advocates-depute, who are all members of the Scottish Bar and who devote part of their time to prosecution in exchange for a salary. The Lord Advocate and his deputes including the Solicitor General have the sole right of audience for the prosecution in the High Court of Justiciary.

In the Sheriff and District Courts the prosecutor is the Procurator Fiscal or one of his deputes. They act as the local officials of the Lord Advocate. Scotland is divided into six Sheriffdoms and apart from Glasgow which is a Sheriffdom in itself, the others are subdivided into Sheriff Court districts, each with its own Sheriff Court. We have a Regional Procurator Fiscal in charge of each Sheriffdom and a District Procurator Fiscal in charge of each Sheriff Court district as far as prosecution is concerned. Procurators Fiscal are all civil servants appointed by the Lord Advocate. There are now 203 lawyers in the Procurator Fiscal Service, with 562 supporting staff.

My own function is as solicitor to the Lord Advocate in respect of his prosecution duties and as head of the Procurator Fiscal Service. Along with my staff in the Crown Office here in Edinburgh I therefore act as liaison between Crown Counsel (the collective name for the Lord Advocate, the Solicitor General and the ten advocates-depute) and the Procurators Fiscal.

Having dealt with the personnel, I think that I should also inform you as to certain basic rules before I proceed to deal with control. They are:

1. The High Court of Justiciary in addition to having a universal

jurisdiction over all crimes has a private jurisdiction over the most serious of them - murder, treason, rape, etc. In the case of statutory offences Parliament has stipulated that certain of them must be tried in particular courts. Apart from those specialties the prosecutor chooses which level of court the case is to proceed in, and in particular whether the trial should or should not be heard before a jury. So for example, if the Procurator Fiscal proceeds in the Sheriff summary court, ie before a Sheriff sitting without a jury, the accused has no right to opt for the case to be heard before a jury.

2. The relationship between the police and the prosecutor is determined by statute in the Police (Scotland) Act 1967 where it states:

"It shall be the duty of the constables of a police force where an offence has been committed to take all such lawful measures and make such reports to the appropriate prosecutor, as may be necessary for the purpose of bringing the offender with all due speed to justice."

and later there appears:

"In relation to the investigation of offences the chief constable shall comply with such lawful instructions as he may receive from the appropriate prosecutor."

From that you will appreciate that the police duty is simply to report. They have no power to prosecute even in relation to the most trivial of offences. Furthermore in the investigation of crime they are the agents of the prosecutor who is also the principal investigator of crime. This seems to have developed as a natural consequence of history - we had procurators fiscal long before we had policemen, so that when police forces did come into being they were grafted on to the existing system of investigation and prosecution.

and 3. There is virtually no private prosecution in Scotland. A vestigial right remains for members of the public to launch a

private prosecution but it has not been exercised successfully for close on seventy years. The procedure is for a bill to be presented to the High Court of Justiciary applying for "criminal letters" to bring a private prosecution against someone. The Lord Advocate could grant concurrence in which case the action would be likely to proceed. If, as usually happens, he does not concur the procedure is more difficult for the applicant. In the leading case McBain v Crichton, 1961 JC 25, at page 28, the Lord Justice-General (Clyde), said:

"Since the Lord Advocate has refused his concurrence to the proposed prosecution, this Court ordered intimation of the bill to be made to the Lord Advocate, as is the custom, and appointed a day for the hearing of the bill. The Lord Advocate has appeared in person at this hearing and has informed the Court that he has fully investigated the matter more than once and, in the exercise of that wide discretion which is invested in the Lord Advocate, he has come to the conclusion that a prosecution would not be justified in connexion with this matter. He has therefore decided not to prosecute at his own instance and not to give his concurrence to the private prosecution which the present complainer desires to raise.

The Lord Advocate is quite entitled to take up this position. In this country he is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his department, and the decision whether or not to prosecute is

exclusively within his discretion. This system has operated in Scotland for centuries, and see Alison on Criminal Law, vol. ii, p. 88 - the result has completely proved the justice of these principles, for such has become the public confidence in the decision of the Lord Advocate and his deputes on the grounds of prosecution, that private prosecutions have almost gone into disuse. It is utterly inconsistent with such a system that the Courts should examine, as it was suggested it would be proper or competent for us to do, the reasons which have affected the Lord Advocate in deciding how to exercise his discretion, and it would be still more absurd for this Court to proceed to review their soundness. Any dicta indicating that such a course is open to any Court are, in my view, quite unsound..

But the lack of the Lord Advocate's concurrence is not necessarily fatal to a private prosecution. Although we cannot review the exercise of the Lord Advocate's discretion nor his reasons for exercising it in the way he did, this Court can permit, and on rare occasions has permitted, a private prosecutor to proceed without the Lord Advocate's concurrence. But to entitle a private prosecutor to do so, he must be able to show some special personal interest in the matter which, notwithstanding the Lord Advocate's decision in the public interest, satisfies us that a private prosecution in respect of this special personal interest may proceed."

In the circumstances of that particular case the applicant was held not to have shown sufficient personal interest to be permitted to proceed.

There is therefore a virtual monopoly of the right to prosecute in the hands of the Lord Advocate and his officials.

At long last I now come to the role of the Crown Office in controlling criminal prosecutions. Most cases start off with a

report to the appropriate Procurator Fiscal by an investigation agency, normally the police but it may also be a Government department investigator or a local authority investigator or even a private citizen. The Procurator Fiscal then in a quasi-judicial fashion has to decide whether or not the case merits prosecution and if so under what procedure. If he decides that proceedings are not merited or that the case is worth summary proceedings only, it is unlikely that Crown Office will get to hear of the case unless someone complains of the decision. On the other hand if he decides that the case merits indictment, ie procedure before a jury either in the High Court of Justiciary or the Sheriff Court he must report the case to Crown Counsel who may:

- a. send it to the High Court,
 - b. send it to the Sheriff and Jury Court,
 - c. reduce it to summary procedure,
 - d. order its abandonment altogether,
- or e. send it back for further investigation.

There is therefore a very strict control over indictment procedure.

Regulations are issued by Crown Office to Procurators Fiscal giving them specific instructions in relation to some matters and general guidelines in relation to others. Thus, for example, they are given clear orders as to how to deal with claims for diplomatic immunity so that there may be no uncertainty, whereas in relation to opposition to bail they are advised in general terms as to the attitude to adopt, although each individual case must depend on its own particular circumstances. When some special feature comes to light Procurators Fiscal may be asked to report all cases of a certain kind to Crown Office. At the moment all cases of obscene publications are being reported to Crown Office, not because we enjoy examining indecent literature but because there was a known divergence of opinion among Procurators Fiscal as to what constituted obscenity.

In addition there are seminars to discuss current problems and

training sessions for the recruits. Crown Office Advisory Committees are formed to examine matters of interest such as proposed legislation or reports by Government-sponsored committees which suggest a change in prosecution procedure.

The Regional Procurators Fiscal also play an important part. They meet monthly under my chairmanship to discuss points of interest and they in turn convey the decisions to their own District Fiscals. Complaints against District Fiscals are usually investigated in the first place by Regional Fiscals who then report to Crown Office. (This procedure also applies in relation to complaints against the police.)

There is however no system of inspection and for the most part we proceed on a basis of trust. This means that initial selection of recruits and their training is extremely important. There is not a problem with regard to advocates-depute as we have a small Bar in Scotland and the qualities of any advocate who may be considered for appointment as an advocate-depute will be well known. This is not however so in the choice of Procurators Fiscal Depute. They are usually solicitors, often fairly recently qualified and normally without much experience in the criminal courts. We look for persons who are reasonably articulate, who seem to possess commonsense and above all who appear to have the essential attribute of integrity. Fairness in prosecution is far more desirable than cleverness.

As I have already stated the recruits receive training during a period of probation. The training officer reports on them as does their own Procurator Fiscal. At the end of a year (or in doubtful cases two years) an assessment is made and the recruit is either confirmed or dismissed. It is a most unpleasant task to have to dismiss a young person for lack of ability but it has to be done in the interests of the Service as a whole.

I would like you to keep in mind this very careful selection of personnel as I tell you something about what is perhaps the most

controversial feature of the Scottish system - the use of discretion. At all levels there is exercise of discretion. As I have already mentioned the duty of the police is to report to the prosecutor but they are encouraged not to report minor violations of the law. This is particularly so in relation to road traffic offences where a warning will often be a sufficient deterrent for the culprit.

Some minor offences do however percolate through the police system to the Procurators Fiscal and they may decide not to proceed in these cases because it would not be in the public interest to introduce such cases into an already over-burdened court. Indeed Procurators Fiscal having sole control of the input of work into the summary courts have a duty to ensure that they do not overload these courts to the extent that delays are created and backlogs accumulate as summary justice must be speedy to be fair. Apart from some "ticket" offences, eg parking, we have no method of dealing with minor violations other than to proceed in court but this subject is now being examined by a Departmental Committee under the chairmanship of Lord Stewart to see if effective alternatives to prosecution can be devised.

A much more difficult type of diversion is that based on social work reasons. It is relatively easy to be lenient with the very young or the very old or even someone who is clearly in need of help such as the shoplifting woman of middle-age who is having menopausal problems. Likewise the mentally ill or defective pose no problem. The difficult case is the one where no such specialties exist but where the individual circumstances indicate that it would be preferable to avoid the stigma of a court appearance.

In this connection I would also like to mention in passing that the Lord Advocate can effectively determine the scope of the criminal law. For example, following his predecessors over a period of many decades, he has decided in general exercise of his discretion not to prosecute consenting adults who commit homosexual acts in private. This is by law a criminal offence but the decision of the Lord Advocate has much the same effect as

decriminalising such behaviour.

In other ways Crown Counsel also help to establish the law, eg by the way in which indictments are framed, the decision to appeal certain cases from the lower courts and the way in which the appeals are presented. All complaints against the police are dealt with in Crown Office, thereby creating a pattern of uniformity. Although the Secretary of State for Scotland is the Minister responsible in Scotland for the exercise of the Royal Prerogative, it is usually the Crown Office which undertakes the investigation to provide the material required to enable such exercise to be considered.

Plea-bargaining is encouraged. Prosecutors at all levels may drop charges or accept pleas to lesser charges in the interests of expediency. The principle of legality which demands that the prosecutor must pursue a charge to the highest that the evidence will support does not apply in Scotland. I do not want to convey the impression that prosecutors in Scotland are always reducing or dropping charges but they must apply their minds to the likelihood of conviction or the effect on sentence in forming a judgment whether or not to agree a compromise with the defence.

These are all matters in which Crown Office sets the pattern to be followed by the whole prosecution service in Scotland.

This element of discretion which is exercised by all prosecutors from the Lord Advocate down to the newest recruit in the Procurator Fiscal Service highlights the need for careful selection of officers of all grades and I am happy to say that there is no public disquiet as to the manner in which the Crown Office and the Procurator Fiscal Service go about their business. I come back to the point which I made earlier about fairness. That colours all our thinking on this subject. We have for example no special rules about disclosure of evidence to the defence but as the Lord Justice-General (Clyde) said in Slater v Her Majesty's Advocate, 1928 JC 94 at page 103:

"An accused person has no right to demand that the prosecution should communicate to him all the results, material or immaterial of the investigations made by the Procurator Fiscal under direction of the Crown Office. No doubt a very different question would arise, if it could be shown that the prosecution had betrayed its duty by insisting in a charge in the knowledge of the existence of reliable evidence proving the innocence of the person accused which it concealed from him. Such a proceeding would constitute a violation of every tradition observed in the Scottish Crown Office."

This tradition of fairness is preached from one Crown Office generation to the next and with that foundation it is hoped that the Scottish criminal system will continue to operate to the satisfaction of the Scottish public.

Crown Office
Parliament Square
Edinburgh
July 1978



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