Basic Issues of Sudanese Pre-Trial Criminal Procedure in the Light of English, Scottish and American Practice.

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### List of Abbreviations

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<tr>
<td>All E.R.:</td>
<td>All England Reports.</td>
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<tr>
<td>British J. of Crim.:</td>
<td>British Journal of Criminology.</td>
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<td>Calif.L.Rev.:</td>
<td>California Law Review.</td>
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<td>Colum.L.Rev.:</td>
<td>Columbia Law Review.</td>
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<td>Corn.L.Rev.:</td>
<td>Cornell Law Review.</td>
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<td>Cox's C.C.:</td>
<td>Cox's Criminal Law Cases.</td>
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<td>Cr.App.R.:</td>
<td>Criminal Appeal Reports.</td>
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<td>Crim.L.Rev.:</td>
<td>Criminal Law Review.</td>
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<tr>
<td>Crim.L.Q.:</td>
<td>Criminal Law Quarterly.</td>
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De Paul L. Rev.: De Paul Law Review.
E.R.: English Reports.
Evolution: The Evolution of the Judicial System in the Sudan (Arabic).
Inter. & Comp. L.Q.: International and Comparative Law Quarterly.
Iowa L. Rev.: Iowa Law Review.
J.C.: Session Cases.
J. of the P.T. of Law: Journal of the Public Teachers of Law.
K.B.: Law Reports, King's Bench Division.
L.Q. Rev.: Law Quarterly Review.
Louisiana L. Rev.: Louisiana Law Review.
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<tr>
<td>Minn.L.Rev.</td>
<td>Minnesota Law Review</td>
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<td>M.L.Rev.</td>
<td>Modern Law Review</td>
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<td>New L.J.</td>
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<tr>
<td>N.I.L.Q.</td>
<td>Northern Ireland Law Quarterly</td>
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<td>Northwestern University Law Review</td>
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<td>Law Reports, Queen's Bench Division</td>
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<td>Rutgers L.Rev.</td>
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<tr>
<td>S.L.T.</td>
<td>Scots Law Times</td>
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<td>SL:</td>
<td>Sudanese Pounds</td>
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<td>Sudanese Civil Law</td>
<td>Sudanese Civil Law, its History and Characteristics (Arabic).</td>
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<tr>
<td>S.L.J.R.</td>
<td>Sudan Law Journal and Reports</td>
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<td>S.L.R. Crim. C.</td>
<td>Sudan Law Reports, Criminal Cases</td>
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<tr>
<td>Sup.Ct.Rev.</td>
<td>Supreme Court Review</td>
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<tr>
<td>Tul.L.Rev.</td>
<td>Tulane Law Review</td>
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<tr>
<td>Tulsa L.J.</td>
<td>Tulsa Law Journal</td>
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<tr>
<td>Texas Tech.L.Rev.</td>
<td>Texas Tech Law Review</td>
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U.Cinn.L.Rev.: University of Cincinnati Law Review.
Utah L.Rev.: Utah Law Review.
Wis.L.Rev.: Wisconsin Law Review.
Introduction

This thesis is basically a study of Sudanese criminal procedure. But as this aspect of Sudanese law is the least developed of an under-developed legal system, the issues are discussed against the background of the practice in three jurisdictions: England, Scotland and the United States. It will be useful to begin by outlining some of the considerations and limitations that influenced the scope and general direction of this study. A few remarks will then be made on the basic dilemma of criminal procedure and how it manifests itself in the Sudanese context in relation to some of the issues discussed in the following chapters. Finally, a brief outline or summary of the work in general will be given.

As will be readily appreciated, this work is rather too long. This is so despite the efforts of the author to contain it as far as possible. Due to the fact that there is no major work on Sudanese criminal procedure, the basic issues had to be considered in much more detail than would have otherwise been necessary. Concern with the reasonable length of the completed work, however, necessitated the postponement of the treatment of some important problems of criminal procedure - from the pre-trial as well as the trial stages. The two stages are obviously closely linked together in such a way that the consideration of each in isolation from the other will produce a distorted and artificial picture. In fact, the criminal process as a whole must be considered in the wider context of the social and political conditions pertaining in the given country if final and valid conclusions are to be drawn. As it is, the present work had
to be limited to some problems of pre-trial procedure to the exclusion
of other relevant and important issues of criminal procedure and evidence.

Even with respect to the issues actually discussed in the present
work, limitations of time, space and access to sources affected the scope
and depth of the treatment of relevant problems. As will be shown in
the first chapter, and pointed out from time to time in the rest of the
chapters, there is very little Sudanese material to be used in discussion
and analysis. The courts usually manage to avoid procedural issues
altogether; consequently, large areas of basic criminal procedure are
regulated only by provisions of the Code of Criminal Procedure. Most
of the cases actually referred to are unreported because systematic law
reporting is a recent phenomenon in the Sudan. The poor quality of the
available reports and records is another problem which frustrates any
attempt to arrive at positive statements of the law or final conclusions
on its suitability or future development. Finally, the fact that this
work has been pursued at a foreign university severely restricted access
to Sudanese sources. This meant that, apart from a period of four months
of research in the Sudan, there has been no opportunity to trace or check
legislation, cases or other relevant material that might have clarified
the position on one point or another.

Subject to all these limitations, it is sincerely hoped that this
study will assist in breaking the vicious circle of the lack of legal
writing on Sudanese law, especially in the field of criminal procedure,
and thereby contribute in its development and reform.
If one is to anticipate the basic conclusion of this study, it is that there are no short and simple answers to the problems of criminal procedure. This is mainly because "the most important single generalization that can be made ... about any civilized criminal procedure is that its ultimate ends are dual and conflicting. It must be designed, from inception to end, to acquit the innocent as readily, at least, as to convict the guilty... The dilemma consists in the fact that the easier it is made to prove guilt, the more difficult does it become to establish innocence."\(^1\) Moreover, not only must the criminal process aim at the prompt acquittal of the innocent and the prompt conviction of the guilty, but it must also accomplish these aims with a minimal disruption of basic human values.\(^2\)

It has been said that "the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry. There have never been more determined law enforcers than Nazi Germany or the Soviets".\(^3\) This may be true, but the "degree of liberty experienced by the great body" of a country's

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citizenry is not only liberty from oppressive methods of law enforcement and excessive police powers but also liberty from fear of violation of the person and property by criminal activity. Such is the dilemma of criminal procedure, especially at the pre-trial stage, that it has to maintain a delicate balance of powers and their exercise in order not only to maximize the efficiency of the system in convicting the guilty while at the same time minimizing the risk of convicting the innocent, but also to do so with all due regard to the dignity and integrity of the individual, whether guilty or innocent.

As I shall attempt to show in the following chapters, this basic dilemma - the need to balance conflicting interests - manifests itself in relation to all police powers and judicial processes. To take the power of arrest as an example, the police must be given the necessary powers to apprehend offenders and bring them to the courts for their liability to be determined and for the proper sentence to be passed. But how is the policeman to tell the difference in the confused and often dangerous encounter with the suspect? If the police powers of arrest are too narrow the criminal may get away, if they are too wide the innocent citizen may suffer. In an effective and fair system the proper balance must be found and maintained not only in the formal provisions for the powers of arrest, but also in their exercise.
The human factor is the most problematic of all, because no matter how comprehensive and well-balanced the legal framework may be, the wrong approach or attitude of the person charged with its enforcement can defeat the whole purpose. The right kind of enforcement personnel is not only a function of initial recruitment and training, but also one of continuous supervision and control. These are not exclusively specialist functions to be performed by designated officials; it is the duty of everyone to guard jealously the personal liberty and privacy of everyone else because that is the best way of guarding his own. To quote an American author:

"It may be an overstatement to draw a parable with a police state from not long ago, but it should serve as a warning to those who are indifferent to unchecked police power to say: First they came for the Communists; I am not a Communist, so I didn't care. Next, they came for the trade unionists; I am not a trade unionist, so I didn't care. Then, they came for the Jews; I am not a Jew, so I didn't care. Then, they came for the Catholics; I am not a Catholic, so I didn't care. Today, they came for me."

This work may be generally described as follows: After a brief historical survey of the arrangements made for the administration of justice prior to the Anglo-Egyptian Condominium, the first chapter proceeds to trace the origins and development of the present system of criminal procedure.

The rest of the chapter is devoted to the general description of the present system—constitution and powers of the criminal courts, investigation of offences, the various stages in the procedure leading up to and including the trial and post-trial stages—as a prelude to the detailed discussion of the specific issues in the following chapters.

Chapter 2 is concerned with arrest and detention in the criminal process. After dealing with some of the definitional problems of arrest, the chapter goes on to discuss the various powers of arrest, and also post-arrest procedure. The consequences of unlawful arrest are then considered in some detail. They are used to illustrate the operation and limitations of the traditional remedies against police misconduct. The question of detention without arrest—the need to provide for the power and its implications—is treated at the end of this chapter.

Chapter 3 deals with the problems of pre-trial release. Besides setting out the practice as well as the thinking on pre-trial release in the three jurisdictions used in this study for comparison, the chapter also deals with pre-trial custody in the Sudan and reflects on the quality of the release and custody decision-making process.

Search and seizure is the subject of the fourth chapter. After the comparative analysis of the powers of search and seizure and a discussion of the practical problems of effecting a search, the chapter turns to consider in detail the exclusionary rule as a remedy for unlawful search and seizure. Though the traditional remedies of civil and criminal
liability and disciplinary action may be available to the victim of unlawful search, the exclusion of the illegally obtained "real" evidence is the remedy most closely associated with this type of police misconduct.

The safeguards against the abuse of the police interrogation powers enforced by the various relevant jurisdictions are reviewed in chapter 5. There follows a special treatment of the voluntariness requirement, again as the remedy peculiar to unlawful interrogation. A brief reference is also made to the application of the direct or traditional remedies in relation to interrogation.

Chapter 6 is devoted to the somewhat topical subject of eye-witness identification - or rather misidentification - of the accused as the culprit. The incidence and causes of misidentification are considered first, and are then followed by a review of the devices employed in the various jurisdictions under study to reduce the risk of mistaken identification.

There is then chapter 7, a short chapter on the problems of pre-trial discovery in criminal cases, which again reviews the practice in the various jurisdictions before turning to consider the issues in the Sudanese context.

Finally, chapter 8 attempts to ascertain and assess the role played by the magistrate in the Sudanese criminal process. In view of the degree of his actual involvement and in the light of such considerations as the lack of legal advice and representation, the chapter explores the possibilities of using this somewhat peculiar feature of Sudanese criminal procedure to resolve some of the problems raised in previous chapters.
Chapter 1

Criminal Law Enforcement in the Sudan:
Development and Current Practice

A. Origins and Sources of Criminal Practice in the Sudan

The Sudan, a vast country of approximately one million square miles, is a political rather than an ethnic unit. Beside the Arab tribes, which are not as homogeneous as their common origin may suggest, there are numerous non-Arab tribes of several racial and linguistic families.1 In any description of the population one is reduced to such generalisations as "predominantly Arab and entirely Islamic in the north, and predominantly negroid and pagan in the south, but there are so many exceptions and qualifications..."2

The country's climate and vegetation, basically desert in the north and tropical and equatorial in the south, is generally on the harsher and poorer side.3

The vastness of the country and the harshness of its climate and living conditions together with the diversity of its population were always significant factors in its administration throughout its history.

1. According to the First Population Census of the Sudan, 1955/1956, 51% of the population speak Arabic though only 40% are of Arab origins. There are 572 tribes. 61% of the population are Muslim, the bulk of the rest believe in various indigenous religions.


Its isolation since ancient times and the marked absence of external influence are largely due to these factors. Its highly developed and universal tribal structure always suggested to its rulers the wisdom of allowing a high degree of tribal and local independence within the larger political structure. This was more recently rationalized and developed into a positive policy that thrived during the last years of the Anglo-Egyptian Condominium.

The country, with more or less its present political boundaries, has known political unity only since the Turco-Egyptian conquest of 1821. Prior to that date it was ruled by several sultans and sheikhs, some owing some sort of allegiance to others in exchange for security and protection.

After 1821, however, the country experienced three different administrations before it came into its present sovereign status. These were: the Turco-Egyptian administration of 1821-1884, the Mahdist


6. Prior to 1821 "the country was divided into a number of Kingdoms and Sultanates which occasionally fought for supremacy and some of which were unified at various periods of history by the efforts of a national leader or an external conqueror". Zaki Mustafa, The Common Law in the Sudan (Oxford, Clarendon Press, 1971), 33.
State of 1884-1898 and the Anglo-Egyptian Condominium of 1898-1956. Each one, however, was influenced, whether positively or negatively, by its predecessor. In the field of the administration of justice, each regime was limited by the country and its people to which they responded in largely different, though in some respects similar, ways.

(1) The Pre-Anglo-Egyptian Condominium Period:

The present official system for the administration of justice has its origins abroad and not in the pre-existing legal order. A brief outline of the previous systems may bring out the contrast and help in understanding the present regime in its historical and social contexts.

(i) The Muslim Sultanates:

Islam came into the Sudan not by conquest, as it did in Egypt and north Africa, but by the gradual infiltration of Muslim tribes, waves of migration, mainly from Egypt and north Africa, reinforced by the influx of jurists and teachers who followed. The Sultanates and Sheikhdoms that were established throughout the country were not states in the modern sense of the term. The Fung Sultanate, the most

7. As opposed to the regimes for the customary administration of justice; see below.

8. The present criminal law and procedure are based on English common law principles as modified and applied in India, see below.

powerful and best organized, was "more or less a loose feudal confederation
with the various vassals enjoying considerable autonomy in their
respective areas."\(^{10}\)

Though little is known of the day to day administration of
justice in those days, the basic features are identifiable. In the
main, the administration of justice was customary in form, with Islamic
Law (Sharia) aspirations in substance.\(^{11}\) Courts of Mediators (Ajaweed)
applied a mixture of Islamic (Sharia) law and local custom. There
were, however, a few somewhat formal courts established by the Fung
and Fur Sultanates of central and western Sudan. These courts had
universal jurisdiction and purported to apply Sharia law to all matters.\(^{12}\)

For example, in the Fung Sultanate there was a supreme court in
Sennar, the capital, and there were subordinate courts in the provinces.

\(^{10}\) M.I. Khalil, "The Legal System of the Sudan", 20 Inter. & Comp. L.Q.
(1971) 626 at 626.

\(^{11}\) The people lacked sufficient knowledge of Islamic Law. Islamic
jurisprudence, by then mature and highly complex, may not have
been relevant to their simple life and relationships anyway.

\(^{12}\) H.S. El-Mufti, Tatwor Nazam Algada fi Al Sudan, ("The Evolution
of the Judicial System in the Sudan") - hereinafter referred to as Evolution - 17-37 and h9-67.
A court might be constituted by a single judge or by several judges, with deputies and clerks, depending on its importance and volume of work. The courts had universal jurisdiction in all civil, criminal and personal matters, but there was a distinction in jurisdiction among them according to gravity of offence and value of subject-matter.\textsuperscript{13} Hearings were public and conducted by the judge, who examined the witnesses as well as the parties, and who did all that was necessary to obtain evidence and dispose of the cases.\textsuperscript{14} Decisions were arrived at after deliberation between the judge or judges and their deputies.

The judges were appointed by the Sultan, in accordance with Islamic traditions, from the distinguished jurists of the day, men of standing in their local community and of religious learning, as the law purported to be applied was Islamic Sharia law. The personality and learning of the judge were important for the authority and respect he was expected to command. Judges were also teachers of jurisprudence and religious practices in their local communities.\textsuperscript{15}

One way of obtaining authoritative opinions on issues of law was to submit such questions to a body of jurisconsults. Such opinions

\textsuperscript{13} Subordinate courts had to refer serious offences, such as murder and robbery, to Sennar court, \textit{ibid.} 35.

\textsuperscript{14} \textit{Ibid.} 28-29.

of maglis al-shar were binding when sanctioned by the official judge or consented to by the parties. 16

Another mode of settling disputes and complaints was that of petition for redress. The Sultan or Sheikh would sometimes sit in public to hear petitioners, investigate their complaints and direct redress when appropriate. 17 The same role was played by provincial governors, including the British District Commissioners of the Anglo-Egyptian administration. 18

Concurrent with all these devices there was enforcement of customary law where jurisdiction depended entirely on consent, but that was readily forthcoming in the tribal setting. 19 In criminal matters most complaints were satisfied by payment of blood money or compensation (diya) and raised no problems of execution. If consent for jurisdiction and execution was denied, the case was simply referred to the official courts.

The basic features of the pre-1821 system may be summarised as

16. M.I. Abu Selim, editor, Al Fung wa Alard, Wataig Tamleek, ("Some Land Certificates from the Fung").
17. Salih, The Administration, 32.
follows. It operated through two channels: the official courts with formally appointed judges, and the customary arrangements. The official courts purported to apply Sharia law which in fact was mixed with customary law. There were also the supplementary procedures of jurisconsults (maglis al-shar) and redress by petition.

(ii) The Turco-Egyptian Administration:

Mohammed Ali, the Viceroy of Egypt, had several reasons for invading the Sudan in 1820-1821, but they were all selfish. An extensive system of law courts, therefore, was not a high priority with the new rulers, so none was established at first. The law then was the law applying to the personnel of the government. The native population was left to its traditional arrangements. But some religio-judicial appointments were made, obviously for political reasons. Men of religious education (ulama) accompanied the invading army to convince the natives of their duty to surrender to the universal Muslim ruler (amir al-momeneen). One of these ulama was appointed Judge General (qadi umum) after the conquest. That signified a change of


21. The new government's "guiding principle was to establish such order as would enable it to exploit the material resources of the country for the benefit of the Khedive. The governors themselves and their lieutenants did not forget their own material benefit; indeed they grabbed whatever they could lay their hands on." Khalil, "The Legal System of the Sudan", 627.


criteria in judicial appointments. The new judges, owing their influence and their pay to the new regime, remained as a class "invariably friendly to established order."\(^{24}\)

A court system, of sorts, gradually evolved. Judges were appointed by the Governor-General after nomination by the qadi umum. At the peak of its development, the court system consisted of local councils (majalis mahallya) in the districts which had original jurisdiction in civil and criminal matters; the provincial council (majlis al-muderia) which had original and appellate jurisdiction; and (majlis al-ahkam) sometimes called (majlis umum al Sudan), the highest appellate authority in the Sudan.

Though these courts were manned by judges who were qualified jurists, each of these courts had a jurist (mufti) to advise on issues of Sharia law. That was a new development and it indicates the importance the Turco-Egyptian administration attached to conformity, or at least the appearance of conformity, with Islamic Sharia law. As the new rulers were Muslims themselves, that is understandable. The political reason, however, may have been the real reason. So long as the Sudanese people believed that they were ruled according to Sharia law, they were less likely to revolt.\(^ {25}\) By means of this

\(^{24}\) Hill, *Egypt in the Sudan*, 43 and 126.

\(^{25}\) Salih, *The Administration*, 43-44.
appeal to their religious feeling the Sudanese were induced to surrender and then to continue to submit to Turco-Egyptian rule.

Towards the end, however, the administration relaxed this policy and drifted away from strict enforcement of Sharia law on the ground that it was too harsh and its rules of evidence too strict. Egyptian codes which were derived from Ottoman codes, in turn influenced by the Codes of Napoleon, were gradually introduced.\(^{26}\) In the end only personal matters were left to the exclusive jurisdiction of Sharia courts.\(^{27}\) That may well have been a major political error; it was utilized by the Mahdi to rally support for his reformist movement.\(^{28}\)

As to procedure as such, there was no uniform code: various rules and regulations applied, but they were not satisfactory and did not cover the whole range of matters that needed to be regulated. Furthermore, such rules as did exist were not always consistent. The relationships, for example, between each provincial council and its

\(^{26}\) Ibid. \(^{44}\) Zaki Mustafa, Al Ganoon Al Madani Al Sudani, Tareekho Wa Khassysu, ("Sudanese Civil Law, its History and Characteristics") - hereinafter referred to as Sudanese Civil Law - \(14\).

\(^{27}\) El Mufti, Evolution, 76.

\(^{28}\) See P.M. Holt, The Mahdist State in the Sudan, \(12\). Mustafa, in his The Common Law in the Sudan, at 35, concluded: "The average Sudanese never came round to associating himself fully with the Egyptian rulers, their imported codes, their sanctions, and their version of Islamic law." A call for a return to Sharia law remains, to the present day, as a powerful political force: see Zaki Mustafa, "Opting Out of the Common Law", 17 J.A.L. (1973) 133 at 134.
mufti and the majlis al-ahkam in Khartoum and its muftis and between all these on the one hand and majlis al-ahkam in Cairo on the other hand, were very vague. The various regulations and circulars that were issued on these relationships added to the confusion. 29

Failure to provide consistent and rational procedural rules was not the only fault in the system for the administration of justice. The substantive rules were harsh and were matched with cruel and inhumane law enforcement methods. 30 The remedy of "petition", which reflects the "paternal relation between ruler and ruled entirely foreign to Western liberal conception of government", 31 was used by the subjects to alleviate the harshness of the rules and the cruelty of the methods.

Though the system displayed some general similarities with that of the previous regime, official courts and customary arrangements with the official courts purporting to apply Sharia law and redress by petition, the trend was towards officialdom and formality. The Turco-Egyptian administration introduced a new image for the judge and jurist: that of the formally religiously educated man. Previously, the judges were religious leaders who practised what they learned of Islam. They were not professionals with formal qualifications, but

29. Mustafa, Sudanese Civil Law, 9.
30. Hill, Egypt in the Sudan, 64.
they commanded respect and enjoyed personal authority because they were self supporting and were not the political tools of the authorities.

(iii) The Mahdist State:

The idea of Al Mahdi, the guided one, goes back a long way in Islamic history and doctrine. Supported by some traditional sayings of the Prophet Mohammed, Al Mahdi is believed to be the Deliverer, divinely inspired and guided. The idea always had irresistible appeal to helpless, oppressed and abused people. To such people he would be the personification of their hopes of escaping their miserable existence in this world, and of Ultimate Salvation in the next world at the same time.

"Such hopes and expectations have usually been passively held as an inner consolation to the individual, or projected into a vague and indefinite future. At times, however, of particular strain, arising from alien domination or from the inner tensions of an unstable society, expectation becomes active: the Deliverer, it is felt, will shortly appear, and the fleeting beliefs are given precise significance through attachment to, or appropriation by, a claimant to this status. Thus there comes into being a movement subversive of the existing political or social order, led by (or at least propagated in the name of) the Expected Deliverer. But the claimant is inevitably confronted with the dilemma of history. If he fails in his mission, the Golden Age is again deferred. If he gains power, expectation is cheated when the Golden Age does not ensue. In either event the hopes of his followers are disappointed, and the expectation reverts to a passive belief."

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Alas, this is what happened in the Sudan in 1885-1898. After overthrowing the Turco-Egyptian administration, Al Mahdi himself died and was followed by the Khalifa Abdullah who ruled for thirteen years until he was killed after the fall of Omdurman to Anglo-Egyptian forces in 1898. Whatever the era of the Khalifa Abdullah was, it was not the Golden Age promised.

With respect to the administration of justice, Al Mahdi left a legacy of circulars and letters with the unmistakable message that all traditional Islamic jurisprudence and thought had been rendered null and void by his manifestation as Al Mahdi. The basic and absolute policy of the regime derived from this principle: the schools of thought that purported to elaborate on and explain the original sources - Quoran and Sunna - were all made redundant and were superseded by Al Mahdi's own proclamations on what the original sources "really" meant, with some supplementary rulings on matters on which there is no text. Thus, with access to traditional works of authority blocked and intellectual activity severely restricted, these proclamations and circulars became

\[34. \text{ See generally, The Mahdist State in the Sudan, and A.B. Theobald, The Mahdiya, on the rise and fall of the Mahdist State in the Sudan.}

The key to understanding the system for the administration of justice in this period lies in classical Islam's concept of the universal responsibility and powers of the leader (Imam). Though true of the earlier periods, this concept was practiced in its purest form in the Mahdist State. The Imam has overall responsibility for the spiritual and material well-being of his followers (subjects), and all the powers he may need to carry out his mandate. In him are vested all executive and judicial powers as well as the residue of legislative powers - that is, the authority to legislate in matters not covered by the explicit text of Qur'an or Sunna. He may need, in practice, to appoint judges and administrators, but that would only be a delegation. His original jurisdiction remains intact; he may interfere even in individual cases. He may also revoke the delegation or restrict it in whatever way he sees fit.

It is not surprising, then, that conflict should arise as to the law to be applied in particular situations. The Imam and his judges


38. This is what Holt described as "the historical ambiguity of the Muslim qadis position arising from a dual allegiance to the political authority and to the Sharia." - The Mahdist State in the Sudan at 262.
do not always have identical views. To say that the authoritative view is that of the Imam is to beg the issue which is what should happen if the judge was unable to accept such view as correct. In real life, at least in the Mahdist State, this sort of conflict situation does not always permit of the simple solution that the judge should resign. That may not suit the Imam politically. In the Mahdist State we have an example of such a conflict and its violent consequences. Qadi al-Islam Al Husayn Ibrahim W. Al-Zahra not only lost his job as the chief judge but also his life when he refused to follow Al Mahdi's proclamations which he believed to contradict Sharia law.39

From the beginning, and out of practical necessity, Al Mahdi had to delegate his powers to hear and determine cases to the Khalifa, whom he appointed very early in the campaign, and to other subordinates. The generals of his army also exercised these powers over the territories they occupied until more specific appointments were made.

Later on, however, as the administration was developed by the Khalifa, certain officials were charged specially with the administration


40. Holt, The Mahdist State in the Sudan, 131; Salih, The Administration, 76; Omer, "The Administration of Justice During the Mahdiya" supra, 167. For the text of relevant proclamations see M.I. Abu Salim, Manhourat Al Mahdiya ("The Proclamations of the Mahdiya") 181-217.
of justice as judges (inwab al-shari). That was, it seems, more in
the nature of distribution of work as its volume increased rather
than a separation of powers as a matter of principle. The practice
of conferring universal, administrative and judicial, powers continued
up to the very end of the Mahdist State. Even in the towns where
judges were appointed, they were subordinate to the governors as well
as to central authority in Omdurman.11 Thus, the chief judge of the
regime (qadi al-islam), did not exercise independent authority but
acted rather as "the special delegate of the judicial powers inherent
in the Mahdi as Imam."12 His subordination to the Imam was demonstrated
by the way he functioned: he would either ask Al Mahdi, later on the
Khalifa, for rulings and opinions beforehand, or submit to him decisions
on cases and petitions for approval before handing them down.13

Though subordinate, the importance and relative independence of

11. Holt, The Mahdist State in the Sudan, 263; Salih, The Administration,
85. For the view that it was a deliberate policy of separation
of powers see M. Shibeika, Tareekh Shoup Wady Al Neel, ("The
History of the People of the Nile Valley"), 704; and Mustafa,
The Sudanese Civil Law, 26.


and 186.
the post of qadi al-Islam somewhat increased during the rule of the Khalifa.\(^{14}\) The second qadi al-Islam, Ahmed Ali,\(^{15}\) held the office for twelve years. During this period the system for the administration of justice developed to its peak, with courts in the provinces and specialised courts in Omdurman. But in 1894 Ahmed Ali was dismissed and sent to prison, where he died, on charges of corruption.\(^{16}\)

His successor, Al Husayn Ibrahim W. Al-Zahra did not survive long; he fell victim to the ambiguity and dangers of the office in an autocratic regime. He died in prison following disagreement with the Khalifa about the legal efficacy, from a Sharia law point of view, of the Madhi's proclamations. Not surprisingly, the office fell into disrepute and became obsolete after the fall and unpleasant death of its successive holders. The impartiality of its holders was, at any rate, lost for good.\(^{17}\)

\(^{14}\) Salih, The Administration, 151-55.

\(^{15}\) The first qadi al-Islam died in battle in 1882 and Ahmed Ali was appointed then.

\(^{16}\) Holt, The Mahdist State in the Sudan, 131-32.

\(^{17}\) Ibid. 262; Salih, The Administration, 226; Omer, "The Administration of Justice During the Mahdiya", supra, 169-70.
In the provinces, judges were appointed either by Al Mahdi, and the Khalifa after him, on the recommendation of qadi al-Islam or by the provincial governors on the instructions of the central authority or its approval. The work of the judges in the provinces suffered from centralisation which sometimes caused delay and defeated justice. Communications were very poor and a reference to Omdurman would take months to return, yet decisions often had to be so referred. Furthermore, the judges worked under the supervision of the provincial governors who were, as it were, the local Imams. Serious matters were sometimes excluded from the jurisdiction of provincial courts and referred to Omdurman for investigation and trial.

The Mahdist State had a curious system of courts: besides the provincial courts and the highest court of the time (Mahkamat al-Islam), there were specialised courts which were established as and when the need arose with specific jurisdiction to meet the requirements of the situation. Mahkamat al-Islam had original and appellate jurisdiction all over the country; though in practice it was exercised more frequently in relation to the capital and surrounding territory. The court sat in Omdurman and dealt with cases referred to it by the Khalifa and from the provinces. As to specialised courts, the


available literature mentions several. 51 There was, for example, the market place court (mahkamat al-Suq), entrusted with enforcement of the market rules and regulations. Working in close alliance with the commandant of police and his small force in Omdurman, the court had the power to impose a sentence of imprisonment to sanction its orders and rulings. The court of the treasury (Mahkamat bayt al-mal) ruled on all claims for and against the treasury and all cases where fiscal interests were involved. There were also specialised courts for the black soldiers (jihadiyya) and the state security police (al-mulazmeen), etc. Army units and detachments in the field had their own court which had jurisdiction over military personnel and over captured territories until permanent courts were established. The court for the redress of injustice (Mahkamat radd al-mazalim) was in effect an institutionalisation of the petitions procedure. These courts, of which there were several touring the countryside, were charged with the investigation and determination of complaints against the governors, princes, army generals and members of the ruling class in general. The Khalifa still continued to receive and decide petitions himself, sometimes with the advice of mahkamat al-Islam. Sometimes he referred such complaints to mahkamat radd al-mazalim, the court with the appropriate jurisdiction.

So it seems that the Mahdist State developed a complex court structure with provincial courts, a central court of appeal and specialized courts. There was no body of rules governing trial or pre-trial proceedings in these courts. Courts were established and judges appointed as the need arose, and with powers and jurisdiction as thought fit; they were then left to do the job the best way they could. With the help of the local army unit, the judge collected the evidence and investigated the cases by himself. The traditional schools of Islamic jurisprudence, which were suspended anyway, had very little to say on these matters. There was no regular police force in the Mahdist State. Law and order were maintained in the provinces by the governors and their local army units. In Omdurman, the capital, there were, however, some specialized forces that did what is now known as police work. These were: the (muhshireen), the (jihadiyya) and the (mulazmeen).

The salient features of the systems for the administration of justice prior to the present system may be described as follows: there existed both official and customary courts which applied or purported to apply Islamic Sharia law. Except for minor and largely unsuccessful efforts of the Turco-Egyptian administration, there were no rules of

52. Salih, The Administration, ch. 5.
criminal procedure in the modern sense of the term. Certain patterns may now be seen and features discovered, but at the time these were not rules in the sense of binding both the political authority and its subjects. The whole system was dominated by the position of the Imam, the autocratic ruler who had all the responsibilities and the corresponding powers. His subordinates were his delegates on the various functions they conducted on his behalf, but it was with him that the duty and privilege lay. Hence there was the petition procedure whereby the Imam remained accessible to all his subjects and redressed the wrongs of his staff.

(2) Origins and Development of the Present System:

The present system, which has had some seventy five years of productive development, is completely different in principles and underlying philosophy from its predecessor. It may or may not have been, objectively speaking and as originally conceived, suitable to the conditions prevailing on its adoption. As it developed with the country and its people, however, it has proved or acquired its suitability and workability. Whatever may have been its sources, it is now completely Sudanese and as such it is now there to stay. It is highly unlikely that it will be replaced with a different code, any future developments are likely to be in the nature of improvements and amendments on the present Code. It may therefore be helpful, at this stage, to trace briefly its inception and development.
(1) Conditions in the Sudan on Reconquest:

As the first Code of Criminal Procedure, the C.C.P. 1899, purported to relate to the socio-economic and political conditions prevailing on reconquest, it is only proper to start with some analysis of these conditions.

One author described the conditions in the Sudan just after the fall of Omdurman in 1898 as follows:

"The state of the Sudan was in every way deplorable. Its population had fallen during the Dervish regime [the Mahdist State] from over 8,500,000 to less than 2,000,000 as a result of famine, disease and internecine warfare. Whole villages had been obliterated, cultivation was at a standstill, flocks and herds had been destroyed, date-palms cut down; slave-raiding was rampant, and there was no security for life or property. Revolts and savage reprisals had left a legacy of bitter feuds, hatreds and suspicion in every district. Little tribal authority survived except among those nomadic tribes, such as the Kababish, which lived in areas inaccessible to the Khalifa's soldiery."

The new administration was faced with enormous problems which had to be

51. Anglo-Egyptian forces, mainly the Egyptian army led by British officers, set out to restore the Sudan to Egyptian dominion. When the mission was accomplished in 1898, a condominium was established with Britain and Egypt as partners in ruling the Sudan.

55. The Sudan Code of Criminal Procedure was first enacted in 1899, with revision and re-enactments in 1925 and 1974. These editions will be referred to hereinafter as C.C.P., followed by the year of the enactment.

56. MacMichael, The Sudan, 73-74. See also, Jackson, Behind the Modern Sudan, ch. 6; Henderson, Sudan Republic, 46-51; and Holt, A Modern History of the Sudan, 112-15.
solved under most unfavourable conditions. Besides the poverty and general backwardness of the country as a whole, there were problems of security and order on a large scale. Although the Mahdist State as such had collapsed after the battle of Omdurman, the country was far from pacified. Remaining Mahdist elements, other local risings with Mahdist colouring, and vast and still unsubdued tribal areas in the more remote parts created constant, though limited, threats to the general establishment of law and order.\textsuperscript{57} Thus, because of frequent revolts and incidents which continued until well after the end of the First World War,\textsuperscript{58} martial law was imposed by the Condominium Agreement.\textsuperscript{59}

Moreover, a large part of western Sudan remained under the virtually independent rule of Sultan Ali Dinar.\textsuperscript{60} The Governor-General of the new Anglo-Egyptian administration recognised him in 1900, and relations of "stiff correctitude rather than cordiality were maintained."\textsuperscript{61} Sultan Ali Dinar displayed a degree of nominal

\begin{itemize}
\item \textsuperscript{57} Holt, \textit{A Modern History of the Sudan}, 112.
\item \textsuperscript{58} MacMichael, \textit{The Anglo-Egyptian Sudan}, 98-102, 136 and ch. XV. Jackson, \textit{Behind the Modern Sudan}, 79-81 and Chs. 13 and 14.
\item \textsuperscript{59} Article IX, \textit{The Agreement for the Administration of the Sudan}, 1899.
\item \textsuperscript{60} What is now known as Dar Fur.
\item \textsuperscript{61} MacMichael, \textit{The Sudan}, 83.
\end{itemize}
allegiance until 1916 when, as he was about to come out in open revolt, the Anglo-Egyptian Government took the initiative, defeated him and annexed his country.

Under these conditions the new administration remained cautious, with a distinctly military outlook for quite some time. That imposed limitations on the new administration, its policies, personnel etc. which, in turn, influenced the form and content of the administration of justice, at least at the beginning.

(ii) The First Administration

The effective head of the new administration was the Governor-General. Article III of the Condominium Agreement read:

"The supreme military and civil command of the Sudan shall be vested in one officer, termed the 'Governor-General of the Sudan'. He shall be appointed by Khedival Decree on the recommendation of Her Britannic Majesty's Government, and shall be removed only by Khedival Decree, with the consent of Her Britannic Majesty's Government."

Although the Agreement was silent on the point of nationality, all the Governor-Generals, from 1899 to 1955, were British subjects from the United Kingdom. 62

By the terms of the Agreement, 63 the Sudan acquired a peculiar status. While associating the British and Egyptian Governments in joint

62. Holt, A Modern History of the Sudan, III.

63. For the rationale and conception of the Agreement, see its engineer and author Lord Cromer in his book: Modern Egypt, vol. II, III.
sovereignty (condominium) over the Sudan, the Agreement preserved the country's separate political entity, at least in theory. This was manifested in the almost complete autonomy of the Governor-General. With full executive powers he combined complete authority to legislate by proclamation. The Agreement expressly excluded the application to the Sudan of Egyptian laws, decrees and other enactments, and barred the jurisdiction of the Egyptian Mixed Tribunals from the country. Thus the scene was set for the introduction of a separate and completely new legal system. The first Governor-General, Lord Kitchener, told the governors of the provinces that:

"The absolute uprootal by the Dervishes of the system of government has afforded an opportunity for initiating a new administration more in harmony with the requirements of the Sudan."

The "new" administration in fact borrowed most of its formal structure from the previous Turco-Egyptian experience. The country

64. In fact it was preserved from Egypt, whose claim was used to justify the invasion of the country, only to be taken over by the British, see below.


66. Articles III and IV.

67. Articles V and VIII.


69. Hill, Egypt in the Sudan, 167.
was divided into provinces which, in the north, originally corresponded closely to those of the Turco-Egyptian period. At the head of each province, responsible to the Governor-General, was a British Governor, (mudir) assisted by British Inspectors, later on called the District Commissioners. Subordinate to the District Commissioners were the Egyptian, later on Sudanese, District Officers (mamurs). The obvious domination of the administration by British personnel, as may be expected, was very significant for the development of the legal system. The laws and Codes came to be enacted by a British Governor-General and applied by British administrators, as no qualified judges were available at first. When judges came to be appointed they were invariably British lawyers, at least in the senior posts. Even junior judges and magistrates were trained in English law.

The policy of the new administration was one of wholesale decentralisation. In view of the vastness of the country, its poor communications and inability to afford an extensive staff of administrators and clerks, that was unavoidable. Very wide discretion was


71. Annual Report, 1904, 137; Annual Report, 1925, 11; and Annual Report, 1907, 81, and 625. In 1906-1907 there were eight judges, all English lawyers. For later developments see Annual Report, 1908, 192.
thus given to the scattered band of British Inspectors and District Commissioners, who combined wide administrative and judicial powers.  

Initially the administration was almost entirely staffed by military personnel, British and Egyptian officers of the Egyptian army. But as it was realised early, however, that this could not be continued for long because army officers were subject to recall, a few civil appointments were also made. With the passage of time, more and more civilians replaced the army officers. But as there were no lawyers qualified for appointment as magistrates and judges, and as the country could not afford them anyway, the administrators continued to enjoy judicial powers.

(iii) The 1899 Code of Criminal Procedure:

As indicated above, the condition of the country and the nature and staffing of the first administration, two related factors, were significant considerations in the conception and application of the first C.C.P.

Thus in the words of Lord Cromer:

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72. MacMichael, The Sudan, 71; Henderson, Sudan Republic, 57; and the Sub-Mamur's Handbook, (Khartoum: McCorquodale & Co. Ltd. 1926), containing lectures on such varied subjects as Penal, Criminal Procedure and Civil Codes and Notes on Accounts, Agriculture, Forestry, Sanitation etc.

73. Holt, A Modern History of the Sudan, 117.

74. Gabriel Warburg, The Sudan Under Wingate, 125. See Ch. VII generally for these early developments.

75. Ordinance No. 12, 1899.

"The Code of Criminal Procedure is partially based on the Indian Code, but having regard to the fact that the magistrates are all military officers, the forms and methods of Egyptian military law with which they are familiar, and which is itself an adaptation of English military law, have been as far as possible retained."

From the Indian Code of Criminal Procedure 77 were adopted the provisions as to inquiry, arrest, search, etc. The constitution of courts and provisions as to the hearing, confirmation, appeal and revision came from Egyptian/British military law. 78 Section 187 of the C.C.P. 1899, for example, provided:

"If the Murder or Governor-General, under the like circumstances (receiving petition for appeal or judgment submitted for confirmation), considers it right to send for the record of the case, he may do so; and thereupon he shall be entitled to exercise in respect of the case all the powers of a confirming authority to whom the decision of a Court-Martial is sent for confirmation under Egyptian Military Law."

It will be observed that the section did not even bother to set out what these powers of the confirming authority were as they were well known to all the officers who acted as magistrates. 79

77. Law No. 5, 1898. See Annual Report, 1903, 137.


79. Until the Magisterial and Police Powers Ordinance 1905 provided otherwise, only army officers could be appointed as magistrates. The C.C.P. 1925 spelled out the powers exerisible on appeal and reference for confirmation, presumably in response to change in personnel.
The Code was drafted by Mr. Brunyate, a British lawyer, and promulgated by the Governor-General by proclamation in exercise of his powers under Article IV of the Condominium Agreement 1899.

As to the application of the Code, it was extended cautiously and gradually, province by province and region by region, with provisions for its suspension wholly or in part as well as for any other necessary modifications. Full weight was given to security considerations, and to the stage of development in each province. The gradual application of the Code and its precarious position even where it was applied are illustrated by some provisions of the Code itself as well as by Orders issued by the Governor-General and published in the Sudan Gazette.

For example, the Code provided that it "shall take effect in such parts of the Sudan as the Governor-General may, from time to time, by notice published in the *Sudan Gazette* order." The Code applied also "subject to the exigencies of martial law, whenever and so far as the same may, for the time being, be in force." The C.C.P., together with the Penal Code, were introduced in the various provinces by a series of Orders published in the Sudan Gazette.

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80. Later Sir William Brunyate, Legal Adviser to the British High Commissioner to Egypt; see Gorman's Preface to volume I, Laws of the Sudan, 19th edition.

81. Section 1(2) C.C.P. 1899.

82. Section 2(3) C.C.P. 1899.

83. Sudan Gazette No. 5 of 2 October 1899, No. 21 of 1 March 1901 and 111 of November 1902.
The Orders applying the Codes to the various provinces, except Bahr el Ghazal, were consolidated in one Order published in 1906. The Codes were finally extended to Bahr el Ghazal too in 1907.

Nonetheless there were parts within each province where the Codes were not in force at all, others where only parts of the Codes applied. This patchy and selective application was authorised by the Orders extending the application of the Codes themselves. Thus the Order published in 1906 read as follows:

"2. Until further order the following provisions shall take effect:
(a) The provisions of the Code of Criminal Procedure and of the Sudan Civil Justice Ordinance 1900 in relation to any act or proceeding to be done or taken by or before any Magistrate or Court shall be applied with such modifications not affecting the substance as, in the opinion of the Magistrate or Court, the circumstances may render necessary.
(b) The duties under the Code of Criminal Procedure of Police Officers and of Mamurs acting as Magistrates of the third class and the duties under the Civil Justice Ordinance 1900 of Mamurs acting as Magistrates of the third class shall be performed according to instructions conformable to the spirit of the Code of Criminal Procedure and the Civil Justice Ordinance 1900 to be issued, with due regard to all the circumstances of the case, by the Mudir or Governor of each Province or District.

3. As regards the Upper Nile and Mongalla Provinces proceedings shall be taken under the Code of Criminal Procedure in such cases only as shall be ordered in any general or special instructions from time to time issued by the respective Governors of these Provinces.

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84. Sudan Gazette No. 86 of January 1906.
85. Sudan Gazette No. 107 of February 1907.
Any such instructions may provide for the omission of all or any part of any procedure which under the provisions of the Code of Criminal Procedure ought to take place before the trial of any accused person..."

The Order published in 1907 extending the Codes to Bahr el Ghazal Province made provisions identical to (2) and (3) above applicable to that province too.

The Governors of the Provinces were thus empowered to decide whether the C.C.P. should apply at all in any given part of the province, and if it did apply, subject to what modifications and omissions. The general spirit in which these decisions were taken may be reflected in the words of the Bahr el Ghazal Province Annual Report of 1908: 86

"...and it not infrequently happens that cases are tried by courts not legally empowered...the wording of charges is often not in accordance with the wording of any section of the Penal Code....As long, however, as no injustice occurs, I do not consider that minor irregularities of this sort do much harm. What is principally needed in countries not far removed from savagery is for the punishment to be just and prompt; and this, I am glad to say, is usually the case."

The flexibility and caution that characterized the introduction and application of the Penal Code and C.C.P. 1899 should, of course, be seen in the context of the administrative and political limitations. 87 It was generally believed that the conditions were such that the administration of justice required discretion and tact more than strict procedure. 88

86. Annual Report, 1908, 163.
87. See Bonham-Carter, Legal Secretary, in Annual Report, 1902, 125.
88. Jackson, Behind the Modern Sudan, ch. 8.
In the words of Wingate, Governor-General, the Sudan required as its law officers men "who were capable of looking at a situation from the point of view in which those actually responsible for the administration have to consider them..." To ensure this, administrators were appointed magistrates: all Governors and some Inspectors were magistrates of the first class; Inspectors and other British officials, as well as a few non-British employees, were magistrates of the second class; while Egyptian mamurs and other non-British officials were magistrates of the third class.

The combination of both administrative and judicial powers was convenient and acceptable to the native population. Knowledge of the district acquired in one capacity was helpful in the other, while the fact that "punishment was in the hands of the local administrator, also tended to boost the latter's authority in his district." The combination of both powers was not only acceptable to the ordinary Sudanese, it was expected. The two powers had always been indivisible, whether in tribal communities or under the administration of the previous regimes.

89. In a private letter to Stack in 1912 quoted by Warburg, The Sudan Under Wingate, 127. Wingate was appointed as Governor-General in 1900 and continued until 1916.

90. Section 7 C.C.P. 1899; and sections 2 and 3 of the Magisterial and Police Powers Ordinance 1905. See also Annual Report, 1903, 136.

91. Annual Report, 1904, 57; and Warburg, The Sudan Under Wingate, 126; see also at 127-28.

92. MacMichael, The Anglo-Egyptian Sudan, ch. XXI.
A specialised judiciary took a very long time to develop into anything capable of taking over from the administrators. Increase in legal work by far exceeded the rate at which judges were appointed. The unqualified administrators who were acting as magistrates, however, were required to pass an examination in the Codes.

Due to the increase in the amount of criminal work it was decided to appoint a resident police magistrate for Khartoum Province in 1907. By then the town had its own police force. Thus the pattern was set for the next stage in development: big towns having qualified magistrates as resident police magistrates working with and supervising the local police force; in the provinces Inspectors - District Commissioners - exercising judicial powers under the supervision of their province Governors. Beside normal appeals, there were the added safeguards of reference for confirmation and the power of revision to ensure correctness and conformity with law and procedure. Every judgement of a Mudir court, that is the province Governor's court, had to be submitted for confirmation by the Governor-General, and every judgment of a Minor court.

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93. Annual Reports, 1906, 3; 1907, 8; and 1908, 191. See also Wurzburg, The Sudan Under Wingate, 127-28.


95. Annual Report, 1907, 630: "This is the more desirable," said the Legal Secretary, "as a considerable number of the cases are concerned with Europeans."

96. See the Magisterial and Police Powers Ordinance, 1905, sections 1 and 5. The police report was quoted from in the Annual Report, 1908, 197.
had to be submitted to the Governor for confirmation before execution.\textsuperscript{97}
The power of revision was exercisable on the Governor's or Governor-General's own motion "for the purpose of satisfying himself as to correctness, legality, or propriety of any finding, sentence or order..."\textsuperscript{98}

(iv) The 1925 Code of Criminal Procedure:

The C.C.P. 1899 was revised and repromulgated in 1925.\textsuperscript{99} The new Code, as amended several times,\textsuperscript{100} remained in force until it was once more revised, with all amendments incorporated, and repromulgated as the C.C.P. 1974, the present Code.

Except for a few changes, amendments and drafting improvements,\textsuperscript{101} the C.C.P. 1925 was essentially the 1899 Code. The revision was no doubt necessitated by the stage of development reached by the country in twenty five years and some deficiencies observed in the first Code.\textsuperscript{102}

\begin{verbatim}
97. Sections 181 and 182 C.C.P. 1899.
98. Section 186 C.C.P. 1899.
99. Ordinance No. 17, 1925. It is interesting to note that the first C.C.P. of 1899 was preceded by the Indian C.C.P. of 1898, and the C.C.P. 1925 followed immediately the extensive and drastic amendments of the Indian C.C.P. in 1923, Acts No. XII and XVIII. The Indian C.C.P. was again revised and repromulgated in 1973, Act No. 2, of 1974, at almost the same time as the Sudanese C.C.P. was being revised.
100. Amendments were consolidated twice in revised editions, 1941 and 1955.
102. The powers of courts were increased, cf. sections 15-18 of the 1899 Code with sections 17-20 of the 1925 Code, and so were the powers of arrest and search. Section 26, "powers in regard to suspected persons", was added in 1925, together with section 67 on search in pursuit. Section 24 on probation was also introduced in 1925, later repealed and reenacted, see Sudan Gazette No. 562, 1932.
\end{verbatim}
There was no change of policy on the need for submission of judgments for confirmation by the Governor of the province, for the decisions of Minor Courts, and by the Governor-General, for the decisions of Major Courts. Although open to the obvious criticism that it caused delay, the main justification for the policy appears to have remained valid: the Penal Code and C.C.P. were still applied by laymen, and it would have been unsafe to allow their judgments to be enforced unrevised. There were, however, drafting improvements in this area: the clear and detailed statement of the powers of the confirming or appellate authority.

The operation of the C.C.P. 1925 was again subject to the discretion of senior administrators. Section 2 of the Code provided:

"(1) This Code shall take effect throughout the Sudan save as provided in subsections (2), (3) and (4).
(2) The Governor General may, as regards any Province or part of a Province where it is impracticable to carry out in detail all the procedure laid down in this Code preliminary to the trial of any accused person, make, on the recommendation of the Governor, regulations for the omission or modification of any part of such procedure.
(3) The Governor General may authorize any Governor to direct that as regards his Province or any part thereof any particular case or cases or any class of cases shall not be dealt with under this Code but under any customary law prevailing in the district or among the natives of the district in which under chapter XIII the offence should be tried. Any Governor so authorised may from time to time alter or revoke any such direction.

103. Sections 251 and 150, C.C.P. respectively. Major Courts replaced the Mudir Court of the first Code.

104. Section 256 of the 1925 Code spelled out the powers of the confirming authority in contrast to section 187 of the 1899 Code.

105. These provisions appear as repealed in the 1955 edition of the C.C.P.
(h) The Governor General may at any time alter or revoke any authority given to any Governor under subsection (3)."

The decision to extend the Codes to any particular area was a political decision.106 Thus it seems that although the scope of application of the Penal Code and C.C.P. increased considerably since the early days of the Condominium, it was far from universal in 1925. In fact it is not universal even now. They have been, and still are, though to a lesser extent, supplemented by customary law enforcement which was institutionalised and officially recognised in the 1920s.107

(v) The Current Code of Criminal Procedure:

The C.C.P. 1974 is basically that of 1925 with all amendments up to date consolidated and a few new sections added.108 This approach to law reform is reasonable as it retains access to the literature and judicial traditions built around the C.C.P. in some seventy five years of application and adaptation. The alternative of a major departure from the pre-existing system would have made redundant the entire body

106. See, for example, correspondence between the Governor of Bahr el Ghazal Province, the Civil Secretary and the Governor-General's office in 1924, concerning the application of certain provisions of the Penal Code to the Dinka tribe. See file, The Sudan Central Records Office, Civsec. 41/1/1, File No. 41.A.2, Civil Secretary Department.

107. See below

108. Between 1925 and 1951, when the last revised edition was prepared, the C.C.P. was amended twelve times; and between 1951 and 1968 thirty five times. Other amendments followed: The Criminal Procedure (Amendment) Act 1970, and the amendments of 1973; see Legislative Supplement No. 1151, of 15/8/1973.
of Sudanese judicial and professional expertise. 109

Naturally enough, the need for revising the whole legal system was voiced after independence in 1956. 110 Piecemeal amendments were becoming cumbersome and hardly accessible. 111 Hence a Law Revision Commission was established in 1966, but beset by internal conflict and a struggle for supremacy among the divergent views of its membership, 112 it had to be disbanded. The next attempt was with specialised commissions charged with first ascertaining the relevant rules of Sudanese law, and then examining them with a view to recommending their continuation, amendment or abrogation. 113 Though labouring under change of membership and other practical limitations and difficulties, 114 the commission on criminal law and procedure achieved a measure of success in its task before it was dissolved in 1969, two months after the army takeover.


110. Ibid. 134-35.


Yet another move towards law reform was initiated in 1969, but this time it was different: all previous attempts started from the premise that the pre-existing system was worth preserving though in need of reform and major amendments; the new body of law reformers was not so minded. A commission of twelve Egyptian lawyers, flavoured with three Sudanese members in a half hearted attempt at representing local legal opinion,\textsuperscript{115} favoured a radical change in policy aimed at bringing Sudanese law more in line with Arab-Egyptian law.\textsuperscript{116} This commission succeeded in putting through three Codes: a Civil Code, a Civil Procedure Code and a Civil Evidence Code. Before its drafts for the Penal Code and C.C.P. were enacted, its activities were terminated and another commission, all Sudanese in membership,\textsuperscript{117} was established in 1972.

Once more, the new commission changed the policy of law reform:

\textsuperscript{115} This commission was constituted under the Law Commission Act, 1970.

\textsuperscript{116} As Mustafa, in "Opting Out of the Common Law", supra, 135, described its work:

"Armed with copies of various codes from all over the Arab world and assured of government protection against criticism from the legal profession, the commission proceeded to copy with impunity, and with very trivial and sometimes absolutely meaningless amendments, section after section and chapter after chapter from the Egyptian Civil Code of 1919, flavouring it here and there with a slightly modified or differently phrased version from the Iraqi, Syrian, or Libyan Civil Code."

\textsuperscript{117} Mustafa, "Opting Out of the Common Law," supra, 133.
back to building on the pre-existing order. Thus the C.C.P. 1925, as well as the Penal Code 1925, were revised and re-enacted in 1971. The basic assumption was that both Codes were, on the whole, worth preserving: they have been "Sudanised" through long application, and they have worked well enough through the years. From a more practical point of view, moreover, both have become familiar not only to the legal profession as such, but also to the police, lay magistrates, administrators, and all others concerned with their interpretation and enforcement. Their interpretation and development is now helped by a large body of case law and other literature that built around the Codes. 118

Thus the C.C.P. 1971 is the natural continuation of the 1925 Code, and of the 1899 one before it. The cases and other material written with reference to those Codes, therefore, retains whatever authority and relevance it had.

This is then the story of the main source of criminal practice in the Sudan: the C.C.P. Since first enacted in 1899, the Code went through many changes and amendments, but its essential character remains, and so do some of its original provisions. It is not, however, the only source of criminal practice, there are other sources supplementary

118. See generally the introduction to the Penal Code and the C.C.P. 1971, Sudan Gazette, Special Supplement No. 1162, 1971 (Arabic).
to the Code. The C.C.P. is the formal and official framework, but what is actually applied in everyday practice is what its rules are understood to mean - a function of basic training and available current and authoritative comment and guidance.

(vi) **Circulars and Instructions:**

In the words of W.O.B. Lindsay, C.J.: 119

"From the point of view of the practical administration of justice, Circulars and Commentaries are the best medium for drawing attention of Judges and Magistrates to points of practice and established precedents arising out of the judicial interpretation of the Codes. In addition, a quarterly journal for limited circulation to the more academic minded would probably be useful."

In the absence of law reports, commentaries and other facilities, 120 circulars and other instructions were immensely important, especially to the lay magistrates and administrators: they gave them a view of the law that was both authoritative and simple. Even at present, these circulars are extremely helpful to all concerned with the administration of justice. They normally cover areas that are not covered by any textbook and on which there are no decided cases or any other guidance.

A relevant inquiry, then, is what circulars and instructions were issued and what effect, contribution or authority they had.

119. In a memorandum attached to AG/Gen./6-1, dated 26/11/1952.

120. On the limitations under which the magistrates and judges had to operate see, Mustafa, *The Common Law in the Sudan*, 172-78, and 223; and Thompson, "The Formative Era of the Law of the Sudan", supra, 480 et seq.
Generally speaking there were two main classes or types of circulars or instruction letters. Criminal Court Circulars, and other circulars and instructions. The first class, as the name itself suggests, was specifically concerned with the administration of criminal justice, and it is by far the more important class. These Circulars continue to be issued to the present day and are frequently referred to in judicial decisions and legal argument. It is therefore surprising that the preliminary question of their legal efficacy has never been answered.

(a) **Criminal Court Circulars:**

To quote Lindsay C.J., once more:

"The administration of justice under the Code of Criminal Procedure where not a professional function is, or should be, always a specialist function. Intelligence, determination to establish facts relevant to the charge and to apply the written law to the facts are essential attributes but are not enough to guarantee an accused a fair trial. Strict adherence to procedure in the Code of Criminal Procedure and to the Circulars in this new series relating to points of procedure and admissibility of evidence is necessary to achieve this objective and to improve generally the standard of administration of justice in the Sudan."

This statement of the former Chief Justice indicates the importance attached to conformity with the Circulars by the highest judicial authority in the land. As these circulars normally address themselves to issues not covered by existing legislation or to explaining various

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121. The introduction to the Criminal Court Circulars, New Series, a Sudan Government publication, 1952.
provisions, that is to say to expressing high judicial opinion beforehand and anticipating problems of interpretation, their conformity with the law was assumed. Moreover, they are usually more in the nature of general guidelines than of specific instructions. In other words, they are not only generally assumed to be in conformity with the law but it is also difficult to show otherwise. Yet a problem may arise when a magistrate or judge feels that a particular Circular is contrary to his understanding of the law, or that the policy promoted by the Circular is at variance with that underlying the express provisions of the law.

The authority to issue instructions and guidelines existed from the very beginning. An early Order conferred the power to issue such instructions on the Governors of the provinces. It could be that this power somehow came to be exercised by the Chief Justice through a process of reference to appropriate legal authority. Alternatively, or in addition to this, the normal common law practice of issuing such circulars for the guidance of police and other officials concerned

122. Mr. Justice K. El Rasheed, President of the Supreme Court, in a private interview, November 1971.

123. Sudan Gazette No. 86 of January 1906, (and No. 107 of February 1907), section 2(b). For text see p. 29 above.

124. In England, for example, such circulars are issued by the Home Office to give guidance to the police on such matters as interrogation of suspects, 238/1977, and identification parades.
with the administration of justice may have been copied in the Sudan. Furthermore, there was the need for reference for confirmation of every judgment of a Major or Minor Court. "Practice Notes" were written giving the opinion of the confirming authority. The origin of the practice may have been any of these or a combination of them. The present source of the authority to issue such circulars and instructions is clear enough: the Organisation of Judicial Work Order 1973 now authorises the President of the Supreme Court, in whom most of the powers of the Chief Justice under the old system now vest, to issue all circular and instructions necessary for proper judicial functioning.125

As "an expression of the opinion of the appellate or confirming authority",126 these Circulars are habitually treated with reverence by trial magistrates who, quite understandably, do not wish to be overruled, if not rebuked. Strictly speaking, however, they are neither proper enactments of the law nor judicial precedents, as they are extra-judicial pronouncements.

Objections have been raised in the past by senior judges who felt that a particular Circular was inconsistent with the C.C.P.127

125. No. 22 of 1973, section 3(2). This provision is generally understood to be merely confirmatory of an established practice.

126. As described by Mr. Justice M. El Fahal, member of the Supreme Court, in a private interview, November, 1974.

127. See, for example, HC/SC/Gen./14-1, XR/Ge./9-b, dated 29/12/1952, from W.C. McDowatt, judge of the High Court, Southern Circuit, in file No. AC/Gen./2-6-9/1, volume II(13), Judiciary.
best known example is that of Mr. Justice R. Owen, judge of the High Court, Southern Circuit, who objected to Circular Letter AC/Gen/2-6-9-1, dated 19/11/1938 - later Criminal Court, Circular 26. He maintained that the Circular unduly limited the discretion of judges in passing the sentence of life imprisonment on a conviction for murder. He refused to follow the Circular in subsequent judgments. The position adopted in the Circular was later somewhat modified when it was passed as Circular No. 26; it still restricts sentencing discretion, but judges appear to have accepted its limitations and apply the Circular without any discussion of the issues. A recent example may give some indication of the quality of judicial functioning in this respect.

In Sudan Government v. Rizig Saleem Abu Gassan and others, the Major Court, the trial court, purporting to apply Circular 26, misquoted the Circular grossly. In his judgment, the President of the Major Court quoted as a single sentence two phrases from two

different sentences in two separate sections in the Circular, missing out the rest of the sentences and sections, with no indication whatsoever that he was so doing. The Circular allows the trial court to pass a sentence of life imprisonment on conviction for murder subject to certain limitations. The misquotation not only failed to refer to the limitations, but made it appear as if there were none. The Supreme Court confirmed the finding and sentence without noticing the defect. 131

The lack of judicial pronouncements on the authority of these Circulars reduce one to ascribing significance to other manifestations of judicial thinking. Out of sixteen reported cases in which one of the Criminal Court Circulars was relevant, the Circular was applied in fourteen. In thirteen out of these fourteen the Circular was simply cited as the authority for the statement or ruling made. 132 The language in some of these cases indicate that the court felt the Circular to be binding. 133

In the two cases where a relevant Circular was not followed, Criminal Court Circular 18 in both cases, the court failed to refer to


the Circular completely. In a more recent case, however, the
Supreme Court was explicit in refusing to apply a Circular that was
relevant on the facts. This is the only authority that expressly
refused to apply a specific Criminal Court Circular. It is not
certain, however, which of three alternative propositions this supports:
that the particular Circular is not binding on all courts, that no
Circular is binding on all courts, or that no Circular is binding on
the Supreme Court but all Circulars are still binding on lower courts.
Furthermore, the fact that the Supreme Court, the highest judicial
authority in the land, felt free to overrule a Circular does not mean
that the same course is open to a subordinate court.

So it seems that the Criminal Court Circulars, though neither
legal enactments nor judicial statements, have received consistent
application for so long that it is difficult to characterize them as
not binding. In practice, they may well be as binding as judicial
decisions. All the available evidence indicates that they are always

at 81.

(unreported). The relevant Circular was No. 9, on special
treatment of prisoners and the criteria for classifying them:
Zakaria Basheer being a university lecturer convicted of a
political offence did not qualify for special treatment under
the Circular. The Supreme Court criticized the classification
criteria as dated and discriminatory and refused to apply the
Circular.

136. It is not possible on the available record to tell which, if any,
of these three the court preferred.
followed by the lower courts, and normally applied by the higher courts. The fact that one or two of them were criticized, ignored or even overruled, does not mean that all Criminal Court Circulars, as a class, are not binding.\textsuperscript{137} Judicial decisions of the highest authority are sometimes criticized, ignored and overruled, yet nobody suggests that all judicial decisions, as a class, are not binding.

In conclusion, one may observe the following about this class of circulars: Some of them have been applied by the higher courts and thus form part of their rulings, the ratio decidendi of the cases. Moreover, insofar as the Circulars are not inconsistent with stronger authority, and insofar as they express the opinion of the confirming and appellate authorities, they are in practice as binding as they need to be. Yet the option remains, at least for the higher courts, to overrule or modify the application of any of them.

(b) Other Circulars and Instructions:

There is a variety of other circulars and instructions issued by the Ministry of Justice to prosecutors, police and other departments pertaining to criminal prosecutions. Generally speaking, these are more in the nature of departmental statements of policy and guidelines in the exercise of discretion and powers vested in the Attorney-General.

\textsuperscript{137} The courts sometimes distinguish a Circular on the facts of the case in order to conclude that it is not applicable; see, example, Sudan Government v. Mohamed Kheir Saeed [1966] S.L.J.R. 19 at 22 and 24.
and his staff and other officials. The legal validity of these circulars and instructions is not in issue as they are extra-judicial in operation; their contribution, however, must be noted as they sometimes provide essential operational rules for pre-trial and out-of-court procedure.

To illustrate the variety and importance of this class, a few examples may be given: One from the Attorney-General's Chambers to prosecutors in the provinces, and through them to the police, deals with defects and faults in their methods of collecting and presenting evidence and conducting prosecutions. Another circular was addressed to advocates advising them on the facts and particulars to be given in applications for permission to represent the prosecution on behalf of victims and their relatives. A third circular was a departmental directive on the exercise of discretion in ordering a nolle prosequi under section 231A.C. C.P.

There are also the circulars and letters sometimes written by judges and magistrates in exercise of advisory and supervisory functions.

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138. See generally, for example, No. M.J./6-6; repeated N.M.K.36-1/1/797, dated 25/10/1972.

139. M.J./6-6, dated 15/2/1969.

140. M.J./6-6, repeated 6-1h/1-5, dated 23/11/1971.
These cover subjects such as procedure at committal proceedings, 14.1 remand, 14.2 and procedure in cases of complaints against individuals for breaches of departamental and local government regulations. 14.3 Sometimes circulars are issued to explain new legislation and the proper procedure for its enforcement. 14.4

Furthermore, the Chief Justice, and other senior judges can communicate with their subordinates through their powers of confirmation and review in individual cases. Comments and directions in this context have always been regarded as having high educative value. 14.5

The C.C.P. itself allows a third class Magistrate or Bench of Magistrates to refer any questions of law which arise in the hearing, or give judgment subject to the opinion of, a first class Magistrate. 14.6

14.5. See Governor, Dar Fur Province in D.R./SCR/11.A.15; Civil Secretary concurring in 11.A/18, dated 17/7/1935.
14.6. Section 240 C.C.P. The provision under the 1925 C.C.P. used to be wider; see Sudan Government v. Omer Abdalla and Others (1937) S.L.R.(Crim.), vol. 1, 123.
There is no way of knowing, however, how frequently, if at all, this provision is used.

It is common human experience that formal rules alone are somewhat inadequate in maintaining a living and growing system for the administration of criminal justice. They need to be supplemented by informal rules, regulations and policy statements. Such rules and regulations are capable of responding to daily events and unforeseen considerations that are not likely to be covered by formal legislation anyway. The review given above covers some of these informal rules and regulations at play in the Sudan, fulfilling and interpreting the C.C.P.

(viii) The Influence of the Common Law:

In day-to-day practice, the C.C.P. is interpreted and applied within the framework of the general legal system as a whole. A brief look into the general nature and sources of Sudanese Law is therefore called for.

Generally speaking, the present day Sudanese legal system may be described as a common law system. It is certainly regarded as such by the whole body of Sudanese lawyers. That is to say, its terminology, basic concepts, reasoning techniques etc. are shared with the group of legal systems generally known as the common law legal systems.\footnote{See generally, James L. Montrose, Precedent in English Law and other Essays, Harold G. Hanbury, editor, (Ireland Shannon, 1968) chs. 10 and 17. On the increasingly blurred distinctions between common and civil laws see Woodfin L. Butte, "Stare Decisis, Doctrine and Jurisprudence in Mexico and Elsewhere", in The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions, ed. Joseph Dainow (Baton Rouge: Louisiana State University Press, 1974), ch. XIII.}
The adoption of the line of development leading to investing Sudanese law with common law characteristic is due to several factors, all stemming from the fact that Britain was the senior or more active partner in the Anglo-Egyptian Condominium. It may not have been a deliberate objective, but it certainly was a necessary conclusion of the policies adopted that the Sudan should one day have a common law system. The Sudan, having been a condominium and not a British colony, did not receive English common law in the same way that other British territories in Africa did. The end result was nonetheless similar, at least in some fields of the law. The principles of English criminal law and procedure were received via India. By the express terms of the Condominium Agreement, subsequent Egyptian laws, that is subsequent to the reconquest of 1898, were not to apply in the Sudan unless expressly adopted by the Governor-General. That provision did not exclude the pre-1884 (the date of the fall of Khartoum to the Mahdi) Egyptian laws; but as Lord Cromer explained, they were allowed to continue in force only so long as was necessary; once they ceased to be necessary, then "...under Article IV all existing

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150. See generally, Mustafa, The Common Law in the Sudan.

151. Article V of the Agreement.
Egyptian laws may be altered or abrogated by Proclamation of the Governor-General. 152

The object then was to give the Sudan the best of two worlds: the Egyptian laws necessary for its administration with the option to abolish them when an alternative body of laws was established. 153 But although the option was held "on behalf of the Sudan" by a British officer of the Egyptian army, the Governor-General, English law was not regarded as the immediate alternative to Egyptian law, at least that was not the declared policy. 154 The predominance of the British elements in the administration together with other factors made it inevitable that English law would be in fact the most influential legal system in shaping Sudanese law. That result was agreeable to the British administrators. 155

The factors most relevant to the course of development of Sudanese law into a common law system may be the following:

152. In the memorandum accompanying the draft agreement, see Mustafa, The Common Law in the Sudan, 47-49.

153. Egan Guttman, "The Reception of the Common Law in the Sudan", 6 Inter. & Comp. L.Q. (1957) l01 at l03.

154. See Lord Cromer, Modern Egypt, volume II, 547; Guttman, "The Reception of the Common Law in the Sudan", l04.

155. Gorman, Legal Secretary, believed the Penal Code, C.C.P. and Civil Justice Ordinance, to have been of incalculable importance in the development of the institutions of the Sudan in that they ensured the reception of English law to the exclusion of all others; see his preface to volume I, Laws of the Sudan, 1941 edition.
All High Court judges, all Legal Secretaries and all Chief Justices were throughout the Condominium period English lawyers.  

The legal training and education of Sudanese, when started in 1936, was conducted by English lawyers teaching, naturally enough, English law. In 1945 the School of Law joined Gordon Memorial College which, in turn, entered into a special relationship with the University of London in 1947. Thus by the time the School of Law matured into the Faculty of Law, University of Khartoum, it had already established a distinctly English law teaching tradition and library. As one author put it: 

"In my submission the method by which High Court judges were recruited and the method of teaching, as well as the subject-matter taught to future Sudanese judges, set up what I would call 'the factor of the unexpressed consciousness of legal training and affinity,' which led to the ultimate adoption and consolidation of a common law legal system in the Sudan."

Furthermore, English was the only foreign language taught in schools. The educated Sudanese who trained as lawyers and took over as judges and advocates had no access to foreign legal material except through the English language, which in practice meant that they had


157. Under this "special relationship" graduates of the School of Law received University of London degrees; the syllabus was based upon the requirements of London University: see W.L. Twining, "Legal Studies at the University of Khartoum", *J.A.L.* (1962) 115.

access to English law in particular, and through it to other common
law jurisprudence. Arabic provided access to the French law oriented
Egyptian law and to the traditional Islamic Sharia law; where the
common law trained Sudanese lawyer feels uneasy, if not hostile. 159

For these, and perhaps other reasons, the Sudanese legal system
came to display the main features of a common law legal system: the
techniques of evolving legal principle and deriving specific rules from
statutory provisions and decided cases. 160 The guidance which judges
and magistrates seek in previous decisions of higher courts, character¬
istic of the common law, is often expressed in terms of a doctrine of
binding precedent: that the court in the subsequent case is bound to
follow the previous decision in so far as it applies to the facts of
the case in hand. 161 The principle and practice of this doctrine
require skill in reconciling and distinguishing cases and in reading
general principles and policy considerations into factual situations.
The proper employment of the doctrine presupposes the availability of
certain facilities such as law reports, commentaries and text books, etc.

159. Ignorance breeds prejudice: the present day Sudanese lawyer is
both ignorant of and biased against both French civil law and
Islamic Sharia law in such a way that it will take time and effort
for either to play any role in the development of future Sudanese
law to the partial displacement of English common law.


161. See generally, Geoffrey Wilson, Cases and Materials on the English
Legal System, 236-70. See also the Statement of Policy made by
the House of Lords, [1966] 3 All E.R. 77; Conway v. Rimmer [1968]
A.C. 910.
A given legal system may operate the doctrine under various limitations, in which case one would expect inconsistencies between principle and practice. It may, on the other hand, only pay lip service to the doctrine with no real effort being made to observe it in practice. It is equally possible to have a variety of mixtures of these two attitudes to the doctrine. It is suggested that the present day Sudanese practice reflects one such mixed attitude.

(a) The Doctrine of Binding Precedent:

The practice of citing previous judicial decisions as authority for statements of law had a fairly early start in the Sudan. The lack of regular and authoritative law reporting, however, was a major obstacle. Because of the lack of systematic law reporting judges had to keep private collections to supplement the scattered and unsystematic efforts of the Judiciary to provide for the need. It is not surprising, therefore, to find that accused persons, parties and their advocates, were sometimes unaware of the decisions relevant to the issues.


163. For example, Mr. Justice Atabani, in *Mohammed El Tahir El Tom v. Taha Mohammed Atiya*, (1951), D.C.C.S.-79-kl (Merowe) (unreported), said: "Referring to my personal digest - and again regretting the absence of official case - reporting, which would at least secure uniformity."

164. These are listed in [1960] *S.L.J.R.* 33h. They were only three: (1) R.H. Bun and T.N. Francoudi, *Digest of the Decisions of the Court of Appeal of the Sudan*, (1926); (2) D.F. Hawley and W.E.D. Davies, *Law Reports: The Court of Criminal Appeal* (1951-55); and (3) H. Stanley-Baker, *Cases in the Court of Appeal and the High Court*, (1955).
in their case: the source of the rules which determined their rights and duties.\(^{165}\) Under these conditions it is clearly unrealistic to expect much in the way of consistent practice. "The most that one can say is that the courts endeavoured to establish a system of stare decisis and to make it work. And in this they at least achieved a partial success."\(^{166}\)

After independence the position of law reporting improved considerably. The *Sudan Law Journal and Reports*, started by the Faculty of Law, University of Khartoum, and taken over by the Judiciary subsequently, began reporting current cases in 1956. There were other efforts to report the pre-1956 cases,\(^ {167}\) a task yet to be finished with respect to the criminal cases.\(^ {168}\)

Encouraged, no doubt, by the official and systematic law reporting, Sudanese judges "seem to have come nearer to a fully developed doctrine

\(^{165}\) In Bamboulis v. Bamboulis (1953) AC.-Rev.-58-53, (unreported), Watson J. said: "I have been able to get access to various decisions of which, I had no doubt, the learned advocate has no knowledge... and I am listing them largely for future reference."

\(^{166}\) Mustafa, *The Common Law in the Sudan*, 177, see generally, 173-77.

\(^{167}\) The salvage of all material and the publication of some are due to the efforts of the Sudan Law Project, a co-operative venture between the University of Khartoum, the Sudan Judiciary and the Attorney-General’s Chambers, which receives financial assistance from the Ford Foundation. See C. Thompson, "Research into the Law of the Sudan", (a paper presented to the Philosophical Society of the Sudan, 12th Annual Conference: Research in the Sudan, Khartoum, 1961) 152 at 179.

\(^{168}\) Civil cases are now reported in two published volumes; criminal cases, however, are not published yet. The cases are edited and ready for publication: one volume, cases decided in the period 1900-1940, has already been published by the Faculty of Law, University of Khartoum, in cyclostyle.
of stare decisis after independence. Sudanese precedents are now cited more often, and it seems that judges feel that the cases of higher authority cited to them in argument would have to be followed if not distinguished.

Nonetheless, it is not certain that Sudanese courts are bound by precedents as a matter of law. The current practice of the courts may be due to the training of the judges and advocates rather than to a rule of law. It may be that in time such a rule will evolve; as of now it can not be said to exist. On the other hand, the technique of citing cases in argument in support of legal propositions is extremely important as it is the only way general principles can be identified and improved and legal literature enriched; not to mention the consistency of practice thereby achieved.

(b) Relevance of Foreign Common Law Materials:

For the common law trained Sudanese lawyer, it is quite natural


171. See, for example, the opinion of Mr. Justice Abed Mageed Imam in Sudan Government v. Kider Abdalla El Hussain [1966] S.L.J.R. 110.

to have a feeling of affinity with other common law systems: he speaks
the same legal language, shares concepts and literature with its
lawyers, etc. That is not to say, however, that foreign, common law
cases and legal treatises should have in the Sudan the same authority
or weight as they do in the country in which they were decided or
with reference to which they were written. Guidance they may provide,
but not if they are followed blindly because then the opposite may
obtain: when they are not used with discretion, such sources produce
confused and absurd, sometimes clearly unjust, results. It follows
then that the best use of foreign materials is the selective and
reasoned, not the dogmatic and rigid. The next question, therefore,
is: which of the two is the Sudanese practice?

Sudanese courts in fact indulge in frequent citation of foreign
cases and legal treatises as direct and binding authority. The
practice was started by the English judges of the Condominium days and
continued by the Sudanese judges. In the sphere of criminal law
in particular, the Indian connection - the fact that the Penal Code and
the C.C.P. were originally based on Indian law - is often used by the
courts not only in support of the consultation of Indian material but
also to make it appear as if they are bound by it. In Sudan Government
v. Pinya Acco, Lindsey, C.J. said:


174. AC-CP-91-1950; this case was cited and the statement quoted
followed in Sudan Government v. Isagha Musa Soliman [1961]
"The wording of the relevant sections of the Indian law are as straightforward and as unqualified as the corresponding sections of the Sudan law, namely, Penal Code, s. 251, and Code of Criminal Procedure, s. 241. My predecessors in the Sudan followed a similar line to India as in fact they were judicially bound to do."

Thus, Indian authors and treatises are quoted as direct authority not only on what Indian law is on the issue in hand, but on Sudanese law as well. To quote the example of the statement of Mr. Justice M. E. Mobarak in Sudan Government v. Bazzou Gamra El Habashi: 175

"The law, I think, is very clear on this matter and in such a case I do not think that the question of the inherent powers of the court arises. In support of my view in this respect, I quote the following paragraph from Vol. I, Sohoni's Code of Criminal Procedure (15th ed. 1960)."

There may be, however, more justification for the use of Indian material than there is for the use of English and other common law material. Beside the Indian origins of the Sudanese Codes, there are significant socio-economic similarities between India and the Sudan, a consideration that may have contributed to the adoption of the Indian Codes in the first place. Yet English and other common law material is used quite freely, and frequently without any argument as to their relevance or suitability to conditions in the Sudan. Again, like Indian material, other common law material is used as if directly

binding: in Sudan Government v. Mohamed Hamid Mohamed Ali, Mudawi, P.J., had this to say:

"However, even if accused...we have high judicial authority that this does not affect the situation either way. On page 137 of the Criminal Law - The General Part Professor Glenville Williams quotes two cases on this point:—

the first is an American case - Jackson vs. The Commonwealth, decided by the Court of Kentucky in 1896— and the second case, Reg vs. Khandn, was decided by the Court of Bombay in 1890..."

In Sudan Government v. Mohamed Abdel Magid Mr. Justice Galal Ali Lutfi said:

"The leading case in this matter which gives a clear guidance as to the meaning of "road", "public" and "access" is the case of Harrison v. Hill (1932) S.C.(J.) 13. The facts of this case are as follows:... See Bingham, Motor Claims Cases (4th ed. 1960) p.181..."

Again, in Sudan Government v. Khidir Abdalla El Hussein, a case in which the decision of the court below was based on Sudan Government v. Mohamed Hamid Mohamed Ali, above, which the confirming authority had to consider before quashing the conviction in the present case, Mr. Justice Abdel Mageed Imam, in a long judgment, used freely cases and other material from all over the common law jurisdictions.

In view of the practice of the Sudanese courts in this respect, the remarks of Mr. David L. Grove are as true of the position in the Sudan as they are of that in Nigeria with respect to which they were

made. He said:

"No one would argue against the point that there is great merit in drawing upon the experience of countries with similar constitutional background in fashioning the constitutional law of Nigeria. It would be foolish to stumble blindly over the same obstacles which tripped up others, or fail to take into account the satisfactory method by which another jurisdiction has treated a problem common to both countries. However, it may fairly be argued that a superficial reference to a random case of another jurisdiction, without attempting to set that case in its larger perspective and thus understand the whole of the law on a subject, and not just a part, is of little value...

As was stated above, the reference by the Nigerian courts to the laws of a foreign jurisdiction has great value. If, however, that reference fails to delve into the whole body of the relevant law as it has developed, but picks out only scattered citations which appear attractive, the conclusion becomes inescapable that what was sought was not insight into the problems at hand, but support for a position that had been adopted."

In fairness to the judges, however, the limitations under which they have to operate must be noted as they do account for some, though not all, of the faults of treatment of foreign common law material in the Sudan. Far from having qualified clerks to help them locate relevant material and assess its authority in long opinions like the American Justices, the Sudanese judges do not even have the benefits of counsel in many cases. Beside the inability of most defendants and litigants to have their own counsel, there are not enough counsel to go round. Moreover, there is no commentary literature to help the

courts, law reporting is in its infancy and direct authority on specific issues rarely found.

But these limitations do not excuse the style of reference to the next most relevant source of comment and guidance in the absence of Sudanese material. Two remarks in particular need to be made on the practice of the Sudanese courts in this respect:

For one thing, the judge ought to give some reasons for referring to the particular source and for accepting its view in preference to other alternative views, if any. It is only by adding something of his own that the judge can make the statement part of Sudanese law, applicable to the case in hand. Without argument and reasoning alternative Sudanese sources will never be developed and the dependence on foreign material will never end.

Secondly, the courts must be selective in the works and legal text books they use. As Mustafa observed: 180

"But perhaps the most striking feature is that whatever was cited was accepted as an authoritative and unquestionable statement of the law. The courts, moreover, did not adhere to any recognizable set of rules in their citation of books and treatises. In a very recent case one of the learned members of the Supreme Civil Court even fortified his judgement by statements taken from a very recently published Ph.D. thesis."

In conclusion, it is not the use of foreign common law material that is objected to, it is rather the way in which it is being used.

There ought to be argument and discretion in the process; the courts should be selective in the use of foreign authorities and account must be taken of local conditions etc.

(viii) Constitutional Guarantees for the Accused:

The very idea of including a declaration of guaranteed rights and freedoms has been the subject of much controversy. English lawyers find political manifestos out of place in a legal document. They neither found constitutional declarations or guarantees of rights necessary in their own experience nor were they impressed with the history of civil liberties in the majority of countries which have such constitutional guarantees. 181 The Joint Parliamentary Committee on Indian Constitutional Reform, in rejecting a proposal for a justiciable set of guarantees of fundamental rights, said: "Either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts." 182

181. S.A. de Smith, "Fundamental Rights in the New Commonwealth", 10 Inter. & Comp. L.Q. (1961) 83 and 215 at 85. This traditional opposition was manifested in the official attitude prior to the Second World War.

Whether this position was abandoned or overtaken by events, the inclusion of a Bill of Rights became a regular feature of post-war independence constitutions. As the Minorities Commission for Nigeria observed:

"Provisions of this kind in the constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless we think that they should be inserted. Their presence defines benefits widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A Government determined to abandon democratic courses will find ways of violating them but they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a Government on individual rights."

The Permanent Constitution of the Sudan purports to give recognition to a comprehensive list of rights for the accused in criminal proceedings. They cover most of the questions discussed in this study: arrest, bail, search, interrogation, legal advice and representation etc. These constitutional provisions will not figure much in the following discussions for two main reasons. For one thing it is too early: as the Permanent Constitution was enacted 1973 the courts did not have much time to interpret and develop its provisions yet. The

186. Articles 12, 13 and 62 to 68. There is also provision for the presumption of innocence, protection against retrospective laws, freedom from double jeopardy, and some penal measures.
prospects of this, however, are not too promising; nothing like the American tradition is likely to evolve from their endeavours because of the way in which these rights are expressed. Wheare said: "No realistic attempt to define the rights of the citizen, indeed, can fail to include qualifications. Yet when we see the result it is difficult to resist asking the question: What of substance is left after the qualifications have been given full effect?" This is true of almost all the relevant provisions of the Sudanese Permanent Constitution: e.g. "Dwellings are inviolable and they shall not be entered or searched without the permission of their occupants, except in the cases, and in the manner, prescribed by law"; and "...A citizen shall not be arrested without a valid warrant of arrest issued by a competent court having jurisdiction save where the law otherwise provides..." This sort of qualification has the effect of constitutionalising in advance whatever restrictions and encroachments the law may chose to impose on the guaranteed right. It offers no independent standard against which the constitutionality and validity of the law itself may be tested.

The Sudanese constitutional provisions are therefore unsuitable as a framework for developing procedural protections. There is, however,

187. K.C. Wheare, Modern Constitutions, (Oxford University Press, 1951) at 57.


189. Ibid. Article 66.
much that can be done by the Judiciary and Legal Profession because, though the Constitution may tolerate unfair and oppressive legislation, it does not command it. Lawyers must maintain constant vigilance so that none creeps into the system. It is up to the lawyers in particular, as leaders of public opinion in this respect, to make sure that our Constitution is not one of those "devised to throw dust in the eyes of observers while the ruling clique or party does as it likes". In fact the Code of Criminal Procedure may provide better and more permanent framework for safeguarding the rights of the accused than the "Permanent Constitution" could have provided - constitutions tend to be suspended, repealed and changed more often than the Code.

(3) The Native Administration of Justice:

Tribal authority and its customary law enforcement have always been part of the basic facts of life to the Sudanese. Various regimes and political orders, native and foreign, came and went while the cohesive universal tribal structure remained. The chief or sheikh, the natural leader whose choice reflected tribal values and socio-


191. The Sudan independence constitution of 1956 was suspended in 1958, reintroduced as amended in 1961, and suspended in 1969. The present constitution was introduced in 1973 and is still in force. As the above survey indicates, we have had the C.C.P. for over seventy years, revised and re-enacted only twice.
economic interests, owed allegiance to the tribe and all its members first and foremost. Himself a tribesman, he would know the limits of his political authority and hence his judicial and administrative powers. Within those limits, compliance with the rules and submission to the jurisdiction of the tribal authority in the settlement of disputes were voluntarily forthcoming. The tribal heads, therefore, had no problems in maintaining law and order, and in displaying the measure of political allegiance to the central authority required in exchange for their privacy and general security.

Before the Mahdist state, central political authority, when it existed in any effective way, was not very much interested in the way internal affairs within the tribe were conducted. A measure of allegiance and a flow of revenue were all that was asked for and all that was received. The central government had no purpose or fundamental ideology to which they wanted to convert people, or in accordance to which they wanted them to live their lives. In the towns, as they gradually grew, the central authority had to fill the vacuum. As there was no tribal homogeneity, the traditional power structure and cohesion were lacking. In the field of law enforcement, therefore, official courts had to be established, judges appointed, and the whole system backed up by a show of force when necessary.

The Mahdist state was different: Al Mahdi set out to reform his people, to mould their lives and save their souls. Tribal traditions and customary law were, therefore, suspect; they pertained to the past, to the discredited regimes. For once the central authority did not
settle for revenue and nominal allegiance: conflict, not surprisingly, ensued. Some of the tribes refused to surrender their independence and traditional ways, and the regime responded. As one author summed up the position:

"The tribes disintegrated between 1882 and 1898. Some sections joined the dervishes [the Mahdist], others resisted, all alike were decimated by continuous punitive expeditions, savage quarrels, famine and disease. As a natural consequence, the traditional authority of the Sheikhs and chiefs diminished to vanishing point and the patriarchal conception of administration was replaced, in all but a few remote districts, by militarism in its worst form."

Perhaps because the traditional, tribal authority took some time to recover, and it seems also as a matter of policy - the new administration not knowing yet who was enemy and who was friend - the Condominium Government did not recognise tribal leaders immediately. Though they performed numerous duties for the administration in maintaining law and order, collecting taxes etc, the theory of direct control over all individuals continued for quite some time to be at variance with practice.

That does not mean that customary law did not apply, it did over all the country except those parts where the newly introduced Codes

193. Ibid. 2nd; MacMichael, The Sudan, 82.
prevailed. The domain of official law, it is true, gradually increased, but up to the present day considerable parts of the country have never known official law enforcement. Moreover, customary law enforcement, or rather administration of justice, as both the law applied and the means for its enforcement were customary, was officially recognised and organised for the first time during the Condominium period. Thus, in the main, customary arrangements played a considerable part in the administration of justice in the Sudan throughout its history.

The customary administration of justice was to receive the dubious benefits of official recognition during the Anglo-Egyptian rule, but not from the beginning. Though some of the administrators were apprehensive of the cost of the total coverage of the whole country with official courts enforcing the Codes, it was not until after the First World War that the potential of what came to be known as the "Native Administration" began to be realised and developed.

A committee headed by the Legal Secretary reported, on 13/1/1919, 

194. Warburg, The Sudan Under Wingate, 133-36; see also, A.W.M. Disney, "English Law in the Sudan", 40 Sudan Notes and Records, (1959) 121; and File No. ll.A.2., Central Records Office, Khartoum, Civsec./ll/1/1.

in favour of the proposal that some influential sheikhs and notables nominated by the Governors of the provinces should be appointed third class magistrates to sit on Mudir and Minor courts as members.\textsuperscript{196} The Governor-General approved and some appointments were made.\textsuperscript{197} Greater developments, however, followed a second report: the Milner Commission Report.\textsuperscript{198} Though concerned primarily with Egypt, the Commission reported on the Sudan too; it recommended decentralisation on a large scale in the administration in general, but under British supervision.\textsuperscript{199} In the judicial sphere further steps followed this Report.

Initially the policy was to recognise existing customary authorities among nomadic and semi-nomadic tribes. The Legal Department and the Judiciary were convinced that only nomads preferred their own methods to those of the C.C.P.\textsuperscript{200} Thus the preamble to the first enactment on the matter, the Powers of Nomadic Sheikhs Ordinance, 1922, said:

"Whereas it has from time immemorial been customary for sheikhs of nomad tribes to exercise powers of punishment

\textsuperscript{196} File No. 39/6/8/1, Central Records Office, Khartoum, Givsec./39/1/6.
\textsuperscript{197} C.S./Adm./204/5, dated 2h/11/1919. The first appointments were published in the "Sudan Herald" of 20/3/1920.
\textsuperscript{198} Egypt No. 1 (1921), Report of the Special Mission to Egypt, Cmd. 1131.
\textsuperscript{199} See MacMichael, The Anglo-Egyptian Sudan, 1140-146 for the part of the Report concerning the Sudan, specially at 1144-145.
\textsuperscript{200} Ibid. 2h8. See also J.S.R. Duncan, The Sudan, a Record of Achievement, 1148.
upon their tribesmen and of deciding disputes among them, and whereas it is expedient that the exercise of these powers should be regularised..."201

The powers actually granted to nomad sheikhs under the Ordinance were quite limited, in fact they were less by far than the powers some of them already enjoyed under customary law. The policy underlying the Ordinance, however, was more important as it established a principle, and gave official sanction to the traditional powers of the sheikhs and opened the door for further developments. Moreover, the cautious approach was later on relaxed, presumably after the success of the new experiment. In subsequent stages of development the scope for native administration of justice and the concept of native courts were evolved.

There was, next, the Village Courts Ordinance 1925 which authorised Governors of the provinces to which it was made applicable to constitute Village Courts for any village or group of villages. The courts were to consist of a president and appointed members; and they were to have jurisdiction to try specified minor offences as well as a limited civil jurisdiction.

In the Powers of Sheikhs Ordinance 1927 the restriction to nomadic tribes was abandoned. The preamble to the new Ordinance added to that of the old one: "...and whereas it is expedient that these powers should

be extended..." Under the new Ordinance, the Governor-General was able to establish, by warrant, sheikhs' courts in any area to which the Ordinance had been applied. The warrant for the constitution of each court would specify its membership and powers.202

The 1927 Ordinance was revised and re-enacted in 1928, with slight changes. In 1932 the Native Courts Ordinance consolidated and replaced both the Village Courts Ordinance, 1925, and the Sheikhs Courts Ordinance, 1928. The 1932 Ordinance is still in force in the northern Sudan.

With respect to the southern Sudan, a similar system of chiefs' courts was started on an experimental basis in 1923, and was continued without legal authority until it was legalised into the Chief's Ordinance, 1931.203 This Ordinance, too, is still in force in the southern Sudan.

Concurrent with these developments, steps were taken with respect to the towns to allow the natives to "share in the administration of justice according to law, as opposed to custom".204 To the C.C.P. 1925, a new section, 10A, was added in 1927 205 to allow for the

202. For a few examples, see MacMichael, The Anglo-Egyptian Sudan, 252.
204. Ibid. 83.
205. No. 1, 1927; Gazette No. 193/1927.
establishment of benches of third class magistrates, in the English tradition of the justices of the peace. The section was amended in 1932 to extend the powers of the benches, \(^{206}\) and the system remained until the present, only to be extended even further recently.

In the northern part of the country, the native courts are now being replaced by benches of magistrates even in the countryside, contrary to former policy. \(^{207}\) No such development is expected with respect to the southern part of the country. Partly because of political instability and physical inaccessibility, and partly because of stronger, more cohesive, tribal structure in that part of the country, the Chiefs' Courts Ordinance is, and is likely to be for a long time, the more practical and effective basis of law enforcement. The state courts and official law enforcement personnel are more thinly dispersed in the south. In view of the past contribution of the native courts and the chief's courts, and the continued importance of the chiefs' courts in the southern part of the country, the constitution and powers of courts under these Ordinances should be briefly outlined:

The Chiefs' Courts Ordinance applies to Bahr el Ghazal, Equatoria and Upper Nile Provinces, and to any other area to which the Council

\(^{206}\) No. 13, 1932; Gazette No. 562/1932.

\(^{207}\) See pp.81-83 and 95 below.
of Ministers, by order published in the official Gazette, may have extended its application. Three classes of courts may be established under the Ordinance: (a) court of a chief sitting alone; (b) court of a chief sitting with members; and (c) a special court under section 8 of the Ordinance. For classes (a) and (b) courts, members from whom the court may be constituted are appointed by the Governor of the Province who may also suspend for up to three months or dismiss a chief or member so appointed if it appears that he has abused his powers or is unworthy or incapable of exercising his powers justly or for other sufficient reason.

The court is actually established by a warrant issued by the Governor in his discretion. Such warrant would define the particular court's powers and limits of jurisdiction. The warrant may subsequently be suspended, cancelled or amended in order to enlarge or diminish the powers of the court. Subject to its warrant and regulations and

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208. The Chiefs' Courts Ordinance 1931 section 2. It was extended by one such order to the southern part of Kordofan Province in 1914.

209. Ibid. section 5.

210. Ibid. section 4(2) and (3).

211. The Self Government Statute, 1953, Article 76, vested in the Chief Justice all the powers conferred upon the Governor by this Ordinance and provided, inter alia, at the same time that the Chief Justice may delegate all or any of the said powers to the Governor of the province concerned; and that, in any case, the Chief Justice, any judge of the High Court acting as his delegate, should not exercise any of the said powers except after consultation with the Governor concerned. In the present work reference shall be made to the Governor regardless of whether in fact the power is currently exercised by him or not.

212. Ibid. section 5.
the provisions of the Chiefs' Courts Ordinance, every Chief's Court of class (a) or (b) above has full jurisdiction in all civil cases in which each of the parties is a native, and in all criminal cases in which the accused is a native. 213 "Native" is defined by section 3 of the Ordinance to mean any native of Africa other than a native of Egypt.

Special courts under the Chief's Courts Ordinance may be convened by the Governor if he thinks that the ends of justice will thereby be served in any of the following cases: (1) where the accused is subject to the jurisdiction of one chief and the complainant is subject to the jurisdiction of another; (2) where the accused is himself a chief; and (3) where the alleged offence is of such gravity that the powers of any other court established under the Ordinance having jurisdiction appear to be insufficient. 214 Neither the finding nor the sentence of a special court is final until confirmed by the Governor. 215

From chiefs' courts other than a special court there is both appeal and revision. In any civil or criminal case there is a right of appeal to the Governor or District Commissioner or other chief's courts authorised to hear such appeals. 216 The power of supervision

213. Ibid. section 6(1); the section, however, provides for several exceptions to this general rule.
214. Ibid. section 8(1); see section 8(2) and (4) for the possible constitution of such courts.
215. Ibid. section 8(5); but see section 10(2).
216. Ibid. section 9(1).
is exercised by the Governor or District Commissioner acting either on
his own motion or on the application of any person concerned. In
exercising this power the Governor or District Commissioner may cancel,
alter or suspend any decision, finding or sentence. Within six
months of judgment, if any was passed, the Governor or District
Commissioner may also order either a re-hearing before the same chiefs' court or the institution of proceedings under the C.C.P. or Civil
Justice Ordinance.

Judgments of the chiefs' courts may be executed, on the request
of the chief or the aggrieved party, by the District Commissioner or
Governor of the province as if they were the judgments of an official
court of law.

By section 13 of the Ordinance the Governor is empowered to make
regulations, binding on the chiefs' courts, on such matters as limitation
of powers as regards jurisdiction over persons, offences that may be
tried, fees to be charged and other questions of practice and procedure.
The apparent opportunity this provision offers of gradually influencing
the practice, and eventually the substance, of customary law enforcement

217. Ibid., section 10(1)(a).
218. Ibid., section 10(1)(b).
219. Ibid., section 12.
220. See Disney, "English Law in the Sudan, 1899-1958", supra, 122-23,
for the view that there is some cross fertilisation between
customary and official law enforcement. Nothing is being done,
to ascertain the best way this relationship may grow and develop
in future.
does not appear to be utilized to the maximum of its potential: the courts are left to their own arrangements once the initial warrant of constitution is issued.

The native courts, established under the Native Courts Ordinance 1932, are subject to similar provision for regulation. In theory, five classes of courts may be established under this Ordinance: (a) a sheikh's court, with the sheikh as president sitting with members; (b) a court of a sheikh sitting in Meqlis, that is a court of a sheikh sitting with a group of elders; (c) a village court; (d) court of a sheikh sitting alone; and (e) a special court as provided for in section 13. In practice, however, some classes were used much more often than others.

The warrant or order establishing the particular Native Court provides for its powers, limits of jurisdiction, membership etc. in a way similar to that under the Chiefs' Courts Ordinance.

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221. This Ordinance applied all over the Sudan except where the Chiefs' Ordinance applied, i.e. the three southern Province and part of Kordofan Province; see below.

222. Section 17 Native Courts Ordinance.

223. Ibid. section 5.


225. The Native Courts Ordinance, section 7.
Regulations under section 17 of the Native Courts Ordinance must accompany every warrant of constitution, the range and importance of subjects covered by these regulations appear to be greater than that of regulations under the Chiefs' Courts Ordinance. For example, there is no right of appeal from the decisions of any native court except when provided for expressly in the regulations accompanying the warrant of constitution which specify the court to which appeal may lie.\(^{226}\)

The potential of jurisdiction from which a warrant of constitution of a native court may draw is more restricted than that of a chiefs' court.\(^{227}\) For example, a native court, other than a special court,\(^{228}\) may never have jurisdiction over cases of homicide, offences against the state or offences relating to the armed forces, and such types of offences as may be specially excepted in the warrant or order establishing the Court.\(^{229}\) There are no limits of jurisdiction with respect to subject matter for the chiefs' courts unless specified as such in the warrant of the particular court. In other words, subject to the warrant, a chief's court may have jurisdiction...

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226. Ibid. sections 12 and 17(2)(b).

227. Cf. sections 6 Chiefs' Courts Ordinance and section 8 Native Courts Ordinance.

228. See proviso to section 8(1) and section 13 of the Native Courts Ordinance.

229. Section 8(1)(f) and the First Schedule to the Native Courts Ordinance.
to try, for example, a homicide case, a native court may never have such jurisdiction.

A power of revision similar to that in the Chiefs' Courts Ordinance is to be found in section 11 of the Native Courts Ordinance. 

Provision as to appeal is different: there is no right of appeal from a decision of a native court unless expressly provided for in the warrant of constitution of the court which must specify the native court to which appeal may lie. In the absence of such provision appeal lies only with the consent of the Governor of the province or the District Commissioner.

In practice certain models of warrants of constitution for various classes of native courts evolved. Such models contain sets of powers, membership formulae, appeal arrangements etc., in a graduated manner. Any given native court can thus be classified according to its range of powers and other features.

The two Ordinances agree on the law to be administered by the chiefs' and native courts:

230. Except that the power is exercised either by the Governor or any authorised first or second class magistrate in the case of Native Courts, see section 11.

231. Section 12 of the Native Courts Ordinance.

232. These are: main courts, regional courts and branch courts, see El Nur, "The Role of the Native Courts", supra, 85-86.
(a) the Native law and custom prevailing in the area or in the tribe over which the Court exercises jurisdiction provided that such native law and custom is not contrary to justice, morality or order;

(b) the provisions of any ordinance which the Court is authorised to administer in its warrant or regulations. 233

Both clauses of the formula call for a brief comment. There is first the opportunity clause (a) affords to supervise and influence the substance of the native and customary law applied. Substantive customary rules may be approved or disapproved in accordance with the dictates of "justice, morality or order". In Sudan Government v. Rainando Legge, 234 for example, the Bari custom prescribing that a man who has premarital intercourse with a virgin whom he is unwilling to marry is to be punished was approved as in accord with justice, morality and order. Unfortunately, the Sudanese courts do not appear to be active enough in this respect. 235

As to the second clause, two considerations are relevant: on the one hand it may not be desirable that substantial portions of official enactments be made applicable to the chiefs' and native courts; they may take over completely and these courts cease to be customary law courts

233. See sections 7(1) of the Chiefs' Courts Ordinance, and section 9(1) of the Native Courts Ordinance.


but merely inadequately staffed and equipped official courts. Besides
the inability of the courts themselves to cope, elements of customary
law are certainly worth preserving, especially within the context of
the community or tribe to which they relate. Moreover, if the
customary courts were to lose their essential character as a local
or tribal authority, they may lose with it the acceptance of their
subjects who now voluntarily submit to the jurisdiction of the
customary courts and enforce their judgments without state inter-
ference.\(^\text{236}\) If that ceased to be the case, the state official law
enforcement machinery might not be able to deal with the extra load.

On the other hand, it may be necessary, in some cases or areas of their
practice, that the customary courts be made bound by certain enactments
or parts of them. This is especially true in the area of criminal law
and its enforcement. Various circulars and instructions have been
issued from the Judiciary, General Division, to the Chiefs' and Native
Courts.\(^\text{237}\) Magistrates and District Commissioners were also instructed
on how to supervise the customary courts in their districts.\(^\text{238}\)

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236. The Sudan, A Record of Progress 1898-1917, (a Sudan Government
publication), 9, described the work of the Chiefs' and Native
Courts as follows:

"...and experience has shown that the justice they
administer is facilitated by their accessibility
and the knowledge of local conditions possessed
by their judges."

237. See, for example, JUD/A/10,F,3/3; CS/LC/1,B,1; and JUD/A/10,B,1;
al in file with the Judiciary, General Division. See also,
Khaliil, "The Legal System of the Sudan", 20 Inter. & Comp. L.Q.
(1971) 621; at 640.

238. See JUD/A/10-B-1, dated 25/11/1958; and JUD/A/10-B-1, dated 7/10/1959.
Magistrates, in turn, issued circulars and letters advising these courts on how to exercise their powers, explained the law to be applied and the procedure for applying it. Judicial decisions on cases on appeal or revision from the customary courts are also used to influence the practice of these courts. A balance must be maintained between the above considerations to allow for the growth of a healthy and positive body of customary law and an effective customary law administration. Above all, the customary courts must not be too hastily liquidated without thorough socio-economic, political and anthropological assessment of the consequences.

Alas, the native courts in the northern part of the country have been drastically reduced, with a view to their total liquidation in the future, but without serious deliberation and in response to purely political considerations. The abolition of the Native Administration in general - both the administrative and the judicial powers of the tribal leaders and sheikhs - have been a hot political issue since Independence in 1956. To its opponents, the Native Administration

239. See, for example, those issued by Mr. Justice Abdel Rahman Abu, when he was Resident Magistrate, Kadogli; also his Dr. P. Ct./Gen./Sh, dated 12/7/1971. See also Office Circular No. 2/1960, from Hasan Mohamoud Babider, Resident Magistrate, Kassala.

was an enemy of the people; having been an ally of the colonial administration, it became the instrument of political power and economic advantage for their members and their class after Independence. The judicial and administrative powers of the Native Administration are seen as effective tools that lend themselves easily to abuse and favouritism and corruption. For its proponents, the Native administration represents the cheapest and most acceptable means of administering a vast country, with such complex ethnic and cultural composition. The administration is seen not only as convenient and cheap, but also as required in itself, as irreplaceable, because many communities and tribes would not accept the state official courts in any case.

In May, 1969, the army took over power and the new administration favoured the abolition of the native courts in the northern part of the country: it is clearly impossible to replace the chiefs' courts in the southern part of the country. The native courts in the northern part of the country are being replaced with benches of magistrates under the C.C.P. and the Judiciary Act 1973.\textsuperscript{211} Before a bench of magistrates is set up in any particular area, a commission must report on the feasibility of the measure, the candidates for membership,

\textsuperscript{211} See p.95 below.
suitable powers etc.\textsuperscript{2i2} The process of officialisation has gone a long way in the last few years;\textsuperscript{2i3} it is now feared that the next administration may try to revise the whole process, again without studying the results of the present approach, merely for political reasons.

\textbf{B. A General Survey of the Current Criminal Process in the Sudan:}

In this section it is attempted to give an overall view of the criminal process, step by step, in order to provide the general background against which the following discussion of certain key issues may be meaningful. Comparative reference is kept to a minimum at this stage in the interest of clarity and in view of the limited purpose of the survey. Again, the survey does not purport to be exhaustive for the same reasons; it is rather a general description of the day-to-day work of the police and the courts as these are the most relevant parts of the whole process to the objectives of this study. It is unfortunate that any description of the Sudanese criminal process has to rely largely on unpublished material and impressions taken from personal experience and private interviews because published material is simply non-existent.

\textsuperscript{2i2} See, for example, No. JUD/G/10.B.2, volume II, dated 2/7/1969; and 10/7/1969; and No. Dongola/Gem./12/2, dated 1/12/1969.

\textsuperscript{2i3} By the end of 1974, 606 Native Courts were replaced with Benches of Magistrates. Only 104 Native Courts now remain.
The Criminal Courts System: Constitution and Powers

There are five classes of official, as opposed to customary and native, criminal courts in the Sudan at present: major courts, courts of a magistrate of the first class, courts of a magistrate of the second class, courts of a magistrate of the third class, and benches of magistrates. As is obvious from the names of the various courts, they follow the grade of the magistrates who man them. In other words, the grade of the court, that is to say, its relative jurisdiction and powers, are expressed in terms of the magistrates who sit or preside in the court. The term magistrate is used in the C.C.P. and decided cases to refer to qualified lawyers as well as lay magistrates. To change the term in this study would only cause confusion. It is hoped that after the following few pages the position will become clearer.

In any event, in the present study, reference is mainly made to the qualified lawyer type of magistrate; when it is not, and this is thought to be significant, the distinction will be made specifically. The term "judge" is reserved by common usage to more senior members of the Judiciary.

On recruitment into the Judiciary, fresh law graduates are appointed as third class magistrates, also known as legal assistants.

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2(h) Section 8 C.C.P.

2(h) This the normal method of appointment; the Judiciary Act 1973, the current enactment on the subject, provides for appointment into the service at any stage or grade. See sections 18(b), 19(b), 20(b) and 21(b).
After an initial training period of attachment to senior and more experienced magistrates, the new magistrates start practising as third class magistrates. Their progress up the judicial hierarchy then becomes a question of individual performance and ability. The grades are, in their present day order, legal assistant, second class magistrate, first class magistrate, province judge, member of the court of appeal, and, finally, member of the Supreme Court. Though a time scale is difficult to construct with any degree of certainty, it seems that, on average, a magistrate becomes a second class magistrate within two to three years of appointment, and a first class magistrate within five to six years. In other words, the average first class magistrate, exercising the maximum trial jurisdiction for a single magistrate, is just turning thirty years old, if not younger.

(1) Major Courts:

A major court, normally convened by order of the province judge, consists of a first class magistrate as president and two magistrates of any class as members. The two members are normally, even in serious cases, lay magistrates who are appointed by the President of the Supreme Court.

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246. See sections 16 and 17 on general procedure and conditions for appointment. See also sections 23-30 The Judiciary Act 1973.

247. According to section 12 C.C.P. province judges are the administrative heads supervising the functioning of the courts within the province. The Judiciary Act 1973 provides for a new procedure, based on Supervisory Board and Regulations to advise and instruct the province judges themselves, see sections 37-38.

248. A major court may also be convened by the President of the Supreme Court or the President of the Court of Appeal, see section 9 C.C.P.
Court specially for this purpose. The policy behind having lay magistrates on major court trials appears to be similar to that of having trial by jury in other systems: to have reasonable and experienced lay members of the community sitting in judgment on their peer, the accused; to keep the law and its administration in touch with the man in the street who is affected directly by its breach and stands to benefit by its enforcement. An added advantage in the Sudan is the valuable knowledge of local custom and conditions which the lay members bring to the case. The main difference of the Sudanese system from that of trial by jury is the fact that in the Sudanese system the lay magistrates are full members of the court who can outvote the legally qualified president, and who decide on all questions of fact and law in the case.

The effect of an irregularity in the constitution of a major court is not clear; it appears to depend, among other considerations, on the seriousness of the irregularity in question. It is settled,

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249. Section 15(2) Judiciary Act 1973. See also section 11. C.C.P.

250. These are the best arguments, in the writer's view, for trial by jury in modern criminal procedure; the real reasons, however, may be historical.

251. Cf. the English Courts Act 1971 section b(2)(c) and section 5(8) which allow lay justices of the peace to sit as full members of Crown Courts.

252. According to section 261 C.C.P. no verdict, sentence or order may be disturbed if the accused was not prejudiced in his defence by the irregularity.
however, that a major court consisting of one magistrate sitting alone is illegal, and so is one consisting of a first class magistrate and two elders who are not magistrates under the C.C.P. The constitution of a major court with one first class magistrate, one third class magistrate and two chiefs as unofficial assessors, was held to be justifiable technical irregularity, at least when no other magistrate is available in a remote district. It may be, however, that such constitution will not be acceptable under modern conditions. The proviso to section 9 C.C.P. under which the constitution of a major court was possible with only two magistrates, if three were not available, subject to the consent of the Chief Justice, has been repealed in the 1974 version of the Code.

The major court’s convening order sets out the particulars: names of the president and members, name of the accused, charges, date and place of the trial etc. On the effect of nonconformity with the convening order we have conflicting opinions. In Sudan Government v. Osman Eltom Koko, where the major court was in fact presided over by a first class magistrate other than the one named in the convening order, the Confirming Authority ruled the proceedings ultra vires

256. On the requirement of confirmation by the Confirming Authority see pp.135 et seq. below.
and ordered a retrial.\footnote{257} On the other hand, in \textit{Sudan Government v. Adam Eltigani}, where one of the named members was replaced by another magistrate not named in the order, the proceedings were upheld on confirmation; it was held to be a mere technicality that did not prejudice the accused in his defence and might therefore be excused under section 261 C.C.P.\footnote{258} The court expressly refused to follow \textit{Osman Eltom Koko} case, though it did not overrule it as such. The two cases can perhaps be distinguished in terms of the gravity of the irregularity - the change of a member is not the same as the change of the president of the major court. Both decisions may therefore be justified under section 261 C.C.P. which allows some discretion in excusing an irregularity.

Offences triable by a major court are those specified as such in the sixth column of the First Schedule to the C.C.P.\footnote{259} or by the law creating the offence.\footnote{260} Since the general rule is that any offence is triable by the designated court or any court with greater powers,\footnote{261} and since a major court is the highest court of original jurisdiction, it follows that it may try any offence whatsoever, whether under the

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259. Section 13 C.C.P.

260. Section 14.

261. Section 13.}
Penal Code or any other enactment. In practice, however, major courts are convened only for the trial of the more serious offences.  

A major court may pass any sentence authorised by law. This general power appears to be limited in a curious way. According to section 76 Penal Code a "Sentence of whipping...may be passed by the Court of a Magistrate of the first or second class trying a case summarily on an adult male offender in lieu of any term of imprisonment to which he might be sentenced under this Code". This section was construed as limiting this type of sentence to the particular procedure specified, hence a sentence of whipping may not be passed by a major court. This limitation, however, has no practical effect because such a sentence is not likely to be appropriate to the type of case triable by a major court anyway.

(ii) Courts of Magistrates of the First Class:

A court of this class consists simply of a first class magistrate sitting alone. The offences triable by the court are indicated as such in the sixth column of the First Schedule or in the enactment creating the offence, and any offence triable by a lower court.

262. Whether a major court trial is called for is decided in the judicial inquiry that may be converted into committal proceedings, see below.

263. Section 17 C.C.P. Section 21 provides: "Any Court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass."


265. Sections 13 and 14 C.C.P.
An offence under an enactment that does not specify the court competent to try the offence may be tried by a court of a magistrate of the first class provided such offence is not punishable by imprisonment for a term exceeding seven years or fine exceeding L31000.266

The sentencing powers of a court of a magistrate of the first class vary according to whether it is trying the offence summarily or non-summarily.267 When trying offences summarily it may pass the following sentences: imprisonment for a term not exceeding six months, fine not exceeding L3100, and whipping. On trying an offence non-summarily, it may pass the following sentences: imprisonment for a term not exceeding five years, fine not exceeding L3500, detention under section 67 Penal Code,268 and whipping.

A first class magistrate is competent to try offences the maximum penalty for which exceeds the maximum sentence he is authorised to pass - as for example, when he is trying an offence under an enactment that does not specify the court, he may try an offence punishable by imprisonment up to seven years though the maximum sentence of imprisonment he may pass is five years. The answer to the paradox lies in the fact that it is not every conviction for such an offence that calls for the

266. Section 14(2)(a).
267. Section 18. The differences between summary and non-summary trials are explained at pp.111 et seq. below.
268. That is, detention in reformatory school for juvenile offenders.
maximum penalty. If it appears that the sentence likely to be appropriate is beyond the powers of the magistrate to impose, the correct approach, which can be adopted even after the trial has started, is to convert the proceedings into committal proceedings and have the offence tried by a major court.

(iii) Courts of Magistrates of the Second Class;

In this class of court sits a second class magistrate alone. He may try offences for the trial of which this grade of court was specified, whether by the sixth column of the First Schedule or the enactment creating the offence. Being a court of greater powers than that of a third class magistrate and some benches of magistrates, a court of a second class magistrate is competent to try any offence triable by such inferior courts. 269 When no court is specified for the offence, a court of a second class magistrate may try it only if it is not punishable with imprisonment for a term exceeding three years or fine exceeding $5.500. 270 As in the case of a court of a first class magistrate, these maximum sentences define the jurisdiction of a court of a second class magistrate and not its sentencing powers. Again as in the case of a court of a first class magistrate, if the offence is punishable by a maximum sentence exceeding the maximum a second class magistrate is authorised to impose, and it appears likely that the

269. Section 13 C.C.P.

270. Section 14(2).
maximum sentence will be called for, the case is referred to a higher court for trial. Thus limits on sentencing powers may indicate the reference of the case to a higher court though a court of second class magistrate is technically competent.

The sentencing powers of a second class magistrate also vary with the mode of trial, whether summarily or non summarily. On summary trial, he may pass a sentence of imprisonment for a term not exceeding two months, fine not exceeding Ks. 50 and whipping. On non-summary trial, on the other hand, he may pass a sentence of imprisonment for a term not exceeding one year, fine not exceeding Ks. 200, detention under section 67 Penal Code - the special sentence for juvenile offenders - and whipping.

(iv) Courts of Magistrates of the Third Class:

This court of a third class magistrate sitting alone is the most inferior of the state official courts. It is competent to try summarily only. The offences triable by such a court are set out in the Second Schedule; it is not competent to try any other offence unless the relevant enactment so specifies.

271. Section 19 C.C.P.
272. Section 20.
273. The Schedule sets out all offences triable summarily, only those set out in the first part of the Schedule are triable by a third class magistrate.
274. Section 14(1) and (2).
A third class magistrate may only impose a sentence of imprisonment for a term not exceeding one month and fine not exceeding £10. Should a third class magistrate feel that his sentencing powers would not allow him to deal with the offence properly, he should transfer the case for trial by a higher court even if he was technically competent to try it himself.

(v) Benches of Magistrates:

A court of this class, first introduced in 1927, consist of three third class lay magistrates. Its competence and powers are as specified in its warrant of constitution. Section 10A C.C.P., authorise the President of the Supreme Court to constitute such courts with powers of a court of a first, second or third class magistrate, either fully or only when trying offences summarily. In other words, a bench of magistrates may be established with the powers of a first class magistrate when trying offences summarily only, or it may be established with the full powers of a first class magistrate, that is when trying offences non-summarily as well as when trying offences summarily. Such

275. Section 20.

276. Sections 137, 145 and 237 C.C.P. provide for this procedure with respect to all classes of magistrates.

277. The development accompanied efforts to institutionalise native law administration in the countryside, but benches of magistrates, originally called town benches were established in towns only. Now the policy is to use them all over the country as explained above.
powers, however, may be subject to any limitations or specifications given in the warrant. Thus, a bench of magistrates may be precluded from trying certain classes of offences or imposing certain sentences that are within the general competence or powers of the class of magistrate with reference to whom the competence and powers of the bench are defined. For example, cases with great technical difficulty such as fraud or fighting involving a large number of individuals, may be excluded.

The most significant difference between benches of magistrates and native and chief's courts, both being manned by laymen, is the fact that the benches of magistrates are supposed to be bound to apply the Penal Code through procedures laid down in the Code of Criminal Procedure; they are regular state courts different from those described above only by being manned by laymen and not qualified lawyers. Though section 10A does not specify, benches of magistrates are always staffed by laymen whether for reasons of convenience or deliberate policy. Native and chief's courts, on the other hand, apply native law and custom and, only when their warrant so specify, certain portions of the Penal Code and any other enactment; but not through procedures laid down in the Code of Criminal Procedure; they are always free to devise their own.

278. Framing the charges and the general management of these trials can be extremely difficult, see Criminal Court Circular No. 5.

279. They must, however, conform with essential features of a fair hearing, see Sudan Government v. Albino Maring Joto [1963] 55.
The benches of magistrates were originally intended to operate in towns under the supervision of the Resident Magistrate, that is to say, the most senior magistrate, normally a first class magistrate. The new policy, adopted in 1969, of establishing benches of magistrates to take-over from the native courts in the countryside does not take into account the need for the work of such benches to be supervised by experienced qualified magistrates who would refer to the local bench of magistrates such cases as they know, from past experience, that the bench could handle. As there are no legally trained clerks attached to the benches of magistrates in the country-side to advise the lay magistrates on questions of law and practice, as in England, the problem of supervision and advice of these benches would tend to limit their usefulness. Short training courses and publications simplifying and explaining the relevant enactments may help.

Significant to the present study are the powers, which may be translated as "security or public order officer's powers", some lay magistrates have in the Sudan. For the trial of offences, the powers of a bench of magistrates are exercised by the bench as a whole. But the president of the bench may be given powers to issue summons and arrest and search warrants, and other powers of a full magistrate. All members of these benches are third class magistrates and as such have these powers in law, though their terms of appointment may deprive them of any of them. In the interest of efficient law enforcement,
specially in remote areas, it is important to have a magistrate enjoying these powers close at hand. The question is whether it provides any safeguard to have the warrants issued by lay magistrates.

These, then, are the regular courts of original criminal jurisdiction. Courts of appellate jurisdiction are, in ascending order, the province court, the Court of Appeal, Criminal Division, and the Supreme Court. Special courts may be established and magistrates appointed when and as the need arises. Section 5 of the Judiciary Act 1973 includes in its statement of the Sudanese Courts "Any other court established under any law which specifies its constitution and powers". Under section 11 C.C.P. "the President of the Supreme Court can confer, temporarily, the powers of a first, second or third class magistrate on any public servant or any other person he sees fit to conduct judicial business." There are further powers of appointment of such magistrates, to assist in sitting as members on major courts, under the Judiciary Act 1973.

(2) The Criminal Process

(1) Institution of Proceedings:

Criminal proceedings are normally instituted when information is

280. Such as the Prices Control Court in Khartoum, charged with enforcing the prices control regulations with some criminal sanctions attached.
received by the police; but as the police, however, are not obliged to accept and follow-up every information they receive, any information or complaint may be placed directly before the magistrate who may then direct the police to investigate.

In the Sudan, as elsewhere, socio-economic and cultural factors influence and shape patterns of crime reporting: certain types of offences are bound to be under-reported in the Sudan. The C.C.P., however, purports to create an obligation to report certain offences and informations to the police. Failure to do so is punished under section 152 Penal Code. The effectiveness of such provision in influencing reporting patterns is doubtful not only because detection of violations is extremely difficult but also because the social or moral imperative not to report is often stronger than the legal sanction to report. The police themselves may be reluctant to prosecute for failure to report for fear of alienating and antagonising the general public.

In a significant number of prosecutions, most notably under the Customs Ordinance 1939, the prosecution must be initiated in a particular way, by specific persons, or else it will be null and void.

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281. One would expect offences the reporting of which may stigmatise the victim, such as rape and adultery, and those not regarded as morally wrong, such as female circumcision (pharonic), to be under-reported.

282. Sections 109, 110, and 110A C.C.P.

(ii) Investigation:

(a) The Normal Procedure:

Once an Information is received by the police officer in charge of a police station the investigation of the offence begins. Subject to some differences noted below, the initial procedure is the same whether the offence reported or suspected is one for which the police may or may not arrest without a warrant. In either event the police begin, subject to rules as to local jurisdiction, by reducing the Information into writing, if it was given orally, on the First Information Report and having it read over to the informant. Every Information must be signed or sealed by the informant. A summary of the Information is then entered in the Register of Informations.

Even when the police are acting on their own information in suspecting the commission of an offence, they must still record the grounds of their suspicion in a First Information Report with a summary in the Register of Informations.

264. The term "Information" is a technical term referring to formal complaint for the police to act upon and initiate criminal proceedings.

265. Chapter XIII C.C.P.

266. Or other prescribed form.

267. Sections 111(1) and 122C(1) C.C.P.

268. Section 111(2). As Mr. Justice Abdel Rahman Abdu, Province Judge, said in Sudan Government v. Balcheita Mngas, D.P. Ct.-Cr. App.-337-1970 (unreported), "all police proceedings begin with an Information. The police powers to summon and examine witnesses, section 117 C.C.P., and to remand the accused in custody for twenty four hours, section 120 C.C.P., are all dependent on the existence of an Information to start with". The judgment is unpublished; my own translation.
After this initial stage, the procedure varies according to whether the offence suspected is one for which the police may or may not arrest without a warrant. In cases where the police may arrest without a warrant, the police will send the First Information Report to the magistrate and proceed with the investigation without waiting for his instructions. In cases where the police may not arrest without a warrant, on the other hand, the police must, normally, refer the informant, if any, and the First Information Report or other prescribed report to the magistrate and wait for orders and directions unless it appears that the consequent delay "may seriously prejudice the interests of justice, in which case the investigation may be commenced forthwith but a report shall be sent as soon as possible to a Magistrate giving the reasons for the action taken and on the receipt of such a report the Magistrate may give such orders or directions as he thinks fit." The difference between the two types, therefore, appears to be in the stage in the case the magistrate is brought in to direct the police.

Though the normal procedure is for Information to reach the magistrate through the police in the way described above, it is possible

289. Section 112.

290. If the complainant is a public servant acting in the exercise of his duties, which includes a policeman, is not normally so referred. See section 122C(1).

291. Section 122C(2).

292. See below.
for complaints to be laid before the magistrate directly under section 135(1) C.C.P. This is an important avenue of initiation because the police have a discretion to refuse to accept the information. Whether notified of the case through the First Information Report or private complaint, the magistrate officially takes cognizance of the offence and directs the police investigations according to the circumstances of the case. Close supervision or personal investigation of the case may be undertaken in case of great complexity or public interest, as where a police officer is the accused. The vast majority of cases, however, either need no investigation at all or are simple enough for the police to handle themselves, experienced investigators are usually quite familiar with the technical rules and requirements of substantive criminal law and the law of evidence as well as procedural requirements. Magistrates often refer cases to the police for investigation, having signed to certify their knowledge of the proceedings and their prior authorization of whatever action the police deem necessary or appropriate.

The conduct of the investigation itself is governed by the relevant provisions of the C.C.P., the Criminal Court Circulars and other operational rules. The Code provides for arrest, bail, search and

293. Section 114(b) C.C.P.

294. The Case Diary is usually signed with the remark: "to the police for investigation".

295. As may be expected the police have various forms and reports to fill as the investigation proceeds, and for the various steps to be taken.
seizure, summoning and examination of witnesses, etc. A Case
Diary must be kept on the investigation and its progress.
Criminal investigation techniques and methods are also covered by Criminal
Court Circulars.

(b) Sudden and Suspicious Death:

There is no office of coroner in the Sudan; sudden and suspicious
deaths are investigated under section 122D C.C.P. If the police
officer believes that an offence has been committed, he would proceed
in the appropriate way outlined above - make the appropriate entries
and report the case to the magistrate and work under his directions
and orders. If, on the other hand, no offence is suspected the
police officer in charge of the police station must nonetheless enter
the Information into a First Information Report, send the Report to a
magistrate of the first or second class and proceed to open an invest¬
igation as to the cause of death, keeping a record of his investigations
in a Case Diary. Such investigations must be conducted in accordance
with the C.C.P. At the end of the investigations, the Case Diary must
be submitted to the magistrate who, after any further investigations
he considers necessary, makes a finding as to the cause of death.

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296. These procedures and investigative powers are considered in detail
below.

297. Section 115 C.C.P.

298. For example, blood group testing, Criminal Court Circular No. 37;
Evidence of Trackers, Circular No. 39; Identification, Circular
No. 40 etc.
In a recent Criminal Court Circular, No. 68, it has been directed that incidents in which policemen cause death in the execution of their duties should be investigated under this procedure and not as an ordinary information. The use of this procedure helps by avoiding much hardship to the policeman involved because he need not be immediately arrested and suspended from his work. Should the investigations made reveal that an offence has in fact been committed, the regular procedure can be adopted.

(c) An Element of Discretion:

One feature of this initial stage that calls for a brief comment is the police discretion to refuse to accept an Information. Both section 111(1) C.C.P., which relates to offences for which the police may arrest without a warrant, and section 122C(1) C.C.P., which relates to offences for which there is no power to arrest without a warrant, contain the following proviso:

"Provided that if the officer is satisfied that no public interest will be served by a prosecution he may refuse to accept the information and notify in writing the informant of his right to complain to a Magistrate under section 135."

There are no data on how frequently this power is exercised, on what effect it has on law enforcement in general, in relation to which the type of complaint or class of complainant it is most likely to be exercised, or on whether the complainants are advised of their right to apply
to the magistrate, and if so how often they lose heart and drop the complaint altogether. The implications of failing to advise the complainant of his right to apply to the magistrate are obviously very serious in a country where the general population is ignorant and legal advice is scarce. Yet such failure does not appear to constitute an offence by itself.

In Sudan Government v. Sol Abdulla Khaleefa, the High Court ruled that a police Sol, which is the most senior non-commissioned officer post in the police, who failed to notify the informant in writing of his right under section 135 did not thereby commit an offence under the Police Ordinance 1928. In the course of his judgment on revision, Mr. Justice Hayes said:

"It is obviously a risky thing to refuse an information of theft, and I suppose that, if he [the accused Sol of police] did so refuse, he ought to have made a note of the occurrence in the station diary. For the Courts it is enough to find that he did bona fide think himself justified. There must be some sort of a guilty mind to constitute this offence; section 16 of the Police Ordinance does not impose an absolute liability, but demands that the failure [of the accused in the execution of his duty] shall be wilful or negligent. I understand that the Commissioner [of police] will deal with the Sol's foolish and injudicious conduct."

The case is not reported, and the record I was able to trace disclose nothing of the facts. It would appear, though, that


300. The Ordinance has now been replaced by the Police Act 1971.
prosecutions for wilful or negligent failure in the execution of duty under section 16(1) of the Police Ordinance or for an offence under the Penal Code, such as wilfully omitting to perform duty, even if the offence was applicable, are hardly the way to tackle such a problem. Internal instructions by superior officers is the right approach; they must explain to their own men the importance of explaining to the complainant, as the men may assume that people know of the right to go before the magistrate, or they may think that the offence is not serious enough. The principle which must be stressed, however, is that the police must not have the final say in the matter, but must observe the Code. A requirement of registration of all Informations refused might also help because of the element of awareness of supervision that would bring.

It is significant that the criterion for refusal is that "no public interest will be served by the prosecution". This makes it very difficult to find the police in the wrong for having refused an Information. It is the kind of test, however, that is best left alone; only long practice will amplify its scope and only close scrutiny of its application will ensure that it is not abused as often as it might be. The element of discretion is no doubt necessary and healthy provided it is kept within reasonable bounds. The

301. Section 142 Penal Code; see also section 111 which may also be relevant in some cases.
impression one gets is that the police do not appear to exercise this power often enough rather than that they exercise it too often. On the whole, Informations are routinely accepted and acted upon. Still, the power is there.

(iii) Judicial Pre-Trial Procedure:

Section 135 C.C.P. reads:

(1) Subject to the provisions of Chapters XIII and XIV any magistrate may take cognizance of any offence -
(a) when an arrested person is brought before him under section 37 or section 38;
(b) upon receiving a First Information Report under section 112 or section 122 or section 122C or a Case Diary under section 120;
(c) at any time when the Case Diary has been sent to him under section 121, or section 122 or section 122B;
(d) upon receiving a complaint of facts which constitute the offence;
(e) if from information received from any person other than a policeman or from his own knowledge he has reason to believe or suspect that an offence has been committed.

(2) Notwithstanding sub-section (1) of this section, it shall be lawful for the Province Judge within the local limits of his jurisdiction to direct that any Magistrate subordinate to him shall not take cognizance of any particular case.

Section 5(1)(a) C.C.P. defines "take cognizance" as "take notice

302. That is, provisions on local jurisdiction and permission needed to initiate certain prosecutions, such as offences punishable under sections 148-163 Penal Code which need the permission of the public servant concerned. Such permission is needed for the trial and not the investigation of the offence, see Sudan Government v. Oliver Lako Duko and Others [1963] S.I.A.R. 166.

303. That is, magistrates with special or temporary powers subject to any limitations the President of the Supreme Court may see necessary.
in an official capacity." Thus in accordance with the principle of judicial supervision of the investigation, discussed in Chapter 8 below, the magistrate comes into the picture very early indeed. This section normally operates concurrently with the police procedure described above, and often starts before it. The magistrate usually takes cognizance either a few hours after the offence has come to the attention of the police, or on receiving a complaint in his chambers which he then refers to the police for investigation.

On taking cognizance of an offence on complaint, the magistrate must examine the complainant on oath and record the complaint together with the substance of the examination. This examination is mandatory. In Sudan Government v. Mansour El Agab and Others, the magistrate, without examining the complainant, dismissed the complaint on the ground that there were no facts constituting an offence under the Corrupt Practices Ordinance 1952, as alleged by the complainant. On appeal from this ruling, the Court of Appeal, quoting from Schoini's Code of Criminal Procedure to the effect that omitting to examine the

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304. Under section 135(1)(d) C.C.P. Section 5(1)(b) defines complaint as "the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed an offence, but it does not include a police report."

305. Such examination is not necessary when the complainant is a public servant acting or purporting to act in the execution of his duties, section 136 C.C.P.

complainant is material error and not a mere matter of form, 307 
ruled that the order dismissing the complaint should be set aside 
and the petition should be returned to the magistrate to examine 
the complainant before ruling on the merits of the complaint. In 
Sudan Government v. El Tegani Mohamed Musa, 308 where the complaint 
was in fact accepted and conviction followed the trial, the Court 
of Appeal, Criminal Division still quashed the conviction because 
failure to make the mandatory examination of the complainant rendered 
the whole subsequent proceedings null and void.

Thus it seems that a complaint may neither be dismissed nor 
proceeded with unless the complainant was examined under oath. The 
object of such examination, it has been said, 309 is to enable the 
magistrate to ascertain whether an offence has been committed at all, 
and if so which; and to decide on the appropriate course of action, 
whether to direct a police investigation and for what purposes etc.

Should the complainant be absent and thus unavailable for exam-
ination, the magistrate may, in his discretion, discharge the accused. 310

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308. AC.-Maj.Ct.-369-1973 (unreported). The President of the Court 
of Appeal, dissenting, felt that the error was not serious enough 
to justify quashing the conviction.
309. Sudan Government v. Siddiek Babiker El Hag, DR.P.Ct.-Crim; App.- 
1971 (unreported).
310. Section 154 C.C.P.
Such discharge, however, does not prevent subsequent trial because it is not an acquittal.\textsuperscript{311} It has been said that such a discharge would be appropriate only in cases "in which the personal element is more obvious than that of the public."\textsuperscript{312} One tends to agree with this remark. Prosecutions initiated by complaint are necessarily of a private nature, and if the complainant is no longer interested in pursuing the matter, why should the court press it any further. The fact that the dismissal does not preclude subsequent trial enables the complainant to reinstitute the case if the need should arise in future.

In all cases, whether instituted by complaint, where an examination of the complainant becomes necessary, or not, the magistrate taking cognizance of the offence or alleged offence has certain basic options to be exercised in accordance with the circumstances of the case. If he feels that he is not in a position to decide, that is, if he "is not satisfied that the offence has been committed or if for any other reason he deems it expedient so to do"\textsuperscript{313} the magistrate may direct any subordinate magistrate or any policeman to conduct an investigation. The magistrate may conduct the investigation himself, but this is

\begin{flushleft}
\textsuperscript{313} Section 138 C.C.P.
\end{flushleft}
extremely rare, and happens only in cases of exceptional public interest. If no further investigation is thought necessary, or after such investigation is concluded, the magistrate may still refuse to proceed with the case, in which event he must record his reasons for so doing. This, again, is a discharge that does not preclude subsequent trial, but the accused must be released if he is in custody or on bail; he may be rearrested if the prosecution is resumed later on. If, on the other hand, the magistrate was satisfied that there was sufficient ground to proceed, he would then prepare the case for trial, either by himself or some other magistrate or by major court.

There are two basic modes of trial in the Sudan: trial by a single magistrate sitting alone (a bench of three lay magistrates is considered as a single magistrate for the purpose of trial of offences triable by a magistrate sitting alone) and trial by a major court.

314. See Chapter 8 below, on the prosecutorial role of the magistrate.
315. Section 139 C.C.P.
316. The Criminal Procedure (Amendment) Act 1970, abolished minor courts which used to have constitution and powers similar, but inferior, to major courts. The First Schedule to the C.C.P. was amended to redistribute offences previously triable by minor courts between major courts and magistrates courts: Criminal Court Circular No. 46.
In this survey, trial by a magistrate will be considered first because it is the simpler, normal procedure in the everyday practice of the courts. Committal proceedings, strictly speaking part of the pre-trial procedure, are to be discussed afterwards as leading into major court trial. The basic model of all trials under the C.C.P. is the common law model of the case for the prosecution, on which the defence may cross-examine, in which event the prosecution may re-examine, and the same treatment accorded the defence. This procedure will not be considered in great detail because the emphasis in this study is on pre-trial procedure. Some reference will be made to the trial and post trial procedure whenever necessary for the general picture to be fully presented.

The relevant provisions of chapter XXII C.C.P. which regulates the conduct of prosecutions,\(^{317}\) taking and recording evidence,\(^{318}\) examination of the accused and the admissibility of his statements, etc. apply to all modes of trial.\(^{319}\) Provisions on trial are explained and elaborated on by various criminal court circulars,\(^{320}\) but reference is sometimes made in practice to common law materials for guidance. In fact the procedure is simplified into several forms to be completed

317. Section 211 C.C.P.
318. Sections 214-217.
319. Sections 218 and 221.
320. Mainly Criminal Court Circulars No. 11 and 22.
according to the type of trial adopted.

(iv) Trial by Magistrate:

Trial by magistrate can be either summary or non-summary. Summary trial is the simplest mode of trial under the C.C.P., involving nothing more than recording various particulars about the accused and the complainant, the offence, names of witnesses, plea, finding and sentence. Witnesses are normally examined by the magistrate himself as neither prosecution nor defence are legally represented in this type of proceedings, but the parties may examine their own witnesses if they wish. The magistrate need neither record the evidence nor frame formal charges. 321

As is obvious from the simplicity of the procedure described, summary trial is designed for the least serious offences, where there is very little evidence to be taken. This is usually true of all offences listed as triable for this mode of trial. 322 Whenever it appears to the magistrate that the offence or accused cannot be properly dealt with under this mode of trial, he must stop the trial and take the necessary steps for the offence to be tried by the appropriate court. 323 That may mean either non-summary trial, which the same magistrate may be competent to hold, or trial by major court, to which the same

321. Section 111 C.C.P.
322. See Second Schedule C.C.P.
323. Section 115. Section 237 sets out the procedure to be followed in the transfer.
magistrate may be competent to commit. If the magistrate is not competent to hold the trial or committal proceedings, then he has to refer the case to a magistrate so competent.

Only a first or second class magistrate may conduct a non-summary trial. Should this mode of trial appear to be inappropriate, that is to say should it appear that the offence ought to be tried by major court, the magistrate must stop the trial and transform the proceedings into committal proceedings. There is no reason why a non-summary trial should not be transferred into a summary trial, but as the magistrate would be able to deal adequately with the offence under non-summary trial, this is not done in practice.

Non-summary trial begins with the appearance of the accused before the magistrate who starts by examining the complainant, if any, and then proceeds to hear the case for the prosecution. If there is no prosecutor, as is normally the case, it is up to the magistrate to ascertain the names of the witnesses and to summon and examine them too. The police investigator in charge of the case, who is usually

321. A third class magistrate is not competent to try offences non-summarily or to commit to major court trial, see sections 20 and 156 C.C.P.

325. Section 149(2) C.C.P.

326. Section 147(1) C.C.P.

327. Section 147(2).
the first witness for the prosecution, makes his statement on oath, puts in the exhibits, sketches, medical reports, etc. and also proves the accused's statements made to the police during the course of the investigation. The magistrate cross-examines the witnesses for the prosecution, and generally acts for both the prosecution and the defence. At the end of the case for the prosecution, the magistrate examines the accused under section 218 C.C.P. for "the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." Such examination is supposed either to enable the accused to explain the prosecution evidence completely, and have the case dismissed at this stage, or to bring out the issues and points he has to meet in his own case for the defence. That is why the accused is examined after all the evidence for the prosecution has been heard; if any of the witnesses for the prosecution is recalled or further witnesses called, the accused must be examined again in the same manner: to help him explain circumstances in the evidence against him.

328. The role of the magistrate in criminal proceedings, and its implications, is considered in Chapter 8 below.

329. Section 218 C.C.P. See below, Chapter 8, on the scope and limits of this examination.

If, having heard the whole of the case for the prosecution and what the accused had to say on the matter, the magistrate finds there is no case "which if unrebutted would warrant" a conviction, he will discharge the accused. This, however, being a mere discharge and not acquittal, does not prevent subsequent trial for the same offence. If, on the other hand, the magistrate is satisfied that there is ground for presuming that the accused has committed an offence for which he, the magistrate, is competent to try and punish adequately, he will then frame the charge or charges against the accused. He will proceed with the trial by reading and explaining the charges to the accused, taking his plea and any evidence offered in defence of the charges.

It remains possible for the magistrate, even after framing the charges, to transform the trial into committal proceedings at any time before the signing of the judgment, whenever it appears to him that the case or accused is better dealt with by major court trial.

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331. Section 118(1). He may do so at any previous stage of the proceedings, Section 118(2) C.C.P.


333. Section 150(1) C.C.P.


335. Section 119(2) C.C.P.
If the magistrate decides to continue with the trial, he invites the accused to plead after reading and explaining the charges to him. If the accused pleads guilty, then the magistrate may, in his discretion, convict him on that plea. Before doing so, however, the magistrate must ensure that the accused fully appreciates the meaning of the charges and the implications and consequences of his guilty plea. For that purpose, the magistrate may examine the accused and the record of any previous proceedings, he may even call witnesses if that is helpful. No effort in this respect is wasted in a country where legal representation is the rare exception. The accused in the vast majority of cases relies on the magistrate for legal advice; he cannot be expected to know the legal implications of his own words and acts or those of his victim, or their effect on his criminal responsibility. He may not be aware, for example, that he has a defence in law or that he is really, under the circumstances, only guilty of a lesser charge.

On a plea of not guilty or no plea, the accused is invited to enter upon his defence, which is taken in the same way as the prosecution case, that is, by examination, cross-examination and re-examination.

336. Section 150(2).
337. Sections 150, 218 and 219 C.C.P.
On the conclusion of the case for the defence, the magistrate considers his finding and sentence, if a conviction follows. 339

(v) Trial by Major Court:

As pointed out above, offences triable by a major court are specified as such in the sixth column of the First Schedule to the C.C.P. or by the enactment creating the offence. The classification of an offence as triable by a major court, or any court for that matter, presumably follows some unarticulated criteria. Seriousness of the offence, difficulty of the case, and the question of sentencing are some of the obviously relevant considerations in such a decision. 339

But these considerations are by no means conclusive: it may well happen that an offence not so classified turns out to be more serious or complex than one so classified. 339 To allow for this unknown factor, it is possible under the C.C.P. to rechannel a case for trial by the appropriate court at any stage before the signing of the judgment. 339 Committal proceedings too may be converted into trial by a magistrate, 339

339. Sections 151 and 153 C.C.P.


339. Sections 113, 119(2) and 237 C.C.P.

339. Sections 160 and 172A(3) C.C.P.
presumably when it becomes clear that the offence or accused does not call for trial by a major court after all. The need "to break down the allocation of jurisdiction by looking beyond the category into which a particular offence falls and considering its particular facts as a method of deciding which court should deal with it" is appreciated in other jurisdictions too. The theory of the Sudanese practice is such that if the magistrate starts the trial as a summary trial and then discovers that he will need to exercise his powers under non-summary trial to deal with the offence properly, he may convert the proceedings into a non-summary trial and continue himself. If what is called for is a major court trial, then the proceedings may be converted into committal proceedings by the same magistrate or by any other first or second class magistrate. Committal proceedings are imperative for all major court trials, hence lack of committal by a second or first class magistrate is fatal to the trial itself. In advising the Governor-General on whether to confirm finding and sentence in Sudan Government v. Paal Tiop and Others, Lindsay, C.J. said:

3h7


3h5. The Practice Direction "Crime: Crown Court Business", issued under sections 4(5) and 5(h) of the Courts Act, 1971, [1971] 1 W.L.R. 1535, classifies offences in four classes while at the same time allowing for boundary crossings. The classification is made in terms of a presumption in favour of trial by one class of court unless etc.

3h6. Only first and second class magistrates may try offences non-summary.

"The trial of the third accused was illegal; there was no commitment, and in India as here such a defect is a defect in substance, not in form, and even if the accused was not in fact prejudiced in his defence and no miscarriage of justice has in fact occurred, following the Indian precedents (section 193(1) and 537 Indian Penal Code) Your Excellency is not empowered under section 261 Criminal Code of Procedure to overlook the irregularity and the proceedings so far as they relate to the third accused are invalid."

The reference to section 261 is a reference to the principle by which the confirming or appellate authority is precluded from interfering with the finding or sentence or other order of the Court on the ground that evidence has been wrongly admitted or that there has been an irregularity in procedure, if (it) is satisfied that the accused has not been prejudiced in his defence and that the finding and sentence or order are correct". The principle is common enough; it is also sensible: there is no reason why the proceedings should be annulled so long as their essential character and purpose were fulfilled. With

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3h8. The Chief Justice said "Indian Penal Code" while in fact he meant "Indian Code of Criminal Procedure".

3h9. The proviso to the English Criminal Appeal Act 1907 read:

"Provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

respect to the committal proceedings it has been said that the evidence must be taken on oath and in the presence of the accused, and that the accused must be given the opportunity of cross-examining the witnesses. Presumably, any irregularity that may have substantially affected this basic procedure cannot be overlooked. The Code, however, describes in detail the procedure to be followed in committal proceedings. Before outlining that procedure, the principle and purpose of such proceedings is considered.

1. Committal Proceedings:

One should observe, first, that committal proceedings are in fact what the participants make of them; the detailed procedure may provide the framework and may even suggest the purpose or purposes of the exercise, it cannot guarantee their attainment in practice. A statement of the principle, however, serves the object of providing a focus or standard to which the practice aspires, it provides a means of judging the usefulness and relative value of the procedure. Criminal procedure is in fact a unit, a process for the determination of guilt; its scheme of rights and guarantees must therefore be viewed as a whole. Thus if the accused side of the balance, or that of the prosecution,


is supposed to be served at a certain stage of the proceedings, it would be worthwhile to investigate whether this is true in fact, and if not what can be done to redress the situation. It is, therefore, very relevant to this study to try to establish what purposes are served, or purport to be served, by the committal proceedings.

(a) Policy:

Committal proceedings, according to the English law model\(^{352}\), that is to say, commitment of the accused to trial on evidence taken on oath and in the presence of the accused who may cross-examine the witnesses\(^{353}\) are said to have several purposes, functions or incidental advantages.\(^{354}\) The basic function is said to be that it provides the accused with an early opportunity to have the strength of the case against him tested and, if it is found to be insufficient to

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352. Some systems, such as the Scottish system, have no such procedure; others have variations on the basic model. The English procedure itself has changed considerably since its beginnings, see Report of the Departmental Committee on Proceedings before Examining Justices, Cmd. 479, 1958, para. 11; Report of the Committee on Depositions (the Byrne Committee) Cmd. 7639, 1969, para. 5. The English proceedings are now regulated by the Magistrates' Courts Act 1952, as amended by the Criminal Justice Act 1967.


subject him to the inconvenience and embarrassment of a trial, to obtain his discharge forthwith. Thus, the Byrne Committee said in 1949:

"committal proceedings before examining justices are no mere formality. The justices have to decide not only whether there is a prima facie case against the accused but also whether there is, to quote the judgment of the Divisional Court in R. v. Governor of Brixton Prison, ex parte Bidwell, 'such evidence, that if it be uncontradicted at the trial a reasonably minded jury may convict upon it.' ([1937] 1 K.B. 305, 311.) They have therefore to consider the quality as well as the quantity of the evidence. Since the abolition of the grand jury, committal proceedings have become of even greater importance than before as a safeguard to the accused, and the fact that this preliminary investigation takes place is a valuable safeguard against speculative prosecutions. There are, moreover, a number of cases in which the justices either do not commit for trial or decide, frequently at the instance of the prosecution, to commit for a different offence from the one originally charged."

This is also regarded as the main function of committal proceedings in the Sudan; the difficulty is for the magistrate conducting the proceedings to maintain a proper balance necessary to achieve the function. On the one hand, insistence on too high a standard for the case for the prosecution may lead to difficulty, if not impossibility, of committal for trial and defeat the legitimate interests of law enforcement. On the other hand, to commit for trial too readily and on too weak a case for the prosecution would defeat the purpose of protecting the individual against the indignity, expense and anxiety

of a public trial without justification. This balance, as will be seen below, is necessary to achieve any of the purposes or functions of the procedure. With respect to the one already mentioned, the question is how the magistrates are to assess the case for the prosecution without taking "too much upon themselves and invading the proper functions of Major Courts". In a note to the Legal Secretary, it was said that:

"the correct line for Committing Magistrates to take is this: If there is before the Committing Magistrate evidence on which, if believed by a Major Court, a Major Court would be entitled to convict of murder, the Magistrate must commit on a charge of murder. It is not for him to decide the veracity of a witness, unless he is an obvious liar, or to weigh the evidence. To do so is to usurp the duties of the Major Court."

More recently, in Sudan Government v. Taha Mohamed Hassan and Another, Abu Rannat, C.J., described the correct approach as follows:

"The words 'sufficient grounds' (in section 162(1) C.C.P.) do not mean sufficient grounds for conviction, but for committing. The Magistrate should consider whether


357. Quoted ibid.


359. Section 162(1) C.C.P. reads:

"If, after such evidence and examination (if any) have taken place and made, the Magistrate being a Magistrate of the first or second class is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand declaring with what offence the accused is charged."
conviction is possible and not whether it is probable, and in a case of conflicting and doubtful evidence, he ought to commit it for trial, however unequally the evidence is balanced; but if the Magistrate finds the evidence against the accused totally untrustworthy, and conviction is impossible, then he is bound to discharge the accused."

In these terms, the position appears to be that magistrates are advised to be inclined to err on the side of committal rather than non-committal. There is, no doubt, some logic in this: the trial itself would provide a second chance for an opinion on the evidence, and the accused will not be convicted on the strength of the fact that he was committed to trial. Nonetheless, the tendency to commit in doubtful cases can be carried too far to the extent of defeating the first and main justification of the procedure itself, namely, to afford an early chance to assess the strength of the case for the prosecution.

As indicated above, the need to observe a balance is necessary with respect to all purposes or functions of committal proceedings. The taking of depositions, subject to cross-examination, allows the prosecution to assess the strength of its own case; provides an opportunity to modify the charge, if appropriate; gives the defence notice of the case against which it which enables it to consider the best line of questioning of the prosecution witnesses and what is needed in its own case to rebut the case for the prosecution; it minimises the risk of an unjustified plea of guilty at the trial, and generally

360. The prosecution is not obliged to produce all the evidence it intends to adduce at the trial, see R. v. Epping Justices, ex parte Massaro [1973] Q.B. 133. It must produce enough evidence, however, to convince the magistrates to commit for trial.
provides for the sifting and arrangement of the evidence in preparation for the trial. For the achievement of any of these purposes or functions, the committal proceedings must be as realistic a dress-rehearsal of the trial as possible without actually being the trial.

In Scotland, where there is no equivalent stage in procedure, similar purposes and functions are served by the public prosecutor, the procurator fiscal, who supervises the preparation of the case for the prosecution and reviews the evidence to decide whether or not to prosecute. Historically, the sheriff played a much more important role in the "judicial examination" of the accused and the decision to commit for trial on indictment; at present the sheriff takes the procurator fiscal's word on the sufficiency and suitability of the evidence. As a qualified lawyer and public officer, the fiscal is as competent as the sheriff in performing these functions. The Scottish model is supported by the criticisms usually levelled against the English model.

Committal proceedings, in the English sense, are criticized as being, in most cases at least, an unnecessary formality and, therefore, a cause of delay, since it is seldom that an attempt is made by the defence to show or argue that there is no case to justify commitment

for trial. Without disputing the value of the procedure in some cases, it is said that the fact that it "can be justified in some cases does not make it necessary or even desirable in all".  

It was therefore proposed that the full procedure - that is taking the evidence orally under oath and subject to cross-examination - should be available but need not be used in every case. This proposal was accepted and enacted in section 1 of the Criminal Justice Act 1967, which allows the examining justices discretion to commit the accused for trial on written statements without considering their contents except when the accused is not legally represented or when his counsel makes a submission that there is no sufficient evidence to justify committal. In other words, the section allows for waiver of the right to be committed for trial by magistrates under the traditional procedure, but only for the legally represented accused.

The same rationale appears to underly the similar Sudanese procedure. The C.C.P. provides for two forms of committal proceedings: ordinary and summary. The summary procedure "is not to be


364. Such statements must satisfy the requirements of section 2 Criminal Justice Act 1967.

365. Section 172A C.C.P., which provides for the shorter, less formal summary procedure was enacted in 1949, see Special Legislative Supplement 31/12/1949.
used except where (a) the ordinary procedure is unnecessary, (b) it will cause no prejudice to the accused. If its adoption will save no substantial time and trouble, or is at all likely to reduce the chances of justice being done, it should not be used." Thus, the summary procedure is designed to be applied when "the case for the prosecution is clear and straightforward with no serious conflict of evidence and there are no good reasons for supposing that the statements of the witnesses if repeated on oath would be substantially changed." There is no provision for taking account of whether the accused is legally represented or not, or of his counsel's submission, but there is no reason why these considerations may not be taken into account under the general requirement that the adoption of the summary procedure should not prejudice the accused. The current policy is to make committal by ordinary procedure the exception, with the presumption in favour of committal by summary procedure. Section 157 C.C.P. has thus been amended to read as follows:

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366. Criminal Court Circular No. 1, section 1. See also headnote to Chapter XVIII of the C.C.P.


367a. This section used to read, before the 1974 revision, as follows:

"...The summary committal procedure...may be followed if it is suitable and if it does not prejudice the accused."
"The summary committal procedure laid down in section 172A of this Chapter must be followed unless the offence is punishable by death or summary commitment is not in the interest of justice."

(b) The Formal Procedure: Committal proceedings according to the longer and more formal procedure begin with the appearance of the accused before the magistrate who hears the complainant, if any, and "all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the Magistrate" himself. The magistrate would ascertain the names of likely witnesses, whether from the complainant or any other source, and summon them to give evidence. Each side may also apply for process to compel attendance of witnesses and production of documents and things. Defence and prosecution may cross-examine each other's

368. The C.C.P. still describes this procedure as the "Ordinary Procedure"; in view of the change of policy, referred to above, making committal by summary procedure the ordinary committal procedure, the term is inappropriate. It is, however, the more formal procedure, hence the term adopted here.

369. A third class magistrate may begin, may be under the impression that the case is triable by a magistrate of his class, but he would have to refer the case to a magistrate of the first or second class as he is not competent to commit, see sections 162(2) and 237 C.C.P.

370. Section 158(1) C.C.P.

371. Section 158(2).

372. Section 158(3). The magistrate to issue process unless for recorded reasons he deems it unnecessary.
witnesses and re-examine their own if they were cross-examined by
the other side.373 The accused, however, has the option to reserve
his defence;374 the pressure is generally on the prosecution to
make out a prima facie case sufficient to convince the magistrate
to commit for trial. The general effect of this hearing is to
expose the case for the prosecution. The accused, however, may be
examined by the magistrate under section 218 C.C.P. to enable him
to explain the evidence appearing against him, which may have the
effect of revealing some of the defence intentions.375

Having taken the available evidence, and examined the accused,
the magistrate will then be in a position to decide on the appropriate
course of action: the options being a discharge of the accused,
summary or non-summary trial, and continuation with the committal
proceedings. A discharge is justified when there are not sufficient
grounds for trial, whether by major court or magistrate court.376
When the magistrate believes that there is no case for a major court
trial "but that there is ground for presuming that the accused has
committed an offence which should be tried by himself or some other

373. Section 158(4).
374. Section 158(5).
375. Section 159(1). See Chapters 7 and 8 below, on the scope and
implications of this examination of the accused by the magistrate
and some of the relevance of discovery.
376. Section 159 C.C.P.
magistrate", he will proceed to conduct the trial or refer the case to a competent magistrate for trial. Thus, what may have started as committal proceedings may end up as a trial by the same or other competent magistrate. On the other hand, what may have started as trial by a magistrate may end up as committal proceedings.

To adopt the third option, namely, to continue with the committal proceedings, the magistrate must find that "there are sufficient grounds for committing the accused for trial". This means sufficient grounds to commit and not sufficient grounds to convict; it is not for the committing magistrate to decide the veracity of witnesses or applicability and effect of legal defences, to do so is to usurp the functions of the major court. The magistrate proceeding with commitment procedure will then frame a charge, read and explain it to the accused. As it is not a trial, the accused is not asked to plead at this stage; he is required, however, to give a list of persons he wishes to call as defence witnesses at the trial. Before finally deciding on commitment, the magistrate may summon and examine any of the persons named as potential witnesses: they may

377. Section 160 C.C.P.
378. See sections 119(2), 160 and 161 C.C.P.
379. Section 162(1) C.C.P.
380. See pp. 122-23 above and the cases referred to there.
381. Section 163 C.C.P.
382. Section 164 C.C.P.
provide some basis for the magistrate to reconsider his view that there is a case for committal by corroborating, for example, the accused's explanation of the events. If the magistrate remains satisfied, whether after hearing the witnesses or without summoning any, "that there are sufficient grounds for committing the accused, he shall make an order committing the accused to a major court and shall briefly record his reasons for the commitment." What remains is preparation for the trial: witnesses being cited to secure their attendance at the trial etc. The charges and record of the committal proceedings together with exhibits are forwarded to the major court for the trial.

(c) **Summary Procedure:** In contrast to the formal procedure, summary commitment procedure is much simpler and quicker, and a committal order may follow a brief session. The basic difference is that in summary procedure the evidence on which the committal order may be based is not given in the presence of the accused, who has therefore no chance to cross-examine the witnesses. The magistrate starts by informing the accused of the offence suspected, then he

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383. Section 166(2) C.C.P.
384. Sections 167, 168, 169 and 171 C.C.P.
385. Section 170 C.C.P.
386. Only a magistrate of the first or second class may conduct summary committal procedure, section 172A(1) C.C.P.
proceeds to read out the statements recorded in the Case Diary relevant to the accusation, whether in favour of or against the accused, while giving the names of persons who made them. Statements made by the accused and recorded in the Case Diary are also read out. Anything which is legally inadmissible, however, is omitted. Any other items of evidence are also shown and explained to the accused. The magistrate may, in his discretion, call any witness to give evidence. 387

The accused is then asked whether he has any other witnesses and what would be the gist of their testimony. Such witnesses may be called to give evidence; and they must be so called if there is a reasonable chance that their evidence may lead to the discharge of the accused. 388 The accused himself will then be invited to make a statement and to answer questions. 389

387. Section 172A(1) (a) to (d) C.C.P.

388. Section 172A(1)(e) C.C.P.

389. Though this examination must be of the section 218 C.C.P. type, the terms of section 172A (1) (f) appear to suggest a difference between the two. The subsection reads: "The Magistrate shall invite the accused to make a statement and to answer questions, informing him at the same time that he is not obliged to do so." There is no reference to such warning in section 218 itself; sections 148 and 159 C.C.P. which provide for the examination of the accused at the trial by magistrate and commitment by the formal procedure, also have no mention of a warning. Such a warning may be misleading as the court is authorised to "draw such inference from such refusal (to answer) or (false) answers as it thinks just" under section 218, see Chapter 8 below.
Having thus heard the evidence in support of the accusation and after giving the accused the chance to rebut or explain it, the magistrate is ready to decide. The options are the same as outlined above: discharge, trial by magistrate or committal order. Should a committal order be the appropriate course of action to follow, the magistrate will then frame the charge, read and explain it to the accused, and give him the names of the witnesses who will be called for the prosecution at the trial. The accused is also asked what witnesses he wishes to call for the defence.

In summary committal procedure, there is express provision for allowing the prosecutor and defence counsel, if any, to address the magistrate before he makes his finding. Either side may feel that his point of view has not come out properly or forcefully enough in the brief summary procedure.

2. Trial:

The major court trial itself follows the common law model of inviting the accused to plead to the charge, on a plea of not guilty or no plea, the evidence in support of the case of the prosecution, and then the defence is heard. Evidence is adduced by each party examining

390. Section 172A (2), (3) and (4) C.C.P.

391. Section 172A (6) allows the magistrate discretion to refuse to summons any witness he considers unable to give material evidence.

392. Section 172A (6) C.C.P.
its own witnesses who may be cross-examined by the other side, in
which event the first party may re-examine them. 393 A detailed
description of the procedure is not very relevant to the present
study, it would be more to the point to refer briefly to the most
significant features in view of the discussion of the pre-trial
issues to follow.

Courts are instructed to be very cautious in accepting a plea
of guilty. No such plea is to be accepted for any offence punishable
with death; 394 as to other offences, the court must first be satis-
fied that the accused clearly understood the meaning of the charge
and the implications of his guilty plea. 395 In the words of Creed,
C.J.: 396

"It is most dangerous to accept a plea of guilty in this
country especially in a Major Court case, unless the whole

393. The procedure is regulated by Chapter XIX C.C.P. and Criminal
Court Circular No. 11.

394. Section 174(2) C.C.P.

395. See Note to section 150. C.C.P.; see Criminal Court Circular No.
11, Part I, section 4, Notes (i) and (ii).

396. In Sudan Government v. Hamed Bakheit Mohamed (1940) S.L.R. (Crim.)
vol. II, 221 at 222. In Sudan Government v. Mohamed Ahmed Dahoga
(1940) S.L.R. (Crim.) vol. II, 274, the confirming authority found
that the accused pleaded guilty to a charge of culpable homicide
not amounting to murder while in fact he was only admitting that
he killed the deceased, but alleged that it was in self defence.
Conviction was quashed and re-trial ordered.
facts of the case disclosed by the witnesses for the prosecution are admitted by the accused, and the accused clearly admits in unmistakable terms his guilt of the exact crime with which he is charged."

The court, normally the presiding magistrate, examines the witnesses for the prosecution as well as for the defence if either side is unrepresented, as is often the case. The lack of legal representation for the prosecution as well as the defence is a most significant factor in understanding Sudanese pre-trial and trial procedure. The magistrate or court is often expected to act for both prosecution and defence beside judging the issues on trial.

The examination of the accused at the committal proceedings under section 218 C.C.P. - that is, to help him explain circumstances appearing in the evidence against him - is produced and read out in court after the witnesses for the prosecution are heard. He must also be examined once more under section 218 C.C.P. by the major court. The object of such examination is not to trip the accused and break down his evidence but rather "to help the accused to explain something which, if he cannot explain, will tell against him in any case."
It is hoped that such examination will help the accused by making clear to him the particular points in the case for the prosecution which he must meet in his defence and by affording him a chance to start doing so. Furthermore, as pointed out by the confirming authority in Sudan Government v. Koko Konda and Others, the accused should always feel that the Court is not merely willing but even anxious to hear all he has to say in regard to the charge, to hear his side of the story. That may be helpful to the Court too as hearing the accused tell his story in person may give quite a different impression from having it read out from the record - "second hand".

In such examination only the accused, and not his pleader or counsel, is allowed to answer; otherwise none of the objectives or purposes indicated above would be served. It is important for the court to assess the weight to be given to the answers, or refusal to answer, to hear the accused in person and observe his demeanour etc. If counsel is allowed to answer, the whole procedure may be manipulated by the defence unduly.

(vi) **Confirmation, Appeal and Revision:**

As the administration of justice, at the beginning of the current

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402. Criminal Court Circular No. 11, Part I, section 2(iv) Note.


system, was conducted in the main by lay administrators, it was believed to be necessary for their decisions and rulings to be reviewed by higher authority before they were allowed to be enforced. The procedure was laid down, therefore, whereby every judgment of a minor court was referred to the province governor, and every judgment of a major court was referred to the Governor-General, for confirmation.

Practice Notes were written by the Legal Secretary, the Chief Justice and other senior members of the judiciary on reference cases to explain points of procedure, practice and evidence to the lay administrators in remote district. So the reference procedure provided a valuable source of training and uniformity of performance as well as ensuring the correctness and reasonableness of finding and sentence in the individual cases.

The obvious disadvantage of such an arrangement is the delay it is bound to cause. This consideration, together with the decrease in the need to supervise the work of the magistrates in this immediate and direct way with the growth of the professional judiciary, prompted the change to a limited system of reference for confirmation as is the position now. The Criminal Procedure (Amendment) Act 1970 restricted the requirement of reference for confirmation to major court judgments where sentence of death penalty or life imprisonment was passed.

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105. See pp. above.
106. Sections 181 and 182 of the 1899 C.C.P.; and sections 250 and 251 of the 1925 C.C.P.
107. Section 2(2)(b); see Criminal Court Circular No. 16. It is now section 250 of the 1974 C.C.P.
When a judgment of conviction is submitted for confirmation the convicted person may submit to the confirming authority - which is currently the Supreme Court - by way of petition of appeal, a statement in writing of his reasons why the judgment or order should not be confirmed.\textsuperscript{408}

The judgment of a major court in other cases, that is where neither the death penalty or life imprisonment was imposed, is appealable to the Court of Appeal.\textsuperscript{409} The Court of Appeal is also competent to consider all appeals and applications for review from rulings of province judges, whether in exercise of their original or appellate jurisdiction.\textsuperscript{410}

Applications for cassation (annulment) of decisions of the Court of Appeal are to be made to the Supreme Court when it is alleged that such decisions are contrary to law or based on its wrong application or interpretation, or that there has been some procedural irregularity which affected the validity of the decision.\textsuperscript{411} In other words, decisions of the Court of Appeal are final except for applications for cassation on questions of law or grave procedural irregularity.

\textsuperscript{408}. Section 251 C.C.P.
\textsuperscript{409}. Section 252 C.C.P.
\textsuperscript{410}. Section 252A C.C.P.
\textsuperscript{411}. Section 253 C.C.P.
Appeal from a bench of magistrates lies to the first class magistrate, \(^{12}\) and from a magistrate court to the province judge. \(^{13}\)

The powers of the confirming or appellate authority are quite comprehensive, ranging from substitution of a conviction for another offence and confirmation of finding and sentence to ordering a re-trial and substituting a finding of not guilty for a finding of guilty. \(^{14}\)

Beside confirmation and appeal, the power of revision provides yet another means of checking the correctness and regularity of proceedings. The present provision for revision allows for the calling and examination of the record of any criminal proceedings for the purpose of being satisfied as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of the proceedings of the court. \(^{15}\) This power, exercised by each court over its junior, \(^{16}\) may be exercised on the court's own motion; it may also be initiated by an application to the court by one of the parties. In exercising its powers of revision, the court

\(^{12}\) Section 254(2) C.C.P.

\(^{13}\) Section 254(1) C.C.P.

\(^{14}\) Section 256 C.C.P.

\(^{15}\) Section 257(1) C.C.P.

\(^{16}\) That is to say, by the Supreme Court over the Court of Appeal, by the Court of Appeal over the province courts etc.
enjoys almost all the powers of a confirming or appellate authority - that is to confirm, change, order a rehearing etc. \[\text{\textsuperscript{117}}\]

Revision may be distinguished from confirmation in that it is optional, in the discretion of the higher court, while confirmation is obligatory and automatic, though now with respect to a limited number of cases, namely major court decisions where the death penalty or life imprisonment were imposed. Revision is distinguished from both confirmation and appeal in that it may be exercised with respect to all kinds of orders and rulings at any stage of the case, and not only with respect to the final finding or sentence.

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This is then a general survey of the current Sudanese system for the administration of criminal justice. As indicated in the first part of this chapter, however, a large portion, may be the majority, of criminal matters are handled by customary courts. This study is concerned only with the official system, if only for the fact that hardly anything is known of the functioning of the customary courts. It will be appreciated, however, that even with respect to the official system, there is very little available material indeed. Most of the

\[\text{\textsuperscript{117}}\]. Subject to some exceptions and limitations, see section 257 (2), (3) and (h) C.C.P.
relevant cases, and they are not many, are unreported. Courts almost always manage to avoid the procedural issues in the case with the result that large areas of basic criminal procedure are regulated only by the applicable provisions of the C.C.P. In the following discussion of some of the key issues of pre-trial procedure, therefore, heavy reliance is placed on common law material, as being the most likely to be looked to for guidance, and usually applied, should the issues face a Sudanese court in an unavoidable way.
Chapter 2

Arrest and Detention

An encounter between the police and an individual member of the public is a regular feature of all criminal investigations and prosecutions. It may not necessarily come at the beginning of the process and it need not involve "detention" in the traditional technical sense of the term, yet it is always a highly significant and sensitive situation reflecting the basic dilemma of criminal procedure, namely, the need to balance the individual's interest in his privacy and personal liberty on the one hand, and the interest of society in effective and efficient criminal law enforcement on the other. Thus, in so far as these encounters with the police invariably involve some degree of encroachment on the liberty of the individual, an invasion of his privacy, they are undesirable. Yet as they are unavoidable if the criminal law is to be enforced, in the interest of the peaceful enjoyment of all individual rights and liberties by everyone, these encounters must be tolerated. Arrest and detention in the course of criminal law enforcement are universally accepted exceptions to guarantees for the rights to life, liberty and security of the person. 1

It follows from this compromise position that the police powers in these situations - the necessary evil - must be kept to the minimum,

1. See, for example, Article 5(1)(c) of the European Convention for the Protection of Human Rights; Article 66 of the Permanent Constitution of the Sudan.
closely defined and regulated; this however, is a continuing problem: when is an interference with individual liberty justified, and how does one minimize the hardship and distress of such interference without defeating its purpose? This chapter is concerned with this problem both at the initial stages of the encounter with the police and also in its subsequent stages.

The common law makes a sharp distinction between "custody" or "detention" on the one hand, and "liberty" or "freedom" on the other - an individual is either under arrest, custody being merely continued arrest,\(^2\) or he is at complete liberty. The importance of the distinction is due to the fact that the consequences of arrest, and they are manifold, only begin to flow when the technical requirements of "arrest" are satisfied. It is important not only to questions of the civil and criminal liability of the policeman and the individual concerned - such as in cases of illegal arrest and assaults on a policeman in the execution of his duty - but also to various investigative devices such as search and interrogation. The sharp distinction, however, is becoming more and more unsatisfactory, from the point of view of individual liberty as well as that of effective law enforcement. A rigid approach fails to recognise the need for brief detention that may


"Any form of physical restraint is an arrest and imprisonment is only continuing arrest."
sometimes arise; insistence on the arrest and non-arrest dichotomy in these situations is likely to lead either to the accused having no protection at all because he is not technically under arrest, or to the police lacking essential powers to investigate and prosecute offences.

Recent trends in some common law jurisdictions appear to show gradual awareness of the problem, and an intermediate area of limited custody without arrest is being suggested in an attempt to deal realistically with the need for limited, and often merely technical, custody or detention. It is better to recognize the need and provide for it legally lest it be satisfied illegally. This new characterization of some encounters between the individual and the police raises its own problems of definition and regulation but it is nonetheless better than the artificially simplistic traditional approach. It is to be observed, however, that the new trends seek to supplement rather than replace the existing law on arrest and pre-trial custody.

However characterized, the initial police-individual encounter develops either into prolonged custody with a view to prosecution or it does not. If it does - that is to say, if the police suspicion of the individual hardens into a belief that a criminal prosecution is justified under the circumstances - concern with minimizing the hardship and distress of custody raises the question of pre-trial release. Assuming that the individual must be tried to determine his guilt or innocence, should he or need he remain in custody pending the trial?
This aspect of the problem too tends to reflect a conflict of interests and depends for its solution on a workable compromise that allows pre-trial release without sacrificing any legitimate need for custody.

(1) **Introduction:**

(1) **Arrest: Definition and its Implication:**

For an arrest the law requires an actual or constructive seizure or detention of the person under a real or pretended authority for the purpose of taking such person into the custody of the law. The person must be deprived of his liberty, such deprivation must be intended as a step in a criminal process and the reason for the arrest must be communicated to the person arrested. Though emphasis on one element of the definition or the other may vary from case to case, the question is normally whether the particular individual was taken into custody or not. The difficulties arise from the fact


5. The issue may arise in a variety of proceedings, such as civil action for wrongful arrest or assault or criminal prosecution for assaulting the policeman while in the execution of his lawful duties or for escaping from lawful custody. See Williams, "Requisites of a Valid Arrest", at 12-13 for the implications of the type of proceedings for emphasis in the definition.

6. Custody may be defined as detention against the will of the person detained, see Thomson Committee Report on Criminal Procedure in Scotland, 1975,Cmd. 6218 para. 3.03.
that it may be necessary to interpret the action and words of both parties to the encounter to determine whether there has been a taking into the custody of the law or merely voluntary co-operation on the part of the person detained. "An imprisonment, or deprivation of liberty, is a necessary element in an arrest; but this does not mean that there need be an actual confinement or physical force. If the officer indicates an intention to make an arrest... and if the suspect then submits to the direction of the officer, there is an arrest." 7

There are obvious policy reasons for this approach as there is a greater risk of provoking resistance and breach of the peace if hands are laid upon the suspect directly without first approaching him politely and asking him to come quietly; 8 yet the proposition contains an element of uncertainty as it necessitates the interpretation of the actions and words of the parties to the transaction. The difficulties of such interpretation are manifold because it depends on such factors as tone of voice, manner, and context. A further difficulty is whether one should approach the question from an objective point of view or from that of either party. In other words, should one seek to determine what each participant reasonably meant and understood the other to mean, or what he actually meant and understood the other to mean? To illustrate

7. Williams, "Requisites of a Valid Arrest", supra, 11.
8. Ibid. 13.
the difficulties and practical importance of the matter, reference to some English and Scottish cases may be made.

In Alderson v. Booth, a police constable attending a road accident asked the defendant to take a breath test, as he is entitled to do under section 2(1) of the Road Safety Act 1967. When that test proved positive the constable said to the defendant: "I shall have to ask you to come to the police station for further tests." The defendant accompanied the constable to a police station where another breath test was made and when it also proved positive the defendant was asked to provide a sample of blood which showed that the alcohol in his blood exceeded the permitted amount for driving. To prove an offence under section 1(1) of the Road Safety Act 1967, however, the sample of blood must have been taken from a person lawfully arrested as required by section 3 of the Act. The question thus arose whether the defendant was under arrest when the blood sample was taken. The justices of the peace decided that there had been no arrest. On appeal, Lord Parker, C.J., said that "whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching it is quite clear that that is no longer the law. It may be an arrest by mere words, by saying 'I arrest you' without any touching, provided of course, that the defendant submits and goes with the police officer.

Equally it is clear, as it seems to me, that an arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion. 10

With reference to the particular case, Lord Parker believed that the words used "were in their context words of command which one would think would bring home to a defendant that he was under compulsion" yet he was unable to interfere with the justices' decision because "this is so much a question of fact for the justices" who "had the evidence not only of the police constable but of the defendant" too.

The factual nature of the question was again stressed in the more recent English case of R. v. Inwood, 11 where the police, while investigating certain thefts and dealings of stolen goods, went to the appellant's house and seized some articles. When he called at the police station the next day he was interviewed at length but allowed to leave. Two weeks later he called again at the police station and was again interviewed, but this time a police officer told him "I propose to charge you


"Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer."

with theft... and dishonest handling...". The police then began the appropriate formalities, such as taking fingerprints and preparing documents. After some time the appellant decided to leave, and in preventing him two police officers were injured. In his trial for assaulting the police officers in the execution of their duty, the judge directed the jury as a matter of law that appellant was no longer merely a suspect, free to leave the police station at any time, but had been adequately placed under arrest, and that the police officers were therefore acting in the execution of their duty in preventing him from leaving. The appellant was convicted. On appeal it was held that in order to establish that the police were entitled to use force to restrain the appellant from leaving the police station it was necessary to show that it had been made clear to the appellant that he was under arrest. The question whether it had been made clear to him that he was under arrest was a question of fact for the jury; on the facts of the case it was impossible to conclude as a matter of law that it had been made clear to the appellant that he was under arrest and the question, therefore, had been wrongly withdrawn from the jury. The appeal was allowed.

The Scottish case of Swankie v. Milne\textsuperscript{12} was an appeal to the High Court from a conviction for driving with more than the permitted quantity

\textsuperscript{12} 1973 S.L.T. (Notes) 28.
of alcohol in the body under section 1(1) of the Road Safety Act 1967. Section 2(1) of that Act provided that a constable in uniform may require a specimen of breath for a breath test if he had reasonable cause to suspect a driver of having alcohol in his body. In this case the defendant was stopped by police officers in plain-clothes who called uniformed officers to the spot. The plain-clothes officers preferred no charges against the appellant. "They did, however, take from him the keys of his car and had he attempted to leave the spot it is found as a fact that they would have prevented him." When the uniformed policemen arrived about 15 minutes later they required the appellant to take the test which proved positive.

The issue of arrest was raised by Lord Cameron who said: "Had the plain-clothes officers in fact arrested or purported to arrest the appellant, then I can appreciate that a very difficult situation might arise with very difficult legal arrangements. In such a situation it could be argued with force that once arrested a person is in the custody of the police and it would or might be difficult to maintain that he could at the same time be in the category of a person 'driving or attempting to drive a motor vehicle'." In other words, if the appellant had been arrested by the plain-clothes police officers, then it would be difficult to convict him under section 1(1) of the Act because at

11. Ibid. at 29. The appeal was dismissed on the construction of the relevant provisions.
the time the uniformed police officers arrived, formed the opinion that he had alcohol in his body and asked him to take the test, he would not have been a person "driving or attempting to drive a motor vehicle" within the meaning of the Act. Lord Cameron made a distinction "between arrest, which is a legal act taken by officers of the law duly authorised to do so and while acting in the course of their duty, carrying with it certain important legal consequences, and the mere detention of a person by a police officer..." He concluded that there was no arrest of the appellant by the plain-clothes officers who stopped his van.

Another aspect of the importance of the question whether there has been an arrest may arise in the context of interrogation. In the English case of R. v. Bass, the police suspected the accused of shop-breaking and searched his premises, under a search warrant, but found nothing. A week later, they left a message asking him to go to the police station. When he arrived, he was interviewed in a room for three-quarters of an hour without the caution required by the Judges Rules for questioning in custody. The confession made during this questioning was the only evidence against him at the trial and he was convicted. The Court of Criminal Appeal quashed the conviction on the ground that the confession ought not to have been admitted in evidence.

16. See Chapter 5 below.
The Court held that while the accused was in that room, he was in custody within the meaning of the Judges Rules. The police maintained that they did not arrest him, but admitted that if he had tried to leave the room while he was being questioned, they would have prevented him - to the court that was sufficient to constitute custody and require the police to caution him before questioning as stipulated by the Judges Rules.

The point about varying degrees of emphasis may be made clearer with reference to this case. If the accused had attempted to leave and been accused of assaulting police officers in the execution of their duties as happened in R. v. Inwood above, the question may well have been decided differently, as the emphasis would have been on whether the accused had notice of the policeman's intention to take him into custody, because without knowing that he was under lawful custody, his action would be lawful self-defence rather than assault.

Thus, the question whether there has in fact been an arrest can arise in the context of various types of proceedings, and on its determination may depend the criminal or civil liability of the individual or that of a policeman. There are, of course, cases where an arrest was clearly made as where the element of physical control and compulsion is put beyond doubt by the action or words of participants in the transaction. On the other hand, there are cases where an arrest was clearly not made. In between the two extremes are the doubtful
borderline cases that must be resolved on a case by case basis.  

(11) Basic Considerations and Principles:

In a study by the United Nations Commission on Human Rights it was stated:

"Protection against illegal or arbitrary arrest and detention is achieved by certain controls which in varying forms exist in the different legal systems of the world. These controls are:
(a) Limitations on the power of arrest by requirements that before a person can be deprived of his liberty certain conditions established by law must be satisfied and certain procedures followed;
(b) A system of checks and controls which, forming part of the process of arrest and detention, provide built-in safeguards against illegal or arbitrary action;
(c) Legal remedies designed to permit the arrested or detained person to obtain speedy adjudication of the validity of his arrest or detention;
(d) Civil, criminal and disciplinary sanctions which act as deterrents to violations of the safeguards established by law against illegal or arbitrary arrest and detention."

This paragraph suggests the issues that must be considered in this examination of the Sudanese law on arrest and pre-trial detention.

Unfortunately, the Sudanese law of criminal procedure is the least developed branch of an undeveloped legal system. In relation to the vast majority of the issues, including those relative to arrest and detention.

17. Considerations such as whether the language used was in the nature of command or request, whether the suspect acquiesced or not, may be useful analytic tools, see Williams, "Requisites of a Valid Arrest", supra, 12-15.

pre-trial detention, there is nothing to go on except a few sections of the C.C.P. and some cases. Common law practice, as indicated in Chapter 1 above, enjoys the respect of the courts: it is the source of guidance in all issues not expressly covered by the Code; it is often applied directly and without any discussion of its suitability in the particular context. The Sudanese position on the various issues will therefore be explained and expanded with reference to the common law as the law most likely to be followed if the issue should arise before a Sudanese court.

The universal principle of arrest and pre-trial custody is that it is only allowed in specific situations and under particular circumstances - the power to make an arrest has to be specifically authorised by law. This was found to be the position in the Commission on Human Rights Study: 19

"No national rule of law allows its police a wholly capricious power to arrest at whim. All require that a lawful deprivation of liberty must be based upon grounds previously established in law against which a proposed invasion of privacy and personal integrity can be measured."

This is particularly true of the common law practice: 20

"Neither a police constable nor anyone else has a general power of arrest for crime. A person making an arrest must either act under warrant, or bring himself within the four corners of one of the detailed rules authorizing arrest without warrant."


Beyond the formal authorisation, however, is the policy decision that restraint on personal liberty is justified by the strength of suspicion and the seriousness of the offence suspected. The accepted level of suspicion and degree of seriousness that lie beyond the specific power of arrest reflect the basic objectives and underlying philosophy of the particular legal system. A more civil liberties, due process, oriented legal system would require stronger suspicion of a more serious offence than would a crime control oriented legal system. In other words, a liberalised system of criminal procedure - that is to say, one which is more concerned with respect for individual liberty and privacy - would authorise arrest less frequently than would an authoritarian system - that is to say, one which is more concerned with ensuring peace and security for the society in general.

The desirable trait, however, is one of balance; thus all legal systems would claim to subscribe to both sets of objectives rather than to pursue either to the extent of sacrificing the other, because both are ultimately linked together in such a way that the exclusive pursuit of either would defeat the purpose of both of them. Public peace and security are the essential pre-requisites of all civilised social life; but a civilised social life is only the means of fulfilling the life of the individual. A legal system should therefore strive to maintain

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the level of peace and security necessary for the maximization of the preservation of privacy and personal liberty which are, in turn, essential attributes of a meaningful and gratifying life for the individual. This balancing process must be sustained right through all issues of criminal procedure; in the field of arrest and pre-trial custody, it must be attained in the definition and limitations of the powers of arrest, the execution of the arrest, post-arrest procedure, remedies for unlawful arrest etc.

Legal systems sharing the same basic philosophies and policies, namely respect for the human integrity of the individual and the need to minimize interference with his personal liberty and privacy, pursue these philosophies and policies differently. Certain features, advanced by Mr. David Thomas in an article critical of the English law of arrest,\(^\text{22}\) are adopted here for the purpose of evaluating the Sudanese practice. These may be stated briefly as follows:

1. The law of arrest must be contained in a simple code;
2. It must provide power to arrest in respect of any offence, however trivial, as a last resort;
3. The existence of the power to arrest should depend, not primarily on the seriousness of the offence, but on the necessity of arrest as a means of enforcement in the particular situation;

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1. The corollary of the last point is that the power to detain should expire when the factor which has been the justification for the arrest disappears;

5. All powers must be exerciseable on the basis of a reasonable belief in the existence of the facts required to justify the arrest;

6. The law must be such that the officer in the street situation should not be compelled to decide any difficult questions of law.

(2) The Powers of Arrest:

As arrest itself is a necessary stage in the guilt determination process, legal guilt cannot logically precede arrest so as to justify it - a degree of prediction is therefore unavoidable in identifying as probably guilty those who are legally innocent. In common law practice the decision whether an arrest is justified is either made by a magistrate or other authority issuing the arrest warrant or by a policeman or other person making an arrest without warrant according to certain criteria. The two types of mechanisms for authorising arrest present somewhat different problems, and may therefore be treated separately.

(1) Arrestable and Non-arrestable offences:

In the Sudan, offences are classified in the third column of the First Schedule in terms of whether the police may or may not arrest for them without a warrant. As there is no authoritative statement of the

23. Legal guilt or innocence is that which is established by prescribed rules of evidence and procedure.
precise policy or reason behind the classification, one can only guess at why it was thought necessary to require a warrant for arrest for one offence and not another.

One of the main considerations seems to be the need for immediate custody - other factors, such as the seriousness of the offence, operate through this basic consideration. A brief look down the third column of the First Schedule suggests that a warrant is usually required to arrest for the more technical or less serious type of offence unless there is a need for immediate custody. Thus, for example, a warrant is required to arrest for all offences against the state except certain offences relating to espionage and sabotage of military installations. In view of the general complexity and political sensitivity of offences against the state, the opinion of a magistrate is thought necessary; but in cases where the delay involved in the warrant procedure may be harmful arrest without warrant is authorised. Urgency and need for immediate custody may be seen as the justification for other powers of arrest without warrant.

The delay and deliberation of a warrant application may be desirable in itself in relation to certain offences for policy purposes.

24. Sections 96 to 10h Sudan Penal Code.
25. Sections 10hA, 10hB and 10hC Sudan Penal Code.
26. Sections 108 to 11h Sudan Penal Code.
considerations. A warrant is required, for example, to arrest for a number of offences in Chapter XIV of the Penal Code27 — offences relating to contempt of the lawful authority of public servants — because, it is suggested, an arrest without warrant may be, or may be construed as being, motivated by personal indignation or in response to the provocation of the personal insult. An arrest warrant would emphasise the underlying policy considerations of respect for the lawful authority of such public servant as an aspect of the rule of law and proper administration.

In some cases the technical nature of the offence, and the consequent need for the review of the available evidence by a qualified magistrate, would be the overriding considerations. Thus, a warrant is required for any arrest for criminal conspiracy, regardless of the seriousness of the offence for the commission of which the suspected conspiracy is alleged to have been formed.28 This is so although in some cases of conspiracy there may be a reasonable danger of the suspect absconding before the warrant is obtained.

As indicated above, the need for immediate custody may arise from various factors: the gravity of the offence suspected and the severity of the expected sentence are obvious examples because of their effect in increasing the likelihood of the suspect absconding if an arrest is

27. Sections 148 to 166 Penal Code.
28. Section 95 Sudan Penal Code.
not made immediately. Fear of private retaliation and breach of the peace may also support the conclusion that immediate arrest is necessary, hence the power of arrest without warrant even for minor offences. Thus, disturbing the public peace which often consists of being a party to a public fight or quarrel, is arrestable without a warrant though it is punishable with imprisonment for one month only or with fine of £5 20. Where the retaliation of the victim may be expected if immediate arrest does not remove the provocation and discharge the situation, arrest without warrant is justified.

These considerations of the need for immediate custody and the need for close examination of the facts and circumstances in view of the technical nature of the offence or some other reason may underlie the classification of offences in the First Schedule to the C.C.P. These factors are not taken into account, however, by the person making the arrest in each case, rather the decision that arrest with or without a warrant is appropriate is made once and for all in the Code itself. The particular circumstances of the case can never declassify an offence listed as one for which arrest may be without a warrant into one that

29. Such as offences affecting the human body, see sections 251 to 261 and 278 to 281.

30. Section 127 Penal Code.

31. As in cases of criminal trespass and certain cases of mischief, see sections 386 to 403 and 366 to 372 Penal Code.
requires a warrant, or vice versa. There is margin for discretion and considerations of the particular case, however, in that arrest without a warrant is always discretionary - no one is bound to make such an arrest if he feels that it was not necessary or desirable under the circumstances. The fact that an offence is classified as one for which an arrest may be made without a warrant is only part of the answer to the question whether the particular arrest was justified; it is, however, an essential pre-requisite to the arrest being justified or authorised.

The general Sudanese scheme, therefore, operates on the general classification of all offences under the Penal Code, and other enactments, as arrestable or non-arrestable without a warrant. This is generally true of the English practice; the difference being that the distinction in England is made in terms of a general formula rather than a list: offences for which arrest without a warrant may be made are those punishable with imprisonment for five years or more and those specified by the relevant statutory provision to be arrestable without a warrant. 32

In contrast, in Scotland there appears to be no such distinction between arrestable and non-arrestable offences: "the police may arrest without warrant in all cases of common law crimes". 33 It is "also

33. Thomson Committee Report, para. 3.04. See Renton and Brown, para. 5-11.
generally accepted that the common law gives the police a power to
arrest without warrant for statutory offences. This power is frequently
exercised for serious offences but its extent has not at any time been
authoritatively determined." The Thomson Committee recently
recommended "bringing statutory offences into line with common law
crimes by restricting the power of the police to arrest without
warrant for statutory offences to those which are punishable by
imprisonment without the option of a fine..." If this recommendation
is accepted, there would be a class of offences not arrestable without
a warrant, namely those statutory offences which are not punishable
with imprisonment without the option of a fine.

Though in the present Scottish practice the police may arrest
without a warrant for all common law offences and probably all statutory
offences, a petition must be presented and a regular warrant obtained as
soon as possible in all cases of arrest without a warrant. Such a
petition is presented by the procurator fiscal, the public prosecutor,
to be signed by the sheriff; thus, all arrests are reviewed and decided

34. Thomson Committee Report, para. 3.05.

35. In the Report this word is printed "be" in what appears to be a
printing error.

36. Ibid para. 3.29. In para. 3.30, the Committee recommended that "a
police officer should not be entitled to arrest without warrant
unless in all the circumstances he has reasonable grounds for believing
that the interests of justice require arrest at that time."

37. Peggie v. Clark (1858) 7 M. 89, Lord Deas at 93. If the accused is
already in custody then his continued detention is authorised by the
committal warrant though a formal arrest warrant is also signed.
upon by the fiscal, whether before arrest in the case of arrest with warrant, or after arrest in the case of arrest without warrant. The role played by the sheriff is purely formal.

(ii) Arrest on Warrant:

An arrest warrant is not only legal authority to make the arrest but also an order directing that it must be made: the person to whom it is addressed is bound to obey. A warrant of arrest, properly signed or sealed by a competent magistrate, remains in force until it is executed or cancelled. A written warrant may in effect be replaced by an oral order of the magistrate, as where he directs the arrest in his presence; a person for whose arrest he is competent to issue a warrant, in such a case, as in the case of a formal warrant, the magistrate makes the decision to arrest and the person who executes it is only his instrument. In the absence of a formal warrant, however, an arrest directed by a magistrate is technically an arrest without a warrant.

The power to issue arrest warrants in the Sudan is vested in magistrates and judges alone, and as such it is regarded as a judicial

38. The prescribed form in No. 3 in the Third Schedule is imperative. According to section 53 C.C.P. a warrant should ordinarily be directed to one or more policemen or sheikhs, and only exceptionally may it be directed to private persons.

39. Section 51 C.C.P.

40. Section 29 C.C.P. See also section 28. See generally below.

41. Section 51 C.C.P. This is the universal position, though there are exceptions, see the United Nations Commission on Human Rights Study, para. 105-107.
function - the warrant provides complete protection to the person executing it from civil and criminal liability.\textsuperscript{12}

The basic assumption of the warrant procedure is that the magistrate will apply his independent mind and expertise to all the facts and circumstances of the case and authorise an arrest only when it is clearly necessary in the interest of the administration of justice. Both the assumption and its implications of protection of personal liberty and privacy are bound to come into serious doubt, however, if applications for arrest warrants are granted automatically without serious consideration of the need for immediate custody in the particular case - that is to say, if the authority granting warrants acts merely as a rubber stamp. This criticism can be true of a variety of judicial decisions in pre-trial procedure, especially with respect to arrest, remand in custody and search and seizure.\textsuperscript{13} If police applications are granted as a matter of course, then it will be the police and not the magistrate who really make the decision, and the procedure will therefore cease to constitute a check or safeguard against police abuse of powers.

Magistrates are likely to lapse into being rubber stamps because it is in their absolute discretion to grant or refuse warrants, without there being any independent criteria against which their decisions can

\textsuperscript{12} See below.

\textsuperscript{13} The problem is considered briefly in the context of each of these decisions in the following chapters.
be judged. In the course of their long working relationship with
the police, magistrates come to rely more and more on the police
version of the facts and their recommendations for the appropriate
action. Magistrates may also find it safer to grant the police the
warrants they need rather than be blamed for anything that may go
wrong later on in the investigation. Yet, because there is no remedy
against a warrant, it is important that it should not be granted
without very good cause.

In the United States, any search and seizure, and an arrest is
regarded as a seizure, must satisfy the constitutional standards of the
Fourth Amendment to the American Constitution which provides that the
"right of the people to be secure in their persons, houses, papers and
effects, against unreasonable searches and seizures, shall not be
violated, and no warrants shall issue, but upon probable cause,
supported by oath or affirmation, and particularly describing the place
to be searched and the persons or things to be seized." To give
effect to the constitutional guarantee, a certain degree of suspicion,
supported by a certain standard of evidence, must be present to justify
every arrest made, whether with or without warrant. All arrests must

44. A person arrested, remanded in custody or searched unjustifiably
under a warrant or authorization of a magistrate has no remedy
against either the magistrate or against the person who executed
his orders.

45. This Amendment is applicable to the States too, see Mapp v. Ohio,
be supported by probable cause, that is to say, personal knowledge or reasonably trustworthy reports of facts that are sufficient to warrant a reasonably cautious man's belief that an offence has been or is being committed.\(^6\) Though the definition of probable cause is the same regardless of whether the warrant is used or not,\(^7\) it seems that the standards "are more stringent where an arrest warrant is absent".\(^8\) This reflects the common law assumption that judicial approval of the arrest, or search, in itself constitutes a safeguard against arbitrary police action.

To illustrate the implications of this approach in the field of arrest warrants, one may take the example of an informant's tip as the basis of an application for an arrest warrant. While it is most probable that a Sudanese magistrate, on being informed that the police "have reason to believe" or "are informed" that an offence has been committed by a certain person, would grant the police application for a warrant for his arrest without further inquiry,\(^9\) his American counter-

\(^6\) Caroll v. United States, 267 U.S. 132 (1925) at 162; Bringer v. United States, 338 U.S. 160 (1949) 175-76.

\(^7\) McCray v. Illinois, 386 U.S. 300 (1967).

\(^8\) Wong Sun v. United States, 371 U.S. 471 (1963) at 480.

\(^9\) An impressionistic view based on several interviews with leading defence Advocates. It seems that this is true of the English practice too: it is easy for the police to obtain an arrest warrant because "an information laid by a responsible officer is not likely to be questioned." Devlin, The Criminal Prosecution in England, 70.
part must ensure that the application satisfies the dual test of Aguilar v. Texas 50 that the informant is a reliable one and that he must have had some reasonable basis for his knowledge of the facts he reported to the police.

One tends to support the principle of the American practice because if the warrant is to be issued by the magistrate, then he must satisfy himself that an arrest is necessary or justified in all the circumstances of the case; to do that he must look beyond the application for an arrest warrant to the alleged facts supporting it. If he consistently accepts the policeman’s version of the facts and grants his applications without an examination, the magistrate will be abdicating his responsibility, the decision effectively being made by the policeman making the application.

In Scotland, the Thomson Committee heard witnesses saying that "in the majority of cases the sheriff [magistrate] merely acted as a rubber stamp when granting warrants. They suggested that the sheriff should not grant a warrant to arrest unless the procurator fiscal [public prosecutor] satisfies him that there is prima facie evidence which justifies this course." 51 The Committee, however, preferred to adopt the opposite view 52 that the present system whereby sheriffs


51. Thomson Committee Report, para. 4.06.

52. Ibid. para. 4.07.
grant warrants on the petition of the procurators fiscal "is operating satisfactorily and that the procurators fiscal as public officials can be trusted to act responsibly." 53 This may be so in a country with a well established professional system of public prosecution, with political accountability through Parliament and the Lord Advocate, the head of the system. It is not true, at least at present, of the Sudanese system where only policemen apply for warrants; the magistrate is the only qualified person to be in contact with the investigation, the only one outside the police to consider the propriety of an arrest. The role of the public prosecutor is largely played in the Sudan by the magistrate. 54

The problem of perfunctory judicial functioning is a general problem which is appreciated throughout the common law jurisdictions. In theory, the judicial supervision of the police ranks high in the common law scheme for the protection of the individual from arbitrary and oppressive police powers. 55 In practice, however, it is often not very meaningful as a check on police powers because of the way in which magistrates tend to follow police recommendations and accept the police version of the facts without any questioning or examination. 56 In his

53. Ibid. para. 4.09.
54. This aspect of Sudanese criminal procedure is considered in Chapter 8 below.
56. Ibid. 989 and 991.
leading study of arrest, La Fave concluded:

"The difference between the stated ideal and the practice raises the question of the extent to which it is practical to structure the system so as to involve the judge at the arrest stage of the process...
It is apparent that a choice must be made. If it is desirable for the trial judge to be involved in the arrest decision, new ways must be developed to make effective judicial participation feasible at this stage. The obvious alternative is to abandon the 'ideal' of judicial participation in the arrest decision and structure the system in a way which will clearly give primary responsibility for these decisions to the police or prosecutor."

To continue with the fiction of judicial decisions while in fact it is the police who are making the decisions is extremely unsatisfactory.

(iii) Arrest Without Warrant:

This is the more problematic class of powers of arrest; the dangers inherent in authorising the police, who are "engaged in the often competitive enterprise of ferreting out crime," to make the decision to arrest are obvious. The decision usually has to be made instantaneously, without opportunity for deliberation and consultation. With their close involvement in the investigation and their understandable desire to have tangible results as soon as possible, the

57. Wayne R. La Fave, Arrest: The Decision to Take a Suspect into Custody, (1965) 503.
59. Section 48 of the Sudan Police General Regulations 1928 used to provide that hasty arrest must be avoided if possible, and that arrest must be delayed unless it was necessary for fear of absconding or tampering with the evidence. This provision was left out of the present edition, the Police General Regulations 1971.
police are likely to make the decision to arrest more frequently and too easily. Besides, the police are always suspected of abusing and exceeding their powers. Though this suspicion is certainly not always justified, every effort must be made to ensure not only that the suspicion does not materialise, but also that the allegation cannot be reasonably made. This is to be achieved by close definition of the powers of arrest without warrant, the imposition of other appropriate safeguards and the strict enforcement of all these regulations of the power.

The power of arrest without warrant raises two basic problems: whether the offence is one for which the police may arrest without a warrant and whether the particular arrest satisfies any other relevant criteria such as the degree of suspicion, the source of information etc. With respect to the first question, the answer in the Sudan depends on whether the offence is listed in the third column of the First Schedule to the C.C.P. as one for which arrest may be made without warrant. But although this is a pre-condition to the legality of all arrests without warrant, with a limited exception, it is not the only condition. In other words, though every arrest for an offence not listed as one for which arrest may be made without a warrant is unlawful, the fact that

60. Under section 25(k) a policeman may arrest without a warrant for an offence which is not listed as one for which the police may arrest without a warrant, but only under certain circumstances, see below.
the offence is so listed does not by itself make the arrest lawful — it must also meet other criteria. Both these types of conditions are expressed in the Code in what may be called the powers of arrest without warrant.

1. Formal Powers of Arrest Without Warrant:

In some of the powers of arrest under the C.C.P., what may be called "formal powers of arrest", the decision to make the arrest is made by someone other than the person making the actual arrest. Questions as to the propriety of the arrest and safeguards against abuse of the power, therefore, relate to that other person and not to the one making the arrest: it is not the arrest without warrant but rather the underlying decision that authorised such arrest which involve the real issues. As will be seen, however, these formal powers hardly raise any substantive issues of personal liberty and privacy — the arrest without warrant is merely in execution of a previous decision or process. In contrast, in what are termed here "substantive powers of arrest without warrant" the decision to arrest is made by the person carrying it out, in exercise of the power vested in him by law. As it involves the exercise of discretion — the person's judgment that an arrest is authorised — such powers of arrest need to be examined in more detail. But it will be simpler to dispose of the "formal" powers first.

The formal powers of arrest are to be found in two provisions
of the C.C.P. Sections 25 and 27.

Section 25: "Any policeman or sheikh may arrest:
(a) any person for whose arrest he has a warrant, or whom he is directed to arrest by a Magistrate under sections 26 or 29;
(c) any person the order for whose discharge from prison has been cancelled by the Supreme Court, Court of Appeal or Province Judge under section 91 or any person the suspension or remission of whose sentence has been cancelled by the President of the Republic under section 276;
(e) any person required to appear by a proclamation published under section 61;
(i) any person who has escaped or attempts to escape from lawful custody;"

Section 27: "Any private person may arrest:
(a) any person for whose arrest he has a warrant or whom he is directed to arrest by a Magistrate under sections 26 or 29;
(b) any person who has escaped from his lawful custody;
(c) any person required to appear by a proclamation published under section 61;"

2. Substantive Powers of Arrest Without Warrant:

Arrest without warrant under this class of powers of arrest is by far the most important of all powers of arrest because it is the most

61. "Sheikh" is defined by section 5(1) C.C.P. to include the sheikh or headman of a village or group of villages or of a quarter or district of any town, and also any other person by whatever title known appointed by the Government to perform functions similar to those of a policeman.

62. Section 91(1) provides for release from imprisonment for failure to give security for keeping the peace etc., but section 91(h) provides for the cancellation of the release order. Section 276 provides for the power of the President of the Republic to suspend or remit sentences.

63. Such a proclamation is published, in prescribed manner, when it is believed that a person against whom a warrant has been issued has absconded or is concealing himself. The proclamation renders the warrant executable by any policeman, sheikh or private person as appears from both sections 25(e) and 27(c).
frequently used and the most problematic of them all. It is the power used by the police in everyday law enforcement, and requires the exercise of discretion and action on judgments formed of the facts and persons involved on the spot. In the interest of clarity, the police powers of arrest without a warrant under section 25 C.C.P. are treated under eight sub-headings; to be followed by the separate consideration of the powers of arrest without a warrant enjoyed by magistrates and private persons.

(I) Section 25(b): "Any policeman or sheikh may arrest: any person who has been concerned in an offence for which according to the third column of the First Schedule to this Code or under any other ordinance for the time being in force the police may arrest without warrant, or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exists of his having been so concerned;"

It will be observed that the power is discretionary, a policeman may arrest in such cases; he need not make the arrest if he feels that there is no need for immediate custody. As suggested above, several reasons may underly the classification of a particular offence as one for which arrest may be made without a warrant, but it may be that such reasons are not particularly true of the case in hand so as to make immediate custody necessary. But in all cases falling within the scope of the provision of section 25(b) above, an arrest without a warrant would be justified in the sense that the policeman making it cannot be sued, prosecuted or disciplined for unlawful arrest; the arrest may be unwise or unnecessary, but it is not unlawful. It would
be more consistent with the spirit of the Code and the need to minimize interference with the individual if justifiable arrests were made as rarely as possible. 61. If there is no real danger of suspect absconding or of the offence being continued or repeated, that is if the violation will cease and the attendance of the suspect be secured on the issuing of summons, for example, arrest may be unnecessary, though it may be justified or authorised in the sense that the suspect has been concerned in an offence for which the police may arrest without a warrant.

The rule contained in this sub-section is basically that of the common law for the power of arrest without a warrant for felonies, translated in India into cognizable and non-cognizable offences. The rule now adopted in the English Criminal Law Act 1967, section 2, is similar, except that the arrestable offences are identified by a test, with reference to sentence, rather than listed as such. According to the Commission on Human Rights Study, such classification "may de-emphasize the warrant and the role of prior judicial control, but gives the police a relatively simple rule. While the police must still make a determination whether or not the required quantum of reasonable

61. See La Fave, Arrest, 177-202, on some of the considerations relevant to the need for immediate custody. See Lord Devlin in Hussein v. Chong Fook Kan [1970] A.C. 942 at 948-49, quoted below at pp.175-76.
suspicion exists, beyond that they have only to classify the offence to know of their rights". 65.

The appearance of simplicity may be illusionary because what is really required is that every policeman should learn by heart, for instant recall, tables of hundreds of offences as being offences for which he may or may not arrest without warrant. This is particularly difficult because a given offence may be classified as one for which the police may arrest without a warrant only in its aggravated form: for example, the police may not arrest without a warrant for causing hurt, but they may do so if the hurt caused was grievous. 66 This factor in the classification makes it harder to remember which offences are and which offences are not arrestable without a warrant.

The more difficult question, however, is that of the "determination of whether or not the required quantum of reasonable suspicion exists". For someone to be liable to arrest without a warrant, he must either be actually concerned in an offence for which the police may arrest without a warrant, or there must be reasonable complaint or credible information or reasonable suspicion that he is so concerned. None of these terms is capable of precise definition, which is not necessarily a bad feature. The question has to be decided with reference to all

65. "The Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile", supra, para. 120.

66. See sections 275 to 278 Penal Code.
the facts and circumstances of the case. What is reasonable and what is credible may not be easy to define, but it is easy to recognise.

To avoid problems as to whether someone actually committed the offence, section 25(b) speaks of being concerned with the offence—this allows a margin which may be useful where the exact nature of one’s involvement is difficult to ascertain. But the reasonable suspicion or credible information that one is so concerned “must relate to definite averments which the police officer must consider for himself before he acts under this section.”

A general statement of the relevant considerations to the key phrase "reasonable suspicion" was made recently in the Privy Council decision in Hussein v. Chong Fook Kan. In delivering the judgment of the Court, Lord Devlin said:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof...

67. In England, the power to arrest someone committing an offence may be taken to mean a power to arrest someone reasonably suspected of committing the offence, Wiltshire v. Barrett [1966] 1 Q.B. 312.


69. [1970] A.C. 942; an appeal from Malaysia against an award of damages for false imprisonment, the issue being whether there was reasonable suspicion justifying the arrest.

70. Ibid, at 948-49.
is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it would seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of these factors...

There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all... Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case. Thus the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime: it will become of considerable importance in the trial when such proof as there is is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance."

In Dumbell v. Roberts, approved in Hussein above, Scott L.J. said:

"That requirement [that there do in fact exist reasonable grounds for suspicion of guilt] is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction:..."

In contrast, in Scotland the Thomson Committee recently recommended as follows:

71. See McArdle v. Egan (1934) 150 L.T. 412 on relevance of previous convictions.
73. Ibid. at 329.
74. In their Report on Criminal Procedure in Scotland, para. 3.30. The Committee also recommended the authorisation of "detention" before arrest, ibid. para. 3.15. See below pp. 251 et seq.
"In the first place we think that arrest should be competent only where the arresting officer has reasonable grounds for believing that he is entitled to charge the arrestee, i.e., that there is a prima facie case against him."

The difference between these two positions reflects a difference in attitude towards the relative importance of law enforcement on the one hand and personal privacy and liberty on the other. In so far as the requirement of a stronger level of suspicion, recommended by the Thomson Committee, makes it harder to justify an arrest, individual liberty and privacy are preserved; the question is whether they are preserved at an intolerable cost to law enforcement. The basic dilemma of criminal procedure manifests itself in the present context as follows: the lower the level of suspicion acceptable as the reasonable suspicion authorising arrest without a warrant, the easier it would be to justify arrests; and the easier it is to justify arrests, the more frequently will they be made. On the other hand, the higher the level of suspicion required, the harder it would be to justify arrests; the harder it is to justify arrests, the less frequently will they be made. The choice is not easy because though it is obviously desirable that arrests should be kept to a minimum, it is also desirable that an arrest should be made whenever necessary. To discourage the making of arrests by requiring too high a level of suspicion may have the effect of discouraging policemen from making arrests even in the most appropriate cases.

The above quoted statements illustrate the sort of considerations relevant to the interpretation of such phrases as "reasonable suspicion"
and "credible information". Each arrest will have to be considered in its own context and under all the facts and circumstances of the case. One would expect that there will be cases where an arrest was clearly justified, others where an arrest was clearly not justified, and the doubtful cases in between the two. One would also expect that the meaning of the relevant phrases will not remain static: it is the sort of test that is bound to reflect, and quite rightly so, the socio-political conditions of the time. What is important, however, is to maintain whatever is regarded as an acceptable standard by articulating and enforcing it in all cases.

(II) Section 25(d): "Any policeman or sheikh may arrest: any person whom he reasonably suspects to be designing to commit an offence for which the police may arrest without a warrant, if it appears to him that the commission of the offence cannot be otherwise prevented;"

This is one of the so-called preventive powers of arrest: though no offence has actually been committed the arrest is thought to be necessary for the prevention of its commission. In view of the obvious objections to preventive arrest\(^7\) - its unfairness and liability to abuse - all limitations on the power must be construed in such a way that its excess are always under check.

It will be observed that the power is provided subject to three limitations; and it may appear that if all three were observed closely,

\(^7\) Packer, *The Limits of the Criminal Sanction*, 97-99.
this power of arrest would not be as objectionable as its principle may suggest: granted that one is designing to commit an offence for which the police may arrest without a warrant, and that there is no other way of preventing him from doing so without arresting him, many would agree that he should be arrested rather than left free until after the harm is done. In fact, under such conditions the argument for preventive arrest is strong indeed; the problem is, however, precisely whether these conditions can ever be shown to exist. In any case where the exercise of this power of arrest comes into question, the court will have to decide whether the arrestee could have been reasonably suspected of being "designing to commit", and whether there was no other way of preventing the commission of an offence for which the police may arrest without a warrant.

To take the first condition, when can one be said to be designing to commit an offence; is it merely the intention to commit the offence or something more, and if so, what is it that constitutes "designing" and yet falls short of the attempt or actual commission of the offence? Even if "designing" is taken to mean mere intention, how can such intention be proved to exist? It is true that under section 25(d) reasonable suspicion of such "designing" is sufficient, but even reasonable suspicion must be founded on "some definite fact tending to throw suspicion on the person arrested, and not a mere vague surmise or information."76

The nearest Indian power of arrest is that to be found in section 111(1)(b) of the Indian C.C.P. 1973, which provides that one found in possession of implements of house-breaking without lawful excuse may be arrested without a warrant. It was indicated in *Emperor v. Abdul Hamid*, that the police officer must have definite knowledge or at least definite information that a certain person is in possession of an implement of house-breaking before putting that person under arrest. This Indian version of the power of arrest may have the virtue of being limited to one type of offence and dependent on more tangible evidence of "designing" to commit such an offence, but it is not related to the need for immediate custody as the only means of prevention as under the Sudanese power of arrest. Both powers of arrest, however, raise interesting questions as to the existence of any power to detain briefly and search a person suspected of being "designing to commit", in the case of the Sudanese power, and "in possession of implements of house-breaking", in the case of the Indian power. If the policeman is seriously expected to verify any initial suspicion he may have, and if he is expected to attempt prevention without arrest, he must be allowed to interfere with the individual before forming a final opinion as to the need for immediate custody by exercising his power of arrest. For example, a brief detention may enable the policeman to ascertain the name and address of the person and to ask him to explain, if he can.

77. Corresponding to section 52(h), Secondly, of the 1898 Indian C.C.P. 1898.
78. A.I.R. [1942] All. 74 at 76.
suspicious conduct; a limited search or "frisk" may also enable the policeman to determine whether the person is armed or carrying any implements of crime etc.

On the whole, this preventive power of arrest may be necessary in some cases; and if it is exercised under all its limitations, it may not be objectionable. All efforts to keep it within acceptable limits must be constantly made, however, if it is to be tolerated at all; otherwise it will grow out of hand and may defeat its own purpose by provoking resentment and protests that may lead to its repeal.

Review and consideration of the power and its proper limits must be concerned with articulating criteria for determining whether one is "designing to commit" and whether there was no alternative to arrest if the offence was to be prevented. These limitations must be rendered more realistically applicable and the power more effectively reviewable if the power is not to be a vindictive or punitive power at the disposal of the police.

(III) Section 25(f): "Any policeman or sheikh may arrest: any person found taking precautions to conceal his presence in suspicious circumstances or who being found in suspicious circumstances has no ostensible means of subsistence or cannot give a satisfactory account of himself;"

This is an even more obtrusive power of preventive arrest in that it allows a lesser level of suspicion to justify arrest. The implications are that a person found taking precautions to conceal his presence in suspicious circumstances or who being found in suspicious circumstances
has no ostensible means of subsistence or cannot give a satisfactory account of himself must be designing to commit an offence or waiting for an opportunity to do so. The objection to this is that it is more likely to reflect upon the poor and the homeless because they are much more likely to be found in suspicious circumstances, they often have no alternative but to wander at night or seek dark and lonely corners to sleep. The section has a hateful ring of the "Victorian" concept of the dangerous classes: "such arrests reflect the view that these people may engage in bad conduct in the future and that, if they are harassed in advance, both their opportunity and their incentive to engage in criminal conduct may be reduced." 79

Moreover, there are several sources of difficulty in the language of the section that increase the dangers of abuse. What do the terms "ostensible means of subsistence" and "satisfactory account of himself" mean? How are claims of having such means of subsistence, or explanations given of one's conduct or reasons for being there, to be verified? To avoid arrest under this power, the individual must be able to prove his identity and means of livelihood every time a policeman decides that he has been found in suspicious circumstances. It is true that such a decision by the policeman must be reasonable, but then it is not rare for any person to be found in what may be reasonably called suspicious circumstances: every time one is returning late from a party or taking

79. Packer, The Limits of the Criminal Sanction, 98.
a shortcut through a dubious part of town such a conclusion can be drawn. Thus, this power of arrest can obviously be used to harass and annoy any innocent member of the public; but the fact that it can apply in situations far removed from its "legitimate" or intended field, that of crime prevention, is not the only objection. Even as applied to its "legitimate" and intended subjects, this power of arrest is unacceptable because it is not an arrest for the commission of offence, and not even for designing to commit one under circumstances that make arrest the only means of prevention. In fact, objection can also be taken to related offences in the Penal Code, namely being an idle person and being a vagabond, punishable under sections 1147 and 1148 Sudan Penal Code, respectively. Section 1146 Penal Code defines an idle person to include "(c) any person who has no settled home and has no ostensible means of subsistence and cannot give a satisfactory account of himself." Being a vagabond includes an aggravated form of being an idle person. Both offences are classified in the third column of the First Schedule as offences for which the police may arrest without a warrant. The question, therefore, is the wider question of policy and not the limited matter of a power of arrest without a warrant, because even if the police did not have the power of section 25(f) they could still arrest for the offences of being an idle person

80. Section 1146(2)(a) Sudan Penal Code.
or a vagabond under section 25(b), arrest for an offence for which the police may arrest without a warrant. 81 The wider issue of policy is whether this area should be regulated by the criminal law at all. I feel that even if it is a legitimate subject of legislation, it is not for criminal legislation.

A measure of the potential for abuse these offences and the related powers of arrest have may be seen from a brief look at the practice in one police district, that of Khartoum South, where in two periods of ten days each it was found that arrest for suspicion of being an idle person accounted for 40% and 89%, respectively, of the total of arrests without warrant made in those periods. While both percentages are much too high, the difference between the two supports even further the contention that this sort of power of arrest is arbitrary and liable to manipulation in sweeping arrest campaigns timed to serve objectives other than those of criminal law enforcement. 82

On the whole, this power of preventive arrest is too wide and ought to be abolished because the legitimate purposes of preventive

81. See pp. 172-78, above.

82. In December 1974, and in response to a high increase in the world prices of sugar, local prices were raised and riots and mob demonstrations followed. The political authorities came out with the theory that illegal immigrants and idle persons were responsible and extensive arrest campaigns were launched. A simultaneous campaign against prostitution and related offences was made. It is interesting that prostitution as such is not an offence under the Penal Code, but arrests are made under section 25(f); and prosecutions sometimes follow for being an idle person if the ingredients of that offence can be satisfied. Otherwise, arrests are used as a harassment device and to distract public opinion from the basic inadequacy of the law to deal with the problem of prostitution.
arrest may be served by the previous power, that of arresting one who is designing to commit an offence for which the police may arrest without a warrant when there is no other means of preventing him from doing so without arresting him. 83

One question that may be asked in relation to all powers of preventive arrest is, what follows the arrest as no offence has been committed? It may be that a person arrested under section 25(f) may be prosecuted for being an idle person, but that is not always the case because in the definition of an idle person all requirements must combine, while for an arrest under section 25(f) they exist in the alternative. The effect of both powers of arrest is to make the arrest lawful; but where no offence has been committed, the person arrested is, of course, released. Such release, however, must follow the post-arrest procedure explained below, because such procedure must be followed in all cases.

(IV) Section 25(g): "Any policeman or sheikh may arrest any person in whose possession property is found which may reasonably be suspected to be stolen or who may reasonably be suspected of having committed an offence with reference to such property;"

83. There may be historical reasons for these powers of arrests and offences, conditions being what they were after the civil war and chaos of the Mahdist State, see Chapter 1 above. It is submitted that present conditions of law and order in general, and the security of the individual's person and home in particular, do not justify the continuation of these provisions.

84. See Explanation to section 416(1) Sudan Penal Code.
This is one of the regular powers of arrest for suspicion of an offence; only it is limited to offences against property, the offence suspected must relate to the property found in the possession of the person arrested. The offence suspected need not be one for which the police may arrest without a warrant, thus it applies when the offence suspected is extortion, criminal misappropriation, cheating and mischief. The justification for this power of arrest appears to be fear that if the suspect was not arrested he might defeat the ends of justice by disposing of the property and any other incriminating evidence. In other words, the need for immediate custody overrides the reason for classifying the offence as one for which a warrant must be obtained, mainly the technical nature of the offences. But then, why not make this a general rule, that an arrest without warrant is authorised whenever there is the possibility that the suspect may destroy the evidence?

(V) Section 25(h): "Any policeman or sheikh may arrest without a warrant: any person who obstructs a policeman while in the execution of his duty."

The key words in this power of arrest are "obstruct" and "execution of his duty", because on their construction, and the enforcement of their limitations on the power of arrest, lies the difference between

85. Sections 326-331, 346, 359-362 and 364-365 Penal Code, respectively.
a legitimate and reasonable power of arrest and an arbitrary one.

In one of the rare cases on the powers of arrest in the Sudan, "obstruction" was defined to involve actual hindrance, physical resistance or obstacle put in the way of a policeman by some overt act done with the intention or knowledge that by so doing the policeman is being prevented from doing his duty, and not the mere offer of passive resistance, opposition or evasion not accompanied by the use of physical force. The function obstructed must also be lawful for an arrest to be authorised under section 25(h). 86

Obstructing a public servant in the discharge of his public functions is punishable under section 161 Sudan Penal Code, but section 161 is not classified as one of the offences for which the police may arrest without a warrant. The paradox of section 25(h) providing for a power of arrest for the same offence - as a policeman is a public servant within the meaning of section 161 Penal Code 87 -

86. Sudan Government v. Omer Awadalla (1954) AC.-Crim. Revision-39-54. In the event, the policeman was held to have been detaining the accused unlawfully, so what happened could never constitute an obstruction justifying arrest under section 25(h) C.C.P. The Scottish definition of the term "obstruction" is similar to that in the Sudan: requiring the presence of some physical aspect, see Curlett v. McKechnie, 1938 J.C. 176 at 179. In England the term is interpreted more widely to include non-physical obstruction, see Betts v. Stevens [1910] 1 K.B. 1 and Duncan v. Jones [1916] 1 K.B. 218. See generally Glanville Williams, Criminal Law, the General Part, 2d. ed. para. 14:0.

87. Section 14(a) Sudan Penal Code.
is resolved by the fact that section 25(h) relates only to the obstruction of a policeman in the execution of his duty; the requirement of a warrant remains applicable to all arrests for the obstruction of public servants other than policemen. The distinction is valid and reasonable because when ordinary public servants are obstructed they resort to the police, so the policeman must have an ultimate power of arrest without warrant should it become necessary to make an immediate arrest. So long as this power is limited by the fact that the policeman must be executing his lawful duties, the power of arrest is reasonable and justified by considerations of the need for public respect for the law and its servants, because even if the person responsible for the obstruction is subsequently arrested on warrant, the lawful function, and its public benefits, would have been defeated. Again if the policeman on the spot cannot arrest, other people may be provoked into taking the law into their own hand. Yet, if the function obstructed was not really in execution of the policeman's lawful duties, the power of arrest would be arbitrary and oppressive, and the law itself will come into public contempt and ridicule because it will be used, and be seen to be used, to save the face of a policeman clearly acting beyond his powers. It is vital, therefore, that every exercise of this power should be reviewed to see what was the function obstructed.

(VI) Section 25(j): "Any policeman or sheikh may arrest:
any person reasonably suspected of being a deserter from the Armed Forces;"

Except for the need to determine whether someone "can be reasonably suspected" of being a deserter, this is really a formal power of arrest. It has nothing to do with the criminal process as such, the arrest is
neither for the suspicion nor prevention of a criminal offence in the Sudan Penal Code.

(VII) Section 25(k): "Any policeman or sheikh may arrest:
any person who in his presence has committed
or been accused of committing any offence for
which the police may not, according to the
third column of the First Schedule to this
Code, arrest without a warrant if, on his demand,
such person refuses to give his name and address
or gives a name and address which he believes
to be a false one;"

The obvious justification of this wide power of arrest, it applies
to offences for which the police may not ordinarily arrest without a
warrant is the paramount need for immediate custody: if the true name
and address of such a person cannot be ascertained, to let him go is
to relinquish any chance of bringing him to account for his offence.
It may be that there is an explanation for the person's conduct or that
the accusation is false, but as that may not always be established
immediately, the police must retain their access to the person suspected
or accused. If the policeman may not arrest as a last resort, for any
offence however trivial, people may be tempted to take the law into
their own hands rather than resort to the official law enforcement agencies
which are seen to be helpless in front of flagrant violations.

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88. This appears to be quite a common power of arrest, see The Commission
on Human Rights Study, para. 110. The Thomson Committee in Scotland
recently recommended in para. 6.02 that "there should be a legal duty
on anyone the police reasonably believe to be a potential witness
to give his name and address. Failure to do so or the giving of a
false name and address should be a statutory arrestable offence...
Such detention should be for only so long as is necessary to verify
these particulars." Though this recommendation is said to relate
to witnesses, but a witness can subsequently become a suspect.
This power of arrest is subject to assurance that an offence has been committed, hence the policeman must either himself observe its commission or receive a complaint that the person to be arrested committed the offence. Such an accusation, however, must be reasonable or credible if it is to justify the policeman's actions. Moreover, the policeman must attempt first to ascertain the suspect's name and address, and if what appears to be his true name and address were given, no power of arrest arises. Again, the view taken as to the authenticity of the name and address offered must be reasonable; it may not be possible to define in advance all means of verification of the information given, but it may be possible to determine whether the policeman acted reasonably or not in refusing to accept it and deciding to arrest.

(VIII) Section 25(1): "Any policeman or sheikh may arrest any person who has been placed under police supervision and whom he reasonably suspects to have committed or to be committing a breach of any of the restrictions mentioned in section 92B which are applicable to him."

A person may be placed under police supervision, a preventive measure, when he is convicted, for example, of an offence involving or likely to cause a disturbance of the public tranquility or is a habitual offender. Such supervision may extend up to three years during which time the person may suffer any of the restrictions listed in section 92B

89. Sections 80 and 82 C.C.P.
C.C.P., which include restrictions as to residence, duty to report to the police and restriction of movement within certain times.

The theory of these restriction orders is to prevent or discourage criminality by restricting opportunity and otherwise limiting the freedom of movement or action of potential offenders. Like all preventive measures it is at best a necessary evil in that it anticipates the offence; but as it involves restrictions short of complete custody, it may be less objectionable than other preventive measures. The power of arrest for the violation of such supervision orders is essentially incidental to the original order in the sense that it is necessary to maintain the credibility of the restrictions and help prove their violation, if that should happen, by catching the offender in flagrante delicto.

3. Arrest by a Private Person:

Originally, at common law, the powers of arrest were enjoyed by everyone; but with the rise of professional police forces, specialisation led gradually to the present day disparity between the powers of the private person and those of the police and other official law enforcement agencies. This is a welcome development because arrest often involves

the use of force and as such it is better done by trained professionals. Moreover, arrestees are more likely to submit to the police because they recognise that they cannot successfully resist the police, and that if they attempted to do so they would be in more trouble. The implications of self help involved in arrest by private persons are not to be encouraged. On the other hand, arrest by private persons should not be banned altogether because the police may not be available. Like the right of private defence, private arrest should be allowed but limited and discouraged whenever recourse to lawful authority can be made. 91

The Sudanese law of arrest reflects this general attitude: arrest by a private person is limited to a single substantive power of arrest. 92

Section 27(d) C.C.P. provides that "Any private person may arrest any person committing in his presence an offence for which the police are authorised to arrest without a warrant."

This power of arrest is conditional upon, first, the offence for which arrest is made being committed in the presence of the private

91. This is now the universal practice, see Commission on Human Rights Study, para. 123-125.

92. Section 27(a), (b) and (c) C.C.P., quoted above at p. 171 provides for some private person's formal powers of arrest, namely under warrant or direction of a magistrate, the arrest of who escaped from his lawful custody, and under a proclamation issued under section 61 C.C.P.
person making the arrest; and, secondly the offence being one for which the police may arrest without a warrant. In contrast to the first condition, at common law a private person could arrest for a felony committed in his absence so long as it was in fact committed. 93

With respect to the second condition, that the offence for which arrest is being made must be of a certain class, 94 it is very unlikely that the private person making the arrest will know at the time of the arrest whether the offence for which he proposes to make the arrest is one for which the police may or may not arrest without a warrant. A private person is unlikely to know even which offence has been committed. These arrests are usually made in emergency situations, and in making them the private person often has no regard to his own liability for unlawful arrest. This presents a dilemma in that an arrest may be technically unlawful though it was reasonable and necessary at the time and under the circumstances. It is true that arrest by a private person should be discouraged, but it is also true, especially in a country like the Sudan with extremely limited police services, that one who makes a reasonable and necessary arrest should be protected from civil or criminal liability.

93. R. v. Dadson (1850) 3 C. and K. 149, see Walter v. Smith [1911] 1 K.B. 595, on how a mistake, though not justifying the arrest, may defeat a civil action.

94. At common law felony and breach of the peace, now an "arrestable offence" under section 2 of the Criminal Law Act 1967. See generally Glanville L. Williams, "Arrest for a Felony at Common Law", and "Arrest for Breach of the Peace", (1951) Crim.L.Rev. 408, and 578, respectively.
1. Arrest by a Magistrate:

A magistrate normally acts through a warrant of arrest, but he may also arrest or direct the arrest without issuing a formal warrant.

Under section 28 C.C.P. "Any Magistrate may arrest or direct the arrest of any person committing any offence in his presence and may thereupon commit the offender to custody."

The key requirement for the exercise of this power of arrest is that the offence must have been committed in the presence of the magistrate to ensure not only that an offence has been committed, but also that considerations of urgency and need for immediate custody are taken into account. Though the section does not expressly say so, one would expect a magistrate to refrain from making or directing arrest for a trivial offence, especially if the name and address of the offender can be ascertained, as he may then be cited to appear in court and arrested under a warrant if he fails to appear. The guiding principle is, therefore, that an arrest should be at least delayed if not avoided altogether.

Section 29 C.C.P.: "Any Magistrate may at any time arrest or direct the arrest in his presence of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant."

Under this section a warrant is merely substituted by the presence of the magistrate who could have issued the warrant if he had the time or opportunity to do so, though that is not a condition for its exercise. In other words, the arrest without a warrant is not related to any considerations of urgency as is the case in Scotland.
where the law that an arrest may be made or directed by a magistrate appears to be linked to the requirement that the circumstances must be such that the suspect might escape if there were any delay in the arrest. This appears to be a reasonable requirement because a warrant is to be preferred to a verbal order. In fact, verbal orders to arrest are likely to be issued on the spur of the moment, often in response to the provocation of the offence committed, and are therefore likely to be made without giving due regard to whether custody can be avoided by ascertaining the name and address of the suspect, for example, so that he may be cited to appear.

These, then, are the powers of arrest with and without a warrant under the Sudan C.C.P. There are, of course, other statutory provisions of powers of arrest such as those provided by section 9(2) of the Hashish and Opium Ordinance 1924 and section 12 of the Residual Control Act 1966. The general rule is that any arrest must be made under a warrant unless arrest without a warrant is specifically authorised by statute.

(3) Effecting an Arrest:

The execution of the arrest, whether with or without a warrant, is also important because it raises the same issues of respect for the

95. Renton and Brown, para. 5-13.
integrity and personal liberty of the individual. The fact that an arrest is authorised or justified does not negate altogether the rights of the individual to his privacy and personal liberty in so far as these are consistent with his new status. In other words, in accordance with the general spirit of the powers of arrest themselves, an arrest must be executed in the most humane and respectful way. Yet, at the same time all steps and measures necessary to effect the arrest must be authorised - a matter of balance between the two somewhat conflicting interests of the individual not to be injured or humiliated unnecessarily and that of society at large in securing the arrest without endangering the life or limb of its agent who is making the arrest.

(1) The Use of Force:

As the use of some physical force may reasonably be expected in some cases in making the arrest, "the most critical human rights issues are the limitations which the law places upon the amount of force which can be utilized." 96 The question of use of force in effecting an arrest is governed by section 30 C.C.P.:

"(1) If a person liable to arrest resists the endeavour to arrest him or attempts to evade the arrest, the person authorized to arrest him may use all means necessary to effect the arrest.
(2) Provided that this section shall not give the right to cause the death of a person who is not accused of an offence

punishable with death or with imprisonment for a term which exceeds ten years. 97

The use of any force is conditional upon resistance to the endeavour to arrest; this may seem an elementary proposition, but it is nonetheless of considerable practical importance. It means that in every arrest, the suspect or subject of arrest must first be approached quietly and respectfully and asked to submit to the arrest; and only if he refuses and resists will any use of force be justified or authorised. It must first be made clear to him, however, that he is being arrested and that he has no option but to submit or be taken forcibly. As indicated above, 98 this may introduce an element of uncertainty into the transaction, it may also be significant subsequently if the question arises whether the suspect was arrested or came to the police station voluntarily. 99 Any form of words and mild action, such as a touching of the shoulder, that would clearly and firmly indicate the intention to arrest would be sufficient at the beginning.

Furthermore, resistance should not immediately lead to the use of

97. In the English text of the 1925 version of the C.C.P. section 30(2) reads "...which may extend to ten years." The Arabic text of the 1974 of the corresponding part of the section can only be translated into "which exceeds ten years". The difference between the two versions is significant indeed; it now requires arrest for a much more serious offence to justify the causing of death in making the arrest.

98. See p.1145 above.

the maximum force allowed, rather it should be proportionate to the resistance and also related to the amount of force actually necessary to effect the arrest under the circumstances. Any excessive force used would not be justified by the arrest and might give rise, for example, to the right of private defence in the person to be arrested. Thus in Sudan Government v. Adam Hassan Adam, the deceased found the accused illegally in his house and directly attacked him by hitting him with a heavy stick; and in the fight that followed, the accused stabbed the deceased thereby causing his death. It was held that though the deceased was entitled to arrest the accused and to use all necessary and reasonable force to that effect, the immediate beating of the accused was an unlawful attack giving rise to the right of private defence in the person to be arrested, the accused. The causing of death is never justified unless the offence for which arrest is being made is one punishable with death or imprisonment for a term exceeding ten years. But, and according to the principle stated above, a lesser amount of force


101. In this case the right of private defence was not a complete defence because the accused exceeded his right, but it was sufficient to reduce the offence to one of culpable homicide not amounting to murder under section 2h9(2) Penal Code. Cases involving the use of force in effecting arrest often raise issues of the right of private defence; see, for example, Sudan Government v. Mohamed Hamza Abdulla [1971] S.L.J.R. 24.

102. Section 30(2) C.C.P.
must always be used first, if at all, before it progresses into the causing of death.

On the other hand, the person executing the arrest must not hesitate to use all necessary and reasonable force because the need to scale and proportion the force used must not be pressed to the extent of endangering the life or limb of the person executing the arrest or innocent by-standers. It is up to the courts to keep the balance in such a way that the use of force should not become routine practice and yet must be, and be seen to be, available when needed. This linear assessment of the reasonably necessary force may be difficult to maintain in practice; and it would be sufficient if the courts were absolutely clear and definite in coming down on wanton and excessive violence and force. The certainty of punishment for such a high degree of excessive force will gradually instil the correct approach to the use of force in those normally involved in making arrests.

The execution of an arrest requires tact and common sense rather than rigid regulations and sanctions; a policeman may easily lose his own life or that of the suspect or even an innocent by-stander if he adopts the wrong attitude or approach. In the end, there is no substitute to the policeman's appreciation that his powers in law will not help him if he loses the tolerance and co-operation of the public, including that of the suspect. To illustrate this point reference may be made to the recent case of Sudan Government v. Salah Saeed Abdel
Majeed,\textsuperscript{103} where the accused policeman caused the death of the person he was trying to arrest. While on regular patrol duty, the accused and his colleague saw the deceased and his companion in a suspicious area of town at 1:30 a.m. The policeman approached the two men directly and asked them their business at that place at that time of morning. No doubt offended by the policeman's action, the two men refused to answer, the situation developed into an argument and a struggle broke out when the accused policeman attempted to arrest the deceased. It seems that the deceased gained the upper hand and the accused policeman started to retreat while the deceased followed. The accused drew his pistol and fired one shot which hit the deceased in his stomach and caused his death.

At the trial, the court decided that the accused was not entitled to the benefit of section 30 C.C.P., but as he was acting in self defence, he was guilty only of culpable homicide not amounting to murder, not being entitled to the complete defence because he exceeded the right.\textsuperscript{104} On appeal, the Court of Appeal, Criminal Division, quashed the conviction and ordered the immediate release of the accused policeman on the ground that he was in lawful exercise of his right of private defence.


\textsuperscript{104} According to section 58 Penal Code the right of private defence in no case extends to the inflicting of more harm than it is necessary for the purpose of the defence.
defence - that is to say, he did not cause more harm than was necessary under the circumstances. Mr. Justice Mubark El Medani, dissenting, argued that he exceeded his right because he need not have shot the deceased at all, let alone in his stomach. In any case, said Mr. Justice Mubark El Medani, when the accused resisted arrest, the policeman should have waited for reinforcements or retreated and placed the accused under surveillance. One finds himself in full agreement with the learned judge: it is doubtful if an arrest was justified at all under the circumstances. But even if it was, it was certainly not necessary because the mere presence of the police in the vicinity must have dispelled any criminal designs the two men may have had; an arrest under the circumstances can never be so imperative that the policeman had to risk his own life or that of the subject of the arrest in order to effect it.

The use of force in affecting arrest is a serious problem in the Sudan because of the magnitude and frequency of the force used. The problem presents the courts with a real dilemma because, on the

105. Though the question was not considered by the court, a power of arrest may have arisen under section 25(f), see above §1.181.

106. Cases are very frequent: at the time of the research, there were several pending trial in Khartoum alone; in one of them, two policemen went to execute an arrest and ended by breaking into the house next door, killing one person and wounding another - First Information Report No. 1539/1974, Khartoum. Accused Abdulla Birema and Adam Haroun were committed to trial for murder.
hand, there are claims for allowing policemen sufficient powers to execute arrests and defend themselves while doing so - there are incidents of policemen being killed in encounters with suspects. On the other hand, any excess or abuse of powers must be checked because after all, an arrest is merely one of the initial steps in the guilt determination process, so due regard must be had to the safety and dignity of the suspect. In response to the first horn of the dilemma and in respect for police morale, Criminal Court Circular No. 68 was recently issued directing that policemen causing death in the exercise or purported exercise of their duties should be dealt with under the special procedure of section 122D C.C.P.\(^{107}\) The Circular maintained that treating accused policemen as ordinary accused may lower morale in the police force and lead to dereliction of duty and bring law enforcement as a whole into disrepute. It is suggested that regard must be had to the other side of the argument, the use of excessive and unnecessary force may also lead to loss of public confidence and cooperation and also bring law enforcement as a whole into disrepute.

(ii) Use of Force in Private Arrest or Feza:

All the special problems of the use of force in effecting an arrest, and the related problems of the right of private defence of one's self and property, converge in Al Feza, the nomadic institution

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\(^{107}\) Circular 68 was issued 9/6/1974. Section 122D provides for the investigation of sudden and suspicious death, see pp.101-02 above.
of group or tribal pursuit of thieves of camels and other property. For these nomadic tribes, law enforcement is still largely a matter of self-help and tribal arrangements; regular police forces are by far too few to cover the whole of the country, and their methods are extremely inappropriate for desert conditions. Moreover, camel and other property thefts are regarded as a sport, calling for personal reprisal as a socio-cultural imperative. On the report of such a theft, a body of tribesmen, fully armed, assemble and set out in pursuit. The thieves, on the other hand, mean to provoke the men of the tribe offended against into coming out in defence of their property.

The Codes seem to accept this aspect of nomadic life, and the courts have not shown their disapproval. Thus, in Sudan Government v. Hamid Beshir Ibrahim and Others, it was held that the members of the feza had both a right of private defence of property and a right of arrest under section 27(d) C.C.P. A lot, of course, may depend on the particular facts, but as a general statement of the law, the

108. In the Annual Report of the Legal Department 1906, Annual Report 1906, it was said: "In the country of Nomads camel stealing and raiding, even if murder results, are, as once were cattle lifting on the Scottish Border, but manly exercise. It is desirable that they should cease to be so, but the same Arab who will indulge in them will no more think of petty stealing than of breaking the laws of hospitality."

109. (1918) AC.-CP.-231-48 (unreported), per Cumings, Legal Secretary. See also Sudan Government v. Osman Haroun Osman and Others (1918) AC.-CP.-325-48 (unreported).
above statement may be misleading. There are two requirements, one
to each aspect of the statement above, which would exclude the typical
feza situation: there must be no time to have recourse to the official
authorities for the right of private defence to accure,\textsuperscript{110} and a private
person can only arrest without warrant for an offence committed in his
presence which must also be an offence for which the police may arrest
without a warrant.\textsuperscript{111}

More important, however, is the policy question whether the feza
tradition should be allowed to continue. On the one hand, there is
nothing like sufficient police man power with the necessary training
and experience to cover the whole country. The cost of raising and
maintaining the necessary man power is much too high for the country
to afford. Besides, there are many practical difficulties in protecting
nomadic tribesmen and their property: they tend to wander all the time
and in very difficult country and climatic conditions. They need very
specialised law enforcement skills. On the other hand, private law
enforcement and self help are undesirable; how can one expect the
nomadic tribesmen to take the law into their own hands in some cases
and submit to lawful authority in others? Is the state not misleading
and confusing its subjects in expecting them to keep this double
standard? Moreover, as feza is not concerned solely with restoring

\textsuperscript{110} Section 59 Sudan Penal Code.

\textsuperscript{111} Section 27(d) C.C.P.
stolen property and bringing the culprit to justice but rather with responding to a challenge and returning an insult, much more violence than is necessary can be expected - a feza is not a law enforcement exercise but rather a private war.

The way out of the dilemma, it is suggested, is to retain the principle of feza but regulate its practice. The man power and expertise of the tribe may still be used, but under the leadership and control of police officers committed to law enforcement and the minimization of harm to all concerned.

(iii) Supporting Measures:

The C.C.P. provides for a variety of powers necessary for the execution of arrests by providing access to places and the power to search for persons sought to be arrested. 112 Whenever the province judge has reason to believe that a person against whom a warrant has been issued has absconded, or is concealing himself so as to avoid arrest, he may publish a written proclamation requiring such person to appear at a specified place and time. 113 This step has two consequences: the warrant may then be executed by anyone and not only the person to whom it has been addressed, 114 and the proclamation may

112. Sections 32, 33 and 34 C.C.P.
113. Section 61 C.C.P.
114. Sections 25(e) and 27(c) C.C.P.; see p. 171 above.
be followed by the attachment of the property of the abscon
ding person, the ultimate measure that may be employed to compel the
person's attendance with the threat of sale of the property and the
confiscation of the proceeds. The principle of this graduation
of measures designed to facilitate arrest of the accused appears to
be that the least hardship should be caused to the individual, the
stronger measure is to be adopted only if the lesser ones fail to
obtain the desired result.

It is an offence under the Sudan Penal Code to resist or obstruct
lawful arrest or cause or attempt to cause an escape from lawful
custody. This makes it imperative that in all arrest situations
there must be clear notice of the arrest and its cause. The C.C.P.,
section 55, requires the person executing a warrant of arrest to notify
its substance to the person to be arrested and, upon request, to show
him the warrant itself. Though there is no similar express provision
in relation to arrest without warrant, it is

115. Section 62 C.C.P.
116. Section 62-63 C.C.P.
117. Sections 182, 183 and 181* Sudan Penal Code.
118. The Northern Nigerian C.C.P., copied from the Sudanese C.C.P.,
expressly provides for the requirement to give notice of the
cause of arrest, section 38 Northern Nigerian C.C.P.
obvious that it is equally necessary to give similar notice. This is a generally accepted basic requirement of executing any arrest, whether with or without warrant. 119

Several reasons have been advanced for the rule requiring notification of the arrest and its basis. It has been advanced, for example, that the person improperly arrested has a right to defend his freedom: he must be told of the reason for the arrest so that he may be able to form an opinion whether or not to submit to the arrest. 120 But as Glanville Williams pointed out, this reason is rather legalistic: "few people know the law of arrest in such a way that they can decide on the spot whether the arrest to which they are being subjected is legal." 121 As will be explained below, for this and other reasons, it may be bad policy to encourage resisting arrest, however unlawful. The notice requirement may be better explained with reference to the

119. Sohoni's Code of Criminal Procedure, 205; Christie v. Leachinsky [1947] A.C. 573; Renton and Brown, para. 5-22. This requirement is subject to the exception that notification is unnecessary if the circumstances are such that the accused must know why he is being arrested, Christie's case, and Willey v. Peace [1951] 1 K.B. 91. The person arrested also cannot complain if he produced the situation which prevented giving him notice, by running away or attacking the arrestor. Precise technical language need not be used.


desirability of affording the accused the earliest possible chance of clearing himself by explaining his conduct or any other suspicious circumstances - an arrest may be avoided altogether. The requirement also has the effect of preventing the police from arresting on vague and general suspicion, not knowing the precise crime and hoping to be able to come up with something by the time the arrest is contested.

(b) Post-Arrest Procedure:

A warrant to arrest authorises the detention or remand in custody of the arrested person only until he is produced before the authority named in the warrant. An arrest without warrant is even less of an authority for detention. Limits on this initial period of custody are important for a variety of reasons: the validity of the arrest and the desirability of continued detention must be determined as soon as possible, the accused at this stage is particularly vulnerable to police pressures to confess, often under conditions raising doubts as to the voluntariness of his statement, to mention a few. The arrest

122. Per Viscount Simon in Christie's Case, at 588.
123. Williams, "Requisites of a Valid Arrest", 17.
124. The warrant in the prescribed form, No. 3 of the Third Schedule to the C.C.P., reads: "Whereas ... stands charge with the offence... you are hereby directed to arrest the said... and to produce him before me."
125. These issues are discussed in the following chapters.
powers are also liable to abuse in other ways, as by using the procedure or threatening its use to harass, or to attain even more sinister objectives. The question then is what does the Code have to say on these matters and how does it compare with other relevant systems.

(1) Without Unnecessary Delay:

The C.C.P. requires that the person arrested be brought before competent judicial authority shortly after arrest, a standard common law device. If the arrest was made in execution of a warrant, then the person making it "shall (subject to the provisions of section 52 as to security) without unnecessary delay bring the person arrested before the Court or Magistrate specified in the warrant." In cases of arrest without warrant, there is also a similar requirement. Any person other than a policeman or a magistrate making such an arrest must take the arrested person to the nearest police station or hand him over to a policeman without unnecessary delay. It is then up to the

126. Reference here is to section 52 C.C.P. which provides for release on security being taken without a formal taking into custody when the warrant has been endorsed to that effect by the court or magistrate issuing it.

127. Section 56 C.C.P. When the warrant is executed outside the jurisdiction, then the arrestee is brought before the magistrate within whose jurisdiction the arrest is made, and he may either release the person on bail or forward him in custody to the appropriate court - section 60 C.C.P.
policeman to re-arrest him if he appears to be one whom a policeman may arrest without a warrant; otherwise he must be released at once.\textsuperscript{128} As the police powers of arrest without a warrant are wider than anybody else's, he would be authorised to re-arrest anyone lawfully arrested without a warrant.

The police, however, are merely an intermediary and not the ultimate competent authority; they are in turn obliged to take or send any person they arrest without a warrant, or re-arrest under section 36 C.C.P., before a magistrate competent to take cognizance of the case and without unnecessary delay.\textsuperscript{129} The officer in charge of a police station is competent to release the accused on bail,\textsuperscript{130} otherwise he must take him before the magistrate without unnecessary delay.

The main exception to this requirement of production before the magistrate without unnecessary delay is that in the case of arrests under section 28(k) - arrest for an offence for which the police may not arrest without a warrant when true name and address are refused.\textsuperscript{131} In these cases the person so arrested must be released if it was found that he had given his true name and address;\textsuperscript{132} if he has not done so,

\textsuperscript{128} Section 36 C.C.P.
\textsuperscript{129} Section 37 C.C.P.
\textsuperscript{130} Under section 287 C.C.P. see Chapter 3 below.
\textsuperscript{131} See pp.\textsuperscript{189} and 190 above.
\textsuperscript{132} Section 38(a) C.C.P.
he must still be released after his true name and address have been ascertained when he executes a bond, with or without sureties, to appear before a magistrate if and when required. If his name and address are not ascertained within twenty-four hours from arrest, or if he refuses to execute the bond or fails to provide sufficient sureties if required for his release, then he must be "forthwith" forwarded to the nearest magistrate competent to take cognizance of the case. Thus, when it is established that the arrested person had already given his true name and address, the arrest becomes groundless and the person is released - he may be summoned or arrested on warrant subsequently if that is thought necessary. If he had not given his true name and address previously, then they are to be ascertained and he may then be released; but as his initial conduct, giving false name and address or refusing to give any, may be reasonably regarded as suspicious, the precautionary measure is imposed of requiring him to execute a bond to appear before a magistrate if and when required. In cases where the true name and address cannot be ascertained, continued detention is necessary; still it is subject to the upper limit of twenty-four hours after which the suspect must

133. Section 38(b).

134. Section 38(c). The word "forthwith" is used in the 1925 English version of the C.C.P. in contrast to the phrase "without unnecessary delay" in the other sections. The word used in the Arabic text of the 1974 C.C.P. normally translates into "immediately". It is difficult to tell if these variations in expression of the requirement of production have any significance.
be brought before a competent magistrate. The same is true in cases where the name and address has been ascertained but the suspect refuses to execute the necessary bond or fails to produce the necessary sureties. In short, the object of the special procedure applicable in cases where an arrest has been made under section 25(k) is to secure the release of the person so arrested when his name and address are verified or ascertained, or else ensure that he is produced before a magistrate forthwith.

The overall impact of above provisions is to limit the period an arrestee remains in police custody without the sanction of a competent magistrate - a familiar device.¹³⁵ It raises two related basic questions: what is the actual length of permissible police custody and what purposes are served by appearance before a magistrate; the length of the custody obviously depends on its permissible purposes.

To take the second question first, appearance before a magistrate is said to ensure "the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him."¹³⁶ It also ensures the suspect's access

¹³⁵. Commission on Human Rights Study, para. 129; Indian C.C.P. sections h2, h3, 56 and 57; the English Magistrates' Courts Act 1952, section 38(h); the Police (Scotland Act) 1967, section 17(l); Renton and Brown, para. 5-22.

to legal advice and representation, opportunity to obtain pre-trial release and consequent better preparation of his defence.137 At the same time, it limits what the police may do during such custody, a safeguard against oppressive police methods and the abuse of suspects in custody - what may generally be called "the third degree". As the United States Supreme Court explained,138 this requirement "constitutes an important safeguard - not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use."

Prolonged police custody creates the opportunity and the risk of police abuse of the suspects - or at least its suspicion.

There are, however, certain investigative steps that the police may legitimately take before taking the suspect before the magistrate. According to Lord Denning, M.R., in Dallison v. Caffery,139 the police may take the suspect to search his house, verify his alibi and hold an identification parade. It is neither possible nor desirable to

\[137.\] Commission on Human Rights Study, para. 129.

\[138.\] McNabb v. United States, 318 U.S. 332, at 343-44.

\[139.\] [1965] 1 Q.B. 348. This was a civil action for damages for false imprisonment and malicious prosecution. The decision of the trial judge that there was no case to go to the jury was upheld by the Court of Appeal.
give an exhaustive list of what the police may reasonably do, it depends on the facts of each case; provided of course, it does not take too long. \(^{110}\) The question of what the police may reasonably and legitimately do thus links up to that of the length of the permissible delay - in fact the two are inter-dependent: the police are allowed the delay needed to carry out reasonable and necessary investigative measures, but such measures must not take too long or be too elaborate or else they render the delay itself unreasonable.

With reference to Rule 5(a) of the United States Federal Rules of Criminal Procedure, which provides for the production of the arrested person before the nearest available competent authority "without unnecessary delay", it has been observed: \(^{111}\)

"What the rule actually prohibits is a delay for the purpose of benefiting the prosecution's case to the detriment of the defendant's case. This is based on the fear that any benefit so obtained by the prosecution will almost necessarily result from a violation of the defendant's rights...

Naturally, the term 'unreasonable delay' is not self-explanatory. Dozens of decisions were required to plot an approximate definition, but still the opinions of courts of appeal judges range from those requiring instant production of the suspect before a commissioner to those permitting a few hours delay for purposes of taking down a confession of one willing - yet not prompted - to confess, and for clearing up uncertainties through non-coercive questioning. The latter is the reasonable position; the former clearly unrealistic. A police department deprived of all rights to ask questions, even though some delay results, loses its tactical power and functional efficiency."

\(^{110}\) Ibid. 366-67. See also Diplock, L.J., at 374.

\(^{111}\) Hall and Mueller, Cases and Readings on Criminal Law and Procedure, 874-75.
Questions as to who is "willing - yet not prompted - to confess" and what is "non-coercive" questioning are better left aside for the moment. At this stage it is sufficient to note that in both the United States and England, as well as in Scotland, some investigative steps are allowed before the suspect is brought before the magistrate. The special problems of police interrogation of suspects - considered in Chapter 5 below - remain after the first appearance of the suspect before the magistrate; but they are checked by the need for periodical renewal of remand orders and subjected to other safeguards. With respect to the permissible delay, these systems prefer to leave it for the courts to decide on a case by case bases.

Other systems put a definite limit on the permissible delay. The Indian C.C.P., for example, while it uses the phrase "without unnecessary delay" in some of its sections, is more explicit in others. Section 57 reads:

"No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

The Northern Nigerian C.C.P., section 42, is almost identical to the Indian section quoted. In actual fact, the Sudanese C.C.P. too had

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1h2. Section 43, in relation to arrest by a private person, and section 56, in relation to arrest by police.
an identical section that was repealed in 1949. The only reference
to the twenty-four hours limit, beside that applicable to arrestees
under section 25(k) mentioned above, is to be found in section 120
Sudan C.C.P. which reads:

"Whenever it appears that an investigation under section 112
cannot be completed within 24 hours of the arrival of the
accused or suspected person at the police station, the
officer in charge of the police station shall release or
discharge him under section 287 or forward him quickly to
the nearest Magistrate competent under Chapter XV to take
cognizance of the offence together with the Case Diary and
if necessary a report on the investigation so far as it has
proceeded."

Section 287 provides for the release of the suspect by the police
officer on bail or on his own recognizance. It will be observed,
however, that the section does not really refer to the limits on police
initial custody; rather, it refers to need for periodical renewal
of remand orders: in those cases where custody must be continued for
more than twenty-four hours, remand in custody orders must be made by
a magistrate who is supposed to see the accused in person and consider
his objections against the granting of such remand orders.

114. No. 3, 1949. In the 1974 revision, a new section 39 has been
enacted, see pp.222-23.

114. See pp. 210-12 above.

115. That is to a regular criminal investigation, see above at p.

116. This question is discussed in Chapter 3 below.
The absence of the twenty-four hours limit in the Sudan, however, is not regretted, what really matters is that unnecessary and unreasonable delay should not be allowed. Though the Indian-Northern-Nigerian type of provision merely fixes the maximum, and the rule remains that "still in no case is a Police-officer justified in detaining a person for a single hour without bringing him before a Magistrate except upon some reasonable ground justified by all the circumstances of the case", such maximum has a tendency of becoming the norm so that all suspects are held for twenty-four hours before being produced before a magistrate. Furthermore, there is no magic in the figure "twenty-four hours"; it is rather what the police may reasonably do during such custody prior to presentation before the magistrate which matters. Ultimately, the question is whether such presentation does serve the purposes it is purported to serve. Police supervision and control is a continuous process, as the following chapters will try to show.

In practice, in the Sudan, the police usually bring arrested persons before the magistrate on the next working day, magistrates are not available outside official office hours except in very rare occasions.

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1148. Section 321(3) of the Criminal Procedure (Scotland) Act 1975 stipulates that the arrested person must be brought before a competent court not later than the first lawful day after being taken into custody, such day not being a public or local holiday.
(ii) Records of Arrest:

Some provisions of the C.C.P. are designed to increase the visibility of arrest decisions by the police; they bring to the notice of senior police officers and magistrates every arrest that is made. The importance of this machinery for controlling and supervising the police exercise of these powers is to be considered now.

Section 140 C.C.P. provides that officers in charge of police stations must report as soon as possible all cases of arrest without warrant within their respective districts to the magistrate or the police officer in charge of the police district. In relation to arrest on warrant, either the warrant is issued by the magistrate within whose jurisdiction the arrest is made or the arrested person is taken before him first before being sent in custody to the court or magistrate issuing the warrant - thus the magistrate is notified of the arrest on warrant if he did not order it himself. Moreover, section 13 C.C.P. stipulates that a register of arrests must be kept in prescribed form at every police station; every arrest made within the local limits for the police station, whether with or without warrant, must be entered in such register as soon as the arrested person is brought to the station. Again, section 41 of the Police General Regulations 1971 requires a daily diary to be kept in every police station; entries in this diary include the name of every person in custody or on bail or other pre-trial release with the date of the arrest.
The object of all these provisions is to establish the machinery by which senior police officers and magistrate are notified of every single arrest, whether with or without a warrant, and to provide a permanent record of all arrests etc. The effect, therefore, is to provide an opportunity for an independent judicial authority to consider the legality and propriety of the arrest—regardless of the willingness or ability of the arrestee to bring the matter to the notice of the magistrate. According to section 42 C.C.P. an arrested person cannot be discharged "except on his own bond or on bail or under the special order of a Magistrate." Thus once an arrest has been made, it must come to the attention of the magistrate and the police cannot just release the arrested person. The point of the whole exercise is for the magistrate to discover any police mistakes in making arrests, or any corrupt release of suspects etc.

The whole question of course depends on whether there has been an arrest or detention short of arrest or a voluntary cooperation with the police, because all these provisions come into play only where there has been an arrest. The answer to this question depends on the facts of each case considered in the light of the definition as mentioned at the beginning of this chapter. The matter is of the

11.9 Above pp.144-52. See also below at pp.251 et seq.
utmost importance because a decision by the police to release a suspect is a decision not to invoke the criminal process; the potential for abuse of such a power needs no elaboration in the present context.

The credibility of the system for checking this unauthorised exercise of the arrest power, however, depends on its practice - the whole purpose will be defeated if the records are not scrutinized properly because it ceases to be a deterrent if detection of improper practices is unlikely or if no sanctions follow on the detection of abuse. The prescribed form for the various records mentioned above is quite rigorous indeed, providing for cross-reference checks and detailed informations. If the records are not kept properly, as appears to be the case, they cease to be effective in reflecting the police activities and daily practice. Nonetheless, one finds incomplete records and inaccurate entries signed to signify inspection without

150. La Fave, Arrest, Part II; Goldstein, "Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice", 69 Yale L.J. (1960) 533.

151. In the Register of Arrests, for example, there are columns for place and time of arrest, custody or pre-trial release, date and order of first appearance before the magistrate, final disposal of the case etc. At the same time, it provides for cross-reference numbers in other registers such as the Register of Informations, bail and remand records etc.

152. This part is based on a modest research in the Khartoum South Police District, reputed to be one of the best in the country.
spotting the mistakes and incomplete entries. 153

To illustrate a frequent fault in arrests, a police sergeant made two arrests without warrant for the same combination of sections of the Penal Code sections 181/161 - criminal intimidation and obstruction of a policeman in the execution of his lawful duties. 15h. Such an arrest without warrant is wrong because section 181 is not listed as one for which the police may arrest without a warrant, so a policeman attempting such an arrest is not acting in the execution of his lawful duties, and as such he could not arrest under section 25(h) C.C.P. for obstruction. Thus, the same police sergeant made the same mistake twice within three days. In both cases the arrested person was released on bail; and yet neither the senior police officer in charge nor the magistrate, in reviewing the record and granting bail, noticed the mistake; this mistaken conception that a policeman may arrest without a warrant for this combination of offences went unchecked and may well be exercised time and time again.

153. Arrests number 3760 to 3780 were all entered as having been made by a single policeman, all in the police station and at precisely the same time - 2.55 p.m. on 25/1/1973. This is obviously inaccurate; and if there is any point of having a column for time and place of arrest, the inaccuracy should have been spotted and the fact indicated to the policeman making the arrests. The record was in fact signed in approval. The same was true of arrests number 1652 to 1671 of 20/8/1971 and 1828 to 1858 and 1852 to 1859 of 11/8/1971; so this type of irregularity is in fact routine practice.

In another group of arrests - a total of seventeen, all made at the police station at precisely the same time under section J149 Penal Code, being an idle person, all cases were referred by the magistrate to the bench of lay magistrates for trial and all the accused were acquitted and the informations quashed for lack of evidence. One would have thought that there must have been a mistake somewhere in this incident. Yet this is the type of situation the whole procedure is intended to deal with, as homeless and poor people, the sort of people who are arrested under this section and the preventive power of section 25(f), are least likely to challenge the arrest or attempt to bring the policeman guilty of unlawful arrest to account for his conduct and are most in need of the protection of the machinery for automatic review to expose mistakes and abuse of powers; but in the event the whole incident passed completely unnoticed.

(iii) Treatment of Persons Under Arrest:

Section 39 of the 1974 C.C.P., replacing the section repealed in 1949, reads:

155. Arrests number 621 to 690 of 26/8/1974. In the Register of Arrests these arrests were divided between two policemen: eight arrests to one policeman at 2:25 p.m. and nine to the other at 2:28 p.m.

156. This is now section 67 Penal Code 1974. This type of exercise of the power of arrest in relation to this offence substantiates the criticisms made above at pp.183-84.

157. Translated from Arabic. The original section 39 used to provide for the twenty-four hour limit of custody prior to production before a magistrate.
"An arrested person shall be treated in such a way as to
preserve his human dignity and shall not be hurt bodily or
morally. He is always entitled to contact his advocate."

It is too early to tell whether this section will help in improving
the treatment of arrested persons and conditions of pre-trial custody,
especially in police cells. It is certain, however, that there is
an urgent need for action on this problem because conditions of police
custody are so bad that policemen are alleged to use the threat of
custody and opposition of bail or other release to induce suspects to
confess. At present, the only protection against police abuse of
suspects in custody is the requirement that the confession must be
voluntary to be admissible. But as explained in Chapter 5 below,
this rule suffers from many limitations, especially in the area of
proof of its violation. In any event, the rule does not help the
accused unless an alleged confession is introduced in evidence at the
trial. Ill-treatment of suspects may have many motives besides the
extraction of confessions.

Although the above quoted section, together with other provisions
such as section 140(2) of the Police General Regulations 1971, are
categorical in requiring free access to counsel for the suspect in
police custody, the police still manage to avoid complying with the
requirement and frustrate every attempt of defence advocates to see

158. Private interviews with Mr. Ali Mahmoud Hassanein and Mr. Abdel
their clients.159

It is a sad fact of life that principled and humanitarian provisions such as section 39 C.C.P. need to have teeth if they are to be effective at all; sanctions must be attached to their violation if they are to be taken seriously and succeed in improving the standard of treatment of suspects. More importantly, however, it must be appreciated that the treatment of suspects by the police and the control and influence senior police officers and magistrates may be expected to have are functions of the attitudes and feelings of the persons concerned; to speak of "human dignity" is to speak of sympathy and understanding of the socio-economic and psychological causes and motivations of deviance.

(5) Unlawful Arrest:

The illegality of an arrest can relate either to the arrest power, the manner of effecting the arrest or post-arrest procedure - that is to say, the violation of any of the regulations of arrest. In fact the problem of unlawful arrest is only part of the general problem of regulation of all police powers in the field of pre-trial criminal procedure. Response to police illegality or irregularity in common law practice is basically the same; usually taking the form of some civil, criminal or disciplinary action against the offending policeman. Sometimes, as will be seen in the following chapters, police illegality

159. Ibid.
or irregularity is "punished" by rejecting its fruit, the illegally obtained real and testimonial evidence. In this section, the traditional common law remedies against police illegality and impropriety are reviewed and evaluated, with special reference to the powers of arrest in illustration. In the subsequent discussion of the police investigative powers of search and interrogation, only brief reference will be made to these traditional remedies - more attention will be given to the exclusionary remedy peculiar to those powers.

In common law literature, a policeman has often been likened to a citizen in uniform in the sense that he is subject to the law he administers in much the same way as a private person; his powers are merely an extension of those of the private person necessitated by the complexity of modern life and the multiplicity of laws and regulations to be enforced. The theory, therefore, appears to be that the policeman is an ordinary citizen empowered to carry out certain functions, for which purpose he is given the necessary powers and afforded certain protections; but once he exceeds those powers he acts at his own peril and may therefore incur civil or criminal liability. Moreover, as the policemen will not be acting in the lawful execution of his duties if he exceeds his powers, he may be resisted by force. As such


force is used in lawful exercise of the right of private defence, it constitutes a complete defence to any action or prosecution for assaulting the policeman. 162

Although the object of any action taken against the policeman is to ensure compliance with the rules regulating the exercise of his powers, such action can only follow the violation in time. Its usefulness from a regulatory point of view is therefore as a deterrent to future illegality and irregularity. The theory and practice of these remedies must be related to their deterrent value; in other words, they must be modified and applied in such a way as to achieve the maximum deterrent effect.

Literature on deterrence suggests several factors, beside basic socialisation, that are relevant to the deterrent effect of any measure. 163 As the sanction is applied in an attempt to inhibit similar future conduct, the reprehensible conduct must be detected first for the unpleasant consequences to follow. But the severity of the sanction must also be assessed and set at the correct level to influence future conduct: it must be related to the level of motivation to engage in

162. Provided it satisfies the requirements of the defence, such as the use of no more force than is necessary to repel the attack.

the specific conduct, the existence of alternative modes of conduct to attain the desired objectives, group loyalty and group support relative to the conduct, the personality of the subject of deterrence. If the mechanism of deterrence, some sort of aversion therapy, is to associate certain unpleasant consequences with the conduct, there must first be certainty of punishment; secondly, the punishment itself must hurt the person if it is to be unpleasant enough to inhibit the repetition of the same or similar conduct. To hurt sufficiently, the punishment must penetrate the person's defences, that is his own personal defences as well as those supplied in the group support of his peers and colleagues. Furthermore, the object of deterrence must be left with some alternative means of attaining the same ends because with a certain level of motivation he will continue to behave in the same way if he is not afforded alternative methods.

Beside the deterrence effected by these traditional remedies, there are several channels for controlling and influencing police behaviour: administration, recruitment, training, together with the action of pressure groups, and the press and public opinion. 16l

(1) Tort Action:

The Sudan law of torts, specifically in the field of malicious

prosecution and civil remedy for the alleged abuse of criminal process, appears to be essentially English law. Thus in *Abdel Halim Ibrahim Taha v. Girgis Naeem Dawalibi*, a civil action for malicious prosecution, Mr. Justice Osman Al Tayeb, said:

"In both England and India it is an actionable wrong to set the law in motion by initiating criminal proceedings against a person maliciously and without reasonable and proper cause. We have to accept and apply the same principles in our Courts in so far as they constitute a wrong affecting freedom and reputation of the individual."

He then proceeded to quote from English and Indian textbooks on the law of malicious prosecution. In rejecting the plaintiff's application for leave to appeal, Mr. Justice M.I. El Nur, confirming the lower court's ruling, quoted an English case as authority for the proposition of law he made. Again, in another action for malicious prosecution, *Lewis Khalil v. Barsamian Motor Agency*, Mr. Justice Salah Eddin Hassan quoted the House of Lords in one case, and Lord Denning in another, on the meaning of reasonable and probable cause. It is

therefore reasonable to assume that other similar tort issues, such as liability for false imprisonment and assault in executing unlawful arrest, will be resolved with reference to English law.

The Sudanese cases on malicious prosecution make the substantive point, concordant with the English common law position, that the persons involved with the administration of criminal justice must be given protection in the interest of future law enforcement. As Mr. Justice Salah Eddin Hassan said of the tort of malicious prosecution:

"This tort is not regarded with favour by the courts because it runs counter to the policy of freedom to prosecute suspected criminals and to the interest in bringing litigation to a close. This judicial attitude is reflected in the development of the requirement that there must be absence of reasonable and probable cause. This is casting on the plaintiff the difficult task of proving a negative burden which he does not discharge merely by proving malice on the part of the defendant."

This principle, as a general attitude towards civil action against policemen or other persons involved with the administration of justice, is bound to affect the availability of a civil remedy, thereby reducing its effectiveness as a check on police excess and abuse of power. As it is reflected in the substantive rules of tortious liability, and as it will be manifested in the admissibility and weight of evidence as well as in the damages awarded if liability is established, this attitude influences both the prospective private individual plaintiff and the prospective.

defendant policeman. On the one hand, the private person will be discouraged from bothering to sue at all if he feels that he is unlikely to succeed in establishing the policeman's liability or in obtaining worthwhile damages even if he did succeed. On the other hand, the same knowledge will make the policeman less inhibited by the possibility of a civil action. The answer, however, is not in an immediate or dramatic change in the above mentioned attitude, because it does have its point too. If a policeman is vulnerable to civil liability for every mistake or error in judgment he makes in his work, society's interest in the detection and prosecution of crime will suffer seriously because policemen will abdicate their duties and fail to take necessary action.

The general common law rule is that no man can be deprived of his liberty without legal authority. The violation of this rule constitutes the tort of false imprisonment: any imprisonment is false imprisonment unless justified by law.172 A warrant of arrest or the statute authorising arrest without warrant are the normal justification in law for arrest in the criminal process. No action will lie against a judge or magistrate for any acts done or words spoken in his judicial capacity;173 provided he acts within his jurisdiction.174 Anyone


acting in the reasonable execution of an apparently regular warrant is also protected from liability. There is, however, American authority for the common sense proposition that there is no protection for one acting on an apparently invalid warrant, such as an unsigned or unsealed warrant. There is also no protection for a mistake of fact in arresting the wrong person, except where the person so wrongly arrested was himself responsible for the mistake.

In the case of arrest without warrant, the arrest must of course be justified with reference to one of the powers of arrest without warrant.

It may also constitute the tort of false imprisonment to adopt the wrong post-arrest procedure. In the English case of John Lewis and Co. Ltd. v. Tim, a store detective, employed by the defendants, arrested the respondent (plaintiff) and her daughter for shop lifting. They were kept against their will in the detective's office until senior officers of the company were summoned and informed of the circumstances. The respondent was later charged at the police station, but the charge was subsequently withdrawn. The Court of Appeal's


176. State v. Weed, 21 N.H. 262, 269 (1850). The warrant must also satisfy its other requirement as a formal document.


holding that there had been false imprisonment was reversed by the House of Lords: it was found to be reasonable, and therefore lawful, for the store detective to detain the respondent until a senior officer of the company considered whether or not to call the police. In Dallison v. Caffery, a distinction was made between the powers of a police constable and those of a private person in the post-arrest stage: it was held that it was lawful for the constable to carry out reasonable investigations before taking the arrestee before the magistrate.

Thus the same post-arrest procedure may constitute a tort if done by a private person after making an arrest but not if done by a policeman.

The use of excessive force in effecting an arrest is the subject of another tort, assault and battery: strictly speaking, the tort of assault is putting another in present fear of violence, and battery is applying force to a person hostile or against his will, however slightly - battery is assault consummated. As only reasonable and necessary force is authorised in effecting arrest, excessive force is unauthorised and may therefore constitute the tort.

180. The same distinction is made in the Sudan too, see above at pp.209-10.
(ii) Criminal Prosecution:

Several offences under the Sudan Penal Code may arise out of an arrest situation: wrongful restraint and confinement are punishable under sections 287 and 288; excessive force is punishable under section 296 and 301. These offences, are found, under one name or another, throughout the common law jurisdictions. Thus, an unauthorised arrest may well be the subject of a criminal prosecution.

There is no reason why an aggrieved party may not obtain both civil and criminal remedy against an unlawful arrest in the Sudan. In English law, however, there is a statutory provision that may limit this option in some cases. When summary criminal proceedings were taken against one making an unlawful arrest for assault and battery and the case has been tried upon the merits, and either the accused has been convicted and punished or, the case having been dismissed, the magistrate have awarded a certificate of dismissal, as he is sometimes bound to do, no further proceedings, whether civil or criminal, may be brought for the same cause. In other words, a conviction or a certificate of dismissal will bar any other proceedings.

183. And not merely dismissed for failure of the prosecutor to appear or where no evidence has been heard — Reed v. Nutt (1890) 21 Q.B.D. 669.

184. Such a certificate must be issued whenever the justices deem the offence not proved, find the assault or battery justified or so trivial as to not merit any punishment — section 44 of the Offences Against the Person Act 1861.

185. Sections 42-45 Offences Against the Person Act 1861.
It has been observed that it is very difficult to find a real justification for this scheme because it can easily be avoided altogether by suing first, an earlier civil action is no bar to a subsequent criminal prosecution. The provision is open to other objections too. It is, therefore, one aspect of English law which is not welcome in the Sudan. Both civil and criminal remedies should be allowed separately and in any combination on which the victim wishes to have them; the two types of remedy serve rather different purposes and have different requirements and procedure.

(iii) Disciplinary Measures:

There are several provisions in the Police Act 1970, and the Police General Regulations 1971, which may be the bases for departmental

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188. It is hoped that this will not be "accidentally" received as part of English law - see Mustafa, The Common Law in the Sudan, chapter V and 201-10 on the unsatisfactory uncritical reception mechanism.

189. Sections 18(d), 21, 30, 32 and 33, The Sudan Police Act 1970.

190. Sections 18, 30 and 40, the Sudan Police General Regulations.
disciplinary action against a policeman who exceeds or abuses his powers of arrest. What is lacking, however, is a prescribed and well defined procedure for handling complaints. Nowhere in the Police Act or Police General Regulation is there any attempt to regulate the reception and investigation of complaints against the police. In this respect, guidance may be found in the practice of other jurisdictions.

The Police (Discipline)(Scotland) Regulations 1967, for example, provide for a procedure whereby an "investigating officer" is appointed to investigate allegations that a constable of a police force has committed any of the offences set out in the Discipline Code in Schedule 1 to the Regulations. After considering the report of the investigating officer the deputy chief constable of the police force decides whether or not the constable should be charged. If the constable is charged, then the hearing follows; the complainant may attend such a hearing but he may not put questions to the accused police constable or participate in the proceedings in any way except when giving evidence as a witness. The English procedure, now governed by section 49 of the Police Act 1964, provides for investigation by a police officer

192. In such a hearing, the rules of natural justice must be observed, Lockhart v. Irving, 1936 S.L.T. 367.
from another police area. On receiving the report of the investigation the chief officer must send it to the Director of Public Prosecutions unless he is satisfied that no criminal offence has been committed.

The criticism levelled at both the Scottish and English procedures is that complaints are investigated by the police themselves - it would inspire greater public confidence if an independent element was introduced in the investigation and consideration of the complaint. The question was considered by the Royal Commission on the Police: the majority were satisfied that the existing arrangements were broadly satisfactory, but a minority of three recommended the establishment of the office of Commissioner of Rights, with powers to investigate allegations that complaints had not been dealt with adequately. Discussion of the matter continues, and further

194. This is in the discretion of the chief officer unless he receives instructions for this from the Secretary of the State; it is now normal procedure to call an officer from another police area to conduct the investigation.

195. The duty to report to the procurator fiscal all complaints and allegations from which it may reasonably be inferred that a constable has committed a criminal offence appears to be clearer, the Police (Discipline)(Scotland) Regulations 1967, Regulation 2. Moreover, it is also possible in Scotland for the complainant to refer such a complaint direct to the fiscal.


197. Ibid. Appendix V.
recommendations are being made. The latest position is that a scheme will be introduced, in both England and Scotland, to give effect to the principle that complaint procedure should include an effective independent element.

(iv) Resisting Unlawful Arrest:

The common law recognises a right to resist unlawful arrest - usually manifested in the form of a defence against charges of assaulting the person attempting to effect the unlawful arrest. This right appears to have originated from considerations of the provocation of the unlawful arrest and the right of private defence. This rule is received in the Sudan too; thus it is an offence to resist arrest only if the arrest is lawful. This right is available as a defence to a variety of charges, such as obstructing a policeman in the execution of his duty, assault or use of criminal force against a public servant


201. Ibid. 352; see also The King v. Thompson (1825) 168 E.R. 1193; and The King v. Curvan (1826) 168 E.R. 1213.


in the execution of his duty.²⁰¹ It is uncertain, however, whether the right to resist unlawful arrest exists in its own right or as an example of the general defence of provocation or right of private defence. In Sudan Government v. Adam Hassan Adam,²⁰⁵ for example, the deceased, who was held to have been entitled to arrest the accused, used excessive force to effect the arrest and in the struggle that followed, the accused killed the deceased. It was held that the accused, though liable to arrest, was entitled to the right of self-defence when excessive force was used by the deceased, but that as he exceeded the right of self-defence himself, he was guilty of culpable homicide not amounting to murder. The question was therefore treated as one of the right of private defence rather than as one of a right to resist unlawful arrest.

If there is no independent right to resist unlawful arrest, then every resistance to arrest must satisfy the requirements of private defence. Most significant, however, is the fact that the right would be subject to the limitation that it sometimes cannot be exercised against a uniformed or other identifiable policeman. Section 60 Sudan Penal Code provides that there is "no right of private defence


against an act which does not reasonably cause the apprehension of
death or of grievous hurt, if done or attempted to be done by a public
servant (or by his direction) acting in good faith under colour of his
office, though that act may not be strictly justifiable by law."
For this limitation to be operative, however, the person purporting
to act on the right of private defence must know or have reason to
believe that the person doing the act is a public servant, or acting
under the directions of a public servant. As will be suggested
below, this is a very reasonable limitation on the right of private
defence.

The Supreme Court of New Jersey is reported to have said:

"The concept of self-help is in decline. It is antisocial
in an urbanized society. It is potentially dangerous to
all involved. It is no longer necessary because of the
legal remedies available."

So there are practical objections as well as the objections to the
principle of self-help. For one thing, the decision whether an arrest
is lawful or not is not an easy one, even trained legal experts cannot

206. Explanations 1 and 2 to section 60 Sudan Penal Code.

207. State v. Koonce (1965), quoted by Paul Chevigny, "The Right to
Resist Unlawful Arrest", 76 Yale L.J. 1128 at 1133.

(1942) 315 at 330; and Max Hochanadel and Harry W. Stege, "Criminal
Law: The Right to Resist an Unlawful Arrest: An Out-Dated Concept?".
3 Tulsa L.J. (1966) 40.
be absolutely certain in the street encounter context whether or not the arrest is unlawful.\(^{209}\) Moreover, the exercise of the right to resist can be dangerous not only to the person exercising it and the policeman or other person executing the arrest but also to innocent by-standers; and it is often futile because the police are trained and prepared to overcome such resistance. Furthermore, the police, who execute most arrests, have enough problems in carrying out their duties without having to worry about the dangers and frustrations of resistance.

In favour of the right, on the other hand, it is argued that the right exists not in order to encourage people to take the law into their own hands, but rather to protect those provoked into resistance by unlawful arrest. The point is that if the impulse to resist is provoked by arbitrary police action, it should not be punished.\(^{210}\) Response to the police conduct may also be influenced by the inadequacy of the traditional remedies: if people see them to be ineffective in controlling the police, they may resist out of frustration.\(^{211}\)

\(^{209}\) Williams, "Requisites of a Valid Arrest", 10.


With special reference to the Sudan, self-help may still be necessary; there is often no way whatsoever of resorting to legal remedies. But this can hardly justify resistance of the lawful authorities themselves. This would suggest that the right should not be effective against the police and other official authorities.

The right to resist unlawful arrest has been rejected altogether by the American Law Institute, and has been abolished in at least six American states. Most of these states adopted section 5 of the Uniform Arrest Act which reads:

"If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest."

This sounds like a reasonable limitation on the right; as indicated above, the right of private defence in the Sudan is already subject to a similar but somewhat wider limitation: it applies when the act is being done by any public servant or under his direction. If there is no independent right to resist unlawful arrest, and one suspects that there is no such right, then its exercise must satisfy one of the general


defences in criminal law. It would thus be subject to the above limitation if it is in exercise of the right of private defence.

With respect to provocation, it cannot be claimed as a defence against "anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant." So it may be available if the arrest is clearly unlawful; but then, as suggested above, one of the main objections against the right to resist is the difficulty of answering whether the particular arrest is unlawful.

In conclusion, it seems that there is no independent right to resist unlawful arrest in the Sudan. Moreover, there are some very good objections to the general recognition of such a right. It may be possible, however, for one who did resist unlawful arrest to plead one of the general defences in criminal law, namely self-defence or provocation.

(v) The Future of the Traditional Remedies:

Ascertaining the limitations imposed on the police powers of arrest, search, interrogation, or any other investigative powers is only part of the answer. "If there is a need to lay down safeguards there is a need to check that the safeguards are being applied." Hence, it is said


that "one of the great unsolved problems of criminal law administration is the gap which separates police practices from the theoretical limitations imposed by the law governing arrests, searches and seizures, and conditions of detention." 217

The so-called traditional remedies - that is to say civil and criminal liability and disciplinary action - will continue to be available regardless of what one thinks of their value and contribution in controlling the police and redressing the grievance and safeguarding the interests of the individual: they are based on principles of civil and criminal responsibility and administrative accountability. Special attention must nonetheless be paid to improving their effectiveness in compensating the victim of police illegality and irregularity and in penalising, and hopefully deterring the guilty policeman. As will be shown in subsequent chapters, allegations of ineffectiveness and inadequacy of these traditional remedies is one of the main arguments in favour of extending alternative remedies, namely the exclusionary rule.

There is no evidence to support a conclusion either way in the Sudan, but even if it were true that the traditional remedies were ineffective in the past, "the fact that these remedies have not served

as effective deterrents in the past should not obscure their potential significance.” They can be most effective because they deal with the incidence of misconduct directly by determining the responsibility of the particular policeman and penalising him. They may be ineffective, however, because of a variety of problems and limitations pertaining to their practice. It is by pursuing and eliminating these problems and limitations that the effectiveness of the remedies may be increased. These difficulties include lack of initiation and determined pursuit of proceedings against offending policemen, difficulties of proof, weakness of the deterrent effect of the remedy granted, etc.

With respect to tort actions for wrongful arrest or false imprisonment, for example, legal actions are rare because "persons mistreated by the police are marginal types who are quite happy, once out of police clutches, to let well enough alone. Few have the knowledge or resource to obtain the services of a lawyer. Many lawyers who might otherwise be available to them cannot afford to tangle with the police because these lawyers depend upon the good will of the police in other cases..." Furthermore, the probable outcome of such actions does

218. Ibid. 493.
not provide much incentive; the "individual policeman may not be thought to be worth suing. In any event he is unlikely to be deterred by the fear of such actions because of the convention that the local police authority indemnifies him... 220 The victim may fear the further loss of privacy entailed in a suit, or subsequent police victimisation. Substantial damages are only recoverable in the event of actual loss or malice; they may be mitigated by the plaintiff's bad reputation, which will also affect his credibility and increase the chances of a finding" 221 for the defendant policeman. Aggravated damages may be awarded in respect of oppressive, arbitrary or unconstitutional conduct by officials; but that is even harder to prove. 222

Criminal prosecutions and disciplinary action are besieged by similar problems; as Mr. Justice Murphy said in dissent in Wolf v. Colorado: 223

220. One is not in a position to confirm that this is also so in the Sudan because of the lack of decided cases on the issue, but the dilemma is the same: the policeman is either unable to pay, so the victim goes uncompensated, or the Government pays, so the policeman is undeterred.


222. See generally Poote, "Tort Remedies for Police Violations of Individual Rights", supra.

223. 338 U.S. 25 (1949) at 42.
"Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

Criminal prosecutions, therefore, are unlikely to be instituted or successfully pursued because their institution and investigation are normally vested in the police and prosecution whose loyalty and sympathy naturally lie with the accused policemen. The same is true of internal or departmental disciplinary action. "Police leaders will be sympathetic to the illegal conduct of their inferiors as long as the latter remains within the unwritten tradition, codes and norms of the force as opposed to the law of the land."\(^{22h}\)

There are, however, no simple answers because there is the other side of the argument: police morale must be preserved, excessive litigation must be discouraged and unscrupulous individuals must not be allowed to take advantage of the arrangements made for those with legitimate claims and grievances. A variety of issues and considerations must therefore be taken into account in any proposed solutions. Moreover, the nature of the problems requires that the arrangements must be kept in constant review to avoid hardships and anomalies developing. Subject to this, the following simple devices may be suggested.

One of the key issues in this area is the question of legal advice

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\(^{22h}\) Heydon, "Illegally Obtained Evidence", supra, 693. See also Amsterdam, "The Supreme Court and the Rights of Suspects in Criminal Cases", supra, 787.
and representation because the vast majority of victims of police misconduct are simply unaware of their remedies and unable to go about enforcing them. It may help, therefore, if the Attorney-General's Chambers were to receive complaints and advise the complainant whether there is a legitimate cause of complaint and what his course of action should be. On the facts given in such general complaints, counsel may be able to see the possibility of a tort cause of action. He may, on the other hand, feel that a criminal prosecution is more appropriate or that the matter can be dealt with best on a departmental basis. An obvious objection to this proposal is that it will greatly increase the workload of the Chambers. Whether that would be to a crippling or unworkable extent remains to be seen.

The benefits of legal advice may also be offered by magistrates who observe some police misconduct and may be able to advise its victim as to the best course of action. Magistrates are in a position to initiate criminal proceedings directly against the offending policeman when, for example, they find that the accused was assaulted in attempts to induce him to confess. Again, a magistrate is in an ideal position to judge the legality of an arrest or search; and he may therefore be able to advise the victim whether he has a cause of action worth pursuing. It goes without saying that such a magistrate must not try the case against the policeman, whether in civil or criminal proceedings, where he has already expressed a view as to the substantive issues.

Problems such as the existence of a cause of action, the assessment
of damages, questions of proof, the ingredients of the tort or offence most appropriate to deal with the particular type of misconduct etc. may all be dealt with legislatively. The overall object is to make the tort and criminal remedy more readily available to the victim of a wider range of police misconduct. It is absolutely indefensible for a Sudanese court to deny remedy or fail to award reasonable damages because of some requirement or rule evolved in 19th century England.

Internal disciplinary measures can be vitalised by giving publicity to a fair and effective procedure for dealing with complaints. Victims of police misconduct must first be informed that they can complain to the policeman's superiors; then they must be assured that their complaints are handled properly and fairly. As indicated above in relation to the procedure in Scotland and England, the key issue in this area is that of an independent element in the proceedings because it is not unreasonable to suggest, in the absence of such an element, that the policeman conducting the investigation of the complaint against a fellow policeman will find it difficult to be as neutral and impartial as he needs to be.


Even if he was, the charge will continue to be made that the investigation was merely whitewash and a coverup for his subordinates or colleagues. It is, however, the implication of this reasoning that the police cannot be trusted to be fair without supervision which the police resent.

Nonetheless, an independent element is necessary for the credibility of police internal disciplinary procedure: to ensure that complaints are investigated properly and that genuine action is taken, and to satisfy complainants of the same. 227

The involvement of independent elements can take any one of several forms. There is, for example, the American experience with civilian review boards, 228 whether with independent disciplinary powers or dependent on the police internal machinery. 229 The ombudsman concept may also be used: "an independent governmental official who receives complaints, conducts investigations, and makes recommendations relating

227. See Alan Grant, "Complaints Against the Police - The North American Experience", [1976] Crim.L.Rev. 338, for the view that the trend in Canada and the United States has been towards finding ways of injecting some kind of independent element into the process of complaints against the police.


to the action of other governmental agencies. He succeeds mainly through persuasion, which is made more effective by the publicity which he can give to his recommendations. Such an ombudsman may have the power, as he does in Finland, Denmark and Sweden, either himself to prosecute or to consent to the prosecution by private persons of public officials, including the police, for violations of the law.

The difficulty with these bodies, or any other form of independent body charged with enforcing regulations of police powers, is that to leave them dependent on police cooperation and internal machinery may not be enough, but to grant them specific disciplinary and prosecutorial powers may antagonise the police and emphasise an adversary relationship between the complainant and the independent body on the one hand, and the police and prosecution on the other. It may therefore be wiser to start with independent and powerless observers and critics of the handling of complaints by the police rather than to attract police hostility and distrust of the whole procedure. Specific powers can be introduced subsequently according to the results of the voluntary arrangement.

In the end, however, as has been said of the ombudsman, "criticisms alone cannot remake or undo malfunctioning governmental machinery..."


231. Gellhorn, Ombudsman and Others 13, 64 note 34, and 205.
can be effective precisely to the extent that governmental organs share the values he seeks to nurture and precisely to the extent that they welcome having an impeccably objective eye peering over their shoulder at what they do".232 So emphasis must be placed on the education and training of the police so that they may appreciate that the limitations and regulations of their powers are valuable safeguards and an integral part of the law, and not merely obstacles in their way.

(5) Detention Without Arrest:

As suggested above, the traditional common law distinction between arrest and liberty is artificial and unsatisfactory because it fails to take into account actual practice - which involves a measure of intermediate restraint on liberty prior to arrest - and because it fails to recognise and appreciate the legitimate needs of law enforcement behind such practice. There is, however, a recent trend towards the recognition and regulation of this practice, and some American jurisdictions already have statutory provisions to this effect. The essential feature of such provisions is that they authorise a form of limited detention on a lesser ground than would justify an arrest: the purpose of such detention is to enable the police to conduct specific functions relative to the decision whether or not to arrest. Before reviewing some of these proposals, and considering the Sudanese position in their light, the cases for and

232. Ibid. at 192.
against granting the police a power to detain without arrest are to be stated first.

(i) Why Provide for a Power to Detain Without Arrest:

This power is relevant mainly in situations where though an arrest may not be justified or authorised, at least initially, some action is nonetheless necessary. A policeman is frequently confronted with situations "in which it seems necessary to acquire some further information from or about a person whose name he does not know, and whom, if further action is not taken, he is unlikely to find again. An inquiry may appear appropriate because such a person is behaving in a suspicious or unusual manner which suggests possible involvement in crime..." 233

Such a person may be found near the scene of a crime, and as such he may be a suspect, or a potential source of information, or it may be impossible to tell in advance whether he is either of the two or someone who just happened to be near-by at the time. 234 In confused and emergency situations, says the argument, "where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to 'freeze' the

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situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken.\textsuperscript{235}

It is true that a policeman, like any other person, may accost others and ask them questions, but what is he to do "when he sees conduct which excites his suspicion, but which does not meet the traditional test that has justified an arrest," and yet the person so conducting himself refuses to stop and answer questions.\textsuperscript{236} If the only options open to the policeman in such situations are full and formal arrest or doing nothing at all, the frustration and conflict in loyalties would be intolerable for the policeman - he must either knowingly make an unlawful arrest or refrain from action in a way which may appear to him to be dereliction of duty. A policeman is trained and conditioned to think that "it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury";\textsuperscript{237} yet he is expected to walk away unless he can


\textsuperscript{237} Lord Parker, C.J., in Rice v. Connolly [1966] 2 Q.B. 111 at 119. Sections 10 and 12 of the Sudan Police Act 1970 have a similar effect.
act within a specific power of arrest. In practice, without an authority to detain briefly, "there are likely to be more arrests on a lesser basis, and what is more important more arrests of innocent persons." The policeman will do whatever he believes may result in the detection of crime or the identification and conviction of criminals. He acts in this way in the knowledge and expectation, justified in practice, that the individual will not complain, and that even if he does, the policeman will suffer no penalty or indignity for his conduct. He is unlikely to be found guilty of tort or criminal offence, and even if he is found guilty, the support and solidarity of his colleagues will neutralise the effects of the legal remedies.

With a similar view of the need and the practice, the Thomson Committee recently said:

"We recommend that the practice of inviting persons to the police station should be regularised. We are convinced that it will continue if the law remains unchanged and that it can be controlled only by being recognised and made subject to clearly defined limits."


239. B. Tiffany, D. McIntyre and D. Rotenberg, Detection of Crime, ll1.

240. See generally, Jerome H. Skolnick, Justice Without Trial chapters 9 and 10.

A similar conclusion is also drawn by the American Law Institute where it is found "that only by providing for this authority explicitly is it possible to confine its exercise even approximately to those situations of genuine urgency which best justify it." With reference to English law, it was also observed that the lack of the power to detain without arrest even for a few minutes "is an inadequacy in the police powers of law enforcement, or would be so if actions against the police were commoner than they are now." In fact, "there is much evidence that the practice of detention for question continues." Instead of coming to terms with the power, the courts continue to adhere to a strict definitional approach: they either hold that the slightest interference with the person is an "arrest", which must be judged by the traditional standards, or they attempt to manipulate the facts to avoid having to draw this conclusion or its consequences. This tends to lead to the making of rather fine distinctions as the following two English cases illustrate.

In Donnelly v. Jackman, the appellant was lawfully walking

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2h5. [1970] 1 All E.R. 987. See also the cases mentioned above pp.116-51.
along the pavement when a uniformed police officer came up to him for the purpose of making inquiries about an offence which the officer had cause to believe the appellant had committed or might have committed. The police officer asked the appellant if he could have a word with him but the appellant ignored that request and continued to walk away. After repeating the request the officer tapped the appellant on the shoulder and the appellant turned and did the same to the officer. When the officer then touched the appellant with the intention of stopping him the appellant turned round and struck the officer with some force. It was found that the officer did not touch the appellant with the intention of making any formal arrest or charge, but solely for the purpose of speaking to him. After he struck the officer, the appellant was arrested, charged and convicted of assaulting the officer in the execution of his duty. In giving the judgment of the Divisional Court, Talbot, J., said:

"When one considers the problem: was this officer acting in the course of his duty, in my view one ought to bear in mind that it is not every trivial interference with a citizen's liberty that amounts to a course of conduct sufficient to take the officer out of the course of his duties. In my judgment the facts that the justices found in this case do not justify the view that the officer was not acting in the execution of his duty when he went up to the appellant and wanted to speak to him. Therefore the assault was rightly found to be an assault on the officer whilst acting in the execution of his duties, and I would dismiss this appeal."

In contrast, in Ludlow and Others v. Burgess three youths were.

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216. Ibid. 989.

convicted of assaulting a constable in the execution of his duty. The constable was kicked on the chin by one of the youths while he was boarding a bus. Though the youth claimed it was an accident, the constable believed it was deliberate, an argument developed and the youth expressed his opinion in strong language. The constable, who did not have his warrant card with him, informed him that he was a police officer and told him to stop using foul language. As the defendant started to walk away, the constable put his hand on his shoulder not with the intention of arresting the defendant but to detain him for further conversation and inquiries. The defendant struggled and kicked the constable and the other two youths then assaulted the constable. In allowing the appeal against conviction it was held that the detention of a man against his will without arresting him was an unlawful act and a serious interference with a citizen's liberty. Since it was an unlawful act it was not an act done in execution of the constable's duty.

It may well be that there is a distinction between these two cases justifying the different conclusions; that distinction, however, may not lie in any specific feature of the cases, but rather in the overall impression that the officer in the first case acted more reasonably than did the officer in the second case. It would have been more helpful if the courts had pointed out why that is so, and had articulated the principle and attempted to regulate the practice of such detention. As quoted above, in a recent Scottish case, the distinction between
"arrest" and "mere detention" was recognised.\footnote{248} What remains is for it to be regularised.

The case for the power of detention may be summarised as follows:\footnote{249} It is a necessary power that constitutes a relatively minor invasion of personal liberty and privacy. Like any other necessary power, it can be structured and controlled, with clarity of the principle improving with the practice over the years - after all, this is how all the other powers such as the power of arrest and search came to be regularised.

The power to detain is not indiscriminate, albeit exercised on lesser grounds than an arrest.\footnote{250} While it is less of an intrusion, and lasts for a shorter period than, and is free from the stigma of, arrest,\footnote{251} it may help in avoiding an arrest that might otherwise have to be made.

The authority to detain briefly and to ask a few questions before making


\footnote{251}{In his article "Detention for Investigation by the Police: An Analysis of Current Practice", (1962) Wash.J.L.Q. 360 at 364, Wayne La Fave explains the many differences between detention and arrest.}
an arrest is really an opportunity for the suspect to explain his
court and remove the suspicion; if he succeeds an arrest is averted. 252

(ii) Objections to the Power:

Though a power to detain is obviously necessary in some situations
in the interest of effective law enforcement, such a power is open to
some legitimate objections that must be considered and allowed for in
providing for the power and in its practice. 253 For one thing, innocent
people, naturally enough, resent the intrusion of such detention and its
implications - that they are suspected of criminal conduct. In the
English case of Kenlin v. Gardiner, 254 two schoolboys were going from
house to house to remind members of their rugby team about a game.
Two police officers became suspicious of their conduct and, producing
a warrant card, asked what they were doing. Not believing that they
were really police officers, one of the boys attempted to run away but
one of the two officers held him by the arm and the boy struggled and
punched and kicked the officer. The other boy too was involved with
the other officer. The boys were convicted of assaulting a police
constable in the execution of his duty. Winn, L.J., giving the
judgment of the Divisional Court, left the question whether the officers

at 261; Stern "Stop and Frisk: An Historical Answer to a Modern
Problem", supra, 542; Glanville Williams, "Police Detention and
P.S. (1960) 113 at 111.

253. See generally, Model Code or Pre-arrangement Procedure, 113-11.

had a power of arrest under the circumstances open because neither of
the officers purported to arrest either of the two boys. "What was
done was not done as an integral step in the process of arresting, but
was done in order to secure an opportunity, by detaining the boys from
escape, to put to them or to either of them the question which was
regarded as the test question to satisfy the officers whether or not it
would be right in the circumstances, and having regard to the answer
obtained from that question, if any, to arrest them." Holding that
such detention was unauthorised, hence constituting a technical assault,
Winn, L.J., concluded that the boys were entitled to the justification of
self-defence. The conviction was therefore quashed.

Had there been a power to detain in England, this conviction would
have had to remain. Yet, the boys' conduct under the circumstances is
understandable if not completely justifiable. People would find such
a result of the police detention power unacceptable: a provocative power
that may well involve any reasonable and law-abiding citizen in a criminal
offence - assaulting the police constable - though his initial conduct
was perfectly innocent. This sort of unfortunate consequence of the
power to detain may largely be avoided by the exercise of some discretion
in prosecution. It is suggested, for example, that no prosecution should
have been brought against the boys in Kenlin v. Gardiner - irrespective
of their technical guilt or innocence.

255. Ibid. at 519.
General resentment of the power itself will continue for some time, but it will gradually fade away as people come to recognise the reasonableness of the power and tolerate its exercise, like that of any of the existing powers. For this to happen, however, the police must show tact and wisdom in exercising the power, people normally respond favourably and kindly to any respectful and polite approach. The police must appreciate that their best asset is the co-operation and goodwill of the general public.

This brings out another objection to the power of detention which is that it is desirable for the police to be dependent on the cooperation and goodwill of the public for some of their functions. It is unhealthy for the police to have, as a matter of legal imperative, all the powers they need, because then they may tend to grow arrogant and authoritarian. There is no doubt that this is true, but there are obvious limits to voluntary cooperation, it will not be forthcoming sometimes when it is most needed. Where, for example, a suspect whose arrest is not yet justified is likely to destroy incriminating evidence on his clothing or his fingers, it is unrealistic to leave the ability to preserve the evidence to depend on the consent "of the very person who is likely to have most interest in refusing to give that consent."256

The power to detain is liable to abuse in other ways; it may be used, for example, "to harass persons to whom the police may be hostile

256. Thomson Committee Report, para. 3.13.
or about whom they feel a generalized suspicion or apprehension...
The danger of abuse is argued to be particularly serious, since the stop must be predicated on a more permissive standard than arrest thus making it more difficult to confine the authority to proper cases and to ascertain after the fact whether an abuse has indeed taken place.  

The opponents of the power, therefore, dispute the need, and the mildness of the affront, as well as the susceptibility of the power to judicial or other control. It is also said that granting the police wider powers is not necessarily a prerequisite of increased efficiency - it may not be even the best way of increasing efficiency. Police performance may be improved better, it is argued, by improving the calibre of police intake and training and by increasing their numerical strength.

In conclusion, as is often done in criminal procedure, a compromise position must be reached. On the one hand there is the need, the actual practice and the need to regularise and control a practice already in existence; on the other hand there is the usual mistrust of any extension of the coercive power of government and the fear that the proposed safeguards may not suffice. Neither point of view, however, must be

257. Model Code of Pre-arraignment Procedure, 111.

allowed to prevail; rather the power must be provided for but subjected to reasonable limitations and controls. The fiction that the law allows no detention without arrest may be a neat proposition, but it is neither sound in principle nor true in practice. It would be better to recognise the power and regulate its practice rather than pretend that it does not exist. One finds himself in complete agreement with the view of the Thomson Committee:

"Unlawful arrest is an actionable wrong and so it is necessary for a police officer to know when it is lawful to arrest without warrant. It is therefore necessary for the protection of the police as well as of the citizen that the law should be clear. It is also necessary that it should be so framed as to allow the police to perform legally whatever functions in the investigation and prevention of crime the public regard as proper. We believe that the police at present are able to carry out their functions only because some persons whom they detain without warrant fail, through ignorance or fear of authority, to exercise their rights. It may be argued that if the police are given specific powers to enforce the attendance at a police station of those whose attendance is presently merely requested, they will require more people to go there. We appreciate the point of this argument, but we do not think that it is a strong one. At worst such legalisation of police practices as we propose will place the articulate and knowledgeable citizen in the same position as that presently occupied by the ignorant and inarticulate citizen. As people become increasingly aware of their rights the present tacit co-operation which makes it possible for the police to function may not continue, and the police may find themselves in a position to do only what they are specifically authorised to do by law. We believe that any abuse of power can best be controlled by insisting upon the principle that no-one should be arrested or detained except in so far as is necessary in the interest of justice."

259. Thomson Committee Report, para. 3.II.
The Thomson Committee itself recommended "a form of limited, or temporary arrest" - to be called "detention" - which must be succeeded as soon as reasonable by either arrest or release. In the United States there is a variety of statutory provisions and proposals for a similar power of detention short of arrest. Most recently, the American Law Institute came out in favour of providing for the power and produced its own detailed proposal. In all these schemes, the power is defined in such a way as to authorise detention in situations where an arrest would not be justified. Such detention, however, is limited in duration and purpose.

As suggested above, one of the main justifications for the power to detain is the need to afford the policeman an opportunity to make a considered and reasonable judgment whether or not to arrest. In some American leading proposals, such as those of the American National Conference of Commissioners, pre-arrest detention is not only to be authorised but also to be required to precede every arrest without a

260. Ibid. para. 3.15.


262. Model Code of Pre-arraignment Procedure, section 110.2.

263. Ibid. 5-9; Thomson Committee Report, para. 3.13 to 3.27.

warrant: detention in order to decide whether to cite, release or arrest the person. The object of such proposals is to reduce to the necessary minimum all pre-trial detention: a brief detention may enable the policeman to avert an arrest even in situations where a subsequent prosecution is intended. 265

(iii) The Position in the Sudan:

In the Sudan, as in England and elsewhere, 266 there are certain specific powers of detention. Section 9(2) of the Hashish and Opium Ordinance 1924, for example, authorises any magistrate, policemen or customs officer to "detain and search any person whom he has reason to believe to be guilty of an offence against this ordinance and if such person has hashish or opium in his possession, may arrest him and any other person in his company suspected of such offence as aforesaid or the abetment thereof." Thus, a brief detention and search are authorised to see if an arrest is justified or necessary. The question is whether there is a general power of detention without arrest or prior to arrest. It is suggested that section 26 C.C.P. is the source of such a power; it reads:

"Any policeman or sheikh may require any person whom he has reasonable grounds for suspecting to have committed an offence of any kind to furnish him with his name and address, and he may require such person to accompany him to the police-station."

265. Ibid. 19-37.

266. See, for example section 66 of the Metropolitan Police Act 1839; Williams, "Police Detention and Arrest Privilege in Foreign Law: England", supra, lii. For Scottish examples of such statutory power see Renton and Brown, para. 5-27.
The view that this section authorises detention and not arrest is supported by two reasons. First, the history and wording of the section itself indicate the clear intention not to authorise arrest. Section 26 C.C.P. was enacted for the first time in the 1925 revision of the Code. In 1921, in Palestine, then a British Mandated Territory, an identical section was enacted which added at the end "...and, if the person refuses to accompany him, he may arrest him." The Sudanese section enacted about the same time omitted this part. Secondly, section 26 C.C.P. immediately follows section 25, the detailed section on the powers of arrest reviewed above. If section 26 was intended to authorise arrest, it would have sufficed as the sole basis of arrest because it applies whenever the policeman or sheikh "has reasonable grounds for suspecting [the arrestee] to have committed an offence of any kind".

It is submitted that not only is the initial "stop" or detention under section 26 not an arrest, but also that there is no power of arrest for refusing to give name and address or to accompany the policeman to the station. If the policeman decides to make an arrest in such situations, he must be prepared to justify his actions in terms of one of the powers of arrest in section 25. In the vast majority of cases no arrest will be necessary because "voluntary co-operation" will be forthcoming. In the rare cases where that is not so, the policeman will have to make up his mind whether to arrest or simply walk away. He may, of course, take

267. No. 4, 1924.
into account the conduct and demeanour of the person so detained; he can utilize the detention situation to obtain information that may help him decide whether an arrest is authorised or justified.

Detention under section 26 being a lawful power, a policeman effecting it would be acting in the lawful execution of his duties; so that if he is assaulted or obstructed while effecting such a detention a power of arrest for assault or use of criminal force to deter a public servant from discharge of his duty, or obstruction of a policeman in the execution of his duties may arise. Thus, though section 26 C.C.P. does not authorise arrest by itself, the situation may develop in such a way as to authorise arrest under section 25 C.C.P.

As a provision for a power to detain, section 26 C.C.P. is very unsatisfactory because it leaves some important questions unanswered. For example, for how long may the detention continue before the policeman must either arrest or release the person detained; what is to follow if no power of arrest appears to be available and the detainee is unwilling to co-operate. The reasonable duration of detention is related to what may the police do with the detainee. Both the American Uniform Arrest Act and the American Law Institute's Model Code of Pre-arraignment Procedure place a definite time limit on pre-arrest detention.270 The

268. Punishable under section 298, Sudan Penal Code, which is one of the offences for which the police may arrest without warrant under section 25(b), C.C.P.

269. The police may arrest for such obstruction without warrant under section 25(h).

270. Sections 2(3) and 110(2)(1), respectively.
Thomson Committee in Scotland decided against a rigid time limit on detention outside police stations, rather it related the duration of the "on the street" detention to one set of purposes and the duration of the police station detention to another set of purposes. In "on the street" situations - that is to say, "elsewhere than in a police station" - no person may be detained any longer than is necessary to ask for an explanation of suspicious behaviour, take his name and address, and search his outer clothing or baggage for stolen goods, tools of crime or weapons.\(^{271}\) In the police station, detention may extend long enough to enable the police "to isolate the detainee while they continue their enquiries elsewhere, interview witnesses, search for weapons, goods etc.... to obtain the detainee's fingerprints and to search him without his consent ... to secure evidence of identification... to ask the detainee questions."\(^{272}\)

Though a purpose-determined duration of detention appears to be the better approach, the list of the purposes of detention in a police station in the Scottish proposal appears to be rather extensive and liable

\(^{271}\) Thomson Committee Report, Criminal Procedure in Scotland, para. 3.18.

\(^{272}\) Ibid. para. 3.21. The Committee recommended that the maximum permissible period of detention in a police station should be six hours. "We stress that this is the maximum period of detention and that we expect that in the vast majority of cases the actual detention will be for a shorter period." Ibid. para. 3.25.
to extend the duration of the detention unreasonably. In relation to
detention under section 26 C.C.P. it is suggested that the duration of
the detention, whether on the street or in the police station, should be
limited only to the time necessary to make inquiries to enable the police-
man to decide whether to arrest or release the person. Though detention
without arrest is authorised, arrest must still be the normal authority
for detention; the police must therefore work up to the point when a
decision on arrest is possible, and once that stage is reached, they must
make the decision and act according to it. If arrest is authorised and
justified, then the detainee must be advised of the decision, informed of
the reasons for his arrest, and the post-arrest procedure outlined above
must be applied.

(7) Concluding Remarks:

Arrest is basically a means of securing the attendance of the suspect
or accused person for the investigation of the suspected offence and the
determination of his guilt or innocence. As the accused is presumed innocent
until proven guilty, the law tries to limit the hardship and indignity to
which he may be subjected. Thus restrictions are placed on the incidence,
duration and conditions of pre-trial detention; hence the restrictions on
the power of arrest, effecting an arrest, post arrest procedure etc.
reviewed in this chapter. Pre-trial release, the subject of the next
chapter, is also concerned with minimizing unnecessary pre-trial detention. 273

273. American Bar Association Standards Relating to Pretrial Release,
Approved Draft, 1968, section 1.1.
"The law favors the release of defendants pending determination of guilt or innocence. Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not yet been judicially established to economic and psychological hardship, interferes with their ability to defend themselves and, in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents major public expense."

The same general principle is reflected in provisions designed to avoid arrest in the first place, trying to secure the attendance of suspects as and when required without taking them into custody at all. Before reviewing the relevant Sudanese arrangements, the novel approach of the National Conference of Commissioners on Uniform Laws deserves to be noted. According to Rule 211(a) of their Uniform Rules of Criminal Procedure, the law enforcement officer "authorised by law to arrest a person without a warrant for the commission of a criminal offence may not immediately arrest him but may detain him for the purposes specified in subdivision (b)." Under subdivision (b), the officer is allowed to detain the person only for the time reasonably necessary for: "(1) The officer to determine whether the person should be issued a citation under Rule 221(a)(1), released without a citation under Rule 221, or arrested under subdivision (c); (2) The person to participate in a procedure described in Rule 134(c) to obtain relevant nontestimonial evidence which the officer reasonably believes may be

271 10 Uniform Laws Annotated.
altered, dissipated, or lost if not then obtained; \textsuperscript{275} and

(3) The officer to conduct any search permitted by law.

The person's detention may not be extended for the purpose of questioning under Rule 2\textsuperscript{13}.

According to subdivision (c) the person detained under subdivision (a) may be arrested, rather than released with or without a citation only if the law enforcement officer reasonably believes that:

"(1) The offence or the manner in which it was committed involved violence to person or imminent and serious bodily injury or the risk of threat thereof;

(2) The person is committing an offence in the officer's presence and will deliberately continue to commit the offense unless arrested;

(3) The person committed an offense punishable by incarceration and would not respond to a citation; or

(4) Arrest is necessary for the protection of the person arrested or to administer, or to bring him to a source of, needed medical or other aid."

The object of this scheme is to postpone, in the hope of avoiding altogether, arrest; and to replace it, whenever appropriate, with an on the spot citation - a form of pre-trial release. It is distinguished from pre-arrest detention discussed in section (6) above in that it applies in all cases where arrest without warrant is authorised by law.

\textsuperscript{275} These procedures include physical and voice identification, providing handwriting and voice exemplars, submitting to the taking of photographs, fingerprints, palm prints, footprints, and other body impressions, the taking of specimens of saliva, breath, hair and nails, measurements or other reasonable body surface examination, removal of foreign substances etc. Ibid. 158.
and also in the fact that it purports not only to authorise but to require pre-arrest detention. The American Bar Association Standards Relating to Pretrial Release propose that the police officer "be required to issue a citation in lieu of arrest or, if an arrest has been made, to issue a citation in lieu of taking the accused to the police station or to court"; but that is limited to specified "minor offences". 276

The Sudan C.C.P. follows the traditional method of specifying certain offences where attendance of the suspect or accused may be sought by the issue of summons - a written notice or order to attend when and where specified. The First Schedule to the C.C.P. specify whether a warrant or summons shall ordinarily issue in the first instance for the offence. Section 61, however, allows the issue of a warrant in addition or in place of the summons, for reasons recorded in writing, if the court or magistrate believes that the person concerned has absconded or will not obey the summons or that he had already failed, without reasonable excuse, to obey a previous summons. Conversely, the court or magistrate may issue a summons in place of a warrant if it or he thinks fit. 277


277. Sections 44-50 C.C.P. deal with the form, manner and proof of service of summons. See also Form No. 1, Third Schedule C.C.P.
The whole question of alternatives to arrest and pre-trial detention is essentially one of attitude: the best policies and regulations require the right approach in the people concerned with their enforcement if they are to have any chance of success because the human element cannot be eliminated. People making the decisions, whether magistrates or policemen, must see arrest and detention for what they are: humiliating and stigmatising restraints of liberty tolerated only because and in so far as they are necessary for the enforcement of the law.
Chapter 3

Pre-Trial Release

(1) The Principle of Pre-Trial Release:

Once an arrest has been lawfully made, the question arises whether custody should be continued and for how long. As arrest itself is mainly justified by the need to obtain physical control over a suspect or accused person in the interest of the efficiency and integrity of the investigation and trial, if any should follow; it follows that continued detention or pre-trial custody must be justified by reference to similar considerations. As an English judge once explained:¹

"I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial..."

This may appear to be self evident and elementary, but it is not properly appreciated in the practice of pre-trial custody and release; accused persons are confined in pre-trial custody facilities more often and longer than is strictly necessary. It is true that there are legitimate objections to pre-trial release in some cases, as when it is feared that the accused may intimidate witnesses or otherwise tamper with evidence or hinder the proper investigation of the offence, but these objections to pre-trial release are given more weight more frequently than can be justified under the circumstances.

The move towards liberalising the law and practice of pre-trial release is gaining momentum - more and stronger objections to pre-trial custody are being advanced and substantiated by empirical research\(^2\) - and the question is how far this is more relevant to the Sudanese practice and in what ways that practice may be reformed.

The main objections to pre-trial custody - that is to say, arguments in favour of more pre-trial release - may be summarized as follows. There is first the unfairness of custody for one who is not convicted of any offence; the punitive element in pre-trial custody may even be stronger than that in a post-conviction prison sentence because of the poor conditions of custody for remand prisoners.\(^3\) Thus it seems that there is "almost universal recognition of the impropriety of punishing - and custody is punishment, no matter what its name - one who is merely accused and who has not been and may never be convicted."\(^4\)

Secondly, there is the human cost in the economic and other hardship


\(^3\) See, for example, Richard F. Sparks, *Local Prisons: The Crisis in the English Penal System* (London: Heinemann, 1971) 15, 100 and 102. In the Sudan conditions of pre-trial custody are so bad that the police are alleged to use the threat of opposing release to induce confessions and other co-operation with the police - Mr. A.M. Hassanein, Advocate, in a private interview, Khartoum, 5/1/75.

caused to the accused and his family. Denial of pre-trial release may cost the accused his job, or at least his income for the duration of custody, and disrupt his family and social life. This is harder to justify in the case of an accused who is not convicted at the trial, and in the case of an accused who does not receive a custodial sentence on conviction.

Thirdly, other tangible interests of the accused, relative to his chances to defend himself at the trial, are threatened by his detention. His efforts to prepare his defence are greatly hampered by his inability to locate witnesses - a task peculiarly within his knowledge⁵ - and otherwise seek and organise evidence in support of his defence. Jail conditions are not likely to be conducive to effective consultation with counsel.⁶

Fourthly, and perhaps in consequence of the last mentioned point, several empirical studies suggest an adverse correlation between pre-trial detention on the one hand and conviction and custodial sentences on the other hand.⁷ In other words, "an accused who has been detained

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in jail between his arraignment and the final adjudication of his case is more likely to receive a criminal conviction or jail sentence than an accused who has been free on bail." The issue "whether the marked statistical relationship between pre-trial detention and unfavorable disposition is a causal one... (or) a statistical by-product of other relationships" was taken up by Anne Rankin who considered "previous record, bail amount, type of counsel, family integration, and employment stability - factors which are statistically related to both detention and disposition - to see if they accounted for the relationship between detention and disposition." The study sought to discover whether any one factor or a combination of them caused both pre-trial detention and subsequent unfavorable disposition of the case at trial. If any factor or combination of factors are causative of both phenomena, then one would expect all defendants sharing those factors or combination of factors to receive the same disposition regardless of whether they were on bail or jail awaiting trial. If, for example, "more detained defendants than free defendants are being sentenced to prison because more detained defendants have a previous record, there should be no difference between dispositions of bail and jail defendants when both have no previous record - as many bail defendants should receive prison sentences as jail defendants. The same should be true for defendants


10. Ibid. 646.
with a previous record.\textsuperscript{11} This was not found to be the case with respect to any single factor and true only to a small extent of a combination of factors. The author therefore concluded that:\textsuperscript{12}

"These findings provide strong support for the notion that a causal relationship exists between detention and unfavourable disposition ... The results as they now stand, however, do add strong support to the argument that pretrial detention increases a defendant's chances of receiving a prison sentence."

The reasons for the correlation relationship may be found in the limitations pre-trial detention places on the defendant's ability to prepare and present a proper defence.\textsuperscript{13} Whatever the reasons, however, the evidence seems to suggest that pre-trial detention is partially causative of unfavourable final disposition of the case.

It is true that these studies were not done with reference to Sudanese practice in particular, yet they certainly support relevant and valid arguments that must be taken into consideration in assessing that practice. Of equal relevance and validity, however, are the reasons for pre-trial custody - the reasons why pre-trial release is sometimes denied. It must first be observed that the accused who is subjected to the hardships and indignities of pre-trial custody is not picked at random but only after investigations by the police and the satisfaction

\textsuperscript{11} Loc. cit.

\textsuperscript{12} Ibid. 655. See generally, 61:7-51:

of legal officers, a magistrate in the case of the Sudan,\textsuperscript{11} that there are reasonable grounds for holding him and putting him on trial. His guilt may not have been proven yet, but there is sufficient suspicion of it to justify his arrest and trial. In the process of holding him and preparing for his trial, some hardships and indignities are unavoidable. In short, the objectionable consequences incidental to arrest and pre-trial custody, though regrettable, cannot be helped when the social interest in detection and punishment of criminals are sufficiently strong.\textsuperscript{15}

The basic problem is therefore one of balance: neither the individual nor the state interests should be over-protected by too liberal or too restrictive rules of pre-trial release. Though general criteria are necessary, both individual and public interests must be taken into consideration in every case. The thesis to be developed in the remaining part of this chapter is that the objective of any enlightened system of criminal procedure is to maximize pre-trial release without sacrificing legitimate social interests - how is the right balance to be achieved in practice?

(2) The Common Law Approach:

The practical question of pre-trial release has always been how to ensure the attendance of those persons released - the need to safe-

\textsuperscript{11} See Chapter 1 above and Chapter 8 below.

\textsuperscript{15} See generally Packer, The Limits of Criminal Sanction, 210-18.
guard against absconding. The traditional common law answer is the
device of bail, a form of contract whereby a man is delivered to his
surety who is bound to produce him when and where required. The
principle has undergone several developments since its ancient origins,
but it can be generally described as a device for releasing accused
persons, pending their trials, on their entering into a recognizance,
with or without sureties, to appear as specified or forfeit a sum of
money. For any surety the undertaking is to produce the accused or
forfeit the sum of money.

The first English statute regulating bail was the Statute of
Westminster 1275, in which specific situations and offences were
classified in terms of whether bail was to be granted or not. The
classification, which remained unchanged until 1826, appears to have been

17. For a review of the theories on the origins of bail see Lynda Clark,
"Bail Decision-Making: Law and Practice in Scotland", (unpublished
Ph.D. thesis, University of Edinburgh, 1975) Chapter I. See also
Note, "Bail: An Ancient Practice Re-examined", 70 Yale L.J. (1961)
966.
18. In common law theory, the accused is released to the custody of his
sureties who may seize him at any time and discharge themselves by
handing him over to the custody of the law - Foxhall v. Barnett
(1853) 23 L.J.Q.B. 7; 10 Halsbury's Laws of England (third edition,
1955) para. 677; and Devlin, The Criminal Prosecution in England,
73.
19. 3 Edw. 1, C. 15.
based on three general factors: (i) seriousness of the offence, (ii) certainty of guilt, and (iii) whether the accused was an "outlaw". All three factors can be seen "To be ultimately derived from the single criterion of the likelihood of the accused's appearance for his trial."\(^{20}\)

A statute enacted in 1826 placed great emphasis on the weight of evidence;\(^ {21}\) but another statute, passed nine years later authorized the granting of bail, irrespective of the weight of evidence, subject to the single criterion of the likelihood of appearance for trial.\(^ {22}\) The modern English rule of magisterial discretion in the granting of bail originates from yet another statute, that of 1818,\(^ {23}\) but the basic and overriding consideration remained one of the likelihood of appearance of the accused for the trial. Judicial statements emphasised this time and again; thus Coleridge, J., said in R. v. Scaife:\(^ {24}\)

"I conceive that the principle on which parties are committed to prison by magistrates previous to trial, is for the purpose of ensuring the certainty of their appearing to take their trial. It seems to me that the same principle is to be adopted on an application for bailing a person committed to take his trial, and


\(^{21}\) 7 Geo. 4, C. 64 (1826), section 1.


\(^{23}\) The Indictable Offences Act 1818, 11 & 12 Vict. C. 42.

\(^{24}\) (1818) 9 Dowl. 553 at 554.
it is not a question as to the guilt or innocence of the person. It is on that account alone that it becomes necessary to see whether the offence is serious, whether the evidence is strong and whether the punishment is heavy."

Again, Lord Russell, C.J., is reported to have said in R. v. Rose:

"It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but the requirements as to bail are merely to secure the attendance of the prisoner at trial."

Considerations such as the gravity of the charge, the nature of the evidence and the punishment expected if a conviction materialises are, therefore, relevant only in so far as they reflect on the likelihood of appearance for trial if one is released on bail. The Court of Criminal Appeal has in several more recent cases given its approval to the inclusion of consideration of the prior record of the accused as one of the relevant factors in deciding whether to release him on bail.

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"the test in my opinion, of whether a party ought to be bailed, is whether it is probable that party will appear to take his trial...but...though I lay down that test I think it ought to be limited by the three following considerations...what is the nature of the crime?...what is the probability of a conviction?...and what is the probable punishment in the event of a conviction?"

See also R. v. Hatry (1929) 168 L.T.J. 303.

seems to be that one with a criminal record is more likely to abscond if released on bail than one without such record.

Other considerations that were frequently taken into account, though not officially approved before 1967, are the likelihood of tampering with evidence or intimidating witnesses, and the police need for further inquiries. In a study of bail-custody decisions in London Magistrates' Courts it was found that the police gave one or more reasons for objecting to bail out of a collection of no less than fifteen reasons. The most frequently cited reasons were previous convictions, no fixed abode and the need to make further inquiries. As the courts did not always give reasons for their decisions, it was not possible to say whether the police reasons were the actual reasons for the decision on bail in the particular case. Courts were generally found to tend to follow the police recommendations.

28. The Criminal Justice Act 1967, section 18(5) gave statutory backing to all these considerations and other ones too; the section mentioned eight possible reasons for refusing bail.


31. No reasons were given even to the unrepresented defendant to whom they are required to give such reasons by section 18(8) Criminal Justice Act 1967.

32. The Study found that the courts followed the police recommendation in objecting to bail in 79% of the cases - ibid. 191-95 and 207. The wide range of police reasons for objection and the difference by which the courts regarded police objection was supported by other English studies such as, for example, that of Bottomley, Prison Before Trial, 59-73.
The English position is generally summarized in Lord Hailsham's, then Lord Chancellor, formulation of the four main considerations in bail decisions:

(I) The likelihood or otherwise of the defendant disappearing before trial or before the final disposal of the case on sentence or appeal;

(II) The chances of his committing further offences when out on bail;

(III) The chances of his interfering with the course of justice when out on bail;

(IV) The necessity to procure medical or social reports pending a final disposal of the case.

The criteria described by the courts as influencing their discretion in Scotland, on the other hand, have been summarized as follows:

(a) The attitude of the public prosecutor;

and (b) regard to the public interest and the ends of justice which has been held to include such factors as the nature of the offence, consideration for the victim, the possibility that the accused might tamper with


34. Clark, "Bail Decision-making: Law and Practice in Scotland", 70 et seq. See generally Renton and Brown, para. 5-54 to 5-65; and W.A. Brown, "Bail in Scotland", [1968] Crim.L.Rev. 70. See also Thomson Committee Report, paras. 11.07 to 11.09.

evidence or intimidate witnesses, previous convictions of the accused, likelihood that he will repeat the offence or commit other offences while on bail, and criminal association. One would expect, however, that these considerations are the sort of considerations the public prosecutor would take into account in forming an opinion whether or not to oppose bail. There is no indication as to the relative importance or effect of any of the above mentioned considerations or factors or any combination of them on the decision of the court; and the list does not appear to be exhaustive.

On the other side of the Atlantic, the theory in the United States is that only one question is relevant to the decision on pre-trial release, namely, how to ensure subsequent attendance. But, as one author observed, "if American law is interpreted in the light of its practice rather than its theory a very different picture emerges". The courts are manipulating the device of requiring excessive amounts of bail to avoid releasing on bail an accused whose release is regarded as undesirable; in other words, they are taking into account the sort

38. This position appears to be a constitutional imperative, see Stack v. Boyle, 352 U.S. 1, (1951) at 72.
of considerations and reasons accepted by the English and Scottish courts in arriving at their decisions whether or not to release while maintaining the appearance of a general right to bail approach - the amount of bail is used to avoid actual release in cases where release needs to be avoided.\textsuperscript{10}

Generally speaking, therefore, the overall common law approach to pre-trial release may be described as follows: traditionally the prime concern was with ensuring the appearance of the accused in subsequent proceedings, but gradually, however, other considerations evolved and began to be accepted, often openly and officially, as relevant to the decision. On the whole, most of these considerations appear to be reasonable and sensible, especially those relative to the basic question of appearance for subsequent proceedings: if one is arrested for suspicion of a particular offence it would follow that he should not be released until after the final determination of his innocence, or the end of any custodial sentence he may receive on conviction, unless it can be reasonably certain that he will re-appear for the final disposition of the case. Otherwise the whole purpose of the initial arrest, and probably that of

any criminal process with respect to the particular accused, would be lost for good.

It is also clear that release can reasonably be denied for fear of intimidating witnesses, or tampering with the evidence because again, to do otherwise would be purpose defeating. This common-sense proposition has received general recognition.

Also enjoying wide recognition, though not equally defensible, are objections to release based on fear of future criminal conduct of the accused. Pre-trial custody "to protect society from predicted but unconsummated offences is ... fraught with danger of excesses and injustice." There is first the lack of factual basis for the prediction, the lack of evidence to support the assumption that the accused would be involved in further offences if released pending his trial for one offence. Moreover, would it not be unfair so to penalise one who has not been proven guilty of the offence in hand, for an offence that has not been committed yet?

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1. Smith, Studies Critical and Comparative, 256.
It is true that there are obvious difficulties in predicting all future conduct, but it is also true that the high probability of the commission of new or further offences in some cases may be too strong to ignore. \textsuperscript{16} Some examples can be given of actual cases where persons released on bail were rearrested, sometimes several times, for committing new offences while on bail. \textsuperscript{17} The public outcry and loss of faith in the wisdom and credibility of the whole system in the event of a single case of this type is sufficient cause for deliberation and reflection in all cases where there is a possibility of future or further criminality of one released on bail. In cases where there may be, for example, a clear danger to the victim of the first crime if the accused is released on bail, as where a husband attempted to murder an unfaithful wife, pre-trial release for the accused would be in reckless disregard of the safety of his victim.

Considerations relative to the future conduct of the accused, whether in the form of interfering with witnesses or evidence or in the form of further criminality, are problematic in that, on the one hand, future conduct is difficult to predict with sufficient certainty to justify prior

\textsuperscript{16} La Fave, Arrest, 191-95.

detention, on the other hand, the probability of interference with evidence or witnesses or committing further offences may be so strong in some cases that it would be unwise to ignore it in deciding on pre-trial release for the accused. The dilemma is connected with the general dilemma of pre-trial release in that though the accused is already in custody on suspicion of one offence, and is therefore likely to have the motive and perhaps even the general propensity to interfere with evidence or commit further crimes if released, it is only a suspicion of which he may well prove to be completely innocent.

(3) The Sudanese Practice:

(1) The Main Scheme:

The Sudanese scheme for granting bail is clearly based on the main assumptions of the common law approach. The presumption in favour of release on bail is geared to a gradient in seriousness of the offence suspected. Taking the sections in this order of graduation, section 287A

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h8. Zander, "Bail: A re-appraisal", supra, 1h0. Paulsen in "Pre-Trial Release in the United States", supra said at 125 that the criteria of risk of further crimes and tampering with the evidence are "anything but precise, opening the door to the vice of subjective speculation... Furthermore, no one can deny that a great bulk of such pre-trial detention may fall upon the disadvantaged. It is easy to classify the poor and rejected as dangerous".

h9. See Criminal Court Circular No. 27: "Remands", issued 15/6/1952. Though the details of the scheme changed twice, in 1925 and 197h revisions of the Code, it still reflects the basic common law approach: release at the discretion of the court or police, with the threat of financial loss to the person released, and may be his surety too, as security for appearance as and when required.
Any person arrested for an offence punishable with fine only shall be released on bail or, when appropriate, after executing a bond without surety for his appearance as hereinafter provided."

This section may have created a right to be released on bail for any one arrested for suspicion of an offence punishable with fine only; it did not, however, create a right to pre-trial release as such. Pre-trial release depends on the ability to find the bail fixed by the authorities unless release is allowed on personal recognizance in the discretion of the authorities. Provisions against excessive bail may help in making release more and more frequent; but pre-trial release will never be achieved in every case as of right.

Section 287, on the next stage of the gradient, reads:

"When any person accused of an offence punishable with imprisonment for a term not exceeding ten years is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court or Magistrate and is prepared at any time while in custody of such officer or before such Court or Magistrate to give such bail as may seem sufficient to the officer or Court or Magistrate, such person shall be released on bail unless the officer or Court or Magistrate for reasons to be recorded considers that by reason of the granting of bail the proper investigation of the offence would be prejudiced or serious risk of the accused escaping from justice be occasioned; provided that

50. This section, following in order section 287, was added in 1974 for the first time.

51. Article 67 of the Permanent Constitution and section 296(1) C.C.P. There is no indication, however, of what is excessive bail or what should the remedy be if excessive bail is in fact fixed by the authorities.
such officer or Court or Magistrate if he or it thinks fit may instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance as hereinafter provided."

The underlined part used to read in the 1925 version of the section: "imprisonment whether with or without fine for a term not exceeding"; dropping the reference to fine may have unfortunately introduced an unnecessary element of uncertainty in the scope of the section - does the addition of a fine to the term of imprisonment exclude the case from the ambit of the section?

This doubt aside, the section clearly creates a presumption in favour of release, albeit rebuttable, in that pre-trial release can only be denied for one or more of the reasons given by the section: insufficiency of bail, release prejudicial to the investigation, or serious risk of escape. In the absence of empirical data, it is not possible to say with any degree of certainty how far the section is effective in securing pre-trial release in practice. On the theoretical level, however, one can see more than one source of difficulty.

All permitted reasons for refusing release are too vague and may easily lend themselves to abuse. There is first the question of sufficiency of the amount of bail: how is this to be fixed, is it to be related to the seriousness of the offence suspected or the means of the accused; how far, if at all, may such factors as strength of the case for the prosecution and the accused's previous criminal record affect the amount regarded as sufficient? Again, when will release be prejudicial to the investigation, and when is the risk of escape serious enough to justify denial of release?
One cannot, however, deny the wisdom and relevance of all three factors: the threat of greater financial loss is certainly more of a deterrent than that of the loss of a smaller amount; and the accused should not be released if he is likely to interfere with the investigation or escape completely and thus defeat the ends of justice. The real issue is one of degree rather than principle. Provision for review would therefore go a long way in relieving the situation. A requirement of notice of the reasons for denying bail, as provided for by section 18(8) of the English Criminal Justice Act 1967, would be very useful in giving the accused the opportunity of appeal; the knowledge that the decision is subject to review in this way would have the result of making the authorities more careful in refusing bail in individual cases.

Finally, at the other end of the scale, section 288 provides:

"(1) Persons accused of an offence punishable with death shall not be released on bail.
(2) Persons accused of an offence punishable with imprisonment for a term exceeding ten years shall not ordinarily be released on bail; nevertheless the Court or Magistrate may upon application made release on bail a person accused as aforesaid if it or he considers-
(a) that by reason of the granting of bail the proper investigation of the offence would not be prejudiced nor a serious risk of the accused escaping from justice occasioned; or
(b) that there are not reasonable grounds for believing that the accused is guilty of the offence, but that there are sufficient grounds for further inquiry."

The term of imprisonment specified by this section as well as section 287 in their 1925 versions used to be three and not ten years. This change, effected in the 1974 revision of the Code, clearly reflects a change of policy in favour of more pre-trial release: one with a longer term of
imprisonment still qualifies for consideration under the presumption in favour of release created by section 287 C.C.P.

The presumption created by this section is against pre-trial release, but it is a rebuttable presumption in the case of offences punishable with imprisonment for a term exceeding ten years. In granting bail, however, the court or magistrate are to take into consideration another consideration beside the risk of hampering the investigation and danger of absconding, namely the weight of evidence: pre-trial release is more likely when the evidence against the accused is not strong enough to create a probability of conviction. The main policy behind this consideration would appear to be the greater unfairness of detaining in custody one who is most likely to be acquitted after the trial; if the evidence is strong then conviction is more likely and the period spent in custody awaiting trial can be taken into consideration in sentencing.

Two features distinguish pre-trial release in cases of suspicion of an offence punishable with imprisonment for a term exceeding ten years from cases of suspicion of an offence punishable with imprisonment for a lesser term: it cannot be made by a police officer and it has to be on bail. If the offence suspected is punishable by imprisonment for a term exceeding ten years, then pre-trial release has to be on bail, and not on personal recognizance, and the decision itself has to be taken by a court or magistrate.

There is provision for release, in cases of arrest with warrant, whereby the court or magistrate issuing the warrant may direct "by
endorsement on the warrant that if such person executes a bond with sufficient sureties for his attendance before the Court or Magistrate at a specified time and thereafter until otherwise directed, the person to whom the warrant is directed shall, on receiving security, release such person from custody. 52 In this form of summary release on bail the decision is shared between the court or magistrate and the person executing the warrant in that the former makes the initial decision, ensuring that such bail will not be contrary to other provisions on pre-trial release, while the latter decides on the acceptability of sureties.

The Code’s statement of the grounds for refusing bail, though quite brief, is nonetheless extensive: it covers all the traditional common law considerations without undue rigidity or complexity. 53 A general statement of the grounds for refusing bail may have the advantage of preserving the discretionary nature of the decision and enable the authority granting bail to take into account the relevant and conflicting interests of the individual and society at large; 54 but it tends to create, and by the same token, a degree of uncertainty that may sometimes be undesirable. 55

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52. Section 52 C.C.P.; this sort of arrangement is not unusual in common law jurisdictions - see J.B. Egan, "Bail in Criminal Law" [1959] Crim.L.Rev. 705.


54. Thomson Committee Report, para. 11.06.

55. The implications are considered below in the context of the "right to bail".
(11) Supplementary Provisions:

The province judge has an overriding power to admit to bail any accused except one accused of an offence punishable with death, and to order the reduction of the bail required by an officer in charge of a police station or magistrate. These powers are obviously designed as a check and channel for revising bail decisions; the corresponding power of English High Court judges, "an inherent jurisdiction in the High Court to admit to bail any person awaiting trial on a criminal charge", is said to have grown "out of the court's powers to order release by a writ of habeas corpus. It is now distinct and usually more useful because the court can determine the conditions of bail, whereas habeas corpus simply orders release without imposing conditions or taking recognisances." This power enables the province judge to effect pre-trial release either directly or by reduction of a previously set bail amount.

Pre-trial release can be terminated, on the other hand, by any court or magistrate who may cause the person "to be arrested and may commit him to custody; provided that the reasons for such action are

56. Sections 289 and 291 C.C.P. This power used to belong to the governor of the province, and was allocated to the province judge by the 1971 C.C.P.


recorded and communicated to the accused." This requirement of recording and communicating reasons was added in the 1971 revision of the Code, and is certainly an improvement, but there is no indication of the sort of reasons that are likely to justify this action. It would seem that the court or magistrate may revoke pre-trial release in this way whenever it becomes clear that its continuation is undesirable, as when the accused starts interfering with the investigation, or otherwise untenable, as when a surety withdraws his support. Though in common law theory a surety may arrest a person bailed to his custody, there is no power of arrest in the Sudan under which a surety may do so; he would have to apply to the magistrate for the discharge of his obligation and the arrest of the accused.

(iii) The Obligation and its Discharge:

An accused released on bail is under an obligation to attend as and

59. Section 290 C.C.P.


61. Section 287 C.C.P., see below. Cf. section 23(1) of the English Criminal Justice Act 1967, which authorises a police constable to arrest, without warrant, a person admitted to bail who is believed, on reasonable grounds, to be likely to break or has broken any of the conditions on which he was admitted to bail. A constable may also so arrest on being notified in writing by any surety that he wishes to be relieved of his obligation because he believes the accused to be likely to fail to appear where and when required.
when required; with his own bond and that of his sureties, if any are needed, as security for his honouring that obligation. Bail is terminated when its conditions are satisfied or the obligation otherwise discharged by the return of the accused to custody. When, for example, through mistake or fraud, insufficient sureties have been accepted, or they subsequently became insufficient, the court or magistrate may revoke the bail and order the arrest of the accused. In such cases there is no reason why the accused may not be released on bail again, whether on his own recognizance, if possible, or on finding new sufficient sureties. Again an accused who is arrested on the application of his surety who wishes to be discharged from his obligation may also be re-released on bail, whether on his own recognizance or on finding a new surety.

Besides discharge by application to the court or magistrate for the arrest of the accused, a surety may also be discharged from liability

62. Failing to appear, jumping bail, is not a criminal offence in the Sudan. Such an offence was suggested in the United States to support the release of the accused on his own recognizance - see La Fave, "Alternatives to the Present System", supra, 16. The Federal Bail Act 1966 (118 U.S.C.) section 3150, makes jumping bail a criminal offence besides the usual forfeiture of the security. The penalty varies with the seriousness of the offence for which the original arrest was made. In Scotland the Thomson Committee also recommended that "failure to appear in court at the appointed time without reasonable cause should be an offence. Non-compliance with any of the other conditions should also be an offence." See the Thomson Committee Report, para. 11.20.

63. Section 296(2) C.C.P.

64. Section 297 C.C.P.
to forfeit the amount of the bond if he dies or is adjudicated bankrupt. In such cases the accused would have to be taken into custody unless he can find new sureties or the court or magistrate decides to accept his own recognizance as sufficient security.

If the bond is not discharged in one of the above ways, it remains binding and is said to be forfeited if the accused does not appear as and when required. On being satisfied that the bond has been so forfeited, the court or magistrate may call upon the person so bound, whether he is the surety or principal, to pay the penalty specified in the bond or show cause why it should not be paid. To compel payment the court may proceed to recover the amount in the manner laid down in section 267 C.C.P. for the recovery of fines; and failing that the person so bound would be liable to imprisonment for a term which may extend to six months. But these recovery proceedings are civil and not criminal in nature. In Alim Abdel Rahman Mirghani v. Sudan Government, on the failure of the accused to appear the surety was arrested and brought before the Omdurman police magistrate who treated the case as a criminal information, tried him non-summarily and ordered

66. That section authorise such measures as the seizure and sale of any movable property, the attachment of debts due to the person liable for the bond, and the attachment and sale of his immovable property with the consent of province governor.
67. Section 299(4) C.C.P. allows the court discretion to remit any portion of the penalty mentioned and enforce payment in part only.
him to pay £150, part of the penalty imposed on the bond, and in default of payment be imprisoned for four months. Following an earlier High Court decision and an Indian case, Mr. Justice Abdel Mageed Imam, Judge of the High Court, reversed and explained the correct procedure to be applied in such cases:

"(a) The facts of the case are brought to the notice of the magistrate in the form of an application and not a criminal information.
(b) These facts are then inquired into by the magistrate and if he is satisfied that the bond is forfeited, he makes a declaration to that effect and then passes an order calling upon the surety either to pay the penalty or to appear and show cause, if any he has, why he should not pay such penalty. This will be in the nature of an ex parte order, and should be conveyed to the surety in the prescribed form of notice (Third Schedule, No. 2h) and not by way of arrest.
(c) If the surety fails to appear or if he appears but fails to show cause, the court then proceeds in accordance with sub-sections (2)-(l) of section 299 of the Code of Criminal Procedure."

This procedure would, of course, apply to whoever is bound by the bond - the accused as well as his surety; the accused remains liable to arrest and criminal prosecution with respect to the original offence.

71. [1960] S.L.J.R. at 69-70. In the event, the High Court ruled that the bond itself was illegal because the wrong form was used; the court quoted with approval an Indian textbook, Iyer, Code of Criminal Procedure (11th ed.) 179:

"In order to be enforceable a bail-bond must be in accordance with these forms. Otherwise the person executing the same incurs no legal liability by executing it."
for which he was arrested in the first place. For his arrest, or rather re-arrest, the court or magistrate may issue a warrant under section 300 C.C.P.

(ii) Pre-Trial Release and Custody Decisions:

Pre-trial release is basically a decision involving, first, the question whether the offence is bailable at all, and then the further question whether the particular accused ought to be released under the circumstances. While the first question is usually simple enough to answer, the second one can be problematic because it requires the application of various criteria to the specific situation and in the general context of considerations relative to the balance of interests between the individual and society. Not only must the authority deciding on the granting of bail decide whether there is any valid reason for refusing to grant bail, or other form of pre-trial release, but it must do so with due regard to the interests of the particular individual accused as well as those of society at large. This would seem to suggest two areas for consideration in this study: the factual basis of the decision on pre-trial release, and the relative rights of the accused as opposed to that of society; that is, whether the decision is an informed decision, whether there is a right to bail, and if so when does it arise and how can it be guaranteed. But first there is the setting in which these questions are tackled.

(i) The Setting:
Section 42 C.C.P. reads:72

"No person who has been arrested by a policeman or re-arrested under section 36 shall be discharged except on his own bond or on bail or under the special order of a Magistrate".

Thus, in any sustained criminal prosecution, an arrested person cannot be released from custody except on bail, or his own recognizance. The decision on pre-trial release may be made by the police, if the case falls within the ambit of section 287, by a magistrate during the investigation, on committal to trial by major court or at any stage before the trial. Different provisions and considerations apply to the custody-release decision at each stage of the proceedings.

According to section 120(1) C.C.P. the officer in charge of the police station must either release the accused under section 287 C.C.P. or forward him "quickly"73 to the nearest magistrate to take cognizance of the offence. The magistrate would then either authorize the continued detention of the accused in custody, release him on bail or on his own recognizance pending the final disposition of the case, or discharge him if he can see no sufficient ground to proceed with the prosecution.74

72. This section covers all arrests, whether with or without warrant, except perhaps where the warrant is directed to a private person, an extremely rare event. Even if it does not apply to such arrests, the warrant itself would require the person making the arrest to produce the arrestee before the magistrate.

73. See above pp.209 et seq on implications of this requirement etc.

74. See sections 139, 118(2) and 159(2) C.C.P., and Chapter 1 above on the various options open to the magistrate according to his view of the evidence.
Detention in custody, however, is subject to periodical review by the magistrate - the purpose no doubt being to keep its incidence and length to the minimum.

Section 120(2) provides that the magistrate, on the application of the police and the production of the Case Diary, may authorize the detention of the accused in custody "for a time not exceeding fifteen days in the whole and shall record his reasons for so doing in the Case Diary. A remand in custody may also be authorized at any subsequent appearance of the accused before the magistrate but it is always subject to the limit of fifteen days at a time."

The general rule is that the person to be remanded in custody must be brought before the magistrate in person before he can be so remanded. Section 10 of the Criminal Court Circular No. 27 reads:

"An accused must never be remanded in custody by a Magistrate for any period longer than 24 hours, unless that accused is in person before the Magistrate at the time of making the remand order. The only exception to this is that the Magistrate may make a remand order for a longer period in the case of an accused who has previously been in person before that Magistrate at the time of making a previous remand order, but who, at the time of the subsequent application for remand, is unable through illness to appear before the Magistrate."

75. The record of all police investigations, see Chapter 1 above.

76. Section 236 C.C.P. See also section 11 of the Criminal Court Circular No. 11.
Moreover, section 12 of this Circular requires that an accused remanded in custody must be remanded until a certain fixed day - to be entered in the special form - and not "until trial".

The purpose of the above provisions would seem to be to safeguard against unjustifiably long detention as well as the physical abuse of the accused by requiring that the accused must be brought before the magistrate at least once every fifteen days. If the procedure is followed in all cases and if the magistrate peruses the record and examines the accused before deciding on further remand in custody the purpose will no doubt be achieved. The indications are, unfortunately, that the procedure is not always complied with in that magistrates renew remand orders in the absence of the accused - in cases not falling within the ambit of the exception made in section 10 of the Circular - and they do so on the strength of the recommendation of the police after reading their summary of the investigation in the Case Diary.

In a Circular Letter critical of the "most unsatisfactory" standard of remand work, Mr. Justice A.M. Atbani, Judge of the High Court, said:

"...Remand should be granted only if the police succeed in making out a prima facie case for further investigation against the accused. The magistrate must scrutinize the reasons assigned for the application and satisfy himself that there are grounds for believing that the accusation against the person sent up for remand is well founded.

77. No. 28 in the Third Schedule to the C.C.P.

In my experience I noticed that the police are too often desirous of securing remand of the accused for the maximum period of 15 days. Magistrates must, therefore, be careful not to grant unnecessary long remands. The effect of limiting the period of remands to the minimum necessary is that the investigating officers would set about their work and complete the investigation as soon as possible and without unnecessary delay, having regard to the circumstances of the case. Further remands can, of course, be granted later if necessary, but subject to the same conditions as in the case of the first remand.

Under sub-section 2 of section 120 C.C.P. it is obligatory on a magistrate ordering the remand of an accused person to record the reasons for the order. Very few magistrates at present do so. In future this provision should be strictly adhered to.

Except in the case of illness, the accused must always be produced before the magistrate when a remand is asked for. The reasons for the proposed remand should then be explained to him and he should be asked if he desires to make any statement before the order of remand is made. The answer of the accused should then be recorded in the Case Diary."

As this Circular Letter emphasises, magistrates must take the utmost care and approach every application for renewal of a remand order critically and objectively. The need for the close supervision of the police in matters of remand is further underlined in a remarkable recent circular - the mere fact that it was found necessary to issue such a circular is extremely significant. Criminal Court Circular No. 61, issued 14/4/1973, may be translated as follows:

"It came to my knowledge that dates on warrants of commitment to prison on remand and until trial which are written in Arabic figures are sometimes interfered with without the knowledge of the authority issuing the warrant.

To curb this serious practice in future I direct that dates of remand should be entered in the appropriate forms in words and not in figures and Magistrates are required to observe this carefully before signing any such warrants."

The above described procedure applies to the pre-commitment stage only: an accused committed for trial by major court, if not released
on bail, may be committed to custody "until and during the trial".\textsuperscript{79} Criminal Court Circular No. 27 does not apply to the post-commitment stage.\textsuperscript{80} It does apply, however, in all cases of trial before a magistrate of the first, second and third class and, in cases triable by a major court, up to and until a committal order is made.\textsuperscript{81} Thus section 236 provides:

"(1) If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may if it thinks fit by order in writing stating the reasons therefor from time to time postpone or adjourn the same on such terms as it thinks fit for such times as it considers reasonable and may by a warrant remand the accused, if in custody. (2) Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time."

The reason for exempting cases triable by major court after the committal order is made appears to be the time lag between commitment and trial and the fact that the completion of the police investigation makes the dangers of abuse and interference by the accused much less likely to materialise. As the accused normally remains in custody for a long time awaiting trial, and as the police have no incentive - and perhaps no access because he

\textsuperscript{79} Section 172 C.C.P.
\textsuperscript{80} Section 16 of the Circular.
\textsuperscript{81} See Chapter 1 above on the differences between the various modes of trial and on committal proceedings.
is kept in the local prison and not in police custody - for interfering with the accused, there is no need to require review of the custody order every fortnight. Besides, as the investigation is over and new facts and considerations are unlikely to arise, such review would be pointless.

The form of the warrant of commitment to prison until trial reflects a degree of concern with limiting the length of custody awaiting trial by major court. The warrant requires the official in charge of the prison to detain the accused "until and during his trial and you should bring him before the Court with this warrant when required: provided that, if his trial has not commenced before the... day of... next you shall bring him before me with this warrant for an order as to his disposal." The date by which the accused must be produced before the magistrate if the trial has not commenced is to be "not more than three calendar months after the date of the warrant." 82

(ii) Length of Pre-trial Custody:

The guarantee of a speedy trial is a familiar common law principle, recognised and respected by the main jurisdictions; 83 yet it is very difficult to define its scope and precise implications. 84 On the one

82. No. 29 of the Third Schedule to the C.C.P.

83. The Habeas Corpus Act of 1679-31 Car. 2,c. 2; W. Blackstone, Commentaries, h38; the Sixth Amendment of the American Constitution, Dickey v. Florida, 398 U.S. 30 (1970); Renton and Brown, para. 7-27.

84. As the United States Supreme Court said in Beavers v. Haubert, 198 U.S. 77 (1905) at 87: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances".
hand, it is patently unfair to keep the accused under the shadow of a
criminal prosecution, even if he is not in custody, for any length of
time except as is absolutely necessary to prepare for the trial. On
the other hand, there are the limitations of manpower and other resources
under which the administration of criminal justice would have to operate:
there is the latent danger that inadequate judicial resources coupled
with strict time limits may lead to procedural "short-cutting". A
balance must, therefore, be maintained between speed and quality in the
criminal process. The "essential ingredient" of the guarantee has been
said to be "orderly expedition, and not mere speed".85

The main problems of schemes for the enforcement of the guarantee
or right to a speedy trial are the following: how to define a time limit
on delay that is flexible enough to take into account the great variety
in factual situations and circumstances and yet rigid enough to prompt
respect for the right by avoiding unnecessary delay. Even if such a
formula is found, there is the further question of consequences - what
should the sanction be for the violation of the right; does the
prosecution have to be responsible for the delay, how far is the accused's
conduct relevant, must the accused allege and prove that he was prejudiced
by the delay, can the right be waived, and when is it waived etc.?86

86. See generally Note, "The Right to a Speedy Trial", 57 Colum.L.Rev.
    (1957) 846; and Allen P. Rubine, "Speedy Trial Schemes and Criminal
In its study of the problem the American Bar Association recommended that a "defendant's right to a speedy trial should be expressed by rule or statute in terms of days or months running from a specified event. Certain periods of necessary delay should be excluded in computing the time for trial, and these should be specifically identified by rule or statute insofar as is practicable." In their specific recommendations on the commencement of the time, excluded periods etc., the American Bar Association attempted to strike the balance between flexibility and rigidity referred to above - taking into account such factors as cause of the delay and the conduct of the prosecution and defence. As to the consequences of denial of speedy trial, the Standards recommend that, first, if the defendant is not brought to trial within the time set, "as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offence charged and for any other offence required to be joined with that offence. Failure of the defendant or his counsel to move for discharge prior to trial or entry of a plea of guilty should constitute waiver of the right to speedy trial." The effect of a shorter time


88. Ibid. para. 2.2 and 2.3, respectively.

89. Ibid. para. 4.1. Rule 18(b) of the Federal Rules of Criminal Procedure, in contrast provide that the court may dismiss the charges against the accused if there is unnecessary delay in bringing him to trial.
limitation with respect to defendants awaiting trial in custody found in some jurisdictions - that is, shorter than the general time limitation should be to "only require release of such a defendant on his own recognizance" rather than bar the trial completely.\(^90\)

The compromise attitude necessary for drawing up a scheme for the protection of a right to speedy trial is apparent in the American Bar Association's model generally - fixed time limitation but subject to excluded periods - but it is best illustrated in the paragraphs on the consequences. While, on the one hand, the absolute bar to prosecution is required as a consequence to violation of the general time limitation; the failure to claim the benefit of the protection, on the other hand, is considered to be a waiver of the right. Again, though the distinction between waiting for trial in custody and out of custody may be recognised, in terms of a shorter time limitation for trying a defendant in custody, it may not, however, have the drastic consequence of barring the prosecution but only of mandatory pre-trial release.

The Scottish scheme for the prevention of undue delay - the one hundred and ten day rule - may be briefly described as follows.\(^91\) The scheme provides for a graduation of consequences in relation to the amount of delay. All time computations are made from the date of "commitment

\(^90\) Standards Relating to Speedy Trial, para. h.2 and p.h2.

\(^91\) See section 101 of the Criminal Procedure (Scotland) Act 1975; Renton and Brown, para. 7-27 to 7-30; and H.M.Adv. v. Bickerstaff, 1926 J.C. 65.
until liberated in due course of law" - that is, from the date of full committal and not from the date of arrest. 92 (1) An accused person who is in prison on a commitment for trial and is not served with an indictment within 60 days of such commitment may give notice to the public prosecutor that if he is not served with an indictment within 14 days, the prosecutor will be called upon to show cause before the High Court why he should not be released from prison. If no indictment is served, the court will ask the prosecutor to show cause why release should not be granted failing which the court may order the release of the accused within three days unless an indictment is served within that time. 93 In this situation, the prosecutor is given ample time and notice to serve the indictment; but if he fails to do so, the accused may be released from custody by the court, though he may be re-arrested and prosecuted for the same offence. The mechanism does apply pressure on the prosecutor to get on with the prosecution and trial as quickly as he can; and in the end may force him to abandon it altogether if he is not ready to pursue it effectively.

(2) If an accused has been served with an indictment and remains in custody for 80 days, "then, unless he is brought to trial and the trial concluded within 110 days of the date of being committed till liberated in due course of law, he shall be forthwith set at liberty and declared

93. Section 101(1) and (2) of the Criminal Procedure (Scotland) Act 1975.
for ever free from all questions or process for the crime with which he was charged."\(^9^4\)

(3) For an accused who has been committed to prison and then released, the total of pre-trial confinement should not exceed 110 days in all; and if his trial is not concluded "Before the expiry of the 110th day of confinement...he shall be forthwith set at liberty and declared for ever free from all questions or process for the crime for which he was committed."\(^9^5\)

The Scottish scheme is thus directed to the protection of the accused who is in custody awaiting trial and has nothing for the accused who is on pre-trial release.\(^9^6\) The scheme purports to limit the period one may spend in custody without receiving the indictment and the continuous as well as the intermittent period one may spend in custody awaiting trial. The sanction in the first case is release from custody, while in the second and third cases is the complete bar of the prosecution that is not concluded within the time limit.

The whole scheme, however, is subject to the overriding discretion of the High Court to extend the time limitation in all three situations where the delay is due to the illness of the accused or judge or juror,

\(^9^4\). Section 101(3).

\(^9^5\). Section 101(4).

\(^9^6\). As observed in Renton and Brown, para. 7-30, the section"...applies only to prevent undue detention in custody awaiting trial:"
the absence or illness of any necessary witness or any other sufficient reason for which the prosecutor is not responsible. 97

A significant step in the direction of protecting the accused against prolonged pre-trial custody in the Sudan was taken in the 197h revision of the Code. Sub-section (3) was added to section 236; it may be translated as follows:

"Provided that if the time the accused spent in custody on remand reaches six months or half the maximum term of imprisonment prescribed for the offence of which he is accused, whichever is less, no Magistrate shall remand such an accused without the written permission of the President of the Supreme Court."

Presumably, if the permission of the President of the Supreme Court is not forthcoming, the accused would have to be released from custody; there is no exemption from prosecution however long pre-trial custody may have been.

Sub-section (3) of section 236 is a significant first step in the right direction; it has a long way to go as an effective device for the protection of the right to a speedy trial, a right provided for in the Permanent Constitution of 1973. 98 It is too early, however, to say how

97. Section 101(5) of the Criminal Procedure (Scotland) Act 1975. In H.M.Adv. v. McTavish, 197h S.L.T. 2h6, the High Court refused to allow the Crown's petition for an extension of time to enable them to carry out tests which might disclose the possibility of a more serious charge being preferred against the accused. It was held that no sufficient ground had been shown for extending the period of 110 days.

98. Article 61 of the Permanent Constitution of the Sudan reads:

"An accused person shall be brought for trial without delay and shall have the right of fair trial in accordance with the legal process."
it will develop. One would suggest that though it is true that prime concern should be with the accused in custody, any accused is entitled to a speedy trial and this right must find some expression in the rules of criminal procedure. With respect to the accused in custody, one would agree with the sub-section that the whole period in custody should be taken into account and not only the period after the accused has been committed for trial because it is the unfairness of pre-conviction custody that distinguishes him from an accused on pre-trial release. The provision could certainly do with some statement of the considerations, relative to culpability for the delay, which will be taken into account by the President of Supreme Court when deciding on applications for permission to remand in custody beyond the time limit. As can be seen from both the American and Scottish models referred to above, some allowance must be made for unavoidable delay or that for which the accused himself is responsible etc. The underlying assumption of sub-section (3) is that the President of the Supreme Court can assess the reasons for the delay; but the prosecution and magistrate too need to know beforehand what is an excusable delay.

The need to obtain permission for custody in excess of the allowed maximum appears to be the only sanction for delay; but the whole purpose can easily be defeated if such permission is granted as a matter of course - and considering the workload of the President of the Supreme Court, he is unlikely to be able to give such applications the attention they deserve and may very well tend to grant them too easily. Barring the prosecution, however, is too drastic a sanction and should not be applied until after
careful consideration of the usual reasons for delay and the construction of a formula allowing for exceptions and other devices to avoid defeating the public interest.

The best way of avoiding the hardships and unfairness of pre-trial custody is to increase pre-trial release; the better way of doing that is to have more information about the subject of the release and custody decision – the accused.

(iii) An Informed Decision:

It is common human experience that some basic information on the subject-matter and a few facts on the relative and relevant considerations are essential prerequisites to intelligent decision-making. Release and custody decisions in the Sudan are extremely inadequate by this criteria. Being, as it were, largely a leap in the dark, they are, as can well be expected, on the conservative side: one is unlikely to release an accused one knows nothing about, it is safer to deny release whenever is possible. Moreover, the little information available to the court comes from the police, with the unrepresented and over-awed accused completely helpless to object. It is therefore a matter of the utmost urgency that a fact-finding machinery be established; the court must have access to informations about the accused and his social background in order to be able to decide on any of the aspects of pre-trial release: bail or own recognizance, are sureties needed and if so how many, what amount should be set in bail etc.?
The need for information has been realised in other common law jurisdictions and schemes have been established to provide the courts with relevant and verified data for the release and custody decisions. The United States is leading in this field with the pioneering Manhattan Bail Project.\textsuperscript{99} The Project was an attempt to break away from the traditional reliance upon bail as financial security and to develop a new system based on the hypothesis that the stability of a defendant's residence in a town is a better indicator of the likelihood of his appearance than his ability to raise bail:

"The main hypothesis of the experiment is that more persons can successfully be released on parole if verified information concerning their character and roots in the community is available to the court at the time of bail determination."\textsuperscript{100}

To measure or quantify this element of social stability a scale was developed. The scheme works as follows:\textsuperscript{101}

An interviewer first interviews the accused\textsuperscript{102} using a set questionnaire\textsuperscript{103} designed to elicit the relevant information about the


\textsuperscript{100}. Ibid. 68. The scheme was constructed with reference to the only recognised consideration in the United States: the likelihood of appearance.

\textsuperscript{101}. Ibid. 72-74.

\textsuperscript{102}. Those charged with certain offences or having a previous record of convictions for certain offences were excluded - ibid. 72.

\textsuperscript{103}. For a reproduction of the questionnaire, see Appendix I, ibid. 93.
accused on such matters as residence, employment, relatives in the city, previous convictions and residence in the city with a view of assessing whether the accused may be a good risk for release on his own recognizance. 104 The information obtained in the questionnaire will be verified, as far as possible, by telephone, in person and by field investigation if necessary. The staff review the case in order to determine whether to recommend that the defendant be released on his own recognizance without posting money bail. 105

Thus the Project devised a scale for identifying the "good risks" so that their release on their own recognizance could be recommended; the assumption being that one with a good employment record, of a fixed and known abode, with relatives in the city - that is to say, one with roots in the community - is more likely to honour an obligation to attend as and when required even when such obligation is not sanctioned by the threat of financial loss to himself or his surety. The Project did no more than recognize the relevant factors, and devise means of ascertaining the facts and verifying them, and recommending to the authority making the decision according their prognosis on the available data. Though it offered wider release to those identified, or rather prognosticated, as "good risks", the Project could not help the "bad risks" except in so far

104. This mode of pre-trial release is called parole in New York, ibid. 68.
105. If the accused satisfies any one of the five criteria, or partially satisfies at least two of them, he is recommended for release. It was found that the interview took about fifteen minutes and verification about an hour.
as it provided relevant and verified information for fair and intelligent decision-making.

The Project, perhaps not surprisingly, was an instantly huge success: within one year of the publication of its findings about fifty similar projects were initiated in the United States; the Canadian Toronto Bail Project, also modelled after the Manhattan Bail Project, demonstrated the strength of the appeal of the idea, political boundaries notwithstanding. Nonetheless, the Project had its critics too in that it is not very helpful to the "bad risks" though they need help most — those released under the Project are most likely to have been released anyway. In so far as the criteria used by the Project reflect middle-class values, it will never help the poor and the young who are least likely to pass its test. It is said that research has verified the hypothesis that defendants with good community ties would not abscond if released on bail, but that does not prove the opposite: that defendants without good community ties would abscond if released.

These criticisms appear to say that the Project does not go far enough in increasing the availability of pre-trial release; this may well be true and in time new ideas may emerge and prove their usefulness in that respect, but that will not derogate from the value of the pioneering Project.

106. Frank N. Williams, "The Toronto Bail Project", 6 Osgoode Hall L.J. (1968) 316.
Law reform in general, and of the law of criminal procedure in particular, must keep its feet firmly on the ground or else it will be counterproductive. If reform is undertaken without experimentation and deliberation, it is most likely to fail and hinder all legitimate reform in the process as people will resist all reform for fear of repeating the failure.

With reference to the Sudan, one is in favour of the concept of the Manhattan Bail Project, but it will be foolhardy to attempt to copy it directly and in detail. In view of the vast social and cultural differences between the Sudan and the United States, it would appear that the relevant factors may not have the same significance in both contexts. It would therefore be most important for extensive pilot research to be made in the Sudan to determine the relevant factors and construct the appropriate scale. The points system developed and used by the original Manhattan Bail Project took five years of research to develop. It may take a similar time to develop a Sudanese scheme, but any work directed towards increasing the information about the accused available to the authority deciding on bail would be welcome in that it is bound to improve the quality of the bail decision-making and increase the rationality and fairness of the whole process.

110. Williams, "The Toronto Bail Project", supra, 319.

There is often reference to a "right to bail"; the question is whether this is a positive legal right in the sense of being one whose violation can be prevented or remedied by some legal procedure, or is merely an expression of the sentiment that pre-trial release ought to be as widely available as possible. It is true that anyone satisfying the conditions of pre-trial release set by the particular legal system will be set free pending his trial and the final determination of his guilt. Given that the conditions have been satisfied one can be said to have a right to release - a right that is enforceable by the opportunity to appeal and to re-apply for release. But the conditions of pre-trial release are usually so vaguely stated and so subjective that it cannot, in the vast majority of cases, be shown that they are in fact satisfied in the particular case. As the decision is concerned with the prediction of human conduct, there will always be room for argument.

The Sudanese practice on pre-trial release can be summarised as follows:

1. Anyone arrested for an offence punishable with fine only is entitled, as of right, to release on bail; but he may be released on his own recognizance.

112. Article 67 of the Permanent Constitution of the Sudan reads:
"Release on bail is a right in cases prescribed by law and the sum demanded for release on bail shall not be excessive."

113. Sections 287A, 287 and 288 C.C.P., respectively. See above at
(ii) Anyone arrested for an offence punishable with imprisonment for a term which may extend to ten years is entitled to release on bail, and may be on his own recognizance, except where such release would prejudice the proper investigation of the offence or create a serious risk of the accused absconding.

(iii) Anyone arrested for an offence punishable with imprisonment for more than ten years is not entitled to release as of right, but he may be released if his release would neither prejudice the proper investigation of the offence nor create a risk of absconding or if the evidence against him is not strong enough to create a probability of conviction.

(iv) Anyone arrested for an offence punishable with death may not be released.

It will be observed that only in the first situation is there a right to release on bail if the money bail and necessary sureties can be found to the satisfaction of the authority - there is a right to bail and not a right to release. In the second and third situations, the factors that may cause the authority to decide against release are so general and vague that it is very difficult to predict in any given case whether release will be allowed, or to contradict a particular custody or release decision. Attempts such as that of the Manhattan Bail Project may help in rendering the relevant factors more objective and easier to assess and review, but some factors such as the likelihood of tampering with the evidence, defy objective assessment. Even with such factors as likelihood of appearance, the point score system is merely a prediction that one person is more
likely to appear than another; but it is a statistically acceptable prediction.\textsuperscript{114} In both the second and third situations pre-trial release is discretionary; but it is more likely to be granted in the second situation than in the third, and it is more likely to be on bail than on the accused's own recognizance. In the fourth situation, there is no chance of release whatsoever.

Pre-trial release can always be denied, even where there is a right to bail as under (1) above, by setting bail at too high an amount or demanding sureties the accused is known to be unable to produce. That is why excessive bail is prescribed by constitutional and statutory provisions;\textsuperscript{115} the problem, however, is one of finding the right operational definition of the term "excessive bail".

In the context of the American Constitution's Eighth Amendment guarantee against excessive bail,\textsuperscript{116} the Supreme Court of the United States observed that requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. "Bail set at a figure higher than an amount reasonably calculated to fulfil this purpose is 'excessive' under the Eighth


\textsuperscript{115} Article 67 of the Permanent Constitution, quoted above, and section 296(1) C.C.P.

\textsuperscript{116} It reads: "Excessive bail shall not be required..."
Amendment". 117 In the Federal Rules of Criminal Procedure, the matter is dealt with as follows: 118

"Amount. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offence charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

Thus, there is no general rule; the amount has to be fixed in the light of all the circumstances of the case. The amount set initially can be revised and reduced if found to be excessive; but the question of reasonable and excessive bail amounts remains a source of difficulty and uncertainty in this area - an angle through which the attitudes of the authorities making release and custody decisions can be reflected in a way that makes it harder to conclude that there is ever a legal right to bail in the Sudan.

(5) Alternatives to Bail:

The American practice has been criticized for its tendency "to be all black or all white and to ignore ameliorating middle-ground alternatives." 119 This would be true of any system that relied exclusively


on the two extremes of release upon purchase of a bond without any formal
police or other supervision during what may be a prolonged pre-trial
period on the one hand, and total imprisonment on the other. "The one
extreme subjects society to unjustifiable risks, the other severely
penalizes the unconvicted detainee." There should be, therefore,
variations on the basic models of pre-trial release in order to increase
the incidence of release while at the same time safeguarding against its
possible adverse consequences.

The premise underlying the bail concept itself is that the accused,
one released prior to his trial, will not attend subsequently without
pecuniary compulsion. It is true that common human experience indicates
that a person who possesses money may modify his conduct under the threat
of losing it; but the converse, however, does not necessarily follow:
that without such threat there is no assurance of attendance. It may,
therefore, be worthwhile to explore possible alternative ways of obtaining
assurance that the accused, if released prior to his trial, will appear
as and when required.

The most obvious way of reducing pre-trial custody is to make less

120. Ibid. 300.
121. See Thomson Committee Report, Criminal Procedure in Scotland, para.
11.11 et seq.
(1966) at 121.
arrests. The question of alternatives to arrest was considered above; a warning note, however, should be sounded here. A clear distinction must be maintained between alternatives to arrest and post-arrest procedure. For example, if street citation is used,\textsuperscript{123} it should be made clear whether it is used as an alternative to arrest, so that no arrest can be said to have taken place, or as post-arrest procedure, in effect pre-trial release by the policeman making the arrest. Without this distinction both parties to the encounter would be confused as to their respective rights and duties; if an arrest is being made, for example, the policeman may use force to effect it, he is authorised to make a search incident to arrest etc.\textsuperscript{124}

An alternative to bail as such is pre-trial release on the accused's own recognizance. The wider use of this mode of release should be encouraged because it can effect the release of any accused person regardless of his ability to raise the bail amount or provide sufficient sureties for the sum. The problem is how to ensure the attendance of the accused without the threat of financial loss. As indicated above, some accused persons may attend without this threat, but no one is suggesting that all accused persons will attend without the threat of financial loss; and

\textsuperscript{123} As suggested in the American Bar Association's Standards Relating to Pretrial Release, para. 2.1, see pp.10 and 31-33.

while it may be unfair to the accused who would appear without money bail to deny him release because of his lack of financial resources, it would be equally unfair to society to release an accused who would not appear without money bail on his own recognizance. The question is then how to distinguish one type from the other. An information gathering project of the type described above would be most helpful in this respect.

A sustained information gathering service, however, would be expensive to run, with all the interviews and follow-ups needed to obtain and verify the information and maintain the general credibility of the system. Besides, there is the risk element involved in all prediction work. It may be possible to cut on the cost and increase the reliability of release on this procedure if the initial information gathered is not extensive while the release is made subject to conditions designed to increase the likelihood of appearance and achieve any other purpose of pre-trial custody. Such conditions may include any of the following conditions or any necessary combination of them:

1. Placement in the custody of a designated person or organisation agreeing to assume responsibility for him.

125. Such as the need to interview the accused later on and the need to protect the victim.

(ii) Restrictions on the accused’s travel, association or place of abode.
(iii) Supervision by a probation officer.
(iv) Return to custody every night after daylight hours.
(v) Any other condition reasonably believed to deter escape, for example, withholding the accused’s passport.

Release on the accused’s own recognizance can also be supported by attaching criminal sanctions to wilful nonappearance. 127

On the other hand, street citation - subject to the point made above about clarifying the nature of the "stop" involved in such citations - would reduce custody to a minimum. 128 The imposition of any of the conditions mentioned above together with criminal sanctions for wilful nonappearance are again helpful devices in supporting this immediate release. As street citation allows for no consultation, and its responsibility lies with the policeman involved in the street encounter, he would be encouraged to make such releases more often with the support

127. Several jurisdictions in the United States and Canada have already done so, see Foote, "Introduction: The Comparative Study of Conditional Release", supra 301. As indicated above, p. 296 note 62 the Thomson Committee in Scotland recommended that failing to appear without reasonable cause or non-compliance with any of the conditions of pre-trial release should be an offence. See Thomson Committee Report, para. 11.20. In para. 11.21 the Committee recommended that breach of a condition or reasonable grounds for believing that breach of a condition is likely should justify arrest without a warrant.

128. See generally on this mode of release Berger, "Police Field Citations in New Haven", supra; and Jeffrey M. Allen, "Pretrial Release Under California Penal Code Section 853.6: An Examination of Citation Release", 60 Calif.L.Rev. (1972) 1339.
of conditions and penal sanction for default.

Even where money bail is regarded as indispensable, it can be more readily available by keeping its amount to a minimum, requiring sureties less often and accepting those presented by the accused more readily. Any weakness occasioned by such relaxations in the bail requirements can be supplemented by adding conditions beside the money bail such as restrictions on residence, requiring regular reporting to the police station, surrender of passport etc. 129

The problems of pre-trial custody and release can all be seen as manifestations of the importance of the human factor in the administration of criminal justice. The attitudes of the persons making the decisions can make all the difference between custody and release. The conflict of interest between the accused and society at large, the fact that pre-trial release may or may not be justified depending on all the circumstances of the case, makes it impossible to set any hard and fast rules. Yet, there is a very strong need to maximize pre-trial

129. The English Criminal Justice Act 1967, section 21, now authorises the imposition of conditions "appearing to the court to be likely to result in his [the accused's] appearance at the time and place required or to be necessary in the interest of justice or for the prevention of crime." In Scotland, the Thomson Committee recommended recently the imposition of such conditions as surrender of passports, staying at a certain address, refraining from visiting a named witness; see their report: Criminal Procedure in Scotland, para. 11.19.
release, and a general desirability of certainty in the practice. The right to pre-trial release, and not merely the right to bail, needs to be guaranteed more effectively, yet it must not be granted in situations where release would defeat the ends of justice. At the end of the day, any formula or rule on either horn of the dilemma would depend for its effectiveness and balanced application on the motivation and attitudes of the person making the custody and release decisions.
Chapter 4

Search and Seizure

Implements, fruits of the crime and other items of evidence are normally, naturally enough, hidden by the culprit in a bid to avoid detection. They have to be sought out, discovered and seized, often from private places and from about the person of the suspect. Guilt is yet to be proved, however, although the facts and circumstances may appear to implicate or incriminate the suspect or accused. Care must be taken, in defining, exercising and controlling police powers of search and seizure, not only that there should be no opportunity for abuse but also no opportunity for charges or suspicion of abuse. Even the guilty have their rights: to be convicted only according to prescribed rules of procedure and evidence, which are, in an enlightened and democratic society, respectful of their human dignity. More

1. Provisions, such as sections 73 and 74 C.C.P., for the presence of witnesses and issue of receipts in search and seizure situations are designed for the dual purpose of confirming that the police did not "plant" the evidence or steal anything else and to refute or disprove any such charges or suspicions. Justice must not only be done, but also be seen to be done.

2. Section 3 C.C.P., added in 1974, reads: "In the application of this Code it shall be observed that it is the right of every accused to receive a fair and speedy trial and that every accused is innocent until proven guilty beyond reasonable doubt and that no person may be punished more severely than is prescribed by the law in force at the time of the commission of the offence and that no person may be subjected to brutal or inhuman treatment or punishment." See also Articles 62, 63 and 69 to 72 of the Permanent Constitution of the Sudan, 1973.
specifically, one has a right not to be searched except under circumstances, in a manner and at a time specified by the law. Deferring for subsequent consideration the question of enforcement - policing the police - we attempt to discover, first, when and how a search and seizure may be made.

The common law aversion to wide search powers appears to have developed, to a large extent, with the long and painful struggle for the fundamental liberties of speech and expression in the curtailment of which wide search powers were used. A search is also regarded as an intrusion on the privacy of the individual, sometimes even an affront, that needs to be justified, limited and closely scrutinized. The emphasis on privacy rather than property rights is more pronounced in American thinking; it has a place elsewhere too. In the 1950 Sudanese Case of Sudan Government v. Atta Ahmed Hussein, Hays J., said, inter alia: "... the power of search is a serious invasion of the right of privacy, and the safeguards of the Code must be insisted upon". In English law concern is with property rights, presumably protected in the interest


6. Lord Denning, M.R., in Chani v. Jones [1970] 1 Q.B. 693 at 706 said: "the common law does not permit police officers, or anyone else, to ransack anyone's house, or to search for papers or articles therein, or to search his person, simply to see if he may have committed some crime or other. If police officers should do so, they would be guilty of a trespass".
of privacy and enjoyment of property etc. 7

Concern with the circumscription of the powers of search and seizure - one of the powers of the executive that is most liable to abuse - resulted in the development of several limitations and prescriptions on when and where a search may be made, how it is to be conducted - time and means of entry and intensity and scope of the search - and what may be seized. It is in the light of the current common law thinking on these issues that the Sudanese provisions and practice are considered.

1. The Powers of Search:

These powers may be conveniently treated under four grounds of search: in execution of a search warrant, authorised by lawful arrest, urgency and consent. 8 All four grounds are based either on common law or statutory authority - statute having been used to supplement deficiencies in the common law powers as and when they are discovered

(1) Search Warrants:

(a) The Basic Procedure:

The English common law position on the issue of search warrants

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7. As Leigh observed, whatever protection of privacy there is in English law, it is incidental to the protection "accorded to the human person, and to the integrity of property". Thus in England, in contrast to the United States, there is "no tort and therefore no redress" in the absence of a physical invasion of private property. See Leigh, Police Powers in England and Wales, 171.

8. These are to be distinguished from powers of entry. For a view on the "entry" aspect of a search see Ibid. 172-75.
is stated by Halsbury's Laws of England to be as follows:9

"A Justice of the peace has at common law the power, on an information being sworn before him alleging a suspicion that larceny has been committed, to issue a search warrant authorising a search in any house, etc., in the day-time for stolen goods and the arrest of any person found in possession of such goods....

Except in the case of stolen goods, there is no power at common law to issue a warrant authorising the search of a house; but provision is made by statute for the issue of a search warrant in certain specified cases".

The absence of a general common law power to issue search warrants is striking, it is alleged to lead to the result that "the police officer is frequently left without power to take necessary and reasonable steps for the investigation even of serious offences...."10 In the absence of a statute authorizing the issue of "a search warrant for a projected purpose (other than larceny), the policeman is powerless, that is why, for example, he has been unable lawfully, with or without a warrant, to search premises for the body of a murder victim or for a murder weapon".11 It is therefore probably true to say that the police "have to rely, it would seem, on a blend of legality and bluff: though the


remarkable dearth of case-law suggests that the blend has not wholly been without advantage to them.\(^{12}\)

The success of the "blend of legality and bluff" may be due largely to the "somewhat haphazard and illogical collection"\(^{13}\) of statutes that supplement the common law in this field;\(^{11}\) the resultant uncertainty of the "powers" of search works to the advantage of the police. Commentators, however, point out the dangers of this uncertainty and call for the simplification and rationalization of the police powers of search and seizure.\(^{15}\)

Multiplicity of statutory provisions notwithstanding, the essential procedure for issuing search warrants "is basically the same".\(^{16}\) The magistrate\(^{17}\) is empowered to issue warrants, normally on sworn information

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17. Normally; the power is sometimes restricted to High Court Judges only, see, for example, section 2(5), Public Order Act 1936.
"that evidence of the relevant kind is believed to be on certain premises".\textsuperscript{18} The actual issue of the warrant, however, is left to the discretion of the magistrate.\textsuperscript{19} A peculiar feature of English law, however, is that the power to issue search warrants is sometimes conferred upon senior police officers, albeit in a limited number of statutes,\textsuperscript{20} obviously in the interest of speedy authorization of search.

In Scotland, the position is basically the same, a common law power to issue search warrants supplemented by statute. It seems, however, that the Scottish common law power to issue search warrants is very much wider than its English counterpart.\textsuperscript{21} It appears that a sheriff (magistrate) in Scotland can issue a warrant to search for anything anywhere. In the language of the Thomson Committee Report: "Warrants to search may be either to search named premises for evidence of a crime or alternatively, in association with an arrest, to search a named person, his premises, his repositories and any place where he may be found".\textsuperscript{22} But in fact there are other grounds for search beside

\begin{quote}
\textsuperscript{19} See, for example, Theft Act 1968, section 26(1) and the Obscene Publications Act 1959, section 3.
\textsuperscript{20} See, for example, The Explosives Act 1875, section 73; the Official Secrets Act 1911, section 9(2); and Theft Act 1968, section 26(2). See Thomas, "The Law of Search and Seizure: Further Grounds for Rationalization", 9-11.
\textsuperscript{21} See generally, Renton and Brown, para. 5-24 to 5-31.
\textsuperscript{22} Criminal Procedure in Scotland (Second Report) Cmd. 6218 (1975), para. 4.19.
\end{quote}
warrant or statutory authority: incident to lawful arrest, urgency and consent.

In the United States, on the other hand, the prime concern is with conformity with constitutional criteria. The Fourth Amendment to the American Constitution guarantees the people the right "to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures...." Every search and seizure would thus have to be "reasonable" to be lawful - or rather it would be illegal if it was found to be "unreasonable".

It is obvious that a search and seizure can be reasonable regardless of the mode in which the power of search is conferred; yet the preference of the American appellate courts is for the search warrant mode of authorization. They "commonly assert that searches ought, whenever possible, to be conducted with a search warrant." The rationale of this preference was expressed in McDonald v. United States as follows:

"We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to

23. Emphasis supplied.

24. Though the Amendment proceeds to specify the required procedure for granting warrants, it is clear that that is not exhaustive of the grounds for a power of search: any reasonable power of search is in conformity with the Constitution.

shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals .... We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.  

(b) Judicial Control:

The premise of this statement of principle is mocked in practice by the perfunctory manner in which arrest and search warrants are often issued.  

The reasons may not be hard to find with lay magistrates handling large caseloads in limited judicial time of which considering warrant applications is only a part. The fact remains, however, that it is misleading to speak of the protection afforded by the warrant procedure when in fact warrants are issued for the asking. This issue is central to the whole theory of the protection of individual liberties and privacy through the requirement of a warrant to be issued by a magistrate. If warrants are granted as a matter of course, then the decision to search, and invade someone's privacy, is with the executive.

26. 335 U.S. 451 (1948) at 455-56. See also La Fave, Arrest, 502.


officer who applies for the warrant and not with the judicial officer who
grants it. In such a case, the procedure would serve no purpose except
that of delay and duplication. The matter was considered in the recent
Thomson Committee Report on Criminal Procedure in Scotland in connection
with warrants to arrest: that in the majority of cases the sheriff
merely acts as a rubber stamp when granting warrants. The criticism
was rejected, however, in the context of the Scottish procedure on the
ground that "procurators fiscal as public officials can be trusted to act
responsibly". In other words, the decision to apply for a warrant is
made by professional legally trained public prosecutors who will request
a warrant "only where the case merited it". The underlying assumption
in the Report is that whatever protection a warrant procedure is capable
of affording the individual is forthcoming so long as the issue of
warrants is effectively controlled by legally qualified and independent
officers.

One would agree with this conclusion; the issue of a search warrant
must be entrusted to some authority other than the police if it is to be
required at all. In this respect one would respectfully disagree with
Mr. Thomas' view when he said:

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30. Ibid. para. l.09.
31. Ibid. para. l.07.
"On a superficial view, it might be argued that the necessity to obtain the magistrate's authority provides little effective check on possible abuse of power, as in practice applications for search warrants by police officers are very rarely refused. However, it is equally reasonable to draw from this fact the inference that the safeguard is effective, not in distinguishing between proper and improper applications, but in discouraging the investigator from making an application which cannot be justified". 32

It is true, though extremely unlikely, that police applications for search warrants are always granted because they are always justified. It is equally true, and very much more likely, that some of them may not be justified at all. As police behaviour is, presumably, rational behaviour, it responds to operational risks in the same way as other human behaviour does: the smaller the risk, the greater the prize, the more often will the gamble be taken. Thus, in the sphere of application for search warrants, if the police were to know that their applications are not closely scrutinised, they would tend to apply more often on weaker grounds in the hope that it will be granted. In other words the whole procedure fails to discourage "the investigator from making an application which cannot be justified", because the investigator knows that he will not be called upon to justify his application.

Warrant applications, therefore, must be closely scrutinised if the system as a whole is to retain its credibility in discouraging the speculative application and thus fulfil its function of ensuring

that there is good cause for invading the privacy of any individual.

Tightening the warrant procedure has to be balanced with tightening and closer supervision of all other grounds of search or else the police will simply resort to them and avoid having to justify an application for a warrant. It is said that there is "an inherent and basically insoluble inconsistency between improvement of the warrant as a safeguard against abuse and encouragement of its use". The tighter and stricter the warrant procedure gets - i.e. closer scrutiny by neutral magistrates - the more difficult and time-consuming obtaining a warrant becomes, the stronger the incentive for the police to resort to other means of making a search. Those other means must not be made much easier than the warrant procedure or else it would be completely redundant. Equal insistence on the showing of good cause for the invasion of privacy and other liberties must be shown no matter which ground of search is employed.

(c) Evidential Support:

Due to the operation of the exclusionary rule, it would seem, American law is highly developed on many questions relative to lawful

search. One such question relevant to the issue of search warrants is that of the evidential support for an application for a search warrant. In the language of the Fourth Amendment itself:

"...no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".34

"Probable cause" has been interpreted as personal knowledge or reasonably trustworthy reports of facts that are sufficient to warrant a reasonably cautious man in believing that an offence has been committed or is being committed.35 In United States v. Ventresca, Mr. Justice Goldberg, delivering the opinion of the Court, explained:

"While a warrant may issue only upon a finding of 'probable cause', this Court has long held that the term 'probable cause'... means less than evidence which would justify condemnation;... and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial...

These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract... affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion..."36

The controversy continues as to sufficiency of evidence in support of an affidavit;37 it also branches into new fields.38 Its impact can

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34. Emphasis supplied. The implications of the latter part of the Amendment is considered below.


37. See, for example, Spinelli v. United States, 393 U.S. 110 (1969).

38. Such as whether and to what extent may a defendant go beyond the face of an affidavit to challenge the accuracy of the allegations, i.e. challenge the validity as opposed to the sufficiency of the allegations. See Steven M. Kipperman, "Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence", 8 Harv. L. Rev. (1971) 825.
be appreciated with reference to the valuable operational technique of the "informant's tip" on which police action is so frequently based. In accordance with its constitutional mandate the Supreme Court devised a two-fold test for the issue of search warrants on information provided by an informant. In *Aguilar v. Texas* the Court sanctioned the use of informants' tips and held that the identity of the informant need not be disclosed but required that:

"the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant ... was 'credible' or his information 'reliable'".39

In other words, the judicial authority issuing the warrant must be satisfied as to how the informer came to know - that is the basis of his knowledge - and why he should be believed - that is the standard of his reliability. The second arm of the test would be satisfied, it has been observed, either if the informant is "credible", for example, he has provided truthful tips in the past - or if the information in hand is "reliable" - for example, corroborated by independent investigation.40

39. 378 U.S. 108 at 111 (1964) per Mr. Justice Goldberg delivering the opinion of the Court. An informant's tip may also provide sufficient probable cause for the police to act without a warrant; see *Adams v. Williams*, 407 U.S. 133 (1972).

In contrast to the American approach, search warrant applications in England are taken at face value. According to a leading English author the warrant procedure "can only be effective in terms of enforcement if warrants are granted regularly on the basis of the officer's sworn information without further inquiry". English law "does not require an onerous evidential test to be satisfied - in most cases a warrant may be issued on reasonable ground for suspicion - and for the magistrate to require the officer to produce much in the way of evidence would be to set a higher standard than the law requires". Presumably magistrates develop their own criteria and "sense" whether the application ought to be granted or rejected. These criteria are not articulated authoritatively, and they are not subject to review by other or higher authority anyway: the grant or denial of a warrant is in the absolute discretion of the magistrate.

The American approach may be criticised as sometimes excessive, a consequence of the exclusionary rule: if a search warrant is shown not to be supported by probable cause, the search becomes illegal and all evidence seized as a result is rendered inadmissible. The English approach is also unsatisfactory: there must be some guidance as to when

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a warrant ought to be granted, in the interest of both police and accused persons. It goes without saying that the discretion to grant a search warrant must be exercised judicially by magistrates. Though it is true that outwith an absolute exclusionary rule, there is no incentive to challenge a search warrant and no occasion to review its factual basis, it may help the magistrates themselves to have the criteria for the issue of search warrants articulated. This is also relevant to the above question of degree of scrutiny of warrant applications by magistrates. If they are to examine such applications closely to determine whether there is good cause for invading the privacy of the individual concerned they must do so against some understanding of what is a "good cause".

There is no doubt that each magistrate has some understanding of the terms his own judgment as to what is reasonable and proper - a judgment as to the proportionate importance of individual rights such as privacy and integrity of the person etc. and the need of society at large to apprehend and punish offenders. This is the basic problem running through the whole body of criminal procedure. Without doubting the commonsense and reasonableness of the judgment of any magistrate on this balance, it is obvious that there is a need to bring it into the open and have it evaluated against that of others. Nothing but advantage can come out of airing views and debating them respecting such a vital area: each magistrate is then either confirmed in his proper balance or guided into one so that his future exercise of his discretion is in conformity with the consensus of opinion on the matter as much as possible. It must be true, and it must be made clear to the police, that it makes
very little difference, if at all, to which magistrate they take their application for a warrant.

(d) Sudanese Practice:

In the light of the above remarks we turn now to consider the position in the Sudan. To appreciate the scope of the power of search under a warrant in the Sudan the provisions of the C.C.P. under which such a warrant is issued should be quoted first:

Section 69 C.C.P. reads:

"Where for any reason it appears to a Court or Magistrate that it is impossible or inadvisable to proceed under the last preceding section or that a general search or inspection would further the purposes of any investigation, inquiry, trial or other proceeding under this Code, the Court or Magistrate may issue a search-warrant authorising the person to whom it is addressed to search or inspect generally or in the place or places mentioned in the warrant for any document or thing specified or for any purpose described in the warrant and to seize any such document or thing and dispose of it in accordance with the terms of the warrant."

Section 70 C.C.P. authorizes an officer in charge of a police station making an investigation under the C.C.P. to apply for a search warrant to any court or magistrate within the local limits of whose jurisdiction the police station is situated. Section 69 itself does not

43. Section 68 provides for the issue of summons to produce any document or other thing. Such summons may be issued by a police officer in charge of a police station as well as by a court of magistrate.

44. For the form of a search warrant, see Form No. 10, Third Schedule to the C.C.P.
appear to be restrictive in this respect; it seems that a warrant may be issued by a magistrate on his own motion or on the application of a private person. In terms of section 69, a warrant may be addressed to any person, even a private person, for execution. A warrant, however, would have to be executed by the person to whom it was addressed and no other.

The criterion of legality of search in the Sudan is the warrant itself, there is no constitutional standard to be observed or fundamental and guaranteed rights to be respected. Certainly, Article 43 of the Permanent Constitution of the Sudan provides for a protection against illegal searches, but it is qualified out of existence as a constitutional guarantee. It reads:

"Dwellings are inviolable and they shall not be entered or searched without the permission of their occupants, except in the cases, and in the manner, prescribed by law".

Thus, it constitutionalizes all that is legal according not only to the present law, but also to any law that may be passed in future. No guidance can be found in the constitutional provision with respect to the question of limitation of the power of search. The authority to issue a search warrant appears to be in the absolute discretion of the magistrate and the warrant defines the power of search. A search warrant may be issued for "general search or inspection" and "for any purpose described in the warrant and to seize any such document or thing".

45. Section 93(1)(c) of the Indian C.C.P., regarded with great authority in the Sudan, also authorise the issue of warrants for "general search or inspection".
Unfortunately, it is not possible to rely on police self-restraint, public alertness and the diligence of the magistracy to counter the mischief of wide statutory powers in the Sudan.\(^6\) The public are ignorant of their rights, disorganised and politically undeveloped, the issue of search warrants is in fact perfunctory in the extreme and the police know it to be so.\(^7\) The wide terms of section 69, therefore, may be unsatisfactory because they leave too much discretion to the magistrates in the issue of search warrants and because that discretion is not exercised properly in practice. But it is difficult to find the right formula: balancing the need to have a power comprehensive enough to cover all eventualities and yet limited enough to avoid abuse.

The American practice is at the other extreme from the English-law oriented Sudanese provision. Though a complete shift would certainly be unsettling and may be counter-productive, a degree of the American approach ought to be injected into the Sudanese practice. The implications in terms of "an exclusionary rule" will be considered below. It need not take the form of a constitutional guarantee; merely more closely defined statutory powers. Any such provision would have to take into account

\(^6\) It is generally agreed that highly developed and well organised press, political and pressure groups and officials and official organs sensitive to public criticism and responsive to reform provide the best constitutional guarantees there are, if not the only real ones.

\(^7\) This assertion is based on personal observation and private interviews with several leading defence advocates in the Sudan: Mr. Abdel Halim Al Tahir; Mr. Ali Mahaoud Hassanein; and Mr. Hussein Wanni, on the seventh, fifth and sixth of January, 1975, respectively.
section 71 C.C.P. which provides for the authority to issue search warrants in specific situations. That is to say, the new provision would have to serve the purposes now served by both sections 69 and 71. Section 71 reads:

"Where upon information and after such inquiry, if any, as he thinks necessary a Magistrate has reason to believe that any place is used for the deposit or sale of stolen property or that there is kept or deposited in any place any property in respect of or by means of which an offence has been committed or which is intended to be used for any illegal purpose, he may issue a search warrant authorising any Magistrate or policeman or retainer or sheikh:

(a) to search the place in accordance with the terms of the warrant and to seize any property appearing to be of any description above mentioned and to dispose of it in accordance with the terms of the warrant; and

(b) to arrest any person found in the place and appearing to have been or to be a party to any offence committed or intended to be committed in connection with the property."

Though section 69 C.C.P. appears to be the wider of the two sections, section 71 has at least two features that may make the more useful one under certain circumstances. Firstly, while a search warrant issued under section 69 must relate to a particular "investigation inquiry, trial or other proceeding under this Code", a warrant under section 71 need not. Indeed the offence, believed to have been committed "in respect of or by means of" the property suspected to be kept or deposited in the place to be searched, need not be named in the warrant. This makes the authority

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18. See Sohoni's, Code of Criminal Procedure, 3h8-4h9 for a comparison between the somewhat similar sections 93 and 94 of the Indian C.C.P.

19. Neither section 71, quoted above, nor the form prescribed for the warrant, No. 11 of the Third Schedule to the C.C.P., appear to require the offence to be named. In contrast, No. 10 of the Third Schedule, the form for a warrant under section 69, requires: "state the offence concisely with time and place".
to issue such warrants both valuable and dangerous and for very much the same reason. It can be used properly and with discretion to authorize surprise searches where the police are not quite sure of the precise nature and extent of the illegality involved but have no doubt of its existence and seriousness. On the other hand, it can be abused to legalize speculative fishing expeditions.

Secondly, under section 71, a warrant is coupled with a power "to arrest any person found in the place and appearing to have been or to be a party to any offence committed or intended to be committed in connection with the property". This power of arrest, in turn, gives rise to a further power of search of the person arrested, as we shall see below, and thus widens the original power of search beyond the limits of any warrant that may be issued under section 69. It is at least conceivable that a person unexpectedly found at the place to be searched may not be legally searched under a warrant issued under section 69, and his search cannot be otherwise justified.50

Section 71 C.C.P. with some modifications, may constitute the sole Sudanese provision for the issue of search warrants. Mr. David Thomas once suggested that section 10 of the Australian Federal Crimes Act 1914-1950, might replace all existing search warrant provisions in England.51

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50. Under section 75 C.C.P. see p.389 below.

"If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel or place -
(a) anything with respect to which any offence against any law of the Commonwealth has been, or is suspected on reasonable grounds to have been, committed;
(b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or
(c) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence;
he may grant a search warrant authorising any constable named therein, with such assistance as he thinks necessary, to enter at any time any house, vessel or place named or described in the warrant if necessary by force and to seize any such thing which he may find in the house, vessel or place."

On comparing this section to section 71 C.C.P., it appears that section 71 is lacking in one important respect: it does not provide for the issue of warrant to search for things that may afford evidence as to the commission of an offence without being "property in respect of or by means of which an offence has been committed". For example, blood-stained clothes may not fall within the ambit of section 71, yet they are obviously legitimate objects for search. On a drafting level, there is no reason for the specific reference to "stolen property", or to "property" as such. Thus, one would amend the section to read:

"When upon information and after such inquiry, if any, as he thinks necessary a Magistrate has reason to believe that there is kept or deposited in any place anything in respect of or by means of which an offence has been committed, anything that will afford evidence thereof, or anything which is intended to be used for any illegal purpose, he may issue a search warrant authorising any Magistrate or policeman or sheikh:
(a) to search the place in accordance with the terms of the warrant and to seize any property appearing to be of any description above mentioned and to dispose of it in accordance with the terms of the warrant; and
(b) to arrest any person found in the place and appearing to have been or to be a party to any offence committed or intended to be committed in connection with the thing."

In the end, however, the essentials of a fair and reasonable power of search upon warrant are to be found not only in the particular system's statutory framework but also in the day to day practice of the courts:

In the words of Mr. Justice Osman El Tayeb in Sudan Government v. Babiker Mohamed Babiker:52

"The issuance of a search-warrant is a judicial act, and so the magistrate has to satisfy himself on the information before him of the necessity of issuing one for the purpose of the investigation, inquiry or trial."

This statement appears to be referring to the two basic requirements of a satisfactory practice in the issue of search warrants: the close scrutiny of applications and deliberation over their factual basis, or evidential support.

In accordance with the principle that any search is an invasion of someone's privacy that must be justified with reference to stronger interest or need, a search must not be authorised except when necessary and must be executed with the least possible interference and with full regard to the dignity and human worth of the person against whom it is issued. Some of these considerations cannot be provided for in formal

enactment and may not be accessible to judicial enforcement in court, but the general attitude of the statutory provisions and of the courts in those areas where they are directly effective is bound to be reflected in the areas where they are not.

These considerations are relevant to the whole field of search and seizure: the power, its enforcement, and the violation of its limitations.

The other provisions of the C.C.P. relative to the issue of search warrants are sections 72 and 78. Section 72 provides for the power to issue warrants to search for any person wrongfully confined. Section 78 substitutes the presence of the magistrate for a search warrant:

"Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant".

It is merely as to the scope and manner of search that the magistrate's presence is supposed to ensure fairness and reasonableness; as he could have done by issuing the warrant properly.53

(iii) Search Authorised by Arrest:

53. In the Scottish case Nelson v. Black and Morrison (1866) 4 H. 328, at 330-31, it was indicated that the presence of the magistrate at the execution of a warrant might cure defects in the warrant as to scope and manner of execution; it would not cure the basic defect of lack of authority to grant the warrant in the first place. The same appears to be the effect of section 78 C.C.R.: where a warrant could have legally and properly been issued by a magistrate, the same magistrate may direct that the search be made in his presence. Such presence, presumably, ensures propriety and fairness.
(a) The Rule and its Rationale:

It is a well settled common law rule that a person lawfully arrested may be searched; a power which appears to be exercisable by whoever makes the arrest, whether he is a police officer or private person. The power is also recognised in the United States and Scotland. Thus in the Scottish case of Adair v. McGarry, Lord Justice-General Clyde stated the law as follows:

"It is beyond all doubt that, provided a person has been legally arrested by the police, they may search him for stolen goods, or weapons, or other real evidence connecting him with the crime; and that neither his consent nor a magistrate's warrant is required for that purpose. This applies even to the limited but well-known class of cases in which the police are entitled to make the arrest itself without a warrant - Jackson v. Stevenson. It is also beyond all doubt that, provided a person has been legally arrested by the police, they may examine his person and his clothes for bloodstains and the like, or for any mark on his person which, according to their information, was observed on the person of the criminal when the crime was committed - again, without his consent and without any magistrate's warrant."

The rationale that readily suggests itself regarding this power of


57. (1897) 24 R. (J.) 38; 2 Adam 255.

58. 1933 J.C. 72 at 78.
search may be expressed in terms of the balance of the necessity for the search against the degree of intrusion or interference with individual liberty it entails. It is clearly necessary: the person arrested may have a weapon or tool with which he may try to effect an escape or hurt the arresting police officer or other persons; he may have evidence of the crime for which he is arrested which he may destroy at the first opportunity; he may have an instrument with which he may hurt himself or someone else, etc. At the same time the search does not involve as much intrusion or interference with personal liberty and privacy as a search without or before arrest: the person is already under arrest and in custody. Whatever justified the arrest in the first place surely justifies a search necessary to protect the arresting officer as well as the person arrested himself or some other persons, and to prevent the frustration of the purpose of the arrest itself by destruction of evidence.

The finding and presentation of a rationale for any rule, while it strengthens its acceptance by providing the reason for it, tends to lead into the further question whether the scope of the rule and its practice are consistent with the alleged rationales. Granted that a search is justified on arrest, what should the scope and intensity of the search be. Clearly, an arrest for a minor traffic offence would not justify searching the person of the accused or his car in every case. The point was made in some decisions of the Supreme Court of the United
Another problem with this power of search is the danger that an arrest may be made specially to authorise a search - arrest to legitimize a search. It may be true that in so far as the arrest itself was legal and justified, there is no ground for complaint. But this begs the question whether the arrest was legal and justified. Even if the validity of the arrest is somehow decided upon by a court, confusing the decision to arrest with the need for the search it authorises tends to water down the requirements of a valid arrest in order to legalise the search. More often than not, however, the validity of the arrest never comes into issue, especially if the search revealed nothing incriminating and no prosecution followed.

(b) Stop and Search:

The decision to arrest in order to authorise a search is usually made by the policeman on the spot. A related question is whether a "stop" without arrest is to be legalised with reference to a specific offence or to further certain policies etc. The stop and search provisions are

59. The problem is considered below at p. 376 et seq. See also Powers of Arrest and Search in Relation to Drug Offences, a Report by the Advisory Committee on Drug Dependence (Deedes Committee) (H.M.S.O., 1970) para. 24.

expressions of the policy decision that "stopping" in order to search for evidence of certain offences is justifiable, e.g. the power to stop and search for controlled drugs. Section 23(2) of the Misuse of Drugs Act 1971 provides, inter alia, that a constable, if he has reasonable grounds to suspect that any person is in possession of a controlled drug in contravention of the Act may "search that person and detain him for the purpose of searching him". According to the Report of the Advisory Committee on Drug Dependence, when the police officer decides that he has "reasonable suspicion" sufficient to stop someone and search him, he will normally ask the person if he is prepared to agree to the search. If consent is given the search may take place immediately; if not, then the officer discloses not only the reason why he wishes to search but also the power under which he is authorised to do so. The search then normally follows on the spot, though it is open to the officer under existing powers to take the suspect back to the police station.

61. For the consideration of arrest/detention aspect of the problem see Chapter 2 above.

62. The Advisory Committee on Drug Dependence considered the problem of defining "reasonable grounds to suspect" in its Report on Powers of Arrest and Search in Relation to Drug Offences, (H.M.S.O. 1970). The unanimous view of the Committee was that the term cannot be positively defined, see para. 123. A minority, however, felt that it might help to define it by exclusion: listing the circumstances that are not sufficient in themselves to establish reasonable grounds of suspicion, see para. 124 and 125. The majority felt that it was neither practicable nor desirable to define the term in the way the minority did.

63. Ibid. para. 105-106. See also para. 108 to 111.
A minority of the Advisory Committee favoured the proposal that the practice of stop and search be discontinued and substituted by arrest, with search following the arrest either in the street or at the police station. They argued it would simplify the law and clarify and restrict the power of the police to stick to the general rule that "the police should have power to arrest on reasonable suspicion, with consequential powers of search". The object of enforcing the drugs law cannot justify the infliction of very considerable indignity upon persons against whom there are no sufficient grounds of suspicion to justify an arrest.

The majority disagreed with this value judgment; to them whether the search was statutory or following an arrest, the physical interference and personal inconvenience will be much the same. They conceded that the crux of the matter lay in the argument that statutory searches tend to be random, that is, without reasonable grounds; they were not convinced that that was the case but if it was, it ought to be vigorously checked by strict operational supervision. The majority concluded that "given the special difficulties of detecting illegal trafficking and possession

61. The provision in force at the time was section 6(1) of the Dangerous Drugs Act 1967, which provided for the same power to stop and search as the current section 23(2) Misuse of Drugs Act 1971.
65. Ibid. para. 113.
66. Ibid. para. 114. See also para. 115-116.
67. Ibid. para. 117.
68. Ibid. para. 120-121.
of controlled drugs, it would be against the public interest to tie the hands of the police in such a way that the police become unduly concerned that the possibility of complaint for wrongful arrest would prejudice the proper exercise of their duties and functions as regards drug offenders". 69

The basic dilemma of such a provision for a "stop and search" power is that if granted it may be used too frequently and too lightly as, in the absence of an "arrest", the police need not justify their detention in terms of the requirements of a valid arrest. Yet, the value of the power lies in the very fact that it can be used in circumstances where an arrest may not be justified. It is in meeting the need to combat certain types of offences where the traditional framework of police powers is inadequate that a "stop and search" power is most useful. By the same token, however, it is precisely in those areas that it is most liable to abuse. It may be that the desirability of combating the type of offence - controlling illegal drugs for example - overrides the individual's interest in his privacy and personal liberty. But if the power is used too frequently against innocent people and without good cause, the price may be too high for the expected benefit.

The Scottish Council on Crime recently published a memorandum on ways and means of preventing crime in general. 70 Besides several

69. Ibid. 122. The 1971 Misuse of Drugs Act followed the majority's view.

wide-ranging proposals of socio-economic and educational devices, the Council suggested that

"To break the weapon-carrying habit of some young people the police should for a trial period of five years be given a power to search persons in public places for offensive weapons". 71

The proposition was examined from three aspects: (a) The likely contribution to the prevention of crimes of violence; (b) the degree of infringement of liberty involved; and (c) possible adverse effects. On balance, the Council concluded, with one member dissenting, that the proposal should be implemented for a trial period of five years.

The difficult policy considerations and value judgments involved in such a decision are clear enough. The decision would have to be made with reference to the socio-economic and political realities of a given country, within the framework of its arrangements for law enforcement, and with respect to the actual and potential mischief of a specific offence. It is a very dangerous power to grant, and if not restricted and controlled

71. Ibid, para. 74:5. In para. 84 the proposition was expressed as follows:

"that power should be conferred on a police constable, if he has reasonable cause to believe that a person is committing the offence of carrying an offensive weapon in a public place, without lawful authority or reasonable excuse (Prevention of Crime Act 1953 section 1(1)), to stop and search that person".

In para. 88 the Council considered the problems of defining terms such as "reasonable grounds" on which the police may stop and search. Like the Advisory Committee on Drug Dependence, the Council was unable to devise any formula which would provide useful restrictions without unduly hampering the police; instead it listed a number of factors which would not, of themselves, constitute "sufficient grounds".
closely, it will take over completely from arrest: if the police can
search without arrest - or other well-established grounds of search -
they may tend to search first and arrest later on the basis of what
they find in the search.

(c) The Position in the Sudan:

The position in the Sudan may not lend itself to clear statements:
beside the general provisions of the C.C.P., there are a variety of
other enactments relative to a power of search without or before arrest.
There is first the traditional power of search on arrest. Section 41
C.C.P. reads:

"(1) A policeman making an arrest or receiving an arrested person
from a person by whom the arrest has been made may search the
arrested person or cause him to be searched and place in safe
custody all articles, other than necessary wearing apparel, found
upon him, and shall make a list thereof."

(2) When the arrested person is a woman, the search shall not be
made except by a woman."

There is also the statutorily authorised search. Section 9(2) of
the Hashish and Opium Ordinance 1926 provides:

"Any Magistrate, policeman or customs officer may detain and
search any person whom he has reason to believe to be guilty
of an offence against this ordinance and if such person has
hashish or opium in his possession, may arrest him and any
other person in his company suspected of such offence as
aforesaid or the abetment thereof."

This section is similar in policy and objectives to the Misuse
of Drugs Act 1971 provision discussed above. It expressly authorises

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72. For the disposal of property seized see sections 301 to 310 C.C.P.
detention and search before arrest, presumably because, to use the
language of the Advisory Committee on Drug Dependence,73 "given the
special difficulties of detecting illegal trafficking and possession
of controlled drugs it would be against the public interest to tie the
hands of the police" by insisting on the formal requirements of a valid
arrest or warrant before they may search for drugs.

There are other examples of this type of statutory power of search.
Section 12 of the Residual Control Act 1966, besides empowering the
Minister of Supply to issue search warrants,74 authorises any policeman
or any member of the armed forces to enter and search for any commercial
commodity in any place in which there is a reasonable doubt that it is
stored or hidden and to seize such commodity. Though the precise extent
of the use of this sort of authorization of search is not known,75 it
is only hoped that it be confined to the minimum. It is difficult to
dispute summarily the policy considerations of necessity and the socio-
political decisions that underly such an enactment, yet it is obvious
that they cannot justify such wide powers in all cases. Furthermore,

73. Report on Powers of Arrest and Search in Relation to Drug Offences,
para. 122.

74. Section 4, secondly (b).

75. The main difficulty is in tracing all the enactments currently in
force. There is no authoritative statement of all the legislation
in force at present. Moreover, these enactments are repealed and
re-enacted so frequently that it is difficult to keep track of what
is repealed and what is not. Section 2U(1) of the State Security
Act 1973 authorises arrest and search without warrant, but it is
not certain whether the Act is still in force and if so for how long
will it remain in force.
the close supervision of the exercise of these powers is a vital and continuous task of superior officers and the courts.

(iii) Search Authorised by Urgency:

Situations often arise in practice where an immediate search is called for but no justification is readily available other than the urgency of the search. It is reasonable to suppose that in such situations delay, waiting for a search warrant or for the situation to develop further, would defeat and frustrate the ends of justice by allowing the flight of suspects or loss of evidence. 76

In England the problem of urgency is partially met by allowing senior police officers to issue search warrants. 77 Moreover, urgency appears to be the basis or rationale of many enactments of local and general application to stop and search. The local legislation, modelled generally on section 66 of the Metropolitan Police Act 1839, authorises the "stop and search" of "any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained..." 78 The "stop and search" provisions of general - national -


77. See, for example, the Explosive Act 1875, section 73; and the Official Secrets Act 1911, section 9(2).

application include the notorious section 23 of the Misuse of Drugs Act 1971.79

It should be noted, however, that in England urgency is not an independent ground for authorizing a search. It may have prompted the legislation or be the basis for a given power of search, but in the absence of common law or statutory authority a search may not be legalized by argument as to urgency.

In Scotland, on the other hand, besides being the underlying rationale behind local80 and general81 statutory powers to "stop and search"; it appears to be an independent ground for authorizing search to argue the urgency of the situation.82 Urgency, it seems, could well regularise an otherwise irregular search.83


80. For example Edinburgh Corporation Order Confirmation Act 1967, section 193. See also section 195.

81. The Burgh Police (Scotland) Act 1892, section 167.

82. H.M. Adv. v. McGuigan, 1936 J.C. 16 at 18, per Lord Justice-Clark Aitchison; Bell v. Hogg, 1967 J.C. 49 at 56, per Lord Justice-General Clyde; at 58-59, per Lord Migidale; and at 61 per Lord Cameron. See also Hay v. H.M. Adv. 1968 J.C. 40, specially at 17-18, per Lord Justice-General Clyde.

In the United States too, urgency appears to be a general ground of search. Searches that are otherwise unlawful may be upheld in view of the "emergency" and the "exigent circumstances" of the case. In Patrick v. State, it was observed:

"The general rules governing searches and seizure are subject to the exception of emergency situations, sometimes called the [exigency rule]. The reasonableness of an entry by the police upon private property is measured by the circumstances then existing..."84

The logic of the principle is undisputable, it underlies such well established common law powers as that of search following arrest: that the situation does not permit of delay lest the evil of loss of the evidence or injury to a person materialise. A judgment that the urgency of the situation justified the search is in effect a judgment that under the circumstances, the social interest in the detection of crime and apprehension and punishment of criminals, justified the invasion of the privacy and personal liberty of the individual concerned. Some circumstances justifying the invocation of this ground of search are easy to imagine in a clear-cut and compelling way,85 there may be

84. 1967-Del.-z, 227 A 20, 186, a decision of the Supreme Court of Delaware quoted by Inbau, Thompson and Sowle, Cases and Comments on Criminal Justice, volume 2, 575 at 577. See also Caroll v. United States, 267 U.S. 132; and Schmerberg v. California, 306 U.S. 757; and Coolidge v. New Hampshire, 403 U.S. 443 (1971). Limited powers of "emergency" searches, are proposed by the "Code of Pre-Arraignment Procedure, section 260, though they are described in different terms.

85. For a few illustrations see Remington et al, Criminal Justice Administration, Materials and Cases, 245-46.
difference of opinion as to others. The reasonableness of the search depends, no doubt, on the facts of each case but there must be some clear limits or framework within which it is considered. If the occasion never arises for an evaluation of the police conduct under the circumstances, this power of search may grow out of all proportion and be invoked in all situations to justify a search. Once again, this emphasises the paramount importance of supervision and remedy for violation of limitations. The Sudanese position is akin to the English rather than the Scottish-American approach. Urgency or emergency may be seen as the rationale behind certain provisions authorizing search but it is the statutory provision and not the urgency of the situation as such that legitimizes the search. An example is to be found in section 67 C.C.P. which provides:

"When any policeman, public ghaffir, retainer or a sheikh is pursuing any person suspected of having committed an offence for which a policeman may arrest without a warrant or is following the tracks of any such person and it appears to him probable that any property in respect of or by means of which the offence has been committed is in any place, he may enter such place and there search for and seize such property and the provisions of sub-sections (2) and (3) of section 33 shall apply".

86. See, for example, Raymond F. Sebastian, "Destruction of Evidence - A Rationale for Blood Tests Without an Arrest?" 18 Stan.L.Rev. (1965) 243.

87. Section 33(2) and (3) relate to ingress and facilities for search. It will be noted that the section provides yet another example of translation oversight. The power originally accompanied the arrest power enjoyed by "public ghaffir and retainer" of section 25, 1925 C.C.P. There is no such power under section 25, 1974 C.C.P.; yet the power of entry and search remained in the law because in revising and updating the Code section 67 was overlooked.
(iv) Search Authorised by Consent:

In the three grounds of search considered above - warrant, arrest and urgency - a search is authorised irrespective of the wishes of the person searched or the occupier of premises searched. This is true of all "legal" powers generally. Consent may also provide a "legal" ground of search: the person to be searched or occupier of premises may consent to the search. If an authorised person gave his voluntary and knowing consent to the search, then neither he nor anybody else can legitimately complain. If all these requirements can be established, the power of search clearly accrues; but one finds that in day-to-day practice that is rarely the case. Search authorised by consent, a convenient and popular ground of search raises its own problems: (1) ascertaining the facts as to what was said and done by the police and what was perceived by the alleged consenting party; (2) establishing who, other than the offender himself, may consent to a search; and (3) determining as a matter of law and policy how "free" the consent must have been to authorise search.

The first problem is really an essential prerequisite to any fair and intelligent assessment of the situation. It is not always, to say

88. Tiffany, McIntyre and Rotenberg, Detection of Crime, ch. 10.
89. Remington et al., Criminal Justice Administration, Materials and Cases, 232–34; Model Code of Pre-arraignment Procedure, 192–96.
the least, that real life situations present themselves to the participants with the clarity of text-book illustrations. Besides, it may help the police not to present all the facts accurately and fairly when seeking the consent; or it may serve the party alleged to have consented so to claim. In other words, there is an inherent element of bias in most situations, from one side or the other. There is also the related problem of whether the inquiry should be into the actual state of mind of the person alleged to have consented at the time or whether the police, as reasonable men, were justified in concluding that consent was given. 90

The problems of the voluntariness of the consent and standing to consent are factual problems, the answer depends on the facts of each case. Yet general considerations of policy and the impact of developments in other fields of the law are relevant. For example, in the area of voluntariness - duress or coercion - there is the question of knowledge of the right as an essential pre-requisite to "intelligent waiver". How can one tell whether it is genuine consent or "mere acquiescence in the apparent authority of a police officer". 91 In the aftermath of

90. Hall et al, Modern Criminal Procedure, 293.
Miranda v. Arizona,\textsuperscript{92} American judicial\textsuperscript{93} and academic\textsuperscript{94} opinion began to emphasize the need for any "consent" to be "intelligent" and knowing, hence the requirement of a warning of the right to refuse as a way to ensure knowledge prior to waiver. But in Schnakloth v. Bustamonte,\textsuperscript{95} where the Supreme Court considered the problem of the validity of consent to search, Mr. Justice Steward, delivering the opinion of the Court said:\textsuperscript{96}

"the question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent."

The question of standing to consent was considered in the very recent decision of United States v. Matlock,\textsuperscript{97} where it was held that "when

\textsuperscript{92} 384 U.S. 436 (1966), discussed in Chapter 5 below.

\textsuperscript{93} See, for example, United States v. Blalock, 255 F. Supp. 268 (E.D.P. 1966) quoted in Remington et al, Criminal Justice Administration, Materials and Cases, 237. See also Model Code of Pre-arraignment Procedure, Section 240, and pp. 192-97.

\textsuperscript{94} See, for example, Note, "Consent Searches: A Reappraisal after Miranda v. Arizona", 67 Colum.L.Rev. (1967) 130; and Hall et al, Modern Criminal Procedure, 293-94.

\textsuperscript{95} 412 U.S. 218 (1973).

\textsuperscript{96} Ibid. at 227.

\textsuperscript{97} 415 U.S. 164 (1974).
the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."

The Scottish courts too have sometimes shown awareness of the problems of whether the consent was a valid consent sufficient to authorise a search. In McGovern v. H.M. Adv., a case in which the police took scrapings from the finger nails of a man before arresting him and without warrant, Lord Justice-General Cooper, in a judgment in which Lord Carmont and Lord Russell concurred, finding the search lacked the authority of warrant or arrest, went on to consider consent as basis for the search. He observed:

"Some point was made to the effect that it is nowhere stated in evidence that force was used against the applicant, or that his consent was expressly withheld; but my reading of the evidence is that his consent was never asked - at least in such circumstances as to justify the requirements of the law - because no consent would avail in the situation here presented unless it was given after a fair intimation that the consent could be withheld."

98. Per Mr. Justice White, ibid. at 171. In note 7 he observed that common authority is not to be implied from the mere property interest a third party has in the property.


100. For a fuller statement of the facts and ruling in the case see below at pp. 128-29.

101. For an example of a successful search based on consent see H.M. Adv. v. Hepper, 1958 J.C. 39, where the accused consented to the search of his house in connection with one matter, and an attaché case on which the police officers "accidentally stumbled" was admitted in evidence in prosecution for a different offence.
The implications of this statement, however, must be seen in perspective: It may not necessarily follow that a failure to intimate that consent could be withheld renders the consent invalid as a basis for the search. In *Bell v. Hogg*, a case where consent was not the ground of search, Lord Justice-General Clyde observed as follows:

"I do not regard it as unfair that the accused were not specifically told that they need not consent to the impressions being taken. It might have been better if this had been said, but the absence of such a warning is not in the circumstances fatal, particularly as the appellants had already been cautioned."

On principle, however, some consideration of these aspects of the consent is surely required. In all branches of the law, consent must be intelligent and voluntary to be operative, why not so when it is sought to base a search on such consent?

(2) Effecting a Search:

The actual search, granted the existence of a power search, must still conform with certain standards to be lawful: "the concern for

102. It was rather urgency. In this case the defendants were at the police station under suspicion of theft of copper but they were not under arrest. The police sergeant asked each of them if he would give a rubbing from his hands on a piece of clean blotting paper. He did not tell them that they were entitled to refuse to do so. All four agreed. Objection at the trial to the evidence of the hand-rubbings were rejected. The High Court confirmed the conviction but Judges made it clear that the search was justified by the urgency in that any of the defendants could have easily removed the evidence by simply washing his hand. See 1967 *J.C.* 49 at 56, 58-59 and 61.

103. Ibid. 56. Emphasis supplied. Lord Cameron remarked to the same effect, *Ibid.* at 60. See Chapter 5 below on the attitude of Scottish courts to police irregularity or illegality.
minimizing the degree of intrusion should persist in restrictions upon the method of executing the search..."\textsuperscript{104} It is to some of these "restrictions" that we turn now.

(i) Time and Means of Entry:

The common law position is stated by Halsbury's as follows:

"In execution of a search warrant for stolen goods at common law, force may be used to break open doors, if admittance is demanded and refused, but the warrant can only be executed in the day-time unless otherwise provided by statute."\textsuperscript{105}

The common law rule, in effect, as reflected in many contemporary statutory and case-law statements, is that normally a search ought to be executed during the day-time and after allowing the occupant an opportunity to submit to the search. Whoever is executing the search should not break open doors unless "otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors..."\textsuperscript{106} The restriction on the time of execution, normally day-time, accords with the same principle: searches should be executed with the least possible intrusion and invasion of privacy.

This rule, naturally, is subject to exceptions: loss of the element


\textsuperscript{105} 10 Halsbury's Laws of England, para. 653. See also the dissenting opinion of Mr. Justice Brennan in the American Supreme Court case, Ker v. California, 374 U.S. 23 at 47-50 (1963) for a review of old English authorities for the rule.

\textsuperscript{106} Semayne's Case, 5 Co. Rep. 91a, 91b, 77 E.R. 194, 195 (1603).
of surprise can afford in some cases opportunity to destroy the evidence or endanger the life of the person executing the search etc. In the United States the exceptions have been formulated as follows: 107

(1) The physical peril exception - where the giving of notice is likely to result in imminent peril of bodily harm to the persons executing the search or other persons on the premises;

(2) the useless gesture exception - the person inside the premises already knows of the police authority and purpose;

(3) the premises are reasonably believed to be currently unoccupied; and

(4) the destruction of evidence exception - that notice would afford opportunity to destroy evidence and frustrate the search.

In Ker v. California, 108 police officers, acting on information and observation that the defendant was dealing in marijuana and that he had a supply of it in his flat, obtained from the building manager a pass key to the flat and unlocked the door and went inside. On entering they found defendant sitting in his living room, whereupon he was arrested and marijuana was found in his kitchen sink. There was a discrepancy between the police officers’ and the defendant’s account of the sequence of events, but it was agreed that the police entered by themselves without first demanding admittance and explaining their

107. These exceptions are recognised by many statutes and judicial decisions. See Israel, "Legislative Regulation of Searches and Seizure: The Michigan Proposals", at 282, footnote 241.

purpose, the discrepancy followed the entry. The California courts concluded that the police were excused from the state statutory requirement that they give notice and demand admittance first, because of the need to prevent the destruction of the contraband. The Supreme Court affirmed the conviction, holding on the point of entry that it was justified under the circumstances. Mr. Justice Brennan, with whom three other Justices concurred, disagreed on the scope of the exceptions to the requirement of giving notice of authority and purpose before breaking into the premises. While he was prepared to accept exceptions to the requirement where the occupant already knew of the authority and purpose of the police or the police were justified in believing that someone within was in immediate danger of bodily harm, Mr. Justice Brennan was unable to accept the exception of need to preserve evidence.

In contrast a committee appointed by the Michigan Bar Commissioners in 1971 accepted only two exceptions: physical peril and the destruction of evidence. They felt that the others, including Mr. Justice Brennan's useless gesture exception, were unnecessary. Similarly, the American Law Institute's Model Code of Pre-arraignment Procedure provides that

109. Mr. Justice Clark delivered the opinion of the Court, with Mr. Justice Harlan concurring in the result on the ground that state searches and seizures should be judged by "concepts of fundamental fairness".

110. Ibid. at 55.

111. Ibid. at 61-62.

if the officer "has reasonable cause to believe that the notice required by Subsection (2) would endanger the successful execution of the warrant with all practicable safety, the officer may execute the warrant without such prior notice."\textsuperscript{113}

While there is disagreement in the United States as to the number and scope of the exceptions, there is "no English decision which clearly recognizes any exception to the requirement that the police first give notice of their authority and purpose before forcibly entering a home".\textsuperscript{114} Yet the requirement cannot be absolute. It may suffice for our purposes, however, to assert the requirement itself and note that its principle and policy may permit of exceptions so long as they be consistent with the basic premise: the least possible intrusion and invasion necessary to attain the lawful purpose that authorises the search.

Available information on the practice of Sudanese courts does not permit any firm views to be stated. There is simply no reported case in which issues of time and manner of entry were considered. It may be reasonable to assume, however, that should such issues be raised, the Sudanese courts would follow the common law approach outlined above.

The common law general rule is embodied in section 33 C.C.P.

\textsuperscript{113} Model Code of Pre-arraignment Procedure, section 220.3(3). See also at 176-78.

\textsuperscript{114} As Mr. Justice Brennan noted in Ker v. California, 374 U.S. 23 at 54.
facilities for search.

(3) If on demand such ingress is refused, the person authorized to make the arrest (search) may effect an entry by force.\textsuperscript{115}

The Sudanese courts have shown a tendency to enforce strictly search regulations;\textsuperscript{116} it may be that no occasion has arisen for considering the implications of an unannounced entry and the sort of exceptions the rule permits. In actual fact section 33 C.C.P. is somewhat emphasised by the police for the power of entry it allows and not for its notice requirement. The police are not happy even with the risk of notice a move to obtain a search warrant may involve.\textsuperscript{117}

Other requirements for executing a search in the Sudan may ensure notice in some cases. A strict requirement is that the search must "unless the Magistrate owing to the pressing nature of the case otherwise directs, be made in the presence of two sheikhs or other respectable inhabitants of the neighbourhood to be summoned by the person to whom the search-warrant is addressed".\textsuperscript{118}

\textsuperscript{115.} The section expressly applies to arrest but is extended to cover search situations - see sections 67 and 77 C.C.P.


\textsuperscript{117.} Hence a call for relaxing the warrant requirement and allowing police more search powers, Private interviews with Superintendent H.M. Aman, Khartoum South Police District; and I.M.S. Nadeem, Superintendent, Khartoum Central Police District, January 1975.

\textsuperscript{118.} The results of a search failing to comply with this requirement was excluded by the court in Sudan Government v. Atta Ahmed Hussein H.C. Gen. 15-9-1950 (unreported). The court appreciated "the difficulties the police experience in finding two 'respectable inhabitants of the neighbourhood' in an indaya [brothel where native liquor, the object of the search in this case, is made and sold] quarter, but life is full of difficulties in the Three Towns [the Capital]".
(ii) Scope and Intensity of the Search:

In accordance with the basic premise that a search is an invasion of privacy and property rights justified only by a higher interest; that of society in detection of crime, the intrusion of search must be limited to the minimum consistent with the object of the invasion. In other words, whether under warrant or any other authority, the scope and intensity of the search must be related to the power of search and what may be seized in such a search. A few remarks on the issues of scope and intensity and related problems may be appropriate at this stage.

(a) On Search upon Warrant:

There is first the question of the specificity and precision of the search warrant itself. "Warrants to search premises must be specific as to the purpose and limitations of search. A wide and indefinite warrant is illegal.\textsuperscript{119} This requirement, however, is not absolute; what is required is that the warrant should describe the premises to be searched with "reasonable certainty, and a technical description is unnecessary ... A warrant is sufficiently descriptive if it enables the officer, with reasonable effort, to identify the place.\textsuperscript{120}"

This requirement of the particular description of the place to be searched does not apply to a warrant issued under section 69 C.C.P.

\textsuperscript{119} Renton and Brown, para. 5-31.

\textsuperscript{120} People v. Watson, 26 Ill 2d 203, 186 N.E. 2d 326 (1962) quoted in Hall et al., Modern Criminal Procedure, 258.
which may expressly issue for "a general search or inspection". Hence the relevant part of the appropriate form of the warrant, Third Schedule, No. 10 reads:

"...This is to authorize and require you to search generally (or specify the place or places to be searched) for all documents or other things necessary or desirable for the purpose of the said inquiry (or specify the document or thing that is to be searched for)...."

In contrast, a warrant under section 71 C.C.P. must be specific. Thus the relevant part of the appropriate warrant form, Third Schedule, No. 11 reads:

"...This is to authorise and require you to enter the said house (or other place) .... and to search every part of the said house (or other place or, if the search is to be confined to a part, specify the part clearly) and to seize and take possession of any property (describe clearly the nature of the property for which search is to be made)..."

It goes without saying that these warrant form limitations are absolutely meaningless if magistrates never bother to check after the event whether the warrant instructions were actually followed: what was seized and where. There is no evidence at all of any such subsequent scrutiny.

Within the area specified by the warrant or suggested by other power of search, there is the further problem of the scope and intensity of the search. It is true that a search warrant, for example, authorises the search of all parts of the premises described in the warrant; does it follow that the executing officers may look everywhere within the described premises? In the United States the position appears to be
that they may look only where the items described in the warrant might be concealed: they may not look for a stolen television set in a desk drawer.\footnote{121}

(b) Upon Search Authorized by Arrest:

The principle of the permissible scope of search incident to arrest was explained in the United States in the Supreme Court decision in \textit{Chimel v. California} \footnote{122}. In this case, the search of the entire three-bedroom house, including the attic, the garage, a small workshop, and various drawers was held by the Supreme Court to be unreasonable in scope; they excluded the evidence so seized, mainly coins, and quashed the conviction for burglary of a coin shop. Mr. Justice Stewart, delivering the opinion of the Court, started his review of the cases on the scope of search incident to arrest by observing that the "decisions of this Court bearing upon that question have been far from consistent".\footnote{123} Overruling two leading cases on the question,\footnote{124} the principle of scope of search incident to arrest was stated as follows:\footnote{125}

\footnote{121}{Hall \textit{et al.}, Modern Criminal Procedure, 261-62.}


\footnote{123}{Ibid. at 755.}


\footnote{125}{395 U.S. 752 (1969) at 763.}
"When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs - or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant."

With respect to limits on the scope and intensity of search of the person on his arrest there is the very recent decision in United States v. Robinson. The defendant was stopped and arrested for a serious traffic offence. When searching him the police officer found an object, the size and consistency of which he could not determine, in the defendant's breast pocket. When he removed it he found it to be a


127. The arresting police officer knew that the defendant was not only operating a motor vehicle after revocation of his operator's permit but also obtained a permit by misrepresentation.
cigarette package within which he found fourteen gelatin capsul of heroin. The court of appeals reversed the defendant's conviction for possession of heroin, holding that when an arrest is made for a crime for which no evidence could be conceivably found on the arrested person, the search incident to the arrest must be limited to an intrusion reasonably required to discover weapons - in the present case a frisk.

The Supreme Court reversed. Expressing the view of the majority, Mr. Justice Rehnquist held, inter alia, that: \(^{128}\) (1) After a police officer lawfully arrests a suspect for the purpose of taking him into custody, even where the arrest was for a traffic violation, the officer could proceed to search him fully and was not limited by standards governing a protective stop-and-frisk search for weapons incident only to an investigative stop of a person. (2) The authority to search the person incident to a lawful custodial arrest while based upon the need to disarm and to discover evidence, did not depend on what a court might later decide was the possibility in a particular arrest situation that weapons or evidence would in fact be found upon the person. Three of the Justices dissented on the grounds that (1) the constitutional validity of the search, even after a lawful arrest, should be determined on the facts and circumstances of each case; (2) case-by-case adjudication of the reasonableness of a search after arrest was necessary to determine whether the arrest was affected for purely legitimate reasons or, rather,

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as a pretext for searching the arrestee for evidence; and (3) while a search for weapons when making an in-custody arrest was lawful regardless of the nature of the crime for which the arrest was made, nevertheless where there could be no evidence or fruits of the offence occasioning the arrest, such as a traffic violation in the present case, the officer, after removing personal effects such as the cigarette package, should not be allowed to search such effects - such a search not being reasonably necessary to protect the officer from harm or to ensure that the arrestee would not escape from custody. 129

The dissenting opinion is clearly more in accord with the rationale of search incident to arrest in cases such as Preston v. United States, 130 and Chimer v. California. 131 Yet, this power of search has consistently been stated by the Supreme Court in wide terms, and not subject to limitations. 132 Robinson, however, is the first Supreme Court decision directly on the permissible scope of search of the person of the arrestee. 133

The general and unqualified authority to search on arrest, asserted by the

130. 376 U.S. 361 (1964) at 367.
132. For a review of the cases see La Fave, "The Robinson Dilemma", 132-33.
133. Ibid, 134.
majority, is supported by older practice; but it may not necessarily follow that since the power was originally conceived as unqualified it should remain so. Times change, there are now significant differences in the machinery, objectives and subjects of law enforcement activities. The scope of the search should be determined on relevant modern policy considerations and not old common law practice.134

The limitations suggested by the minority - namely, that search for evidence of the crime and weapons should be made only when there is probable cause to believe that such objects are on the person of the arrestee, and that the search should extend only so far as is necessary to find those objects - may be, on the other hand, unacceptable. It presents the police officer with very difficult decisions to make on the spot in street arrests. As it often happens that lawful arrests are made without knowledge of the precise offence or its exact tools or fruits etc., the policeman conducting the search may not know what evidence to look for. Thus, "once it is conceded that an evidentiary search incident to arrest 'is not for specific, predesignated articles' then there does not exist any particular item which is the necessary object of the search. Consequently, no part of the area to be searched is logically excluded as a possible place of concealment, and there is no practicable basis for making a judgment on what degree of search is too intrusive."135

134. Ibid. 135-36.
135. Ibid. 144.
relation to weapons, custodial arrest is different from the stop-and-frisk situation\textsuperscript{136} in that "the dangers to which the police are exposed in the circumstances of a custodial arrest are sharply accentuated by the prolonged proximity of the accused to police personnel following the arrest."\textsuperscript{137} This prolonged proximity affords the arrestee the opportunity "to extricate and use any small hidden weapon which might go undetected in a weapons frisk, such as a safety pin or razor blade. In addition, a suspect taken into custody may feel more threatened by the serious restraint on his liberty than a person who is simply stopped by an officer for questioning, and may therefore be more likely to resort to force."\textsuperscript{138} The police may therefore inspect even small objects in custodial arrests as they may contain small and hidden weapons; the police should not be expected to take unnecessary risks. "If the 'general authority' to search an arrestee for weapons must extend this far, then it is very doubtful whether realistic intensity limitations upon such searches is feasible."\textsuperscript{139}

It seems, therefore, that it is impracticable to place limitations

\textsuperscript{136} For the limits of the protective search in street "stop" situations see \textit{Terry v. Ohio}, 392 U.S. 1 (1968) at 17, note 13. See generally La Fave, "'Street Encounters' and the Constitution: Terry, Sibron, Peters, and Beyond", at 91.

\textsuperscript{137} \textit{United States v. Robinson}, 471 F.2d at 30, the court of appeal stage, quoted in La Fave, "The Robinson Dilemma", at 146.

\textsuperscript{138} \textit{United States v. Robinson}, 471 U.S. at 254.

\textsuperscript{139} La Fave, "The Robinson Dilemma", 149.
on the scope of the search of the person of the arrestee. There is, however, the danger of abuse in that arrest for minor traffic offences may be used as a pretext to conduct a search, a point forcefully made in the opinion of the minority. Some empirical studies in the United States indicate that the police sometimes use this subterfuge to search for evidence on the persons of suspects who could not be lawfully arrested for the crimes of which they are really suspected. But how is the court to discover the true motive for the arrest authorising the search? In the context of the American practice it was suggested that this abuse can be limited by removing "the temptation to engage in pretext arrests by broadening the exclusionary rule so as to exclude from evidence anything but a weapon found in a search incident to an arrest for a crime, such as a traffic violation, for which there existed no justification to search for anything but a weapon." Alternatively, the exclusion of the fruit of the search may be achieved by considering the necessity of the arrest justifying the search.

Neither suggestion is applicable or acceptable in the Sudan because there is no absolute exclusionary rule, of the American type, in the Sudan.

1h0. La Fave, Arrest, 151; Tiffany, MacIntyre & Roenberg, Detection of Crime, 136.

1h1. Fa Fave, "The Robinson Dilemma", 156. This would be a significant departure from existing law under which contraband not sought but discovered during a properly limited search may be seized and is admissible in evidence, Harris v. United States, 331 U.S. 115 (1947).

1h2. La Fave, "The Robinson Dilemma", 157-58.
and, as will be suggested below, it is undesirable that there should be one. To question the necessity of the arrest, and hence its validity in order to undermine the power of search in situations where it is most liable to abuse - pretext search - is open to a basic objection. The validity of the arrest must be decided with reference to specific statutory authority which is directed towards resolving the question whether the arrest is authorised or justified and not whether it is necessary. Without the exclusionary rule as the remedy for unlawful arrest and search, only legal remedies remain; and it is not possible to say that although the arrest is strictly legal it is unnecessary, and may therefore have an ulterior motive, such as the authorisation of search, and then to attach legal remedies to its incidence.

(c) Search Upon Consent:

The question of limits on the scope and intensity of search authorised by consent presents its own problems. On the one hand, if the suspect is told that he is suspected of concealing "burglars' tools or a sawed-off shotgun on his premises, an invitation to come in and look is a consent to look in places large enough to contain such articles, but not to probe tiny recesses or look through files of documents." If the search is authorised by the consent, then it ought to be confined to the limits of such consent - to go beyond that is unauthorised by the consent and in the absence of other legal authority would constitute unlawful search. On the other hand, should the guilty suspect be allowed to "seek to throw

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143. Model Code of Pre-arrainment Procedure, 196.
the police off the track by an appearance of innocence and willing disclosure, thinking his contraband is well hidden, and then terminate the consent if the searchers come dangerously close to the hiding-place? Will the result not be that whenever the police find something incriminating in the course of a consent search, the defendant will subsequently claim that he withdrew consent, and that the discovery was thus under coercive circumstances?" The American Law Institute, in its recent Model Code, elected to limit the scope and intensity of search authorised by consent to the limits in duration and physical scope imposed by the consent. Consequently, and following the reasoning of the Supreme Court in Miranda v. Arizona - that an arrestee may withdraw his waiver of his right to silence at any time and the questioning must stop immediately if he did - the Institute also maintained that consent to search "may be withdrawn or limited at any time prior to the completion of the search, and if so withdrawn or limited, the search under authority of the consent shall cease, or be restricted to the new limits, as the case may be. Things discovered and subject to seizure prior to such withdrawal or limitation of consent shall remain subject to seizure despite such change or termination of the consent." Conversely, it has also been argued

114. Ibid.
115. Ibid. section 2h0.3(1).
117. Model Code of Pre-arrainment Procedure, section 2h0.3(3).
in the United States that once consent is effectively given, then it remains binding within the scope initially stated throughout to the end of the search.\textsuperscript{118} But, in accordance with the Miranda principle, for consent to be irrevocable, the consenting party must have been warned in advance that he will not be allowed to withdraw or limit his consent once given.\textsuperscript{119}

It is difficult to choose between these two positions, yet a choice has to be made. It would appear that the second view is the more realistic and practical one. Provided a suspect is advised of the significance of his consent - that it constitutes the sole authority for the search and that it can be refused or limited as he sees fit - he should not be allowed to waste the time of the police and frustrate their efforts by subsequently withdrawing or limiting it when it no longer suits his purposes. It is true that the search power is dependent on knowing and voluntary consent - it is authorised and limited by it - but once an intelligent and free choice to grant consent has been made, the person is stopped from withdrawing the authorisation.

It is of course open to the police to take into account any subsequent declaration of wish to withdraw consent or limit the scope of the search in deciding whether a power of search, independent of consent,


\textsuperscript{119} Ibid. 158.
exists.

(d) Implications for the Sudan:

The Sudanese courts appear to be - perhaps understandably as the Code itself is silent on the matter and English courts, whose practice is closely observed for leads on the proper issues to be raised, are unconcerned - completely unaware of this dimension of the execution of searches. This is most unfortunate because, as the American cases and materials clearly indicate, this area presents some very real and important problems. In the total absence of any Sudanese provision, statutory or otherwise, for limitations on the scope and intensity of the search, it is not possible to relate any of the specific issues raised above to the Sudan. It is possible, however, to make the general point that some regulation for the scope and intensity of search is necessary. It may suffice to start with the general proposition that the search may extend only to the area in the possession or under the control of the person against whom the search is directed; the legitimate objects of search are evidence of the offence suspected and weapons and other tools that may be used to effect an escape. Refinements in the principle, and more specific limitations, are better developed in the light of practical experience and not imposed in advance before the need for them arises. The American experience may be interesting, and even helpful as a source of suggestions of limitations, but it must be borne in mind that it is the result of gradual and long development within the context of constitutional imperatives and state and federal experience.
It is encouraging to observe in the Sudanese C.C.P., a feature of regulation of scope and intensity of search in relation to persons found on the premises being searched. Section 75(1) C.C.P. states:

"Where any person in or about a place which is being searched is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. Provided that if such person is a woman, the search shall not be made except by a woman." 130

It is significant that the Sudanese Code should reflect this refinement in balancing conflicting interests. The dilemma is obvious enough: interfering with one who may be, and probably is, perfectly innocent versus risking the frustration of the whole object of the search. The subsection authorize searches subject to the limitation that the person must first be "reasonably suspected of concealing about his person any article for which search should be made".

This appears to reflect the general common law position. 151 In the Privy Council case of King v. R., 152 on appeal from Jamaica, a warrant directed the search of certain premises only and the arrest of a

150. In the 1899 C.C.P., section 75 used to be section 7k. Only the last clause, that women should be searched by women, was added in 1925.

151. In some of the American states, statutes empower their police, when executing a search warrant, to search all persons found on the premises described therein. The constitutionality of these statutes have been doubted: see Richard D. Avil, Jr., "Constitutional Law - Fourth Amendment - The 'Search All Persons' Power - Does Presence Really Equal Probable Cause?", 58 Cornell L. Rev. (1973) 614 at 619-24.

person named therein. The appellant, who was found in the house at the
time of the search, was himself searched, purportedly under the authority
of the warrant. The Judicial Committee of the Privy Council advised that
the search of the appellant was not justified by the warrant and was
therefore wrongful: if the warrant was to cover the search of persons
found on the premises it had explicitly so to provide.\textsuperscript{153}

(3) The Power of Seizure:

The power of search and ancillary powers lead up to the opportunity
to seek, find and seize evidence - the whole object of the exercise. But
what is it that may be seized? Is a search authority a licence to seize
all one can lay his hands on? It appears not; what are the limits then?

The position of English law on these issues was stated recently by
Lord Denning M.R. in \textit{Chic Fashions (West Wales) Ltd. v. Jones,}\textsuperscript{154} and
\textit{Ghani v. Jones.}\textsuperscript{155} Where the police enter by virtue of a warrant, or
arrest a man lawfully, with or without a warrant, they may seize:

\begin{quote}
\textit{But in accordance with Kuruma v. R. [1955] A.C. 197, the illegally
obtained evidence was nonetheless admissible. See J.T.C. "Evidence
Obtained by Means Considered Irregular", a Case Note in \textit{14 Jur.
Rev. (N.S.)} (1969) 55.}
\end{quote}

\textsuperscript{154} [1968] 2 Q.B. 299.

\textsuperscript{155} [1970] 1 Q.B. 693. For an assessment of these and other significant
cases see Leigh, \textit{Police Powers in England and Wales}, 183-96; and
"Recent Developments in the Law of Search and Seizure", 33 \textit{M.L.Rev.
(1970) 268.}
"Goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of their search they come on any other goods which show him to be implicated in some other crime, they may take them provided they act reasonably and detain them no longer than is necessary." ¹⁵⁶

For the taking of an article when no one has been arrested or charged to be justified several requisites must be satisfied. The police must have reasonable grounds for believing that:

(1) a serious offence has been committed;

(2) the article in question is either the fruit of the crime, or its instrument or is material evidence to prove its commission; and

(3) the person in possession of the article has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.

Furthermore, it was held that the police must not keep the property any longer than is reasonably necessary to complete their investigation or to produce it in evidence. Moreover, the lawfulness of their conduct, it was explained, must be judged at the time and not by what happened afterwards. ¹⁵⁷ That is to say it must be judged on information available to the police at the time they acted and not as confirmed by the results of the search or other subsequent information.


¹⁵⁷. Ibid. 709.
In Scotland the position appears to be somewhat similar. Once the police are lawfully on the premises, whether with the authority of a warrant or by permission, "they may take suspicious articles they happen to see, but cannot actively search for articles outwith the warrant or take away articles which might on further examination disclose further offences". In other words, they may seize articles not named in the warrant or not relating to the purpose for which they obtained the permission provided they only "accidentally stumbled upon" the suspicious article.

The position in the United States on this issue is too confused to permit of precise statement. The gist of the Anglo-Scottish position, as stated above, however, may be summed up as follows: All articles that constitute material evidence in the offence in connection with which the entry was made may be seized. Articles which may constitute evidence in other offences may also be seized under certain circumstances but not always.

The Scottish test is simple enough to apply: where and how was the item seized. The test is really, as it should be, one of scope and intensity of search. Concern with what may or may not be seized in any search may be said to have two purposes: (a) the invasion of the privacy

160. Ranton and Brown, para. 5-31.
162. See Hall et al, Modern Criminal Procedure, 262-265; 273-7h and 278-80, and Mode Codel of Pre-arraignment Procedure, section 210.3, and pp.165-70.
of the person searched should be kept to the minimum necessary to serve the purpose for which the search was authorized; and (b) the search should not be used as an opportunity to fish for evidence in the hope that something may be found. So long as the search is confined to the purpose for which it was authorized both purposes are satisfied. If, however, during the search they stumble on something which may reasonably be supposed to be evidence of another offence, it would be unreasonable for them to look the other way and pretend not to have seen it, or to have to obtain a warrant before they can seize it. The police have the general duty always to be alert to detect violations of the law and apprehend the offenders and seek the evidence to convict them. If they failed to seize the evidence their reasonable and limited search revealed, it might be removed or destroyed by the time they obtain a warrant.

These points are brought out nicely in two Scottish decisions. In H.M. Adv. v. Turnbull, in execution of a warrant to search the accountant accused's business premises - in connection with charges of making fraudulent income tax returns on behalf of a client - the police, accompanied by an official of the Inland Revenue, removed a large number of his business files most of which clearly related to the affairs of four clients other than the one mentioned in the initial charge. The files were later examined, and almost six months later a second warrant was obtained to cover the material already seized. At the trial, on five charges, objection to the evidence relating to the four new charges was sustained by the trial judge, Lord Guthrie. In this case, the police had done

163. 1951 J.C. 96.
precisely what limitation on what may be seized is meant to guard against; taking what is not evidence of any crime at the time in the hope that it may later on prove to be useful. The decision rejecting this police procedure emphasises the point that this is too high a price, in terms of invasion of privacy and violation of freedom to enjoy private property, to pay for law enforcement.

The other case provides an example of a legitimate seizure of property not the object of search. In H.M. Adv. v. Hepper, the police obtained permission to search the defendant's house in relation to one matter; but during the search an attaché case containing the name and address of another person was discovered. At the trial on a charge of theft of the attaché case objection to the admission of the evidence was rejected by Lord Guthrie. He considered it to be the duty of the police to remove the attaché case under the circumstances; otherwise "it might have disappeared".

It may be, as one commentator observed, that some of the factors that justified the search in second case were also present in the first one: the files or some of their contents in Turnbull case might have disappeared if not removed at the time of the search; the police had no evidence

165. Ibid. at 110.
at the time of the search in Hepper case that the attaché case was stolen, just as they did not have evidence of other violations at the time of the search in Turnbull case. Nonetheless, one has to admit that the decisions in both cases appear to be reasonable and well balanced under all the circumstances of the case. After all, there is an obvious difference between wholesale removal of documents and papers to be examined by experts for six months before charges are made and a removal of a single attaché case the theft of which may be confirmed simply and quickly. Behind both cases and other Scottish cases lies the overriding consideration of fairness to the accused which will be discussed in the next chapter.

The English approach, as reflected in the statements of Lord Denning quoted above, also appears to be reasonable enough in principle. It is not, however, as simple and easy to apply as the Scottish rule when the police are not acting under the authority of a warrant or arrest. The requirements that must be satisfied appear to be logical and reasonable but they seem to be too elaborate for serious and frequent application by the police as checked and supervised by the courts. Though one cannot quarrel with any one of the requirements, the variables are somehow too many for a quick decision by the policeman on the spot.

Once again one is faced with the complete lack of Sudanese cases on this aspect of search though the relevance and practical importance of limitations on the power of seizure cannot be doubted. The two Scottish cases referred to above may provide some indication of the relevant considerations; ultimately, however, Sudanese courts will have to evolve their own limitations on the power of seizure. As suggested above, that
is closely related to limitations on the scope of the search itself.

Besides any specific power of seizure created by the relevant power of search, there is a general power of seizure under section 315 C.C.P.

According to this section:

"Any policeman may seize any property which may be alleged or suspected to have been stolen or which may be found in circumstances which create suspicion of the commission of any offence. Such policeman, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer."

Any seizure must be justified either under the specific power of search or under this section. It goes without saying that section 315 C.C.P. does not create an independent power of search; rather the section envisages the finding of such property abandoned or in the course of executing lawful arrest or search.

(h) Unlawful Search and Seizure:

Though any search and seizure violating any of the above regulations and limitations on the police powers is an unlawful search and seizure, the term is used in this study to refer to the more serious violations, mainly search without a power of search or in excess of a limited power of search or seizure.

To enforce its regulation of the power of search and seizure, the law penalises unlawful search and seizure in a variety of ways that may be grouped under two categories: direct remedies and the exclusion of the illegally obtained evidence.
(1) Direct Remedies:

As indicated in Chapter 2 above, three types of remedies may be available against a policeman exceeding the limits of his powers: civil action, criminal prosecution and disciplinary action. But, as already explained, these remedies labour under several limitations and difficulties. The police conduct complained against must constitute an identifiable tort or criminal or disciplinary offence; there must also be initiative to sue or prosecute and the sustained and informed effort to see it through. That is often not forthcoming because the end result in terms of damages or penalty imposed on the offending policeman is too small to justify the effort. The difficulties of proof are a further discouragement to the complainant. Thus, though the traditional remedies are available with respect to unlawful search and seizure, these difficulties and practical considerations seriously diminish their value as remedies against misconduct and as safeguards against its future incidence.

The ineffectiveness of the traditional remedies is the main argument for the development of the exclusionary rule as a remedy for police misconduct. It is concluded from the following discussion, however, that the exclusionary rule is not satisfactory either. A mixture of the two types of remedy may be best. The traditional remedies are therefore to be reinforced and their weaknesses supplemented; otherwise the exclusionary rule will grow to its logical conclusions as it did in the United States

167. See above pp. 224 et seq.
and that would not be healthy for either the victim of police misconduct or society at large.

(ii) The Exclusionary Rule:

Though the exclusionary rule in this context is primarily an American contribution, some measure of the rule can be traced in the practice of other common law jurisdictions. But as the American practice is by far the most developed, it will be discussed in some detail. The Scottish and English positions will be considered before the present and future of the Sudanese practice is discussed.

The absolute exclusionary rule is reviewed and criticised in the American context because that is where it is presently practiced. The remarks and points made, however, are intended to be of general application.

(a) The American Exclusionary Rule:

1. Statement of the Principle and Scope of the Rule:

Principle: The exclusionary rule in the United States is a generic term used to refer to several rules each of which makes evidence inadmissible in court if law enforcement officers obtained it by means forbidden by the Constitution, by statutes or by court rules. The Supreme Court currently enforces an exclusionary rule in state and federal criminal proceedings as to four major types of violations:

(I) Searches and seizures that violate the Fourth Amendment of the United States Constitution; 168

(II) Confessions obtained in violation of the Fifth and Sixth Amendments; 169

(III) Identifications testimony obtained in violation of these Amendments; 170

(IV) Evidence obtained by methods so shocking that its use would violate the due process clause of the Fourteenth Amendment. 171

First suggested in a dictum in Boyd v. United States, 172 an exclusionary rule has been applied in the federal jurisdiction since Weeks v. United States. 173 In Wolf v. Colorado, 174 the Supreme Court recognised for the first time that the immunity from unreasonable search and seizure, guaranteed by the Constitution, was applicable to action taken by state as well as federal law enforcement officers; but the Court declined to impose the exclusionary rule as the required method of enforcement. It was not satisfied that alternative methods employed by the states were inadequate


171. Rochin v. California, 342 U.S. 165 (1952). This aspect of the exclusionary rule is not considered in the present work; on it see 8 Wigmore on Evidence (McNaughton rev. 1961), para. 2184a, at 43-51.

172. 116 U.S. 616 (1886).


to make the prohibition effective: 175

"Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective... We cannot brush aside the experience of [most states and other English speaking jurisdictions] which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence." 176

Mr. Justice Murphy, in dissent, argued that the alternative methods of implementation of the constitutional guarantee against unreasonable search and seizure were not adequate in practice. 177 In another dissent, Mr. Justice Rutledge appears to add into consideration a constitutional immunity from conviction of the basis of illegally seized evidence. 178 It took the Court about twelve years to change its mind, but when it did, it came out in full force in favour of the exclusionary remedy for police illegality, and carried the principle to its logical conclusion.

There was first Mapp v. Ohio, a hard case indeed that made the Supreme Court respond in a sweeping manner and impose an exclusionary rule on the

175. These were enumerated as: authority to use force to resist illegal police action, damage action, criminal prosecution, and removal or other disciplinary action at the hand of superiors, Ibid. 31, note 2.
176. Ibid. 31-32.
177. Ibid. 41. The same point was made by Mr. Justice Douglas in dissent.
178. Ibid. 47-48.
states as a matter of constitutional imperative. The facts, as reported in the opinion of Court delivered by Mr. Justice Clark, were as follows:

Police officers arrived at Miss Mapp's residence, knocked on the door and demanded entrance to search for a person who was wanted for questioning, but Miss Mapp, after telephoning her attorney, refused to admit them without a search warrant. Some three hours later the police officers sought entrance; and when Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the police officers refused to allow him to enter the house or see Miss Mapp. When the police broke into the house, Miss Mapp demanded to see the search warrant; she was shown a paper which she grabbed and placed in her bosom. The paper was removed by force from her person and she was handcuffed in the process and removed to her bedroom. The police officers then searched the house and the obscene materials for the possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial, no search warrant was produced by the prosecution nor was the failure to produce one explained or accounted for; it seems that at best there was considerable doubt as to whether it existed at all.

The state argued that even if the search were made without authority, or otherwise unreasonably, it was not prevented from using the unconstitutionally seized evidence at the trial - relying on Wolf v. Colorado and the

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freedom it allowed the states to deal with the problem of police illegality. But the Supreme Court rejected this reasoning, and in quashing the conviction it held that all evidence obtained by searches and seizures in violation of the Constitution was inadmissible in a state court: 180

"Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforced against them by the same sanction of exclusion as is used against the Federal Government."

That decision was the turning point in the history of the American rule; from then on the principle was logically extended into interrogation and identification in the enforcement of constitutional rights and basic due process of law. The essential feature of the American rule is its absolute nature: once it is shown that the evidence was obtained in violation of the constitutional right, it has to be excluded no matter how trivial the violation may have been or how unfair or extreme such a reaction would be under the circumstances. As may be expected, however, the scope of the rule is restricted by such limitations as the standing requirement, the fact that the illegally obtained evidence may be used to impeach the credibility of a witness etc. 181 On the other hand, the scope of the rule is somewhat extended, one might say, by the operation of the doctrine of the "fruit of the poisonous tree"; but that, in turn, has its own exceptions. 182

180. Ibid. at 655.


Standing: According to the standing requirement, in a case of alleged unreasonable search and seizure for example, the defendant cannot object to the admissibility of the evidence so seized unless he can show a personal interest in either the property seized or the premises searched; that is to say, he must show that his personal privacy has been invaded. While many commentators call for the abolition of this requirement, the courts have almost unanimously rejected the suggestion. The effect of the requirement is such that if on searching X evidence is found that incriminates Y, Y cannot object to its admissibility however unreasonable or illegal the search may have been.

It is true that the standing requirement is a general requirement of law in relation to a variety of actions and claims, but surely this is one area where the requirement ought to be relaxed because the object is to deter the guilty policeman rather than compensate the victim. The requirement


of standing is inconsistent with all rationales for the exclusionary rule: whether the object is to deter the policeman or to disassociate the courts from the illegally obtained evidence, it is equally served, or not served, by exclusion regardless of who is raising the issue.\(^{186}\)

The requirement, however, may be justified on practical grounds: without it the courts would be overwhelmed with litigation and objections to the admissibility of evidence. The requirement also gives the courts the opportunity to exclude some undeserving cases.

**Impeachment:** The second limitation is that the evidence illegally obtained may be used on collateral questions such as the impeachment of the credibility of the accused as a witness by the use in cross-examination of the evidence or information illegally obtained.\(^{187}\) In *Harris v. New York*, for example, the accused, who was arrested and charged with selling heroin, voluntarily answered questions for the police without having first been warned of his right to counsel as required by *Miranda v. Arizona*.\(^{188}\) At the trial, on direct examination, he gave an account of the sales which differed from the one he gave to the police in his original statement. Over defence objections the prosecution was allowed to use the prior statement in cross-examination.


\(^{188}\) 38 U.S. 436 (1966).
The trial judge instructed the jury that the statement attributed to the accused by the prosecution could be considered only in deciding his credibility, and not as evidence of guilt. The accused's conviction was affirmed by the New York appellate courts as well as by the Supreme Court of the United States which held that trustworthy, voluntary statements of a defendant, even though inadmissible in the prosecution's case in chief because they violate Miranda requirements, may nonetheless be used on cross-examination to attack the credibility of the defendant's direct testimony.

**Poisonous Tree:** The doctrine of the "fruit of the poisonous tree" refers to the degree of relationship between the police illegal conduct and the evidence sought to be excluded. The line must be drawn somewhere because the exclusion of the so-called second and subsequent generation "fruits" may be the logical result of the exclusionary principle, but it is certainly excessive in terms of other policies such as the effectiveness of law enforcement efforts and the social interest in the conviction and punishment of the guilty. Granted that the primary illegally obtained evidence be excluded, the question is where to draw the line?

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190. The phrase was coined by Mr. Justice Frankfurter in Nardone v. United States, 308 U.S. 338 (1939) at 341.


The genesis of the present doctrine was first advanced by Mr. Justice Holmes in *Silverthorne Lumber Co. v. United States*, where he said: 193

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

In *Costello v. United States*, the principle was again stated in similar terms:

"the 'fruit of the poisonous tree' doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an independent source". 194 The working of this principle is illustrated by the Supreme Court decision in *Wong Sun v. United States*: 195

A, shortly after being illegally arrested and having narcotics seized from him, informed the federal agents that B possessed narcotics. When confronted by the agents, B surrendered some heroin. Moreover, B, when arrested, made statements implicating C. Several days after being arraigned and released on his own recognisance, C voluntarily returned to the police station and made his statement. The federal agents conceded at the trial that they would never have found the drugs without A's assistance.

193. 251 U.S. 385 (1920) at 392. Emphasis supplied.
The Court set out a two-part test to determine whether a subsequent discovery of evidence is tainted with the primary illegality:

(a) the exclusionary rule has no application when the Government learns of the evidence "from an independent source";

(b) the rule has no application when the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint. The evidence is not the "fruit of the poisonous tree", however, simply because it would not have come to light but for the illegal actions of the police. The controlling question in each case is whether, "granting establishment of the primary illegality, the evidence to which instant objection is being made has been come at by exploitation of that illegality or instead by means sufficiently distinguished to be purged of the primary taint." 197

Applying the test to the case the Court held as follows: The narcotics seized from A were inadmissible against him as they were "fruits of the poisonous tree" - namely A's illegal arrest. The narcotics seized from B could not be used against A either as they were fruits of the illegally obtained statement of A, and the connection between them and the statement was close enough to warrant excluding the evidence. The narcotics seized from B were inadmissible against A because A's illegally obtained statement led to their discovery. C had no standing to object on the same ground. 198

196. Ibid. 487.
197. Ibid. 488.
198. Ibid. 471.
Moreover, C's statement was made voluntarily and after warning, and some time after he was released: that is to say, the illegality has become so attenuated as to dissipate the taint of any initial illegality.

A's oral statement, made at the time of illegal entry and arrest, was also held to be inadmissible: the Court held that verbal evidence "which derives so immediately from an unlawful entry and unauthorised arrest [is] no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." It is not clear, however, if either unlawful entry or unauthorised arrest would suffice to exclude a statement under this reasoning.

Within the bounds of the above mentioned limitations and exceptions, the essential feature of the American rule remains: the absolute requirement of exclusion of all illegally obtained evidence. The merits of the rule will be considered below, but one comment may be made at this stage that is relative to such consideration. The above statement of the rule and its scope had to be confined to the absolutely essential generalities, yet one is struck with the complexity of the rule with its requirements and exceptions which, in turn, have their own requirements and exceptions. One would further observe the reason of this complexity to be, at least in part, the desire to avoid, in some cases, the drastic consequences of the

199. Ibid. 485.

absolute requirement of exclusion: it is conceived that in some cases the application of the rule needs to be limited to avoid clearly unjust and impracticable consequences, so exceptions and requirements had to be developed. The rigidity of the rule which led to this complexity may well be a result of the principle and rationale of the rule itself.

2. Rationale and Criticism:

The main justifications of the exclusionary rule as found in American literature may be treated under two headings: normative and factual. In the normative sphere it is argued that since the state recognizes a certain number of fundamental rights and protects them by law, it should neither tolerate their violation nor allow its courts tacitly to accept such violations. The state should make every effort to encourage and promote respect for laws and the fundamental principles of social organisation which they embody, it should at least set a good example to its subjects; after all strict crime control is not an end unto itself, in a democratic society the means of enforcement must also conform with the values of respect for the privacy and human dignity of the individual.


202. In Weeks v. United States, 232 U. S. 383 (1914), at 391, the Court said: "To sanction such proceedings [illegal search] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action."

The classic statement of this principle is to be found in the dissenting opinion of Mr. Justice Brandeis in Olmstead v. United States, a wiretapping case, where he said:

"Decency, security, and liberty alike demand that government officials shall be subject to the same rules of conduct that are command to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites everyman to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

This dissenting view became the accepted and well established view of the Court, so that one finds the Court saying in the recent case of Terry v. Ohio:

"Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

This notion is no doubt essentially valid; the question, however, is one of degree and method: how to reflect disapproval and denunciation of

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204. 277 U.S. 438 (1928) at 440-45. See also Mr. Justice Holmes, ibid. at 470.

205. The statement of Mr. Justice Brandeis was quoted with approval by Mr. Justice Clark, for the Court, in Mapp v. Ohio, 267 U.S. 643 (1921) at 659.


207. For another statement of the same notion see Traynor, J., in People v. Cahan, quoted in 8 Wigmore on Evidence, (McNaughton rev., 1961) 34-35.
the illegal official conduct. Unless one is adopting an approach such as that of Mr. Justice Rutledge: that there is a constitutional right not to be convicted on the basis of illegally obtained evidence, it does not necessarily follow from accepting the principle that the state should disassociate itself from the illegal conduct that the evidence so obtained always be excluded. The state is equally committed to the maintenance of law and order, the protection of the life and property of its subjects by the adoption of reasonable and effective means for the apprehension, conviction and punishment of offenders. The courts, therefore, must be attentive to both demand: effective law enforcement through humane and reasonable means.

Furthermore, as Oaks pointed out, the practice of Supreme Court itself is not always consistent with the notion in absolute terms. Frisbie v. Collins, for example, permits the courts to enter a valid judgment against a defendant who is brought before the court by kidnapping and illegal arrest. It is not suggested here that this should cease to be the case, but rather that this reasonable and realistic ruling reflects the need for balancing and weighing the various interests in the administration of justice. No principle should be allowed to run to its extreme absolute or else other


211. On that question see Pitler, "'The Fruits of the Poisonous Tree' Revisited and Shepardized", supra, 597-601.
vital and valid social goals and objectives will be lost.

Strong emphasis is placed in the United States on the factual justification of the rule: the need to deter the illegal conduct and to educate the police and the population at large to be sensitive to and respectful of the rights and liberties of the individual. Thus it was said in Elkins v. United States,212 quoted with approval in Mapp v. Ohio,213 that the purpose of the rule

"is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it."

Similarly, it is said that "the use of the rule is a natural consequence of the restrictive principle."214 Exclusion is used as a means of enforcing the basic restrictions and depriving the police of any benefit or gain from their violation. The argument is usually made in terms of the ineffectiveness of the traditional remedies - liability of the offending official for civil, criminal and disciplinary action - and the consequent need for an effective alternative, namely the exclusionary rule.215 The choice being made and supported may be described as follows: the cost to society and the rule of law in terms of persons who are clearly guilty being allowed to go

free when the evidence is excluded is to be paid because there is no other way for ensuring compliance with legal restrictions on police powers. In this reasoning, two assumptions are being made: that the traditional remedies are ineffective, and that the exclusionary rule is not only effective but is the only effective remedy. In view of the difficulty of producing concrete evidence on this type of assumption, one is normally left to choose which claim he wishes to believe\textsuperscript{216} - that these assumptions are true or false. It is the view of this author that the position is such that the assumptions are neither wholly true nor wholly false, at least not always; hence, it is suggested, it would be unwise to form any permanent conclusions on the matter. The available literature, however, raises serious doubts as to the truth of the assumptions; but that should suggest caution and flexibility rather than the falsity of the assumptions as such.

The effectiveness of the exclusionary rule, for example, is usually taken for granted; thus Mr. Justice Clark, in Linkletter v. Walker\textsuperscript{217} referred to the rule as "the only effective deterrent against lawless police action", and Chief Justice Warren, in Terry v. Ohio\textsuperscript{218} said: "...and

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\textsuperscript{217} 381 U.S. 618 (1965) at 636.
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\textsuperscript{218} 392 U.S. 1 (1968) at 12.
\end{flushleft}
experience has taught that it [the rule] is the only effective deterrent to police misconduct in the criminal context...". There are those, on the other hand, who argue in terms of its relative effectiveness:

"The fact that there is little agreement and little evidence that the exclusionary rule does deter police lawlessness is much less significant, I think, than the fact that there is much agreement and much evidence that all other existing alternatives do not."

Quoting the above statement, Oaks observed:

"Professor Kamisar is obviously too careful a thinker to be suggesting that the absence of deterrent effect by any of the existing alternatives establishes the deterrent value of the exclusionary rule. That there is no alternative cure for cancer does not prove the effectiveness of treatment by the 'expressed juice of the wooly-headed thistle'."

He then continued to explain that if the exclusionary rule does have "measurable deterrent effect, then the lack of feasible alternatives helps to justify the use of the rule even though it has undesirable side effects. But if no positive case can be made for the deterrent effect of the rule, then the lack of feasible alternatives adds nothing to the case."

In his own study of the effects of the rule, Oaks concluded that the "data contain little support for the proposition that the exclusionary rule discourages illegal searches and seizure, but fall short of establishing


that it does not. Other statistical analyses also seem to indicate that the rule, as applied in the United States, has not contributed to any appreciable decrease in illegal police practices.

Several factors may be operative in limiting the deterrent effect of the rule. The occasion of its application is very limited, it operates under unfavourable conditions and it is subject to too many exceptions and qualifications. The rule is also open to objection regardless of its effectiveness in deterring police misconduct. But first the factors diminishing its deterrent value. The penal effect can materialise only if there is an attempt to introduce the illegally obtained evidence to secure a conviction. The rule is not likely to be an effective deterrent against official misconduct if that misconduct is not directed towards acquiring evidence or if the evidence is not likely to be used in court. Thus, it cannot possibly directly influence the police in arrests that are not intended to be followed by prosecution, in harassment searches.

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225. La Fave, Arrest, ch. 21-25.

in the physical abuse of persons in custody, unnecessary destruction of property while conducting lawful business etc. It is true that evidence unexpectedly obtained in such activities may not be used in court, but that prospect is unlikely to influence a policeman who does not expect to obtain or need to use such evidence in court in the first place. Moreover, for the large majority of defendants who plead guilty, the illegally obtained evidence may prompt the guilty plea, that is to say a conviction is obtained with the illegally obtained evidence. It may also prompt a confession which may be used in court.

Secondly, the exclusionary rule operates under conditions unfavourable to effective general deterrence. The position is negative on the various relevant factors: While deterrent effect varies with the perceived risk of detection and punishment, the police work under conditions that make their misconduct very difficult to detect or punish. In any contest of credibility as to what happened on the scene, whether consent to search was given etc., the policeman is more likely to be believed than the

accused. Though this is a general problem with any inquiry into the legality of the police action regardless of the consequences of the finding, it is even harder when the exclusion of the evidence is the inevitable result of a finding in favour of the accused's version of the events. Furthermore, even if the evidence was excluded, that does not punish the guilty policeman in any direct sense; it may affect him in the sense that loss of convictions, so far as that is a police goal, may be reflected in action by his superiors. But the effect of the legal sanction, so far as exclusion is a sanction, may be neutralized by the fact that the forbidden behaviour is approved by the relevant community - the policeman's working milieu - and the fact that guilt of the violation entails no loss of prestige. Deterrence is likely to result when the sanction reinforces or is reinforced by a sense of moral obligation or an appeal to the con-

230. As Amsterdam rightly observed:

"Only a few appellate judges can throw off the fetters of their middle-class backgrounds... Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book.

These trial judges and magistrates are the human beings that must find the "facts" when cases involving suspects' rights go into court (that is, when police treatment of a suspect is not conclusively masked behind a guilty plea or ignored by a defence lawyer too overworked or under compensated to develop the issues adequately). Their factual findings resolve the inevitable conflict between the testimony of the police and the testimony of the suspect - usually a down-and-out or a bad type, and often a man with a record. The result is about what one would expect."

"The Supreme Court and the Rights of Suspects in Criminal Cases", supra, 792.

science of the policeman; that would not be the case, however, in the case of the policeman who sees nothing wrong in searching a man he "knows" to be guilty or in making him confess his "obvious" guilt. Thus, on the whole, the motivation to engage in the illegal conduct is too strong to resist: The drive to discover and apprehend the offender is cultivated carefully in the policeman, yet the lawful alternative of providing effective and legal investigative techniques may not be enough to satisfy the drive.

Thirdly, there are the limitations on the scope of the rule itself: the requirement of standing, possibility of using the evidence or information for a purpose such as impeachment etc. - which tend to confuse the issues for the policeman, and may encourage him to gamble by taking the illegal action in the hope that something will come out of it.

The rule is also said to suffer from several other disadvantages besides doubts as to its effectiveness in deterring police illegality. Because of the way the rule operates, not only does the offending policeman often go unpunished in a direct sense, but the innocent victim is left without remedy while the guilty victim goes free: only one who is incriminated by the illegally seized evidence benefits by its exclusion;

232. Ibid. 216-17.

one who is not so incriminated is probably not prosecuted at all, and even if he was, the evidence so obtained is not presented, and so the rule never applies in his case. As Wigmore complained: "Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off someone else who broke something else." Another author also observed the "startling result achieved under the rule: to deter the police both the guilty defendant and the law-breaking officer go unpunished." It is true that the rule does not preclude the operation of the direct remedies, but its very existence tends to divert attention and effort from the fact that the direct remedies are available too.

In some cases, especially in the area of search and seizure of real evidence, the rule is open to the criticism that it frees the guilty: when the evidence excluded is so relevant and so reliable, its exclusion inevitably leads to the acquittal of someone everybody "knows" to be guilty; in other cases, irregularity in obtaining a confession or conducting an identification parade, there would be doubt as to the reliability of the evidence. "The criminal is to go free", said Cardozo, when he was Chief


236. Paulsen, "The Exclusionary Rule and Misconduct by the Police", at 256.
Justice of New York, "because the constable blundered". The operation of the rule, therefore, "unhappily brings to the public gaze a spectacle repugnant to all decent people - the frustration of justice".

The procedure and timing of the application of the rule causes delay and diversion from the question of the guilt or innocence of the accused. The rule "attempts to redress a violation of law without the time-honored method of direct complaint and trial on a carefully defined issue. The procedure looking toward exclusion of evidence interrupts, delays, and confuses the main issue at hand - the trial of the accused. The principal proceeding may be turned into a trial of the police rather than of the accused."

There are other disadvantages of the rule - such as the pressure it places on the police to distort or falsify the facts to avoid exclusion; the encouragement or temptation it creates for the police to resort to


239. Paulsen, "The Exclusionary Rule and Misconduct by the Police", supra, at 256-57; See also 8 Wigmore on Evidence, (McNaughton rev. 1961) p.6-7.

extra-judicial measures such as harassment, with offenders they feel are getting away with breaking the law, and the fact that it forestalls the development of alternative remedies, even only to supplement and not to replace it - it tends to be seen as the final solution, the one the courts resorted to after all others have failed. Yet, and inspite of all the criticisms and the opposition, the rule received the support of the highest judicial authority in the United States, the Supreme Court, in such a way that it may require a constitutional amendment to displace it - it has been declared a constitutional imperative, the only way the constitutional guarantees can be enforced. It may, therefore, be necessary to inquire into the reasons for the resilience of the phenomenon: surely all the criticisms cannot be true of the rule, or at least, not of the rule alone, or else it would have ceased to exist.


21. The mood of the present Court does not seem to be so favourable. In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), Burger, C.J., delivered a very strong attack on the rule. He said, inter alia: "Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine [the exclusionary rule] demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person - such as petitioner claims to be - has been left without an effective remedy, and hence the Court finds it necessary now - 55 years later - to construct a remedy of its own". 403 U.S. at 115-16. After reiterating all the criticisms noted above he concluded it should not be abolished until meaningful alternatives could be developed - 403 at 113-21. See also Coolidge v. New Hampshire, 403 U.S. 143 (1971) at 192-93.
3. In Defence of the Rule:

The factual justification of the rule may remain an area of doubt and controversy: the methodological difficulties of proving the effectiveness of the rule in deterring illegal conduct are not easy to overcome to the satisfaction of both sides to the controversy. Nonetheless, and notwithstanding the extreme claims of either side, it is certain that the rule must have some deterrent value; the question is whether it is enough to justify the cost in terms of loss in efficiency and effectiveness of the law enforcement efforts. Put in another way, the issue is whether, given minimal deterrent value, the rule can still be justified. On this issue one turns to the force of the moral or normative justification for the rule. Again one is thrown back into considerations of degree: even the strongest proponents of efficiency and effectiveness for law enforcement would not be prepared to insist on it at any cost - they would not, for example, accept a confession obtained by torture even if its truth could be conclusively shown.

Essentially, what the rule does is to place the police or the prosecution in the position in which they would have been had they complied with the rules regulating their investigations in the first place. It also contributes towards respect for the legal system by freeing the judges from

243. For an evaluation of the criticisms usually levelled against the rule see Heydon, "Illegally Obtained Evidence", at 691-95.
the repugnant complicity in the "dirty business" of condonation of illegal police practices. It certainly has some deterrent effect on the police: the policeman is punished, perhaps in an indirect way, because arrests and prosecutions that end in acquittal cannot be maintained as police objectives or goals indefinitely: successful prosecutions must be part of the police duty. As to the negative effect of support for the misconduct as justified in the "war against crime", this can be true of any action taken against the offending policeman: whether it is civil or criminal action. If taken seriously it would render civil, criminal and disciplinary action very unlikely to be taken at all, or to be strong enough to have any impact.

The uncertainty and limitation of requirements and exceptions are general features of legal remedies and are not peculiar to the exclusionary rule. With any given remedy the right approach would be to strive to rationalise it and improve its effectiveness rather than abandon it altogether at the first sign of difficulty, especially when there is no better alternative in sight.

One of the most telling criticisms of the rule, it is suggested, is its tendency to forestall the development and improvement of other remedies: but then that is not a necessary feature of the rule as such. The fact that the rule itself is open to some valid criticisms, such as the fact that it operates only to the advantage of the guilty victim and has nothing to offer the innocent one and that the policeman is not punished directly, demand that the rule be supplemented with other direct remedies.
Another strong criticism is the fact that the response of exclusion may sometimes be disproportionately strong, that serious and dangerous offenders are and are seen to be acquitted on minor points of technical detail. This is a consequence of the absolute nature of the American rule.

(b) The Scottish Approach:

The key to understanding the attitude and approach of the Scottish courts lies in their appreciation of the need to reconcile and balance the conflicting claims that are fundamental to all the problems in this area: the interests of the accused and those of society at large. In his much quoted statement, Lord Cooper posed the issues in the following terms:

"From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict: (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical

2h4. Chief Justice Cardozo, of New York, expressed both interests in terms of society when he said in People v. Before, 212 N.Y. 13, 25, 150 N.E. 585 at 589; quoted in 8 Wigmore on Evidence (McNaughton rev. 1961) at p.37:

"On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office."

Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps highhanded interference, and the common sanction an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.

Thus, as will become apparent from the review of some of the cases below, the Scottish courts, while on the one hand they take a positive view of their discretion to exclude otherwise relevant and admissible evidence because of some illegality in the methods of its procurement, strive, on the other hand to be reasonable and pragmatic in doing so. They are careful not to commit "an outrage upon common sense and a defiance of elementary justice" by acquitting an accused "because of some technical flaw in the conduct of the police". Whatever one may think of the current position and trend, whether one regards it as restrictive of the rights of the accused or the powers of the police in contrast to an earlier trend or position, it must be born in mind that both positions spring from the same fundamental position; the pendulum may swing to and fro, but it does so from the same point. This middle position of following the dictates of the balancing of conflicting interests was first articulated by Lord Cooper in Lawrie v. Muir. Before that case, it has been suggested that the courts were consistently admitting the evidence illegally obtained. Be that as it may, however, the


present position is clear enough.

In Laurie v. Muly, a statutory prosecution for selling milk in bottles belonging to other persons, evidence was given by two inspectors of a subsidiary of the Scottish Milk Marketing Board, who had innocently misrepresented their right of entry to the accused's premises and so gained evidence of the offence. The conviction that followed was quashed by the Full Bench of the High Court. The seeds of this decision are to be found, however, in the earlier decision of H.M.Adv. v. McGuigan, where having arrested the accused without warrant on charges of murder, rape and theft, the police searched the tent where he lived with his parents without a warrant and without asking the accused's mother or her husband for permission. The evidence so obtained was admitted: Lord Justice-Clerk Aitchison explained that the search was justified by the urgency of the situation - so it was not a case where illegally obtained evidence was allowed but rather a case where the search was held to have been authorised under this peculiarly Scottish ground of search. Lord Aitchison continued to observe, obiter:

"Even if I thought otherwise, and that the police had acted irregularly, it would not in the least follow that the evidence proposed to be led would be inadmissible."

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2h8. 1950 J.C. 19.
2h9. 1936 J.C. 16.
250. Ibid. at 18.
251. See above pp. 362 et seq.
irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible. .... Rules as to search and warrant must, no doubt, be strictly observed and never lightly departed from; but, on the other hand, they must always be reasonably interpreted in the light of the circumstances of the particular case."

In Lawry v. Muir, Lord Cooper took Lord Aitchison's above quoted statement "to have indicated that there was, in his view, no absolute rule and that the question was one of circumstances." Lord Cooper then continued: 252

"I respectfully agree... Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not slightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in evidence of confessions or admissions by a person suspected or charged with crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by unfair trick."

The practical implications of this principle in terms of factual situations in particular cases naturally varies, not only from case to case, but also from time to time, reflecting the changing emphasis and trends. 253

By definition, neither the relevant considerations nor their relative

252. 1950 J.C. at 27.

importance can be exhaustively stated; a discretionary principle's strength lies in its flexibility and adaptability to changing conditions as authoritatively read by the courts. On the whole, it seems that the Scottish courts are more positive in the exercise of their discretion to exclude than the English courts are, or are ever likely to be. To illustrate, a few Scottish cases may be briefly reviewed.

To start with two cases in which Lord Cooper himself delivered the judgment: McGovern v. H.M. Adv., and Fairley v. Fishmongers of London, whose contrast makes the point. In McGovern v. H.M. Adv., the accused

25hl. Heydon in "Illegally Obtained Evidence" [1973] Crim.L.Rev. 608-10, listed some of the factors taken by the Scottish courts in their exercise of discretion:
(i) Did the irregularity occur as a vital part of a deliberate attempt to get the evidence, or did it happen accidentally?
(ii) How serious is the illegality?
(iii) Were there circumstances of urgency or emergency?
(iv) Were those responsible for the illegal conduct public officials or mere private individuals?
(v) Was a special procedure described in detail in the relevant statute?
(vi) How easy would it have been to obey the law?
(vii) The seriousness of the offence being inquired into?
(viii) How important are the particular means used in the detection of the type of crime committed?

255. 1950 J.C. 33.
claimed that his bicycle - which was found near an office that was broken into where a safe was blown open with explosives - was stolen. He went into the police station in order to identify a bicycle. While there he came under suspicion for the break in and theft of the contents of the safe and a warrant was obtained to search his house. As a further precaution but without asking his consent the police took scrapings from his finger nails. He was charged and apprehended subsequently; and convicted despite objection by the defence at the trial to admissibility of the evidence of traces of explosives found in the scrapings from his finger nails. On appeal, however, the conviction was quashed. According to Lord Cooper, as the evidence in question formed a material link in a chain of circumstantial evidence and was highly prejudicial to the accused, it was impossible to excuse the admittedly irregular procedure of the police when obtaining it.  

In Fairley v. Fishmongers of London, on the other hand, a prosecution under sections 20 and 21 of the Salmon Fisheries (Scotland) Act 1868, evidence was discovered by illegal entry - a warrant was not obtained under section 26 of the Act. The appeal from conviction was dismissed and objection to the admissibility of the evidence repelled. In the course of his judgment, Lord Cooper said: "I can find nothing to suggest that any departure from strict procedure was deliberately adopted with a view

257. 1950 J.C. at 36-37.
of securing the admission of evidence obtained by an unfair trick; ... in
the present instance the irregularity ought to be 'excused' and the
evidence admitted." 258

The contrast of two other cases, Lord Guthrie having delivered the
Court's opinion in both cases, brings out the same point. In H.M.Adv.
v. Turnbull, 259 in execution of a warrant to search the accused's, an
accountant, business premises in connection with charges of making
fraudulent income tax returns on behalf of one client, files concerning
other clients were also seized. Six months later, after the files were
examined by Inland Revenue authorities, search warrants were issued for
the documents already seized in the first search. At the trial for
charges of making fraudulent tax returns on behalf of five clients, the
first mentioned and four others, objection was raised to the admission in
evidence of documents which had been recovered in the course of the search
authorized by the first warrant but which did not relate to the affairs of
the first mentioned client. Lord Guthrie sustained the objection and
held that the documents had been illegally obtained and that in the
circumstances the admission of the documents in evidence would be unfair
to the accused since the illegal action of the police was not justified
by the circumstances of urgency but was deliberately undertaken in order
to obtain from the accused's private papers evidence upon which further

258. 1950 J.C. at 2h.

259. 1951 J.C. 96.
charges against him might be founded. In H.M.Adv. v. Hepper, in a search authorised by consent of the occupant, later accused, the police seized and removed an attaché case unconnected with the matter then under investigation but connected with the charge of theft subsequently preferred. The objection to the admissibility of the evidence relating to the finding of the attaché case was rejected. Lord Guthrie held that the case was properly seized and removed, but that even if it was not, it was nevertheless admissible having regard to the interest of society in the detection of crime.

In the opinion of one Scottish writer, in the light of the fact that Hepper was co-operative enough to consent to his house being searched in connection with the other matter, "it was at least as hard in his case that the evidence obtained should have been admitted as it was in Turnbull"; though he would agree that the public interest demanded the admission of the evidence, he felt that the same interest might well have secured the admission of the evidence in the Turnbull case too. This comment underlines the basic difficulty of, some would say objection to, a discretionary exclusionary rule. The cases mentioned above were chosen because, each pair having been decided by the same judge, they bring out

260. Ibid. at 102-103.
262. Ibid. 100.
the point about positive discretion: that the same judge may take one view of the police action in one factual context and a completely different view of their action under different circumstances. By the same token, however, a different judge might have felt differently on both occasions: is it proper that the decision of a case should turn on the chance of which judge happens to decide the case? There will be a return to this question in the conclusion of this chapter; one would, however, point out that this is an inescapable consequence of any discretionary power which, though it may be reduced, cannot be eliminated altogether. In the final analysis, one is faced with the choice between alternatives, each with its points of strength and points of weakness.

A recurrent consideration in the judgments in the Scottish cases is that of the urgency or emergency of the situation. It may be somewhat confusing to find judges speaking of this factor as merely excusing the illegal police conduct in some cases, and elevating it to the position of an actual right to search that renders the police action legal rather than excuses its illegality in other cases. The difference, of course, may be in the level of the urgency in the situation, whether objectively speaking or as perceived by the different judges. From a practical point of view and as far as admissibility of the evidence so obtained is concerned, it makes no difference if the illegality is excused or none is said to have taken place at all. It makes a lot of difference if the policeman involved

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264. See, for example, Bell v. Hogg, 1967 J.C. 49.
265. See, for example, Hay v. H.M. Adv., 1968 J.C. 40.
is being sued or prosecuted for what he has done; there would be no wrong or offence at all if the urgency legalised rather than merely excused his action. There may, or may not, be a case for retaining the two levels of urgency or emergency; if the distinction is deliberate and is going to stay, courts must be clear on which of the two they think is applicable to the case.

Under the Scottish approach there appears to be no distinction, in the sphere of fairness to the accused, between real evidence and statements. Thus remarks made by Lord Wheatley in *Miln v. Cullen*, a case concerning the admissibility of the answer to a question by the police, on the necessity of balancing fairness to the accused with fairness to the public are quoted with approval by Lord Clyde in *Bell v. Hogg*, a case concerning the admissibility of evidence relating to rubbings from the hands of the accused person. In *Lawrie v. Muir* itself, Lord Cooper was speaking of "the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions". This, however, is not surprising because the question of reliability, which is the only crucial difference between real evidence and statement - that is to say, the reliability of real evidence can be assumed or shown more easily and conclusively than that of statements -

266. 1967 J.C. 21.


is not of paramount importance in the thinking of the Scottish courts.\textsuperscript{269} They are more concerned, it would seem, with the propriety of the conduct of the police in the light of the totality of the circumstances. In practice, statements and real evidence are often so connected and related that it would be extremely difficult to treat them separately. The leading case of \textit{Chalmers v. H.M. Adv.},\textsuperscript{270} illustrates the connection and stands in clear contrast to the decision of the Canadian Supreme Court in \textit{R. v. Wray}, noted in some detail below.\textsuperscript{271}

In \textit{Chalmers}, the police, acting on information that Chalmers, a boy of sixteen, was involved in a murder, fetched him to the police station where he was interviewed by two detective inspectors. Thereafter he was cautioned and interrogated further. A second caution followed and he was asked if he wished to have his father or a solicitor present. He declined this, twice. After a third and a fourth caution he made a statement which was not put in evidence by the Crown; but it led the police to a field where a purse belonging to the murdered man was found. On returning to the station, the accused was again cautioned and formally charged with murder in the presence of his father. He then said; "I did it. He

\textsuperscript{269} Considerations of reliability are not completely disregarded. Thus though an irregularity in obtaining real evidence may be excused, there is no such discretion in relation to statements: once a court decides that a statement was irregularly obtained, it must exclude it.

\textsuperscript{270} 1956 J.C. 66.

\textsuperscript{271} See pp.414-414 below.
struck me". He was convicted of murder at the trial. His appeal was considered by a Full Bench of the High Court which held that the statements taken from the accused were unfairly obtained because of interrogation. The High Court also excluded the evidence as to the visit to the field where the purse was found as also tained with unfairness.272

This case shares its most significant feature with Wray - an inadmissible confession273 leading to real evidence; yet the results were different: in Wray both the real evidence and the part of the confession relating to it were held admissible, in Chalmers both were excluded. It is interesting to note further that the confession in Chalmers was not involuntary in the traditional sense of the English rule, yet it was so unacceptable to the Scottish court that even real evidence thereby discovered was excluded.

The pragmatic nature of the Scottish approach remains, however, so that it is possible for the High Court to reach a different result in a somewhat similar case without having to repudiate or in fact diminish the authority of the earlier decision. Thus in Brown v. H.M. Adv.,274 the accused, one of several people who had been in the company of the murdered girl, was taken to the police station, cautioned and asked to give an

272. 1954 J.C. at 76.

273. In Wray the confession was ruled inadmissible at the trial, while in Chalmers it was not attempted to introduce it at all, its inadmissibility being conceded.

274. 1966 S.L.T. 105. Strictly speaking, both Chalmers and Brown are interrogation cases, but they are also relevant in the present context.
account of his movements. On checking his statement discrepancies appeared, so he was told of them and that he would be questioned further. He immediately broke down and said: "I killed her". He was then cautioned and charged, and he showed the police where he had hidden the girl's purse and the murder weapon. All this was held to be admissible.

The contrast between Chalmers on the one hand, and Brown and other similar recent cases, is taken by some commentators as demonstrating a shift in the attitude of the Scottish courts. Without judging the merits and basis of the proposition, one would observe that if that is the case, it only shows the vitality and responsiveness of this sort of approach. One would suggest that, at least for the purposes of the present study, the fact that such a shift can happen is more significant than whether or not it did happen.

(c) The English Position:

The general English law rule is that all relevant and reliable evidence is admissible subject to the exceptions formulated in the law of evidence; the illegality of the mode of obtaining real evidence is not generally one of them. The absolute nature of the admissibility rule in relation to real evidence is reflected in statements such as that of Crompton, J., in R. v. Leatham: "It matters not how you get it; if you steal it, it will


277. (1861) 8 Cox C.C. 198 at 503.
still be admissible." The general principle of admissibility has been repeatedly asserted by the highest authority. Thus, for example, Lord Goddard, delivering the opinion of the Judicial Committee of the Privy Council in Kuruma v. R. said:278

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."

There is, however, some authority as to the existence of a discretionary exclusionary rule. It is certainly true that quite frequently one finds the general rule of admissibility followed by a statement of the view that the judge has a discretion to exclude the evidence.279 In Kuruma v. R., for example, Lord Goddard went on to say:280

"No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused... If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."


The problem with this discretionary power is that not only does its existence depend on a number of dicta, albeit highly authoritative ones, but also most of these dicta refer to different problems of evidence - mainly the admissibility of evidence as to the accused's character and previous record. In cases involving real evidence such a general discretionary power should not be asserted without considering the differences, if any, between real evidence and, for instance, evidence as to character.

With real evidence, the most significant factors are its demonstrable relevance and reliability: if a murder weapon or the purse of a robbery victim are found in the possession of the accused, then the relevance and reliability of the evidence is not affected at all by the legality or illegality of the search. Such evidence, relevant and reliable as it is, may be excluded to serve some policy other than effective law enforcement, such as the American policies of deterrence and moral imperative mentioned above, but such a reason for exclusion must be set out and argued clearly and not covered and confused in sweeping generalisation.

The striking thing about the English discretionary exclusionary rule is that it is stated most clearly when it is not applied in the case in hand. Thus in the Privy Council cases of Kuruma v. R. and R. v. King, all the cases in note 279 above are in that class. In Selvey v. D.P.P., the House of Lords reviewed all the cases and confirmed that the discretion exists in such cases.

281. All the cases in note 279 above are in that class. In Selvey v. D.P.P., the House of Lords reviewed all the cases and confirmed that the discretion exists in such cases.


the discretion was asserted but not exercised though the cases present classical examples of unlawful search and seizure. In *Kuruma v. R.*, on appeal from Kenya, where the appellant was searched by a police constable and not a police officer of the rank required by regulation 29 of the Emergency Regulations 1952, the two rounds of ammunition found in the search were admitted in evidence and the appellant was convicted of unlawful possession of the ammunition contrary to regulation 8A(1)(b). In advising the dismissal of his appeal, Lord Goddard, C.J., delivering the opinion of the Judicial Committee, stated the rule quoted above, that relevant evidence is admissible subject to the discretion to exclude. Although "there were matters of fact in the case which caused [their Lordships] some uneasiness"; and although the particular regulation violated in the search, namely that it must be conducted by an officer of certain rank, appears to have been designed to ensure reliability as the evidence can be planted on the accused, the Privy Council did not see fit to exercise its alleged "discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused".

In the more recent case of *R. v. King*, an appeal from Jamaica, the appellant who was found in the premises being searched under a search warrant was himself illegally searched and the results of the search admitted at his trial. His appeal to the Privy Council was dismissed: although

285. Ibid. at 204.
the search was wrongful the evidence was admissible.

In the English case of Callis v. Gunn, the accused was charged with stealing from a slot gas meter. While in police custody, a constable said to the accused: "I want to take your fingerprints. All right?" and the accused replied "Yes", and gave his fingerprints without objection. He was not cautioned before his fingerprints were taken that he need not give them. The magistrates declined to admit evidence of the accused's fingerprints. On appeal Lord Parker, C.J., giving the judgment of the Divisional Court, said:

"... it is quite clear that this present case is not concerned in any way with answers to the police or statements made by a defendant. That being so, the Judges' Rules in regard to the giving of caution do not apply at all. As a matter of law the evidence of fingerprints, if relevant, and it clearly was relevant here, is admissible subject to the overriding discretion of the court... That discretion, as I understand it, would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort. But in the present case it is to be observed that whatever the defendant knew about the law and his rights, the police never misrepresented it to him. True, they did not give any caution. As I have said, it is quite unnecessary to give any caution. There is no suggestion here that they conveyed to him that he had to concede to the request. If that had been done there might be a clear case for excluding the evidence..."

Lord Parker's statement of the discretion to exclude is clearly derived from


287. Ibid. at 501 and 502.


"We do not read this passage as doing more that listing a variety of classes of oppressive conduct which would justify exclusion..."
the principle stated by Lord Goddard and quoted above. Lord Parker in
Callis v. Gunn quoted Lord Goddard and said: "in every criminal case a
judge has a discretion to disallow evidence even if in law relevant and
therefore admissible, if admissibility would operate unfairly against a
defendant. I would add that in considering whether admissibility would
operate unfairly against a defendant one would certainly consider whether
it had been obtained in an oppressive manner by force or against the wishes
of an accused person. That is the general principle". He then went
on to elaborate on this "general principle" as quoted above.

It is striking that English courts always manage to avoid having to
exclude the evidence under this "general principle". According to one
author who made a through study of the subject, "there are only four
reported cases in the Commonwealth outside Scotland where appeal courts
have said the court's discretion should have been exercised to exclude" the
evidence illegally obtained. Two of these cases are English:

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290. Heydon, "Illegally Obtained Evidence", 605. Bernard Livesay,
"Judicial Discretion to Exclude Prejudicial Evidence", 26 Camb.L.J.
(1968) 291 at 295 confirms that R. v. Court is the first English
case where it was said that the discretion should have been
exercised to exclude admissible evidence.

291. The other two are both from Australia, see Heydon, "Illegally
Obtained Evidence", 605-06.
R. v. Court, 292 and R. v. Payne. 293 In both cases the accused was told that he would be medically examined to see if he was ill but the results of the examination were admitted in evidence to prove drunkenness. In both cases the English Court of Criminal Appeal held that although the medical evidence was strictly speaking admissible, the trial courts should have, in their discretion, refused to allow the evidence to be given, since the appellant might have refused to subject himself to examination had he realised that the doctor would give evidence on the matter.

It is not surprising, therefore, in view of its doubtful origins and lack of application, that this general discretionary power has come under attack. In the leading Canadian case of R. v. Wray, 294 the accused, charged with murder, had made a confession, ruled inadmissible at the trial, and told the police that he had thrown the murder weapon into a swamp. The police, led by Wray, found a rifle which was sought to be introduced as evidence at the trial. The prosecution also sought to have admitted as evidence that part of the accused's confession corroborated by the discovery of the rifle. In upholding the decision of the trial judge to exclude both the rifle and the confession, the Ontario Court of Appeal said that

292. [1961] Crim.L.Rev. 697. The Report does not say whether the conviction was actually quashed.

293. [1963] 1 All E.R. 848. The conviction was quashed in this case.

"A trial judge has a discretion to reject evidence even of substantial weight if he considers that its admission would be unjust or unfair to the accused or calculated to bring into disrepute the administration of justice". 295

But the Supreme Court of Canada reversed, ruling that both items - the discovery of the rifle as directed by the accused and that part of his confession thereby corroborated - were admissible. The majority of the Supreme Court held that the trial judge had no such discretion. 296 There were strong dissents on the Supreme Court itself, 297 and many commentators criticised the decision. 298 The Supreme Court's reading of the authorities, however, may be the more accurate one: 299 the discretion to exclude admissible evidence may be exercised to exclude only gravely prejudicial


296. [1971] S.C.R., per Martland, J., at 292-93. The traditional rule on confessions is of course observed in Canada; that is to say, involuntary confessions are excluded from evidence.


evidence of tenuous admissibility and trifling probative force.

On the whole, it may be reasonable to conclude that the general discretion to exclude admissible evidence in English law in response to some illegality or irregularity in the mode of its obtainment lacks clarity of principle and authority of application. According to one author who reviewed the relevant cases, the following conclusion is justified:

"From the above it seems clear that lip service is paid to the dictum of Lord Parker (that evidence even though admissible should be excluded where it has been obtained in an oppressive manner, by force, or against the wishes of an accused), in practice this is overridden by the practical expediency of the administration of justice. It would be in the interests of justice if the judiciary were to set out a clear line of demarcation, as the high-flown principle of fairness is not applied in practice."300

(d) Nigerian Application of the English Rule:

The Nigerian practice is particularly significant because of its proximity to both the Sudanese and English law: it has a relationship to English law similar to that of Sudanese law.301 The issue in the Nigerian case to be noted here is of special interest because the statutory provision considered is shared with the Sudan C.C.P.302

Section 78(1) of the Criminal Procedure Code of Northern Nigeria


301. The Northern Nigerian Code of Criminal Procedure was very closely adopted from the Sudanese C.C.P.; both Codes are based on the general principles of English criminal procedure, and both are now interpreted against the general background and with reference to the legal literature of the English common law.

302. Cf. section 73 Sudan C.C.P.; see below, pl146 note307, for the text of the Sudanese section. It would seem that the Sudanese section is slightly stricter in requiring the presence of witnesses: except with the prior authorisation of the magistrate, the presence of witnesses is imperative.
provides that a search under the Code "shall, unless the court or justice of the peace owing to the nature of the case otherwise directs, be made whenever possible in the presence of two respectable inhabitants of the neighbourhood to be summoned by the person to whom the search warrant is addressed". In Sadau and Another v. The State, the police, armed with a search warrant, searched the house of the first accused while he was away and without summoning any witnesses and removed some incriminating materials which were tendered in evidence at the trial. The accused claimed that the incriminating materials were planted in his house by the police officers who conducted the search, and argued that the evidence so illegally obtained - contrary to section 78(1) - should be held inadmissible. "The Supreme Court, faced with this factual situation and also in the absence of any statutory or case law direction in Nigeria, preferred to fall back on the English common law for guidance. It was decided to admit the evidence derived from the illegal search, quoting with approval the ruling of the Privy Council in Kuruma, Son of Kaniu v. R...."

This decision was criticised on the grounds that, in the context of the Nigerian Evidence Act, the Supreme Court was not justified in applying Kuruma; and that even if the principle in Kuruma did apply, it was not


applied properly: "the evidence in Sadau's case is unreliable, and furthermore, as there was no reason given by the constables as to why the Criminal Procedure Act was not complied with, the trial court should have exercised its discretion and excluded the evidence." 305

(iii) The Exclusionary Rule in the Sudan: Its Present Practice and Future Development:

(a) Current Sudanese Practice:

The current position in the Sudan with respect to a general exclusionary rule is not clear; the only reported case seems to support the proposition that an exclusionary rule is in force in the Sudan; it fails, however, to define the scope and principle of the rule. Before considering this case, an earlier unreported case ought to be mentioned.

In Sudan Government v. Atta Ahmed Hussein, 306 an application for revision of a conviction for the illegal possession of araki - a native liquor - the defendant complained that the search of his house which was alleged to have resulted in the seizure of the araki was contrary to section 73 C.C.P. That section requires, inter alia, that the search must be conducted in the presence of two independent witnesses. 307 In

305. Ibid. 82.
307. Section 73 C.C.P. reads: "Searches under Part C of this chapter shall, unless the Magistrate owing to the pressing nature of the case otherwise directs, be made in the presence of two sheikhs or other respectable inhabitants of the neighbourhood to be summoned by the person to whom the search-warrant is addressed. A list of all things seized and of the places in which they were found shall be drawn up by the person carrying out the search and shall be signed or sealed by witnesses."
holding the evidence relating to the finding of the araki in the defendant's house inadmissible and quashing the conviction, Mr. Justice Hayes said:

"It is not merely that Khartoum North Police bungled the prosecution by omitting to summon the single independent witness of the search and finding; the search had been conducted in disregard of section 73 Criminal Procedure Code: one independent witness is not enough. There would have been no point in adjourning to call the missing witness, for the Court, as a matter of practice, ought not to convict without two witnesses. This is not a piece of pedantry; the power of search is a serious invasion of the right of privacy, and the safeguards of the Code must be insisted upon. Not only that, but, if these safeguards are disregarded, people are going to say that araki is 'planted' by the Police.

The araki found, as a piece of real evidence, is conclusive only if the Court believes the Policeman. But the Court should not accept the Policeman's evidence unless supported [by two witnesses] as provided in section 73."308

In the only reported case on the question, Sudan Government v. Babiker Mohamed Babiker and Another,309 the defendant's business premises were entered and searched by the Public Health Officer and Public Health Inspector of Omdurman under the suspicion that the defendant, whose business was to grind and package shatta, red pepper, mixed it with extraneous materials. They seized specimens from the shatta found in the premises and sent them for analysis. The analysts confirmed the presence of extraneous materials in the shatta, and concluded that it was unfit for human consumption. Information was lodged against the defendant, under section 217 Sudan Penal Code, for adulteration of food or drink intended for sale. During the investigation the defendant persisted in denying


having any mixed shatta in his premises; a warrant was obtained to search his premises, but analysis of the second specimens showed that the shatta was pure of any extraneous matter.

At the trial, the magistrate relied on the evidence of the first search and convicted the defendant. On application for revision, counsel for the defendant argued that the search was illegal and the conviction based on its results therefore bad. Mr. Justice Osman El Tayeb agreed and quashed the conviction; after noting the requirements of the C.C.P. for a valid search he continued:

"A warrant improperly issued or drafted may be described as illegal but we do not want, as we are not concerned, to comment here on the effect of the result of the search thereby conducted on the proceedings before the magistrate. But we think that a search or inspection, made without a warrant (except in searches during pursuit: Code of Criminal Procedure, s.67, or under the like provisions), is not only illegal, but the result of such search or inspection should have no effect on the proceedings before the magistrate. In the least in a case like the present there is doubt as to the propriety of the search and the arrangement of the samples taken. It is important to safeguard that no mistake was made, and if any it should be explained. For these reasons we have to acquit accused Babiker and order his release."

This is the closest any Sudanese court has come to stating a general principle with respect to an exclusionary rule. The proposition this case really supports is quite limited: that the results of a search conducted under a certain degree of illegality are excluded from evidence at the trial.

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310. Ibid., at 17. Emphasis supplied. Mr. Justice Osman El Tayeb does not appear to be aware of the earlier unreported case of Atta Ahmed Hussein.

311. From the language used, see underlined part of the quote, it appears that the court envisaged situations where illegality did not lead to exclusion.
It is interesting to note that in both cases, Atta Ahmed Hussein and Babiker Mohamed Babiker, the rationale given by the court for exclusion was reliability and not any notions of the evils of participating in illegal conduct or the need to deter official illegality. This appears to be the reading of the position by the lower courts. In a recent unreported case, Sudan Government v. Idris Doud Ahmed and Others, the warrant was duly signed, but suffered from other defects such as the fact that the accused's first name only was given, no address was mentioned and no date was entered on the warrant. The search itself was conducted in the absence of any independent witnesses. At the trial the magistrate dismissed the defence objections to admissibility of the results of the search; with respect to the first type of defects, those in the warrant, they were regarded as immaterial as long as the accused and his address were identifiable and the search conducted only once. As to the absence of independent witnesses, the magistrate first noted that the requirements of section 73 C.C.P. can be dispensed with by the magistrate when appropriate, then he proceeded to say that under the circumstances of the present case there was no need for the presence of witnesses: because of the nature of the evidence being sought - evidence of prostitution, there was no danger of the police planting or being accused of having planted the evidence as was the case under Babiker case. In conclusion, the magistrate decided to accept the evidence.


313. Both the counsel for the defence and the magistrate cited and argued on Babiker case; neither appear to have been aware of the earlier case.
the defence appeal was dismissed on grounds other than the correctness of the decision of the magistrate to admit the evidence.\textsuperscript{311}

There is an unfortunate flaw in the magistrate's reasoning that should be mentioned because it reflects the consequences of unclarity of principle in this area of the Sudanese practice. The magistrate appears to be saying that since it is within his discretion to relieve the police of the requirements of section 73 C.C.P. he is doing so, under the circumstances of the case, after the event. One would respectfully disagree, the section refers to prior and not subsequent authorisation. It is suggested that it is not open to the magistrate to legalise an illegal search by declaring that since he would have authorised the search to be conducted in the absence of witnesses, he is doing so post facto. It may be open to him to say that he does not believe the defect to be serious enough to warrant the exclusion of the evidence;\textsuperscript{315} but that would be quite a different matter: in the first case he is legalising the search itself, in the second case he is exercising his discretion under a

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\textsuperscript{311}. The defence objections were raised at an early stage, asking for the case to be dismissed under section 118 C.C.P. for lack of evidence; the appeal against the decision to proceed with the trial was dismissed by the Province Judge, who was confirmed by the Court of Appeal, holding that there was enough evidence to justify continuing with the trial. After conviction the sentence seems to have been so light that the defendants did not bother to appeal, the interest of lawyers in clarity of principle notwithstanding.

\textsuperscript{315}. Query, whether failure to observe section 73 can ever be excused; evidence may not be planted, but who is to certify what was in fact found?
discretionary exclusionary rule. Whether such a rule exists is a completely different question.

Thus, the position in the Sudan appears to be fluid and in need of clarification. In future, it is quite capable of developing in any one of the three ways described above: strict exclusion, a compromise position of a discretionary exclusionary rule or strict admission. Before it solidifies in any direction, full discussion of all the possibilities, with reference to the conditions in the Sudan, is called for.

(b) Future Development:

The problem of police misconduct and abuse of power is a very real problem in the Sudan: one would suggest that it is the most serious and pressing problem of law enforcement in the country. The most significant facts in this respect are the vastness of the country and the ignorance of the general population: the vastness of the country is significant because of the consequent variations in socio-economic conditions and the practical difficulties of devising and enforcing a general system of limitations or controls. Besides, the desirability of any measure needs to be assessed with reference to each region - none of the arguments can be equally valid and relevant to all parts of the country, at least not with the same force. The following general assessment and proposals, therefore, necessarily have to be tentative and general.

316. Cf. the Scottish position on the effect of urgency.
The practical difficulties of communications and facilities necessary to enforce any system of checks or limitations on official authorities are complicated and rendered even more frustrating by the ignorance of the vast majority of the population of their rights, and the apathy and indifference of the few educated Sudanese. Thus, whether from ignorance or apathy, the importance of the underlying principle involved in the control of police powers - the dangers of gradual erosion and nullification of the very basis of security and freedom of the individual that will grow, if unchecked, into debasing and dehumanizing authoritarianism in its worst forms - are not appreciated, largely by default.

I. A General Proposition:

In relation to the Sudan, therefore, it would be superfluous to offer new plans and schemes involving fundamental changes in the existing system, requiring additional cost and manpower. It would be more practical to attempt to realise the full potential of the existing arrangements first, and see if they will suffice; if not, then the least costly and easiest to implement changes should be made with reference to specific defects and problems.

For the realisation of the full potential of the present system action is required at various levels. It is suggested that the most effective action is political; public pressure and vigilance in regard to the daily and ordinary practice of the police, especially when poor and ignorant "bad types" are the subjects of police action. No significant improvements can be expected if the control of the police is left exclusively to
official channels and processes; control of official power is primarily a political activity to be tackled by responsible press coverage and enlightened public opinion. An abuse of power is the concern of everyone because, if allowed to go undetected and unchecked, it will affect everyone directly and personally in time. 317

Whether in response to pressure and political action or on their own initiative, police administration and superior officers can do a lot to prevent abuse of power in the first place, besides detecting and penalising its incidence. Prevention can be affected not only through recruitment of the best elements and their proper training, but also by articulating and effectively communicating policy statements on the various areas of police activity. 318 Such internal policy statements are much more likely to influence police behaviour than would the courts: "norms located within the police organization are more powerful than court decisions in shaping police behavior...." 319 "Workable guidelines are beyond the capacity of the courts to formulate or administer" 320 because they lack the necessary

317. A relevant Sudanese proverb translates: "if they shave your brother's hair, you better prepare yourself for the same treatment."


information and consultation machinery: they are bound and limited to the facts of the case in hand, and can only review police practices that are raised or become relevant to the issues before the court. 321 Yet, though unsuited to formulate general policy and guidelines, the courts would respond to any lack of such guidelines by attempting to fill the vacuum; 322 the results are bound to be unsatisfactory.

Nonetheless, a legal scheme for dealing with abuse of official power, especially by the police, is absolutely essential not only as a framework within which other checks can operate, but also as a basic and comprehensive last resort, available to all regardless of any adverse facts or characteristics. The law must provide for the equal protection of the underprivileged, the lonely and the unknown and champion unpopular causes.

Having reviewed the literature in other common law jurisdictions, it is concluded that there is no complete and final answer to the dilemma of providing for effective but controlled police powers: only concerted and continuous efforts, perfecting and modifying the procedure and its practice as and when necessary to carry on with the basic aims of effective but controlled law enforcement. The twin purposes - ensuring the protection of the individual interest in personal liberty and the social interest in the detection and punishment of offences - must always be kept in sight,


neither must be allowed to encroach upon the other. It is proposed that in the context of present conditions in the Sudan it would be best to retain the traditional remedies approach - the imposition of civil, criminal and disciplinary sanctions on the offending policeman - as the primary device of control, and to supplement them by a general exclusionary rule.

2. An Exclusionary Rule:

In recognition both of the merits of the arguments in favour as well as of the limitations of the exclusion of evidence illegally obtained as a device for controlling the police and enforcing regulations of their powers, it is proposed that a single general but discretionary exclusionary rule should be maintained. The bounds of this discretionary rule and the factors relevant to its application will emerge and be improved and developed through long and regular practice once the validity and usefulness of the principle are appreciated. One would expect such developments to be concerned with the nature and degree of the illegality of the police conduct, its circumstances and motives, the nature of the offence being investigated at the time, etc.

Proposing a discretionary rule requires support and defence against both sides to the present controversy: why an exclusionary rule, and why

323. As observed in Breithaupt v. Abram, 352 U.S. 432 (1957) at 436: "Due process is not measured by the yardstick of personal reaction...but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct." One would not presume to define or contain this general principle.
not an absolute one? Nonetheless, it is the easiest proposition to maintain and the most balanced and realistic: in the field of control of police powers there are no conclusive arguments, hence no absolute solutions. It may be true that it is morally wrong for the courts to condone and reward the illegality by admitting the evidence and basing its finding of guilt on it; yet there are other less drastic ways in which the court can condemn the police illegal or improper action e.g. by directing the institution of criminal prosecutions of the officers responsible. Cross makes the point by an illustration:324

"If a room is searched and a dead body is found in it, it would certainly be a terrible thing if the guilty occupant were allowed to go free on a charge of murder because the search was technically illegal; but there must be a limit to this doctrine. What if admission were gained to the room in consequence of a violent assault, or what if the whereabouts of the corpse were ascertained by means of prolonged torture of the accused."

Again, though it may be conceded that exclusion of the evidence may have some influence on future conduct of the police, such deterrent effect does not appear to be as strong as the proponents of the absolute exclusionary rule make it out to be. Even if it was as effective a deterrent, police discipline and deterrence are no more the sole factor or consideration than is the reliability of the evidence obtained. Concern with the rights and liberties of the victim of police action must be balanced against those of the victim of criminal activities; besides

the need for reasonable and humane police methods, respectful of the privacy and dignity of the individual, there is the need for effective law enforcement. In conclusion one tends to appreciate the point:

"Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy, but it is a prohibitive price to pay for an illusionary one."

One would therefore suggest that if the illegality or irregularity does not seriously contravene a rule of law embodying a fundamental value, and if it is not the result of a deliberate offence or dishonesty, but rather an honest error committed in good faith or a failure to comply with an insignificant technical rule of procedure, the exclusion of the evidence so obtained would be an excessive and unreasonable response. Yet, exclusion of the evidence may sometimes be justified on considerations of reliability or to influence and control future police conduct.

A discretionary exclusionary rule allows the court to be selective in its response by leaving at its disposal the full range of responses. The risk of exclusion would be as effective a deterrent as an absolute requirement without the cost of compulsory acquittal of the least deserving and most dangerous criminals.

Similar suggestions have been made in the context of the various relevant legal systems. Criticism is usually levelled against the uncertainty of a discretionary rule. It is said, for example, that the resultant uncertainty would hamper the administration of justice because the prosecution would not know what is admissible evidence, thus becoming unable to decide whether or not to prosecute and how to conduct its case if it should decide to prosecute. In answer to this one would point out that there is an element of uncertainty inherent in all rules of evidence - including an absolute rule, whether of exclusion or inclusion, of illegally obtained evidence - with all its requirements and exceptions. It may be true that a discretionary rule would increase the uncertainty but not, it is submitted, to an unworkable degree. After all, the doubt as to admissibility of evidence will arise only in a few borderline cases,


in most cases the question will be easy to answer either way. Moreover, with the passage of time the principle of admissibility will become clearer. The similarity of the proposed position to the Scottish practice suggests that the Scottish literature may be helpful in this respect. Moreover, with the passage of time the principle of admissibility will become clearer. The similarity of the proposed position to the Scottish practice suggests that the Scottish literature may be helpful in this respect. In any event, the temporary uncertainty is not too high a price to pay for a just and reasonable rule. In conclusion one finds oneself in complete agreement with Heydon when he says:

"There is little point in deterring or punishing conduct which is accidental or which is, as a matter of common sense, justified by urgency, seriousness or necessity. Much of the debate about the exclusionary rule is in fact falsely conducted from extreme positions. It is not true that all evidence excluded in America is the product of an innocently blundering constable investigating a murder, nor that all evidence admitted in England is obtained by callous detectives brutally getting blood samples from those charged with drunken driving. Police methods and the crimes investigated show great variety, and a rule of the Scottish kind is capable of varying the conclusion with the facts. If conduct must be deterred or punished, the Scots rule permits exclusion; if there is no point in the police conduct, the evidence will be admitted and the guilty convicted."


Chapter 5

Interrogation

This chapter is concerned with the interrogation of suspects or accused.¹ By "interrogation" references is made to the questioning of suspects in depth. It is obvious that on the reporting or discovery of a suspected criminal offence the police, in their general investigations, will ask questions of persons concerned with or suggested by the situational context of the incident or offence, some of whom may become witnesses, other suspects. At such an early stage the police usually maintain an open mind, their questioning being merely probing, following all leads they have, and not seeking evidence to be used in the criminal prosecution. If such initial questioning and other investigation lead the police to focus their suspicion on some particular suspect, the police may then wish to, and they normally do, question this suspect in detail or depth. It is this latter questioning that is referred to as interrogation in the following discussion.²

The police interrogation of suspects raises several problems of principle and practice. There is first the basic problem of the necessity and desirability of the interrogation of suspects as an investigative technique and the regulation and control imposed on it in the main common law jurisdictions. There is also the further question of the enforcement of these regulations and controls as there is little point in

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1. No special significance is attached to the use of either of these terms in the present work.

establishing elaborate systems of checks and safeguards if they are not enforced in practice.

(1) To Interrogate or not to Interrogate: The Basic Dilemma:

It should be observed, from the outset, that the views and arguments expressed on both sides of this controversy are inconclusive for two main reasons. First, they fail to meet each other: the proponents of interrogation allege the practical need for the device in solving crimes and obtaining evidence, its opponents assert the dangers and potential for abuse. Secondly, both views are based on factual assumptions that are largely unverified, often unverifiable. The case for and against interrogation is therefore to be considered in the light of these limitations.

The proponents of police interrogation of suspects argue that physical evidence is not always found in any degree or shape that would reveal any clues as to the identity of the perpetrator of the crime or provide the necessary proof of his guilt. High judicial authority accepts the need for interrogation in some cases. As pointed out above, however, there is no conclusive evidence one way or the other.


The experience of other countries is also cited in support of the normality of the technique; it cannot be all bad, the argument presumably goes, if it is used by "civilised" countries.

The opponents of the technique, on the other hand, point to several of its objectionable manifestations and raise general objections. These may be grouped as dangers of false confession, difficulty of proof of what was said and done in secret police interrogation, the privilege against self incrimination and the general standards of police procedure.

The first two objections are closely linked; the common law has condemned coerced confessions for centuries and the law of evidence expressly excludes such confessions, but how is it to be proved whether or not the confession was in fact coerced or involuntary? It is claimed, and secret interrogation allows no verification either way, that secrecy "conceal(s) violence, protracted questioning and other coercive tactics". There are no independent witnesses or reliable record on which conflicting claims as to what actually happened may be assessed.

The psychology of confession is used to explain how an innocent suspect under interrogation may confess guilt without the use of measures that would render his confession inadmissible under the traditional

7. See Schaefer, The Suspect and Society, 32 and note 7 at 87-88.
It may seem highly improbable that an innocent man should confess under "normal" police questioning, that is, without the use of force, threats or other "improper" inducement. The phenomenon of false confession, and there is no doubt that false confessions are in fact made, may be explained, at least in part, by whatever it is that makes anyone, whether guilty or not, confess to a crime. It is said that the "guilty" confess to relieve anxiety and dispel hostility; for the same reasons "an innocent" man may confess. Furthermore, some people can actually be convinced of their own guilt by "noncoercive" questioning. As Glanville Williams puts it:

"There are perhaps persons of such mentality and temperament that in order to end an atmosphere of suspicion and hostility they will say and sign anything that seems to produce for the moment a more favourable feeling.... Some people seem to be


11. See for example, Paget and Silverman, Hanged - And Innocent, (London: 1953) for the case of Timothy J. Evans who confessed to and was hanged for a murder he probably did not commit. He had certainly confessed to the murder of his wife though it was established three years later that he did not kill her at all. For other incidents see Arthur E. Sutherland, Jr., "Crime and Confession", 79 Harv.L.Rev. (1965-66) 21 at 37-40. See also The Guardian, Saturday October 18, 1975 for reports of the release of three youths after three years in prison for a murder they did not commit. All three "confessed" to the killing in police interrogation at the time and signed written statements to that effect.
so suggestive that they can themselves be falsely persuaded of their guilt."12

The privilege against self-incrimination and the so-called right to silence are also used in argument in favour of limiting police interrogation.13 This view finds support in several decisions in the United States Supreme Court which culminated in Miranda v. Arizona, where it was said:

"In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will' .14

The entire thrust of police interrogation there (in Escobedo v. Illinois15), as in all the cases today, was to put the defendant in such emotional state as to impair his capacity for rational judgment".16

12. G. Williams, "Questioning by the Police: Some Practical Considerations", (1960) Crim.L.Rev. 325 at 336. He concludes, however, that the risk does not justify rejecting all confessions to the police. "Important as it is not to convict the innocent, we cannot draw up the rules of procedure and evidence merely for the purpose of acquitting the innocent. Some slight risk of convicting the innocent in rare and extraordinary cases must be accepted for the purpose of convicting the mass of those who are guilty". loc.cit. Emphasis in original.


The Court concluded, inter alia, that "without proper safeguards the process of in custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 17

Along similar lines, one writer pointed out that a man who surrenders his right to remain silent under police interrogation "voluntarily", does so under circumstances in which no other legal act would be sustained as "voluntary" by any court anywhere. 18

It is further claimed that in the long run secret interrogation and police reliance on confessions will have a deleterious effect on the operation of the criminal law. 19 It is also alleged that because the

17. Ibid. at 167. Hence the set of warnings and the famous Miranda scheme. There was, however, a strong dissent. This case is discussed more fully below.

18. Sutherland, "Crime and Confession"; he contrasts the position of the accused with that of a testatrix who is subjected to similar environment and "questioning" as a person under interrogation in an effort to make her change her mind about whom she wishes to will her property: "Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

Police tend to abuse their power of questioning in relation to the general public, the opportunity and magnitude of abuse in relation to suspects must be much greater. 20

In view of the fact that the claims and counterclaims are not effectively repudiated, though sometimes challenged, and as interrogation is already in practice, its proponents conceded and its opponents were obliged to settle for limitations on interrogation of suspects rather than its total abolition. 21

(2) Interrogation Circumscribed:

Thus, against this background of conflict between need and danger of abuse a compromise is once more worked out in the various legal systems: allowing interrogation in the interest of effective detection and prosecution of offenders subject to safeguards against convicting the innocent and to maintaining the moral acceptability of the criminal justice system as a whole. 22 The variations in practice can be seen as differences in emphasis on one aspect or the other. It is not easy to separate the restrictions placed on interrogation from the consequences of their violation because the restrictions need the support of sanctions if they


22. See Eleventh Report, para. 16, 17 and 56.
are to be applied; and if the sanctions are not effective in ensuring compliance that will be a weakness in the restrictions themselves. In the interest of clarity, however, the restrictions must be set out first, and assessed before the sanctions are considered.

Taking the three main jurisdictions under review - that is to say, England, the United States and Scotland - the picture may be generally described as a spectrum. There is wide scope for interrogation in England that narrows down as the investigation advances and suspicion hardens; the United States and Scotland fall on either side of this middle position. In Scotland, the interrogation has to cease earlier in the investigation while in the United States it may continue to the end subject to requirements of warning and the right of the suspect or accused to terminate it at any time by withdrawing his waiver of his right to remain silent. It may be said, in general, that each regime has its points of laxity and compensating points of firmness. Space permits of only a brief outline.

One device used for limiting or controlling interrogation by all three regimes is the rule against involuntary or coerced confessions. Essentially an exclusionary rule of the law of evidence, the rule prohibits the use of violence or physical abuse, threats and other improper inducements in questioning the accused. In this way, in such questioning of the accused as may be allowed, the police are circumscribed in what they

may do or say to induce the accused to answer their questions or to incriminate himself. 24

(1) England

(a) Judges' Rules:

Out of this voluntariness requirement evolved other requirements, sometimes not as strict rules of law, to limit further police interrogation of suspects. 25

In English practice this is done through the Judges' Rules. These rules must be understood in the light of the general rule against involuntary confessions and general notions of fairness to the accused. 26 Cautioning the accused before taking his statement, a practice that is said to be two centuries old, evolved to help the prosecution to gain admissibility for any statement the accused might make by proving its voluntariness. Yet it was neither a condition of admissibility nor "a magic formula capable of cancelling serious irregularities such as inducements". 27


27. In the early days the caution "was administered by the magistrate before whom arrested persons had to be brought". Ibid. 9.
The origins of the Judges' Rules may be traced to the preface to Vincent's Police Code written in 1882 by Lord Brampton - Mr. Justice Hawkins - as advice to constables on questioning. The principles expressed then were confirmed in a letter from the Chief Justice, Lord Alverstone, to the Chief Constable of Birmingham in 1906. The Rules, in their known form, were formulated in 1912 in four rules, added to in 1918 and confirmed in 1930. They stood unaltered until they were revised and reissued in 1964. The old Rules had their difficulties of interpretation and were criticised on principle too. The significant features of those Rules need to be stated to contrast them with the position under the 1964 version.

The 1918 Judges' Rules allowed police questioning up to the point when the police had made up their mind to charge the person being questioned with a crime or such person was taken into custody. In either event - a decision to charge or an arrest - the police must caution the suspect that he was not obliged to say anything, but that whatever he did say...
would be taken down in writing and might be given in evidence.\textsuperscript{32} The combined effect of Rules 3 and 7, as understood by the great majority of police forces, as reported by the Royal Commission on Police Powers of 1928\textsuperscript{33} and confirmed by the 1930 Home Office Circular,\textsuperscript{34} was that no further questioning of an accused person was permissible except to clear up elementary and obvious ambiguities in any statement he may have given.\textsuperscript{35} Thus the Rules prohibited all interrogation once the accused was taken into custody or a decision to charge him was made.\textsuperscript{36}

The new Judges' Rules, announced by the Lord Chief Justice on 21\textsuperscript{st} January, 1961,\textsuperscript{37} start by reaffirming certain general principles which

\begin{enumerate}
\item Rules 2 and 3. For text of caution see Rule 5; see also Home Office Circular of 1930, quoted in Abrahams, \textit{Police Questioning and the Judges' Rules}, 33.
\item The Lee Commission, Cmd. 3297. See Final Report, published March 1929, paras. 162, 165, 166 and 169.
\item Relevant part was quoted by Abrahams \textit{Police Questioning and the Judges Rules}, 32-33.
\item As G. Williams pointed out, the second test is inherently difficult to apply as it is for the police alone to determine the point of time at which they wish to make a charge, "Questioning by the Police: Some Practical Considerations" at 327.
\item This restatement was published in Home Office Circular No. 31/1961, which also contain Administrative Directions on Interrogation and the Taking of Statements. The new Rules came into effect on 27\textsuperscript{th} January, 1961. For text of Rules and Directions see Abrahams, \textit{Police Questioning and the Judges Rules}, 53-60.
\end{enumerate}
may be regarded as declaratory of the common law. The essential difference between the new Rules and the old ones is that the new Rules provide for an earlier, objectively determined point at which a caution must be given but permit interrogation or questioning at a later stage in the investigation. By Rule 2 the police are obliged to caution the suspect as soon as they have "evidence which would afford reasonable ground for suspecting" that he has committed an offence. Yet, and whether he was in custody or not, the suspect or accused may continue to be questioned or interrogated by the police. It is only when the suspect is "charged with or informed that he may be prosecuted for an offence", when he is given the second caution, that questioning is restricted under Rule 3(b). No questioning is allowed beyond this stage except where "necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement." Before any such questions, a third caution must be given.


39. From the language of Rule 3(b), these appear to be illustrations and not an exhaustive list of the "exceptional cases" where questioning after the second warning.

40. Though the wording of the three cautions, under Rules 2, 3(a) and 3(b), is slightly modified, the message is the same: that one is not obliged to make any statement or answer questions, but if one does the statement or questions and answers will be taken down in writing and may be given in evidence.
Thus, the operative stage in restricting interrogation under the new Rules is when the suspect has been charged with the offence or informed that he may be prosecuted and not when he has been taken into custody as used to be the case. The test under the new Rules has been clarified in R. v. Collier, in that there is no warrant for reading into the words "has been charged" the words "or ought to have been charged". The effect of this holding is that "by delaying the charge the police can deprive the accused of the protection of the Judges' Rules, except that he must still be cautioned under Rule 2, because the test laid down in that rule ... is objective not subjective".

It has been argued that the new Rules violate the common law in that they contemplate custody before "charge" while the House of Lords decision, Christie v. Leachinsky, require that, as a condition of lawful arrest, one must be informed of the ground of his arrest.

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41. Rules 1 and 3.


43. R.N. Gooderson, "The Interrogation of Suspects", supra, 275. The first caution is called for under the new Rules once the police have "evidence which would afford reasonable ground for suspecting" regardless of whether or not they decided to charge or to make an arrest on such evidence.


But as has been explained in judicial decisions\(^1\) and by other writers,\(^2\) the information to which one is entitled on arrest does not constitute a "charge" within the meaning of Rules 1 and 2. The difference appears to be one of degree of suspicion and evidence in support of such suspicion.

As one writer further explained, even if the arrest be unlawful, one may still be questioned in conformity with the Judges' Rules and, barring a violation of the voluntariness rule, his confession or statement would be admissible. "The Rules deal with police questioning and do not regulate powers of arrest".\(^3\) In other words, the Judges' Rules regulate and allow questioning in custody regardless of the legality of such custody.\(^4\)

One issue which is not covered by the new Judges' Rules, nor was it covered by the old ones, is questioning relating to offences other than the one for which the accused is in custody. On the one hand, it is obvious that all the considerations or reasons for limiting or controlling police questioning of suspects in custody apply with equal force whether the suspect is being questioned with reference to the offence for which he is in custody or with reference to another offence.\(^5\)

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5. See Commentary [1959] Crim.L.Rev. 186 at 188; and the correspondence and editorial comment, \textit{ibid.} 673-79.
hand, it would be difficult to investigate offences if the suspect should be immune from inquiries simply because he has already been arrested for another offence. The present position in English practice is that "it is permissible to question a man, albeit in custody, in regard to other offences." The current English practice, in its essential features, may be described in the following terms. The accused is given the benefit of several cautions, "a declaration of war" by the police. He is informed that he need not talk at all and warned against the consequences of talking. Subject to this the police are allowed full range in questioning up to the point when they formally charge him with the offence. From then on, with respect to the offence charged, their ability to interrogate is drastically curtailed.

(b) The Eleventh Report:

The English Criminal Law Revision Committee recently produced its

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53. For a good comment and rule by rule analysis and comparison see Abrahams, Police Questioning and the Judges Rules, 42-52.

54. As Devlin described it, see The Criminal Prosecution in England, 31.
Eleventh Report - Evidence - in which they discussed and recommended on the interrogation of suspects. In view of the distinguished and highly authoritative membership of the Committee, it is important to set out their views on the subject although "there does not seem to be any immediate prospect of the implementation of the Committee's recommendations".

The Committee proposed "to restrict the so-called 'right to silence' enjoyed by suspects when interrogated...By the right to silence in this connection we mean the rule that, if the suspect, when being interrogated, omits to mention some fact which would exculpate him, but keeps this back till the trial, the court or jury may not infer that his evidence on this issue at the trial is untrue!" Under the proposal it will be permissible to draw this inference if the circumstances justify it. "The suspect will still have the 'right of silence' in the sense that it is no offence to refuse to answer questions or tell his story when interrogated; but if he chooses to exercise this right, he will risk having an adverse inference drawn against him at the trial." The Committee felt that to forbid the


57. Eleventh Report, para. 28 and clause 1(1) and (2) of the annexed Draft Criminal Evidence Bill. The Committee also propose to limit the right at the trial by allowing the prosecution to comment on the accused's omission to give evidence and by allowing adverse inferences to be drawn from silence at the trial, see para. 110-113.
jury or magistrate's court to draw whatever inferences are reasonable from the accused's failure, when interrogated, to mention a defence which he puts forward at the trial is not only contrary to common sense but also gives an unnecessary advantage to the guilty without helping the innocent. 58

The proposal allows for the drawing of "such inferences... as appear proper" 59 from the failure of the accused to mention the fact. What are the proper inferences, if any, depends on all the circumstances of the case; an adverse inference may not always be proper or justified. "Obviously there may be reasons for silence consistent with innocence. For example, the accused may be shocked by the accusation and unable at first to remember some fact which would clear him. Again, to mention an exculpatory fact might reveal something embarrassing to the accused, such as that he was in the company of a prostitute. Or he may wish to protect a member of his family." 60 That is why the Committee leave it to the court to decide, under all the circumstances of the case, what are the proper inferences from the accused's silence at interrogation.

This recommendation, if accepted, would place pressure on the accused to respond to police questioning, or else risk adverse inferences being drawn from his silence at subsequent proceedings. The Committee considered the implications of their proposal on the cautions presently administered to

58. Ibid. para. 30.
59. Clause 1(1), see ibid at 172.
60. Ibid. para. 40. See clause 1(1) of the Bill.
suspects under the Judges* Rules: if adverse inferences are allowed, then the caution must be modified or abolished to avoid misleading the suspect. The Committee also objected to the requirement of caution for other reasons:

"(i) It is of no help to an innocent person to caution him to the effect that he is not obliged to make a statement. Indeed, it might deter him from saying something which might serve to exculpate him. On the other hand the caution often assists the guilty by providing an excuse for keeping back a false story until it becomes difficult to expose its falsity... (ii) It is illogical that, when the police have a duty to question persons for the purpose of discovering whether and by whom an offence has been committed, they should be required to tell a person being questioned that he need not answer. In particular, the first caution (under Rule II), which was introduced when the rules were revised in 1964, has been objected to on the ground that it interrupts the natural course of interrogation and unduly hampers the police..."

In accordance with their proposal, the Committee included a declaration of the absence of any legal requirement to give a caution in clause 1(5) of their Bill. To advise the accused properly on the significance of his silence during questioning and to avoid some difficulties including argument as to whether the accused appreciated the change, the accused is to be given a written notice when he is charged, or officially informed that he may be prosecuted, to the following effect:

"You have been charged with (informed that you may be prosecuted for)---. If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done."

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61. Ibid. para. 23.
62. Ibid. para. 114.
The timing, contents and manner of presentation of this notice reflect the Committee's awareness of various problems associated with caution and warning devices in practice. For example, it is delayed to the time of charge to avoid interrupting the natural course of interrogation; and the wording of the notice is designed to avoid the danger that "the need to give a warning be made an excuse for using threats" – implying that other unpleasant consequences, besides the possibility of adverse inferences, may follow if the accused remains silent.

With respect to the Judges' Rules, the Committee recommended that they should "be replaced by administrative directions by the Home Office dealing, so far as is thought desirable, with the matters provided for in the rules..." it is thought that "restrictions on the way the police should interrogate persons should be imposed not by the judges but by the authority responsible for the police (in this case, by the Home Secretary) or, if the matter is important enough, by law." 64

These views of the English Criminal Law Revision Committee are highly significant from the point of view of the present study because the position in the Sudan has always been that no caution is given at any stage of the interrogation. Now and after an experience of some sixty years with the Judges' Rules and cautions it is recommended that in England too there should be no warning of the right of silence; is the Sudan better off now, or ought

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63. Loc. cit.
64. Ibid. para. 46.
we to introduce warnings?

(ii) The American Models:

Turning to the American scene one finds two distinct approaches or models: in the federal jurisdiction there is a time restriction on interrogation through the operation of the prompt production before a magistrate rule; in both federal and state jurisdictions there is the duty to warn or advise of certain constitutional rights and the offer of legal advice which if exercised would seriously limit the value of any questioning that may follows.

(a) McNabb-Mallory Rule:

According to the federal doctrine of McNabb-Mallory, explaining and applying Rule 5(a) of the Federal Rules of Criminal Procedure, no delay after arrest is allowed for the purpose of interrogation. Thus, the federal statutory or procedural rule of prompt production before a magistrate sets a rigid time limit upon interrogation.


66. This rule requires whoever makes an arrest to "take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offences..."

67. The rule was developed by the Supreme Court in exercise of its supervisory role over the federal courts. For possible argument of constitutional bases for the rule see Remington et al., Criminal Justice Administration, 399. See also "Developments: Confessions" 79 Harv.L. Rev. at 961-96.
This rule has been criticized as causing "voluntary" statements to be excluded from evidence.\(^{68}\) The exclusionary rule used\(^{69}\) to operate by excluding from evidence any statement obtained during such questioning regardless of what methods of interrogation were used. It has been explained, on the other hand, that it reflects concern with difficulties of proof of coercion in custodial interrogation; and that it eliminates opportunity and temptation for abuse by banning all custodial interrogation.\(^{70}\) Other functions or rationales such as effectuation or implementation of various constitutional rights before the magistrate,\(^{71}\) are suggested for the rule.\(^{72}\)

While retaining the procedural requirement of prompt production after arrest, and probably the prohibition of delay for interrogation, Title II

\(^{68}\) See, for example, Fred E. Inbau, "The Confession Dilemma in the United States Supreme Court" \(^{1}\) Ill.L.Rev. (1958) 112.

\(^{69}\) Exclusionary effect is now uncertain in view of the Crime Control Act 1968; see below.


\(^{71}\) That is, right to counsel, privilege against self-incrimination etc. would then be effectively notified and exercised by the accused.

of the Omnibus Crime Control and Safe Streets Act 1968, section 3501(c) appears to nullify at least the automatic exclusionary sanctions the Supreme Court attached to the rule: it provides that in federal prosecutions

"a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offences against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be travelled to the nearest available such commissioner or other officer."

As will become clear when the rest of the section is quoted below, the general impact of section 3501 is to restore "voluntariness" as the basic condition of admissibility of confessions: neither delay between arrest and arraignment, nor any other factor is necessarily conclusive in excluding the statement from evidence.

(b) The Miranda v. Arizona Model

The second model, applicable to both federal and state proceedings, is basically similar to that of the English Judges' Rules, at least in its underlying assumption. Proceeding from the premise of privilege against self incrimination and notions of fair play to the accused in the context of the so-called "accusatorial system", it is said that the accused must
be advised of his constitutional rights and that he must be offered the opportunity of exercising them. After a long and gradual development in the fields of right to counsel, right to silence, due process of law, voluntariness rule and related matters,\textsuperscript{73} the model culminated in the Supreme Court decision of \textit{Miranda v. Arizona}.\textsuperscript{74} Briefly stated the holding in that case was this:

"the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuing opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned".\textsuperscript{75}

\textsuperscript{73} See cases and materials tracing this evolution in \textit{Hall et al, Modern Criminal Procedure}, \textit{h67-97}.

\textsuperscript{74} And companion cases - 384 U.S. h36 (1966).

\textsuperscript{75} Ibid. at h34-h45.
The scheme set out in this decision thus consists of warning of the right to silence and the offer of counsel to be present during interrogation; the accused who cannot afford his own counsel will have one at the state’s expense. The whole scheme, however, is subject to waiver by the accused; that is to say, he may elect to answer questions despite the warnings and decline to take advantage of the offer of counsel. The issue of the warnings must precede every custodial interrogation and the waiver of the rights must be made “knowingly and intelligently”.76

The Supreme Court, however, left the door open for the development of an alternative scheme that may equally satisfy the constitutional imperative of giving effect to the constitutional rights of accused persons. Thus it was said that:

"...we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws".77

76. In the rest of the opinion, Mr. Chief Justice Warren, for the majority, elaborated on the basic scheme and attempted to rationalize it and define its scope.

77. Ibid. at 1467. After stating and explaining the new requirements, the opinion proceeded to say at 1476 "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant".
It was in response to this invitation that Congress enacted section 3501 in Title II of the Omnibus Crime Control and Safe Streets Act in 1968. 78 This Act provides that in federal prosecutions "a confession... shall be admissible in evidence if it is voluntarily given". Voluntariness is determined by the judge in the absence of the jury; but if the confession is held to be admissible then the judge "shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances". In determining the issue of voluntariness, the trial judge "shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession... (2) whether such defendant knew the nature of the offence with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such


79. A confession is defined in sub-section (e) of section 3501 to mean "any confession of guilt of any criminal offence or any self-incriminating statement made or given orally or in writing."
confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession". 80

The section purports to incorporate all the Miranda warnings, as well as restrictions on pre-arrainment delay, in a "totality of circumstances" voluntariness test of admissibility of confessions. Miranda, of course, did not abolish the voluntariness rule, rather it superimposed specific requirements failing which the statement is automatically excluded. It remains possible even under the Miranda scheme for a statement, however, to be excluded for failing to satisfy the traditional voluntariness test though the warnings were given as required. The Act seeks simply to nullify this automatic exclusion aspect of the Miranda scheme.

It is to be observed, however, that in the Miranda scheme exclusion of the statement obtained in violation of the scheme is the negative feature, the consequence of its breach. More important, it would seem, is the positive feature: whether the scheme is valid in the sense that if observed it would fulfil its objectives or purposes. The successful operation of the scheme appears to depend on at least three related assumptions: (a) that the police will give adequate and effective warnings of legal rights and will honour the accused's exercise of those rights; (b) that the accused will understand the meaning of the warnings and their significance as applied

80. Section 3501 (a) and (b). See above for subsection (c).
to his situation and that he will thereby have sufficient basis to decide in his own best interest whether to exercise his rights to remain silent and to request counsel or to waive them; and (c) that the presence of counsel in the police station will protect the accused's privilege against self-incrimination.

In one study conducted by the Institute of Criminal Law and Procedure of the Georgetown University Law Centre to test these assumptions, none of them was found to be true in practice: The police were reported to have failed to observe the spirit and often the letter of Miranda by not giving some or all of the warnings, and by interrogating accused persons without their voluntary, knowing and intelligent waiver. Furthermore, accused persons, even when warned of all their rights and where they signed formal waiver forms, did not understand their rights, or the warning or the meaning of the waiver. Moreover, besides accused persons' declining to request counsel, as and when advised of the right, counsel were not effective in


82. Ibid. 1362-67.

83. Ibid. 13770-71. See 1375-78 on the relationship between an accused person's understanding and behaviour, i.e. whether he decided to exercise his rights even when he understood them. It is suggested that some of those who understood the warnings still declined to exercise them because of a desire to avoid antagonising the police and prosecution and the hope to benefit from cooperating with the police.
protecting the accused rights as often as the Miranda premise appears to maintain. The services they provided were very limited because of the short time they were prepared to spend in the police station, or because their clients had been caught in the act, or the cases were unimportant etc. 84 They also functioned under operational problems such as delay between arrest and counsel's arrival at the police station and delay in seeing his client once he was at the station. 85

Though one may have some reservations on accepting the total and continuing validity of all the findings of this study, 86 it does throw some doubt on Miranda assumptions. On reflection, that is a fair and reasonable conclusion. The Miranda scheme postulates that the warnings be given, understood and acted upon. To the degree that any of these requirements is not satisfied, the effectiveness or validity of the scheme is diminished. That is not to say that the scheme is valueless or useless; it does mean, however, that it is not as valuable or useful as some would

84. Ibid. 1387-90.
85. Ibid. 1385-87.
86. There are inherent methodological weaknesses in this type of study in sampling and otherwise. It may be argued that the study followed Miranda too soon, though it is not certain whether it would have been better to delay it; it could be either too early for the decision and its implications to be fully absorbed or too late as people tend to forget and enthusiasm die down. The validity of the study is also affected by considerations of time and place; it cannot be valid now even with respect to its geographical context, let alone with respect to any other place and time. Validity of the findings is much weaker in relation to other countries.
have it. To maintain otherwise is to defeat the very purpose and objectives of the scheme.

(iii) The Scots Law Approach:

The last system to be considered before the various models or schemes are assessed is the Scottish system. Stated briefly, all custodial interrogation is banned in Scotland. In Stark and Smith v. H.M. Adv. Lord Moncrieff said that "when a man has been arrested on a charge of crime it is even elementary that all interrogation by the police must cease". Unfortunately, this proposition "is so brief as to be misleading"; the question is not that simple. It is agreed that at some point all "interrogation by the police must cease", the question is when? The policy arguments would go to make the point earlier or later, depending on the view one takes of the competing interests. Those in favour of granting the police more powers, on the assumption that that would enable them to catch and obtain the conviction of more criminals, call for a delay in the fall of this ban on questioning. The Courts, however, were suspicious

88. 1938 J.C. 170 at 175.
of police questioning. This trend reached its climax in Chalmers v. H.M.Adv., which was regarded as putting the time of the operative ban on interrogation at a point which may come even before arrest: when the person being questioned "is under serious consideration as the perpetrator of the crime"; whenever that may be. The tide appears to be receding now and the trend is in favour of more latitude for police questioning - or so suggest some of the recent decisions to some writers.

In efforts to classify and reconcile the cases and establish with some degree of certainty as to when it is that interrogation must cease Scottish writers divide the pre-trial proceedings into three stages with reference to the graduation in hardening of police suspicion of the accused.

91. See, for example, Lord Justice-Clerk Cooper in H.M.Adv. v. Rigg, 1966 J.C. 1 at 1-5. See Gordon, "Institution of Criminal Prosecution in Scotland", 259; and Renton and Brown, para. 18-24.


93. Ibid. per Lord Justice-Clerk Thomson at 82. Lord Justice-General Cooper, however, suggested that the stage of suspicion did not necessarily put an end to all questioning; "further interrogation of the person becomes dangerous and if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, will almost certainly be excluded".


On the whole police ability to ask questions of their suspects diminishes progressively as their suspicion increases; that is, it stands in inverse relationship to suspicion. The law, to be extracted from many cases, can be summarized as presenting a spectrum. At the initial investigation stage, "the police are entitled to ask questions of anyone, and all citizens have a duty to assist them, although no one can be compelled to answer any questions". At the charge, post-arrest, or focusing of suspicion and no questioning is allowed. In between the two ends is an area of uncertainty.

The uncertainty of the middle stage is obviously undesirable as it diminishes the workability of the system. The best description of the "sort of thing" one should look for is to be found in the often quoted statement of Lord Justice-Clark Thomson in Chalmers v. H.M.Adv.:

96. Renton and Brown, para. 18-26. See Lord Cooper in Chalmers at 78.


98. Renton and Brown 18-27 to 18-35 for a review of all recent decisions and the general trend. See also Murphy v. H.M.Adv., 1975 S.L.T. (Notes) 17, where Lord Justice-Clark Wheatley questioned the category of "chargeable suspects" appearing in the 4th edition of Renton and Brown. The difficulty with this categorization is that the information on which it is based is in the hands of the police alone, and may change rapidly or even fluctuate as the investigation progresses.

99. 1956 J.C. 66 at 81-82.
"But there comes a point of time in ordinary police investigation when the law intervenes to render inadmissible as evidence answers even to questions which are not tainted by (by bullying pressure, third degree methods and so forth). After the point is reached, further interrogation is incompatible with the answers being regarded as a voluntary statement and the law intervenes to safeguard the party questioned from possible self-incrimination. Just when that point of time is reached is in any particular case extremely difficult to define - or even for an experienced police official to realise its arrival. There does come a time, however, when a police officer, carrying out his duty honestly and conscientiously, ought to be in a position to appreciate that the man whom he is in process of questioning is under serious consideration as the perpetrator of the crime. Once that stage of suspicion is reached, the suspect is in the position that thereafter the only evidence admissible against him is his own voluntary statement."

More recent cases, however, appear to lay "less stress on the stage at which answers are made, and more stress on general considerations of fairness. They have also suggested that in so far as the stage of suspicion is important it is reached only when one person has emerged as the prime suspect, and not, for example, when there are two suspects and it is clear that one of them is going to be charged but not clear which".  

While it makes no recommendation for change with regard to the first investigation stage and the post-charge stage - that is, there is no restriction on questioning in the former and no questioning at all allowed in the latter,  


101. Thomson Committee Report, para. 7.08; and 7-18.
middle or second stage as follows. Starting from the premise that "what-
ever the stage of the law the police do question and will continue to
question suspects... There is in our view nothing improper in the police
asking questions, checking the answers and coming back to the suspect to
ask for his explanation of any discrepancies. We are not suggesting
that a suspect should be compelled to answer police questions, or that
any adverse inference may be drawn from his silence at this stage..."102
the Committee recommended that this type of questioning be allowed so that
"it should be competent for the Crown to lead evidence of statements made
by a suspect before arrest in answer to police questioning".103 As safe-
guards the Committee stipulated for the admissibility of such evidence that
"it must have been fairly obtained..."104; that before "being questioned
the suspect must have been cautioned..." to the effect that he need not
answer but, if he did, his answers will be noted and may be used in evidence;105
that interrogation of suspects in police stations be recorded on tape;106
and that "the procedure set out in Chapter 8.17 and 8.18 has been complied
with at a judicial examination held as soon as is reasonably practicable
after the interrogation so as to give him an opportunity for admitting,

102. Thomson Committee Report, para. 7.12.
103. Ibid. para. 7.13.
104. Ibid. para. 7.13a. See below.
105. Ibid. para. 7.13b.
106. Ibid. para. 7.13c and 7.21b.
denying, expanding or qualifying any answers alleged to have been made by him, or of making any complaints he may have about the interrogation. 107 The Committee recommended also with respect to situations where a suspect says to the police that he wishes to make a statement. The recommended procedure in such cases is for the police to caution the suspect, and record the statement which is to be signed by the suspect; if made in a police station the statement must also be recorded on tape; and, in any case where solemn procedure is followed, the suspect must be given the opportunity to admit or deny making such statement at a judicial examination to be held as soon as practicable after the making of the statement. 108

Spontaneous remarks made by the suspect to or in the hearing of the police are admissible subject to the requirement about opportunity to admit or deny making them in a judicial hearing. 109 This requirement, stipulated for the admissibility of all kinds of statements and remarks by any suspect who is proceeded against on indictment, is designed "to ensure that the accused is given the earliest possible opportunity to admit or deny having

107. Ibid. para. 7.13d. The Committee proposed the revival of the judicial examination of the accused as an effective stage in the proceedings "that when an accused is brought before the sheriff on petition on the next lawful day after arrest, the procurator fiscal should be entitled to require him to be judicially examined" - ibid. para. 8.11. In para. 8.17 and 8.18 the procedure for such examination is set out in detail. See Chapter 8 below.

108. Ibid. para. 7.1h. See also 7.21 on the recording of statements.

109. Ibid. para. 7.15 and 7.22a.
made any such statement or to challenge it on the ground that it is inaccurate or was unfairly obtained. At present such statements are not challenged until the trial and guilty accused have weeks in which to think up false explanations for making such statements. If an accused has to make that challenge within a day or two or even a few hours of making the statement, this would reduce any chance of police unfairness to the accused and also of false challenge, so protecting the police against unjustified attacks upon their integrity. The requirement, however, was thought to "be inconsistent with the (informal and expeditious) nature of summary procedure."

Though no interrogation is allowed after arrest and charge, an answer made to the caution and charge will be admissible. The Committee recommended that the accused "should be specifically asked if he has anything to say in reply to the charge." The suggestion that formal post-charge statements by an arrested person should be taken by a magistrate was rejected. Instead the Committee recommended that "such statements made to

110. Ibid, para. 7.22a. See Chapter 8 generally on judicial examination, specially para. 8.17 and 8.18.

111. Ibid. 7.22b.


113. Thomson Committee Report, para. 7.17.

the police officers should continue to be admissible in evidence provided that certain conditions obtain. The statement must be preceded by a caution and an offer of an interview with a solicitor. It must be recorded in a document in which the accused acknowledges his right to silence, and contain a declaration that he has seen a solicitor or has decided not to see one signed by the accused and a witness. The whole proceedings are to be recorded on tape if they take place in a police station. The accused's statement must be voluntary and not made in response to any invitation, threat or promise by the police; the police questions, which may be only when necessary for clarification, must be inserted in the record of the statement. The requirement of opportunity to admit or deny making the statement in a judicial examination must also be offered to any accused making such a statement who is proceeded against on petition.

One last point that deserves specific mention in the Thomson Committee's treatment of the interrogation is their position on the presence of a solicitor. Section 17 of the Criminal Procedure (Scotland) Act 1887 provided that any person arrested on a criminal charge should be entitled immediately to have intimation sent to a solicitor informing him of the place to which such person was to be taken, and provided further that the

115. Thomson Committee Report, para. 7.19. See also Renton and Brown, para. 18-38 and 18-39.

116. See Chapter 8 of the Thomson Committee Report for the proposal to revive judicial examination as an effective stage in the proceedings. See generally Chapter 8 below.
solicitor was entitled to have a private interview with the accused. The Committee was not in favour of extending this right to counsel to the pre-charge stages so they recommended that "a solicitor should not be permitted to intervene in police investigations before charge" because the purpose of the interrogation, namely, "to obtain from the suspect such information as he may possess regarding the offence...might be defeated by the participation of his solicitor."

This is a major point of contrast with the Miranda v. Arizona model where the suspect or accused not only has a right to have counsel present during the interrogation but also the right that counsel be appointed for him at state expense if he cannot afford one; and that he be advised of both rights. There are other significant differences between the Scottish position, whether actual or recommended, and the American position. On the whole, the differences derive from the fact that the Scottish position and thinking on these questions "proceed not so much on any fundamental constitutional or philosophic basis, such as the privilege against self-incrimination, as on a conception of fairness and a determination by the

117. See Gordon, "Institution of Criminal Proceedings in Scotland", 19 N.I.L.Q. (1968) at 258. The section, now section 19 of the Criminal Procedure (Scotland) Act 1975, refers to a private interview before the accused is "examined on declaration" - that is before he is brought before the sheriff. There is no reference to such an interview before police examination. But according to the Thomson Committee Report, para. 5.03, the police in practice allow the solicitor to have an interview with his client at the police station.

118. Thomson Committee Report, para. 7.16.
courts to control police activity in the interest of fairness". There is no constitutional imperative driving principles and rules to their extreme logical conclusions in Scotland. In other words, the Scottish approach may be described as rather pragmatic than principled.

In contrast to the English Law Revision Committee, the Scottish Thomson Committee objected to any adverse inference being drawn from the accused's silence when questioned by the police. At the same time, and consistently with the general compromise position of the Scots law, they recommended that such inferences may be drawn from failure to disclose at the judicial examination.

It is important to note in general, that all the recommendations of the Thomson Committee reviewed above are to be seen in the context of the Scottish criminal procedure and against the wider background of law enforcement - personnel, capabilities, traditions etc. The reasoning and priorities of the Committee cannot apply in toto to any other legal system. Nonetheless, certain features of the scheme proposed by the Thomson Committee

119. Ibid. para. 7.02.
120. This is also reflected in other areas of Scottish practice, such as attitudes towards the exclusionary rule as a remedy for police illegality.
121. Eleventh Report, para. 28 et seq. and clause 1 of the 'Draft Criminal Evidence Bill, Annex 1.
122. Thomson Committee Report, para. 7.12.
are to be noted.

The traditional order of diminishing powers of questioning is retained; but whenever an admissible statement is allowed to be taken by the police the following safeguards are insisted upon: a caution; tape recording; and, where a person is proceeded against on petition, an opportunity to challenge the accuracy of the statement or the fairness of the circumstances of its taking, to explain or expand it etc. The underlying policies appear to be right to silence, reliability, and fairness to both the accused and the police. It is too early to say whether the Committee's proposals will be accepted as sufficiently safeguarding and serving these policies; earlier still to say whether they will work in practice. If one may express a pessimistic thought, the inter-dependence of the recommendations may not be very helpful towards the acceptance and implementation of any particular recommendation. What is to happen, for example, if the recommendations regarding a judicial examination were not accepted? How important is the requirement of such an examination to the scheme regarding interrogation?

Before leaving the Scots law scene for the moment, the overriding consideration of fairness must be emphasised as the key to understanding the Scottish position as a whole. This consideration balances or complicates, depending on one's point of view, Scots law and practice in pre-trial procedure. It is believed that although this concept is subjective, and hence is bound to introduce an element of uncertainty, yet it provides a machinery for balancing legal rules and relating them to what the ordinary lay member of the jury feels are proper and legitimate police methods.
Considerations of fairness may be seen as a potential limitation on police powers. In his direction to the jury in Thompson v. H.M. Adv. Lord Wheatley is reported to have said:\textsuperscript{124}

"...if the police in the course of a very difficult and serious investigation have got to keep asking questions and probing and probing and probing then as long as they are doing that fairly having regard to their task and their duty, and that nothing unfavourable or unfair to the accused was done either by word or by deed, or by trickery, then, of course, anything that they can elicit is normally competent and acceptable evidence."

Again, in the very recent case of Jones v. Milne,\textsuperscript{125} the High Court of the Judiciary said:

"The mere fact a suspected person is asked a question or questions by a police officer before or after being cautioned is not in itself unfairness, and if answers are to be excluded they must be seen to have been extracted by unfair means which place cross-examination, pressure and deception in close company."

(3) An Assessment of the Options for the Sudan:

Space does not permit of an evaluation of the conflicting claims on the need for interrogation,\textsuperscript{126} the scope and rationale of the privilege

\textsuperscript{124} Ibid, para. 7.10.
\textsuperscript{125} 1975 S.L.T. 2 at 5.
\textsuperscript{126} For a review of the empirical material available see A.L.I. Model Code of Pre-Arraignment Procedure, Study Draft No. 1 (1968) at 102-59.
against self-incrimination and its consequential right to silence and other arguments in favour of or against police questioning. Hence, we start from the compromise premise that a degree of interrogation is justified but that it has to be closely supervised or controlled lest it should get out of hand. To this extent all sides agree; the problem is how to strike and maintain the balance.

In all three regimes briefly reviewed above, when police questioning is allowed, it is subject to the overriding requirement of voluntariness. This would preclude the use of physical abuse, threats, promises and perhaps a variety of other devices, sometimes described as the "third degree". This is a basic principle with which no one can argue. It is with giving it effect and reducing and detecting the incidence of its violation that difficulties arise.

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129. See Gray, "Chalmers and After: Police Interrogation and the Trial Withiin Trial", supra, 16-18, for an indication of what this term means.

130. On this see below at pp. 52 et seq.
The position adopted in this study, and explained and discussed in Chapter 8 below, is that no police interrogation of suspects should be allowed in the Sudan — interrogation before a magistrate should replace all police interrogation. Nonetheless, it is still necessary to make alternative recommendations for improving the current position under which police interrogation is allowed freely. The question therefore arises whether any of the devices reviewed above, whether actually practiced or merely recommended, ought to be adopted in the Sudan should the current position continue.

(i) The MacNabb-Mallory Rule:

One approach that is clearly unsatisfactory is the American McNabb - Mallory rule purporting to limit interrogation by limiting the time during which police may have control over the suspect. For one thing, it is too rigid an answer and fails to allow for variations in factual situations. It is for this reason that the English Royal Commission on Police Powers, 1929, rejected a similar suggestion.\(^{131}\) As the courts feel the need for flexibility and observe the absurdity or unfairness of a rigid rule, they may tend to tamper with the definition of terms such as arrest and interrogation to avoid having to apply the rule. There is also the fear that when time is running out the police might be tempted to exert undue pressure to obtain the information or confession they need before they have

\(^{131}\) Lee Commission, Cmd. 3297, para. 92 and 94.
to surrender the suspect to the control of a magistrate.

Generally speaking, the case against interrogation is not conclusive enough to sustain banning all interrogation as the logical and consistent application of this rule aims at. As no one suggests that police should not be allowed to question witnesses or offer suspects a chance to explain, even before arrest, the question becomes one of degree and extent of interrogation or questioning. For suspects to emerge and become accused persons, and in need of protection as such, a good deal of questioning may have already been done. To ascertain facts alleged by persons "interviewed" by the police and to check their alibi etc. often takes much longer than the twenty four hours or less allowed to the police under this type of rule.

(ii) The Caution or Warning:

As indicated above, there is no requirement of warning in the Sudan; quite the reverse, section 118(2) C.C.P. provides: 132

"But no policeman or other person shall prevent any person by any caution or otherwise from making in the course of the interrogation any statement which of his own free will he may be disposed to make."

Thus, no warning or caution is given at any stage in the interrogation. The question is whether experience with this device in the common law jurisdictions under review would recommend its adoption in the Sudan.

132. Section 118(1) embodies the traditional common law voluntariness rule discussed below. Despite this express provision of section 118(2), magistrates routinely administer a caution, in the English Judges's Rules terms, when they come to record a confession under section 119 C.C.P. See below.
The principle and underlying policy of the caution or warning is to advise the suspect or accused of his right to silence, and any other right that accrues at that stage such as the right to counsel under the Sixth Amendment to the American Constitution, so that he may either exercise them or waive them knowingly and intelligently. To quote C.J. Warren in *Miranda v. Arizona*:

"For those unaware of the privilege, the warning is needed simply to make them aware of it - the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damming and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."

It is true that "there is no point in a man having the right to remain silent unless he is aware of it"; but it does not necessarily follow, however, that the warning or caution is the best way of giving effective notice of the right in a way that enables the suspect or accused to exercise it freely and intelligently. It may be that the caution or warning does not achieve its purported purposes and is merely a ritual or formality to be gone through in order to get down to the real business of interrogation and obtaining confessions and other useful information.


134. Thomson Committee Report, para. 7.13b.
As already indicated by studies referred to above, the warnings model of control over police interrogation is open to several objections to all its underlying assumptions. According to a leading study on the efficacy of Miranda in practice, the warnings were not given properly, the accused neither understood their significance nor was he able to exercise his rights accordingly, and the right to counsel did not help him frequently. Other studies are also similarly unfavourable to the warnings technique.

On the theoretical level, serious doubts were raised as to the efficacy of these warnings: they do not tell enough and, more specifically, they do not help the suspect in deciding whether to exercise or waive his right, or how to do so. Such a decision requires much more information and experience than a recital of the rights can possibly give. Furthermore, psychologically, the warning tends to create the impression that the interrogator is fair minded and perhaps sympathetic; in other words, the warning lowers rather than raises the suspect's guard, and induces cooperation.

Moreover, there are grave doubts as to whether waiver of constitutional rights can ever be "knowing and intelligent" as Miranda stipulates.

135. See above at p.486.


It can reasonably be argued that the same elements of compulsion inherent in custodial interrogation which necessitate warnings will compel waivers. Furthermore, any attempt at determining whether a waiver was made at all and whether it was voluntary labours under the old problem of proof; conflicting versions of what occurred prior to and during interrogation will continue to be made. Miranda only added to the subjects of such conflicting versions and claims: whether and how the warnings were given and whether and how they were waived in addition to the circumstances relative to the traditional inquiry on voluntariness of the statement itself etc.

Empirical studies are also not favourable to the benefits of warnings.

One study concluded:

"Our data and our impressions in New Haven converge to a single conclusion: Not much has changed after Miranda ... The second reason for the almost nugatory impact of Miranda in New Haven should also apply as well to other cities: the Miranda rules, when followed, seem to affect interrogation but slightly. The police continue to question suspects, and succeed despite the new constraints."
In part this may be attributed, it was said, to the inadequacy of mere verbal warnings which the police may by their tone or manner gild of meaning. Though failure to give the warning at all may decline and as review by the courts and police superior officers tighten, the problem of ensuring that the warnings will be full and fair remains. "The tone of a detective's voice, a few words added or omitted, the context in which a warning is given - all are factors difficult to review, and hence to control, but each may profoundly affect the suspect's understanding of his rights." The warnings, however, are not completely valueless: it may be that little is achieved in the specific case, but in the long run warnings contribute to a greater general awareness of rights and a corresponding awareness in the police that they are subject to review. The limits of a scheme based on warnings, must nonetheless be stressed.

Beyond the question of efficacy of the warnings or caution, however, there are the policy considerations relevant to the existence of and scope of the rights purported to be notified and protected in such cautions and warnings. Is the right to silence recognised in the Sudan, and if so, when does it come into effect?

114. Ibid. 1576.
115. Ibid. 1614.
116. On the right to counsel see the next section.
It appears that Sudanese law is ambivalent with respect to the privilege against self-incrimination and right to silence. In common law practice the right to silence is protected by immunity from prosecution for failure to answer questions and freedom from adverse comments at the trial. To take the second protection first, it has no direct application in the Sudan because there is no trial by jury. As to the further question whether it should influence the trial magistrate to know of the accused's silence when questioned by the police the position is unclear. It may be reasonably said that it is only human that the magistrate should be influenced regardless of what the law says. Such influence may manifest itself in many ways, some of which are quite subtle and hard to detect or check in appeal, such as the view the magistrate takes of the evidence for the defence or of the rest of the case for the prosecution. As a matter of law, however, there is no authoritative ruling either way. The analogy of the examination of the accused by a magistrate at committal proceedings and trial, where adverse inference may be drawn from failure to answer, can be argued to support conflicting conclusions. Questioning by the police can be distinguished as one by the accused's adversaries, without the protection of the presence of a judicial officer and at a stage when

1147. The right to silence is discussed more fully in Chapter 8 below.
1148. Eleventh Report, para. 28 and 29; Renton and Brown, para. 18-26.
1149. Under section 218 c.c.p., see Chapter 8 below.
the accused lacked the benefits of legal advice and any degree of discovery. It is also distinguished in that refusal to answer police questioning may be punishable as an offence. Each of these distinguishing features, however, can be used in argument either in favour of or against allowing adverse inferences from silence at the police questioning stage. In favour of allowing the adverse inferences it can be said that the early stage, absence of legal advice and discovery make the answers more genuine and a failure to give them more suspect. It can also be argued that if the accused was willing to accept the risk of prosecution rather than answer police questions, he must have something to hide. In anticipation of the argument that the absence of a judicial officer may encourage police abuse it may be answered that it is covered by the general rule against involuntary confessions and supporting rules of civil and criminal liability. Besides the danger of abuse, opponents of adverse inferences, on the other hand, can say that the accused should be allowed to withhold his defence until he has a chance to consult with counsel and discover something of the nature and circumstances of the offence alleged. To force him to respond to police questioning under threat of adverse inference would be to give his accusers undue advantage.

As to immunity from prosecution there is section 117 C.C.P.: (1) A policeman making an investigation under section 112 may require the attendance before him of any person being within the limits of his own or any adjoining police district whose evidence appears likely to be of assistance in the case, and may examine such person orally.

150. Under sections 150 and 156, Sudan Penal Code.
Such person shall be bound to attend and to answer truly the questions put to him save so far as his answers would tend to expose him to a criminal charge or to a penalty other than a charge of failing to give information under Chapter XI of this Code.151

"Any person" who may be summoned and examined obviously include suspects or at least potential suspects. There is no limit in the section to the depth and intensity of such questioning. The only way out of a prosecution is to admit that the answer would be self-incriminatory. This is a hard choice for the person being questioned to have to make. The section is ambivalent because in purporting to make the exception, it defeats the very purpose of the privilege against self incrimination. One is told that in order to avoid being punished for refusing to accuse himself, he must accuse himself. Thus in contrast to the general common law position that one need not respond to police questioning,152 in the Sudan there is such a duty sanctioned by criminal penalty unless one admits that the answer would be self-incriminatory. There is also the risk of adverse inferences being drawn at the trial. It may therefore be misleading to advise an accused of his right to silence at the police interrogation stage. Furthermore, if police interrogation is to be allowed at all, then

151. Chapter XI deals with the duty of the public and sheikhs to report certain offences.

it must be allowed to be effective. A caution or warning discourages the suspect from making a statement or answering questions and as such it is objectionable for two reasons. First, while it does not help the innocent, who may be deterred by it from giving a ready and complete answer which will exculpate him, it affords the guilty with an excuse for keeping back a false story until it becomes difficult to expose its falsity. Secondly, it is illogical to charge the police with the duty of investigation of offenses and interrogation of suspects, and yet require them to tell the person being interrogated that he need not answer.

In conclusion, if police interrogation is to continue in the Sudan, no caution or warning should be required.

(iii) The Presence of Counsel:

The strict provision of a "right to counsel" before and during the interrogation is one of the main features of the Miranda model. Principle (c) of the preamble to the Judges' Rules in England refers to a qualified right to consult with a solicitor before the interrogation "provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice by his doing so". The discretionary "right" is further limited by absence of reference to legal

aid; it is only extended, qualified as it is, to the accused who can afford his own solicitor. In Scotland "any person arrested on any criminal charge (is) entitled immediately upon such arrest to have intimation sent to a solicitor that his professional assistance is required by such person, and informing him of the place to which such person is to be taken for examination." Such a solicitor is "entitled to have a private interview with the accused person before he is examined on declaration, and to be present at such examination."155 This provision, though it may be significant in terms of a general right to counsel, may not be very relevant to police interrogation as such, in so far as that is allowed in Scotland. The "right" to counsel is related to the "judicial examination" of the accused and not his questioning by the police. Judicial examination refers to the production of the accused before the sheriff where he may, but need not, emit a declaration in regard to the charge. It has been suggested that it is precisely the provision of the right to counsel at this stage,156 together with the right of the accused to give evidence in his defence at the trial,157 which greatly reduce the importance of the judicial examination; on legal advice, the accused would simply decline to make any declaration.158

155. Section 19(1) and (2) of the Criminal Procedure (Scotland) Act 1975.

156. Section 17 of the Criminal Procedure (Scotland) Act 1887 first provided for it.

157. This was allowed for the first time by the Criminal Evidence Act 1898. The provisions of this Act relative to Scotland are now incorporated in the Criminal Procedure (Scotland) Act 1975. For convenience I will cite the 1898 Act.

The primary role of counsel before and during interrogation, according to the Supreme Court of the United States in *Miranda v. Arizona*, "is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights." 159 As the Court added, the presence of counsel may also serve other subsidiary functions: 160

"If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced and if coercion is nevertheless exercised, the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial."

The basic assumption, then, is that if counsel is present, he would ensure that the suspect rights are protected throughout the interrogation: ensure that he is not forced to answer police questions, advise him, in the light of all the circumstances, whether it is in his best interest to speak to the police. Counsel will also assist in the proof of what actually took place during interrogation. Several questions need to be answered in this context: Does the presence of counsel achieve these purposes? If yes, what other interest is sacrificed? Is it desirable to provide

159. 384 U.S. at 459.
160. Ibid. at 470.
for the right in view of the cost involved and difficulties in settling up
a workable system to provide counsel at the right place and time?

It is doubtful, to say the least, whether the presence of counsel with
the accused before and during interrogation will achieve these purposes.
According to an American study attorneys found it difficult to define
adequately their role at the police station; they were often unavailable
at the critical point in time necessary to protect the defendant's rights. Counsel is most likely to be helpful to the accused who anticipate his need
for counsel and pay for his services to have him available at the moment of
"need". In other words, it is the experienced and professional criminal
who benefit from a provision of a right to counsel before and during
interrogation and not the ignorant and inexperienced chance offender or
innocent person getting entangled with the law.

If and when counsel is available and helpful, the effect of his
intervention is to defeat the purposes of the interrogation. In the often
quoted words of Mr. Justice Jackson:

"...any lawyer worth his salt will tell the suspect in no
uncertain terms to make no statement to police under any
circumstances".162

161. Medalie, Zeitz and Alexander, "Custodial Police Interrogation in Our

162. In Watt v. Indiana, 338 U.S. 49 at 59 (1949). It is precisely for
this reason that the Scottish Thomson Committee recommended against
the right to counsel at this stage, see Report, para. 7.16. See also G. Williams, "Questioning by the Police: Some Practical Considerations",
[1960] Crim.L.Rev. at 344-45; and Enker and Elsen, "Counsel for the
Suspect: Messiah v. United States and Escobedo v. Illinois", 49 Minn.
L.Rev. (1965) 47 at 66-68.
So the effect of the presence of counsel is similar to a complete ban on interrogation, but it operates only when counsel is present and effective. In other words, the most experienced and "prepared" accused persons escape all serious interrogation while the most inexperienced and helpless accused persons have to undergo interrogation without protection; the safeguards provided not being operative in their case.

Furthermore, the cost of providing counsel and the difficulties of setting up a workable system are enormous. When viewed in the light of the expected returns the cost and effort is also less justified.

The above remarks appear to suggest the conclusion that the provision of a "right" to counsel before and during police interrogation is neither desirable nor practicable. Yet, the purposes counsel can serve are essential: provide advice to the accused with respect to his right to silence in particular and his position under the circumstances in general; and help in ascertaining the facts of the interrogation situations and the conditions under which statements were made. If no alternative means for achieving these purposes can be found the above criticisms and limitations of the right to counsel would have to be met and solutions worked out.

In relation to the Sudan, the right to counsel is guaranteed by the Permanent Constitution of 1973, and provided for in the C.C.P., but it

163. Article 63 of the Permanent Constitution 1973 reads:
"Every citizen has an absolute and unfettered right to obtain independent legal advice, and to be represented in legal proceedings by a pleader of his own free choice in accordance with the law". The right to choose one's own advocate at the trial, and even to have an advocate appointed at state expense, are guaranteed in Article 68.

164. Sections 39 and 212, C.C.P. 1974. There may be room for argument whether these provisions create a right to counsel at the police interrogation stage. At present the issue is academic because of the inadequacy in the number of qualified lawyers.
nonetheless not available, least of all at the interrogation stage, because of the simple reason that the number of qualified advocates is extremely inadequate to provide effective services even at the trial, let alone at any earlier stage.

The lack of trained lawyers means that any provisions as to the right to counsel must remain a dead letter for the foreseeable future. Thus, although section 39 C.C.P., providing that "...and an arrested person is always entitled to contact his counsel", 165 can be argued to provide for the right to counsel at the police station, if not before interrogation as such, there is not much point in insisting on this construction because it cannot help the ordinary everyday accused person. Such a right will be effective only in an extremely limited number of cases - only the rich and well connected accused persons in the main towns may manage to have an advocate in time, but the vast majority of accused persons will never have the benefit of legal advice, even if they can afford to pay for it. 166

If the option of the presence of counsel, or even the opportunity to seek his advice, is made a condition of police interrogation, no such interrogation will be made at all.

In view of this practical impossibility, together with the other objections noted above, this device is not suitable for the Sudan. As the

165. This section was added in the 1974 revision of the Code.

166. There are now the beginnings of legal aid, as guaranteed by Article 68 of the Constitution, but that is limited to serious offences only and comes into play at the trial stage and not earlier.
Thomson Committee observed in Scotland, the provision of a right to counsel and police interrogation are basically incompatible. It may be possible to secure the benefits of legal advice to a large number of accused persons in the Sudan if the interrogation is done before a magistrate as is suggested in Chapter 8 below.

(iv) The Recording of the Interrogation

The suggestion that a mechanical, electronic or photographic record of the interrogation be made, to provide conclusive evidence of what was said and done for the benefit of the court's determination on voluntariness and admissibility is often made. The objections to this suggestion may be grouped as technical and general. Technical objections concern the difficulties of obtaining a clear and accurate recordings and reproductions of the interrogation. The Thomson Committee considered these problems with reference to tape recording simulated interrogation and "found the result to be technically satisfactory". There are considerations of availability of sophisticated equipment and cost which are relative to technical reliability and feasibility: how much can one pay for the right equipment and how far is one prepared to limit interrogation to situations where the best conditions for recording prevail?

167. Thomson Committee Report, para. 7.16. See also para. 5.08.


169. Thomson Committee Report, para. 7.21b.
These considerations lead into the second type of general objection to the suggestion:

There is first the question of cost which is essentially a question of priority. It is very unlikely that the necessary funds will be available for the sort of devices necessary to implement the suggestion. Besides, only specific spots or areas can be equipped for the recording; hence all interrogation outside such areas cannot be recorded.\textsuperscript{170} What is to prevent the police from by-passing the whole elaborate set up by interrogating the suspect elsewhere. This possibility can be met in one of two ways: either by attempting to define the sort of situation or circumstances under which the police can interrogate without recording or by ruling inadmissible the results of any unrecorded interrogation. To leave it to the discretion of the police to decide whether to record or not, by deciding whether to interrogate within or without the equipped area, is unsatisfactory because it is the activities of the police themselves that the device is designed to check; yet it is impossible to define in advance all the situations where recording may have to be abandoned. On the other hand, to rule out all the results of unrecorded interrogation is unsatisfactory because there may be legitimate reasons for not recording. What if the equipment broke down and there were urgent circumstances such as the need to preserve the life of a kidnap victim necessitating immediate interrogation, or interrogation on the spot outside the police station? To leave the question of admissibility

\textsuperscript{170} Ibid, para. 7.13c.
of the results of unrecorded interrogation for the court to decide from case to case is precisely the present position. The cost and effort of installing the necessary equipment can hardly be justified by the benefits of recording in cases where the interrogation takes place under recording conditions. These are probably situations where the protection is least needed.

Moreover, it is also reasonable to expect that recording would inhibit the parties to the interrogation and reduce its effectiveness. The Thomson Committee reasoned that that may be true, but on balance they considered that "the vast majority of persons will be reassured by knowing that anything that is said will be accurately recorded". The truth of this assumption, however, remains to be seen after some trial period. The presence of an independent witness, as sometimes suggested, to testify as to the conditions of interrogation, is also open to this objection: inhibiting the participants. The availability of such witnesses to attend all interrogations is a practical difficulty which can also be raised as an objection to the suggestion.

The suggestion may be open to other objections too. It has recently been reported in England that a Home Office steering committee discovered several snags: (1) extra police officers might have to be called as witnesses to give evidence as to the machines, details of when and where a tape seal

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171. Ibid., para. 7.21b.

172. See The Daily Telegraph, Wednesday, December 24, 1975, p.3.
was broken so that it could be put on to a recorder, where the tape had been kept between the interrogation and the court appearance, whether the tape had been changed in the middle of an interview; (2) at what point does an interrogation start for recording purposes? Other objections include the question of availability of a sufficient number of machines when an extraordinary number of arrests was made and the possibility that an accused may attempt to feed into the recording false information, e.g. by shouting: "stop twisting my arm", or scream in pain while in fact no violence is being used.

With respect to the Sudan at the present time there is not even any suggestion that this safeguard be employed. The lack of the technical abilities to man the machines and the money to pay for them are the strongest objections. So long as that is the case, there is no point in discussing the remaining objections to this type of safeguard.

Section 119 C.C.P. which requires that for any confession to be admissible in evidence it must be recorded by a magistrate in accordance with prescribed procedure has nothing to do with police interrogation as such. It is only concerned with proof of voluntariness for the purposes of admissibility of the results of the interrogation.\(^{173}\)

The Sudanese current position may thus be summarised as follows: except for the general rule excluding from evidence involuntary confessions, there are no restrictions on police interrogations. Yet, as the above

\(^{173}\) This section is quoted and discussed in detail below, pp.345, et seq.
assessment suggests, the safeguards operated or suggested in the main common law jurisdictions - caution, counsel and tape recording - are unsuitable for the Sudan for mainly practical reasons. The choice therefore appears to be between completely unfettered police interrogation, subject to the voluntariness rule, as is presently the case, or interrogation before a magistrate, as is suggested in Chapter 8 below.

(4) Unlawful Interrogation:

Whatever may be the regime for interrogation, the question of the consequences of violating its regulations and limitations arises. With reference to the present position, these consequences may be grouped as either direct remedies or action with reference to the fruits of the unlawful interrogation - the exclusion of the statements of the accused so obtained.

(i) Direct Remedies:

If, during the course of interrogation, the policeman commits a tort, criminal offence or violates the police disciplinary code, he may then be sued, prosecuted or disciplined. Unlawful inducement to confess, for example, is punishable under section 192B Sudan Penal Code with imprisonment for a term not exceeding six months, or fine, or both. As indicated above in relation to arrest and search and seizure, these direct remedies labour under several limitations and difficulties. The policeman's conduct must constitute a definite tort or criminal or disciplinary offence, and there are also the problems of initiation of the action or prosecution, difficulties or proof etc. 174

174. See above at pp. 224 et seq.
Voluntariness Requirement:

Besides direct action against the offending policeman, there is also the exclusion of the fruits of the unlawful interrogation. In fact, the regulation of powers of interrogation is dominated by action against the fruits of unlawful interrogation: the basic device employed, the only one shared by all common law jurisdictions, is the requirement that the confession must be shown to have been voluntarily made if it is to be adduced in evidence against the person who made it. This voluntariness requirement - its scope, rationale and efficacy - is the subject of the remaining part of this chapter.

(a) Statement of the Rule:

In early common law not even the fact that a confession had been obtained by torture required its exclusion from evidence. Confessions were admitted at trial without restrictions.\(^{175}\) The exclusionary rule, however, found expression as early as the sixteenth century,\(^{176}\) and was recognised judicially by the end of the eighteenth century when, perhaps because of the frequency with which objection was raised by the defence, the inquiry into the voluntariness of confessions sought to be adduced in evidence became a general inquiry undertaken by the judge himself in accordance with


\(^{176}\) 3 Wigmore on Evidence, pp.232-33.
the rule as stated in R. v. Warwickshall:177

"A confession forced from the mind by the flattery of hope, or by the torture of fear comes in so questionable a shape... that no credit ought to be given to it..."

The modern version of the rule may be found in the often quoted and approved statement of Lord Sumner in Ibrahim v. R.:178

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

The general principle underlying these statements is accepted throughout the common law jurisdictions, though some differences may be found with regard to its scope. As Wigmore pointed out: "While no one seems to have questioned the fundamental principle of the exclusion of the confessions, there has been a decided difference of practice in the kind of test used in applying the principle."179 Thus, one finds numerous statements of the rule and its practical test.180 It is not, however, necessary to review

177. (1783) 1 Leach C.C. 263; 264; 168 E.R. 234, 235. See also R. v. Thomson (1783) 1 Leach 26; 168 E.R. 28; per Hotham B. at 283; and R. v. Thompson (1893) 17 Cox C.C. 611.


179. 3 Wigmore on Evidence, para. 824 at p.250.

or to attempt to reconcile all of these statements in the present context; but it may be helpful to indicate the general direction of the various tests.

The tests of exclusion commonly used may be classified into three groups:

181. (a) Whether the defendant had been induced to confess by a promise of benefit or a threat of harm; 182. whether the confession was obtained from him either by fear of prejudice or hope of advantage. 183
(b) Whether the defendant had spoken under circumstances that impaired the reliability of his statements. 184
(c) Whether the confession was made "voluntarily". 185

As Wigmore rightly observed the last mentioned type of test "is not so serviceable as a rule of thumb, for its significance is so indefinite and loose that it does not of itself supply a solution for the various

181. 3 Wigmore on Evidence, para. 82h-26; "Developments in the Law: Confessions" 954-55.
184. R. v. Court (1836) 7 C & P. 186; R. v. Thomas (1836) 7 C & P. 306. Wigmore, who regarded this direct inquiry into reliability as the proper test, posed the question as follows: "Was the Inducement sufficient, by possibility, to elicit an untrue Confession?" - 3 Wigmore on Evidence, para. 82h at p.250. Cf. McCormick, Evidence, (1954) 155.
situations with their graduated differences; hence it is often, perhaps usually, found in combination with the preceding test in one form or another, the latter serving to explain and make it more specific..."

The consideration of the "inducement" effect of the promise or threat, the fear or hope it creates, is linked to two further factors, the person who makes it and the nature of the inducement made. It is certainly correct to say that concern with the trustworthiness of a confession made under certain conditions underlies the whole principle; and since "the inadmissibility of a confession depends on the relative strength of the inducement to confess falsely, as measured against the prospects attached to nonconfession, it is obvious that the various situations can best be grouped according to the nature of the inducement. But as the

186. 3 Wigmore on Evidence, para. 26 at p.255. In R. v. Fennell (1881) 7 Q.B. 150, for example, Lord Coleridge, C.J., said:

"A confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."


187. According to Wigmore this is the only rationale, see 3 Wigmore on Evidence, para. 322 and 324.
strength of the inducement must depend more or less upon the power of the person offering it, the rule of law must first specify the kinds of persons from whose mouths the inducements may be regarded as having any value.\textsuperscript{188} Hence came the formulation that the confession, to be admissible, must be shown not to have been obtained from the accused "either by fear of prejudice or hope of advantage exercised or held out by a person in authority."\textsuperscript{189}

Once more, one finds many pronouncements on who is a "person in authority".\textsuperscript{190} By any formulation, however, a policeman is a person in authority, hence there is no need to go into this problem in any detail. It is best dealt with, together with the further question of whether what transpired in any given situation amounted to "inducement", with reference to the facts of each case.\textsuperscript{191} Aid may be found in previous decisions in

\textsuperscript{188} Ibid., para. 827 at p. 256. Emphasis in original. See also Viscount Dilhorne in the Privy Council decision of Deokinanan v. R. [1969] 1 A.C. 20 at 33; 52 Cr. App. R. 211 at 250.

\textsuperscript{189} Lord Sumner in Ibrahim v. R. [1914] A.C. 599 at 609. Emphasis supplied. Lord Hailsham in D.P.P. v. Ping Ling [1975] 3 All E.R. 175 at 180, pointed out that "the word 'exercised' in the above quotation though repeatedly reproduced, is, I believe, meaningless and corrupt in the report. I believe that Lord Sumner really said 'excited' and that he was quoting from the almost equally well-known and authoritative judgment of Cave J. in R. v. Thompson [1893] 2 Q.B. 12 at 12. However that may be, the sense is obvious and unaffected."

\textsuperscript{190} See generally 3 Wigmore on Evidence, para. 827 to 830. See also M.E. Mathews, The Admissibility of Extra-Judicial Confessions: A Comparative Study (unpublished Ph.D. thesis with the University of Durham, 1970) 46 et seq.

cases with similar factual situations. It is well worth noting and emphasizing that any rigid formula that is applied without regard to variations in factual situations and the purpose of the whole exercise is bound to lead to unfair and even unjust results. Any rule must be applied with discretion and consideration to its rationale and policy.

(b) Rationale of the Rule:

Reliability: The principle of exclusion on which there is general agreement is that of assurance of reliability. As explained in R. v. Baldry, where this principle was re-asserted by the Court of Appeal, a confession was to be excluded not because the law "presume[s] that [the confession]... is untrue; but rather that it is uncertain whether a statement so made is true." In other words, not all confessions following upon inducements are necessarily untrue, but since some confessions caused by an inducement may be false, all are excluded. Wigmore, the leading proponent of trustworthiness as the only proper basis of exclusion, explained the principle as follows:

192. See generally 3 Wigmore on Evidence, para. 831 to para. 841a. See also, Mathews, The Admissibility of Extra-Judicial Confessions 62 at sec.


194. Ibid. at 432, 169 E.R. 569.

"Thus, the essential features of the situation are, first, the fact that the alternative is presented between present silence (or assertion of innocence) and some other prospect held out by and associated indispensably with the confession of guilt; and, secondly, the relative advantage of this confession, with its consequences certain or contingent, over silence, with its consequences certain or contingent... Thus, where a promise (for example, of pardon) is the inducement for a confession, its effect is to make the certain freedom which will accompany false confession more attractive at the moment than the mere possibilities of freedom, coupled with temporary restraint, which attend silence. Again, where a mob's threat of hanging has induced a confession, the alternative of present certain and future possible safety proves naturally more attractive than present certain death. Thus in both cases - a promise and a threat - the confession is untrustworthy because it has been associated with an alternative too strong to resist." 196

In other words, whenever the situation of interrogation is such that there is a real risk of the accused confessing falsely in order to relive himself of the pain of violence or its prospects, or to avail himself of some advantage offered, whether real or not, it becomes unsafe to accept the confession into evidence. 197

It is obvious that the use of actual violence or its threat or the use of other threats and promises ought to lead to the exclusion of any

196. 3 Wigmore on Evidence, para. 823 at p.251. Emphasis in original. In the Sudan, the tender of pardon is an express exception to the general rule: the tender of pardon, as regulated by the C.C.P., does not render a confession inadmissible in evidence, see sections 235 C.C.P. See below pp.513-515.

197. As Rand J. put it in the Canadian case of Boudreau v. The King (1949) 94 C.C.C. 1 at 8:
"It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule".
confession so obtained: the risk of a false confession is such that it is unsafe to admit the confession. The same is true, however, of other situations that are not at present treated by some jurisdictions as necessitating exclusion of the confession so obtained. To take for example the use of a lie or trick in the interrogation: if during interrogation of a person accused of murder, the accused is lead to believe that the police believe that he was provoked or had some other defence, he may confess falsely to the murder; he may reason that he stands a better chance of an acquittal or a lighter sentence than he would if he persisted in protesting his complete innocence. Yet the use of such tricks or lies does not fall within the ambit of the orthodox rule; it would appear that a confession so obtained would be admissible in England.

By the same token, it is not every threat or promise that creates an unacceptable risk of false confession: any confession that is rejected as being made under threat or promise while the threat or promise in question would not in fact create any risk of leading one into confessing falsely constitutes an illogical and too rigid application of the rule if reliability or trustworthiness is the sole policy or rationale.198

198. In "Developments in the Law-Confessions" it was observed, at 956, as follows: "While it seems clear that these inducements (physical violence or its threats, promise not to prosecute, or promise to provide lenient treatment after conviction) create a real risk of unreliability, other cases appear much less consistent with the reliability rationale. On the one hand, very mild promises or threats have been held, especially in older cases, to vitiate a confession given in response to them;... On the other hand, the coercive effects of today's police interrogation are not taken into account by the traditional rules, presumably because at the time the rules originally developed, police forces had just begun to come into existence, and the systematic practice of interrogation was unknown."

In Victoria, Australia, statute provides that the threat or promise must be really calculated to cause an untrue admission of guilt, now section 11 of the Evidence Act, 1958 (Act No. 626). New Zealand statute provides that the threat or promise must be in fact likely to cause an untrue admission of guilt, Evidence Amendment Act, 1950, section 3. On the judicial interpretation and the scope of these provisions see Cowan and Cantor, Review of the Law of Evidence, 83, 89.
position may be different if there are other policies or rationales to be taken into consideration. It remains true, however, that whatever policies or rationales one attributes to the rule, its practice must be consistent with them. Not only must the rule serve its stated purposes, it must also do so effectively and exclusively; should it either be extended to serve other purposes for which it was not designed, or fail to serve its stated purposes effectively and properly only confusion and inadequacy will follow. There is no valid reason for restricting the rule to a single rationale or reason; others may also be relevant and

It is true that reliability was the originally sanctioned reason for exclusion; but as the rule has developed for some two hundred years, support may be found in principle and authority for other rationales without in any way questioning the validity and authority of the original one. Historical review may indicate the historical scope of the rule, not its only or final one. Provided the main source of confusion


200. In R. v. Warwickshall (1783) 1 Leach C. C, 263-64, 168 E.R. 234, 235, it was said:
"It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith. No such rule ever prevailed...Confessions are received in evidence or rejected as inadmissible under a consideration whether they are or are not entitled to credit."

201. Eleventh Report, para. 56.
is avoided, that is to say declaring the rule to have one purpose and applying it to serve others, there is no reason not to give it as many purposes as it can effectively serve. At the same time, the rule must not be applied as a universal remedy for all ailments. The rule must be confined to the purposes it can serve and applied in such a way as to do so most effectively and with the least disruption of other principles and rules.

Deterrence: A second reason or rationale for the rule that is sometimes suggested, beside concern with reliability, is the need to discourage the police from using improper methods to obtain a confession. "This discouragement takes place by depriving them of the confession for the purpose of obtaining a conviction... the disciplinary principle."202 It is argued that the "existence of any possibility that a confession, if likely to be true, will be admitted, must constitute a standing temptation to the police to attempt to exact a confession in the hope that, once obtained, its reliability may be able to be demonstrated and its admission thus ensured. This temptation will be removed only by a rule that renders all improperly obtained confessions, however reliable, inadmissible, and their exaction therefore futile."203


This is the argument for the wider exclusionary rule: the use of exclusion of the evidence as a means of disciplining the police and influencing their behaviour. It is open to the main objection that the effect of exclusion of the evidence is to let a guilty person go free, as the reliability of the confession is not in question, without ensuring that the future behaviour of the police will be influenced for the better. According to the argument the traditional remedies of penal and civil action against the offending police officer are simply ineffective, what remains is to deny the police the fruits of their improper conduct— the evidence so obtained: as effective law enforcement is not the only consideration, it may be necessary to let a few guilty persons go free in order to make the more important point about the standard of police performance. 204

The application of the confessions rule itself is not always consistent with a deterrent principle. Because of the formulation of the rule in such a way as to seek out and penalise methods that are likely to affect reliability rather than improper methods in general, the traditional rule often fails effectively to enforce a disciplinary principle. Facts discovered as a result of an inadmissible confession are admissible at common law. 205  "If the disciplinary principle were applied, one would have

204. Ibid. 69-70.

205. This appears to be the general common law position, see 3 Wigmore on Evidence para. 560; but see A. Gottlieb, "Confirmation by Subsequent Facts", 72 L.Q.Rev. (1956) 209 for the variety of views on the subject.
expected the evidence to be excluded in order to prevent the prosecution from taking advantage of the impropriety". But then, the same is true, though to a lesser extent, of the reliability principle too: "the fact that a confession can be proved by extraneous evidence to be reliable does not make it admissible if it was not obtained voluntarily, as would be the result if the reliability principle were fully applied". 206

In R. v. Barker, 207 the defendant, an accountant, produced fraudulently prepared incriminatory documents to Commissioner of Inland Revenue in response to a promise of immunity from prosecution. He was then prosecuted and convicted but his appeal was allowed. The court held that the promise or inducement offered in this case expressly related to the production of business books and records; and that their production so induced "stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat." 208 Thus the documents were held to have been wrongly admitted in evidence and the conviction was quashed.

This case illustrates nicely the dilemma with which the courts are

207. [1941] 2 K.B. 381.
208. Ibid. 385.
sometimes faced when applying the confessions rule according to a single rationale. As was unsuccessfully argued by the Crown, the documents were not brought into existence as a result of a promise or threat; their trustworthiness or reliability could not have been in any doubt because they were already in existence when the promise was made, they were only brought to the notice of the authorities as a result of the promise. 209

If the court were to have been true to the reliability principle, the conviction should have been allowed to stand; but it seems that the court felt that such a result would have been unfair and perhaps bad policy: it would have been unfair to the defendant, and bad policy because it might encourage the prosecution and other law enforcement agencies to resort to this type of trick if they can get away with it and obtain a conviction.

While the court felt that the conviction should be quashed, it was restrained by the traditional rule and its stated rationale: it had to bring its ruling within the confines of the accepted principle. 210

It may be that there are good arguments for exclusion of confessions improperly obtained and it may be that there is evidence of that being an underlying principle, in addition to the reliability principle. 211


210. In Scotland, the evidence would have been excluded under the principle of fairness to the accused.

question is, however, whether the rule itself, in its present form is capable of sustaining any disciplinary principle. It is not very helpful to maintain that the rule does or does not serve a certain purpose when in fact it cannot do so. It is my submission that the present rule cannot serve the disciplinary principle effectively enough. The existing confessions rule is inadequate in serving a disciplinary purpose because of the way it is formulated: in any current formulation, the rule fails to cover the vast majority of situations calling for disciplinary action. Furthermore, the rule is too absolute: automatic exclusion of the confession may not always be the appropriate response but, as presently stated, the rule allows no discretion.

The confession rule, as we now know it, is not completely consistent with any rationale or principle except that directly derived from its particular formulation in the jurisdiction in question: normally that a confession obtained by threats or promises is not allowed in evidence. To carry the reliability principle to its logical conclusion would raise strong moral objections: it would mean, for example, that even a confession obtained by torture must be allowed in evidence if its reliability can be demonstrated. On the other hand, reliability is not seriously in question every time a confession is rejected, the rule is not normally expressed in terms of actual probable or ever likely falsehood. At the same time, whatever disciplinary effect the rule may have is only incidental and too limited to be taken as a general principle.

It is certainly true that the confessions rule does serve a useful
purpose and limit the police interrogation methods, albeit in a very restricted way. It is suggested that such purpose can be equally served by a general discretionary exclusionary rule wide enough to include all sorts of improper and objectionable methods yet flexible enough to avoid the unhealthy spectacle of releasing the guilty over "a mere technicality".

(c) Miranda and Others:

As suggested above, concern with voluntariness lead to the development of preliminary requirements designed to ensure and help prove its fulfilment whenever the admission of the accused's statements is sought. In the United States this evolved into the Miranda warnings, and in England the Judges Rules - the Scottish principle of fairness to the accused has always been wider and stricter than the common law voluntariness requirement.

In accordance with the absolute exclusionary rule explained above, any statement obtained in violation of the Miranda scheme is automatically excluded in the United States.\(^{212}\) The violation of the English Judges' Rules, however, only give rise to a discretion to exclude the resultant statement. Thus, in the Court of Criminal Appeal decision of R. v. Voisin,\(^{213}\) it was said:

"These Rules have not the force of law; they are administrative directions, the observance of which the Police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these Rules may be rejected as evidence by the Judge presiding at the trial."


\(^{213}\) [1918] 1 K.B. 531.
The same principle was reiterated in the introduction to the 196th edition of the Rules.\textsuperscript{21h} The official line, therefore, appears to be that failure to observe the Rules may lead to the exclusion of the evidence so obtained - the answers to the questioning.\textsuperscript{215} To what extent they operate to exclude statements it is not possible to say dogmatically, because there are no statistics for the many thousands of trials in which statements have been challenged. The available evidence is only from appeals against refusals to exclude and against misdirection. Nonetheless a leading English author was able to conclude that "... it seems from the reported cases that the judges have given up enforcing their own rules, for it is no longer the practice to exclude evidence obtained by questioning in custody. In 1930, when the judges' opinions were reported in the Home Secretary's circular, it was broadly true that the custom of judges was not to allow any answer to questions addressed to a person in custody to be given in evidence... but since about 1950 they have almost uniformly been admitted."\textsuperscript{216}

(d) Procedure:

The procedure for applying the rule in the main jurisdictions under review deserves only a brief mention; it is irrelevant for the Sudan because it is tied up with a mode of trial, trial by jury, which is not

\textsuperscript{21h} H.O. 31/196h, following paragraph (e) of the introduction.


used there. The point behind the procedure described below is to protect the accused from the effect an inadmissible confession may have on the jury, and consequently on the case for the defence, if they were to hear it.

The decision on the admissibility of a confession is made by the judge in the absence of the jury, a procedure known as _voir dire_ or the trial within the trial. Before arriving at a final decision on the matter, the judge has to make a series of findings of fact: in effect he has to decide which to believe, the accused or the police, and to what extent. It is only after establishing what was said and done at the time the confession was made that the court can proceed to consider its significance in terms of the rule stated above. The importance of these findings of fact can not be exaggerated: not only the decision on admissibility at the trial, but also all subsequent appellate review of that decision, as appellate courts are known to be most reluctant to interfere with the trial court's findings of fact, will be based on such findings of fact.

(iii) The Rule in the Sudan: The Present Practice:


218. See Lord Hailsham and Lord Salmond in *D.D.P. v. Ping Lin* [1975] 3 All E.R. at 183 and 188, respectively.
(a) Scope and Rationale: The common law rule is to be found in section 118 C.C.P.:

"(1) No policeman or person in authority shall make use of any threat or of any promise of an advantage towards any person in an investigation under section 112\textsuperscript{219} in order to influence the evidence he may give.
(2) But no policeman or other person shall prevent any person by any caution or otherwise from making in the course of the investigation any statement which of his own free-will he may be disposed to make.
(3) Any information given by the witness as a result of inducement shall not be admissible in evidence and shall not have any other legal effect."

It is interesting to note that the common law rule is made applicable to "any person"; and the requirement of voluntariness is applied to "the evidence he may give", and not to "confessions" in any strict or technical sense of the term. These aspects of the rule have not been developed by the Sudanese courts: all the available cases involve the application of the rule to the confession of the accused.

Another aspect of the above version of the common law rule that is not developed yet is subsection (3) of section 118 - that the information obtained by improper inducement "shall not be admissible in evidence and shall not have any other legal effect"\textsuperscript{219a}. The latter part of this subsection appears to be aimed at limiting the indirect use of inadmissible confessions and statements. It may therefore be used to argue for the exclusion of facts discovered in consequence of an inadmissible confession. If such

\textsuperscript{219. That is to say, any criminal investigation under the C.C.P.}

\textsuperscript{219a. This subsection was enacted for the first time in the 1974 revision of the Code.}
argument is accepted, Sudan Government v. Aturingya Aribryi, which received the English common law rule that facts discovered in consequence of an inadmissible confession are admissible, will have to be overruled. It would also constitute a departure from Indian law, which is regarded as highly persuasive, especially in the field of evidence: in Indian law such facts are not only admissible themselves, but they also render such parts of an inadmissible confession as "relates distinctly to the facts thereby discovered" admissible too.

Without going into this question in much detail, the following remarks may be made. The admissibility of facts discovered in consequence of an inadmissible confession, and the admissibility of those parts of the confession confirmed by the discovery of the facts, is basically a question of the rationale of the exclusion of the confession in the first place. The exclusion of the facts discovered in consequence of an inadmissible confession, and also the insistence on excluding those parts of the confession confirmed by the facts, cannot be justified on reliability grounds alone. If the accused's confession indicates to the police where to find an item of real evidence connecting the accused to the crime, such as the purse

220. (1940) S.L.R. vol. 1, 276, per Creed, C.J., at 280.
221. Criminal Court Circular No. 29.
222. Section 27 of the Indian Evidence Act 1872.
of the victim or the rifle by which the murder was committed, the probative value of the item of real evidence and the way it was found is not only unaffected by the involuntariness of the confession, but can also be seen as reinforcing the reliability of the confession itself, involuntariness notwithstanding. But as suggested above, reliability is not the only rationale for the exclusion of involuntary confession: there is also the need to deter the police from indulging in third degree methods. If the police can hope to gain by having the facts discovered in consequence of an inadmissible confession, then they may be encouraged to use the very methods the voluntariness rule is designed to check.

There is no simple and final answer to this aspect of the problem of the illegally obtained evidence either. On the one hand there is the relevance and reliability of the evidence, on the other hand there is the objectionable nature of the means by which such evidence was obtained. The best way of dealing with this problem is the recommended combination of discretionary exclusion with more certain and effective direct remedies. It is suggested that the court should be able to admit or exclude evidence of the facts discovered in consequence of an inadmissible confession, depending on the facts and all the circumstances of each case. At the same time the court must ensure that appropriate action is taken against the


225. See pp.530 et seq., above.
offending policeman. 226

The principle of exclusion of involuntary confessions declared by Sudanese courts is clearly one of reliability, but that does not necessarily exclude other rationales, such as a disciplinary principle - the reliability principle is not stated to be the exclusive rationale for exclusion. One of the most explicit and detailed statements of the principle is that of Mr. Justice Abdel Magid Imam in Sudan Government v. Noutassia Abdel Rahman Adam and Another. 227  In this case the accused were charged with forging cheques and misappropriating the money. The major court found the accused not guilty, notwithstanding a confession recorded by a magistrate as a voluntary confession, under the procedure of section 119, C.C.P. set out below. On reference for confirmation, 228 this finding was confirmed on the ground that the confession was involuntary: one of the complainants who was the Minister for the Interior at the time, advised the accused that "if a thief confesses his guilt this may reduce his punishment"; the formal confession was recorded in the Ministry of Interior premises - this was held to be improper inducement rendering the confession inadmissible. 229

226. See above, pp.42-51 on the means for improving direct remedies.
228. See above, p.135 on this aspect of Sudanese criminal procedure.
229. [1968] S.L.J.R. 78-79. One other Justice concurred while the third felt that there was sufficient other evidence, and that the case should be sent back for retrial - per Mr. Justice M.E. Mobarak, ibid. 79-81.
In the course of his judgment Mr. Justice Abdel Magid Imam said:

"The principle underlying this rejection of a confession sometimes is that under certain conditions it becomes untrustworthy as testimony".

Mr. Justice Imam then went on to set the following test:

"The questions that present themselves to the court to arrive at a safe conclusion that the confession was voluntary are:

a. Was the inducement likely to produce an untrue or involuntary confession? and

b. Did the inducement in fact operate upon the mind of the accused? and

c. Did the inducement proceed from a 'person in authority'?

The element of inquiry into the unreliability of the particular confession, the likely effect of the inducement in the particular case, though in accord with the approach adopted in the present study, appears to be inconsistent with the statement of the voluntariness rule in section 118 C.C.P. which does not qualify the "threat or promise" in terms of their likely effect.

If the courts are determined to limit the exclusionary rule in this way, then they must first determine the precise scope of the rule in the Sudan, its underlying policies, and the reasons for the restriction. They must also find a way of reconciling their views with the statutory provisions. That has not been done in any of the cases the author was able to trace. Hence,

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230. Ibid. 78.

231. Emphasis supplied. This implies that there may be other principles for exclusion.

232. Loc. cit.

233. The judgment of Mr. Justice Omer Bakeit Alawad in Sudan Government v. Kuku Tayla Anglo and Another [1971] S.L.J.R. 95, reported in Arabic only, also reflects the tendency to look behind the facts of the alleged threat or promise.
it is not open to a Sudanese court to find a confession admissible because the threat or promise was unlikely to produce an untrue confession. Similarly, it is not open to a Sudanese court to find either that an otherwise inadmissible confession is admissible because it can be shown to be true, or that a confession must be excluded because the police used improper means other than threats or promises. For the time being the rule in the Sudan is that it is the threat or promise that determine exclusion and not the unreliability of the confession, or any other principle of exclusion. 23h

(b) Tender of Pardon:

A statutory exception to the "threat of promise" rule is the tender of pardon in prescribed procedure - the procedure whereby a suspect or accused person may become a witness for the prosecution: In certain cases, offences triable exclusively by a major court or punishable with imprisonment for a term which may extend to seven years, a pardon may be tendered to "any person supposed to have been directly or indirectly concerned in or privy to the offence", with a view of obtaining his evidence. The condition of this offer of pardon is that such person makes "a full and true disclosure of the whole of the circumstances within his knowledge relating to such offence and the connection therewith of every other person concerned whether as principal or abettor in the commission thereof." 235

234. A more flexible rule is recommended below at pp. 557 et seq.
235. Section 232(1) C.C.P.
On accepting the offer, the proceedings against such person continue in the normal way: committal proceedings and trial except that he must be acquitted if he satisfies the court that he has fulfilled his obligation. If the trial court finds that he has complied with the conditions on which the tender of pardon was made, then it must acquit him. Pardon may be tendered at any time before judgment is passed, and if accepted and its conditions satisfied, then a judgment of acquittal must be entered. Such pardon, however, may be revoked if the person accepting it "either by wilfully concealing anything essential or by giving false evidence" failed to comply with its conditions.

As the tender of pardon according to the above procedure constitutes a threat or promise from a person in authority to one who is giving evidence in order to influence the evidence he may give, it violates the rule in section 118(1) quoted above. To avoid the inadmissibility of the evidence an express exception was created. Section 235(1) C.C.P. provides for this exception: "Except as provided in sections 232 and 233 [paraphrased above] no influence by means of any torture or promise or threat or otherwise shall be used by policemen or any other person in authority to an accused person

236. Section 232 C.C.P.
237. Section 23k(l) C.C.P.
to induce him to disclose or withhold any matter within his knowledge."

The policy behind this procedure is reasonable and practical - the
evidence implicating others or information necessary to discover and
disrupt larger or more serious criminal activity in exchange for the
acquittal. Once the pardon itself is justified in this way, the exception
to the voluntariness rule naturally follows or else the very purpose of the
tender of pardon will be frustrated when the evidence becomes inadmissible.

(c) Recording by Magistrate:

The voluntariness requirement is usually applied at a hearing before
a magistrate recording the confession according to the procedure set out
in section 119 C.C.P. The effect and meaning of such recording must now
be examined. Section 119 C.C.P. reads as follows:

"(1) If any person in the course of an investigation under
section 112 or at any time after the close of the investigation
but before the commencement of any inquiry or trial confesses
to the commission of an offence in connection with the
subject matter of the investigation he may be taken before
a Magistrate, if available, for his statement to be recorded

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238. Section 235(2) provides that any "information that the accused may give
as result of inducement shall not be admissible in evidence against
him or any other person and shall not have any legal effect". The
last phrase may refer to facts discovered in consequence of the informa-
tion, see above at p. 532. There appears to be some conflict between
this section and section 234(2) C.C.P. which allows the statement made
by a person who has accepted a tender of pardon to be given in evidence
against him at his trial when the pardon is revoked for not complying
with the condition on which it was made under section 234(1). Such
a statement has been made as a result of the inducement of the tender
of pardon, yet it is admissible under section 234(2) without being
covered by the exception mentioned in section 235(1) which refers to
sections 232 and 233, i.e. successful tenders of pardon. The dilemma
is a real one because although it may seem unfair to admit the statement,
pardon is revoked because of the accused's failure to comply.
in the Case Diary but if the confession is in respect of a serious offence or one which is triable only by a Major Court the Magistrate must record his statement in the Case Diary.

2) When a Magistrate records such confession in a Case Diary he shall do so in detail in his own handwriting in the presence of the person making the same and after reading over to him such record the Magistrate shall sign the same.

3) No Magistrate shall record any such confession unless after questioning the person making it he is satisfied it is made voluntarily.

4) No oath shall be administered to any person making a confession.

5) The record of such confession in the Case Diary if made by a Magistrate in manner aforesaid shall be admissible as evidence against the person who made the same and if so admitted shall be read out in Court by the Magistrate conducting the inquiry or trial and it shall not be necessary to call as a witness the Magistrate who recorded the same provided that the Magistrate holding the inquiry or the Court trying the case may if he or the Court thinks fit either on the application of the accused or of its own motion call the Magistrate who recorded the confession as a witness to the contents and to prove the circumstances in which it was recorded."

There is no authoritative statement on the policy considerations behind this procedure; but it may not be difficult to see some of these policies. It is to be noted, first, that there is no trial by jury in the Sudan - the magistrate, or magistrates, decide all questions of fact and law at the trial. A procedure designed to settle the question of voluntariness, and hence the admissibility of a confession, may therefore have the effect of protecting the trial court itself from exposure to an inadmissible confession as such a confession may influence the court in other determinations of fact. Another purpose that may be served by a hearing on voluntariness

239. A major court consists of three magistrates; otherwise a magistrate normally sits alone - See Chapter 1 above.
before another magistrate before the trial is the convenience of disposing of the preliminary question of admissibility. It is also true to say that if the admissibility of a confession is settled early in the prosecution, both the defence and prosecution will be able to prepare for the trial better. In other words, the trial can bring no surprises in at least this respect: if the confession is admissible, then the defence must prepare to seek the necessary evidence to mitigate the charge or sentence; if it is not, then the prosecution must seek alternative proof or abandon the case. There is also the reason given by the Thomson Committee for their proposal for putting to the accused at a judicial examination all his statements sought to adduced in evidence at the trial: "to ensure that the accused is given the earliest possible opportunity to admit or deny having made any such statement or to challenge it on the ground that it is inaccurate or was unfairly obtained." 2h0

All these policies are sound and reasonable policies for the procedure except for the fact that as the procedure of recording before a magistrate is neither obligatory, as will be explained below, nor when it is in fact adopted is it necessarily done early enough to serve these policies - or to serve them properly. As will also be explained below, this procedure creates no extra restriction on police interrogation beyond that already imposed by the voluntariness requirement itself - the Sudanese procedure is therefore to be distinguished from the Indian procedure and rules of evidence that do impose a degree of limitation on police interrogation.

2h0. Thomson Committee Report, para. 7.22(a).
This procedure, though frequently used in practice and often confused with the substantive confessions rule, is in fact quite limited. For one thing, it is not obligatory except "when the confession is in respect of a serious offence". Secondly, its effect, when it is applied, is to render the record of the confession in the Case Diary itself admissible in evidence. In other words, where it is followed, the procedure is not a condition of admissibility but only one way of proving that the confession was voluntarily made. Thus it was said in Sudan Government v. Fadl El Nula Fazari and Another:

"the object of the practice in this country of taking an accused to the Magistrate is that it is one way by which the Police may discharge the burden of satisfying the Court that the confession is indeed voluntary, for what it is worth."

If the procedure was not followed properly, the confession may still be proved by calling the policeman or other person who heard it as a witness. Thus in Sudan Government v. Saleh Yacoub Khalil, where the Magistrate recorded the confession in a separate sheet of paper and not in the Case Diary as the section requires, Maclagan, C.J., said:

"This does not make the confession inadmissible; but it does mean that the confession has to be proved by the ordinary rules of evidence. That is to say, the Magistrate who recorded it has to be called to prove it."


2h3. AC.-CP.-26-1948 (unreported).
Though the normal effect of recording a confession under section 119 C.C.P. is to make the record itself admissible as proof of the content and voluntariness of the confession, compliance with the section does not preclude the trial court from inquiring into voluntariness afresh and even rejecting a confession recorded by a magistrate as having been voluntarily made. In a recent unreported case, the accused was taken before the magistrate twice in a single day to record his confession but none was recorded as the accused explained on both occasions that he had nothing to say and that he had been threatened with the police dog in order to induce him to confess. The accused was taken the next day before another magistrate who recorded his "voluntary confession". The trial court rejected this confession as involuntary and the Court of Appeal affirmed. Though such renewed inquiry is possible, it is extremely rare, the trial court normally accepts the confession so recorded as voluntary. As recording before a magistrate is not a condition of admissibility, it is theoretically possible for a confession rejected by a magistrate to be held admissible at the trial - the trial court may be satisfied of its voluntariness though the magistrate asked to record it on the Case Diary was not. In practice, however, the earlier rejection would make it extremely difficult to prove voluntariness at the trial: it is unlikely that the prosecution will try to do so anyway. It is essential, therefore, that the magistrate recording the confession should conduct a proper inquiry into voluntariness and apply the rule closely because that is often

the only time it is going to be applied. The fact that the vast majority of accused persons in the Sudan are not represented by counsel at any stage makes the magistrate's role a vital one.

As required by the section, when recording the confession the magistrate must satisfy himself as to its voluntariness. How that should be done is left largely to the discretion of the magistrate; but some guidance may be found in judicial statements. Thus Mr. Justice Dafalla El Radi, Judge of the Supreme Court, acting as Judge Advocate in the Court Martial Trial of Abdel Rahim Mohamed Kheir Shanan explained that a mere advice by the magistrate to the accused that he need not make a statement and that what he says may be used in evidence is not enough. What questions ought to be asked vary from case to case and as such are best left to the judgment and good sense of the magistrate. Normally the accused should be asked about the length of his stay in custody, what sort of treatment he had there and whether there was any coercion or threatening etc. The accused should also be given time for reflection and consideration of his position. In the earlier case of Sudan Government v. Hassan Ibrahim Hussein, Bennett, C.J. said:


A Magistrate taking a confession properly refrains from cross-examining an accused person against his interest, but when the accused has already made a statement which contains points in his favour which have not been repeated to the Magistrate, he should call them to the accused's notice and invite him to amplify his statement thereon…"

Advice from the magistrate recording a confession to the accused to the effect that he need not say anything, mentioned by Mr. Justice Dafalla El Radi in the Court Martial Trial of Abdel Rahim Mohamed Kheir Shanan as one of the devices a magistrate may use to ensure voluntariness, may be inconsistent with section 118(2) which provides that "no policeman or other shall prevent any person by any caution or otherwise from making in the course of the investigation any statement which of his own free-will he may be disposed to make." It has been concluded above that this subsection precludes a policeman from issuing a caution or warning to an accused person during interrogation. Does it also preclude a magistrate recording a confession under section 119 C.C.P. from issuing such a warning or caution?

It would seem that the answer is in the affirmative: the subsection, which is quite explicit, applies to "policeman or other person" which presumably includes a magistrate. It has been suggested above that such a caution or warning is not very helpful anyway, at least when given by the police. There may be, however, valid reasons for distinguishing a caution or warning given by a magistrate from that given by the police:

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2h8. See above at p.502.
2h9. See above at pp.503 et seq.
the magistrate is an independent judicial officer and legal expert who can be expected to advise the accused objectively and fairly on whether he ought to exercise his right to silence and how to do so to his best advantage. This is unlikely to materialise, however, in the typical recording of a confession made during police interrogation; rather, the caution will be given in a brief and superficial manner that is not likely to help the accused very much. Besides, the accused has already been compromised by a confession to the police.

It is suggested that the benefits of an audience with a magistrate can be expected to materialise better and more often when the interrogation itself is done before a magistrate as recommended in Chapter 8 below. But if police interrogation and recording before a magistrate under section 119 C.C.P. are to continue then the caution or warning, if given at all, must be given in a deliberate and clear manner, with the full implications of silence and of answers or statements explained to the accused person. The difficulty with subsection 118(2) can be resolved if the warning or caution itself is worth having as a serious safeguard: it may be argued that as the warning or caution is given in order to determine voluntariness in the first place, then it is not given to prevent the accused from making a statement "which of his own free-will he may be disposed to make". In other words, the ban on caution or warning presupposes voluntariness, and does not come into effect until that is established: hence it does not apply to caution or warning used to ascertain voluntariness. If such argument is not accepted, subsection 118(2) can always be repealed.
Indian Practice Distinguished:

In Indian law there is the general common law voluntariness requirement, and a procedure for recording a confession before a magistrate similar to the procedure under section 119 C.C.P., but there is also something else. Sections 25 and 26 of the Indian Evidence Act 1872 restrict the admissibility of confessions made to the police. In view of the special relationship between Indian and Sudanese Law, and to assess the true effect of the Indian provisions for comparative purposes, the Indian position must now be outlined and distinguished.

The basic voluntariness rule, which contains features of the 19th century English law rule, is to be found in section 2h of the Indian Evidence Act: A confession is inadmissible if it was "caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him." It is obvious from the language of the section that unreliability is the basis of exclusion, yet the section is restricted in ways that are inconsistent with that rationale. For example, the "advantage or evil" must be "in reference to the proceedings against the accused". But, as Lord Reid pointed out in Commissioner of Customs and Excise v. Harz and

Power where he repudiated the requirement of English law that the inducement must relate to the charge or proceedings in hand, a threat or promise not so relating to the charge at all "would in most cases be a far more powerful inducement and far the more likely to lead to an untrue confession."251

The Indian Evidence Act, however, adds two further sections which are not found in other common law jurisdictions:

Section 25 "No confession made to a police officer shall be proved against a person accused of any offence."

Section 26 "No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person..."

Section 25 "absolutely excludes from evidence against the accused a confession made by him to a police officer under any circumstances (while in their custody or not)."252 It is inadmissible not only against the person who made it but also against any accused person; it may be used, however, for other purposes such as a subsequent civil suit. It may also be used for the benefit of the person making it, to prove motive or provocation, for example.253

Section 26 "goes further and enacts that a confession made by a person while is in the custody of the police to a third person is also inadmissible, unless made in the immediate presence of a magistrate."254


253. Ibid. 271.

254. Ibid. 278. Emphasis in original.
The combined effect of the two sections is that while a confession made to a police officer 255 is never admissible against an accused, one made while in police custody is only admissible if made in the immediate presence of magistrate. For a confession to be admissible, therefore, it must either be made outwith police custody, when it can be proved by anyone, other than a police officer, who heard it, or be made in the immediate presence of a magistrate who must record it in accordance with section 161 of the Indian C.C.P., 256 corresponding to section 119 of the Sudanese C.C.P. quoted above.

The difference between the Sudanese and Indian positions are clear enough: In the Sudan "voluntariness" is the only condition of admissibility for a confession by the accused, whether it was made to a policeman or not. Recording the confession before a magistrate may help the prosecution to discharge its burden of proving that the confession was voluntarily made, and offers the further convenience of dispensed with the presence of witnesses and delay of a voluntariness hearing at the trial; it is not, however, a condition of admissibility. In contrast, in India, besides the orthodox common law rule excluding involuntary confessions, the voluntary confession must have been made either to persons other than a police officer and outwith police custody or in the presence of a magistrate in order to be admissible.

255. According to Garth, C.J., in R. v. Hurribole, 1 C. 207 at 215 "The term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning." See Sarkar, Law of Evidence, 272.

256. Indian authority is conflicting on whether such recording is a condition of admissibility in all cases - see Sarkar, Law of Evidence, 279-82.
The obvious reason why the Indian rule in sections 25 and 26 of the Indian Evidence Act was not received in the Sudan is that the Sudan never had an Evidence Act as such, the courts borrowing from English and Indian rules of evidence as the need arose. Criminal Court Circular No. 29 approved this practice in the following terms: "In general, the Indian Evidence Act is followed in the Sudan and this Act is based in the main on the English law of evidence. However, where there is a conflict between the English and the Indian rule, it is the Indian rule which is generally followed." The preference for the Indian rules of evidence is not reflected in the decided cases - the courts continue to seek and apply English law. With specific reference to sections 25 and 26 of the Indian Evidence Act there are no reported cases, but the author came across some reference to the sections in two unreported recent cases. In one case, Sudan Government v. Yousif Sinein Fadel, Mr. Justice Abdel Rahman Abdu referred to section 26 Indian Evidence Act as being part of the law of Sudan. But the same Mr. Justice Abdel Rahman Abdu thought differently in Sudan Government v. Alfaki Ali Sid Ahmed. In the second case Mr. Justice Abdel Rahman Abdu said that the two Indian sections were deliberately left out of the Sudan scheme which adopted the rest of the Indian provisions and rules.

257. Criminal Court Circular No. 29, issued 31/12/1952, section 3. The Circular continues to refer to specific English text-books, namely "Phipson's Manual of Evidence and Cockles Cases."


It is unfortunate that the above two cases cannot be discussed further because the record to which the author had access contained only the Arabic text of Mr. Justice Abdel Rahman Abdu's judgments which did not have much to say on the particular issue, only what is reported above. It is still possible, however, for a reasoned judgment to adopt or reject the rule in sections 25 and 26 relying on Criminal Court Circular No. 29; the question is whether the Indian rule is worth adopting - whether it offers a significant improvement on the present position.

(iv) The Future of The Voluntariness Requirement in the Sudan

The basic dilemma of interrogation is to be recalled here. On the one hand questioning often serves essential and legitimate purposes: it offers the suspect an opportunity to explain incriminating circumstances, or indicate a complete and simple defence such as an alibi. In either event, his account must be verified and it is not always that independent witnesses or other direct evidence is available for the purpose: questioning may offer a means of checking or verification in some cases. Again, questioning may provide information leading to the saving of life or the recovery of property or evidence that cannot be obtained otherwise. If a kidnapping suspect is apprehended picking up the ransom money, it is only by questioning him that the police can hope to ascertain whether he has any accomplices and to discover the whereabouts of the victim.

260. The author had access to the private files of some of the Justices which contained collections of judgments and opinions. Official reporting, which is highly selective, is presently running late. If these cases are eventually selected for reporting, the facts and text of judgments will become available for fuller examination.
On the other hand, and precisely because of its effectiveness, police questioning is open to abuse, advertent as well as inadvertent. Beside the obvious dangers of the use of third degree methods to obtain confessions and other informations there are dangers in all questioning:

"Police officers, acting within the accepted canons of fairness, may interrogate a person at such length that, combined with the various strains induced by tension in a police station and anxiety about the whole outcome, the person may come to say almost anything. Dr. Sargent [Battle for the Mind (1957)] has shown that those who interrogate may feed in supposed facts which eventually come back to them in the form of a confession in such a way that they regard it as spontaneous. The process of excessive interrogation may be misleading to those who do the questioning as well as being unfair to the victim of the process. The result may be that at the end there is an apparently voluntary confession that the police are firmly convinced is true and yet the confession is retracted by the accused at a later date."261

In other words, interrogation is an effective tool that is liable to be abused, and not always consciously. In its effectiveness in obtaining results - making people say what they would rather keep secret - lies its usefulness and its dangerousness.

The answer to the dilemma, as has been indicated in the first section, is to allow interrogation but only subject to sufficient safeguards. Though this may not appear to be very helpful, it is the only way the general principle may be stated: free interrogation and no interrogation are both unacceptable. Though the safeguards must be effective enough to combat the perceived dangers, they must not be too strong or else they would drain

261a. See pp.461-66 above.
the device of all usefulness. The answer, then, is a compromise of a
compromise: both the safeguards and their effectiveness must be worked
out gradually and kept under constant review.

To turn to the present Sudanese position, it is clearly unsatisfactory.
Subject to the operation of the voluntariness requirement the police have a
completely free hand in interrogation: provided they use no violence and
offer no threat or promise, they can question for any length of time, using
any tricks they can think of. As the interrogation is neither supervised,
nor attended by an independent witness, there are problems of proof as to
whether violence, threats or promises were used or not. The recording of
the confession before a magistrate is not a real safeguard even when
followed: if the police can make an accused "confess" to them, they can
make him tell the magistrate that he has done so freely and voluntarily.
The police need not always follow the procedure at all and can prove the
confession directly at the trial by calling the policeman to whom it was
made. Thus the police can either avoid the procedure altogether or use
it to authenticate the confession and guarantee its admission into evidence.

The Indian procedure also labours under two main limitations: that
it applies to the confession and not to the interrogation leading to it;
and that it applies to confessions as such and not to all incriminatory

262. While researching for the present work, the author witnessed an
incident where a senior police officer and his subordinates were
"punishing" an accused for having told the magistrate that he had
been beaten into confessing. The author was at the time inter-
viewing the officer on police interrogation methods.
statements by an accused or to all information obtained from interrogating
him. Under the Indian procedure, therefore, the police have a lot to
gain and little to lose by conducting extensive, even coercive, interrogation:
If they succeed in extracting a "confession" and in "persuading" the accused
to repeat it before the magistrate, they may have it admitted into evidence;
any admissions, short of a full confession, or other information that may
lead them to real evidence, they can use in the usual manner - proving it
by calling the person who heard it, whether he is a police officer or not.
The procedure, therefore, does not go far enough - so long as the questioning
itself takes place out with the presence of the magistrate, there remains
the danger that the magistrate may be only rubber stamping all confessions
obtained by the police, some of which may be involuntary. The irony is
that the most objectionable third degree methods are most likely to escape
detection because they can be most effectively used to coerce the accused
into even denying that they happened.

Reject All Retracted Confessions:

One approach to the question of safeguards in interrogation is to
exclude all retracted confessions and admissions; in other words, to make
the requirement of voluntariness operative at the time the evidence is being
considered in the process of determination of guilt and innocence and not

263. Admissions are admissible under section 21 of the Indian Evidence Act.
Sections 24, 25 and 26 of that act apply to confessions as distinct
from admissions, see Sarkar on Evidence, 206-07, 226-27 and 268.

264. Loc. cit.
when it was made. Whenever a confession is retracted at the time of the trial, only one of two conclusions is possible: either that it was initially coerced and the accused is taking advantage of the trial's open hearing to repudiate it, or that it was not so coerced but is being retracted on reflection and appreciation of the full implications. In many cases the accused voluntarily admits a fact believing it to be exculpatory while in fact it is inculpatory; he may then wish to withdraw it or negate its damaging effect on discovering that it was not in his best interest to have admitted it at all. If the latter was the case, one may well conclude that he should not be allowed to succeed in defeating justice in this way. On the other hand, if the former was the case, then justice would be defeated if he was not allowed to repudiate the confession. The problem is, however, that neither can safely be assumed to be, or proved to be, the case: the traditional confessions rule is all about the best means of discovering which of the two conclusions can safely be made. It can be argued, however, that given the difficulties of proof and the chances of error, it may be better to reject all retracted confessions. The point was made by Lord Kilbrandon in _D.B.P. v. Ping Lin_, that it is "very difficult to imagine circumstances in which there could be a proper inducement to obtain a confession."265 If there were, then it is fair to expect the accused to stand by his confession to the end. Barring improper inducement, a confession can normally be motivated either by genuine

remorse and penitence or by confusion and ignorance; a retracted confession is more likely to be motivated by the latter than by the former. Some remarks made by Cave J. in R. v. Thompson, deserve to be quoted in this 266 context:

"I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; - a desire which vanishes as soon as he appears in a court of justice."

The suggestion can thus be made that, when a retracted confession is allowed, the state is at best taking advantage of the confusion and ignorance of the accused - only the frightened, the insecure, the weak, the bewildered and the stupid confess. 267 At present Sudanese courts are cautious in receiving a retracted confession, but is that enough? In an often quoted statement Abu Rannat, C.J., said: 268

"The retraction of a confession does not cancel the confession, but it puts the court on inquiry as to its value, its voluntary character, and the probability of its being true. Prudence and caution require any court not to rely on a confession without independent corroborative evidence. The corroboration should not only confirm the general story of the alleged crime but must also connect the accused with it. In a serious charge like murder we never convict a person on an uncorroborated confession."

266. [1893] 2 Q.B. 12 at 18.

267. See Mr. Justice Black in Chambers v. Florida, 309 U.S. 227 (1940) at 237-38; Beisel, Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court (1955) at 105-06; Note, "Historical Argument for the Right to Counsel During Police Interrogation", 73 Yale L.J. (1964) 1000 at 1014.

So long as retracted confessions are sometimes admitted in evidence, however, all the difficulties of proof and doubts as to voluntariness etc. remain with the system. A complete break away through a general rule excluding all confessions that are not made or maintained in open court at the trial is certainly one way of avoiding those difficulties and disposing with the inquiry into voluntariness altogether.

This may not be the right answer for the interrogation dilemma which is concerned with the treatment of the accused at the hands of the police - any restrictions on the admissibility of his statements is only a means to that end. Excluding all retracted confessions may still fail to protect the accused from abuse at the hands of the police because it does not necessarily effectively regulate the interrogation leading to such statements. In the prior interrogation it remains possible for the police to coerce the accused not only into confessing but also into maintaining such confession in open court. More important, however, is the incentive to interrogate for information and leads, and without any scruples either: with the inquiry into voluntariness gone, the only consideration is effectiveness. The effect of the rule would then be to give the police a completely free hand in interrogation; what they do then does not reflect on the admissibility of the evidence, even of confessions and admissions, because an accused may refuse to make a confession in open court though he was not interrogated at all or no coercion was applied, or may make a confession in court as a result of coercion applied in prior interrogation.
Interrogation Before a Magistrate:

The answer preferred by the author to the dilemma of interrogation is the banning of all police interrogation of suspects and accused persons in private. Interrogation should remain available as an investigative technique, but it should be possible only in the presence of a magistrate. The legitimate purposes of interrogation are thus served under conditions that are most likely to safeguard not only against third degree methods but also the more subtle coercive and oppressive conditions: the outcome of such interrogation will not only be most likely to be true but also obtained under humane conditions.

This proposal will be discussed in detail in Chapter 8 below; a brief outline may therefore suffice at this stage. It is suggested that the most attractive solution to the dilemma of interrogation is to allow it, but only before a magistrate who will conduct the proceedings and ask the questions. The obvious advantage of such procedure is that it provides the best safeguard against the abuse of powers, the participation of a qualified but independent referee, while retaining a reasonable degree of effectiveness. It avoids all the problems of proof as the record of the whole interrogation will be available at the trial.

If the Voluntariness Requirement Remains:

It is unlikely, however, that this proposal will be immediately implemented. It is therefore necessary to consider ways of improving the present system of police interrogation. That may be done by widening the application of the rule on the admissibility of the accused's statements
while at the same time modifying its absolute nature so that it covers a wider range of police misconduct in a fair and rational manner. It should cover modes of police misconduct which are as objectionable as threats or promises, but are not covered by the traditional voluntariness requirement. Again, the exclusion of the statement is not always the best or most reasonable response to police misconduct. In other words, it is not every sort of action in every sort of case that raise the same degree of objection; and it is not every objection that warrants the exclusion of the evidence. The same threat may render the resultant statement unreliable in one case but not in another; and a milder or harsher action may be enough or necessary in one case but not in another. Reliability is not the only consideration either, a trick or a lie, such as telling a murder suspect that the victim of the assault is not dead, may be more objectionable and warrant stronger reaction from the courts than many threats or promises.

The formulation of the confessions rule by the English Criminal Law Revision Committee may be quoted here as an example of a wider but more flexible rule. Clause 2(2) and (3) of the Draft Criminal Evidence Bill, annexed to the Eleventh Report reads as follows:

"(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by the accused, it is represented to the court that the confession was or may have been made in consequence of oppressive treatment of the accused or in consequence of any threat or inducement, the court shall not allow the confession to be given in evidence by the prosecution (whether by virtue of this section or otherwise) except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) -
(a) was not obtained by oppressive treatment of the accused; and
(b) was not made in consequence of any threat or inducement of a sort likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof."
In any proceedings where the prosecution proposes to give in evidence a confession made by the accused, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove with respect to the confession the matters mentioned in paragraphs (a) and (b) of subsection (2) above.

Thus the burden of proof may arise either in consequence of representations being made to the court, presumably by the defence, or out of the court's own motion. The significant features of the proposed provision are the following: The Clause adds oppressive treatment as a cause of exclusion, while requiring any threat or inducement to be "of a sort likely, in the circumstances existing at the time", to render the confession unreliable. The inducement need not come from a person in authority "the risk that an inducement will result in an untrue confession is similar whether or not the inducement comes from a person in authority." While reliability is made a basic concern, it is not the only one; hence the truth of the confession which is objectionable on the given criteria is irrelevant. Again, the addition of oppressive treatment as a cause of exclusion indicates that a "disciplinary principle" is taken into account - to discourage the police from using improper methods to obtain a confession for the purpose of obtaining a conviction. The Committee noted the criticism that "it is illogical not to apply one or other of the two principles - either (i) to apply the reliability principle and admit in evidence the whole of a confession shown to be likely to be true in spite
of the method by which it was found or (ii) to apply the disciplinary principle and exclude evidence of facts discovered as a result of the confession." But the majority of the Committee thought that "there are sufficient practical reasons for accepting the mixture of the two principles as the basis of the law..."\(^{272}\)

The inclusion of oppression as a ground for exclusion is not the exclusive innovation of the Committee: though a recent development in the law, "oppression is now established as a separate ground of inadmissibility.\(^{273}\)

Lord Parker, C.J., in \textit{Callis v. Gunn}, referred to the "fundamental principle of law that no answer and no statement is admissible unless it is shown by the prosecution not have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducements."\(^{274}\) This statement is closely followed in principle (e) of the introduction to the Judges' Rules 1964 - a statement treated by the House of Lords in \textit{Commissioners of Custom and Excise v. Harz and Power} as a correct statement of the law.\(^{275}\)

As to the meaning of the term, the Court of Appeal in \textit{R. v. Prager}\(^{276}\) quoted with approval Sachs, J., in \textit{R. v. Priestly},\(^{277}\) and Lord MacDermott,

\begin{footnotes}
272. Ibid. para. 56.
273. Ibid. para. 60.
275. [1967] 1 A.C. 760 at 818, per Lord Reid in a judgment on which all the other Law Lords agreed.
\end{footnotes}
in an address to the Bentham Club in 1968. Sachs, J., had said:

"to my mind, this word in the context of the principle under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary...Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."

Lord MacDermott described "oppressive questioning" as

"questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have stayed silent."

The English Criminal Law Committee said that it was not in favour of substituting for the present ground of inadmissibility the general ground that the confession was obtained by "unfairness" or the like because such a test "would produce too much uncertainty in its application as courts would be likely to take widely different views of what were 'fair' methods of obtaining confessions." But one finds that their own proposal is likely to produce at least as much uncertainty as a "fairness" test. When, on the one hand, oppressive treatment is included as ground for exclusion

278. Eleventh Report, para. 61.
while, on the other hand, any threat or inducement will not result in exclusion unless they were "of a sort likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof"; then there is uncertainty in the outcome of admissibility determination hearings. When one adds to this formula the general discretion to exclude, the overall outcome is not very much unlike that of a "fairness" principle. On the general discretion the Committee said: "However, if the confession was obtained by means involving serious impropriety, it might be excluded by the court in exercise of its general discretion." An element of uncertainty is not so bad anyway; it is unavoidable if the rule is to be flexible. Flexibility is essential for the rule to meet the vast variety of factual situations and produce fair and reasonable results. One can see some indications of a trend to apply a wider but discretionary rule of exclusion; the clearest example of this is the American Omnibus Crime Control and Safe Streets Act 1968. This Act emphasised that in determining the issue of voluntariness as a requirement of admissibility the trial judge "shall take into consideration all the circumstances surrounding the giving of the confession" including all the Miranda warnings: length of pre-arraignment custody, the accused's

279. Ibid. Clause 2(2)(b).
280. Ibid. para. 61, see also para. 278. This general discretion is discussed in Chapter 4 above.
knowledge of the charge, his right to silence and right to counsel, whether he had the assistance of counsel. "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession." 282

The recent House of Lords decision in D.D.P. v. Ping Lin, 283 may also be read as supporting this trend, though the decision is rather disappointing in some ways.

In this case the appellant was discovered smoking heroin in his flat with two friends, and substantial quantities of heroin were found in the flat. The appellant and friends were taken into custody. In questioning after caution the appellant admitted that he obtained the heroin from "a man in Gerrard Street" and offered to reveal his identity in exchange for his own freedom, but the police detective superintendent questioning him refused. On further questioning the appellant admitted that he was a dealer and repeated his offer which was again rejected. When he said: "If I help police, can you help me?", the superintendent replied "I can make no deal with you", but then he added "If you show the judge that you have helped the police to trace bigger drug people, I am sure he will bear it in mind when he sentences you." The appellant then disclosed the name of his supplier who was subsequently arrested. The appellant appealed against conviction for conspiring to contravene the Misuse of Drugs Act 1971. The House of Lords dismissed his appeal emphasising that the transaction must be considered

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282. Section 3501(b) quoted above at p.184 above.

283. [1975] 3 All E.R. 175.
as a whole in the light of all the circumstances. "The task of the judge will be to apply the spirit of and intendment of the rule [in Ibrahim v. R.]. Without being anchored to any particular words he will consider whether the statement of an accused was brought about by some hope or fear held out or caused by someone who could be classed as a person in authority." After ascertaining all the facts and circumstances "what was said must be considered in a common sense way in the light of all the circumstances; and what was said must be given in a common sense way the meaning which it would rationally be understood to have by the person to whom it was said."^281

Two of their Lordships referred to the historical context of the rule. 285 It was developed at a time when the accused could not give evidence himself and lacked many of the protections now available to him: the savage code of the 18th century was in full force, law enforcement officers formed no disciplined police force and were not subject to effective control by the Central Government Watch Committees or an inspectorate, no legal aid, no system of appeal. "The judiciary were therefore compelled to devise artificial rules designed to protect him [the accused] against dangers now avoided by other and more rational means. Nevertheless, the rule has survived into the 20th century, not only unmodified but developed, and only Parliament can modify it now from the form in which it was given classical expression by Lord Sumner."286

281. Per Lord Morris, ibid. at 177 and 178.
The reasoning of all the judgements in this House of Lords decision tends to support the view that each case must be considered on its own facts to see if exclusion is justified. Thus, referring to the judgment of Lord Kilbrandon in the same case, Lord Salmon said:

"I entirely agree with my noble and learned friend, Lord Kilbrandon, that in deciding whether an alleged confession or statement was free and voluntary and should be admitted in evidence, it is useless, just as it is in an accident case, to search for another case in which the facts seem to be similar and treat it as binding. Facts vary infinitely from case to case. The judge's task is to consider the evidence before him, to assess its implications and to decide the case on his view of that evidence in the light of the basic established principle."

This is a most recent and highly authoritative case on the subject and must receive due respect as such. But although it supports, in a general way, the proposition adopted in this study, it is disappointing in ways that are perhaps common to many of the English cases. One is struck, for example, by the lack of any serious discussion of the Eleventh Report's analysis and recommendations. Except for a brief and superficial reference in the judgment of Lord Salmon, the Report is not even mentioned. Again, it is difficult to see why Lord Sumner's formulation should be regarded as final and conclusive to the extent that "only Parliament can modify it now". If the rule was developed by case law it can be modified by

287. Ibid. at 187-88.
288. Ibid. at 188.
289. Lord Hailsham at 182.
case law also. It is not that the rule should be repudiated altogether, rather it should be modernized and refined to take into account the changes in the regime for criminal law administration.

In conclusion, at present there are no restrictions on police interrogation in the Sudan except the requirement of voluntariness. Rather than recommend the adoption of any of the devices employed in the various common law jurisdictions, it is suggested that all interrogation in the Sudan should be conducted before a magistrate. As will be explained in Chapter 8 below, the magistrate already plays a dominant role in pre-trial procedure: what is proposed in this study will neither increase his involvement substantially nor increase his workload significantly. If the present position is to continue, however, the voluntariness requirement must be modified into a wider but discretionary rule: to exclude unreliable statements as well as discourage the police misconduct and maltreatment of suspects, all improperly obtained statements must be excluded. The proper limits of this wider rule will gradually evolve in practice as guided by the two principles of exclusion: reliability and disciplining the police. There should be no exclusion if neither purpose is thereby served.
Chapter 6

Eye-Witness Identification

All investigative devices seek to connect the accused to the offence in a way that establishes his culpability according to the principles of criminal responsibility. By search and seizure the police seek to find and seize physical evidence: items from the possession of which guilt may be inferred. By identification the police seek to connect the particular accused to the particular offence to the same effect.

The accused may be identified as the culprit in many ways: the identifiable features of the culprit that may be compared to those of the accused vary with the factual situation and type of offence; and so does the probative value of the identification. The principle, however, is the same:

"A particular person, endowed by the nature of things with certain recognisable characteristics or peculiarities of body or conduct, has committed an offence; find the person with those recognisable peculiarities and you probably have the criminal. Whether the peculiarities are of facial feature, of voice, of fingerprint, of footprint, of conduct, or even of scent, the principle is the same; the only difference between them is the degree of certainty which the court will attach to the identification".1

Each type of identification has its own dangers or weaknesses; corporeal identification - the "recognition" of the accused by the victim or other eyewitness of the crime - may have more than most. It is

also distinguished from other types of identification in that it is normally made by laymen who have no training or expertise for it. All other identifications: fingerprints, footprints, handwriting, voice etc., are made by experts. Furthermore, the experts have the objects to be compared for detailed and, more or less, scientific scrutiny; \(^2\) in contrast to the mental image the layman would have for corporeal identification.

The following discussion will be confined to corporeal identification because of both its fallibility and practical importance. As a leading French author in the field once wrote of this identification by witnesses:

"It is a statement of opinion which may readily fail to withstand scrutiny but which is often impossible to controvert and which, once established, tends to remain permanent. Showing of prisoners to witnesses bears to the spontaneous answer the same relationship an experiment bears to observation. Hence, it seems to demand all possible guarantees of correctness". \(^3\)

For reasons considered below, correct identification may well be the exception rather than the rule. Yet, when accurate it presents the best proof of the accused's involvement. The incentives to use it are great in spite of its fallibility. In view of the available evidence, its reliability is often exaggerated, to say the least.

\(^2\) This is equally true whether the technique used is that of trackers of footprints - an ancient nomadic skill - or tracing fibre of hair from the victim or scene of the crime to the accused - using sophisticated equipment.

(1) The Incidence of Misidentification:

"Some of the most tragic miscarriages of justice", said Wigmore, "have been due to testimonial errors in this field (of identification of the accused)".\(^4\) In his important and most readable book, _Convicting the Innocent_, Borchard reviewed sixty-five cases of miscarriage of justice; misidentification of the accused by the victim of a crime of violence "was practically alone responsible for twenty-nine of these convictions".\(^5\) It was also contributory in other convictions.\(^6\)

The frequent incidence of misidentification is well documented in Anglo-American literature.\(^7\) But for the fortunate chance of being able to establish a conclusive defence such as alibi, misidentification would have led to even more wrong convictions.\(^8\)

To cite some of the more outrageous examples in illustration

\(^4\) Wigmore on Evidence (3rd ed. 1940) para. 786a, p.163.

\(^5\) Edwin M. Borchard, Convicting the Innocent, Errors of Criminal Justice, (New Haven: Yale University Press, London: Oxford University Press, 1932) Introductory Chapter, XII, see, for example, 1, 8, 23, 46, 63, 71, 80, 100.

\(^6\) Ibid. XV. See, for example, 94, 123, 131. Misidentification was responsible, wholly or in part, for the wrong conviction in thirty-seven out of sixty-five cases of miscarriage of justice.


of the magnitude of the injustice, the cases of Beck, Slater and Ashman come to mind. They spent seven, eighteen and nine years, respectively, in prison after wrongful convictions based on misidentification. In another case, the unfortunate man, Rowland, actually hanged for a murder he did not commit.

The very recent English cases of Luke Dougherty, served nine months, and Laslo Virag, served five years, on wrongful convictions which were partly based on misidentification - prompted the Home Secretary to set up a Committee, headed by Lord Devlin, to look into "the present law and procedures relating to identification". In the yet more recent Scottish case of Maurice Swanson, convicted for robbery on evidence of identification, the man "identified" as the robber served eleven months of his sentence before he was granted a Royal pardon on the confession of another man to the robbery.

10. Ibid. 11b-19. The miscarriage of justice in this incident is not yet officially admitted.
11. Mr. Roy Jenkins, The Times Tuesday, 9 April 1974. The Report of the Departmental Committee on Evidence of Identification in Criminal Cases, hereinafter referred to as the Devlin Report, was published by H.M.S.O. in April 1976. The Report found many faults with the investigation and trial of both cases, misidentification featuring higher as a cause of the miscarriage of justice in the case of Virag than in that of Dougherty.
12. Glasgow Herald, Saturday, July 26, 1975; The Scotsman, Saturday, July 26 1975. The confession of another man, communicated to the authorities by his solicitor after his death, was one of the main factors behind the decision of the Secretary of State for Scotland to grant a free pardon to Patrick Meehan on the 19th of May, 1976. Meehan served more than seven years after being wrongly convicted for murder. The conviction rested partly on voice identification by the husband of the deceased woman, himself a victim of the attack. See Weekly Hansard Parliamentary Debate (House of Commons) No. 1037 (1976) at 11.21 et seq.
In perhaps a more sensational way, the case of George Ince illustrates the same point, though, happily, no conviction followed the misidentification. The evidence against George Ince, charged with, inter alia, murder and attempted murder, "was purely and simply identification... The case against him in his two trials amounted to the fact that several people picked him out from photographs and on identification parades. Two of these people had spent some considerable time close to the gunman in the room in which the shooting happened."\(^{13}\)

Ince was acquitted in the second trial - the jury having been discharged in the first, but many believed he was guilty until the real culprit was later caught and convicted.\(^{14}\) The acquittal of George Ince may have been due to several features peculiar to the trials, to the publicity the "Barn Murder" received and to the conclusive alibi he was able to produce; otherwise the identification - or rather misidentification - might have been sufficient to produce a conviction.

\(^{13}\) Cole and Pringle, Can You Positively Identify this Man, 171. Two men broke into the home of the Patience family with the intention of robbery, one of them shot and killed Mrs. Patience, and shot and seriously wounded her daughter Beverley and shot but missed Mr. Patience. Beverley Patience spent about half an hour in face to face view of the gunman before the shooting; yet she identified the wrong man, Ibid, 28-31. Ince was tried twice, in his first trial he objected to the judge so much that he dismissed his lawyers and offered no defence, the jury failed to agree and were discharged. In the second trial the jury acquitted him.

\(^{14}\) Ibid, ch.8.
Had any of the many features of the case been different, Ince would most probably be serving a life sentence now.

Thus glaring and cruel miscarriages of justice continue to happen because of errors in identification of the accused by eye-witnesses.\(^\text{15}\) It is also most probably true that this is only the tip of the iceberg: authorities are naturally reluctant to admit mistakes\(^\text{16}\) and the corroborated confessions and conclusive alibis, necessary to expose the misidentification, are hard to come by.

(2) Causes of Misidentification:

The reasons behind misidentification of accused persons by eye-witnesses are not hard to find.\(^\text{17}\) An appreciation of what is involved in these identifications goes a long way in explaining the phenomenon. As was noted in an Australian case:

"An honest witness who says 'The prisoner is the man who drove the car', whilst appearing to affirm a simple, clear and impressive proposition, is really asserting: (1) that he observed the driver, (2) that the observation became impressed upon his mind, (3) that he still retains the original impression, (4) that such impression has not been affected, altered or

\(^{15}\) For recent examples in the United States see F.T. Read, "Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance", 17 UCLA L. Rev. (1969) 338 at 369 note 89. So many cases of misidentification were uncovered following the publication of the Devlin Report that a special court of appeal was set up to consider them - R. v. Whitby (1976), The Times Friday May 11, 1976.

\(^{16}\) The Devlin Report, para. 3.103, blamed "the misjudgment in the Home Office which delayed the release of Mr. Virag for two years". See also paras. 3.113 and 6.16 to 6.22, of the Report. See also L. Kennedy, A Presumption of Innocence (Gollancz, 1976).

\(^{17}\) See generally Patrick M. Wall, Eye-Witness Identification in Criminal Cases, 8 et seq.
replaced, by published portraits of the prisoner, and (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment not of resemblance but of identity."18

In view of the multiplicity of the sources of error it is remarkable that there are as many accurate identifications as there appear to be. The evidence of the unreliability of eyewitness testimony, in general and eyewitness identification in particular, is formidable indeed.19 Numerous scientific studies are reported,20 all to the effect that "error in testimony is the rule rather than the exception".21

According to the Devlin Report "Psychological studies of the process of memory and recall underline the need to approach evidence of eyewitness identification with great caution. A person's observation of any episode is itself an interpretative process involving interaction of sensory data presented by the episode in question and the observer's own bodies of knowledge, attitude and expectations about the world,

18. Craig v. R. (1933) 49 C.L.R. 429 at 446.


including those preoccupations which are uppermost in his mind at the moment. The process of subsequent recall involves a similar interaction between the observer's knowledge of the episode and the demands of his present circumstances. 22 To illustrate we take only two examples. 23

The first is an experiment performed by Professor Gower during a law lecture at the London School of Economics. 24 During an altercation between an Englishman and a Welshman, each drew weapons and the Englishman "shot" the Welshman. The audience, when examined, said that the Welshman produced his weapon first; in fact both drew weapons at the same time. Nine members of the audience were asked to try to identify the two actors at an identification parade held a week later. Only two students were able to identify the Englishman and only four identified the Welshman. "The rest with varying degrees of assurance identified completely innocent men. Two innocent men were identified twice." 25

The second experiment was conducted as a television programme. 26

22. The Devlin Report, para. 4.12.
23. See Devlin Report, para. 4.12 to 4.14 for reference to several studies.
26. "The Evidence of Your Eyes", shown on 19 February 1971. For a brief report see Cole and Pringle, Can You Positively Identify this Man, 168-69. Similar findings were reported from the experiment carried out by the Tavistock Institute of Human Relations - partly shown in "World in Action" television programme on Monday 26th November 1975. See the Guardian, Monday, November 26, 1975, p.5.21: out of 68 people made false identification after spending two minutes in a waiting room with an actor.
A "murder" was re-enacted on stage and the audience were asked detailed questions about what had happened. A large number of the answers were wrong. The "murder" was acted out again, in slow motion, and then the "murderer" was put on an identification parade. More than half the audience picked the wrong man.

These experiments establish the fallibility of human observation, recall and recognition, unaided or interfered with. In practice, however, the risk of error is multiplied by suggestion, whether advertently or not. One way in which the power of suggestion operates has been described as follows:

"A person who eyewitnessed the crime, when he first talks to the police, may have no clear recollection of the man he saw. The police and prosecutor may work on the eyewitness by subtle and repeated questions until he loses his initial uncertainty about a suspect and finally, without hesitation, declares him the man who did the deed. Then, at the trial, this eyewitness testifies so positively that cross-examination does not create any doubt in the jury's mind, and they believe the witness's testimony that the defendant was the culprit... This has happened more often than it is comfortable to contemplate."

The suggestion creating or confirming a misidentification could be inadvertent, such as an accidental sighting of the accused in police custody by the witness before an identification parade. Often it is inherent in the identification procedure itself, such as face to face

27. See generally Wall, Eye-Witness Identification in Criminal Cases, chapter II and 68-73.

confrontation, or showup in American terminology, between witness and accused. The witness, when confronted by the accused in police custody would infer his guilt from the mere fact of such custody, that may be "reinforced by the unfavorable impression due to the lamentable appearance of the prisoner, with handcuffs on his wrists, and a policeman at each side".29

Suggestion is also risked when a witness is shown a photograph of the accused. As Williams explained:

"When the witness is shown the photographs, he is likely to pick on the face that best accords with his recollection of the culprit. Thereafter his recollection of the culprit and recollection of the photograph are likely to be so merged that he can no longer separate them, even though in fact his identification was mistaken. Psychological tests show that if he thereafter sees the real criminal, he may no longer be able to recognize him as the person he saw previously, the sight of the photograph and efforts at recall having distorted the memory".30

Thus evidence of identification is demonstrably dangerous; in fact it is "opinion evidence... a form of proof against which English law has always guarded with particular care".31 It suffers from two types of

29. Gorphe, "Showing Prisoners to Witnesses", 1 American Journal of Police Science (1930), 82. Psychological factors, such as a desire to please the police, are also operative on the witness. See Note, "Criminal Procedure Lineups - Right to Counsel etc." 45 Washington L. Rev. (1970) 202 at 204.


defects: inherent weakness of memory and recall and external suggestion. Much can and ought to be done to reduce, and eliminate if possible, the manifestations of both types of defect. 32

(3) Some Suggested Improvements:

To reduce the risk of misidentification, 33 some safeguards were suggested, some implemented, in various countries - some of these may be considered in the context of the danger they were meant to contain.

(i) Assessment of the Witness:

To assess the credibility of the witness or the weight of his identification evidence it is only logical that the character and basis of his recollection be examined. It has been suggested, with reference

32. As Gorphe urges: "Most cases of mistaken identity are traceable to unfavourable conditions - the confusion invariably associated with a criminal event, the distance of a witness from the scene of action, inattentiveness on his part, shadow or obscurity, rapidity of occurrence, and other factors. Is it not desirable, then, to study the proper conditions of the case, in order to conduct the showing under the most favorable circumstances? Moreover, is it not important to learn what quality of memory the witness possesses, for the powers of recollection vary more or less in dependability? But first and foremost, we must be assured as to his truthfulness". See his article, "Showing Prisoners to Witnesses", supra 80.

33. The Devlin Report concluded in para. 4.25: "Our view is that identification ought to be specially regarded by the law simply because it is evidence of a special character in that its reliability is exceptionally difficult to assess. It is impervious to the usual tests." There is no story the probability and coherence of which may be taken into account - it is simply a single piece of observation. The demeanour of the witness is useless because the mistaken witness is convinced of the truth of his identification.
to the Continental system of criminal procedure,\textsuperscript{34} that the witness should be questioned as to the circumstances in which he witnessed the occurrence how closely he observed, how much time elapsed since the event, in what position was the accused at the time of the event, etc., before he is asked to make any identification.\textsuperscript{35}

In the Continental type of criminal process, such examination would be done by the examining magistrate. In the common law "adversary" type of process similar examination may be made by, and certainly often is actually made by, the defence counsel at the trial. This arrangement is unsatisfactory for several reasons. For one thing, and specially in a country like the Sudan, representation by counsel is the exception rather than the rule. The vast majority of accused persons, even in the most serious cases, are not represented at any stage of the proceedings. Even if the accused was represented, his counsel may elect not to, or fail to, ask the relevant questions.

A tactical decision not to cross-examine the identifying witness in this way is quite likely, or even advisable, in view of the probability

\begin{quote}
\textsuperscript{34}. Gorphe, "Showing Prisoners to Witnesses", supra, 80-81. Somewhat similar procedure is enacted by the Italian and Spanish Codes, see Daniel E. Murray, "The Criminal Lineup at Home and Abroad", [1966] Utah L. Rev. 610 at 626-25.

\textsuperscript{35}. In the Continental tradition, the witness is examined again after the "showing process" - Gorphe, "Showing Prisoners to Witnesses", supra, 87-88.
\end{quote}
that at such a late stage, trial, the witness may convey such an impression of positiveness and assurance as to completely conceal his initial, and more credible, uncertainty. This is a well known and understandable human reaction to this type of questioning. "Identification seems to be a matter on which personal pride has a strong effect: a witness often resents it when his ability to recognise someone is questioned". 36 Thus it seems that any such examination by defence counsel at the trial is most likely to be counter-productive.

Examining the witness in this way attempts to provide some basis for the objective assessment of his evidence. By establishing the angle, timing, light etc. of his observing the person he purports to identify, it is hoped that one can tell how accurate such identification is likely to be. In other words, when the witness had no more than a fleeting glimpse of the culprit in bad light, or under other circumstances derogatory of positive recognition or subsequent recall, that would reflect adversely on any subsequent identification he may make. 37

36. Williams, The Proof of Guilt, 113. As explained by Gorphe, "Showing Prisoners to Witnesses for Identification", at 82: "...once having made his identification, the witness tends to maintain it by a process of auto-suggestion which evidences itself in continually seeking means of justifying his opinion and reinforcing his belief. Questioned once more regarding the matter, the chances are that he would repeat, with perhaps even greater emphasis, his previous declaration". See also scientific evidence referred to in "Criminal Procedure - Lineups - Right to Counsel...etc.", 45 Wash.L.Rev. (1970) 202 at 205-6.

37. The need to warn the jury on these considerations has been appreciated by the Devlin Committee and the Court of Appeal in R. v. Turnbull and Others, The Times, Saturday, July 10, 1976. See below pp. 609-10.
Assessment of the Bases of the Identification:

Wigmore suggested that at the time of the original observation, that is as soon as possible after the incident, the police "should obtain from the observer a note of any marks of the personality observed, so that there will be less need to depend later on the observer’s memory". This is current police practice but its value is doubtful so long as any discrepancy between initial description and ultimate identification is not made available to the defence. This measure of "discovery" was called for by the English Criminal Law Revision Committee:

"It would also help, in our opinion, to reduce the danger of convictions on mistaken identification if the police made it a practice in all cases to supply the defence with copies of any descriptions of the offender which any likely witness has given to them. This would assist the defence to challenge the value of the witness’s identification of the accused".

The English Court of Appeal in its recent guidelines to the courts on identification evidence adopted this safeguard: if in any case whether it was being dealt with summarily or on indictment, the prosecution had reason to believe that there was a material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance, they should supply the accused or

38. 3 Wigmore on Evidence, para. 786a(B)2(a). See generally the Devlin Report, paras. 5.6 to 5.15.


his legal advisers with particulars of the description the police were first given. The Court also said that in all cases if the accused asked to be given particulars of such description, the prosecution should supply them.

The corroborative value of comparing initial description with subsequent identification may be challenged by the argument put up by Wigmore himself: "the process of Recognition being often more or less subconscious, it may be quite correct, even though no specification of marks can be given as reasons for recognition". Therefore, it does not necessarily follow from failure to describe, and to a lesser extent from discrepancy between description and identification, that the subsequent identification is erroneous.

(ii) The Identification Parade:

Partly to minimize the risks emanating from the witness, but mainly to combat external suggestion, the procedure known as identification parade - "lineup" in the United States - was devised. The origins of this police practice are obscure; it is certain, however, that at

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h1. 3 Wigmore on Evidence, para. 786a(B)1. Emphasis in original.
h2. Wall, Eye-Witness Identification in Criminal Cases, h0-h1.
h3. The Devlin Report, para. h.16, referred to several alternatives to the parade, e.g. "hot pursuit", identification by the witness in a public place. In para. 5.77 to 5.79, the Report approved some of these methods as fair and reasonable in some cases.
h4. Leigh, Police Powers in England and Wales, 204. See also the Devlin Report, para. 1.10 and 5.29.
present the "courts have come to expect that evidence of identification should be subjected to the test of a parade...."\(^45\)

The dangers of showing the accused alone to the identifying witness are obvious. The suggestion is implicit in police suspicion - the fact that the accused was regarded by the police as the likely culprit is most likely to influence even the fairest and most positive witness. Whatever doubt he may have is dispelled by the mere fact of custody of the accused.\(^6\) An identification parade may be better, though not absolutely safe:

"Several experiments of this kind have been tried which indicate that such collective presentation or, rather, selective presentation, has apparently yielded better results than the individual identification. Comparison of the accused with other persons is an aid to the recollective processes of the memory, and, consequently, favors recognition.... (But it) would thus appear that even the selective presentation does not preclude error".\(^7\)

As may have been gathered from the above quotations, and as the name itself suggests, an identification parade is basically a collection of persons of similar general appearance from which the witness is supposed to pick out the accused, unaided. There is obviously more than one way of doing this; what is important is what must be avoided: "all factors which might lead - or which might be said by the defence

\(^{45}\) Williams and Hammelmann, "Identification Parades", [1963] Crim.L.Rev. at 481. See also the Devlin Report, para. 5.30.

\(^{46}\) Craig v. R. (1937) 49 Commonwealth L.R. 429. See also Wall, Eye-Witness Identification in Criminal Cases, 28-33.

\(^{47}\) Gorpe, "Showing Prisoners to Witnesses", supra, 83-84.
to have led - the witness to identify the accused by the circumstances surrounding him rather than by his recognisable personal peculiarities." 48

There are several sources of such factors. 49 To eliminate these dangers, whether real or imagined, standards have gradually evolved, judicially at first and by general internal directives to the police subsequently. 50

Other safeguards to increase the credibility of identification parades have been suggested by commentators. The following brief review does not purport to be exclusive, 51 only illustrative of the kind of danger

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48. C. Williams, "Identification Parades", [1955] Crim.L.Rev. at 526. See generally this article and Williams and Hammelmann, "Identification Parades" on the proper conduct of these parades and the precautions to be taken.

49. See Williams and Hammelmann, "Identification Parades", supra 482-90 and 514-56.

50. Leigh, Police Powers in England and Wales, 204; Report of the Royal Commission on Police and Procedure, 1929, Cmdd. 3297, para. 123-29. For extracts from the first Home Office Circular, that of 1925, see 3 Wigmore on Evidence, para. 786a, pp.164-65. For the current Circular, No 9/1969, see Cole and Pringle, Can You Positively Identify This Man, 184-87 - (hereinafter referred to as Home Office Circular).

51. We are not concerned here with such issues as whether one can be compelled to take part in such a parade, and whether it violates the privilege against self-incrimination. For a consideration of these issues see Williams and Hammelmann, "Identification Parades", supra, 580-81; C. Williams, "Identification Parades", supra, 528; R. v. John [1973] Crim. L.R. 113; Teasdale, "If Seeing is Believing - A Cautionary Tale", 124 New L.J. (1971) at 804. For some of the American material see Murray, "The Criminal Lineup at Home and Abroad", [1966] Utah L.Rev. at 611-12; Comment, "Regulation and Enforcement of Pre-Trial Identification Procedure", 69 Colum. L.Rev. (1969) 1296; and Holt v. United States, 218 U.S. 245 (1910) at 252 and United States v. Wade, 388 U.S. 218 (1967). See also Leigh, Police Powers in England and Wales, 204-05.
to guard against and some of the suggested ways of doing so. 52

(a) Any policeman or officer concerned with the investigation
should not take part in conducting the parade. 53

(b) The witness should be prevented from seeing the suspect before
he is paraded with other persons, and a witness who has previously seen
a photograph or description of the suspect should not be led into
identifying the person whose photograph or description he saw previously
by showing him the same shortly before the parade. 54

(c) The accused should be placed among persons who are as far
as possible of the same age, height, general appearance and position in
life. Where there are two accuseds (suspects) of similar general
appearance they may be paraded together with at least twelve others.
If they are not of similar general appearance or they were more than

52. For a suggested model statute, providing for several safeguards,
see Murray, "The Criminal Lineup at Home and Abroad" supra, 627-28.
See also Wall, Eye-Witness Identification, 42-65. The Devlin Report,
para. 5.32 to 5.32, discussed many of the problems related to the
parade, e.g. how to resolve objections taken by the defence.

53. Home Office Circular, section 3; C. Williams, "Identification
Parades" supra, 527.

54. Home Office Circular, section 7; C. Williams, "Identification
Parades", supra, 529. According to C. Williams, it was violation
of this rule that led to the misidentification and miscarriage of
justice in the Scottish case Oscar Slater, see The Proof of Guilt,
113-14.
two accuseds (suspects) separate parades are to be used.55

(d) The accused (suspect) should be allowed to select his own position in the line, asked if he has any objection to the persons present or the arrangements made and advised that he may have his solicitor or a friend present at the parade.56

(e) The witnesses should be introduced one by one and not be allowed to communicate with the others still waiting to see the persons paraded on leaving the parade. The accused (suspect) should be informed that he may change his position after each witness has left.57

(f) The witness should be asked whether the person he came to identify is on the parade and that if he cannot make a positive identification he should say so. In other words the questions to the witness should neither be suggestive or leading nor compelling him to make any identification he can.58

55. Home Office Circular, section 8; Williams and Hammelmann, "Identification Parades", supra, 487-88. As C. Williams points out: "The guiding principle in this respect, as in all others is, not to make the identification as difficult as possible, but to prevent suggestions that it was made too easy" - see "Identification Parades", supra, 533.

56. Home Office Circular, section 10. Williams and Hammelmann went further and required that the men in the parade should not be allowed to adopt fixed and static positions - see "Identification Parades", supra, 490. On presence of solicitor or counsel see below.


58. Home Office Circular, section 12; Gorphe, "Showing Prisoners to Witnesses", supra, 83; As Williams and Hammelmann indicated, it is a practical safeguard "for the officer in charge to put into his question to the witness some saving clause which will at least make it appear open whether the offender is believed to be present in the line-up before the witness". See "Identification Parades", supra, 487.
(g) It is generally desirable for the witness to touch the person he identifies unless he or she is nervous at the prospect (e.g. child or woman victim of sexual or other violent assault) whence he or she may just point him out. 59

(h) The witness should be allowed, if he desires, to see the accused (suspect) with or without his hat, walk or speak etc. Such a request must be recorded. 60

A useful recommendation was recently made by the Thomson Committee in Scotland: they recommended the use of "one-way vision screen" in identification parades so that the witness may identify the suspect without being seen by him. 61 The danger of a witness being too frightened or excited - especially in cases of robbery, sexual assault

59. Home Office Circular, section 13. Williams and Hammelmann, "Identification Parades", supra, at 5h6, report the practice of the Copenhagen police to allow such witnesses to identify through a one way mirror, i.e. the witness can see and point out without being seen - looking through a glass window that is a mirror on the other side.

60. Home Office Circular, section 15. As Gorphe explains: "If he (accused) had originally been observed in the act of running away, he should be made to run; for a man in action presents an entirely different outline from that of a person at rest. Even his size seems different. It is the recollection of movement that the witness preserves most clearly..." see "Showing Prisoners to Witnesses", supra 86. Williams and Hammelmann, however, insist on the opportunity to compare the voice etc... of all persons on the parade - see "Identification Parades", supra, 490.

and other violent crimes – to identify a suspect in his presence had already been pointed out by commentators. The use of a one-way vision screen appears to be a very practicable and inexpensive way out of the difficulty.

The Scottish Committee also recommended that the suspect should have the opportunity to have a solicitor present on the witness side of the screen to "see him make or fail to make the identification". They also recommended other safeguards to ensure the fairness and reliability of the parade. The essential point behind the recommendation is to avoid situations where a witness is too frightened to identify a suspect he would otherwise identify. All other requirements of a fair and effective identification parade are not affected by the recommendation.

(iv) Identification of the Accused in Court:

The identification of the accused as the person who was seen committing the criminal act is a necessary step in procedure at the trial. "The person who will be convicted if his act was criminal is not a person with a given name but the corpus actually in the dock, that is, the

62. See, for example, Williams and Hammelmann, "Identification Parades", supra, 545-46.
63. Thomson Committee Report, para. 12.08.
64. Ibid. para. 12.10.
prisoner. In current practice the witness is asked at the trial to identify the accused not only by naming him but also by pointing him out. The obvious objection to this identification in court, or dock identification, is that the accused is put in such a prominent position in court that the witness will know that he is the person on trial. If the witness saw an accused for the first time when the offence was committed and did not have an opportunity of seeing him again until the trial, then if "there is any sort of similarity between the man he saw and the man in the dock, he naturally tends to identify the man in the dock as the criminal." In other words, dock identification "comes as an answer to what is in effect, if not in form, a leading question, that is, a question put in a way which suggests the answer that is expected." Identification has always been treated as an exception to the rule against leading questions "since otherwise the evidence could not be given at all." If identity is in issue, dock identification is of little evidential value.

Identity, however, is not always in issue; identification of

65. The Devlin Report, para. 4.89.
67. The Devlin Report, para. 2.21.
68. Ibid. para. h.99.
the accused in court as the person seen committing the offence can be a mere formality where the accused is not disputing the fact that he was the person seen by the witness but denies the offence. In such cases the "policeman who deals with literally hundreds of cases cannot be expected to identify positively an accused whom he has seen only at the time of the incident perhaps a year earlier." Yet, if unidentified in court, the accused will have to be acquitted. After considering several suggestions the Thomson Committee came in favour of the following solution: "that in summary cases a new procedure should be introduced whereby where a person has been charged by the police there would be a presumption that the person who answers the complaint is the person who was charged and that fact would be held as admitted unless challenged by preliminary objection before his plea is recorded."  

In indictment cases where the defence failed to indicate in the first diet that identification is to be an issue in the case, "the procedure for identification at the trial will remain as at present"; i.e. the Crown can ask the witness to identify the accused as he sits in the dock.

70. Thomson Committee Report, para. 46.04.
71. Ibid. para. 46.06.
72. Ibid. para. 46.08.
73. Ibid. para. 46.11. This is subject to the recommendation made in para. 46.13: "that in any case in which a witness has viewed an identification parade and has failed to identify the accused, it shall not be competent for the Crown to ask that witness to identify the accused in court."
When the defence indicate at the first diet that identification is to be an issue, "the Crown must arrange for an identification parade to be held in respect of each witness who will be called upon to identify the accused and who has not already attended such a parade and it will not be competent for the Crown to lead at the trial evidence of identification other than evidence of such a parade."74 A witness who identified the accused at an identification parade may be asked, when he confirms the fact at the trial, whether the accused in the dock is that person.

In recommending that identification at an identification parade must precede court room identification in all indictment cases where the defence indicates at the first diet that identification is to be an issue the Thomson Committee made no allowance for cases where an identification parade would be impracticable or not very helpful. The Devlin Report mentioned a number of such cases:75 when the accused refuses to attend the parade; when between the commission of a crime and the proceedings in court a witness has seen and identified an accused in suggestive circumstances;76

74. Ibid. para. 46.11.

75. The Devlin Report, paras. h.90 to h.97.

76. An example of this would be when a police officer visits the address given to him by a driver whom he has stopped for a motoring offence and identifies the man he finds there as the driver while the man contends that he was not the driver and maintains that the driver must have given a false name and address. "The police officer's identification must be suspect since he is identifying the man whom he expected to meet; it would be futile thereafter to hold a parade. If in such circumstances a dock identification is forbidden, the case against the accused would collapse." Another example would be where, in spite of the precautions taken before a parade, the witness accidentally sees the accused in circumstances which reveal that he is the man whom the police suspect. Ibid. para. h.94.
when it might be futile to hold an identification parade as when the appearance of the suspect is so distinctive, due to a peculiar feature such as a facial scar, as to make it impracticable to collect an identification parade in which he would not stand out; and when the witness says that he was familiar with the appearance of the man he saw at the scene of the crime. In view of these and other cases where an identification parade would either be impracticable or unhelpful the Devlin Report, while preferring the making of real identification part of pre-trial procedure by making the witness identify the accused from an identification parade or in some other way in which the witness takes the initiative in picking out the accused before the trial so that court identification becomes a mere formality, retains the discretion to allow dock identification in some cases:

"Identification on parade or in some other similar way in which the witness takes the initiative in picking out the accused, should be regarded in law, as in the normal case it is already regarded in practice, as a condition precedent to identification in court, the fulfilment of the condition to be dispensed with only in exceptional circumstances. The discretion of the judge should be limited to determining whether in the particular circumstances of the case he is trying, the holding of a parade would have been impracticable or unnecessary."

77. "A witness who claims to have had a fleeting glimpse of a close relative may, of course, be mistaken, but it is not a claim that could be tested by a parade." Ibid. para. 4.96.

78. See para. 4.16 for unobjectionable identification other than from an identification parade.

79. Ibid. para. 4.102.
The Report also recommends that in any case in which dock identification is permitted "there should be a judicial warning about the weakness of such evidence in a situation in which there has to be a confrontation and not a picking out." Such warning should be given even if the need for dock identification is created by the refusal of the accused to attend the parade but the jury "should be told of the accused's refusal and also that they can have regard to it."

(v) The Use of Photographs:

The use of photographs deserves special treatment because of the dilemma it presents:

"This practice (showing a witness a photograph and asking him to identify subsequently) cannot be condemned, because it is often a necessary part of the process of detection. At the same time, it obviously impairs or destroys the value of a subsequent identification. The vague recollection of a witness who has been shown a photograph becomes fixed and settled on a likeness which may not be the right one at all, and so easily leads him to a false identification."

It could well be that this explains the perplexing case of George Ince - of the Barn Murder trials - who had been falsely identified by a victim who spent half an hour in face to face confrontation with her

80. Ibid. para. h.107.
81. Loc. cit.
82. Williams and Hammelmann, "Identification Parades", supra, 553. Earlier, at p.186, the authors pointed out that such subsequent identification "shows nothing except that the picture was a good likeness" of the person identified.
attacker in the well-light lounge of her family house. 83 Beverley Patience, a victim, was shown and identified a photograph of George Ince, a suspect. At the same time, her father Bob Patience picked out two different photographs out of the collection of twelve. The police, however, followed the identification of Ince and continued their search for him. When Ince was put on an identification parade, the witness identified him as the man who murdered her mother and attempted to murder her and her father. 85 The fact, fortunately proved beyond any doubt, that the identification was mistaken and yet an honest and "good" witness was so positive in making it "call seriously into question the validity of the identification parade as a means of determining whether or not a man has taken part in a crime". 86

83. Part of this time was spent waiting for Bob Patience to come into the house. When he did and delayed in handing the keys to the safe, the gunman shot Mrs. Patience. That produced the key; after the safe was opened and money taken, the gunman shot both Beverley Patience and her father Bob and left them for dead - see Cole and Pringle, Can You Positively Identify this Man, 28-31.

84. Ibid. 64-65.

85. The father, however, who spent about twenty minutes with the gunman in the room and who failed to identify the photograph of the accused, identified another man at the same parade - Ibid. 89-90.

86. Ibid. 88. A possible explanation is that the image she obtained from the photograph of Ince fixed, falsely as it turned out, into her mind any uncertain or vague recollection of the murderer. Thus, any subsequent recall becomes that of the man whose photograph she saw rather than the man she originally saw in person.
The investigative value of showing photographs to witnesses is undeniable: it helps to narrow down the search for suspects or even to identify a particular suspect - so that what remains is to seek evidence to connect him to the crime through search, interrogation and other investigative techniques. On the other hand this practice has its dangers of suggestion and confirmation of a false identification in the mind of the witness. 87

In English law the use of photographs, at least when followed by identification in person - or corporal identification - was criticised by Lord Hewart C.J. in R. v. Dwyer and Ferguson. 88 But his Lordship qualified his criticism in R. v. Haslam, 89 by saying that it applies to showing a witness a photograph of a man already in custody and not to doing so before making an arrest. In view of this case and R. v.

87. See the Devlin Report, para. 5.17 and 5.18. See also Wall, Eyewitness Identification in Criminal Cases, 66-73. According to the Tavistock Institute of Human Relations study, false identification is worse with photographs. 12 out of 15 "witnesses" made wrong identifications from photographs. People who have looked at photographs before an identification parade are twice as likely to make a false decision on the parade. See The Guardian, Monday, November 21, 1975, p.5.


89. (1925) 19 Cr. App. R. 59 at 60. At 61-62 his Lordship again returned to the significance of the fact whether the suspect was in custody or not at the time photographs were shown. See Williams and Himmelmann, "Identification Parades", 484-85, and C. Williams, "Identification Parades", 531.
Hinds,\textsuperscript{90} it is settled now that witnesses may be shown photographs of the accused even though they are called upon later to identify him on parade, at least when the accused was not in custody at the time of the showing of the photographs.\textsuperscript{91}

The police, of course, are not obliged to hold a corporal identification parade after every identification by photograph. They may be inclined not to when they have only one eye-witness or when they have other evidence of identification.\textsuperscript{92} As the case may thus go to trial with no evidence of identification other than photographic identification by the witness, and to improve the quality of identification evidence generally, rules similar to those regulating corporal identification were devised for identification from photograph.\textsuperscript{93} These are, for example, requirements designed to create a parade situation for safer identification.\textsuperscript{94}

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\begin{itemize}
\item \textsuperscript{90} [1932] 2 K.B. 6th. See also R. v. Melany (192h), 16 Cr.App.R. 2.
\item \textsuperscript{91} Home Office Circular, section 18.
\item \textsuperscript{92} See Leigh, Police Powers in England and Wales, 206. In the Barn Murder trials, an identification parade followed a positive photographic identification. But see Home Office Circular, sections 21 and 22.
\item \textsuperscript{93} See, for example, Home Office Circular, sections 18-21.
\item \textsuperscript{94} Ibid. section 21. Alas, it is not always that the police follow the rules. In the recent case of miscarriage of justice of Luke Dougherty, the police allowed both the key witnesses for the prosecution to look at photographs and they picked out Dougherty. The Home Office Circular, section 20, require that one of the two witnesses should attend an identification parade. See Cole and Pringle, Can You Postively Identify this Man, 166-67. See also Wall, Eye-Witness Identification in Criminal Cases, 74-85; and the Devlin Report, para. 5.24.
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One final point on photographic identification relates to the problem posed by its true evaluation. It is obviously very significant for the jury, or whoever is trying the facts,95 to know that the witness had previously picked out the accused from police photographs before identifying him on the parade. But to tell the jury of that is to admit in the case another source of prejudice to the accused: for the police to have his picture he must have a police record. That is why it was held that the prosecution should not give evidence of this;96 the defence is left with the choice of bringing it out, if it wished.97 Thus the Home Office Circular on Identification Parades provides:

"The police should inform the defence of any case where an identification is first made from photographs since it cannot normally be said in court that an identification was made from photographs without revealing the existence of a criminal record."98

On the other hand, in R. v. Wattam,99 the judge warned the jury

"...you must not assume against the accused man that it was a book of

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95. In the Sudan it is a magistrate sitting alone or three magistrates sitting together - see pp. 81, et seq. above.


98. Section 23.

photographs of convicted persons or known thieves or anything of that sort". This view was approved when the case reached the Court of Criminal Appeal. This sort of warning might be helpful in a jury trial; the only snag is that it is not obligatory: the judge need not make it. The defence, therefore, cannot be sure beforehand that it will be made and thus seek to reveal the fact of the earlier photographic identification.

(vi) Corroboration and Warning:

"The argument for imposing a requirement of corroboration", said the Devlin Report, "is brief but cogent. Such a requirement, absolute or conditional, is the obvious remedy when the prosecution is relying upon a class of evidence that may have inherent defects. It is the well-tried remedy which both Parliament and the judiciary have regularly applied in the past. So once the need or desirability for some sort of a safeguard is granted, corroboration is the natural one to employ and the onus passes to its critics to make out a case against it." 100 There are, however, sufficient objections to this particular remedy that it cannot be adopted as a general legal requirement in all cases, though it may be used in qualified form. 101

100. The Devlin Report, para. 4.34.

101. The term corroboration is used here to refer to corroboration from evidence of a different kind and not merely the testimony of a second eye-witness who identified the accused which does not offer much protection. Experience with cases of misidentification show that as many as 15 witnesses, Slater's case, and 17 witnesses, Warner's case, can make the same mistaken misidentification. See the Devlin Report, para. 4.30 and 4.31.
Besides the problems of corroboration in general, such as the difficulties of deciding what does and what does not amount to corroboration, there are some specific arguments against corroboration in relation to eye-witness identification. There is, first, the type of case in which the opportunity for observation is prolonged, as in the case of a kidnapper or rapist who operated without a mask. It is true that even in cases of prolonged observation misidentification can still happen, as in the Barn Murder case noted above. Nonetheless, it would be wrong to exclude uncorroborated evidence absolutely because "the effect of the blanket exclusion would be that acquittals of the guilty would considerably outnumber convictions of the innocent... there is, it is argued, a limit to the price which can be paid for the ideal (of avoiding even a single wrong conviction)... Some of the most despicable crimes are committed in circumstances which permit of identification evidence only... It would indeed be difficult to justify a rule which excluded prolonged or repeated observation and admitted a fleeting glimpse plus a trifle from a forensic laboratory." A requirement of corroboration will also block the enormous number of petty convictions which depend upon the uncorroborated identification by a single police officer. It is also

102. For the latest and most authoritative treatment of corroboration see Eleventh Report, para. 171 to 208.

103. See above at pp.599-600.

104. The Devlin Report, para. 4.38.

105. Ibid. para. 4.39.
argued that "an apparently reliable identification" should at least require the accused to account for his movements. Yet a requirement of corroboration entitles such an accused to a dismissal of the charge on a submission of no case at the end of the prosecution's evidence. 106

On the requirement of a general warning to the jury regarding evidence of identification the Supreme Court of the Republic of Ireland said that in cases where the correctness of an identification is challenged the jury "should be directed on the following lines, namely, that if their verdict as to the guilt of the prisoner is to depend wholly or substantially on the correctness of such identification, they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently proved to be erroneous; and accordingly that they should be specially cautious before accepting such evidence of identification as correct; but that if after careful examination of such evidence in the light of all the circumstances, and with due regard to all the other evidence of the case, they feel satisfied beyond reasonable doubt of the correctness of the identification they are at liberty to act upon it." 107

106. Ibid. para. 4.1.1.

English courts do not appear to be as enthusiastic about this warning. Lord Morris, in the House of Lords decision in Arthur v. Attorney-General for Northern Ireland did not favour the laying down of "the rule of law that a warning in some specific form or in some partly defined terms must be given."\(^{108}\) Lord Hailsham, however, thought, in a later case, that the question may still be open in England.\(^{109}\) The Court of Appeal in R. v. Long said that no such warning is required by law but it might often be appreciated in some cases - the matter is to be left to the discretion of the judge to see what warning is reasonable or necessary in his direction to the jury.\(^{110}\) "So it must now be regarded as settled law that there is not in England any rule which requires the judge to give any warning to the jury about identification evidence or indeed to deal with it in any particular way."\(^{111}\)

The Criminal Law Revision Committee in its Eleventh Report came out in favour of "a statutory requirement that the judge should give a warning of the special need for caution before convicting in reliance on the correctness of one or more identifications of the accused where

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\(^{110}\) (1973) 57 Cr.App.R. 872.

\(^{111}\) The Devlin Report, para. 4.51.
the case depends wholly or substantially on this." The Committee rejected, however, a requirement of corroboration in identification cases. The Devlin Report arrived to a similar conclusion: "against the imposition of a statutory requirement of corroboration" but in favour "of some form of warning or special direction." The Report gave several specific points for the direction to cover which include the following:

"(i) The witness himself. Whether he appeared in examination and cross-examination as careful and conscientious or as obstinate or as irresponsible. Whether the experience, e.g. in the case of violent crime, might have affected his identification.
(ii) Conditions at the scene. Lighting and points of view. How much of the criminal seen. Period or periods of observation.
(iii) Lapse of time, when it occurs... between the observation and the subsequent identification.
(iv) Description. What does a comparison show? The judge and jury should bear in mind that the ability to identify correctly and the ability to describe correctly are distinct.
(v) Identification parade. Any criticisms of the conditions. Did any witnesses make no identification or pick out someone other than the suspect?
(vi) Identified person. Easy to recognise or nondescript?
(vii) No circumstantial evidence. What might have been expected."115

The judge should also direct the jury not only on the need for caution, but also on why it is necessary: "The chief reason, put briefly, is that

113. Ibid. para. 198 and 199.
114. The Devlin Report, para. 4.53.
115. Ibid. para. 4.59.
experience has shown that the chance of an eye-witness making a mistake is high enough to induce a reasonable doubt, bearing in mind that a witness who is mistaken can give evidence as apparently convincing as one who is not. At the same time, the judge must draw the attention of the jury to any exceptional circumstances that may exist, such as the fact that the witness already was familiar with the person he claims to have seen, or where the accused admits his presence but denies that it was he who performed the criminal act. The judge must also refer the jury to any additional evidence that may exist.

The special Court of Appeal formed to consider cases involving questions of identification evidence tried to follow the recommendations of the Devlin Report in the guidelines it gave to the courts on the subject. The Court advised trial courts as follows: (1) Whenever the case against an accused depended wholly or substantially on the correctness of one or more identifications of the accused which the defence alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should also instruct them as to the reasons

116. Ibid. para. 4.60.
117. Ibid. para. 4.61 to 4.65.
118. Ibid. 4.66 et seq.
for the need for such a warning and make some reference to the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could all be mistaken. Provided that was done in clear terms, the judge did not need to use any particular form of wards. (2) The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g., by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?120

(vii) The Assistance of Counsel:

Though a right to the presence of counsel (solicitor) for the defence in the parade is accepted in English practice,121 the issues are more visible in the American literature. The need for the presence

120. The Court also required the prosecution to provide the defence with the particulars of the first description if there is such discrepancy. See above at p587.

121. Home Office Circular, section 10, provides: "...He should be informed that if he so desires he may have his solicitor or a friend present at the identification parade." For some of the problems of giving effect to the right in England see the Devlin Report, para. 537 to 539.
of defence counsel (solicitor) is obvious: to ensure that the police do observe the rules or at least to ascertain the manner in which the identification of the accused by witnesses was made. The matter is not, however, that simple.

The Supreme Court of the United States, in United States v. Wade, reasoned as follows:

"Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid (of counsel) ... as at the trial itself'".

In other words, the identification of accused by witnesses "is peculiarly riddled with innumerable dangers and variable factors which might seriously even crucially, derogate from a fair trial". The suspect, by himself, could not detect improper influences; but even

122. Williams and Hammelmann, "Identification Parades", supra 548. This ties up with questions of remedy to police violations and general problems of effective right to counsel.


124. 388 U.S. at 236-37.

125. Ibid. at 226.

126. The Court distinguished other techniques such as systematized or scientific analysis of the accused's fingerprints, blood sample, clothing, hair etc... on the ground that defence counsel can reconstruct the initial analysis and effectively cross-examine witnesses without having to attend at such initial analysis: "Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for meaningful confrontation of the Government's case at trial through the ordinary process of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts."
if he did, he would be reluctant to take the stand to expose them if he has a criminal record, as to take the stand involves the risk of having to admit to his previous convictions.\textsuperscript{127} Moreover, the accused is unlikely to win any credibility contest with the police; his word as to what actually happened is not likely to be believed by the jury. Not only does the accused need counsel at lineup so that he may be able to reconstruct at trial any unfairness that occurred at lineup and thus render meaningful the cross-examination of witnesses at trial, the presence of counsel may help to prevent any such unfairness from the start.\textsuperscript{128}

Through this reasoning the Court came to declare a constitutional right to counsel at pre-trial lineup identification. Problems of defining the scope of this right, however, immediately started to emerge. In \textit{Simmons v. United States},\textsuperscript{129} the Supreme Court had to decide whether the right to counsel extends to photographic, as opposed to corporal identification. The Court ruled in the negative.\textsuperscript{130} Lower federal

\textsuperscript{127} This is not the case in the United Kingdom where the accused giving evidence is protected by section 1 (f) of the Criminal Evidence Act 1898 from questions tending to expose his previous record or to show that he is of bad character, subject to certain exceptions. See Devlin, J., in \textit{R. v. Cook}, [1959] 2 Q.B. 310, on the scope of this protection. See also Renton and Brown, para. 18-10 to 18-16.

\textsuperscript{128} On the benefits of the presence of counsel see "The Role of the Defence Lawyer at a Line-up in Light of the Wade, Gilbert and Stovall Decisions", 2 Crim.L.Bull. (1968) 273, a panel.


\textsuperscript{130} See also \textit{Higgens v. Tennessee}, 390 U.S. 447 (1968).
courts dealt with the problem too: in Russell v. United States, the Court of Appeal for the District of Columbia decided that there is no right to counsel if prompt on-the-scene identification is used.

Lower courts, state and federal, were divided in their interpretation of the scope of the new right and United States v. Wade. Some interpreted the Wade decision strictly, restricting the right to counsel to post-indictment or formal charge. Others rejected the post-indictment limitation, holding that the right to counsel at lineup accrues irrespective of whether the accused was formally charged or not.

When the Supreme Court had to rule on the issue a "sharply divided Court" refused to extend the right to counsel to preindictment identification confrontations in Kirby v. Illinois.

131. 108 F. 2d 1280 CD.C. Civ. 1969. For extracts of the judgment see Hall et al, Modern Criminal Procedure, 582-86.


136. 406 U.S. 682 (1972). The Court upheld a one man stationhouse showup conducted before formal charges were filed against the accused and without presence of counsel or advise of the right to have counsel present.
This decision and other recent Supreme Court decisions in this area\textsuperscript{137} are strongly criticised in the United States legal literature\textsuperscript{138} as seriously diminishing an essential protection for the accused. An evaluation of these criticisms and the recent Supreme Court decisions takes us into a consideration of the Sixth and Fourteenth Amendments to the American Constitution and a long line of decisions and development, a matter not within the scope of this work. It is sufficient, for our purposes, to note the complexity of providing for a right to counsel at pretrial identification procedures. Issues of scope of the right, its policy and practical limitations, accessibility of counsel and other problems tend to drown all other considerations and safeguards.\textsuperscript{139} It then becomes harder to remember that it is only one of many potential safeguards.\textsuperscript{140}

(4) Sudanese Practice - An Evaluation:

Not surprisingly, the problem of identification is not dealt

\textsuperscript{137.} Neil v. Biggers,\textsuperscript{141} 409 U.S. 188 (1972) and United States v. Ash,\textsuperscript{142} 413 U.S. 300 (1973).


\textsuperscript{139.} As appears to be happening in the United States. Judging by the relative amount of literature and decided cases, the right to counsel issue seems to be blown up beyond all proportions.

\textsuperscript{140.} For an assemblage see Murray, "The Criminal Lineup at Home and Abroad", [1966] Utah L.Rev. at 627-28; Comment, "Regulation and Enforcement of Pre-Trial Identification Procedure", 69 Colum.L.Rev. (1969) 1301-03; and other works cited in the discussion above.
with legislatively; but rather by a Criminal Court Circular.\textsuperscript{1h1} The Circular, its issue and contents, reflects awareness of the dangers of misidentification and an effort, with some positive features, to tackle them. For meaningful evaluation, this Circular should be quoted in full first. Criminal Court Circular No. 40 reads:

\textbf{CRIMINAL COURT CIRCULAR NO. 40}

\textbf{SUBJECT:} Evident of Identification.

\textbf{DATE OF ISSUE:} 20.4.1955.\textsuperscript{1h2}

\begin{enumerate}
\item The object of this Circular is to set out the principles on which a Court should decide on the weight to be attached to the evidence of a witness who has picked the accused out of an identification parade.

\item The evidence of a witness is not inadmissible because the proper procedure has not been followed at an identification parade, but if it has not been followed the Court will naturally not give the identification so much weight as if it had been.

\item Therefore when an identification parade has been held the Court should always hear evidence of the manner in which it was held in order to ascertain the degree of credibility to be accorded to the witness.
\end{enumerate}

\textsuperscript{1h1} Following the English example, no doubt.

\textsuperscript{1h2} This is not necessarily the first date of issue; it may have existed previously as a circular letter or in other form.
The correct Procedure is as follows:

(a) The suspected person shall be placed amongst not less than eight other persons of similar social status who are unknown to the witness. No indication as to which is the suspected person should be afforded by his dress.

(b) The witness should not see the suspected person brought into the Police Station under arrest, or obtain any indication in any other manner as to which is the suspected person.

(c) In case there are several witnesses the identification shall be done separately so that no witness knows who other witnesses have identified.

(d) The identification parade should be supervised by a Magistrate or Police Officer.

5. The Court should hear evidence of the manner in which the witness identifies the suspect and in particular should ask whether the witness showed any hesitation at the time of the identification.

6. More credence may be given to a witness who has affirmatively stated that a suspect is not present, when the suspect has been kept out of the parade, and has subsequently identified him at a parade at which he was present.

W.O. B. LINDSAY,
Chief Justice of the Sudan.

It is obvious that the basic features of the Home Office Circular of 1925, which probably inspired the Chief Justice, are present – one

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For a suggestion that this should be the practice in England see Williams and Hammelmann, "Identification Parades", [1963] Crim.L.Rev. at 551.
should not expect major departures: Indian practice, which is closely followed by Sudanese Courts, is basically the English practice. Hence, as in England, "the problems in this area are treated as problems of admissibility and weight of evidence". The safeguards against mis-identification add nothing new except for the hint at holding "blank" parades - parades in which the suspect is not present - in section 6.

The point was made by Williams and Hammelmann that knowing that the man suspected by the police is present in the parade, the witness may "strain his memory to the utmost to find some resemblance between one of the men before him and the offender as he remembers him. The witness may therefore be inclined to pick out someone, and that someone will be the one member of the parade who comes closest to his own recollection of the criminal. Discrepancies may easily be overlooked or explained away". The authors, therefore, suggested that "blank" parades should occasionally be put up.

The Circular is silent on the use of photographs, whether alone or in combination with corporal identification. Though it is advisable

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117. Ibid. The suggestion of blank parades was also made by others - see, for example, Comment, "Regulation and Enforcement of Pre-Trial Identification Procedure", supra, at 1302.
to provide specifically for this the matter can be satisfactorily dealt with either through expanding the present provisions of the Circular or referring to Indian practice - which in turn refers to English practice.

One positive feature of Sudanese court practice is the willingness to consider the need for corroboration. In *Sudan Government v. Hamad Soliman A gab El Dour*, the accused was arrested, on mere suspicion by the police, a year after the incident and was identified, yet four months later, by a prosecution witness "but after much hesitation." It trial, the court failed to hear the evidence of the police officer who conducted the identification parade, contrary to section 5 of the Circular. On reference for confirmation Mr. Justice Hassan Abdel Rabim quashed finding and sentence. He said, *inter alia*:

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148. The provision of section 4(b), for example, that the witness should not "obtain any indication in any other manner as to which is the suspected person", can be useful.

149. See *Sarker on Evidence*, 88-89.


151. Ibid. The report is scanty and makes no reference to the offence alleged or the circumstances of initial observation or subsequent identification. The report does note that two prosecution witnesses "identified" some other suspects less than two weeks after the incident yet they had to be released for lack of evidence.

152. From Major Court. See pp. 135 et seq. above.

153. There was no evidence to support a conviction except that of the identification parade which he ruled to be "of no value and inadmissible".

"Identification tests as a rule cannot form a sufficient basis for conviction though they may perhaps add some weight to the other evidence against the accused. In this case the identification evidence of the two witnesses has no weight in the eye of the law and it was not corroborated by any other evidence. Identification evidence should not be accepted blindly and the court should make most careful scrutiny before accepting it as a basis for conviction in cases of robbery and sexual offences. There is reasonable doubt and accused is entitled to an acquittal".

It is clear that the statement leaves much to be desired in the way of clarity of principle and scope. Yet its warning note about the reliability of identification evidence is unmistakable. Even where a witness was sure of his ability to identify the culprit and even where he did identify someone from a parade without apparent hesitation, still caution is necessary. "It is known that over-assurance hides its own peculiar dangers of unconscious self-deception. This is only one of the many pitfalls of identification evidence which may mislead the jury, as it may have misled the police".

The arguments reported above against a general requirement of corroboration of all evidence of eye-witness identification must be appreciated. Such a requirement appears to be too rigid to allow for the realistic and fair determination of the vast variety of factual situations; it may be resented for letting the guilty go on a mere technicality.

156. Williams and Hammelmann, "Identification Parades", supra, 553.
A warning may be more appropriate. As there is no trial by jury in the Sudan, the trial magistrate, or magistrates, need only direct his, or their, own attention to the dangers of accepting and convicting wholly or substantially on evidence of eye-witness identification. 157

(5) The Effect of Violation of Instructions on Identification:

As indicated above, eye-witness identification is made the subject of some regulations in the form of instructions to the police-specially in relation to the conduct of identification parades and the use of photographs. Once again, the question of the consequences of the violation of the rules governing police investigations arises.

There is no simple or easy answer to this problem; it presents the same basic dilemma of competing interests. On the one hand the violation of these rules may seriously impair the reliability of the resultant identification; this justifies the rejection of the evidence. 158 But, on the other hand, the result of an exclusionary rule would be "that a trivial breach might defeat a substantially unobjectionable identification." 159 With these considerations in mind the Devlin Report recommended that "there should be stated plainly the object of the identification parade

157. See above at pp. 608-610.

158. Cf. the rejection of involuntary confessions, see above at et seq.

159. Devlin Report, para. 5.88. A similar criticism of the current version of the voluntariness requirement lead to the proposal of a more flexible rule, see Chapter 5 above.
and that if in the opinion of the judge at the trial the conduct of any part of the parade is such as to substantially impair the achievement of that object, the parade or the part of it affected shall be treated as a nullity; and that in considering whether the object is impaired, the judge shall have regard to the Rules but shall not be confined to them. This form of discretionary exclusionary rule appears to be reasonable enough; in fact it is not unlike the position adopted in the present study in relation to both search and seizure and interrogation.

(6) Conclusion:

The difficulties of regulating evidence of corporal identification of the accused by eye-witnesses are twofold: There is first the difficulty in formulating any rules that would "eliminate suggestive elements... while still allowing the police sufficient leeway for adapting these procedures to the peculiar exigencies of a given situation". Secondly, "the danger of mistaken identification is one against which in the nature of things there can be nothing like a perfect safeguard" for two reasons: verdicts depend on the impact of the witness's identification on the tribunal of fact - jury or magistrates; and the identifying witness

160. The Devlin Report, para. 5.88. See also para. 5.90 et seq.
161. Comment; "Regulation and Enforcement of Pre-Trial Identification Procedure", supra 1300.
"may very likely be obviously perfectly honest and his evidence is likely to seem entirely convincing". What must and can be done, however, is to provide flexible and fair rules, designed to reduce to the minimum suggestion and undue influence. Furthermore, as mistakes are bound to slip through any net of safeguards, caution should be exercised in receiving evidence of identification.

163. Ibid.

164. As R.M. Jackson puts it: "There is no particular method that can be adopted to ensure the truth in disputes as to identity; the problem is but one instance of ascertaining facts by legal process, though it is rightly singled out for special consideration because the result of error is almost certainly the conviction of an innocent man". See Enforcing the Law, (London: McMillan, 1967), 84.
Chapter 7

Some Problems of Pre-Trial Discovery

The basic dilemma of criminal procedure - namely, the need to balance the conflicting interests of society and the accused - is reflected once more in the principle and practice of pre-trial discovery as will be shown in this chapter. On the one hand, there is the need to provide the accused with an adequate knowledge of the accusation and evidence in its support as early as possible. On the other hand, it is recognised that the state can be prejudiced by the accused taking undue advantage of too early or too wide knowledge of the case for the prosecution as witnesses can be intimidated and evidence can be fabricated or distorted to serve the purposes of the defence. Again, there is the common sense and essentially fair notion that discovery should be a two way street: that the prosecution too is entitled to some discovery of the case for the defence. But the problem with this apparently fair proposition is how can the accused disclose a defence or show how he intends to rebut an accusation before knowing of its extent and the evidence in its support first? At the bottom of both aspects of the problem is the question of balance of advantage between the prosecution and defence - between the state and the individual: absolute equality between the two is not necessarily the right balance. Moreover, whatever the balance may be, whatever specific rules one may devise, there is the further question of enforcement - how to maintain the balance in practice.
(1) **The Basic Issues:**

In the beginning there was no discovery,¹ surprise was regarded as the ally rather than the enemy of the truth in early common law practice.² Both parties to the criminal action were therefore denied discovery. The position gradually changed, through legislation and court and professional practice, in favour of wider discovery.³ The controversy continues until the present time on the proper scope and timing of disclosure.

There is first the question of balance of advantage between the prosecution and defence. The proponents of wider and earlier disclosure by the prosecution argue in terms of redressing the balance of advantage which is at present in favour of the prosecution.⁴ They point out that the government has a vastly superior ability to discover information concerning the alleged crime. The defence lack the necessary resources and investigative tools to conduct highly technical tests on the physical evidence, post mortem examinations etc. Even if they had the means of conducting their own tests, it

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2. In ex. v. Holland, (1792) 4 B.J. & East 691, 100 E.R. 1248 (K.B.), an officer of the East Indian Company, charged with peculation (embezzlement) and corruption, requested access to the report of the interrogation of witnesses in India upon which the Attorney General’s information was based. Expense and distance made it virtually impossible for the accused to obtain the evidence; yet the Court of the King’s Bench Division denied the request — see Lord Kenyon, C.J., at 1249, and Buller, J., at 1250.


would be wasteful and inefficient to duplicate the work already
done by the prosecution. In some ways time is of the essence, it
effectively negates any chance of the defence matching the prose-
cution's ability to investigate: the prosecution generally "has
access to both material evidence and witnesses, when tracks are
fresh and recollections relatively sharp. By the time defence
counsel enters the case, witnesses often have disappeared and
evidence has either been taken into custody by the police or rendered
useless by others." It is suggested, therefore, that it would be
fairer and better to place the results of government investigations
and tests in the hands of the defence.

Another consideration with practical implications for discovery
is the role of the prosecutor in criminal trials. Notions of the
adversary role of the prosecutor in an accusatorial system notwith-
standing, the prosecutor is said to have a duty to disclose informa-
tion beneficial to the defence. "It is now well established that
prosecuting counsel is to act as a minister of justice rather than an
advocate; he is not to press for a conviction but is to lay all
the facts, those that tell for the prisoner as well as those that
tell against him, before the jury." In the Scottish case of

H.M. Adv. v. Harrison, the Crown "went to the length of asking a jury to acquit an accused on the ground of insanity where he himself sought a conviction for culpable homicide on the ground of diminished responsibility, because the Crown felt unable to ask for a conviction when they had information that the accused was entitled to an acquittal." The Supreme Court of Canada also require the prosecutor to call all the material witnesses whether their testimony is unfavourable or favourable to the accused. The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to the guilt or to punishment, irrespective of the good faith, or bad faith of the prosecution."

The implications of this notion to discovery were stated by Lord Denning as follows:


"The duty of a (prosecutor) ... is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If (he) ... knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wished."

The issues, however, certainly go beyond the apparent balance or imbalance of advantage, and the equal contest notions that may be used in argument in favour of either wider or narrower discovery. The effect of any set of rules of discovery on the basic purposes and policies of the criminal process must be taken into account; it is, after all, concerned with the determination of the truth, though not exclusively. The validity of the objection that wide discovery may be abused by some defendants must therefore be appreciated and appropriate safeguards against the danger provided before wider discovery claims are granted. The case against wide discovery was put in the following terms:


"In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense... Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime... To permit unqualified disclosure of all statements and information in the hands of the State...would defeat the very ends of justice".

It may be true, as some writers have suggested,¹⁵ that this reasoning is based on the assumption that there is a causal link between discovery and perjury and the intimidation of witness. This is a perfectly legitimate assumption; one that is clearly indicated by common sense. One may dispute the frequency of this happening in practice, but not that it is not likely or even probable in some cases. That does not mean, however, that discovery should be drastically curtailed in all cases because it may be abused in some, perhaps very few, cases. The proponents of wider discovery, therefore, propose that a distinction should be made between the type of case where these dangers are likely to materialise and those where that is unlikely – where the prosecution can show, for example, that the dangers of perjury or intimidation of witnesses are real, the court may authorise appropriate restrictions on discovery rights.¹⁶


One of the sources of resistance to wider discovery appears to be the reluctance to enforce mutual discovery rights — that is to say, to allow the prosecution equal or similar discovery rights against the defence as are claimed for the defence against the prosecution. The privilege against self-incrimination and right to silence are regarded as inconsistent with equal discovery rights for the prosecution against the defence — the accused would be forced to incriminate himself if he were forced to reveal to the prosecution his line of defence beforehand. But as long as the defence is not obliged to disclose, it would appear unfair to oblige the prosecution to disclose; it would be at least very difficult to obtain the co-operation of the prosecution in any discovery scheme — which may have the effect of defeating the prosecution's purpose — if the prosecution is not given something in return for its disclosure of information that may have some tactical if not direct value at the trial. To overcome the resultant resistance to wider discovery, suggestions have been made to avoid any constitutional or other objections to discovery by the defence.

It has been suggested, for example, that in the same way as the defence may be required to give advance notice of a special defence such as alibi and insanity they may be required to disclose in advance the names of witnesses and other evidence they intend to call at the trial. As they already intend to make such evidence public, the requirement of its earlier disclosure would be only a regulation of the procedure by which the defence present their case and not a

way of forcing the accused to incriminate himself.\textsuperscript{18} This does not solve all the problems, however, because there is the practical question of how can the defence reveal its line of defence before discovering the case for the prosecution. To disclose all materials and information that the defence may possibly need in rebutting the case for the prosecution implies a degree of knowledge of that case. Besides, how can one require this from the defence before the prosecution establish that there is a case to answer? The prosecution too may be accused of taking advantage of this prior knowledge of the defence in preparing its case, that is abusing the discovery rights in the same way the defence may be accused of abusing discovery of the prosecution case.

Another suggestion is that the prosecution should disclose first, but only on condition that the defence should disclose afterwards - that is to say, discovery by the defence in exchange for a voluntary promise of disclosure to the prosecution.\textsuperscript{19} But is this not in effect penalising the defendant for his exercise of the privilege and right to silence?\textsuperscript{20} The American Bar Association, in its Standards Relating to Discovery and Procedure Before Trial, rejected this notion of conditional discovery and said: "If

\begin{itemize}
  \item 18. Traynor, "Ground Lost and Found in Criminal Discovery", supra, 247-48.
  \item 19. Louisell, "Criminal Discovery: Dilemma Real or Apparent?", supra, 87-90.
  \item 20. In Griffin v. California, 380 U.S. 609(1965) at 614, the Supreme Court of the United States ruled that comment on the defendant's silence was unconstitutional "it cuts down on the privilege by making its assertion costly". See Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure", supra, 1185-86.
\end{itemize}
disclosures to the accused promote finality, orderliness, and efficiency in prosecutions generally, these gains should not depend upon the possibly capricious willingness of the accused to make reciprocal disclosures ... (it) does not, however, reject the notion that there can be required disclosure to the prosecution. It believes, however, that such discovery should be independent of that granted to the accused and clearly no broader than is constitutionally permitted."

(2) Discovery in Scotland: 22

Discovery of the Prosecution Case: There are no committal proceedings in Scotland, the accused is produced before the sheriff on the petition of the procurator fiscal for committal either for further examination or until liberated in due course of law - that is to say committal for trial. The accused is committed for trial on the strength of the fiscal's petition which contains the charge giving the time, place and nature of the offence. In fact the fiscal himself may have incomplete information at this stage of the case as he will normally be acting on the initial police reports and on statements taken from witnesses by the police. On committal for trial the accused receives a copy of the petition and


22. I am grateful to Professor G.H. Gordon for allowing me to use his unpublished paper on discovery in Scotland. See also generally Gordon, "Institution of Criminal Prosecution in Scotland", supra, 269-71.
the warrants - the committal warrant, the arrest warrant even if the accused is already in custody, and the warrant authorising the fiscal's investigations by empowering him to cite witnesses and recover productions.

By utilizing this last mentioned warrant the procurator fiscal starts to prepare his case in earnest: obtaining copies of the statements made by witnesses to the police, interviewing and taking statements from the witnesses and other persons - this is what is known as precognition - gathering all the documents and other productions, and medical and other expert reports. The results of these preparations are sent to the Crown Office in Edinburgh for a final decision on whether the prosecution should proceed, and, if so, for what charge or charges.

If there is to be a prosecution an indictment, which contains the charge and lists of witnesses and productions, will be prepared and served on the accused. The indictment also sets out two diets for the hearing of the case: the first or pleading diet and the second or trial diet. The Crown has the right to give notice of additional witnesses and productions up to two days before the trial, although the use of such evidence is subject to the discretion of the trial judge.

23. On these stages see Renton and Brown, para. 5-57 to 5-72; Gordon, "Institution of Criminal Proceedings in Scotland", supra 263 et.seq.; and Thomson Committee Report, ch.17.

24. On the form and contents of indictments see sections 41 to 67, Criminal Procedure (Scotland) Act 1975.

25. Ibid., section 75.

26. Ibid., section 81.
The accused is not entitled to discovery of Crown precognitions because they are very highly confidential. Where their production is refused by the Crown it will be ordered by the court, if at all, only in the most exceptional circumstances." The accused is offered the opportunity of precognoscencing the Crown witnesses himself. But this is not always easy: for one thing the time allowed for the defence to precognosc the prosecution witnesses is sometimes insufficient, and secondly there is no means of compelling the uncooperative prosecution witness to allow himself to be precognisced by the defence. The Thomson Committee recently considered both problems. On criticisms about the shortness of the period between the service of the indictment, when the defence receive a list of the prosecution witnesses, and the first diet - at present a minimum of 6 days - the Committee recommended that the period be extended to a minimum of 20 days. With respect to precognition of reluctant witnesses by the defence they recommended that "the defence should be entitled to apply for a warrant to cite those witnesses for precognition before a sheriff."
The Thomson Committee preferred the existing system whereby the defence precognosed the prosecution witnesses for themselves rather than giving the defence access to the Crown precognitions: "Crown precognitions contain confidential background material and other information which should not be disclosed to anyone but the fiscal, ... witnesses who give precognitions to the Crown should be entitled to assume that what they say on precognition will not be disclosed to any third party, least of all to the accused or his legal adviser. Disclosure may not be to the advantage of the defence since the precognition may give only one side of the case and may thus discourage further exploration of the facts on the part of the defence." 31

Productions must be notified on the indictment and the accused is entitled to see them "according to the existing law and practice" in the office of the appropriate clerk of court. 32 The overriding consideration is that the productions must be in the hands of the clerk early enough to give the accused time to inspect them. In the case of William Turner Davies, Lord Wheatley said, obiter: "I see no reason why, generally speaking, the defence should not have the same facilities as the prosecution to make an inspection and examination of a production in a case." In this case the High Court said that not only are the defence allowed to examine

31. Thomson Committee Report, para. 17.11.
32. Section 83 Criminal Procedure (Scotland) Act 1975.
productions in the hands of the clerk, but also that the court may in certain circumstances allow the defence to uplift Crown productions for scientific examination.\(^{33}\)

Another aspect of discovery in Scotland centres on the role of the procurator fiscal as a "minister of justice rather than an advocate".\(^{34}\) This reflects on discovery in the sense that for "the Crown to insist in a charge in the knowledge of the existence of reliable evidence proving the innocence of the accused would 'constitute a violation of every tradition observed (by the) Crown Office'. The conventions regarding the extent to which information should be disclosed have become more favourable to the defence in recent years ... Although the Crown have no obligation to discover a line of defence for the accused, once they know of a special defence they may have a duty to make available material which at an earlier stage they had rejected as irrelevant."\(^{35}\) Thus, the obligation on the Crown to disclose information in their possession which they do not intend to make part of their case emerges from a conception of the role of the prosecutor not as an adversary of the accused but rather as an officer of the court. The difficulty with this type of discovery is that should the prosecutor fail to maintain his proper role, the defence has no means of knowing of the breach and no chance of remedy.

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33. 1973 S.L.T. (Notes) 36. It is up to the court to decide whether there are grounds for refusing inspection and to impose the necessary safeguards. See Thomson Committee Report, ch.26.\(^{36}\).

34. See pp.625-7.

With regard to evidence in the hands of third parties, the petition warrant enables the Crown to precognosce third parties and require them to produce the documents or articles. This facility is not available to the defence but they may obtain such documents and articles either by courtesy of the Crown or by application to the High Court. The Thomson Committee rejected the suggestion that there should be a summary procedure before the sheriff to enable defence solicitors to obtain an order for the production of documents and articles. They regarded the present combination of informal arrangement and petition to the High Court as providing adequately for the need – the High Court should have exclusive jurisdiction over these petitions because "such applications will require to be made only in quite exceptional circumstances and will usually involve difficult and complex questions, appropriate for High Court decision."

**Discovery of the Defence Case:** In current Scottish practice the accused is required to notify the prosecution of any special defence on which he wishes to rely at the trial. Section 82(1) of the Criminal Procedure (Scotland) Act 1975 provides:

> "It shall not be competent for the accused to state any special defence unless a plea of special defence shall be tendered and recorded.

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37. Thomson Committee Report, 26.05.

38. Notice must also be given of any plea in bar of trial such as insanity, no jurisdiction and res judicata –see Renton and Brown, pp. 78-81 and 482-83.
A special defence is a plea which if successful will lead to acquittal, but not all such pleas are special defences. The generally recognised special defences are a heterogeneous group: insanity, self-defence, alibi, and incrimination (that is alleging that another named person committed the crime). The form of notice is very brief: normally just the name of the defence; although in alibi the accused must specify where he claims he was and at what time, and in incrimination he must name the person he alleges committed the crime.

According to the subsection notice must be given at the first diet "unless cause can be shown to the satisfaction of the court for a special defence not having been lodged till a later day, which must in any case not be less than two clear days before the second diet."

In H.M. Adv. v. Young and Cater, Lord Wheatley refused to exercise his discretion to receive a special defence which had been lodged the due two days before the trial because he was not satisfied with the

39. According to H.M. Adv. v. Cunningham, 1963 J.C. 80, the categories of special defences were closed. The court, however, did not list them.

40. Renton and Brown, para 7-15; and Thomson Committee Report, para. 37.01.

explanation offered for the late lodging. 42

The Thomson Committee considered the discovery value of special defences. In the recent case of H.M. Adv. v. Lambie, 43 the Lord Justice-General said: "The only purpose of the special defence is to give fair notice to the Crown ..." From this perspective the Committee rejected the proposal that the present requirement on the defence to tender any special defence at the first diet should be replaced by a requirement to serve on the Crown at the first diet a list of defence witnesses. In the Committee's opinion that "would not be satisfactory since it would not give the Crown adequate notice of the line of defence, and it would necessitate the Crown precognosing all the witnesses in order to ascertain what the defence is ... In many cases of self-defence there is no defence witness except the accused himself and thus the Crown would have no warning." 44 The Committee then went on to say: "Our view is that the element of surprise in criminal trials should be reduced as far as possible and that the main points at issue should be clarified before any trial. This means that notice should

42. Lord Wheatley emphasised the point that now with the introduction of legal aid in criminal cases all accused persons have full and proper legal representation there is no longer any valid reason for the court's indulgence in excusing delay in giving notice of a special defence. But is this not penalising the accused for what may be the fault of his counsel? It is true that the accused always benefits from the competence of his counsel and suffers from his incompetence, but does that mean that the court can discipline counsel at the expense of the accused by rejecting his special defence?


44. Thomson Committee Report, para. 37:06.
be given to the Crown of defences such as coercion, necessity, provocation, diminished responsibility and others, which are not currently recognised as 'special defences'. Accordingly, they recommended the adoption of the wider term "substantive defence" to replace the term "special defence" in describing defences of which the defence should be required to notify the Crown before the first diet. The Committee defined "substantive defence" as "any defence relevant either to exculpate the accused or to reduce the quality of the offence charged.".

The Committee appears to have left out an important aspect of the discovery value of such notice, namely the contents of such notice. If the purpose is to give fair notice to the Crown then the content as well as the subject of notice are both relevant. It would seem more consistent with the Committee's thinking on discovery of the defence case to require the notice given of any substantive defence to contain all essentials of the defence that the Crown needs to know in order to be able to conduct an effective challenge of the defence at the trial.

The accused in Scotland is also required, besides giving notice of any special defence, to give notice of witnesses and productions.

45. Ibid. para. 37.11.

46. Ibid. 37.12. The Committee also recommended that there should be no closed list of substantive defences - presumably to avoid the difficulty with the present list of special defences.
for the defence not less than three days before the trial. 47
Otherwise he cannot examine such witnesses or put in evidence such productions unless it can be shown before the jury is sworn that such notice was not possible - in which case the accused is entitled to call the witness or put the production in evidence and the court is required to give the prosecution such remedy by way of adjournment or postponement of the trial or otherwise as shall seem just. 48

In summary cases the only requirement on the accused is that if his defence is one of alibi he must give notice "of the plea with particulars as to time and place and of the witnesses by whom it is proposed to prove it" prior to the examination of the first witness for the prosecution. On such notice being given the prosecution is entitled to an adjournment. The Thomson Committee rejected a proposal that in summary cases it should be made obligatory on the prosecution to supply a list of witnesses to the defence on request and vice versa. They opposed introducing technical rules into summary procedure and regarded the present informal voluntary exchange of lists of witnesses as sufficient. 49

47. Thomson Committee Report, para.1803 recommended the extension of this period to seven days to allow the prosecution more time to precognosce the defence witnesses.

48. Section 82(2) Criminal Procedure Act 1975. The accused need not give notice of his intention to give evidence himself.

49. Thomson Committee Report, para.18.04 and 18.05.
Discovery in English Practice:

Discovery of the Case for the Prosecution: Committal proceedings are the main instruments for discovery of the case for the prosecution in England. In these proceedings "the prosecution can be compelled to make a complete disclosure of the whole of its case... (the prosecution) is not obliged at the trial to confine his case only to the material which he put before the magistrates because he may obtain other material afterwards; but if he does so, he must disclose it by serving on the defence a notice setting out in the form of a statement by the witness the additional evidence he proposes to call." In cases of committal under section 1 of the Criminal Justice Act 1967 - committal to trial without consideration of the evidence, a sort of summary committal - the defence can discover the prosecution's case from written statements and depositions. Under rule 11 of the Magistrates' Courts Rules 1968 the accused may apply for copies of the depositions, a copy of the list of witnesses and the information, if it is in writing.

With respect to scientific, medical and other expert evidence, the Home Office issued a circular in 1947 to the effect that in any cases where criminal proceedings are instituted the result of any examination made by a Home Office Forensic Science Laboratory which might have any bearing on the case should be communicated to the defence whether or not it is proposed to call a member of the staff.


51. Section 2(2)(c) of the Criminal Justice Act 1967;
of the Laboratory as a witness. Later circulars provided that the defence could submit material for scientific analysis by the Home Office Laboratories but that such requests must be made to, and the material submitted through, the police. The report of the analysis is also available to the police. The Law Society, in its Annual Report 1965-1966, said that this "procedure has been beneficial but in the opinion of the Council does not go far enough. It is not sufficient merely to communicate the result of the examination. Sufficient scientific detail should be given to enable the defence to judge whether or not the result should be scientifically challenged, accepted or prayed in aid. The nature of such scientific detail is really a matter for forensic scientists, but it seems to the Council that it should include a brief description of the control samples and exhibits, of the apparatus and systems used in the examinations and the results obtained both negative and positive. Where inferences are to be drawn from these results they should also be included." Emphasising the dangers of expert evidence the Council recommended "that scientific, medical or other similar technical evidence shall not be admitted in evidence in a criminal court unless, within a reasonable time prior to the effective hearing, the accused shall have been supplied with a copy of the investigator's report, containing all relevant data and the conclusions drawn therefrom, together with a notice informing him of his right to request and obtain any further information reasonably


53. Ibid. 182-83.
required and to inspect any record maintained in the laboratory supplemented, if necessary, by details not included therein as to the precise course of the investigations and the materials and instruments employed in relation thereto." 54 The Council also recommended that accused persons should have direct access to the Government Laboratories and that the results should not normally be disclosed to the prosecution. 55

The duty of the prosecution to disclose certain information to the defence also provides a source of discovery in England. 56 In R. v. Bryant and Dickson the Court of Criminal Appeal laid down that where the prosecution have taken a statement from a person whom they know can give material evidence but whom they decide not to call as a witness, they must make that person available to the defence.

In its recent examination of two cases of miscarriage of justice, due in the main to mistaken identification, the Devlin Committee had

54. Ibid. 134.

55. Ibid. 135. But "if further investigation modifies, in a fundamental scientific respect, the opinion of the expert as already expressed to the prosecution, the expert shall be at liberty to amend his statement to the prosecution and to disclose the factual bases for so doing."

56. See above pp.625-7.

57. (1946) 31 Cr.App.R. 146 at 151-2, dicta. See also Dallison v. Caffery [1965] Q.B. at 369 and 376. It is not certain whether the duty extends to furnishing the accused with a copy of a written statement or merely the person's name and address.
occasion to consider an aspect of this duty. In one of the two cases, that of Mr. Virag, "the police at an early stage of the investigation discovered that certain fingerprints evidently made by a thief on the stolen property (Mr. Virag was charged with theft as well as with the wounding of a police officer in the subsequent pursuit) were not the prints of Mr. Virag. Ought this evidence, if it was not to be made part of the prosecution's case, to have been communicated to the defence?" The Committee observed that the Virag case certainly provides material to support calls for reform: there is first the possibility of different views being taken by the prosecution and defence on what may be "material evidence". Secondly, there is no machinery for ensuring that the question whether any item of evidence is material enough to warrant disclosure to the defence is considered at the appropriate level on the prosecution side. Thirdly, there is the question whether the disclosure is made in sufficient width and sufficient time to afford the defence the opportunity of considering the material and perhaps making further enquiries in order to decide whether to use it and how.

"On the other hand", continues the Report, "it is questionable whether

58. Another aspect of disclosure by the prosecution considered by the Devlin Report relates to disclosure of the witness's description of the criminal as it may be useful to the defence in challenging the witness's identification of the accused. The Committee concluded that descriptions should be obtained whenever practicable and that "there should be a legal duty to supply a description if one has been obtained" the Devlin Report, para. 5.15. See generally para. 5.6 to 5.16. The Court of Appeal recently adopted this safeguard - see p.610 above.

59. The Devlin Report para. 1.20. See also para. 3.104 to 3.112 on this aspect of Mr. Virag's case.
everything which the police discover and which might conceivably be material should be made available to the defence.\(^{60}\)

Another problem area in which the defence is "at a disadvantage as compared with the prosecution" is that of obtaining access to documents in the possession of a third party.\(^{61}\) The Council of the Law Society recommended that both sides should be afforded the opportunity to inspect such documents if they wish. "They therefore propose that, on the defence or prosecution issuing and serving a witness summons, a third party should be required, on reasonable notice, to produce documents in his possession or control for inspection before the hearing ... it (should) be open to the person to whom the subpoena is directed to apply to the court on notice to both prosecution and defence to show cause why such documents should not be disclosed, the grounds for resisting such disclosure being those which would be available to a witness when attending to give evidence ...\(^{62}\)

It has been said that the "principal difference between summary trial and jury trial is that the defence have no prior notification of the prosecution evidence.\(^{63}\) The Council of the Law Society found itself "unable to reconcile or commend a procedure under which

\(^{60}\) Ibid. para. 5.3. On the understanding that "some aspects of pre-trial disclosure are under consideration in the Home Office" the Devlin Report made no firm conclusions or recommendations on the matter. See para. 5.4.


\(^{62}\) Ibid. 130-31.

\(^{63}\) Daid Barnard, The Criminal Court in Action, 89.
the same defendant charged with the same offence and dealt with summarily, is denied that indispensable information which would be open to him on an election for trial by jury."^64 This is of course due to the fact that there are no committal proceedings leading to summary trials, hence no machinery for informing the accused of the case for the prosecution except for what he may gather from the charge or summons, that is to say, a description of the specific offence, by name, with limited particulars in non-technical language. 65

**Discovery of the Defence Case:** The prosecution is entitled to very little discovery of the case for the defence in England as the accused is not obliged to reveal any of it before the trial except a defence of alibi. The accused may avail himself of his right to give and call evidence at the committal proceedings and thus reveal his defence. There is, however, very little incentive for him to do so because he may succeed in having the charge dismissed by simply attacking the case for the prosecution. As a dismissal of the charge at this stage is not an acquittal, the accused is not normally advised to reveal his own case in seeking the dismissal of the charge at the committal proceedings.

64. Zander, *Cases and Materials on the English Legal System*, 174. The Council recommended that in all offences tried on indictment and certain other offences the defence should be supplied, on request, with a document setting out the substance of the case which the accused is to be called upon to answer - a precis of the substance of the case without the names and addresses of witnesses.

65. Rule 83(1) of the Magistrates' Courts Rules 1968 also says that the summons should "give such particulars as may be necessary for giving reasonable information of the nature of the charge."

The requirement to give notice of any defence of alibi, required only in cases tried on indictment, is clearly designed to give the prosecution the time and information necessary for them to check it out and perhaps produce evidence in rebuttal. The accused is not allowed to adduce evidence of the defence of alibi unless he has given notice of the particulars of the defence within seven days after the end of the committal proceedings. These particulars include the name and address of the witness or any information in the possession of the defence to help in finding him. If the accused was not warned by the magistrates at the committal proceedings of his duty to give notice of the defence then he must be allowed to call and give alibi evidence even if he had not given notice of the defence.

In accordance with the objects of the present study, a few remarks ought to be made about the Scottish and English practice on pre-trial discovery before one turns to consider the Sudanese position. The most significant factor about both systems is the extensive legal

67. The Criminal Law Revision Committee in its Ninth Report, Evidence, (Cmd. 3145) 1966, para. 40 expressly said that the police should interview the alibi witnesses.

68. Section 11(1) of the Criminal Justice Act 1967. The court has the discretion to allow such evidence even if notice was not given.

69. Section 11(2) mentions several detailed rules on this requirement,

70. Section 11(3); and rules (3(4) and 4(9) of the Magistrates' Courts Rules 1968. See generally the Devlin Report, para. 5.96 to 5.120 on the preparation and investigation of the defence of alibi.
representation of both prosecution and defence, in serious cases both are always legally represented. Besides the obvious implications of the effective and efficient execution of the case for the prosecution as well as the defence, legal representation has other advantages too. With reference to discovery in particular the significance of having experienced and respected counsels on both sides of the case is clear enough: it greatly facilitates frank and objective communication of relevant facts - specially with the certainty that the confidence will not be abused. At the same time, the high standing and working relationship of both counsel has a direct bearing on the operational or professional code of ethics: what is proper and what is not.

This "old boy" spirit is reflected in the extensive use of procedural courtesies; a device particularly useful in the area of discovery as members of the same profession can call on the cooperation of their colleagues in the most deserving cases. A level of professional courtesy is certainly desirable if not essential, but the danger of leaving important matters to personal arrangements must also be appreciated.

(4) Discovery in the Sudan:

The field of pre-trial discovery is extremely undeveloped in the Sudan - more so than most other pre-trial issues. The obvious reason for this lack of appreciation of the importance of discovery in modern criminal procedure is the lack of legal representation for both prosecution and defence. Moreover, the little legal advice and help either side might get comes very late, often at the trial
or post-trial stage - too late for discovery to have much significance, and the question simply never arises.

**Discovery of the Case for the Prosecution:** Such discovery as the accused may obtain of the case for the prosecution is obtained in committal proceedings if any are held. As in England, the prosecution is required to produce its evidence at these hearings though it does not seem that they are required to produce all their evidence at this stage. The magistrate, however, enjoys a wide discretion to call for evidence and may be able to ensure fuller discovery for the accused. Committal under the so-called summary procedure, which is now the normal practice, also affords the accused a measure of discovery because the magistrate must "read out, or have read out, all statements recorded in the Case Diary which are relevant to the accusation both those against and those in favour of the accused, giving the names of the persons who made the statements, ...". The magistrate must also "show and explain to the accused anything else which is admissible in evidence, including plans and medical reports;" as well as call witnesses to give evidence if he feels it to be necessary or helpful. In both types of committal proceedings, however, much depends on the magistrate and how he handles the evidence: the magistrate has enough powers to bring out and explore the whole case for the prosecution; whether this is actually done or not is another question.

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71. Committal proceedings, known in the Sudan as Magisterial Inquiry, are required in cases triable by major court only. See generally pp.119 et seq. above.
72. Section 153 C.C.P.
73. Section 157 C.C.P.
74. Section 172A(1) C.C.P.
The main fault with arrangements for discovery under the Code is that none are made for offences triable by magistrates where no committal is necessary. But even in cases where committal proceedings are held, the discovery they afford does not always satisfy the needs of the defence by providing material for cross-examination of prosecution witnesses or challenging expert or medical reports. For this sort of discovery the accused needs to have access to records of police investigations, copies of the expert reports, items of real evidence etc. To these there is no access because they are bound to be either in or bound with the Case Diary, and discovery of the Case Diary is almost nonexistent.

Section 116 C.C.P. reads:

"(1) Save in so far as expressly permitted in this Code such Case Diary shall not be admissible as evidence against any accused person in any inquiry or trial but -
(a) any Magistrate or Court may in any inquiry or trial refer to the Case Diary to aid him or it in conducting the inquiry or trial;
(b) any Magistrate or Court may in any inquiry or trial use any relevant part of the Case Diary for the purpose of examining any witness whose testimony at the inquiry or trial is at variance with his statement entered in the Case Diary as to such variance with a view to testing his credibility;
(c) any relevant part of the Case Diary may be used by a policeman who made the same to refresh his memory if called as a witness.

(2) Save to the extent to which the Case Diary is used for the purposes set out in paragraphs (b) and (c) of sub-section (1) of this section the accused or his agent shall not be entitled to call for or inspect such Diary or any part thereof."

A Case Diary must be kept in every investigation of a criminal

75. That is to say, committal proceedings.
offence and it must set out, in chronological order, the following:

(a) any information received by the police in connection with the investigation;

(b) any action taken or inquiry made in the course of the investigation and the facts ascertained as a result thereof;

(c) any report made by any policeman acting under the instructions of the officer in charge of the police station;

(d) the statement of any witness, if reduced to writing.

Restriction of access to the Case Diary, therefore, is restriction of all pre-trial discovery because everything that is worth discovering is included in it. The rule in section 116 C.C.P. is extremely restrictive of discovery for the defence and in more than one way: it is conditional on the magistrate, or a policeman giving evidence, making use of the Case Diary at the committal proceedings or trial - and therefore delayed until the late stage at which such use is in fact made of the Diary; and it is confined to such parts of the Diary as are so used by the magistrate or policeman. Judicial interpretation of the section, as may be expected, confirms this literal reading. Thus Mr. Justice M.E. Mobarak, in Sudan Government v. El Tahir El Jack El Naari, where he overruled an order of the trial magistrate allowing the advocate for the accused to peruse the Case Diary, said after quoting section 116(2) C.C.P.:

76. It must also include the First Information Report, section 115 C.C.P. See chapter I above.

"It is an elementary principle of the Code of Criminal Procedure that the Case Diary is accessible to advocates within certain limits. The magistrate was absolutely wrong in allowing the advocate access to it."78

Defence advocates, perhaps not surprisingly, are very strong in their condemnation of this relatively recent development of the C.C.P.79 They complain that in serious cases of misappropriation and fraud the accused and his advocate are denied access to all documents and records of accounts, which makes it impossible to obtain the opinion of handwriting experts and accountants as witnesses for the defence or otherwise prepare an intelligent or effective defence.80 The accused often has no chance of contradicting reports and other items of evidence that the prosecution may introduce in evidence at the trial because he does not know of their contents until it is too late. He is not told, for example, of the results of medical examinations in good time so that he may seek a contrary opinion; the first time he expects to know is at the trial where he has no right to ask for an adjournment to enable him to seek evidence in support of his version

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78. In this case the defence advocate came late into the case and requested to be allowed to see the Case Diary and the record of what already transpired of the trial. The trial magistrate allowed him access to the Case Diary but not to the trial record. Mr. Justice Mobarak reversed both orders and directed that the defence advocate may have access to the record of the trial but not to the Case Diary unless it is one of the exceptions allowed by section 116 C.C.P.

79. Section 116 C.C.P. appeared for the first time in the C.C.P. after the 1940 revision.

of the facts - even if such adjournment is granted, it would be too late to seek such opinion after all the symptoms have disappeared. 81

There is also the obvious possibility that the Case Diary may contain evidence beneficial to the accused of which he is not aware. It is true that it is "the duty of the Prosecuting Officer to see that justice is done. If he knows of a credible witness who can speak of facts which go to show the prisoner's innocence; he must himself call that witness. Moreover, if he knows of a material witness who can speak of relevant matters, but whose credibility is in doubt, then, though he need not call him himself, he must tell the prisoner's counsel about him, so that he can call him." 82 This duty, however, needs to be enforced at least by a realistic chance of detection of its violations; otherwise, the prosecution would tend to be complacent and selective in complying with this duty. Even assuming the good faith and co-operation of the prosecution, it is not easy for them to spot evidence and information to the advantage of the defence, they are not likely to be in the right frame of mind. The accused's advocate may need information in the Case Diary necessary to trace a witness, to follow a lead, to obtain facts relevant to the credibility of witnesses for the prosecution etc. 83 All these defence needs are not satisfied under the present rule.


82. M.A. Abu Ranni, J., in Sudan Government v. Ibrahim Nasir (1955) AC.-Cr.Revision-74 & 78-55. It seems from the use of such terms as "prisoner" and "counsel" that the Chief Justice was quoting from an English case.

The second horn of the dilemma of discovery, on the other hand, is reflected in the fears expressed by some trial magistrates that the defence may abuse the information so obtained and the effect wide discovery may generally have on police confidential sources. They also feel that it is unfair to require the prosecution to expose its records and informations to the scrutiny of the defence without requiring the defence to reciprocate.34 Some leading members of the Judiciary, 35 however, would not object to wider discovery for the defence if the right formula can be found: one that takes into account all the relevant considerations and succeeds in effecting the benefits of greater discovery without sacrificing the effectiveness of law enforcement efforts.

The question to be considered in Chapter 3 below is whether the role of the magistrate in the Sudan can be modified or adapted to serve as such a formula. It must be appreciated that the proposal is intended primarily to resolve the dilemma of interrogation, That is no reason, however, for not applying it to resolve another dilemma, that of discovery.

**Discovery of the Case for the Defence:** Again the magistrate holds the key to wider discovery of the case for the defence in committal proceedings. Whether the formal and longer procedure or the less formal summary procedure for committal were adopted the

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84. Private interviews with S.E.A. Omer, Khartoum Province Judge; and Amur Abdulla and Allun Osman El Zein, first class magistrates.

85. Mr. Justice Hassan Mahmoud, Judge of the Supreme Court, for example, expressed this view in a private interview, Khartoum, 6/1/1975.
The magistrate is authorised to call and examine defence witnesses before deciding on committal.\(^{36}\) The magistrate is also authorised, sometimes required, to examine the accused himself in committal proceedings.\(^{37}\) There is no provision, however, for the prosecution to examine either the accused or his witnesses during committal proceedings. Presumably the prosecution can act and seek discovery of the defence case or clarification of certain points etc. through the magistrate.

As in relation to discovery of the case for the prosecution, the main difficulty with discovery of the case for the defence is the total lack of provision for discovery in cases triable by magistrates - the vast majority of criminal cases.

**An Assessment:**

The most striking feature of the minimal discovery arrangements made in the Sudan C.C.P. is the dominant role of the magistrate in controlling the direction and scope of disclosures. In view of the most significant factor in Sudanese criminal procedure, namely the lack of legal representation for both prosecution and defence, the magistrate plays a dominant role throughout the process as will be explained in the next chapter. It is therefore only logical to involve the magistrate in any reform of discovery in Sudanese criminal procedure. As both the prosecution and defence are

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36. Sections 165 and 172A(1)(e) C.C.P.

37. See Chapter 8 below.
unlikely to be legally represented in the normal everyday case it is useless to devise elaborate and detailed rules for discovery of the prosecution and defence cases because they will most certainly be dead letters as both sides would be ignorant of the rules, let alone being able to enforce them.

One area in need of immediate action is that of discovery of real evidence for the prosecution. As we have seen above, in both Scotland and England there are arrangements for the defence to have access to and examine productions and exhibits for the prosecution. In the Sudan there are no such arrangements, but even if there were the defence cannot be expected to make much use of them for the simple reason that there are no experts outside the employment of the government. So the defence is unable to develop and use its own real evidence let alone challenging that of the prosecution. The answer in this area is therefore not to allow the defence access but to provide the defence with the results of tests and scientific examinations conducted by the prosecution as well as extending the government's facilities to the accused for necessary and technical examination. An innocent accused may be on trial for his life and yet unable to present an effective defence because of his inability to obtain technical help in a country where the government, his accuser, has a monopoly over technical resources. After all, these resources "are maintained for the benefit and at the expense of the public generally and not any particular section

33. See pp.634-5 and 641-2 above.
of it"; 39 including the accused, irrespective of his guilt or innocence. The extension of this facility to the defence needs to be policed and supervised lest it be abused, a function that can be performed by the magistrate.


90. This theme will be developed in the next chapter.
Chapter Eight

The Role of the Magistrate in Pre-Trial Procedure

Two remarkable features of Sudanese criminal procedure are the role played by the magistrate in supervising police investigations, and the magistrate’s examination of the accused at the committal proceedings and at the trial. This chapter is concerned with ascertaining the nature of these practices. These features are remarkable because they are contrary to accepted common law practice. They are not, however, necessarily wrong or objectionable for that reason alone. This chapter explores the possibilities of the positive use of these features in dealing with some of the problems of pre-trial procedure. That is to say, are these features undesirable in the context of the Sudanese criminal process; and if they are to remain, can they be modified to serve other purposes; and how does that affect their desirability? It is suggested that both features are dictated by practical considerations - the limitations of criminal law enforcement in the Sudan - but if they are viewed positively, both features can be retained, at least for some time, as valuable assets rather than liabilities.

Though it has no parallel in current common law practice, the Sudanese position may nonetheless be traced to the previous role played by the justices of the peace in English practice; the term
"examining magistrate", which is still used, suggests an interrogatory role. The justices were required to question a person accused of a felony, and record the results of their examination in writing, before he was committed to goal or admitted to bail. Such examination was inquisitorial in character, and not in the nature of a judicial inquiry into the strength of the case for the prosecution as in the modern committal proceedings, which were a later development. The accused was not put on oath for examination by the justices. 2

This practice of questioning the accused fell gradually into disuse until it became limited, by the beginning of the nineteenth century, to the recording of any statements that the accused wished to make voluntarily. The transformation from inquisitorial examination to preliminary inquiry-committal proceedings - was completed by the Indictable Offences (Jervis) Act of 1848. 3 From then on the accused could be asked no questions but he was invited to make a statement if he wishes. The change can be explained in terms of the development of professional police 4 and the growth of the privilege against self-incrimination.


3. 11 & 12 Vic., c. 42 (1848).

4. 1 Stephen, History of Criminal Law, 194-200; Plucknett, A Concise History of the Common Law, 432.
In Scotland too the "investigation of crime was the function of the sheriff, who was investigator as well as judge". But again, as in England, the practice was gradually discontinued as the public prosecutor, the procurator fiscal, originally a servant of the sheriff, took over these functions and developed into a separate office.

The present position in the relevant common law jurisdictions is one of specialisation: the "accusatory" model of criminal procedure stipulates an equal and public contest between prosecution and defence, referred and adjudicated upon by an independent and unbiased judge or magistrate. The position of the Sudanese magistrate, therefore, is more akin to that of the French juge d'instruction, rather than that of a magistrate in the modern common law sense of the term. Yet, the Sudanese magistrate operates in the context of a common law system. The extent and implications of this ambivalence will be considered below.

5. Report of the Thomson Committee on Criminal Procedure in Scotland, para. 8.03.
(1) **Inquisitorial or Accusatorial:**

As the above remarks suggest, an underlying question, one that may be considered at this stage as it has a bearing on all the following discussion, is that of the essential character or nature of the particular legal system as a whole. For the proper evaluation of both features, magisterial participation in police investigations and magisterial examination of the accused, one needs to discover the essential character of Sudanese criminal procedure in order to see if either feature is so alien to it as to be disruptive and unfair.

Labels and general classifications are not very helpful analytical tools: one tends to be too much occupied with the attributes of the class or label rather than their purpose or policy. As Schaefer observed, to characterize a system as accusatorial, or inquisitorial, and then to derive consequences from that characterization involves the risk of losing sight of the objectives of the system. The goal of criminal procedure should be the conviction of the guilty and the prompt acquittal of the innocent with as little disruption of other human values as possible. The problem is to decide which human values are to be disrupted, and how much. The label accusatorial, or inquisitorial, does not help to decide these questions. Bearing this point in mind, it may still be helpful to consider some of the implications of the classification; after all if the classification is completely

irrelevant one would not have felt it necessary to justify an uncharacteristic feature of the system. The relevance of the point made above comes in assessing the implications of uncharacteristic features.

Systems of criminal procedure are sometimes classified as either inquisitorial, on the civil law model, or as accusatorial, on the common law model. The distinction essentially lies in the respective systems' attitudes towards the relevance and admissibility of evidence and the means of adducing it in court. In an inquisitorial type of system of criminal procedure all the facts concerning both the offence and the accused are to be placed before the court. The accused is to be judged as a person with reference to detailed and extensive information about his personality and antecedents collected in extensive pre-trial inquiries and in examination of the accused and witnesses by the judge at the trial also. At the trial, it is the judge and not the parties, who adduces the evidence.

A characteristic feature of the system, therefore, is the extensive pre-trial inquiries which are conducted, in serious cases, by an independent magistrat known as the juge d'instruction. Such examination of the accused and of the evidence by a magistrate is justified not only in terms of the general social interest in detection and punishment of criminals, but also in terms of safeguards


to the accused. The examination of the accused by one with "judicial status may shield innocent persons from the risk of being exposed to overzealous police interrogation. The device of instruction also ensures that an accused is not arraigned upon a serious charge in open court with all the attendant publicity unless and until a magistrate, after carefully and impartially investigating the facts, is prepared in effect to say that there is a sustainable case against him." Anton described these extensive pre-trial inquiries:

"It is an extremely patient preliminary examination of the evidence, which is sifted and studied, heard and reheard, until as far as possible all inconsistencies have been eliminated and until those which have not been eliminated are thrown into sharp relief. The juge d'instruction hears evidence from the accused and from all the witnesses in the case. If in any respect this evidence is contradictory, the witnesses are reheard and asked to explain the contradictions. If inconsistencies still remain, the juge d'instruction will arrange for the persons tendering contradictory evidence to be confronted with each other in the hope that one or other will give way. He may also proceed to a reconstitution of the crime, which often demonstrates to the accused or to a witness the absurdity of maintaining a false version of the facts and so leads him to admit the truth. All this evidence is committed to writing in an authentic form and is placed in a file in which all the papers

12. Robert Vouin, "The Protection of the Accused in French Criminal Procedure", supra, at 4-7 and 13 et seq.

13. Anton, "L'Instruction Criminelle", supra, 441. He warns, however, that "these are oversimplifications, and in this matter the nuances are important and the context crucial."

14. Ibid. 442.
relating to the case are assembled, the dossier, which is studied by the president of the court, and sometimes by the other judges, before the trial. This dossier permits the president at the trial to observe when the witnesses are departing from the evidence which they previously tendered. He is then in a position to question them effectively and to challenge them with any apparent contradiction."

Inquiry by the juge d'instruction is not the first or the only procedure used in the investigation of offences and preparation for the trial. As a general rule, all criminal proceedings are instituted by the procureur de la Republique to whom the police and other sources report offences for that purpose. Under the procedure known as l'enquête flagrante, the procureur de la Republique, together with the police judiciaire, enjoys wide powers of investigation. In more minor offences, known as contraventions, the procureur and the police also enjoy investigative powers, albeit more limited. In fact, the juge d'instruction can not initiate any inquiry unless requested to do so by the procureur de la Republique or by the partie civile. The procureur must request an investigation by the juge d'instruction in all cases of crimes, he may ask for it in cases of delits.

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15. There are a few exceptions, such as criminal proceedings instituted directly by the partie civile and prosecutions instituted directly by custom officials etc. - see Sheehan, Criminal Procedure in Scotland and France, 31.
16. Ibid. 32-43.
17. Ibid. 34-40. This procedure may be employed in cases of crimes and delit detected during commission or recently thereafter - that is to say offences that may be treated as flagrant; they are to be treated as urgent.
18. This procedure is known as l'enquête preliminaire, Ibid. 40-41.
19. Ibid. 41 and 44. There is nothing to prevent the juge d'instruction from investigating even contraventions, the least serious offences, but that is naturally very rare in practice.
The characteristic feature of the system as a whole, however, is that these extensive pre-trial inquiries are compiled into a dossier which is accessible to all parties, and closely studied by the trial court. The fact that at the trial "the evidence is led by the president of the court makes it necessary that he should be well-informed, not only of the charges against the accused, but of the evidence which points to his culpability."21

At the trial, the president of the court starts by questioning the accused, using his knowledge of facts and all aspects of the case gained from studying the dossier.22 The president also examines the witnesses, the parties may suggest questions. The judge also takes all other steps he deems necessary to find the truth; virtually no evidence is excluded as inadmissible on the grounds of incompetency or irrelevancy except hearsay.23 Thus, the salient features of the trial in an inquisitorial system are the reliance on the pre-trial inquiries in the examination of the accused, the witnesses and the general introduction and assessment of the evidence at the trial all of which is done by the court and not by the prosecution and defence.

In contrast, under the accusatorial type of system, also referred to as adversary system, the "primary responsibility for

20. Ibid. 25.
establishing guilt is upon the prosecutor and for 'establishing' innocence upon the defence and the arbiter (the judge or jury) plays a passive and impartial role." The evidence for either side is adduced by the party concerned and tested by cross-examination by the other party. "The function of the judge is not to act as inquisitor and inquire into the matter, nor does he take part in the presentation of the evidence. He may not summon other or fresh witnesses or examine the witnesses themselves, apart from sometimes putting a few supplementary questions to clear up a matter on which he is still in doubt." 

The implications of the contest concept are most clearly reflected in the field of relevance and admissibility of evidence. The burden of proof is on the prosecution who must discharge it in accordance with restrictive, sometimes highly technical, rules of

24. Anthony Hooper, "Discovery in Criminal Cases", 50 Can.B.Rev. (1972) 439 at 452. In theory the defence does not have to 'establish' the accused's innocence as the burden of proof is on the prosecution; in practice, however, the accused may need either to attack the case for the prosecution or to offer a defence of his own and adduce evidence in its support.

25. Sheehan, Criminal Procedure in Scotland and France, 117; see also Williams, The Proof of Guilt, 24-29; and Wilson, Cases and Materials on the English Legal System, 164-77.

26. Williams in his book, The Proof of Guilt, 30, warns that the analogy of the English trial with a duel or game "cannot be pressed too far, because the two sides are not governed by the same rules." See also the Eleventh Report, para. 27.
evidence and trial procedure: several items of privileged information are not admissible, the accused's character is normally irrelevant, the accused is not required to testify and cannot be asked any questions unless he elected to testify etc.

It is neither possible on such a superficial review, nor necessary for our present purposes, to conclude on the direct comparison between these two systems. More relevant is the question whether the Sudan system can be characterized as either of the two, and if so what are the implications to the problem of evaluating the role of the magistrate in criminal procedure.

27. See *Wigmore on Evidence*, Chapters 78–87; *Cross on Evidence*, Chapter XI.

28. The rule in section 1(f) of the Criminal Evidence Act 1898, a United Kingdom enactment, prohibits cross-examining the accused in a way tending to show that he has a criminal record or bad character, subject to four exceptions. See *Maxwell v. D.P.P.* [1936] A.C. 309; and *Jones v. D.P.P.* [1962] A.C. 635.

29. Section 1 of the Criminal Evidence Act 1898 also made the accused a competent but not compellable witness for the first time. The common law rule that he is not a competent witness for the prosecution was not affected by the Act; see *Cross on Evidence*, 145–46; *Williams, The Proof of Guilt*, Chapter 3.

It would appear that the Sudanese system is too mixed to allow of any clear-cut classification: in general framework and legal methodology it is of the common law model, yet it has aspects of the civil law or continental model too. The resultant degree of identity crisis is not without practical consequences.  

As may have appeared from the general survey given in Chapter 1 above, the system can generally be described as of the common law model, at least it is conceived as such by its own practitioners, bench and bar alike. At the trial, for example, evidence is normally presented by the respective parties and tested by cross-examination of the witnesses by the other party in the traditional common law fashion. Yet the presiding magistrate may, and often does, question the witnesses himself; he can summon witnesses of his own accord, or on the suggestion of the parties, under section 219 C.C.P. The magistrate also examines the accused himself under section 213 C.C.P. On the other hand this somewhat continental feature, the examination of the accused, is not carried far enough to be truly continental: the accused is not to be cross-examined, his character and previous convictions are not to be the subject of this examination; rather, he is to be helped by such examination to appreciate the case against him, and to be offered the opportunity to answer or explain the evidence against him. The applicable rules of evidence are those of the common law and not the continental type.  

31. This is reflected, for example, in the ambivalent attitudes towards the role of the magistrate in pre-trial procedure, and the problems of discovery.  

32. Criminal Court Circular No.29.
Again, though the Case Diary in Sudanese procedure may resemble the French dossier, it is in fact different: it is neither as extensive in scope and depth of inquiries as the dossier, nor is it the basis of the trial. In fact, its use at the trial is quite limited, and as such the defence access to it is correspondingly restricted.

The general problem with the classification is that no system is completely true to its classification, there are elements of either system in the other. The Sudanese system, however, is more ambivalent than most. In fact, it seems that the continental features appeared out of the need to adjust to or accommodate local conditions rather than out of basic or deliberate policy. In the present context, the most significant factor is the lack of legal advice to both prosecution and defence; hence the magistrate had to act as legal adviser for both sides at the pre-trial as well as at the trial stage. Now that we have magisterial participation in police investigations and magisterial examination of the accused, what should we do with them?

33. The dossier includes a full life history of the accused and his background besides the record of the investigation in hand, Sheehan, Criminal Procedure in Scotland and France, 43-49 and 58-59; the Case Diary is merely a record of the investigation of the offence in hand, and no more.

34. Anton concluded his description of the French preliminary investigations, "L'Instruction Criminelle", with the remark, at 256, that "... it is only a slight exaggeration to say that, while in England or in the United States a man is on trial, in France it is a dossier."

35. Section 116 C.C.P. See above pp. 645 et seq.

(2) Magisterial Participation in Police Investigations

The logic of the Sudanese position is the logic of necessity and expediency: the need to supervise and guide the police in their investigations and the inability to staff and finance an alternative system of specialisation more consistent with the common law model. Part of the duties performed by the Sudanese magistrate really belong to a public prosecutor type of official: advising the police on what evidence to seek and which, if any, offence has been committed, the choice and formulation of charges etc. Similar duties are sometimes performed in England by legal advisers who are not public prosecutors as such. The point is that such functions are not performed by the magistrate who may be later on called upon to decide the case. Unfortunately, lawyers in the Sudan are not available in sufficient numbers for either a public prosecutor type or independent legal adviser type of service to be provided to anything near the necessary extent in terms of numbers and places of consultation. In the vast majority of cases the magistrate is the only trained lawyer involved at any stage of the


case because legal representation for the defendant too is almost non-existent. There is also the geographical factor; such legal services and representation as there are, whether for the prosecution or defence, are to be found only in the capital and a few of the main cities.

The obvious objection to the Sudanese scheme is the threat, or at least the appearance of a threat, it poses to the impartiality of the magistrate. Since he is involved in supervising and directing the police investigation of the alleged offence and in assessing the sufficiency of the evidence to bring the case to trial, he is likely, or at least appears to be likely, to be influenced by his prior knowledge of the case. This objection is answered in terms of the fiction that the magistrate is capable, because of his legal training and experience, of playing both roles without confusing them. In other words, he is supposed to be able to shed the mentality and motivation of the prosecution adviser and assume those of the judge as and when necessary. How far this fiction is true and whether or not it is being carried too far will be considered below.

This magisterial participation is a central feature of Sudanese pre-trial procedure, it has been dictated by the necessities of the Sudanese situation which are likely to remain with us for some time yet. It may either be accepted as an imperfect but unavoidable state of affairs or it may be justified and developed even further; the third alternative of immediate change is unrealistic and too disruptive to be considered seriously.
The Principle and its Practice:

Section 114 C.C.P. provides as follows:

After receiving the First Information Report the Magistrate may:-
(a) give any direction to the police as to the conduct of the investigation, or
(b) if he thinks fit, at once proceed or depute a Magistrate subordinate to him to proceed to hold an inquiry into or otherwise deal with the case as provided in Chapter XV; and in the event of the Magistrate deciding to proceed in accordance with paragraph (b) of this section he shall forthwith inform the officer in charge of the police station of his intention so to do and thereupon the police shall act according to the direction of the Magistrate.

The effect of this section and other relevant provisions may be described as follows: on receiving information about the commission of an offence the police officer in charge of the police station enters it in the appropriate books and forms, including the First Information Report which is sent to the magistrate. Any decisions as to arrest and search warrants at this stage are made by the magistrate on the information the First Information Report provides. The police investigation is initiated and directed according to the directions and orders of the magistrate made on the First Information Report. The Case Diary — containing, in chronological order, any information received in connection with the investigation, any action taken or inquiry made and facts ascertained, reports of subordinate policemen relative to the investigation, statements of witnesses, the First Information Report gradually builds up.

39. See Chapter 1 above.
40. That is, if the accused is not already under arrest.
41. Section 115 C.C.P.
This Case Diary may be submitted, and is in fact routinely submitted,\textsuperscript{42} to the magistrate for "directions as to the further conduct of the investigation".\textsuperscript{43} The investigation, therefore, not only starts, but also continues subject to and according to the directions and orders of the magistrate until its conclusion.

At the end of the investigation the police officer in charge of the investigation will summarize the case in the Case Diary and submit it to the magistrate for a decision whether to prosecute and for what offence. This is done regardless of whether the police officer feels that a prosecution should follow or not. Section 121 C.C.P. provides that if it appears to the officer that

"such investigation should be terminated without an inquiry\textsuperscript{44} or trial following he shall, after entering in the Case Diary a summary of the case, submit it to a Magistrate who may order that the investigation be terminated or give such order as to the continuance of the investigation as he thinks fit and in either case order the release of

\textsuperscript{42} The author conducted a series of private interviews with magistrates, judges and defence counsel in Khartoum in January, 1975. This and other assertions of practice are based on these interviews.

\textsuperscript{43} Section 122B(1) C.C.P.

\textsuperscript{44} The term "inquiry" in these sections refers to the so called "magisterial inquiry", that is to say, committal proceedings, see Chapter I above. There is, however, no reason why a magistrate may not hold any other type of informal inquiry into the case.
of any person under arrest in the investigation."45

According to section 122(1) C.C.P., if it appears to the police officer in charge that the investigation

"discloses reasonable grounds of suspicion against any person of having committed an offence and that an inquiry or trial should begin he shall after entering in the Case Diary a summary of the case submit to a Magistrate competent under Chapter XV to take cognizance of the offence the Case Diary and the final Police Report."

Thus, in either event, it is up to the magistrate to decide whether the prosecution should continue, and if so on what charge. What is more significant, however, is the fact that the same magistrate may decide to prosecute — that is decide that there is sufficient evidence for the case to go to trial — and then proceed to try the case himself. This is completely different from committal proceedings required before any major court trial; the decision is prosecutorial and not judicial. If a major court trial is called for, the magistrate would decide first if there is sufficient evidence to justify sending the case to committal proceedings — which he may hold himself — and at the committal proceedings, where witnesses are cross-examined under oath and evidence for the defence may be presented,
the case may still be rejected and commitment for trial by a major court denied. That does not necessarily mean, however, the end of the matter: the accused may still be tried before a magistrate, who could be the same magistrate who decided that the prosecution should be continued, for a lesser or modified charge.

The prosecutorial decision, in the police investigation stage, may be made directly on receiving the Case Diary with the summary and police Final Report, or it may be delayed until after any further inquiries and investigations the magistrate may direct. Section 122 proceeds to lay down the options:46

"(3) If on receipt of the documents referred to in sub-section (1) of this section it appears to the Magistrate that he should begin an inquiry or trial he shall fix a day therefore and make any necessary order and direct the officer in charge of the police station as to any action to be taken by him.

(4) If on receipt of the documents referred to in sub-section (1) of this section it appears to the Magistrate that further investigation is necessary before the inquiry or trial is begun he shall give such directions as he shall think fit after entering the same in the Case Diary."

The overlapping of prosecutorial and judicial functions is therefore twofold: not only may the same magistrate direct and supervise the investigation as well as try the case himself later on, but he may also decide to return the case for further investigation before deciding finally on the sufficiency of the evidence. In terms of section 138 C.C.P. "If the magistrate taking cognisance of an alleged offence is not satisfied that the offence has been

46. Sub-section (2) of section 122 merely describes the procedure for submitting the documents to the magistrate – through the responsible senior police officer.
committed or if for any other reason he deems it expedient so to do, he may either himself make an investigation into the case or direct any Magistrate subordinate to him or any policeman to do so.\textsuperscript{47}

But once a charge is formulated, that is to say at the end of committal proceedings or the beginning of the trial, there is no authority for directing further inquiries and investigations. The various stages of supervision of police investigations, committal proceedings and trial are so confused and overlapping because a magistrate, normally the same magistrate, is involved in all of them. The magistrate does not only wear more than one hat, but it is also difficult to tell which hat he is wearing at any particular time.

In the recent unreported case of \textit{Sudan Government v. Abdel Jaleel Osman Ali and Another},\textsuperscript{48} the trial magistrate, after the investigation was completed and the trial commenced and after hearing some of the prosecution witnesses, ordered that the Case Diary be returned to the police for further investigation - for some witnesses to be interviewed. The appeal from this order - arguing that the trial magistrate ought not to seek further evidence in support of the case for the prosecution - was allowed. The Province Court distinguished between the powers of the magistrate in directing the police during the investigation and what he may do once the trial has started.

\textsuperscript{47} This apparent repetition of section 122 is necessary, it seems, to link the provisions of Chapter XV, on the initiation of judicial proceedings before a magistrate, to those of Chapter XII of the C.C.P., on police procedure as such. The different Chapters of the Code refer to the magistrate in his different capacities; in practice the magistrate may be going in and out of the various capacities throughout the working day. A magistrate may consider a particular case in both his prosecutorial and judicial capacities during the same day: review the police investigation and then proceed to try the case.

\textsuperscript{48} \textit{N.P.Ct.-Crim.App.-436-1970}, (unreported); a prosecution for criminal trespass under section 386 Sudan Penal Code.
The proper procedure once the trial starts is for the magistrate to summon the witnesses himself in exercise of his discretion under section 219 C.C.P. which provides that

"Any Court may at any stage of any inquiry, trial or other judicial proceedings under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case."

As Mr. Justice Salah Eddin Hassan explained in Sudan Government v. Charli Mousalli: "The Court is not precluded from exercising its discretion under this section merely because somebody asks it to do so." So if either prosecution or defence should suggest it, the court may summon or examine witnesses for the first time at the trial.

In conclusion, it is clear that the magistrate enjoys a large measure of independence in deciding when a case should go to trial. Not only does he exercise both prosecutorial and judicial powers, he also decides when to shed the first role and assume the second.

(ii) An Assessment:

As suggested above, the objection is the obvious risk, or at least the appearance of the obvious risk, to the magistrate's impartiality and objectivity when the case comes to trial. There is a basic and inherent contradiction in the two roles of accuser and judge; it is inconceivable that they can both be effectively and fairly pursued by the same person. Whether consciously or

unconsciously, negatively or positively, the magistrate is bound to carry over some views and feelings about the case from his earlier contact with it in his investigatory role into his hearing of it at the trial. If only because he is the same person, lawyer or not, with a certain degree of experience, attitudes and whatever else comes into decision making, believing witnesses etc., who formed the view that there was sufficient evidence for the case to go to trial, he is more likely to convict the accused at the trial that a magistrate who had no previous contact with the case. Moreover, the appearance of impartiality is as important as impartiality itself in these matters. Therefore, whether the magistrate can in fact achieve complete impartiality and come to consider the case at the trial with a fresh and unbiased mind is not the whole answer; it must also be seen and believed by the general public to be the case.

Magistrates, perhaps understandably, protest that they are quite capable of performing the dual functions of prosecution advisers, if not prosecutors, and judges of the issues. They emphasise that they are not as involved with the police investigation as their powers may suggest, and that such involvement, in so far as it exists in practice, is in fact to the advantage of both sides. It is maintained that the magistrate applies his training and expertise to the facts from an early stage, he guides and advises the police in ascertaining all the relevant facts and circumstances; it is said that the magistrate is not preparing the case for the prosecution but rather looking to see if there is such a case. In short, it is argued that magistrates do not, in practice, follow the
police investigation closely enough to be influenced by it, and that where they do, they look after the interests of both sides.

The objection to this line of defence of the present arrangements is precisely its tendency to claim to have the best of two worlds while in fact it has the best of neither. If it is true that magistrates do not follow police investigations closely, they are failing in their duties of controlling and supervising the police. This is, as will be seen below, the major objection to the scheme. As to the second claim that when they do take an active part in police investigations they do so by looking after the interests of both parties, it is unlikely that this is the attitude of most magistrates in practice. Even if it is, it is really a contradiction in terms: it is not in human nature to be impartial and objective at an early stage of an investigation and yet to be effective in pursuing all leads and possibilities, "the whole mentality of a public prosecutor is necessarily different from that of a judge," and if both roles are to be played by the same person, one or the other is bound to suffer. If he is to maintain a completely open mind with respect to all possible suspects in a murder case, for example, he will necessarily be a poor adviser to the police for the very same reason – lacking the conviction and thrust of a motivated prosecutor. If he is such a prosecutor, then he cannot

possibly have the conviction and thrust of a defence legal adviser
at the same time.\textsuperscript{51}

As indicated above, the dangers of magisterial bias are largely
neutralised by the failure of magistrates to carry out their
functions properly. Typically, the magistrate endorses whatever
action the police suggest and grants all their requests. On
receiving the First Information Report or a Complaint under section
135 (1)(d),\textsuperscript{52} the magistrate usually writes: "to the police for
investigation"; on subsequent references of the Case Diary, he
only reads the summary prepared by the policeman in charge of the
investigation and signs his approval. Even proper judicial functions
such as granting search and arrest warrants and renewing remand
orders are exercised mechanically: police requests are granted
without scrutiny of the Case Diary.

To illustrate the point, one example may be given. In Sudan
Government v. El Dary Osman El Fur,\textsuperscript{54} the police refused to accept

\begin{itemize}
\item \textsuperscript{51} The juge d'instruction in French criminal procedure, whose
involvement with the case is similar to that of the Sudanese
magistrate, operates within a completely different system:
the trial is not adversary in the sense of the court accepting
either the case for the prosecution or that for the defence
but rather a collective and determined pursuit of the "truth"
by means that are often unusable in a Sudanese, or common law,
court.
\item \textsuperscript{52} See above pp. 99 \textit{et seq.} on the initiation of proceedings by
complaint.
\item \textsuperscript{53} The Arabic equivalent of this phrase is almost a term of art
in the Sudanese judicial jargon.
\item \textsuperscript{54} Ct.App.-Crim.Rev.-20-1974, (unreported).
\end{itemize}
the information presented by the complainant, as they are authorised to do if they are satisfied that no public interest will be served by a prosecution.\textsuperscript{55} The complainant then lodged the complaint before the magistrate, as he is entitled to do in such cases.\textsuperscript{56} The magistrate, who is supposed to accept the complaint and examine the complainant to see if the police rejection was justified, returned the complaint to the police with the direction: "to the police to do what is necessary". As Mr. Justice Mohamed Ahmed Abu Cassasa said in his criticism of the direction: "what is the point of telling the police to take the necessary action when they have already decided that no action is necessary". They were not told specifically what to do: whom to interview, where to search and for what, etc.

The strongest argument for reform emerges from concern with the quality and effectiveness of supervision and direction by magistrates. It is said that if this role is taken over by professional and full time public prosecutors, they will have the time and the conviction and duty to do a thorough job; and what is also important, they can be held accountable for the standard of their supervision. Some Sudanese lawyers, such as Mr. Justice Hassan Mohamed Alob, Judge of the Supreme Court,\textsuperscript{57} emphasises the essential contradiction in the two roles - prosecutor and judge -

\begin{itemize}
\item \textsuperscript{55} Sections 111(1) and 1220(1) C.C.P.
\item \textsuperscript{56} Ibid., and sections 135(1)(d) and 136; see Chapter I above.
\item \textsuperscript{57} In a memorandum to the Code of Criminal Procedure Committee, dated 14/5/1974, on file in the Attorney-General's Chambers, Khartoum.
\end{itemize}
and point out that the overworked magistrate with divided loyalties will never do either job properly if he has to do both at the same time. In view of the lack of sufficient numbers of trained lawyers, and the disruptive effect of an immediate change, Mr. Justice Alob suggested the drawing up of a long term scheme whereby a system of public prosecutors may be established throughout the country with magistrates acting as prosecutors in areas where none can be appointed. The advantage of such a scheme is in the fact that when a magistrate is acting as a public prosecutor, the extra-judicial nature of his functions would be readily appreciated by everyone concerned. A more practical suggestion of Mr. Justice Alob, one that may be implemented immediately without any delay or expenditure, is that no magistrate should ever try a case in the investigation of which he was involved.

It is suggested that this last point offers the best hope of an immediate improvement of the position. In view of the disruption and cost of establishing a network of public prosecutors with sufficient human and material resources to take over from the magistrates all over the country, and in realistic recognition of the opposition of the Judiciary to such a scheme which they see as stripping them of powers to control the police they have traditionally enjoyed, an immediate change in the machinery is unlikely, except in the sense of a fuller realisation of the potential of the present scheme, which is argued for below. The system can be reformed only by building on the existing structure and not replacing it, otherwise the whole process would be artificial and uneconomical. Besides
the established and general supervisory functions of the magistrates, there is a skeleton service of public prosecutors and enough statutory powers for it to take over all it can handle of the work of the magistrates in this respect. This will allow for a period of trial and error during which the service will have the opportunity to test its capabilities without the risk of a complete breakdown should it fail to cope. Adjustments can thus be made by both the judiciary and the new service without undue haste, panic or disruption of ordinary business.

(iii) Public Prosecutors and Magistrates: Shared Powers:

It can safely be assumed that Sudanese legal opinion would agree on the proposition that ideally magistrates should have nothing to do with prosecutorial duties and functions. Some would hasten to add, however, that it is not practicable at present; we already have a system that involves magistrates in these duties and functions, or rather purports to take advantage of their training and experience to help the police prepare its case, as well as help the accused by controlling the police and supervising their methods. Unfortunately it is not working in practice in this way; rather magistrates are either too indifferent, or may be too over-loaded, to take proper charge of the police investigation or too prosecution minded to fulfil properly their role as guardians of the rights of the accused. Moreover, the logic of necessity is not as compelling today as it used to be in the past. The number of trained

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58. The present arrangements and their future development are the subject of the following few pages.
lawyers is increasing all the time; and with some adjustments of
priorities may be made to increase even faster.\textsuperscript{59} It is therefore
proposed that there should be a twofold solution: one of immediate
relief and an ultimate and final solution. In short it is proposed
that a mixed system should be worked and developed gradually into
one of specialisation and separation of powers. The seeds of the
mixed system are already there, in due course some slight modifications and amendments of the relevant provisions will complete the
transformation into the specialised scheme when the machinery for it
exists.

With reference to the investigation of offences, as opposed to
the actual conduct of prosecutions in court,\textsuperscript{60} the powers of the
Attorney-General and his staff received very significant additions
in the 1974 revision and re-enactment of the C.C.P. To bring out
the contrast, and possible change in underlying policy, the pre-
existing provisions are quoted first. Section 122B 1925 C.C.P.
used to read as follows:

"(1) The officer in charge of a police station may
at any stage in the course of an investigation under
section 112 submit the Case Diary to a Magistrate in
order to receive directions as to the further conduct
of the investigation.

\textsuperscript{59} It is believed that the Faculty of Law, University of Khartoum,
can at least triple its intake on the present level of
resources. A change of attitude towards the University of
Cairo, Khartoum Branch, may also help in transforming the
present level and quality of legal service for both
prosecution and defence.

\textsuperscript{60} In court conduct of the prosecution is regulated by section
211 C.C.P. see below.
(2) Any Magistrate of the first or second class and any confirming or appellate authority or the Advocate-General may at any time during the course of the investigation order the immediate submission of the Case Diary either to himself or to any Magistrate subordinate to him or to the Advocate-General.

The section did not say what the Advocate-General, effectively the Prosecutor-General and his staff, might do with the Case Diary when they receive it. They neither had investigative powers of their own nor could they order the police to act on their behalf. It would seem that the section was originally designed to enable the Advocate-General and his staff, and the other persons mentioned in the section, to be informed on any criminal prosecution of which they might need to know, whether for administrative or political reasons. The section also enabled the Advocate-General and his staff to peruse the records of the investigation to see if they needed to represent the prosecution in court at the trial under section 211, C.C.P. Criminal Circular No. 1/62 is more explicit in this regard: it instructs the police to submit to the representative of the Advocate-General in the province the Case Diary in any of a specified type of cases, namely, cases triable by major court, cases involving offences against the state and cases involving offences suspected to have been committed by public

61. The Attorney-General is now the Minister of Justice with the Advocate-General in charge of civil, and the Prosecutor-General in charge of criminal matters.

62. Section 211 provides: “Prosecutions may be conducted by the Attorney-General or any person appointed by him to represent him or by the complainant or a pleader appointed by him provided that the Attorney-General may intervene to remove the conduct of the prosecution from the complainant or his pleader and in such case the Attorney-General shall direct by whom the prosecution shall be conducted.”

63. Dated 8/4/1962. This is not one of the Criminal Court Circular class, but a departmental circular - see pp. 46-9 above on the distinction.
servants in the course of their duties. The Circular then indicates the options open to the province representative regarding the prosecution of the offence, which are: prosecute himself, instruct the police to prosecute, or consent to a prosecution by the complainant or his counsel.

The Circular then proceeds, perhaps unjustifiably because of the lack of statutory basis, to claim for the Advocate-General's representative the authority to instruct the police on conducting the investigation in the case. The doubt as to the legal basis of the relationship between the police and the Advocate-General is reflected in the formulation of the relevant section of the Circular which leaves it to the police to seek advice when they need it; it reads:

"If the police thought it necessary, they may refer the Case Diary to the representative of the Advocate-General for directions and advice on the following:
(1) Specification of charges for the investigation;
(2) Determination of circumstances and facts relevant to the proof of the offence or its ingredients;
(3) Methods of obtaining statements;
(4) Legal advice on the sufficiency of the available evidence in proving the charges."

The doubt as to the legal basis of the relationship was never really significant because the provision was not used in practice, reference was confined to the consideration of whether the province representative wished to represent the prosecution in court. Now it is also irrelevant because statutory authority does exist under the 1974 C.C.P.

64. This is a translation, the Circular is not available in English.
In practice, therefore, the involvement of the public prosecutor was very late and very limited indeed. Due in the main to the extreme inadequacy of staffing and other facilities, and to some extent to the jealousy of magistrates who feared the loss of their supervisory powers over the police, the public prosecutors made very little impact on the administration of justice. In the relatively few cases in which they were involved, the most serious and most controversial, they represented the prosecution only at the trial. The vast majority of cases, therefore, continued to be investigated and prosecuted by the police under the direction and advice of magistrates who had to act as counsel for the prosecution and counsel for the defence as well as judges.

Though there is now a new element, namely wider and more explicit powers in relation to the investigation of offences, one should not expect it by itself to make much difference in terms of the level and vigour of participation. For the full potential of the change to be realised other changes, not least in the public prosecutors' own approach to their role in the administration of

65. At its peak, the service consisted of four provincial branches; one or two professional staff of low rank and little practical experience were left in each province to cover vast territories and to handle thousands of serious prosecutions a year.

66. Annual reports and statistics are extremely unsatisfactory - none existed prior to 1970 - and they are unsystematic and hard to compare because they tend to use different terminology and cover different periods. Yet an indication of the work of the province office of public prosecution may be given. In Kassel Province, for example, out of 218 cases referred by the police in 1972, the office represented the prosecution in court in only 62 cases; in 1973, only in 38 out of 185 of the cases referred by the police under Circular 1/62.
justice, are necessary. It takes time for a new service to develop and earn the respect and acceptance of the relevant authorities, that is to say the judiciary and the police.

Section 122B, added for the first time in the 1974 revision of the C.C.P. reads as follows:

"(1) Subject to the provision of this Code, whenever it appears to the Attorney-General or his representative on information received or from his own knowledge that there is reason to believe or suspect that an offence has been committed, the Attorney-General or his representative may investigate or order any person other than a Magistrate to investigate.
(2) The person conducting an investigation under sub-section (1) above shall have the powers of a Police officer investigating an offence under this Code.
(3) No Magistrate or Police officer may investigate or continue to investigate an offence which has been or is being investigated under sub-section (1) above without the prior consent of the Attorney-General.
(4) Any Police officer in charge of a Police Station is bound to render all assistance in the investigation which is requested by the person conducting the investigation."

On its face, the provision has the effect of substituting the representative of the Attorney-General for the magistrate in the investigation of offences subject to two qualifications. There is first the practical matter of how the public prosecutor is to know of the case so that he may decide whether to intervene. Secondly, the magistrate retains absolute discretion over the issue of warrants for arrest and search, matters of direct and practical importance for any effective investigation. The section does not require the police to report all, or even a certain class of,

67. This is my own translation, the text of the section is available only in Arabic.
offences to the public prosecutor; the matter is left to the vague provision of "information received or from his own knowledge". The power of the public prosecutor to require that the Case Diary be submitted to him has been enhanced by the new formulation of section 122B C.C.P. which now provides:

"(3) The Attorney-General may at any stage in the investigation require the Case Diary to be submitted before himself or any of his legal staff."

Criminal Circular No. 1/62, therefore, remains in force; it is also possible for the Attorney-General to increase at will the offences or classes of offences in which the police are required to submit the Case Diary to his local representative. It remains nonetheless true that criminal Informations and reported offences are not referred to the public prosecutor as a matter of course and in all cases, they must be required to be so submitted, whether on a class of offence or case by case basis. The normal procedure remains that of reference to the magistrate in the first instance; but once the public prosecutor is informed of the investigation and decides to take it over, the magistrate and the police are precluded from proceeding without his consent.

The position of the Attorney-General and his representative may be compared with that of the English Director of Public Prosecution, referred to here as the D.P.P. The office of D.P.P. was first created by the Prosecution of Offences Act 1879, and reconstituted under the Prosecution of Offences Act 1908. His functions now rest
upon the Prosecution of Offences Regulations 1946. The D.P.P. is under a duty to prosecute in cases involving the death penalty, and in a variety of cases ranging from coining and incest to explosives and dangerous drugs; cases referred to him by a government department in which he thinks criminal proceedings should be instituted; and in any case which appears to him to be of importance or difficulty or which for other reasons requires his intervention. He is also required to give advice to government departments, clerks to justices, chief police officers and other persons on any criminal matter of importance or difficulty.

To enable him to carry out his functions, chief police officers are under a duty to report to the D.P.P. in five classes of cases, including those cases in which by statute he must prosecute or consent to the prosecution. Chief police officers are also "required to report to the D.P.P. a considerable number of different types of offences ... In practice many of these are dealt with by the local police force." The D.P.P. may only direct advice to the police about proceedings for which he is not strictly responsible, "but in practice his advice is not disregarded."


69. B.M. Dickens observed in "Control of Prosecutions in the United Kingdom", 22 Inter. & Comp. L.Q. (1973) 1, in note 34: "Curiously, murder is no longer within the Regulations, since when they were drafted in 1946, the offence came within the employed formula of offences punishable with sentence of death; nevertheless, the Director still assumes the duty of prosecuting in many of these cases."


71. Dickens, "Control of Prosecutions in the United Kingdom", 11.
In contrast to this mixed picture of responsibilities and functions in relation to various offences, the Lord Advocate and his staff have a stronger and more uniform hold over all prosecutions in Scotland. The police are dissociated from the decision to prosecute - a characteristic feature of the Scottish system as opposed to the English. The police are bound by section 9 of the Criminal Procedure (Scotland) Act 1975 to observe instructions issued from time to time by the Lord Advocate to chief constables "with regard to the reporting, for consideration of the question of prosecution, of offences alleged to have been committed". Subject to such instructions the police have a measure of discretion in their working relationship with the local procurator fiscal. "In most cases the procurator fiscal may not know about the offence until the police have charged someone, but he is frequently consulted at an early stage, and he is called out personally to the locus of all suspected murders."


73. Gordon in "Institution of Criminal Proceedings in Scotland", supra at 251 concluded that at present there are three classes of persons who can institute criminal proceedings: the Lord Advocate (and his staff including the procurators fiscal), statutory prosecutors, and private prosecutors acting with the concurrence of an appropriate public prosecutor or with the leave of the court.

74. Dickens, "Control of Prosecutions in the United Kingdom", supra, 21.

75. Gordon, "Institution of Criminal Proceedings in Scotland", supra, 254. Ultimately, however, the decision to prosecute is always taken by the fiscal. The police may select the initial charge, but the final charge on which the accused is taken to court is decided upon by the procurator fiscal.
Thus the complexity and potential for conflict of powers varies from system to system. Ultimately, the public prosecutor's relationship with the police will have to be worked out over a period of time and within the particular legal and formal framework. A combination of legal obligations and discretion is necessary for the success of any system of public prosecutions, whether mixed like the English, or more exclusive like the Scottish. On the one hand, the public prosecutor may need to limit the number and nature of cases referred to him if he is to give them the attention and effort they require. On the other hand, he may need to interfere in a particular case of a type in which he usually has no interest.

The second limitation, which is likely to remain even if a public prosecutor service completely takes over, is the retention by the magistrate of the power to issue arrest and search warrants and to renew remand orders etc. Even in a full-fledged system of public prosecution as in Scots law, the sheriff or judge retains these powers. Without these essential investigative powers, however, the public prosecutor's effectiveness is drastically curtailed; he remains dependent on the good will and confidence of the magistrate.

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76. Warrants are normally granted by the sheriff on the petition of the procurator fiscal - the public prosecutor. Such petitions, however, are routinely granted because "being presented by responsible officials, (they) are assumed to be well founded." Renton and Brown, para. 5-09.
Both limitations are quite appropriate and wise features of the system; they appear to have been purposely planted in accordance with deliberate policy. The first limitation safeguards against flooding the infant service with cases and duties before it is ready for them; rather it is left to the service itself to take on as much as it can at its own pace. There are enough powers in these and other sections of the C.C.P. for the service to play an active role in criminal investigations and prosecutions; as it expands and earns the confidence of the police and the judiciary as well as the public at large, its powers will increase and become well defined and accepted in proportion to its ability. Meanwhile, and because of the need for supervision and advice of the police, the participation of the magistrate in pre-trial investigations must continue. When the time comes, the necessary amendments and adjustments can be made.

One rule of practice that needs no legislation to implement yet is essential for the overall integrity and fairness of the system is that a magistrate, as a rule, should never try a case he helped to investigate himself. If only for the benefit of a second opinion on the facts, at least two magistrates should have considered the evidence and all the circumstances of the case. In towns, where there are usually more than two magistrates in the same court house, such a rule of practice would not be difficult to apply: it can be agreed that all offences the Case Diary for which has been seen and

77. A private interview with the Attorney-General of the Sudan, January 1975.

78. Sections 211, on the representation of the prosecution in court; and section 231A on the stay of prosecution and the discretion not to prosecute.
acted upon by one magistrate should be tried by another. Even in the countryside where only one magistrate is normally available in one place, the practice can still be maintained, but it may involve some delay in referring the case to the nearest other magistrate for trial. The Judiciary itself should adopt the policy of stationing at least two magistrates in every court, even if this should mean fewer courts than is the case at present.

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(3) Magisterial Examination of the Accused

The second remarkable feature of Sudanese criminal procedure is the examination of the accused by the magistrate. This examination normally takes place in the formal context of committal proceedings and trial. There is no reason, however, why it should not take place at any stage of the case, even at the police investigation stage. Later on the proposition will be considered whether it is desirable to abolish all police secret interrogation and require that all interrogation of the accused be held in the presence of the magistrate, if not be made by the magistrate. Should the answer be in the affirmative, there appears to be no reason why such a proposal should not be applied immediately without any amendment of existing provisions or new enactments. Before turning to this question, the practice of magisterial examination of the accused itself needs to be examined and assessed.
(1) The Scope and Purpose of the Examination:

Section 218 C.C.P. provides:

"(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court may at any stage of an inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. (2) The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the Court may draw such inference from such refusal or answers as it thinks just. (3) The answers given by the accused may be taken into consideration in the inquiry or trial and put in evidence for or against him in any other inquiry into or trial for any other offence which such answers may tend to show he has committed. (4) No oath shall be administered to the accused."

Such examination may take place "at any stage of an inquiry or trial"; it is in fact routinely made at the committal proceedings stage, it may even be imperative before commitment in certain circumstances. According to Bennett, C.J., in Sudan Government v. Hassan Ibrahim Hussein, the examination of the accused under section 159 C.C.P. in the course of the committal proceedings under the formal procedure "is not a matter of discretion. A failure to examine him invalidates the committal order." It would appear

79. This examination must be distinguished from the giving of evidence in the traditional sense because the accused cannot be cross-examined during this examination. See p. 699 below.

80. AC.-CP.-25 1944, (unreported).

81. See Chapter I above on the committal procedure.
however, that this conclusion does not necessarily follow from the language of section 159. All procedural irregularities are subject to the test of section 261 C.C.P. that no finding, sentence or order should be interfered with "on the ground only that evidence has been wrongly admitted or that there has been an irregularity in procedure, so long as the defendant has not been prejudiced in his defence and that the finding and sentence or order are correct."

Thus, circumstances may or may not be such as to require the invalidation of the committal order for failure to examine the accused.

A failure to afford the accused the opportunity to explain the evidence appearing against him at the committal stage may be rectified at the trial; such a failure at the trial is more serious because it affords no subsequent chance for rectification. Thus, it may be easier to find that failure to examine the accused at the trial is serious enough an error to justify quashing a conviction or

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82. Section 159(1) C.C.P. reads:

"If, upon taking all the evidence referred to in section 158 and making such examination (if any) of the accused as the Magistrate thinks necessary for the purpose of enabling him to explain any circumstances appearing in the evidence against him, the Magistrate finds that there are not sufficient grounds for committing the accused for trial to a Major Court or for trial of the accused by himself or some other Magistrate, he shall record his reasons and discharge him."

Note - See section 218.

Emphasis supplied. Section 218 C.C.P., to which the note in the section refers, however, makes the examination of the accused "after the witnesses for the prosecution have been examined and before he is called on for his defence" obligatory.
refusing confirmation or finding and sentence. The language of section 173 C.C.P. also seems to indicate that the examination of the accused at the trial is imperative. Section 177 C.C.P. provides that after the witnesses for the prosecution have been heard "the examination of the accused duly recorded by or before the committing Magistrate shall be produced and read out in Court."

Section 173(1) then adds: "After the reading of the examination of the accused, the accused shall be examined as provided in section 213. After that he shall be asked whether he means to call witnesses other than to character." Thus, while section 159(1) refers to "such examination (if any)" at the committal stage, section 173(1) requires that "the accused shall be examined". In Sudan Government v. Abdulla Bannaga El Bashir, the accused was convicted of murder and sentenced to life imprisonment. But as he was not offered an opportunity to make a full chronological statement of his story to the major court, confirmation was refused and a retrial ordered. Sandes, A/J.C., said that in the Sudan "an accused person who is convicted without having told his whole story to the Court in person, tends to regard himself as unfairly treated ... Nothing creates greater confidence in the Courts than an obvious desire to ensure that the accused has every opportunity to say everything he has to say; some accused are shy before a Major Court and

83. Emphasis supplied. The examination of the accused at committal proceeding will be read out if any was made. This part of section 173(1) does not make that examination imperative.

84. AG-CP-191-1943, (unreported).

85. The available report does not say what the facts were — only the statement of Sandes A/J.C.
it is for the Court to overcome this". Again, in *Sudan Government v. El Feki Kuti*, the accused was convicted of murder and sentenced to death, although his confession to the police, which was an important part of the case against him, was not properly put in evidence at the trial. The Confirming Authority refused confirmation of the finding and ordered the trial to be resumed to hear fresh evidence and to enable the accused to be questioned under section 213 C.C.P. to being out his answer to the evidence.  

The general position may be summarised as follows. The examination of the accused at both committal proceedings and the trial is the normal procedure that is not to be departed from lightly. A failure to conduct such an examination is much more serious, however, at the trial than it is at the committal proceedings. The scope of the questioning obviously varies with the facts of each case and the circumstances that need to be explained. The difference between the committal proceedings and the trial, both with respect to the importance and purpose of the examination, is one of degree only — relative to the difference in the objects of each type of proceedings. 

The opening words of section 213 are often quoted and emphasised

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36. AC-CP-154-1944 (unreported).

37. The available report does not give the reasons why the confession was not properly put in evidence.
as the key to the purpose of the examination. Two judicial statements on the purpose and proper scope of the examination may be quoted here as being typical on the subject. In *Sudan Government v. Gadalla Mohamed*, Gorman, Legal Secretary, said:

"Cross-examination of an accused person is not permitted under our Code in any case, the reason being that the accused is not on oath. A President may and should, however, put such questions to an accused under section 218 Code of Criminal Procedure as will help the Court to understand his defence. As one question sometimes leads to another, this distinction may seem rather fine but I think it lies in the motive behind the question. The object of a cross-examiner is to trip up a witness, and to break down his evidence, but the object of a question under section 218 should be to help the accused to explain something which if he cannot explain it, will tell against him in any case."

In *Sudan Government v. John Petrides and Another*, Mr. Justice Stanley-Baker said on the subject the following:

"The examination of the accused at the resumed trial was incorrectly conducted in the following respects:— (a) the prosecutor is not entitled to question the accused (although he can help the Court by suggesting points in the prosecution case which the Court has omitted to put to the accused


89. (1938) *S.I.R. Crim. vol.1, 171 at 174*. Emphasis in original.

90. That is to say, the president of the major court, see Chapter I above.

91. NP-Crim.App.-34-1951 (unreported).
for explanation); (b) the accused can only be examined on matters appearing in the evidence against him - the object of the examination being, of course, to enable the accused to explain the evidence against him, not to obtain admissions which might assist the prosecution case in the absence of such evidence.

In this case there is no suggestion that the defence was in fact prejudiced by procedural irregularities. In the result the defence was fully brought out, and the accused was not trapped into any admissions which he was not perfectly prepared to make."

The general object of the examination therefore appears to be to afford the accused a chance to explain the evidence so that he need not be committed to trial, in the case of committal proceedings, or need not enter into his formal defence at the trial. Should he be committed to trial or called upon to present his defence at the trial, the examination by the magistrate, a qualified lawyer, ought to help him to do so most effectively because it brings out the issues and points in the case for the prosecution he needs to meet and dispel. 92 Without such examination the accused may accept facts or fail to explain or meet points in the case for the prosecution though he may in fact have the answer. This service is vital in view of the general lack of legal representation for the accused in the Sudan. 93 It is also thought that "an accused person

92. Criminal Court Circular No.11, Part I, section 2(vi), Note.

93. Criminal Court Circular No.11, which explains and describes the trial procedure, begins by the observation: "In most cases in the Sudan there is no prosecutor or pleader for the accused, and the Court itself has to act as both."
should always feel that the Court is not merely willing but anxious to hear all he has to say in regard to the charge." 94 It is also believed that hearing the accused "tell his own story in person may give the Court quite a different impression from having it read out 'second hand'." 95

These then are the purported policies or purposes of the magisterial examination of the accused; whether they are in fact realised in practice is a completely different question. Assuming that they are, and that they are as such some of the advantages of the practice, one turns to consider the disadvantages or the objections in order to arrive at a final conclusion on the desirability of the device.

It is clear from the available material on the scope and purpose of the examination of the accused under section 218 C.C.P. that such an examination of the accused is different from his giving evidence in the traditional way. Whereas the accused may be cross-examined by the prosecution when he is giving evidence, he may not be cross-examined even by the court itself - as the above quotations indicate - when he is being examined under section 218; rather he is only offered an opportunity to explain the evidence appearing against him. The accused or his pleader may also open his case after the end of the case for the prosecution by


"stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and, after their cross-examination and re-examination (if any), the accused may make a statement in his defence and he or his pleader may sum up his case."96 With all these opportunities to explain his position and further his case without exposing himself to the prosecution's hostile cross-examination, it would be surprising if the accused elected to give evidence in the traditional way as well. Yet, it may serve the purposes of the defence better to put the accused on the stand in some cases: his explanations will receive more weight if they were given from the witness box — under oath and subject to cross-examination. Is this course of action open to the defence in the Sudan: can the accused testify in his own defence?

There is no direct answer to this question because the Code is silent on the point though it refers repeatedly to the examination under section 218.97 There is no reason, however, why the accused may not give evidence as a witness. In Sudan Government v. Fatma Ahmed Rasheed and Another,98 Abu Rannat, C.J., said that in the Sudan "we follow in criminal proceedings the Indian Evidence Act."99 He then applied section 120 of that Act and held that a husband is a competent witness in a criminal proceedings against his wife.

Section 118 of the Indian Evidence Act provides:

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96. Section 179 CC.P.
97. See, for example, sections 148(1), 159(1), 172A(f) and 173(1)CC.P.
98. B.L.J.R. 7.
99. Ibid., at 8. See also Criminal Court Circular No. 29. See p. 476 et seq.
"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

Thus in India the accused is a competent witness: "he has the option to examine himself as a witness for the defence and in such case he has to take oath. His position is like that of any other witness and he can be cross-examined." The accused is also a competent but not compellable witness in the United Kingdom. It is therefore reasonable to expect a Sudanese court to uphold this general common law rule should the issue arise.

(ii) The Right to Silence and the Magisterial Examination of the Accused:

One of the most significant differences between the inquisitorial and the accusatorial models is to be found in their attitudes towards the examination of the accused and his duty to answer. What follows is an assessment of the Sudanese practice in this respect from the common law point of view. The terms "right to silence" and "privilege against self-incrimination" are used interchangeably; the right to silence, which is said to embrace "the right of suspects not to respond to police questioning and the right of the defendants

101. Section 1 of the Criminal Evidence Act 1898.
to be free from testifying at their own trials," is essentially a practical manifestation of the privilege against self-incrimination (hereinafter called the privilege). The privilege emerged from a long historical development, and it sometimes finds expression in terms of constitutional guarantees, as in the Fifth Amendment to the Constitution of the United States.

Historical and constitutional argument, however, may not be very relevant or helpful in the present context. It is becoming more and more appreciated, even in the United States, that the constitutional text "does not clearly foretell the contemporary meaning of the privilege" and that absolute answers "are not to be provided even by the most painstaking historical research." Statements from two leading American judges make the point elegantly. Mr. Justice Frank, dissenting in United States v. Grunewald, said:


105. For a history of the privilege see 8 Wigmore on Evidence, para. 2250; and E.M. Morgan, "The Privilege Against Self-Incrimination", 34 Minn.L.Rev. (1949) 1.


"The critics of the Supreme Court, however, in their own emphasis on the history of the Fifth Amendment privilege, overlook the fact that a noble privilege often transcends its origins, that creative misunderstandings account for some of our most cherished values and institutions; such a misunderstanding may be the mother of invention."

In *Green v. United States*, Mr. Justice Frankfurter said:

"Law is a social organism, and evolution operates in the sociological domain no less than in the biological. The vitality and therefore validity of law is not arrested by the circumstances of its origin. What Magna Carta has become is very different indeed from the immediate objects of the barons at Runnymede."

The question, therefore, is not whether the privilege, in its historical or constitutional version, applies to police interrogation, or at what stage in the proceedings it becomes operative, but rather what are its underlying policies and purposes and whether they are relevant and helpful in solving some of the problems of pre-trial procedure. The privilege has neither historical basis nor present constitutional authority in the Sudan, it will have to stand or fall on its own merits, not for any sentimental or other reasons. To determine whether there is a right to silence

103. 356 U.S. 165 (1953) at 139. He was not, however, dealing with the privilege as such, but with an analogous point.


110. In none of the Sudanese constitutional documents was the privilege ever mentioned as the point is made below.
in the Sudan is a matter of statutory interpretation of the relevant provisions; the further questions of the desirability of maintaining the right if it exists, and introducing it if it does not exist at present, require close examination of the policies and purposes of the privilege itself. In view of the scope of the present work, the following remarks will be confined to the privilege, and its consequential right to silence, as it applies to the suspect or accused in criminal proceedings.

(a) Policies: A statement of the policies of the privilege that is typical and authoritative at the same time is that of Mr. Justice Goldberg, delivering the opinion of the Supreme Court of the United States in *Murphy v. Waterfront Commission of New York*, where he said:

"It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminatory statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load' 8 Wignore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and the right of each individual 'to a private enclave where he may lead a private life' United

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While some of these policies are clearly valid and relevant reasons for the privilege as it applies to the criminal process, others are also clearly what may be called "makeweights. 112 The controversy over the merits of the privilege and the validity of its policies is too massive to review here; 113 the crux of the matter is the question of balance that runs right through the whole of criminal procedure: does it provide a needed protection to the accused, and is it justified in view of the cost in terms of the effectiveness and efficiency of the system as a whole? As Schaefer put it, the "critical question, of course, is not whether the privilege may protect an innocent man now and then; prohibiting all criminal prosecution would be a more effective way to do that. If the privilege is to be justified as a protection of the innocent, it must protect them in a way that does not protect the guilty." 114

112. 8 Wigmore on Evidence (McNaughton rev., 1961) p.311.


With reference to this particular criterion, two policies of the privilege stand out as the most relevant and the most valid reasons. These are the prevention of the torture and illtreatment of the accused and the need to maintain a fair balance between the state and the individual. After thoroughly reviewing all the alleged policies, McNaughton concluded that in these two reasons must be found the essence of the policy of the privilege against self-incrimination applicable in the normal day-to-day criminal investigation and prosecution. One respectfully agrees with this conclusion.

Firstly, the existence of the privilege prevents the torture and other inhumane treatment of the individual, regardless of his innocence or guilt, at the hands of the police or other investigative agency. In the words of Wigmore, who regarded the privilege as protecting the innocent only in this indirect way of operating on the morality and efficiency of the system of criminal law, "any system of administration which permits the prosecution to habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds

a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer - that is a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognised.\textsuperscript{116}

The related second policy is the need to preserve a fair balance between the state and the individual by requiring the government to leave the individual alone until good cause is shown for disturbing him; it is the accuser, the prosecution, who must shoulder the burden of proof, and without extracting it from the accused. It is feared that if the accused or suspect is obliged to answer the questions of the police and other investigative agencies, these agencies will tend to arrest on the slightest suspicion and subject the suspect to intensive, sometimes coercive or oppressive


"During the discussions which took place on the Indian Code of Criminal Procedure in 1872 (drawn by Sir J. Stephen himself), some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence'..."
questioning to obtain the proof of their accusation from his own mouth.\textsuperscript{117}

These then are the only two reasons or policies which "have any great probative force, and they are perhaps opposite sides of the same coin: (1) preservation of official morality, and (2) preservation of individual privacy."\textsuperscript{118} Other valid policies or reasons relate more appropriately to the protection of constitutional fundamental rights and freedoms such as the freedoms of speech and conscience.\textsuperscript{119} In conclusion, one would respectfully agree with McNaughton's concluding remarks on the policies of the privilege:\textsuperscript{120}

"These two and other reasons - in varying degrees of intensity depending on the particular witness, the particular question, the particular kind of tribunal, the particular setting in which the question is asked - often merge like notes from the pipes of an organ to produce a chord of unanalyzable impact. The impact of the chord

\begin{itemize}
\item \textsuperscript{117} Ratner, in "Consequences of Exercising the Privilege Against Self-Incrimination", 24 U. Chi. L. Rev. (1957) 472 at 484, expressed this fear as follows:
\begin{quote}
"Without the restrictions imposed by the privilege, and in the absence of statutory limitations, any number of persons could be rounded up by the police, brought before a magistrate, grand jury or even a legislative committee investigating crime, placed under oath and cross-examined to determine whether they had committed any crimes."
\end{quote}
\item \textsuperscript{118} McKay, "Self-Incrimination and the New Privacy", supra, 213-14. But see Schaefer, The Suspect and Society, 69-70, for disputing the protection of privacy as a policy of the privilege.
\item \textsuperscript{119} Schaefer, The Suspect and Society, 71-76.
\item \textsuperscript{120} 8 Wigmore on Evidence, (McNaughton rev., 1961) p.318.
\end{itemize}
is most ominous and impressive when questions are put by the police (where Ironically, it is doubtful that the privilege as such is recognized at all, see para. 2252 infra) and by unrestrained legislative committee investigators; it is the least impressive when questions are asked of third party witnesses in civil cases presided over by a judge."

The reference to the doubt as to the applicability of the privilege to the police station arises in consequence of the following reasoning: since the "police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose — that one is excused from the legal consequences of contumacy — when there are no legal consequences of contumacy." But as McNaughton himself observed, to say that the privilege does not apply to the police questioning of suspects is a quibble. All the policies of the privilege apply with greater force to police informal questioning than they do to formal proceedings where the privilege is technically applicable. "Whether the result is reached by pointing out the elementary fact that police have not been given the authority to compel disclosures of any kind or whether the result is put on the ground that the person questioned is 'privileged' not to answer makes little difference. Answers should not be compelled

121. Ibid. note 27, p.329.

These then are the policies underlying the privilege, and the consequent right to silence; the next question in this brief exposition of the common law position is that of the protection of the right to silence in criminal cases.

(b) Protection of the Right to Silence: The so-called right to silence is not really a right to speak or not to speak in exercise of a free will because a suspect or defendant "may or may not remain silent at various stages in the criminal process, and at each stage a variety of possible consequences may impose greater or lesser penalties on silence and create greater or lesser pressures to speak ... A suspect or defendant would have a 'perfect' right to silence if no one could draw any adverse inference from his decision to remain silent, if he were free from any other pressures to speak except those produced by his own conscience and by the possibility that speaking would help establish his innocence, and if he could make an informed decision whether speaking would be likely to help or hurt him. Such a person would speak only if he freely wished to confess his guilt and expose himself to punishment or if he intelligently concluded that speaking would be likely to help him. A 'perfect' right to silence is unrealizable in practice." 

123. Ibid. 152. See note 56, at pp. 151-52, also in 3 Wigmore on Evidence, (McNaughton rev., 1961) note 27 on p. 529, for the arguments in favour of applying the protection of the privilege to police questioning. In the United States, it is settled now that the privilege apply to all "custodial interrogation", Miranda v. Arizona, 384 U.S. 436 (19660) at 444.

pressures to be polite and co-operative, the desire to appear
innocent and avoid arousing police suspicion, the possibility
that jurors or other trier of fact will draw adverse inferences
from silence even if they are told not to.\textsuperscript{125} As Bentham said,
between "delinquency on the one hand, and silence under inquiry
on the other, there is a manifest connection; a connection too
natural not to be constant and inseparable."\textsuperscript{126} Moreover, the
suspect is too confused and frightened, unadvised or ill-advised, to
make a reasoned and intelligent assessment of his position and
decide freely and purposely whether or not to answer police or
prosecution questions. Thus, with the law powerless to guarantee
a perfect right to silence, "considerable pressure to speak must
remain on the best advised suspects and defendants whatever the
applicable rules."\textsuperscript{127} The unadvised or ill-advised suspect or
defendant is under greater, if not irresistible, pressure to speak.
Concern with protection from the excesses of questioning is first
and foremost concern for "the ignorant, suspicious, frightened,
highly suggestible people who are simply not able to face up to
police questioning even if that questioning is scrupulously fair—
an ideal not often attained."\textsuperscript{128}

Current common law practice purports to safeguard the right
to silence by immunity from prosecution for refusing to answer
police questioning or refusing to testify at the trial and by

\textsuperscript{125} Ibid. 236-37.

\textsuperscript{126} J. Bentham, \textit{Rationale of Judicial Evidence}, (1827), 7 \textit{The Works
of Jeremy Bentham} (Bowing editor, 1843) 446.

\textsuperscript{127} Greenawalt, "Perspectives on the Right to Silence", supra, 237.

\textsuperscript{128} Field, \textit{"The Right to Silence: A Rejoinder to Professor Cross"},
supra at 79.
restricting comment on the accused's silence. Immunity from prosecution is a positive protection, easy to enforce because it is within the power of the prosecution and the courts to ensure compliance. Restrictions on comment, however, are different in that they relate to the effect the comment may have on minds of the jury, which is inherently uncertain. This is not a very definite or positive protection because it is a ban not on all comment but only on some comments; the resultant uncertainty must create a real dilemma for the accused when deciding whether or not to speak. This is added to the knowledge that even a total ban on comment on his silence may not be enough in protecting him from adverse inferences. This unsatisfactory device for protection has no direct relevance to the Sudan because it applies only to trial by jury and we have no trial by jury in the Sudan. The restriction is not on taking account of the silence in arriving at a verdict, but only that it may not be the subject of comment. Some reference to the device, however, must nonetheless be made, if only to point out its problems and limitations as an argument for an alternative protection.

Not being able to guarantee that adverse inferences will not be made, the law does not do the next best thing of requiring that they ought not be made but adopts the approach of restricting comment; and in doing that it does not go all the way and require that no comment may be allowed, but makes the further compromise of allowing some comments to be made. The precise extent of the restrictions on comment is not easy to ascertain. It appears fairly
certain that the prosecution is not allowed to comment at all in any of the relevant jurisdictions. In England and Scotland, section 1(b) of the Criminal Evidence Act 1898, precludes such comment. The judge, however, may comment, but what he is allowed to say is unclear; the matter is decided on a case by case basis: whether what the judge said on the subject of the accused's silence amounted to a misdirection in the particular case depends on the actual wording of the direction to the jury and other circumstances of the case. In the words of Salmon L.J. in R. v. Sullivan:

"What a judge may say to a jury when a man refuses to answer is, perhaps, not so plain. There are cases in which the comment in the summing-up upon an accused's silence is clearly unfair;... There are other cases, however, and this is one of them, in which the circumstances are such that it does not appear that there is any unfairness involved in the comment. The line dividing what may and what may not be said is a very fine one..."

The somewhat similar position in Scotland is described in Renton and Brown in the following terms:

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129. R. v. Rhodes (1899) 1 W.B. 77.


131. at 105. See also Lord Oaksey in Nauch v. R. (1950) A.C. 203 at 211.

"The prosecution may not comment on the failure of an accused to give evidence, but such comment is not fatal to a subsequent conviction where it does not influence the result of the case. It is open to the presiding judge to comment on an accused's failure to testify, and it may sometimes be his duty to do so. Unjustifiable and repeated comment may, however, amount to a misdirection as constitution a failure to put the defence case fairly to the jury."

In contrast, in the United States, even the judge is not allowed to comment since the Supreme Court decision in *Griffin v. California.* In that case the Supreme Court held that any invitation to the jury to draw adverse inferences from the defendant's silence would be an unconstitutional penalty on the exercise of his right to remain silent. This appears to be the position in Canada too.

The difficulties of protecting a right to silence are obvious enough; but there is also the policy decision not to give the right all the possible protection. Thus in terms of adverse inferences from the exercise of the right the common law does not restrict the drawing of the inference, but rather the making of comments on the point. So it is a fair comment on the system to say that the law does not "go as far as it might to create an effective right to silence. Instead it compromises between protecting silence and satisfying competing interests, namely the usefulness for determinations of guilt of having suspects and defendants make statements...."

133. 380 U.S. 609 (1965).
134. The Canadian Evidence Act 1970 section 4(5). In both the United States and Canada the accused may be questioned as to previous record if he gives evidence; in the United Kingdom he is protected from such questioning by section 1 of the Criminal Evidence Act 1898. This may explain the difference in relation to comments on refusing to give evidence at the trial.
and of allowing silence to be given its natural significance."\textsuperscript{135}

No opinion at all is being expressed as to the appropriateness of the balance being maintained in the common law jurisdictions; it is clear that the respective systems have decided that the cost of a greater protection of the right to silence would be too high for them. It may well be that within the present framework, that view is the correct one; in any case it is not for one to say. As will be shown in the following few pages, Sudanese law is ambivalent with regard to the privilege and right to silence. A suggestion to be explored below is that the policies of the privilege accepted in the present study may be better served, in the Sudanese context, by banning all police interrogation and allowing interrogation before a magistrate rather than attempting to regulate police interrogation by such measures as those reviewed in chapter 5 above.

(e) The Right to Silence in the Sudan: There is no certain or short answer to the question whether the privilege and the right to silence are recognised in the Sudan. On the one hand, there is no direct or express evidence of recognition and guarantee in constitutional or statutory provisions. None of the previous Sudanese constitutional documents referred to the privilege in the provisions for fundamental rights and liberties;\textsuperscript{136} the privilege

\textsuperscript{135} Greenawalt, "Perspectives on the Right to Silence", supra, 237.

is also conspicuously absent from the otherwise comprehensive, though not very helpful,\textsuperscript{137} scheme of the Permanent Constitution of 1973. If only it was mentioned in the qualified terms of the Permanent Constitution, one could have argued that it enjoyed the same level of recognition as other procedural limitations on the powers of the police as in the case of arrest, search, bail etc. The fact that the privilege is the only absentee may be construed as an indication of positive rejection. Such a conclusion, however, cannot be sustained because some of the relevant statutory provisions, though not conclusive on the matter, do suggest a degree of recognition of the privilege and consequent right to silence.

Section 117 C.C.P. reads:

\textquote{"(1) A policeman making an investigation under section 112\textsuperscript{138} may require the attendance before him of any person being within the limits of his own or any adjoining police district, whose evidence appears likely to be of assistance in the case, and may examine such person orally. (2) Such person shall be bound to attend and to answer truly the questions put to him save so far as his answers would tend to expose him to a criminal charge or to a penalty other than a charge of failing to give information under Chapter XI of this Code."

\textsuperscript{137} Though the Permanent Constitution mentions all procedural protections for the accused, it qualifies them almost out of existence as constitutional guarantees, see consideration of this and other problems with reference to the present study in pp.\textsuperscript{62-65} above.

\textsuperscript{138} That is to say, an ordinary criminal investigation under the C.C.P., see chapter I above.

\textsuperscript{139} Chapter XI, C.C.P. provides for the duty of the public and sheikhs to report and the duties of sheikhs to investigate certain offences.
(3) No person giving evidence in an investigation under section 112 shall be required to take an oath or sign his evidence if it be reduced to writing; nor shall such writing be used as evidence, unless expressly permitted under this Code.\(^*\)

I was unable to trace a single case where this section was considered by a Sudanese court; one is left, therefore, with the text of the section as the only source of guidance as to the implications to the right to silence. It is clear enough that the section both recognises and limits the right to silence at the same time; the question is whether what is left after the limitation is a sufficient protection of the right to silence. The basic issue is whether the duty "to attend and to answer truly" applies to accused persons as well as witnesses. The section is not conclusive on the point in that the criteria it provides is that any person "whose evidence appears likely to be of assistance in the case" may be required to attend and answer questions. The need for the requirement, supported by a threat of prosecution under sections 150 and 156, Sudan Penal Code, is clear enough: the police must have the power to induce co-operation in their efforts to investigate crimes and prosecute offenders. The objection that this power may be used to examine accused persons is not very strong where the police can arrest an accused and question him at length without any restrictions except those imposed by the voluntariness rule.\(^{141}\) An accused person is

\(^{140}\) Reference here is to section 116 C.C.P. which regulates the use of the Case Diary at the trial, see pp. 651-52 above.

\(^{141}\) See Chapter 5 above.
certainly one "whose evidence appears likely to be of assistance in the case." There is no objection anywhere else, whether in the C.C.P. or any other enactment, to the examination of the accused, even when he is identified as such, by the police; they would have to prove the voluntariness of any confession of the accused they wish to introduce in evidence, otherwise they may use the results of such examination of the accused in any way they find useful and helpful in the investigation or prosecution of the case. For the person being examined by the police, whether he is later on accused of the offence or not, to be excused from his duty to answer police questions, he would have to assert that the answers "would tend to expose him to a criminal charge or penalty."\(^{\text{42}}\)

In view of the general relevance of Indian provisions to the Sudan,\(^{\text{143}}\) the position in India must be referred to before a final conclusion on the Sudan section 117 is made. Similar ground in India is covered by sections 160; \(^{\text{161}}\) and 161 of the Indian C.C.P. Direct comparison, however, is not possible because the Indian provisions and practice are to be seen in the context of a constitutional guarantee of the privilege against self-incrimination, and several relevant sections of the Indian Evidence Act. There are also wording difference between the Sudanese and Indian provisions which may be seen as emphasising the substantive

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142. The Code is silent on the question of who decides whether the answer would in fact tend to expose the person to criminal charges or penalty.

143. See Chapter I above.
differences between the two positions.\textsuperscript{144}

Article 20(3) of the Indian Constitution provides that "No person accused of any offence shall be compelled to be a witness against himself." This protection, it has been emphasised, applies to accused persons only and not witnesses.\textsuperscript{145} With respect to witnesses, section 132 of the Indian Evidence Act states that a witness "shall not be excused from answering any questions as to any matter relevant to the matter in issue ... upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind. Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."\textsuperscript{146} Moreover, the limitations of section 25, Indian Evidence Act, on the admissibility of confessions by the accused to the police or while in police custody, do not apply to witnesses.\textsuperscript{147}

\begin{verbatim}
\textsuperscript{144} The much more detailed three Indian sections refer to one who "appears to be acquainted with the circumstances of the case". There is no obligation to "answer truly" under the Indian provisions. See Mitra, The Code of Criminal Procedure, vol.I, 517-56.
\textsuperscript{145} Sarkar on Evidence, 1207.
\textsuperscript{146} Ibid. 1207-14. Emphasis supplied.
\textsuperscript{147} Ibid. 757; but see 1310-13 on the use at the trial of the results of police examination of witnesses.
\end{verbatim}
It makes sense, therefore, in view of these Indian provisions to speak of an obligation on witnesses, not accused persons,\textsuperscript{143} to answer police questions. If the witness should later on become an accused, his confession to the police, if any, cannot be admitted in evidence. If he should remain a witness in that case, his answer cannot be used against him in a separate prosecution.

Any provision or practice is always subject to the overriding constitutional guarantee of the privilege. In India, therefore, the dangers created by the requirement for a witness to attend and answer police questions are somehow overcome and safeguarded against in the constitutional and statutory provisions.

The same is not true of the Sudanese situation; in the absence of constitutional guarantees and specific enactment on evidence, the ambivalence of section 117 C.C.P. is multiplied. On the one hand, to allow one to refuse to answer may be seen as a sign of recognition of the privilege; on the other hand, to face one with the choice of either having to answer, under the threat of criminal prosecution for refusing to answer, or admit that the answer would be self-incriminatory can hardly qualify as a protection of the privilege and right to silence. Moreover, the person being questioned by the police is not told of this choice — as the section

\textsuperscript{143} Mitra, \textit{The Code of Criminal Procedure}, 517 and 538.
does not require a warning— and at best one is left to guess for himself what the consequences of his silence would be, if he was not told of one side of the formula — that he may be prosecuted for refusing to answer — and left to conclude that there is no exception.

Section 213 C.C.P. is also relevant to the consideration whether the privilege is recognised and sufficiently protected in the Sudan. In providing for the power of magistrates to examine the accused in pre-trial and trial proceedings in subsection (1) of the section, it proceeds to state:

"(2) The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the Court may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in the inquiry or trial and put in evidence for or against him in any other inquiry into or trial for any other offence which such answers may tend to show he has committed."

Again, the ambivalence towards the privilege and the right to silence is reflected in this section: on the one hand, the accused is allowed to refuse to answer without fear of prosecution for such refusal; on the other hand, he is offered the choice between adverse inference being drawn from his silence and the possibility of having his answers admitted in evidence against him in the same or any other prosecution.

149. The Northern Nigerian version of the section, namely section 123 of the Northern Nigerian C.C.P., otherwise copied from the Sudanese section, require that the person must "be warned that he is not bound to answer if his answer would tend to expose him..."
The combined impact of sections 117 and 218 C.C.P. is such that one is bound to conclude that the privilege and right to silence receive limited recognition and protection in the Sudan. The various hints at the privilege reflect some awareness of the need to protect the basic policies the privilege is intended to protect; yet the hesitation in coming out in full, or even strong, protection of the right to silence signify the unwillingness to meet the cost in terms of loss of effectiveness and efficiency of the law enforcement efforts. This ambivalence is not healthy, however, for the system in general; the limits of respect and protection of the privilege must be more clearly defined if the police are not to be allowed to overstep the line. For example, the person being interviewed by the police — not to say an accused being interrogated, though often that is the case — must be warned of his right to refuse to answer. I am not personally in favour of maintaining the present arrangements because of their obvious potential for abuse by the police as indicated in chapter 5 above. Starting with the view that a degree of respect for the privilege, protection for the right to silence, is called for — that its basic policies deserve recognition and protection — the proposal to ban all police interrogation of suspects, and allow interrogation only by or before magistrates is to be considered in the next section. As will become apparent, this proposal is based on a positive and expansive view of the participation of the magistrate in pre-trial procedure in the Sudan. In the above evaluation of the participation of magistrates in police investigations and their examination
of the accused it was shown that it is contrary to current common law practice. It was also shown, however, that that is not necessarily a bad thing if it was in better accord with the prevailing local conditions; if it can be shown that it serves the basic policies and purposes of criminal procedure in a more realistic and practical fashion, then it should be maintained and improved. In other words, instead of being apologetic about the magisterial participation, one should be positive in recognising that it is there to stay, and in looking for ways of utilizing it ever further.

(4) A Positive View of Magisterial Participation

We have a high level of magisterial participation in police investigations and magisterial examination of the accused in pre-trial and trial proceedings; and we also have problems in controlling police interrogation of suspects where the privacy of the interrogation and the ignorance of the general population foster a degree of abuse, if not its persistent and regular practice. The question here to be considered is whether the former features of the system can be applied to solve the latter problem while maintaining the basic policy of criminal procedure, namely the detection and conviction of offenders with the least disruption of certain values - such as privacy, personal dignity - and generally keeping individual suffering and hardship to the essential minimum.
(i) **Statement of the Proposal:**

The basic rule in the proposal is that no interrogation of suspects or accused persons is to be made except by or before a magistrate. To apply this basic rule, however, several supplementary rules must be observed:

(a) Suspects and accused persons are not to be kept in police custody in cells in the police station but are to be taken to the local prison or other custody facility where the police will have no access to them except to take them before the magistrate.

(b) Witnesses and other persons whose evidence appears likely to be of assistance to the police in their investigations may be interviewed by the police and they may be summonsed, under section 117 C.C.P., for that purpose. Should any person so interviewed subsequently become an accused person, the results of his prior examination by the police are to be disregarded and he is to be examined by or before the magistrate afresh. No reference may be made during this magisterial examination to the earlier police examination.

(c) No statement of an accused person may be admitted in evidence or used in any way at the trial of such accused person, whether or not he was an accused at the time he made it - unless it was made during and as a result of examination by or before the magistrate.
(d) The examination itself must be conducted by the magistrate although the police or prosecution may suggest questions to be put to the accused.\textsuperscript{150}

(e) An accused person should not be prosecuted for refusing to answer or for giving false answers, but adverse or any other inferences may be drawn and the accused must be advised accordingly by the magistrate.

(f) The examination of the accused must be conducted in private to avoid inhibiting the accused - so that he may be encouraged to answer truthfully and frankly, and to avoid publicity and embarrassment to the innocent accused.

(g) An examination need not be conducted in every case, as it may not be necessary in every case; the basic rule, however, is that no other examination of an accused person is allowed.\textsuperscript{151}

\textsuperscript{150} In the Scottish version of the proposal, the Thomson Committee recently proposed - para.8-12 of their Report - that the procurator fiscal (that is the public prosecutor) should ask the questions since he will have knowledge of the case and the relevant facts. Schaefer, in The Suspect and Society at 79-80, suggested that it should be the police who ask the questions because they "will know what information is relevant and what direction the inquiries should take. Such a procedure would also minimize the risk that the magistrate might come to feel responsible for the successful outcome of the interrogation from a police point of view." The Thomson proposal is unsuitable because the prosecution is never represented by qualified lawyers in the Sudan at this early stage. The objection to the police questioning is that it may intimidate the accused, especially as the magistrate may have to intervene to help and advise the police on points of law.

\textsuperscript{151} The Thomson Committee decided against recommending that judicial examination should take place in all cases in solemn procedure because of the considerable additional load that would place on the courts and procurators fiscal and also because such an examination would not be appropriate or helpful in all cases. The decision to hold an examination is left with the fiscal.

See the Thomson Committee Report, para.811.
In the course of time, if this proposal is accepted, practice may reveal defects and loopholes which will then be corrected and covered. It may also turn out to be impracticable or otherwise undesirable, in which case amendments or replacement may be considered and implemented. At present, this appears to be the most attractive solution to the dilemma of interrogation: the need for interrogation, on the one hand, and the dangers of abuse, on the other. On the assumption that the presence and participation of a qualified magistrate will sufficiently safeguard the interests of the accused while at the same time maintaining the usefulness of the interrogation as an investigative technique, the proposal is clearly the best way out of the dilemma. Only time will tell, however, whether the assumption is justified.

(ii) The Pros and Cons of the Proposal:

One should perhaps begin with the observation that this proposal is not in any way novel — in adopting it one is in distinguished company indeed: it has been made within the context of all three

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152. See chapter 5 above.
legal systems—the United States, England, and Scotland. This does not mean that it is suitable to the Sudanese situation; it does mean, however, that it is at least a feasible solution to the problem of interrogation. As concluded in Chapter 5 above,


155. Kilbrandon, Other People's Law (1966) 102; Smith, British Justice, The Scottish Contribution (1961) 130; Criminal Procedure, Journal of the Law Society of Scotland, Jan.1972, 7, at 18-19. Most recently, the Thomson Committee came in favour of reviving the old Scottish practice of judicial examination for the suspect, see chapter 3 of their Report. According to the Committee's recommendation the judicial examination is not to replace all police questioning, but "statements made to the police by a suspect or an accused person who has been charged on petition will not be admissible at his trial unless put to him at a judicial examination, and the procurator fiscal therefore will be compelled to arrange for an examination unless he is prepared to forego the use of these statements at the trial." Thomson Committee Report, para. 8.11. See also chapter 7 of the Report.
there is a need for some interrogation of the accused; but there is the constant danger of abuse. To say that the suspect or accused has a right to remain silent, a choice to refuse to answer police questions, proved to be extremely problematic: is the accused aware of this right, is he capable of forming an intelligent and rational judgment whether or not to answer, how can one ascertain the facts and circumstances of a secret interrogation in order to decide on questions of voluntariness, etc? Conditions of police interrogation of suspects contrast sharply with conditions prevailing at the trial; yet the real issues of guilt or innocence are often decided on the results of the secretive and oppressive, if not coercive, interrogation of the accused – away from the safeguards of the trial and facilities of proof of what actually transpired at such examination. The implications are even more objectionable in view of the discriminatory tendency of the present arrangements: they tend to work in favour of the sophisticated criminal who is less likely to be intimidated and more likely to be able to weigh rationally the advantages of silence or co-operation in the particular situation. The ordinary inexperienced and often frightened suspect is more likely to be too confused and too ignorant, first, to decide rationally and voluntarily whether or not to answer and, secondly, to appreciate the implications of what he says. In other words, the system of

police interrogation is abused and manipulated by those most likely to be guilty while it abuses and manipulates those most likely to be innocent.

As silence or evasiveness, as well as answers, whether true or false, may be useful at the trial, magisterial examination of the accused enhances rather than weakens the interrogation as an investigative device. It provides an independent, trustworthy and knowledgeable record of the examination of the accused for use at the trial whether for the assessment of a plea of guilty or for the regular trial of the issues. At present, as explained in Chapter 5 above, the interrogation itself takes place out with the presence of the magistrate, or any independent witness for that matter. If a confession is produced then the accused may, but need not, be produced before a magistrate to record his confession. The effect of such recording is to render the record itself admissible, on the assumption that the magistrate satisfies himself when recording the confession that it was voluntarily made. But the recording before a magistrate is not a condition of admissibility, if a confession was not so recorded it may still be adduced in evidence and proved in court by calling the policeman who heard it. Thus, the present procedure for recording before a magistrate does not really certify that the conditions of interrogation were acceptable. Moreover, the recording procedure can be avoided altogether by the police without much difficulty.

The magisterial examination will provide a suitable forum for

157. See p. 559 above.
encouraging the accused to make an early statement of his position, give his version of the facts and explanation of his conduct, if he has any. The provision of this facility has several advantages: the accused's claims may then be verified, and if true charges may be either modified or completely dropped; if they are found to be untrue, however, the comprehensive and trustworthy record will make it easier to expose the falsehood or any subsequent attempt at fabrication of a false line of defence. As Stephen put it nearly a century ago: "No greater test can be given than the fact that as soon as he is charged, and whilst there is still time to inquire into and test his statements, a man gives an account of the transaction which will stand the test of further inquiry." At present, the accused cannot be asked to do that because he cannot be assured that his statement will not be misrepresented or distorted, whether intentionally or not, by the police who may genuinely believe in his guilt. He cannot be assured also that any favourable statements, especially when confirmed by subsequent inquiry, will be reported at the trial. The proposal offers the best conditions possible under which the accused may be invited to make the fullest statement of his position as early as possible.

As the police will have, under the proposal, no physical control over the accused after arrest, they will have no opportunity for abusing or maltreating him; as no statement made to the police

158. Thomson Committee Report, para. 3-14.

is ever admissible, they would have no incentive for abusing or maltreating him. The proposal will therefore not only protect the accused from statements being extracted by tricks, threats or promises - which he cannot prove at the trial - or other oppressive means and being admitted against him at the trial, but also maintain his privacy and personal dignity by removing both the opportunity and the incentive for their violation.

Because of its fairness, thoroughness and increased relevance, the examination of the accused by magistrates fulfills two functions. An early screening process - the accused whose explanation was verified is more likely to be released by a magistrate than by the police who may tend to think that the decision must be taken by a qualified magistrate at the trial. It also tends to eliminate the discrimination between the knowledgeable and the naive in that it makes it harder for the sophisticated criminal to manipulate the system and for the naive to be manipulated by the system. The first purpose is achieved by the magistrate conducting the examination recording his assessment of the explanations and answers given, and the manner in which they were given, beside the explanations and answers themselves; the second purpose is achieved by ensuring that the suspect is aware of his true options in the situation and that he is not coerced or tricked into making a statement he would not make of his own free and voluntary will.

Objections to the proposal may be expected from both sides: that it is too restrictive of the police investigative powers, and
hence of the effectiveness of law enforcement; and that it is restrictive of the privilege and right to silence. The answer to both sources of objection is essentially in the policy decision of the proper balance between the competing interests involved in the criminal process in general. I would submit that the proposal serves each interest at not too high a price in terms of the other interest.

To take the first type of objection in the light of this criteria, what is lost by the banning of all police interrogation may be a rich source of admissible confessions and other admissions, but that is hardly a loss if the cost of obtaining those confessions is taken into account. The pursuit of evidence has its limits, that is why torture and other coercion are not allowed together with wide search and other effective investigative techniques. Moreover, interrogation is not being banned altogether under the proposal, rather it is being regulated and rendered even more effective and controlled at the same time.

Objections from the point of view of the privilege and right to silence are also rejected because the basic policies of the privilege are served better by the proposal than they are by the present arrangements in the Sudan. One who may be examined by the police under threat of prosecution for refusing to answer unless he admits that his answers would tend to incriminate him, one who

160. It may be that other arrangements may serve the policies of the privilege even better; I am not at present aware of any, and should any be advanced they may be examined and adopted if suitable.
may be examined by the magistrate both at committal proceedings and at the trial, can hardly complain of the encroachment on his privilege and right to silence when he is examined by a magistrate who advises him of his true options and explains to him the evidence suggesting his guilt. The accused is already being examined by the magistrate in the Sudan, what is suggested is that no other examination should be allowed, and that the examination by the magistrate should be modified and strengthened in order to replace police questioning completely.

Under the proposal, one is not prosecuted for refusing to answer, but at the same time, his silence or evasiveness are given their reasonable and logical significance which need not always be adverse, and an adverse inference if made need not remain. It is sometimes said that failure to answer or to offer convincing explanations may be due to nervousness or excessive timidity. If that was the case, then any adverse inference that may have been drawn after the magisterial examination may be repudiated after--

161. The accused is examined under section 213 C.C.P. both at the committal proceedings and the trial as shown earlier in this chapter.

162. Though there is no express authority for the magistrate to examine the accused at the early informal inquiry, there is no authority against such examination. Provisions will have to be introduced, if the proposal is accepted, for banning police questioning and authorising informal examination before the magistrate shortly after arrest.

wards when the reasons are known. Moreover, such a person would be worse off at the hands of the police than he would be with a magistrate.

As indicated in the discussion of the privilege and the right to silence above, what really matters are the policies of the privilege and not its formal recognition. On reflection, it will be appreciated that the proposal serves the essential purposes of the right to silence best. As one author put it: 164

"Deprived of the assurance that the prosecutor can probe for a suspect's information by decent, orderly questioning, police are tempted to bully their prisoner into admissions suggesting lines of investigations usable to turn up other evidence of guilt. The privilege may encourage torture rather than the reverse."

This is much less likely, if not impossible, under the proposal. Furthermore, the fishing expedition of holding suspects and hoping to discover incriminating evidence from their oppressive and intensive questioning is also much more less likely, if not impossible. The mere fact that an arrest must be justified, or justifiable, at this stage would ensure that sufficient cause exists before one is subjected to questioning. At present, the police may succeed in interrogating a suspect at length without placing him under arrest in the technical sense.

The need to interview witnesses and even potential accused

persons is also catered for under the proposal without allowing it to become a loophole used to defeat the purpose by interviewing suspects under the pretence that they are regarded as witnesses because statements so obtained cannot be used in court.

(iii) The Proposal and Discovery

In the same way that the basic proposal is based on current practice in magisterial participation in the investigation and examination of the accused, its application to the problem of discovery may also be seen as a development of current practice. At present, the advocate may apply to the magistrate for specific items of information from the Case Diary that he may believe to be beneficial to the defence; the magistrate may also check the witness's statement recorded in the Case Diary to see if it differs materially from his testimony in court etc. These arrangements may work to alleviate the hardship of the present rule, they are unsatisfactory, however, as a permanent and general rule because it presupposes knowledge by the defence advocate of the contents of the Case Diary — or else he could not ask for specific items of information or indicate certain witnesses for inconsistency checks. This is unlikely to be the case in practice. Moreover, the vast majority of accused persons are not represented by an advocate at any stage of the case — they lack the advantage of his educated guess on the contents. Another objection to the current arrangements is that whatever discovery they may provide comes too late in the case; in practice the magistrate is unlikely to meet the
accused's advocate, if any, until the committal proceedings or the trial itself.

The principle of the magistrate inspecting the Case Diary and releasing appropriate information to the defence may be the basis of the discovery rule in the Sudan. As envisaged by the proposal, a magistrate must interview the accused immediately on arrest or very soon afterwards; supervised discovery by the accused or his advocate, if any, can start from that first meeting. As this magistrate is not the one who is going to try the case eventually, he can advise the unrepresented accused or offer information for the advocate of the represented accused without affecting the final disposition of the case. Thus the magistrate may suggest to the accused to seek medical opinion or other expert opinion to support his line of defence; he may also provide samples of handwriting, for example, for that purpose, or allow access for defence accountants, under appropriate safeguards, to inspect records and accounts and try to lawfully substantiate the defence etc.

The magisterial examination of the accused can be used for the administration of a balanced and fair discovery rule in that it can offer the accused the advantages of early discovery under the supervision and control of the magistrate who will follow the course of the investigation - one who is familiar with the prosecution case yet not involved with its final disposition. At the same time the venue may be used to establish a degree of discovery of the line of defence in so far as the examination of the accused will reveal the
possible line of defence, or the lack of it, in a way that may help expose any subsequent attempt at fabrication or perjury. In general, the magisterial examination of the accused may work as a pragmatic and realistic way of policing the balance of discovery in the Sudan. The enforcement of any set of specific rules on discovery would otherwise be extremely difficult; it will tend to work to the advantage of the legally represented accused. The unrepresented accused, that is the vast majority, would neither be aware of his discovery rights nor able to press for their fulfilment. Even for the represented accused, the advocate is most likely to come into the picture much too late to be able to exploit the accused's discovery rights.

(5) **Conclusions**

The basic theme of this chapter may be summarized as follows:

we have too high a level of magisterial participation in police investigations and examination of the accused - both pre-trial and at the trial itself - for a common law system of criminal procedure.

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165. Thomson Committee in Scotland recently recommended "that there should be informal discussion between prosecution and defence prior to the first diet" - a sort of conference to discuss subjects which may include mutual discovery, para. 30.05. In the Sudan the magistrate often has to act as legal adviser for both prosecution and defence.

166. For a very good example of a detailed set of discovery rules see The American Bar Association, Approved Draft, 1970, Parts II and III. The regulations set out in Part IV, however, may indicate the suitability of the proposed scheme for the Sudan: the need to avoid impeding the investigation, continuing duty to disclose, custody of material etc. Discovery under the supervision of a magistrate is the best way of policing and regulating discovery in specific cases.
That is not, however, necessarily a bad thing. Rather than attempt to apologize for the uncharacteristic features or suggest their abolition, the conclusion is that they should be positively developed to resolve some of the dilemmas of pre-trial criminal procedure. There is first the problem of providing for the interrogation of suspects and accused persons—as some sort of interrogation is always necessary—while at the same time safeguarding against abuse. This problem was considered in some detail in Chapter 5 above, but no completely satisfactory answer was found. The magistrate may play a helpful role in the Sudan in that he can replace the police secret interrogation with a fair, intelligent and more direct questioning of the accused under conditions that guarantee the voluntariness, and hence admissibility of the statements obtained.

Another problem in the solution of which a more positive view of magisterial participation may be helpful is that of discovery. In a country where legal representation is the rare exception the magistrate, being in charge of the investigation from the start and in close contact with the accused, may not only supervise the enforcement of discovery rights and safeguard against abuse, but also advise the unrepresented accused on the development of his line of defence and the help he can obtain in that respect from informations and leads he gets from the allowed discovery of the case for the prosecution. The participation of the magistrate makes the accused's discovery early and effective while at the same time guarding against abuse. It may also be used to achieve a degree of discovery of the case for the defence too in that its outline, or
the lack of it, can be put on record too early for any subsequent fabrication or perjury to go undetected. The magistrate may have the discretion to reveal to the prosecution what it needs to know of that case, in the same way that he has the discretion to do so for the defence, to allow opportunity for checking and verification.

In the first section of this chapter it was suggested that magistrates should continue to share prosecutorial powers with the infant specialised service. If and when that service grows up into a complete service with exclusive control on the investigation and prosecution of criminal cases, then the role of the magistrate may be modified accordingly and with reference to the position on the other side of the scale, namely, the level and quality of legal representation for the accused. If the two sides are legally represented then the magistrate's role may be more in the nature of the independent and somewhat aloof referee; he may still be involved in both processes: interrogation and discovery. One change in his actual role may be that the questioning of the accused be left to the prosecution counsel, in the presence of the counsel for the defence and under the supervision and control of the magistrate. The magistrate may also be confined to applying more detailed discovery rules rather than be active in advising the accused on the use of the information so obtained.
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