

THE ROLE OF THE PUBLIC PROSECUTOR IN UPHOLDING THE RULE OF LAW

It's a great honour for me to address this eminent assembly. I am very conscious of the qualifications and experience of other speakers so I hope you will forgive my address to you, as a humble practitioner still – despite the grey hairs – having served as a prosecutor firstly employed by the police, then for many years as a defence lawyer and, I hope finally, as an independent public prosecutor.

I suppose I can at least claim to have seen and experienced the issues which I will raise from different points of view but I do now say how proud I am to serve the public and justice in a role which I always aspired to but which has only become available for lawyers in England and Wales since 1986. The Crown Prosecution Service is now just 20 years old and we are still in a process of development but we have achieved a great deal and we learn much from others. This is why these kinds of meetings are so useful and important.

In my sort address, I will deal with who or what is the Public Prosecutor, what is his/her role and then cover how the rule of law is upheld and public confidence maintained through the establishment of suitable and appropriate structures and systems and by what are sophisticated interactions with the press, other state organs, the defence and prosecution witnesses.

INTRODUCTION

1. Citizens who pay through their taxes for their criminal justice systems have many expectations in return. They expect to be able to live a life free from violence. They expect to be able to enjoy their property and not have it stolen. And if someone breaks the law which hurts or injures them in some way, they expect that the authorities will take appropriate action.
2. In other words, they expect the law to be upheld and the guilty punished in return, say, for not seeking personal revenge or engaging in some kind of vigilantism.
3. But the rule of law can mean many things: at its worst, superficial but enthusiastic support of this epithet becomes a justification for the enforcement of the worst kind of unfair or oppressive laws. But in a modern developed society, the rule of law must be linked to the enforcement of just laws; laws that are compatible with standards such as the European Convention of Human Rights – so I approach my short address to you today on the basis that the rule of law refers to laws that are fair and reasonable.
4. A modern criminal justice system is a complex and expensive process. It requires a gate-keeping filter which only admits cases where the admissible evidence sufficiently points towards guilt. Too many failures to meet what must necessarily be the exacting standards to prove guilt beyond reasonable doubt will inevitably cause a loss of public confidence in the rule of law with the damaging consequences that ensue. This gate-keeping role is that of the Public

Prosecutor.

5. So today I will attempt to raise issues that you may find worthy for further discussion during the debate that is to follow. My practice over the last 30 years has been under the influence of the Common Law adversarial system as it has evolved in England and Wales but I have been fortunate enough to view many other jurisdictions and to meet their very worthy practitioners. I have drawn on that knowledge where I can.

WHO IS THE PUBLIC PROSECUTOR AND WHAT IS HIS/HER ROLE?

6. The Public Prosecutor is appointed by the State to scrutinizing allegations that citizens have broken the law, and usually works with the investigator to examine the detail before subjecting the accused to the trauma and expense of the trial process. There are various models for this relationship – which I will deal with shortly.
7. The Public Prosecutor applies a set of published standards for prosecution objectively to the evidence, no matter who the subject of the investigation, and will form a judgement exclusively on the facts as to whether there is sufficient to prosecute or merit further investigation or whether no further action need be taken.
8. If the evidence is *prima facie* sufficient, he should also have the discretion whether to prosecute either at all or to deal with the offender in a different way, again according to a set of open and transparent conditions often labelled as public interest criteria.
9. The Code by which the prosecutor makes judgements will facilitate the application of published standards on diversity, gender, sexual orientation and race which will have been strengthened by a process of public consultation.
10. The Public Prosecutor will present cases in court fairly and deal with appeals as necessary, ensuring that the court is provided with all relevant facts.
11. The important point is that whatever the process, it must be and be seen to be consistent, fair and proportionate to maintain public confidence and support. This is a necessary and fundamental aspect of upholding the rule of law: allowing cases into the justice system that need some kind of judicial attention while dealing with the remainder appropriately – perhaps through some diversion mechanism. This is the burden and indeed the challenge for the modern Public Prosecutor.
12. Critics might quite rightly say that prosecutorial discretion is open to abuse and that the rich and powerful are more likely to be the beneficiaries of a decision not to bring proceedings through their ability to manipulate the system or the personalities involved.

“QUIS CUSTODIET IPSOS CUSTODIET?” – WHO POLICES THE PROSECUTOR: THE NEED FOR CHECKS AND BALANCES

13. To preserve public confidence in upholding the rule of law, the Public Prosecutor is therefore under a constant obligation to demonstrate that he or she is also subject to the same laws. There needs to be some kind of what is called ‘checks and balances’ to police and prove the integrity of the process.
14. So prosecutorial operational procedure must be open and transparent, with audit trails for decisions and suitable management checks operated by high principled and professionally qualified officials. Decisions must be taken at the right level and by those not involved nor seen to be involved in the case. There may be a role for a prosecution or criminal justice inspectorate
15. Further, any prosecutorial decisions must be open to an approved process of independent examination and challenge, if necessary, in a Court with the power to judicially review the process and make orders that will affect the outcome. However, this needs to be appropriately limited so as to avoid a level of litigation that would make the ordinary business of prosecution unworkable. The doctrine of reasonableness has an important part to play.

PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM - RELATIONSHIPS WITH THE PRESS

16. A free and independent press has an important role in the provision of the oxygen of publicity to the failings of those that operate the justice system.
17. The press may not always get it right but they can and do act as a thermometer of public opinion, exposing poor, suspect or even outrageous decisions. Their ability to do so does not make the job of the prosecutor any easier, but then nor should it make any difference to a system that is acting honestly efficiently and fairly.
18. For the prosecutor, a healthy and open relationship with the Press is therefore beneficial for the rule of law, albeit not always an easy one. The public’s need or even right to know needs to be balanced with the rights of the unconvicted and agreed rules of engagement should ensure that the trial takes place in court not in the media beforehand.
19. Occasionally, sensitivities of various sorts must impinge on the flow of information but in a good working relationship, this will be understood and contributes to maintaining the complexities of the fabric of the rule of law and respect for due process.

RELATIONSHIP WITH STATE ORGANS

20. To carry out his role fairly and be seen to be a strong bulwark of the rule of law, the Public Prosecutor must not be, nor be seen to be, too close to any other

official organ of State or grouping, or other powerful corporate or individual interest.

The State itself

21. It is perhaps the relationship with the State itself which is most problematic and where the needs for safeguards are the most important. The State is after all the paymaster and cannot stand idly by watching the rule of law crumble through inefficiency or overtly wrong, unjust or partisan decisions by the prosecutor. A process of some open accountability and agreed efficiency standards needs to be agreed and monitored.
22. The office of the Prosecutor General, perhaps appointed through an independently overseen process, needs some safeguard on continuity of employment in order to act without fear of upsetting the Executive or any other pressure group. This needs to be supported by suitable conditions of service for employees, with good career paths and incentives to attract and retain the best lawyers, and with the necessary safeguards of the State if any are personally threatened.
23. The Prosecutor General must have the ability to act in an unfettered way, free of intimidation or threat, yet with the ability to co-operate with other criminal justice organs in order to participate in a process that is efficient.
24. Suitable and appropriate internationally agreed methods of international co-operation are ever more important if terrorism and trans-national crime are to be prevented from subverting the nation state.

The Police

25. A slow, unresponsive, over-bureaucratic and wasteful prosecutorial system will not attract public confidence so the Public Prosecutor must be able to work with the investigator to produce strong prosecutions in order that the wicked are convicted and punished and public confidence in the rule of law maintained.
26. There are many models for this co-operation from integration, supervision or co-operation. There are strengths and weaknesses in all three mentioned.
27. But one should not confuse separation and independence and working closely should not be stigmatised as indicative of lack of impartiality. Indeed the relationship between the police and prosecutor is key, with mutual respect and professional relationships being hallmarks for the proper functioning of this part of the criminal justice process.
28. The difficult balance for the prosecutor then is to be independent and not just be, or be seen to be a 'police prosecutor'. The police culturally come at cases from a different angle having experienced, as they do, personal contact with all sorts of obscenities or tragedies and they may be occasionally distracted by the need to obtain intelligence. It is the impartial, detached and clinical approach to casework of the prosecutor that is so necessary and important in upholding the

rule of law and avoids suspects being put on trial where there is little more than suspicion or outrage. Working too closely may make the sought for detachment more difficult to achieve since it is undoubtedly the public prosecutor's role to examine police investigative methodology and to ensure that the human and other legal rights of the suspect are respected.

29. The ideal would seem to be a delicate balance: recognition of mutual inter-dependence for efficiency reasons if nothing else but strong independence of judgement as a safeguard against oppression and corruption and for the better maintenance of the rule of law.

The Court

30. The public prosecutor's relationship with the Court is also critical to the independence of both the judiciary and prosecutor. If the prosecutor trusts the Court to be fair, there will be no pressure to manipulate the evidence or avoid its jurisdiction. If the Court trusts the prosecutor, it will make decisions without wondering about the provenance of the evidence while its judgements, based on all the facts, are far more likely to be accurate and fair and act as a stabilizer for the public peace.
31. Many believe therefore that it is important for there to be an accepted attrition rate of prosecution cases in the Courts as an indicator of the health of a scrupulous process. Many cases may not be as strong as when first examined and the ability of the Courts to reject evidence of the prosecutor, even when provided by the police, is fundamental.
32. A developed and sophisticated relationship will also allow a process that provides for the confidential release of sensitive information to the Court so that the judge may assess whether, if it is to be withheld from the defence, a fair trial is still possible.
33. Above all the prosecutor must respect the decisions of the Court if the rule of law is to be maintained. Some decisions of the Court may be very unpopular but a proper process of appeal is the solution rather than a campaign of subversion or a fermentation of public disapproval. If the process is not working as it should, it should be up to the elected legislative to amend the process.

The Defence

34. Many miscarriages of justice have occurred where the prosecutor has not disclosed evidence that would have assisted the defence or undermined the prosecutor's own case. The powers of those employed by the State to gather or obtain information are considerably greater than those of the private individual.
35. The Convention principle of equality of arms means that all parties must have the ability to access all relevant information and that where this is not possible and a fair trial cannot follow, the prosecutor should not proceed with the case. This is a heavy burden, especially where some dreadful outrage may have taken

place, but is another important characteristic of the Public Prosecutor acting to protect and uphold the rule of law.

36. Whatever the provocation from the more pro-active of the defence fraternity, it is absolutely fundamental for the Public Prosecutor (and of course the police) to observe 'due process' – to stick to the rules, departure from which is what is often the only opening for defence teams facing an otherwise strong case. So it behoves a prosecutor in such circumstances to be absolutely professional, providing to the defence early details of the allegation and material that points to possible weaknesses in the case or giving information that will help the offender.

RELATIONSHIPS WITH VICTIMS AND WITNESSES

37. A word about victims of crime and witnesses. The rule of law cannot be maintained unless people are prepared to support prosecutions and come forward as witnesses where necessary. Giving evidence in itself can be and often is an intimidating experience. There is a growing industry of countering prosecutions by threatening or delivering harm against those willing to testify or their loved ones. Too many serious cases are lost by witnesses who withdraw their evidence and who are too frightened to report what has happened.
38. This cancer threatens the rule of law almost more than anything else. Constant witness protection is always expensive, especially in a time when budgets are under pressure and not everyone is amenable to having their identity changed.
39. So what is the prosecutor's role to prevent this subversion and uphold the rule of law? I think there are many things to be done apart from demonstrating those qualities prosecutors are increasingly being required to show: namely leadership and courage.
40. They involve ensuring that suitable protective measures exist, using existing laws to their full extent, working with the police and courts to provide physical safeguards on the one hand and with the politicians and legislative on the other to ensure that the State can pass appropriate legislation and deploy its resources for the protection of its citizen witnesses.
41. While mentioning citizens, it is increasingly recognised that the public prosecutor has a duty to the community. The rule of law and confidence in those that safeguard it will be much strengthened by appropriate and regular feedback and discussion. The Red Hook Community Justice Model in New York State brought about a quiet revolution in that part of Brooklyn through regular reports to the community allowing the prosecutor and others to listen to the concerns of residents.

CONCLUSION

42. This has been a gallop through a fascinating topic. As you will no doubt agree the public prosecutor has a key role in the legal intellectual application of the rules of the justice system, acting on behalf of the State or the People on the one

hand, but being totally independent in the exercise of the legal professional judgements that are required to be made on the other. This balance will help to ensure that there is a fair, sensible and proportionate deployment of state resources, essential as this is for the maintenance of public confidence in the rule of law.

43. I hope that what I have said may act as a catalyst for the discussions that are to follow and I thank you for listening so patiently to my observations.

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