Sir Hartley Shawcross, a former English Attorney General (the AG has overall supervision of prosecution decisions in England) explains the rationale in a statement made in the House of Commons on 29 January 1951:

"It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should intervene to prosecute, amongst other cases: wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect therefore is required in the public interest. That is still the dominant consideration.

"So, under the tradition of our criminal law the position is that the Attorney General and the Director of Public Prosecutions only intervene to direct a prosecution when they consider it in the public interest so to do."

He made it clear that the discretion not to prosecute covered more than simply the insufficiency of evidence.

"It is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigating circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed. And almost every day in particular cases, and where guilt has been admitted, I decide that the interests of public justice will be sufficiently served not by prosecuting, but perhaps by causing a warning to be administered instead.

"Sometimes, of course, the considerations may be wider still. Prosecution may involve a question of public policy or national, or sometimes, international, concern."

The danger is that broad and unfettered discretion can however lead to inconsistent decisions and even abuses. Keir Starmer QC, former DPP makes the point in an annual lecture delivered in 2009:

"there are risks attached to the exercise of discretion. Whilst, in appropriate circumstances, it can be a force for good, poorly exercised discretion can mask corruption and malevolence. Let me offer an example: two cases of theft of a small amount of money are presented to the prosecutor. It may well be entirely correct for the prosecutor to decide to prosecute in one case but not in the other. But let us add some characteristics to our two fictional offenders. One is white; one is not. One is Christian; one is not. One is heterosexual; one is not.
"It is the bad decisions which are taken on the basis of inappropriate factors – be they based on the offender, the victim, the offence, or indeed the personal views of the prosecutor – which may be hidden under the respectable cloak of discretion."

What are the safeguards?

First, the DPP himself as head of the prosecution service who has to ensure that the decisions taken by his officers are correct. It is simply not possible for the DPP to personally go through each file but he has to ensure through delegation of powers to senior officers that there is supervision of all files and in-built quality control of the decisions taken to ensure their correctness.

Second the courts act as an important filter process and may strike out a case where it considers that the process constitutes an abuse. That presupposes a case lodged in court by the DPP, but where the decision is to the effect that there should be no further action, an aggrieved party may ask the court to review the decision of the DPP.

Challenges Ahead

The challenge for the public prosecutor, just as it is a challenge for our law makers, is to ensure that, even within a flexible structure, the expression of the public interest remains in keeping and in touch with prevailing social trends and views.

Adapting the public interest factors so that they continue to reflect current social attitudes is not a precise science. The key to maintaining public confidence is to ensure that the vast majority of the communities whom the justice system serves broadly accept those factors, which are identified as relevant to the decision-making process, as reasonable.

There is no legal obligation on the DPP to give reasons for his decisions and no legal rule, if reasons are given, governing their form or content. It is for the DPP to decide whether reasons should be given and, if reasons are, how full those reasons should be.

In a number of cases however the DPP has deemed it fit to explain his decisions, especially where the decision was one not to prosecute.

The guidelines issued by the DPP are available on this website.

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