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Prosecution Services and Their Relationships With Government

I Introduction

When I was asked to speak on this subject, I was happy to do so in that it was a subject in which I have some interest. However, since then, because of two cases in which the involvement of the Attorney General of England and Wales has been the centre of press and parliamentary comment, the subject has become one of some current interest in the United Kingdom (UK). That said the UK does give us the opportunity of looking at a range of models for the relationship between prosecution services and government which can give us cause for thought about what they are and what they might or should be.

What is the United Kingdom or, to give it its full name, the United Kingdom of Great Britain and Northern Ireland. It is a sovereign country which, under that name, is a member state of the European Union (EU) and the United Nations (UN). The united kingdoms are those of England, which since the thirteenth century has included the Principality of Wales (formally joined by the Act of Union of 1536), Scotland (joined by union with England and Ireland in 1707) and Ireland (joined by union with England in 1801 and divided into two in 1920 with Northern Ireland remaining within the union and the remainder of the island becoming an independent country).

For some purposes, notably sporting ones, the UK appears to be four countries – England, Northern Ireland, Scotland and Wales. Logically one would expect there to be one national prosecution service or four. In fact there are three – the Crown Prosecution Service of England and Wales (the CPS), the Crown Office and Procurator Fiscal Service (COPFS) in Scotland and the Public Prosecution Service for Northern Ireland (PPSNI). This mirrors the three legal jurisdictions - Wales seems to have suffered by being subdued at an early stage. Two of these are pure common law systems but one, Scotland, while having in many ways the appearance of a being a common law system, displays a number of idiosyncratic differences which are reminiscent of the civil law world. Without labouring the point, prosecutors in Scotland are not called Crown Prosecutors or Public Prosecutors, common nomenclature in common law jurisdictions, but Procurators Fiscal, a name more readily recognised in Latin America.¹

¹ There is presently no comprehensive account which compares and contrasts the UK prosecution systems. For a recent survey focusing on the English system but also making reference to Scotland and Northern Ireland, see White, “Investigators and Prosecutors or, Desperately Seeking Scotland: Re-formulation of the

Scotland which has the most established of the three systems is also the most straightforward of the three. The concept of a public prosecutor began to emerge in Scotland in the fifteenth century and took hold when a single law officer, the Lord Advocate, took responsibility for prosecutions. Today prosecutions in Scotland are undertaken by the Crown Office and Prosecutor Fiscal Service which is headed by the Lord Advocate and this one body has, to all intents and purposes, a monopoly over the prosecution process. England and Wales has, by contrast, a much more complicated system. The system was founded on the principle of private prosecution according to which anyone could prosecute any other person in the name of the Crown. During the nineteenth century the police forces which had been established in England and Wales began to fill this prosecutorial role. The largest prosecuting authority today is the CPS which was created in England and Wales in 1986 to take over prosecutions from the police. It is headed by the Director of Public Prosecutions under the superintendence of the Attorney General for England and Wales.

Unlike the COPFS in Scotland, the CPS does not have a monopoly over the prosecution process in England and Wales. The police retain the power to initiate prosecutions, although the CPS has recently been given the power to institute proceedings by means of 'statutory charging'.² Second, in addition to the CPS, there are a number of other specialised prosecuting agencies which account for approximately a quarter of all prosecutions in England and Wales.³

Northern Ireland has a system of prosecution which has been described as sitting "between the Scottish and English extremes of age and complexity".⁴ A system of public prosecution was established in Ireland some two centuries ago but the system in Northern Ireland has undergone considerable change recently with the creation of a new Public Prosecution Service in 2005 headed by the Director of Public Prosecutions for Northern Ireland under the supervision of the Attorney General for Northern Ireland.⁵ Like the COPFS in Scotland, the PPSNI has the power to direct as well as conduct prosecutions but it does not have the same monopoly over public prosecutions as the COPFS. Instead the prosecution system in Northern Ireland mirrors England and Wales in the number of other prosecuting agencies that pursue specialised prosecutions. The SFO, for example, operate in Northern Ireland as well as in England and Wales.

II Relations with Ministers

'Philips Principle'" (2006) 69 *Modern Law Review* 143. For an international perspective which makes reference to all three UK systems but is now somewhat outdated, see Bryett and Osborne, *Criminal Prosecution Procedure and Practice: International Perspectives* (2000).

² Under the Criminal Justice Act 2003. See chapter 5.

³ Ashworth and Redmayne, *The Criminal Process* (3rd ed, 2005), p. 142.

⁴ White, *supra* n 1, 148.

⁵ *Under the present constitutional arrangements the Attorney General for England and Wales and the Attorney General for Northern Ireland are offices held by the same person. This is set to change under the new devolutionary arrangements for Northern Ireland as explained in Section Part III below .*

Although the three prosecution systems share a number of common features, there are very real differences in structure at the highest level and at the interface between the three national prosecution services and ministers – differences which are very relevant in the light of some recent and current cases.

In the U.K.'s three criminal jurisdictions, the relationship between prosecutors and ministers spans the whole spectrum from total ministerial involvement to mere consultation with two other models in between. There are indeed four models to be considered - the Scottish model, that in England and Wales, the current position in Northern Ireland and the position which will obtain there when government is devolved to Northern Ireland.

First, let us look at the Scottish model. The Crown Office and Procurator Fiscal Service is the body responsible for prosecutions in Scotland. However, unlike other jurisdictions, there is no director of public prosecutions or prosecutor general. The Crown Agent is a prosecutor, a civil servant with the rank of permanent secretary. He runs the department and is responsible for its staffing and budget. He is the organisation's chief executive. However, he is demonstrably not the chief prosecutor. This function lies with the Lord Advocate, who is assisted in his rôle by the Solicitor General. Both are politicians. The Lord Advocate is a member of the devolved Scottish Executive. She answers for the COPFS in the Scottish Parliament. Her predecessors have been members of the upper house of the United Kingdom Parliament. She is also actively the chief prosecutor in the jurisdiction.

It could be argued that this is an exemplary model in terms of accountability. The prosecutor with whom the buck stops answers for the prosecution service in parliament. The Lord Advocate and the Solicitor General are responsible for all the decisions taken by the COPFS and indeed take many of the most sensitive ones themselves. How then is the independence of prosecutorial decision-making maintained? The Lord Advocate and the Crown Agent see themselves as jointly responsible for ensuring the independence of decision-making from improper political interference. The Lord Advocate is given a certain authority in resisting any political interference by section 48(5) of the Scotland Act which provides that "Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person". The last Lord Advocate, as the senior Law Officer, was firm in the view that it would be for him to resist any pressure from the executive to influence individual decisions. Equally it would be his duty to resist any improper political pressure from members of the Scottish Parliament. He may be accountable to the Parliament (and may ultimately be removed by Parliament) but this does not mean that he should be subjected to interference on individual decisions by individual Scottish MSPs. Similarly, the Crown Agent, as head of profession, would see it as a resigning issue if he was under pressure to take a decision which he viewed as political.

In England and Wales and Northern Ireland the relationship of the Attorney General with the Directors of Public Prosecutions (DPPs) are currently similar to each other. At

present the Director of Public Prosecutions for Northern Ireland must exercise his functions under the “superintendence” of the Attorney General and is subject to “any directions given by him” which extends to decisions in individual cases.⁶ In England and Wales the DPP acts under the “superintendence” of the Attorney General.⁷ This relationship is currently described on the CPS website thus:⁸

“The superintendence of the Attorney General over the independent CPS, the details of whose decision-making usually cannot be discussed publicly, is an important constitutional safeguard for the public. In practice, the Director consults the Law Officers or keeps them informed about the conduct of appropriate cases; consults them in the development of aspects of CPS policy and practice; and may discuss with them the whole range of casework and organisational issues.”

The Attorney General’s view of the relationship is contained in the Attorney General’s Review of the Year 2001 – 2002 :⁹

“The Director of Public Prosecutions, ...the head of the CPS, is appointed by the Attorney General and superintended by him. This means that the Attorney General (i) has ultimately the ability to give directions to the DPP in relation to the overall conduct of the CPS and its prosecution policy and (ii) is answerable in Parliament for decisions or actions that he or the DPP takes on prosecution matters and for the policy that is applied by the CPS in the handling of particular cases. successful holders of both offices have accepted that this means that in relation to individual prosecuting decisions, in the event of disagreement between the Attorney General and the DPP, the Attorney General's view would prevail.”

The Attorney General, with current responsibilities for England and Wales and, separately, for Northern Ireland is a government minister, a member of the legislature and, in the terms expressed above, the de facto chief prosecutor. As with the Lord Advocate in Scotland, however, he is, most importantly, the government’s chief Law Officer and it is this rôle which is crucial. The tradition of independence of this office is an ancient one. It means that the Attorney General or Lord Advocate is, when performing these functions, independent of the government and is its senior legal advisor. The United Kingdom as a whole does not have a written constitution and the relationships between various parts of the state are often governed more by tradition than statute. The traditional independence of the office of the Attorney General was severely tested in the Campbell case in 1924 when Ministers were accused of instructing the Attorney General and the DPP to withdraw proceedings which had been brought against the editor of a Communist newspaper for inciting mutiny.¹⁰ Since this case, however,

⁶ Section 40(2) of the Justice (NI) Act 2002.

⁷ Section 3(1) of the Prosecution of Offences Act 1985.

⁸ See www.cps.gov.uk

⁹ See www.lso.gov.uk

¹⁰ *The full story of this notable case is chronicled in Edwards, The Law Officers of the Crown (1964), chapter 11. With the availability of Cabinet records Edwards wrote an addendum to the case in 1984 in which he considered that his earlier interpretation of the Attorney General's stance in the case had been*

there would seem to have been no serious or undue fallings out between prosecutors and ministers. What then are the constitutional safeguards? As far as we can see there are none in a traditional sense. There is no written constitution for the U.K. as a whole and none of the U.K. legislation is comparable to a prosecutors' act which may be found in a number of countries.

The answers are more subtle and are allied to the workings of a mature and sophisticated democracy. First, we have a press which is not only free but, many would think, intrusive. The advantage of this is that there would be, as in the Campbell case, an uproar if any improper political interference were to take place. A politician's hope that such an action would not be discovered would no doubt be forlorn. There is the Civil Service Code and its mechanisms which would again alert both public and Parliament to the issues. Parliament itself would also be a forum for airing the issues and in 1924, in a much more compliant era, the Campbell case was at least one factor in the downfall of the government. We should also mention here the processes of judicial review which could also be used to review particular decisions. The result perhaps depends on one's standpoint. Are the democratic institutions described here sufficient safeguard or is there need for a formal legislative explanation of the various relationships?

Interestingly, the future position in Northern Ireland, once devolved government is reinstated, will feature a new-look relationship between the Attorney-General for Northern Ireland and the DPP. Section 42 of the Justice (Northern Ireland) Act 2002 provides for the future :

Independence of Director

- (1) The functions of the Director shall be exercised by him independently of any other person.
- (2) The Director must consult the Attorney General for Northern Ireland and the Advocate General for Northern Ireland –
 - (a) before issuing or making alterations to a code under section 37, and
 - (b) before preparing his annual report.
- (3) The Attorney General for Northern Ireland and the Director may (from time to time) consult each other on any matter for which the Attorney General for Northern Ireland is accountable to the Assembly.
- (4) The Advocate General for Northern Ireland and the Director may (from time to time) consult each other on any matter for which the Attorney General for Northern Ireland is accountable to Parliament.

Section 43 of the 2002 Act goes on to provide that the Director or Deputy Director may only be removed from office by the Attorney General for Northern Ireland if a special tribunal consisting of a Lord of Appeal in Ordinary and a person who has held office as a judge of the High Court in England and Wales or a judge of the Court of Session has

*“too charitable” and that the expanded record showed a “compliant Attorney General anxious to do the bidding of his political colleagues assembled in the Cabinet.” See Edwards, *The Attorney General, Politics and the Public Interest* (1984), 310, 314.*

recommended removal on the ground of misbehaviour or inability to perform the functions of the prosecutor.

This is, of course, a considerable departure from the other U.K. models and owes more to the model that has been developed in the Republic of Ireland.¹¹ It is, perhaps, more in line with the relationships envisaged by the IAP and the Council of Europe and, who knows, it may point to a new way for future consideration elsewhere.

¹¹ See the Prosecution of Offences Act 1974. A full account of the relationship between the Attorney General and the DPP in Ireland is to be found in Casey, *The Irish Law Officers* (1996) and Walsh, *Criminal Procedure* (2002), 580 – 592.