

2014

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Shiels, R.S. (2014) 'The Structure of Authority and the Prosecution of Crime in the Sheriff Courts of Mid-Victorian Scotland', *Law, Crime and History*, 4(3), pp. 56-73. Available at:  
<https://pearl.plymouth.ac.uk/handle/10026.1/8907>  
<http://hdl.handle.net/10026.1/8907>

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SOLON Law, Crime and History  
University of Plymouth

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# THE STRUCTURE OF AUTHORITY AND THE PROSECUTION OF CRIME IN THE SHERIFF COURTS OF MID-VICTORIAN SCOTLAND

*Robert S. Shiels\**

## Abstract

The law of Scotland has barely recognised the existence of private prosecutors and the preferred policy has been prosecution by a public prosecutor in the public interest. The legal persona engaged in public prosecution in the Sheriff Court has been traditionally the Procurator Fiscal. The move towards the modern system of public prosecution necessarily required legislative authority from the Imperial Parliament. The Sheriff Court reform in 1877 altered the dynamics of judicial oversight of the local public prosecutor and revealed something of the structure of authority. Elements of the concepts of the inquisitorial and accusatorial influence may be seen in these changes.

**Keywords:** Scotland, local public prosecutor, accountability, Sheriff Court Act 1877, reform by Imperial Parliament

## Introduction

One mid-Victorian commentator compared contemporary criminal courts and contrasted the approach in England and Scotland: it was at most either: 'litigation or inquisition'.<sup>1</sup> Reform of Scots law seemed to accentuate rather than reconcile differences between the legal systems of the United Kingdom.<sup>2</sup> The Sheriff Court (Scotland) Act 1877 took effect on 1 October 1877 and made provision for the appointment and removal of Procurators Fiscal as local public prosecutor in the Sheriff Court. The Act has been mentioned in a historical survey but with little discussion.<sup>3</sup> Perhaps contemporaries were unsure of its true importance: one Member of Parliament said in the debate on the Bill that the indifference of the Government then to Scottish business was such that the proposed legislation might

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<sup>1</sup> Anonymous, 'The City of Glasgow Bank Failure and Trial', *British Quarterly Review*, 70 (1879) 157-177, p.165

<sup>2</sup> RC, 'On the Investigation of Crime in Scotland', (1864) 8 *Journal of Jurisprudence* 473.

<sup>3</sup> D.M. Walker, *A Legal History of Scotland: The Nineteenth Century* (Edinburgh: Butterworths Lexis Nexis, 2001), vol.6, p.358.

more properly be entitled: 'A Bill to relieve Her Majesty's Government from the imputation of doing nothing for Scotland'.<sup>4</sup>

Several reasons justify revisiting the reform: first, the development of the common law does not take place in a vacuum. Any analysis of the law in practice must offer something about the balance of power and authority *ex officio* amongst the office-holders.<sup>5</sup> In this respect 'authority' is not merely an abstract concept but the actions of participants in the administration of criminal justice.<sup>6</sup> Secondly, the balance of power and authority varies over time and note ought to be taken of that and the inherent changes.<sup>7</sup> Finally, criminal trials are never exclusively about the identification and punishment of wrongdoers; they are also about the relation between the legal and social order.<sup>8</sup>

The available evidence suggests that the reform of 1877 implemented an intention to move authority for immediate judicial supervision of the local public prosecutor to centralised direction accountable to the Imperial Parliament. The 1877 Act may be considered to be a statement of constitutional principle in an era of incremental change. Taken together the context of these elements shape prospective attitudes to authority.<sup>9</sup> That context suggests a developing tendency to attain uniform policies through centralisation, an ordering of the participating agencies (a term taken at its widest) and preference for precise and rigid normative directives rather than more flexible standards.<sup>10</sup>

## 1 Prior to the Reform of 1877

There was in Scotland until 1877 comparatively weak central government in the sense that there was only a little local supervision of the decision-making capacity of the local public prosecutors. The Lord Advocate was the public prosecutor for

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<sup>4</sup> HC Deb, July 28, 1877, vol.236, c.108: that tetchiness followed from the Bill being called at very short notice for debate on a Saturday.

<sup>5</sup> In *Cadder v HM Advocate* (2011) UKSC 13, Lord Rodger of Earlsferry at pp.42-44, para[74]–[80], considered briefly the professional relationship between the Sheriff-Substitute and the Procurator Fiscal.

<sup>6</sup> D. Hay, *Property, Authority and the Criminal Law* in D. Hay *et al* (eds.) *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Peregrine Books, 1977) pp.52-53.

<sup>7</sup> P. Duff, 'Adversarial Ideology and Police Questioning after Charge', (2013) *Juridical Review* 1.

<sup>8</sup> L. Farmer, *Criminal Responsibility and the Proof of Guilt* in MD Dubber and L Farmer (eds.) *Modern Histories of Crime and Punishment* (Stanford University Press, 2007).

<sup>9</sup> M. Damaska, 'Structures of Authority and Comparative Criminal Procedure', *Yale Law Journal*, 84, 480-544, (1975), p.540.

<sup>10</sup> Damaska, 'Structures of Authority and Comparative Criminal Procedure', p.484.

Scotland and as Law Officer the principal legal adviser about Scots law to the British Government in London. The Lord Advocate was invariably a Member of Parliament. Operating at the national level the Lord Advocate was in no position to engage with local and unremarkable decisions unless some matter of principle became involved.

The broadly unrestrained exercise of discretion in local matters was in effect an evil to be tolerated until more precise guidelines, such as the Book of Regulations of 1868, were formulated and promulgated to Procurators Fiscal. Moreover, Lord Glencorse spoke then, justifying other reform, of it being a time of:

rapid movement in society. Transactions go on so much faster than they did; things are carried out so much more quickly; communication between one part of the country and another was so much more constant...<sup>11</sup>

Appeals were competent in some circumstances but calling up the prosecution's papers for an occasional prosecution, however, could not constitute meaningful review of past practice or general policy. In truth, there may not have been much that could be called general policy.

It has been suggested that not all Procurators Fiscal were qualified as lawyers.<sup>12</sup> The Procurator Fiscal on appointment held an office in the performance of which he owed a duty, not to a client, but to the Court, to the members of his own profession, and to the public interest. These suggest limitations on the discretion of Procurators Fiscal. There is a fine example of those limits: on questions of divergence between charges at the committal stage and the evidence that would support such charges it has been noted early in the nineteenth century that there were competent means of revising any over-enthusiastic, and therefore incorrect, selection of charges: 'the Sheriff might *control* [emphasis added] his Fiscal on such an occasion'.<sup>13</sup>

It may be deduced that, in an era of slow communications and comparatively long distances from minimal central authority, it was entirely possible that central government may have had little knowledge of local appointments.<sup>14</sup> Indeed a contemporary concern was the abolition of patronage in all forms since this was 'the

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<sup>11</sup> J. Crabb Watt, *John Inglis, Lord Justice General of Scotland: A Memoir*, (Edinburgh, W Green, 1893) p.56.

<sup>12</sup> A.V. Sheehan and DJ. Dickson, *Criminal Procedure* (Edinburgh: Lexis Nexis, 2<sup>nd</sup> edn 2003), 23, but the actual number of unqualified office-holders is uncertain as the legal profession had been reformed by the Law Agents (Scotland) Act 1873.

<sup>13</sup> D. Hume *Commentaries on the Law of Scotland Respecting Crime* (Edinburgh, Bell & Bradfute, 1844) vol.2, p.90.

<sup>14</sup> HC Deb, August 2, 1877, vol.236, c.352.

source of every evil'.<sup>15</sup> In attempting to discern the precise nature of the legal relationship between Sheriff and Procurator Fiscal it may be, at the very least, that *delectus personae* was a relevant consideration.<sup>16</sup> There was some indication of a general unease about the working relationship that might develop.<sup>17</sup> Nevertheless, the policy of the unreformed structure of authority seems, at least until the contrary is proved, to have been designed to maintain independent judicial supervision that in practice disallowed prosecutorial decisions based on the capricious attitudes of the private prosecutor as was apparently an acceptable norm elsewhere.<sup>18</sup>

Sheriffs were generally in practice as seniors at the Bar and also part-time appellate Judges with the first instance forensic duties delegated to Sheriffs-Substitute.<sup>19</sup> In 1878 there were 21 Sheriffs<sup>20</sup> and 47 Sheriff-Substitutes.<sup>21</sup> There were 58 County Procurators Fiscal<sup>22</sup> and 74 Justice of the Peace Procurators Fiscal.<sup>23</sup> The police were characterised by multiple jurisdictions and a lack of centralised control.<sup>24</sup> As late as 1889 nearly half of the forces had less than 20 officers and at the end of the century there were still 64 separate police forces in Scotland.<sup>25</sup>

By the mid-century, the view was that the Procurator Fiscal in the Sheriff Court was the officer of the Sheriff and the Procurator Fiscal was entirely under the control of the Sheriff.<sup>26</sup> Thus, on 6 March 1877 the Lord Advocate (Wm. Watson) was able to say in stark language in an answer to a Parliamentary Question, about some Procurators Fiscal charging fees for certain prosecutions and others not doing so:

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<sup>15</sup> O. MacDonagh, *Early Victorian Government, 1830-1870* (London: Weidenfeld and Nicolson, 1977) p.206.

<sup>16</sup> The practical arrangements ought not to be overlooked: in Sheriff Court Houses of the mid-Victorian era the Sheriff and the Procurator Fiscal probably had their own personal chambers in the same building, whereas the solicitors attending court may only have had use of a library or common room.

<sup>17</sup> RC, 'On the Investigation of Crime in Scotland', p.480.

<sup>18</sup> c.f. Hay, *Property, Authority and the Criminal Law*, pp.40-43.

<sup>19</sup> The modern terminology of Sheriff Principal and Sheriff, respectively, date from the Sheriff Courts (Scotland) Act 1971 s.4(1).

<sup>20</sup> *The Scottish Law List and Legal Directory for 1878*, (Edinburgh, Wm. Paterson, 1878) pp.353-4.

<sup>21</sup> *Ibid* pp.354-5, not counting the six 'Assistants' at Elgin, two 'Honorary Sheriff-Substitutes' at Banff and the one vacancy at Cromarty.

<sup>22</sup> *Ibid* pp.354-5, not counting the one 'Assistant' and the seven 'Deputes'.

<sup>23</sup> *Ibid* pp.363-5. The figures are probably not what they seem as some individuals held two appointments such as John Maclullich, who was both County and JP Procurator Fiscal at Inverary.

<sup>24</sup> D.G. Barrie, *Police in the Age of Improvement: Police Development and the Civil Tradition in Scotland, 1775-1865*, (Cullompton: Willan Publishing, 2008).

<sup>25</sup> Walker, *A Legal History of Scotland*, p.202.

<sup>26</sup> *Rose v Grant* (1853) 25 *Scottish Jurist* 535 per Lord Ivory, p.536.

The patronage of the office of Procurator Fiscal belongs to the Sheriff, and *in the event of disobedience of his orders* [emphasis added], whether the Procurator Fiscal likes them or not, he has the power of dismissing the Procurator Fiscal without explanation or apology.<sup>27</sup>

To state the matter another way: while the Lord Advocate was in virtual control of the Procurator Fiscal, in law the Procurator Fiscal remained an officer of the Sheriff who continued to be responsible for his selection, appointment and dismissal. The Lord Advocate, for the avoidance of doubt, had no control in law over a Sheriff especially as the latter since 1832 had held a commission *ad vitam aut culpam*<sup>28</sup> and from 1838 a Sheriff might be dismissed only by the Lord President and the Lord Justice Clerk.<sup>29</sup>

Consequently, if a Procurator Fiscal failed to perform his duties in a satisfactory manner, no real sanction was available to the Lord Advocate (or the Treasury) other than attempting to persuade the Sheriff to revoke the Procurator Fiscal's commission.<sup>30</sup> The supervisory power of the Sheriff over his own Procurator Fiscal was essentially one of an inherent authority to appoint, direct and remove. One can only speculate as to whether, and if so to what extent, the shrieval supervisory power included local policy or individual prosecutorial decisions.

The centrality of the Sheriff to operational efficiency, in law at least, ought not to be under-estimated. Section 15 of the Police (Scotland) Act 1857 provided:

The Constable acting under this Act shall, in addition to their ordinary duties, perform all such duties connected with the police in their respective counties as the Sheriff or the Justices of the Peace of the County may from time to time *direct and require* [emphasis added].<sup>31</sup>

Moreover, by s.78 of the same Act of 1857 it was provided that the word 'Sheriff' and the words 'the Sheriff' included Sheriff-Substitute as well as the Sheriff. Accordingly, the supervisory power of the Sheriff and the Sheriff-Substitute extended to such police as were available in his jurisdiction.

That supervisory power was not the only one that might competently be exercised by the Sheriffs as later by s.86 of the Burgh Police (Scotland) Act 1892:

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<sup>27</sup> HC vol.232, cc.1450-1.

<sup>28</sup> Walker, *A Legal History of Scotland: The Nineteenth Century*, vol.6, p.358.

<sup>29</sup> Sheriff Court (Scotland) Act 1838 s.3.

<sup>30</sup> *Stair Memorial Encyclopaedia* (Edinburgh: Lexis Nexis; 1989) vol.17 *Control and Removal from Office* para.535.

<sup>31</sup> The prosecutor and the police were then distinct, and that remains the position: *HM Advocate v Wright*, 2007 SCCR 258 per Lord MacFadyen p.268F, para.31.

the chief constable and constables shall obey the orders of the magistrates, and at all times afford their aid and assistance to the magistrates, and to all other judges and magistrates having jurisdiction within the burgh, in all matters relating to the preservation of peace and good order, the suppression of nuisance, and the removal of obstruction within the burgh.

The Sheriff-Substitute in the late Victorian era as tribunal of fact had in law a power to direct the local police, appoint and remove the local public prosecutor, and after 1887 enhanced powers to amend the charge on summary complaints or indictments before him to ensure the relevance of the evidence at trial.

## **2 A Contemporary Discussion**

Sheriff-Substitute Francis Russell in a talk to the Scottish Law Amendment Society in 1870 noted harshness in the application of Scottish criminal procedure when compared to England.<sup>32</sup> The problem of accountability was not irrelevant to the subject matter.<sup>33</sup> Reference was made to the comment of Lord Barcaple that the Procurator Fiscal was 'the hand of the Sheriff'. He referred to the duties of the Procurator Fiscal which included that of taking precognitions that is to say the interviewing of witnesses summoned to his office and the writing down of evidence in statement form.

Sheriff-Substitute Russell recalled that previously the Sheriff was always present at precognition, but for many years that practice had been almost uniformly otherwise. He thought that in the years prior to his talk the Sheriff of Zetland had in all cases personally taken the precognition. There was a contemporary report that the Sheriff at Cupar had attended all precognitions for serious cases: 'as a general rule, in all pleas of the Crown'.<sup>34</sup> He thought the practice of Sheriffs attending precognition had long been a general practice. The presence of the judge of fact at the taking of precognitions might mean that at trial he was better prepared although it was recognised that there was a danger in that early knowledge of jumping to conclusions.<sup>35</sup>

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<sup>32</sup> (1870) 14 *Journal of Jurisprudence* pp.259-260.

<sup>33</sup> *Ibid* pp.259, 260 and Lord Colonsay at p.261.

<sup>34</sup> *Ibid* pp.259, 263: c.f 'It very rarely happens that the Sheriff directed a prosecution and sat as Judge in a case': HC Deb, August 2, 1877, vol.236, c.353. Perhaps it was rare but it seemed to be procedure that was not then incompetent in law.

<sup>35</sup> *Ibid* pp.259, p.264.

### **Views of lawyers on the changes**

A Report of a Committee of the Faculty of Advocates detailed their view of the reforming Bill.<sup>36</sup> As to the appointment of the Procurator Fiscal the Committee believed that the proposed change was inexpedient. It was thought, but not unanimously, that under the existing system it was advisable that the Procurator Fiscal:

should be under the direction and control of the Sheriff on whom the responsibility of preventing and investigating crime ultimately rests. In cases of delicacy, or where prompt action is required, it is of benefit to the public interest that the Procurator Fiscal should be able to consult a superior authority upon the spot.<sup>37</sup>

The Committee thought that any change would 'tend to throw out of gear a system which has hitherto worked well and the efficiency of which has generally been acknowledged'.<sup>38</sup> A majority of the Committee was also concerned that if, as happened, patronage of the office of Procurator Fiscal were vested in the Government, the appointments would be liable to be influenced by political considerations, and would be conferred as the reward of party services.

On the other hand, the minority of the Committee think that the old theory-that the Sheriff should be both prosecutor and judge in criminal cases-was never sound in principle, and has been superseded in practice. They think that the Procurator Fiscal is now really under the orders of the Lord Advocate, and that to make his tenure of office no longer depend upon the Sheriff is merely to conform the law in that particular to modern usage.<sup>39</sup>

### **The reform**

One writer deplored the spirit of acrimony about the reforms 'in letters and leaders in the daily press; a matter like the present ought to be commented upon with calmness and impartiality, and party feeling above all should be laid aside'.<sup>40</sup> The comment in the House of Commons about the clause in the 1877 Bill dealing with the appointment of salaried Procurators Fiscal is instructive as a matter of constitutional law:<sup>41</sup>

The great safeguard against appointments being made improperly was that the officer of the Crown with whom the appointment rested should be responsible to the House.

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<sup>36</sup> (1877) 21 *Journal of Jurisprudence* 452

<sup>37</sup> *Ibid* p.453.

<sup>38</sup> *Ibid* p.453.

<sup>39</sup> *Ibid* p.454: no source of that 'old theory' is mentioned.

<sup>40</sup> *Ibid* p.453.

<sup>41</sup> HC Deb, August 2, 1877, vol.236, c.357.



The 1877 Act established authoritatively the independence *ex officio* of the Procurator Fiscal: by s.5 no person holding the *salaried* [emphasis added] office of Procurator Fiscal was removable from office, except by one of the Principal Secretaries of State, for inability or misbehaviour, after obtaining a report of the Lord President of the Court of Session and the Lord Justice Clerk. By s.6 the appointment of Procurator Fiscal was to be made by the Sheriff 'with the approval' of one of the Principal Secretaries of State.<sup>42</sup> New and existing appointments to the office of Procurator Fiscal could not be removed from office except in the manner provided for in the Act.

It remains a matter of conjecture now as to what was required to be done to come to the notice of the two most senior Judges in Scotland and, conjunctively, to be the subject of a report which it may be assumed was not a matter of inquiry that the Judges had undertaken *ex proprio motu*. Conversely, allowing a Procurator Fiscal a degree of latitude in the exercise of professional skill and judgment that an ordinarily competent public prosecutor might reasonably be expected to exercise suggests that the two most senior Judges in Scotland would report adversely only in the most extreme of circumstances. The security of tenure implicit on appointment was extensive, probably quasi-judicial in effect, and allowed the incumbent in practice a high degree of security from outside influence.

By s.7 it was restated as a matter of principle that no Sheriff had the power after the passing of the Act to nominate or appoint any person to perform the duties of Procurator Fiscal, but the rigidity of that rule was ameliorated by the additional point that it was lawful for a Procurator Fiscal with the leave of the Lord Advocate and the Sheriff expressed in writing to grant a deputation to one or more 'fit persons' to be named in such writing 'for whose acting he [the Procurator Fiscal] shall be responsible, to sign writs, to appear in Court, and to conduct prosecutions and inquiries in his name, and on his behalf'.<sup>43</sup> With a vacancy in the office of Procurator

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<sup>42</sup> Constitutional control was a notable contemporary development. The executive by means of extensive standing orders at this point was beginning to extend the means of majority control of the House of Commons. These powers were designed chiefly for the purpose of combating abuses that sprang up then: P. Fraser, 'The Growth of Ministerial Control in the Nineteenth Century House of Commons', *English Historical Review* (1960) 75 (296) 444-63 at p.445.

<sup>43</sup> This was a significant change and probably necessary by statute on account of the well-established principle of *delegata potestas non potest delegari* [a delegated power cannot be further delegated]. In short, the Sheriff-Substitute had delegated the investigative powers to his selected Procurator Fiscal but without statutory authority the Procurator Fiscal could not competently pass the work on to another.

Fiscal any Depute appointed in terms of s.7 could by the same provision discharge the office of Procurator Fiscal until the vacancy was filled.

### **3 The Changed Dynamics**

It is not difficult to see within the reform several themes that suggested a changed legal and political environment: perhaps the most obvious of these new ideas was the personal and Parliamentary accountability that followed the 1877 Act. The personal accountability arose by s.6 because the appointment of Procurator Fiscal to be made by the Sheriff was with the approval of one of the Principal Secretaries of State. That suggests some explanation for any particular appointment was required. Moreover, an appointment made the Secretary of State was a decision for which he was accountable to Parliament should any doubt arise from the actions or decisions of a Procurator Fiscal.

At the very least the payment by the Treasury of salaries to Procurators Fiscal required that there be some accountability.<sup>44</sup> Such payment was of course a clear indication of the use of lawyers and their directed application of the law as an instrument of government in the widest sense. Finally, Scotland was hardly an outpost of the Empire but there was still a need for London, albeit with a degree of political latitude, to be able to control what ultimately was the responsibility of the British Government.<sup>45</sup>

Lord Kilbrandon described the Sheriff-Substitute in unspecified earlier times as that both of 'executive examiner into criminal activities and also of judicial officer responsible for assembling and assessing the evidence against persons who are to be put on trial'.<sup>46</sup> The delegation of the latter task to the Procurator Fiscal was in essence to pass on the duties of initial investigation and the conduct of trials. That delegation could not be to an independent officer holder, given the retained power of the judiciary to appoint and dismiss the local public prosecutor at will.

It is not too outrageous a proposition to argue that the delegated investigations and the forensic duties were not adjudicated upon by the Sheriff but rather revised and approved or perhaps disapproved according to circumstances. The Sheriff could not

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<sup>44</sup> Anonymous, 'A Procurator Fiscal-What He Was, And Is And Will Be: Part X', (1877) 21 *Journal of Jurisprudence* 556-563, pp.557-8.

<sup>45</sup> G.H.L. Le May, *The Victorian Constitution*, (London, Duckworth, 1979) p.121.

<sup>46</sup> J.A. Coutts, *The Accused: A Comparative Study*, (London: Stevens: 1966) ch.4 *Scotland: Pre-trial Procedure*, p.67.

be said merely to be a revising lawyer as such but neither could he approach the Crown case as one alternative of two competing sides. The Procurator Fiscal both prior to the 1877 reforms and after until the 1907 reform was to some degree independent of the Bench and yet part of the judicial hierarchical structure.

What was the position in practice of a Procurator Fiscal? One Judge said, admittedly in a different legal context, that:

A man cannot serve two masters in this sense-that in the performance of the same act he is employed separately, both by A and by B. He may do so in this sense-that in the performance of a single act he is employed both by A and B jointly.<sup>47</sup>

A more nuanced explanation in the context of criminal procedure is available. Procurators Fiscal then: 'were serving two masters. They were appointed by the Sheriff, and had to take his directions in the investigation of crime. But the moment the prisoner was committed for trial, they [Procurators Fiscal] became the servants of the Lord Advocate, and had to take their directions from him'.<sup>48</sup> In short, in the investigation stage the Procurator Fiscal was required to follow the directions from the Sheriff but with a *prima facie* case the matter became the responsibility of the Lord Advocate to whom the Procurator Fiscal then was required to defer. These functions of the Procurator Fiscal were not necessarily inconsistent in principle or practice.

Two further points might usefully be added: first, if the Lord Advocate through Crown Counsel instructed trial on indictment in the Sheriff Court the matter in effect was remitted back to the Sheriff who had original responsibility. At least, it might be said, someone out of the immediate hierarchy had taken the decision, but in effect the investigation of an incident had been carried out by the judicial manager at the trial of the matter. Secondly, there has always been a skewed view of the true state of the system in judging it by the merits or the working of a system by indictment case. Even in the mid-Victorian era summary procedure was growing in importance and the close working relationship of the investigator and the fact finder remains a relevant albeit uncertain factor.

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<sup>47</sup> *North British Railway Company v Leadburn Railway Company and Waddell*, (1865) 3 *Macpherson* 340 per Lord Justice Clerk (Lord Glencorse) at p.345.

<sup>48</sup> HC Deb, July 28, 1877, vol.236, c.89.

However, with instructions competently issued by the Lord Advocate, there was at the very least a possibility that Procurators Fiscal were being compromised on conflicting views on the facts of specific circumstances. The attitude of the Sheriffs as judges at first instance and the Lord Advocate as the supreme public prosecutor could never be identical, especially with old authority that the public prosecutor could not be compelled to prosecute in any case.<sup>49</sup>

The reforms were not admired universally as nearly 20 years after the changes came into effect a note was published about the matter: 'Can a Sheriff Appoint an Interim Prosecutor?'<sup>50</sup> The intention of the reform in 1877 had been to restrict the previous authority to do so. The writer pointed to the High Court of Justiciary recently then reserving to itself the authority to appoint a Prosecutor: *Hill v Finlayson*.<sup>51</sup> Prior to the 1877 reforms a Sheriff, it was pointed out, might appoint as many Procurators Fiscal as he pleased and he could do so at any time: *Maclean v Cameron*<sup>52</sup> and *Macrae v Cooper*<sup>53</sup> It seemed to have been contemplated that in an emergency 'such as the sudden illness of the Prosecutor in the middle of a trial, and the absence or non-existence of his Depute, the Sheriff would be powerless to proceed.'<sup>54</sup>

The suggestion then was that the statute of 1877 ought to be amended to restore to the Sheriff the power possessed by Judges in Scotland. No miscarriage of justice was alleged in the discussion but the sentiment seemed to be that something *might* go wrong, and canvassing the point suggested that it was more than a possibility. While not said so explicitly, umbrage seems to have been taken to the Judges of the High Court of Justiciary retaining a power that was also exercisable by Justices of the Peace: the Sheriffs were alone in being curtailed by statute.

There was some prescience in the remarks of the Committee. By the Edwardian era the extent of political preference had reached embarrassing proportions.<sup>55</sup> These lists concluded with the remark from the anonymous compilers that:

we have not given the names of any Procurator Fiscal appointed in Scotland during the twenty years under consideration, as these appointments are not

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<sup>49</sup> J.H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, (Edinburgh, W Paterson, first edn, 1867), p.314.

<sup>50</sup> (1895-96) 3 *SLT* 27.

<sup>51</sup> (1883) 5 *Couper* 284.

<sup>52</sup> (1845) 2 *Broun* 657.

<sup>53</sup> (1884) 5 *Couper* 657.

<sup>54</sup> (1895-96) 3 *S.L.T.* 27.

<sup>55</sup> Anonymous, 'Twenty Years of Legal and Official Patronage', (1906) 22 *Scottish Law Review* 4, p.37.

always political, being made by the Sheriff Principal with the approval of the Secretary for Scotland, which is never withheld.<sup>56</sup>

Why that generally non-political status had developed is difficult to explain easily but it may be that the financial position was a deciding factor. In the debate in the House of Commons on 27 July 1877 the Government confirmed that there would be no superannuation allowance for Procurators Fiscal.<sup>57</sup> That decision, it may be suggested, implied an intention not to add the many lawyers employed as local public prosecutors in Scotland to Treasury payrolls. The omission became a contentious issue that took 50 years to be resolved, with the passing of the Sheriff Court and Legal Officers (Scotland) Act 1927, and even then not satisfactorily.

By 1877 the local public prosecutor was an identifiable officer in the Scottish legal system, apart from but not wholly independent of the local bench. It was a stable occupation and not necessarily dependent on variations of trade. The modernised system introduced by the 1877 Act was in place for 30 years. The Liberal Government that entered office at the end of 1905 did so, however, without a legislative plan: the reforms that emerged reflected initiatives taken by individual ministers and the pressure exerted through the party itself.<sup>58</sup>

The Sheriff Courts (Scotland) Act 1907 by s.22 provided that the Lord Advocate alone could appoint the Procurators Fiscal for the Sheriff Court and by that single brief section it was assured that the local public prosecutor was independent of the local judiciary. Central decision making as to appointment suggested uniformity and thereafter parliamentary accountability. The balancing factor was the statutory provision protecting a Procurator Fiscal from arbitrary removal.<sup>59</sup> At the very least, these changes seem to suggest a higher degree of professionalization.<sup>60</sup>

The 1877 Act probably enhanced the office of Procurator Fiscal as the new appointees under the Act could say that they had executive approval. The legislative changes could not be tolerated politically if inconsistent with the Imperial model: a wide margin of appreciation was allowed by political managers but they knew limits

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<sup>56</sup> (1906) 22 *Scottish Law Review* 37, p.43.

<sup>57</sup> HC vol.236 col.11.

<sup>58</sup> M. Pugh, *The Triumph of the New Liberalism: 1899-1914*, in R. Ingram and D. Brock (eds.) *Peace, Reform and Liberation: A History of Liberal Politics in Britain, 1679-2011* (London: Biteback Publishing, 2011) pp.156-7.

<sup>59</sup> Sheriff Court and Legal Officers (Scotland) Act 1927, s.1.

<sup>60</sup> L. Farmer, *Criminal Law, Tradition and Legal Order*, Cambridge University Press, (1997) p.85.

when they saw them. What was the structure of authority and criminal business in the Sheriff Court of late-Victorian Scotland? To put the question another way: how was the process of investigating and discovering the facts and the fact-finding duties organised in order to determine or adjudicate disputes?

First, the existence of the close professional relationship between the Sheriff and the Procurator Fiscal in the Sheriff Court meant that in practice the local empire had two emperors: one senior to the other and each watching but dependent on the other. It goes some way to explain the privileged and almost protected position of the local public prosecutor appearing for the public interest.<sup>61</sup> It may be that in Scotland as has been suggested of England that there was a ruling class that controlled an institution like the law.<sup>62</sup> The difference was, however, that the reform of 1877 implied the development of a degree of professionalism. The authority in the Sheriff Courts of Scotland began to be exercised by lawyers who were accountable, amongst each other and to the Imperial Parliament.<sup>63</sup>

Secondly, the inter-dependence of the Sheriff and the Procurator Fiscal identified the place of authority and emphasised a hierarchical organisation which tended to support or promotes certainty of decision making and uniform policies.<sup>64</sup> The judicial hierarchy was delineated precisely with in ascending order Sheriff-Substitute, Sheriff and Senator of the College of Justice.<sup>65</sup> Of course Sheriffs and the their Procurators Fiscal were required to work together to apply the law, but the implied answerability of the Procurator Fiscal to the Sheriff in addition to the directions in the Book of Regulations necessitated a reduction, or a real possibility of a reduction, of any residual discretion that a Procurator Fiscal might contemplate. Even that limited official discretion of the local public prosecutor while it remained unchecked made for a residual degree of predictability of outcome difficult.<sup>66</sup>

Finally, the 1877 Act may explain how little intellectual or principled opposition to the terms was directed at the Criminal Procedure (Scotland) Act 1887. That Act makes provision for implied conditions that prevent an accused avoiding the consequences

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<sup>61</sup> R.S. Shiels, 'The civil liability of the public prosecutor', 2012 *SLT* (News) 209.

<sup>62</sup> Hay, *Property, Authority and the Criminal Law*, p.61.

<sup>63</sup> Hay, *Property, Authority and the Criminal Law*, argues that in England the 'familiar constellation' of the monarchy, aristocracy, the gentry and, to a lesser extent, the great merchants controlled English criminal law.

<sup>64</sup> Damaska, 'Structures of Authority and Comparative Criminal Procedure', p.484.

<sup>65</sup> *Ibid* p.498.

<sup>66</sup> *Ibid* p.485.

of his or her actions on technical grounds. The charge might either have implied conditions that catch the criminal behaviour or the charge might be amended to the same effect.<sup>67</sup> Provided a Procurator Fiscal spotted a change, or presumably noticed a judicial hint, and moved quickly enough to take advantage in law of matters at proof being different from precognition then an appropriate motion saved the prosecution. Others might in their systems have seen a criminal prosecution as litigation amounting to a two-party contest but arrangements suggest that Scots lawyers saw a prosecution as an official inquiry.

#### 4 Concluding remarks

The Sheriff Court (Scotland) Act 1877 became effective at the time that the separation of the functions of 'judging' and 'prosecuting' was under general consideration elsewhere in Europe.<sup>68</sup> The location of authority is important in the context of seeking to understand the workings and perception of a system of administering criminal justice.<sup>69</sup> Sheriffs who appointed their own Procurators Fiscal were hardly creating a diarchy but the inter-dependence may in practice have constituted a system of checks and balances by which one would mitigate any extremes of another.

At the very least, the reform of 1877 suggests a development of the responsibility for governing the innovating forces of Victorian society between central and local, and public and private elements.<sup>70</sup> The Sheriff Court was being modernised with its own legislation<sup>71</sup> and yet it seems strange that the Imperial Parliament should find time to pass the Act when so many other matters were the subject of contemporary grievance.<sup>72</sup> Perhaps the new legislation merely reflected the growing tendency for centralisation and accountability that was developing for Scotland.<sup>73</sup>

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<sup>67</sup> Various latitudes, e.g., are allowed in ss.10-15 of the 1887 Act for indictments and are extended to summary complaints by s.71 of the same Act. These were concessions to the onerous task of proof.

<sup>68</sup> S.J. Summers, *Fair Trials*, (Oxford and Portland, Oregon: Hart, 2007) pp.31-34.

<sup>69</sup> That point remains valid today: 'The Procurator Fiscal directs criminal investigations and not the police' *Johnson and Allison v. HM Advocate*, 2006 SCCR 236 per Lord Justice Clerk (Gill) at p.259, para.[117].

<sup>70</sup> W.C. Lubenow, *The Politics of Governmental Growth: Early Victorian Attitudes Towards State Intervention, 1833-1848*. (Newton Abbott: David & Charles, 1971) p.180.

<sup>71</sup> See Sheriff Courts (Scotland) Act 1876 which 'altered and amended' the administration of civil causes in the 'ordinary Sheriff Courts' in Scotland.

<sup>72</sup> H.J. Hanham, *Mid-Century Scottish Nationalism: Romantic and Radical*, in R Robson (Ed.) *Ideas and Institutions of Victorian Britain*, (London: G Bell & Sons; 1967), 164-5.

<sup>73</sup> H.J. Hanham, 'The Creation of the Scottish Office, 1881-1887', 1965 *Juridical Review* 205.

It is of relevance then that Sheriff-Substitute Russell opined: We have a thoroughly organised, and to some extent a *centralised* [emphasis in original] system'.<sup>74</sup> Moreover, there was criticism of the confidential investigations in Scotland, the 'resolution to prosecute...formed after a private inquiry',<sup>75</sup> in contrast to the open committal hearings in England. These comments are instructive in the context of the conventional contrast in criminal procedure between the system that emphasises the adversarial (or accusatorial) aspects of the Anglo-American process, and the non-adversarial (or inquisitorial) character of the continental mode of proceedings.<sup>76</sup> An alternative mode of analysis suggested has been to replace the conventional approach with a set of organising concepts.<sup>77</sup> By that analysis greater insight may be gained into the larger divergences in the conception of the proper organisation of authority that was characteristic of the Continent and the English-speaking world.

The system of values underlying the hierarchical model places a high premium on certainty of decision-making.<sup>78</sup> In 1868 Procurators Fiscal had received from the Crown Office a Book of Regulations, a work that might reasonably be assessed as the procedural matrix then for the system of public prosecution in Scotland. There had been individual instructions earlier but the bound book of printed instructions appears to have been the most comprehensive then produced.<sup>79</sup> The Book of Regulations was evidence of an evolving, and perhaps advanced, concentration of authority.<sup>80</sup> Further, certainty in decision-making requires that uniform policies be developed. This has been described as centripetal, namely tending towards a centre and leads quite naturally to centralisation of authority.<sup>81</sup> Incumbents of authority positions have no autonomous powers as authority is only delegated to them and its exercise must be closely watched. It is clear, and was even so in 1877, that all Procurators Fiscal in the Sheriff Court were under the general supervision of Crown

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<sup>74</sup> (1870) 14 *Journal of Jurisprudence* 259, p.261.

<sup>75</sup> W. Watson, MP and Lord Advocate [later Lord Watson of Thankerton] 'The Repression of Crime' Transactions of the National Association for the Promotion of Social Sciences; Aberdeen meeting, 1877 (London: Longman, Green & Co, 1878) pp.44-55, 50.

<sup>76</sup> For helpful summaries see: P. Duff, 'Intermediate Diets and the Agreement of Evidence: A Move towards an Inquisitorial Culture' 1998 *Juridical Review* pp.350-1; and P. Duff, 'Changing Conceptions of the Scottish Criminal Trial: The Duty to agree Uncontroversial Evidence' in A Duff *et al The Trial on Trial* (Oxford: Hart; 2004) pp.30-31.

<sup>77</sup> Damaska, 'Structures of Authority and Comparative Criminal Procedure', p. 481.

<sup>78</sup> *Ibid* p.483.

<sup>79</sup> Copies may be consulted in the National Records of Scotland at AD: 5/11.

<sup>80</sup> Damaska, 'Structures of Authority and Comparative Criminal Procedure' p.539.

<sup>81</sup> *Ibid* p.484.



Counsel in Crown Office in Edinburgh to whom Procurators Fiscal were answerable for all actions and decisions.<sup>82</sup>

The nature of the business in practice may itself have induced a general uniformity of purpose amongst Procurators Fiscal merely by their all performing the same tasks. The arrival in offices of a new Book of Regulations probably signified a milestone that constituted real cohesion. The existing authority of Crown Office was enhanced by this event. It is not difficult to see probable reasoning: a hierarchical model sought to guide its officials by suggesting approaches for anticipated circumstances.<sup>83</sup>

However, it may be suggested that the statutory change in 1877 of the authority of a Sheriff to appoint the Procurator Fiscal for the public interest without reference to anyone else was in effect a diminution of judicial control over the fact-finding and fact-adducing phases of the criminal process. In order to obtain the approval of a Principal Secretary of State something, but perhaps not much, by way of justification would be necessary.<sup>84</sup>

Further, no Procurator Fiscal could be imposed on a Sheriff as the Act of 1877 merely required the Sheriff to obtain approval, on unspecified grounds, for the preferred appointee. Such permissive legislation was entirely characteristic of the measures of the contemporary government.<sup>85</sup> The exercise of authority under the new legislation left a very limited role for the State. Reform of the structure of the legal system as well as the law was in any event necessary as the inexorable growth of summary offences meant that the costs of proof of criminal responsibility were seen as disproportionate to the multiplying regulatory functions that the criminal law was being required to perform.<sup>86</sup>

The reform in the 1877 Act separated any concentration of power albeit with residual co-dependence between Sheriff-Substitute and Procurator Fiscal. The Procurator Fiscal could with security of tenure set down all the business that a Sheriff-Substitute

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<sup>82</sup> R.S. Shiels, 'Crown Counsel', in J. Chalmers, *et al* (eds.) *Essays in Criminal Law in Honour of Sir Gerald Gordon*, (Edinburgh University Press, 2010).

<sup>83</sup> Damaska, 'Structures of Authority and Comparative Criminal Procedure', p.484-5.

<sup>84</sup> e.g. 'I have known professionally the preferred appointee for some years and I am confident of his ability to meet the requirements of the public office for which I recommend him'.

<sup>85</sup> R. Harris, *The Conservatives: A History*, (London: Bantam Press, 2011) p.147.

<sup>86</sup> N. Lacey, *Character, Capacity and Outcome*, in MD. Dubber and L. Farmer (eds.) *Modern Histories of Crime and Punishment* (Stanford University Press, 2007) at p.22.

was required to adjudicate upon.<sup>87</sup> The Crown by the hands of the Procurator Fiscal exercised in practice subject to the supervision Crown Counsel a principle of expediency that allowed discretion to decline to prosecute or to withdraw from judicial consideration a particular case.<sup>88</sup>

It remains doubtful if Sheriffs, or any other group, in the Scottish legal system of the mid- to late-Victorian era were pursuing, knowingly, an adversarial ideology as such. On the contrary, the system indicated markers of a hierarchical system. Assessing the true nature of what might now be called the criminal justice system in 1877 is difficult: 'Adversarial procedure entrusts the responsibility for gathering and presenting the evidence upon which accurate adjudication depends to partisans whose interests is in winning, not in truth.'<sup>89</sup> Under the Scottish system Sheriffs entrusted the responsibility for gathering and presenting the evidence upon which accurate adjudication depended to particular local solicitors. What constituted 'winning' in the forensic context was and remains an elusive concept.

The preferred system of law when introducing British governance to new territorial acquisitions in the Imperial age was English law, which was doubtless part of what has been described as the 'information milieu' of imperial policy-makers.<sup>90</sup> Whether the Scottish legal system before or after the reform of 1877 is labelled 'inquisitorial' or in any other way hardly matters but it was not predicated on any theoretical and meaningful right in law of the citizen to take matters into their own hands and prosecute at will. The public prosecutor was the key official and any French influence was not a matter of regret.<sup>91</sup>

Scotland in the mid-Victorian era came to be subject increasingly to the constitutional discipline of Westminster after generations of minimal central control. Political accountability was increasingly necessary and political cohesion required a focus of loyalty: constitutional monarchy was acceptable pragmatically but in 1877 the personal future of Queen Victoria was uncertain and increasingly democratic ideas introduced other considerations. Lawyers in Scotland were probably the principal

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<sup>87</sup> Damaska, 'Structures of Authority and Comparative Criminal Procedure' p.535.

<sup>88</sup> *Ibid* p.503.

<sup>89</sup> J.H. Langbein *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005) p.332.

<sup>90</sup> J. Darwin 'Imperialism and the Victorians: The Dynamics of Territorial Expansion' 447 *English Historical Review* (1997) 614, p. 642.

<sup>91</sup> A.W. Renton, 'The Influence of France on Scottish Economical and Legal Ideas' (1883) 27 *Journal of Jurisprudence* 449, p. 450.

group with whom central British administrators could collaborate meaningfully as the local gatekeepers.<sup>92</sup>

Politically, in the 1860s the nations of the United Kingdom were still drawing together, and progressive people then favoured amalgamating smaller states into larger ones.<sup>93</sup> The Sheriff Court (Scotland) Act 1877 consolidated, that is to say introduced, a degree of parliamentary supervision. Such accountability went somewhat to stifling any developing enthusiasm amongst Scots lawyers for, or subliminal drift towards, the conceptual basis of continental criminal procedure. That would have been almost certainly too inconsistent with the preferred British model. This was the period in the nineteenth century of a general feeling in the Imperial Parliament of fear of Continental criminal jurisprudence.<sup>94</sup> There remained also a concern for the potential abuse in the office of public prosecutor.<sup>95</sup>

## **Conclusion**

Adversarial or inquisitorial systems are still discussed in the modern era as structural models or arrangements for prosecution.<sup>96</sup> It is suggested, however, that a better lens for an analysis of the appointment and accountability of a Procurator Fiscal in the Sheriff Court are the comparative hierarchical or co-ordinate models because of the subtlety of criminal procedures. The slow and incremental changes, such as that in 1877, were not evidence of the unequivocal existence of either an adversarial system or, separately, an inquisitorial system but rather one which in practice demonstrated many varied jurisprudential influences.

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<sup>92</sup> J. Darwin, *Unfinished Empire: The Global Expansion of Britain*, (London: Allen Lane, 2012) p.295.

<sup>93</sup> B. Harrison, *The Transformation of British Politics, 1860-1995*, (Oxford: Oxford University Press, 1996) pp.16-7.

<sup>94</sup> P.B. Kurland and D.M. Waters, 'Public Prosecutions in England, 1854-1979', (1959) 9 *Duke Law Journal*, 493, p.494.

<sup>95</sup> *Ibid* pp.561-1.

<sup>96</sup> e.g. Lord Bony, 'Post-Conflict Battlefield' 2007 *Juridical Review* 103, pp.130-133.