

Non-prosecutorial functions of the prosecutor in common law countries

In order to understand why, and in what circumstances, prosecutors in common law countries exercise functions other than those of criminal prosecution, it is necessary to say a little about the history of public prosecution in common law jurisdictions.

The home of the common law was England. The first country to which the common law was exported was Ireland, and subsequently common law systems extended to other places colonized by the English, notably to what is now the United States of America, to Canada, Australia and New Zealand as well as many other countries which at one time or other formed part of the British Empire.

Prosecution in England and Wales¹

Historically England did not have a system of public prosecution. Instead the right of the individual to bring and maintain private prosecution was recognized. The efforts of private prosecutors were supplemented in various ways. In the eighteenth century, for example, justices of the peace played an important role in helping the private prosecutor to prepare the case. From the beginning of the nineteenth century prosecution increasingly became the province of the police, although they prosecuted in their capacity as “common informers” rather than as public prosecutors as such. Crimes were also prosecuted by the Attorney General, but not in such a systematic way as would make that officer a public prosecutor in the modern sense. The office of Attorney General had its origins in England in the Middle Ages. The Attorney General’s primary responsibility was to assert and defend the interests of the Crown. This included advising Government and appearing before courts of law on behalf of the Crown or the Government. In addition the Attorney General had functions relating to the protection of public interest and the protection of minors who could not assert their own interests.

While the Attorney General could and did bring criminal prosecutions, and was particularly likely to do so in matters where state interests were concerned, such as treason, sedition or criminal libel, the Attorney had no monopoly on prosecution nor was the function of the office primarily that of prosecution. The one power the Attorney did have which savours to an extent of public prosecution was the power to take over prosecutions brought by another person and to continue or to discontinue them by entering a *nolle prosequi*. In this respect, however, it would be more accurate to describe the Attorney General as a prosecutor of last resort than as a public prosecutor.

Prosecution in Ireland

¹ For further discussion on the origins of the prosecution system in England see J.L.L.J. Edwards *The Law Officers of the Crown*, London, Sweet and Maxwell, 1964

In Ireland, matters developed very differently. Ireland with its history of foreign conquest, native disappropriation and foreign settlement, leading to a divided society marked by agrarian disturbances and intimidation was not a society in which the idea of the ordinary person enforcing the criminal law through a system of private prosecution could take root. Enforcement of the criminal law was seen as a function of government, not as a duty of the private citizen. From the early nineteenth century on the Irish Attorney General was effectively in charge of a prosecution service and crown solicitors were appointed to each county to prosecute on behalf of the Attorney General. Advocacy in court was carried out by crown counsel who were briefed by the crown solicitors to represent the Attorney General. This system of prosecution survived more or less unchanged in Ireland until the middle of the twentieth century, notwithstanding the changes brought about by Irish independence after 1922 including the establishment of the office of Attorney General on a constitutional basis in 1937². The nineteenth century Irish Attorney General combined the functions of prosecution the functions of representing state and governmental interests in matters of civil law as well as the function of asserting and protecting the public interest and this continued to be the case well into the twentieth century.

Prosecution in the United States

It is beyond the scope of this paper to discuss the practice in the United States of America other than to say that there the principle was adopted that enforcement of the criminal law was the responsibility of the federal or state government, as the case might be, acting through officers appointed for that purpose. At a federal level the system of prosecution was and is ultimately controlled by the Department of Justice headed by the Attorney General. At a state level there is a wide variety of arrangements, many of them involving the intervention of elected prosecutors.

The DPP in England and Wales

In England by the middle of the nineteenth century the system of private prosecution had become discredited. There were serious abuses principally involving bribery, collusion and illegal compromises. As was stated by Lord Campbell, the Chief Justice of the King's Bench, "The Criminal Law is often most shamefully perverted to serve private purposes. Indictments for perjury and conspiracy are in a great majority of cases preferred with a view to extort money; the same for keeping gaming houses and brothels."³ There was a recognition, too, of the disadvantages of leaving prosecution decisions in the hands of the police. Many commentators criticized the situation in England with that of Scotland and Ireland where public prosecution existed.⁴

² Article 30 of the Constitution of Ireland

³ Evidence before the House of Commons Select Committee on Public Prosecutors, quoted in J.L.L. J. Edwards, *The Law Officers of the Crown*, London, Sweet and Maxwell, 1964, at p.343

⁴ The Scottish prosecution system is in origin a civil law system and I have not discussed it in this paper.

England and Wales, despite being the original home of the common law, came later to the idea of public prosecution than other common law jurisdictions. In 1879 the Office of Director of Public Prosecutions was created.⁵ Despite the calls by many commentators for a fully-fledged public prosecution system the DPP's role was essentially a very limited one. Acting under the superintendence of the Attorney General the DPP's functions were to "institute, undertake or carry on such criminal proceedings as may be for the time being prescribed by regulations or may be directed in a special case by the Attorney General".⁶ Initially the role was limited to giving advice and making decisions to prosecute.

It is beyond the scope of this brief address to trace the history of the office of the DPP in England and Wales.⁷ Suffice it to say that the DPP dealt with only a small number of cases (albeit that these were the most important cases). As late as 1960 the DPP's cases amounted to only eight per cent of the total number of prosecutions for indictable offences. The bulk of cases were prosecuted by police or other investigative agencies. Not until the creation in 1985 of the Crown Prosecution Service was there a fully fledged public prosecution system in England and Wales⁸. Even after this development, however, the police retained the power to make the initial decision to charge a suspect with an offence and the prosecution service lacked the power to direct investigations. Not until the passing of the Criminal Justice Act 2003 was the prosecution service finally given the power to make the initial decision on charging in the most serious cases. The DPP for England and Wales, who is the head of the Crown Prosecution Service, still acts under the superintendence of the British Attorney General.

The DPP in Ireland

Developments in Ireland followed a somewhat different path. It has already been noted that from the early nineteenth century on the Attorney General and the Attorney's officers effectively constituted a prosecution service. In 1937 the new Constitution of Ireland conferred on the Attorney General the function of prosecuting all crimes and offences prosecuted in any court other than a court of summary jurisdiction in the name of the People of Ireland.⁹ The relevant provision also left open the possibility of appointing some other person to act for this purpose. In addition the Attorney General had a residual power to prosecute in summary offences which were not prosecuted by any other person¹⁰.

⁵ Prosecution of Offences Act, 1879 42-43 Vict., c.22

⁶ See Jackson and Hancock *Standards for Prosecutors, An Analysis of the United Kingdom National Prosecuting Agencies*, Wolf Legal Publishers, Nijmegen, 2006, at p. 82

⁷ See *ibid*, also *Edwards*

⁸ Prosecution of Offences Act, 1985

⁹ Article 30.3 of the Constitution of Ireland states: "All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

¹⁰ Section 9(2) of the Criminal Justice (Administration) Act, 1924

The Attorney General, of course, also exercised the function of advisor to the Government in matters of law and legal opinion as well as the function of representing the public interest.

In 1974 it was decided to create a new office of Director of Public Prosecutions and to transfer to that officer “all the functions capable of being performed in relation to criminal matters and in relation to election petitions and referendum petitions by the Attorney General immediately before the commencement of this section”.¹¹ Two reasons were advanced to support this change. The first was that with the accession of Ireland in 1973 to the European Economic Community (as it then was) there would be a large increase in the amount of legal advice that the Government would require from the Attorney General in connection with European law and it would be advantageous to lessen the workload by transferring the criminal prosecution functions elsewhere. Secondly, it was acknowledged that there was a public perception that there could be political interference with the business of prosecution, although there was no acknowledgement that there had in fact been any such interference. The Attorney General was an officer appointed by the Taoiseach (prime minister) of the day, who sat at the cabinet table with the Taoiseach and the other members of the Government. Despite the Attorney’s undoubted independence of Government, which had been upheld in the courts¹², it was accepted that the public at large would not always be convinced that prosecutions were taken without reference to political considerations. It may be significant that the Office of DPP was established a mere four years after the Taoiseach in 1970 had sacked three ministers following which two of them had been charged with the illegal importation of arms into Ireland.¹³

Since the establishment of the Office of the DPP in Ireland in 1974 developments have seen a gradual transfer of functions away from the police and towards the prosecution authority. It had long been the practice that most summary prosecutions were brought in the name of the Director of Public Prosecutions by the Garda Síochána (police) and that in such circumstances the DPP could give directions concerning their disposal. In 2005 the Garda Síochána Act 2005 formalised this position by providing that henceforth the police could not prosecute as common informers when they acted in their official capacity but must do so in the name of the Director of Public Prosecutions and subject both to the DPP’s general directions and to any specific directions given in an individual case.¹⁴ In Ireland, unlike the situation already described in England, the DPP always had the power to insist that the police not charge without first obtaining consent to do so.

¹¹ Prosecution of Offences Act 1974

¹² In the case of *McLoughlin v. Minister for Social Welfare* [1958] IR 1 the Supreme Court had to determine whether an employee of the Chief State Solicitor’s Office (which was a service assigned to the Attorney General) was a government employee for the purposes of social welfare law. The Court ruled that the Attorney General is an independent constitutional officer, independent of the Government.

¹³ Readers of the parliamentary debates on the establishment of the DPP’s office in Ireland will search in vain for any mention of this elephant in the room!

¹⁴ Section 8 of the Garda Síochána Act 2005

The only non-criminal prosecution function conferred on the Director of Public Prosecutions in Ireland relates to election and referendum petitions.¹⁵ The reason for the transfer to the DPP from the Attorney General appears to have been to ensure that an officer not beholden in any way to the government of the day would have this responsibility. However, the DPP has pointed out in the office's Statement of Strategy that this function sits uneasily with his criminal prosecution functions and it is intended in the near future to transfer these functions to a new electoral commission as soon as that body is established.¹⁶

The new Office of Director of Public Prosecutions in Ireland differed from the English model insofar as the DPP was declared to be independent and is not subject to superintendence by the Attorney General. However, there is a reporting relationship insofar as the Act establishing the DPP provides that the Attorney General and the Director "shall consult together from time to time on matters pertaining to the functions of the Director"¹⁷.

Other Common Law Jurisdictions

In Australia Directors of Public Prosecution have been established in all six states, two territories and at the federal level. The precise relationship in each case with the Attorney General varies from state to state and ranges from complete independence to a degree of general supervision or issuance of guidelines but generally speaking the independence of the prosecutor at the level of the individual case is protected. In Tasmania, as well as carrying out the function of criminal prosecutor the DPP also represents the state in civil matters. In this respect his position seems to be akin to that of the Attorney General in many small jurisdictions. In South Australia the prosecutor deals with civil remedies arising from prosecution. In other Australian jurisdictions the functions of the DPP are confined to those of criminal prosecution.

Canada has also seen the emergence of independent DPP systems in recent years. The traditional Canadian model involved an Attorney General who was also Minister for Justice and who had the function of criminal prosecution among many other functions including that of being a cabinet member and being in charge of matters such as law reform as well as civil cases involving the interests of the Dominion or the province. In practice, the prosecution service would be run by a senior official within the Department of Justice who would have power to make decisions at the level of the individual case without reference to the Attorney General. However, the power of the Attorney General to intervene to direct the prosecutor varied from one province to another. In British Columbia where the Attorney General gave a direction, the direction had to be made in public¹⁸, with the result that any exercise of this power would be likely to come under public scrutiny. Nova Scotia established an independent Office of the DPP in 1990.

¹⁵ Prosecution of Offences Act, 1974

¹⁶ Strategy Statements of the Office of DPP are available electronically at http://www.dppireland.ie/publications/strategic_plans/

¹⁷ Section 2 of the Prosecution of Offences Act, 1974

¹⁸ This is generally done through publication in a relevant gazette

In 2006 a new independent Office of Director of Public Prosecutions was established at the federal level in Canada.¹⁹

In Northern Ireland, the DPP has at present a relationship with the British Attorney General similar to that of the English DPP. When the justice and home affairs functions are devolved to the local Northern Ireland institutions it is intended that the Northern Ireland DPP will have a similar independence to that of the DPP in Ireland.

A key feature of the offices of Director of Public Prosecutions which have been established in many common law jurisdictions is that they almost invariably relate solely to the function of prosecution in criminal cases. There are some exceptions – the function in relation to election and referendum petitions in Ireland and the civil law functions in Tasmania are examples - but on the whole the purpose of establishing DPP offices seems to be a recognition that criminal prosecution is a discrete function which is best exercised independently of and apart from any other function of government and that prosecution decisions should not be made by governments or by persons who answer directly to them. It is clear that if governments exercise a control over who is to be prosecuted and for what charges, they may make decisions for motives which do not always serve the interests of justice or fairness.

In many common law jurisdictions, particularly in small jurisdictions, criminal prosecution continues to be a function of the Attorney General and to be exercised together with all the other functions the Attorney General has, including the giving of advice to and representation of the interests of the authorities in relation to non-criminal matters. In small jurisdictions this is no doubt justified by the expense and difficulties involved in creating separate institutions. For example, criminal prosecution is still the function of the Attorney General in Cyprus, Malta, the Isle of Man and the Channel Islands, as well as a number of other small jurisdictions. It may be noted, however, that in at least some of these jurisdictions (for example, in Cyprus) the Attorney General is a permanent officer independent of government rather than a political office holder. In this respect the position would appear similar to that of the DPP in Tasmania.

The more difficult questions as to whether there is a true separation of the prosecution function from other responsibilities may arise where there is a separate prosecutor established who is effectively subservient to the Attorney General or some other public official. In such a case, even though criminal prosecution is entrusted to a specific individual, the real decision may be made at a higher level by somebody who carries out other functions and has other interests and who may not necessarily put those other interests out of mind in making the decision. Having said that, an examination of the various reporting arrangements which are in place in many common law jurisdictions

¹⁹ The Public Prosecution Service of Canada was created by the Director of Public Prosecution Act on December 12, 2006, when Part 3 of the Federal Accountability Act came into force.

tends to suggest that the usual practice (at least on paper) is to confine any power of instruction that the Attorney General may have to general principles while leaving the decision in individual cases to the prosecutor. Furthermore, the reporting relationship is usually to an Attorney General who is declared to be independent in the exercise of prosecutorial functions even though a political appointee and close to Government.

However, it must be conceded that where there is a reporting relationship at all, however independent the prosecutor is in principle, it is difficult to exclude totally the possibility of pressure being brought on the prosecutor in an individual case.

Conclusion

In conclusion, the tendency in common law countries outside the United States, which differs in so many respects from other common law jurisdictions, has been to confer the power to decide on and conduct prosecutions on an officer specially appointed for that purpose. That officer is either independent of Government or has a reporting relationship with an Attorney General. In most cases the Attorney General is a politically-appointed officer who is expected to take prosecutorial decisions for which he or she has responsibility independently of government.

The tendency outside very small jurisdictions is not to combine the prosecution power with other functions. This serves to protect the prosecutor's independence by avoiding conflicts of interest. It also promotes the idea of the separation of powers. The power to prosecute is itself a very great power which if combined with other powers may create an overmighty institution which can too easily be abused and used as an instrument to oppress rather than to protect the citizen's human rights.

Common law systems tend to separate the investigative power, which is with the police, from the prosecutorial power. The potential for abuse where the two are combined can be very great and there are obvious dangers in allowing the investigator to decide whether to prosecute. Having the prosecution decision taken by an officer independent of the investigator is more likely to ensure respect for the rights of the suspect. This is not to say that the prosecutor might not appropriately have powers to supervise the exercise of investigative powers in certain cases.

Common law systems also exhibit a marked distinction and separation between the prosecutor and the judiciary. Usually the prosecutor requires the authority of a court of law to exercise such functions as permitting the search and seizure of evidence or to carry out arrests other than in clearly defined circumstances. While the prosecutor is required to observe human rights it is the courts, not the prosecutors, who are the final protectors of human rights. A system where the prosecutor was regarded as the ultimate protector of human rights would have no human rights protection at all.

Confining the function of the prosecutor to prosecution is a vital element in this scheme. In this connection Recommendation 1604(2003) of the Parliamentary Assembly of the Council of Europe on the role of the public prosecutor's office in a democratic society governed by the rule of law is of great importance. That Recommendation referring to the non-penal law responsibilities of prosecutors, declares:-

"it is essential:

a. that any role for prosecutors in the general protection of human rights does not give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights;

b. that an effective separation of state power between branches of government is respected in the allocation of additional functions to prosecutors, with complete independence of the public prosecution from intervention on the level of individual cases by any branch of government; and

c. that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions;"

In the writer's opinion it is important that these principles be respected, both to ensure that the prosecution decision is taken on its own merits and independently of all improper or extraneous considerations, and in order to ensure a proper balance between the institutions of state and to avoid the creation of institutions with too great powers and too limited accountability and answerability.

James Hamilton
Director of Public Prosecutions, Ireland