SELECTIVITY IN PROSECUTION IN THE DISTRICT COURT

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INTRODUCTION

In our common law jurisdiction, which professes to uphold the importance of jury trial to the criminal justice system, the ever-increasing resort to summary trial suggests unease between principle and procedure. If the criminal justice system were to be viewed as involving a balance of powers among stakeholders – those stakeholders being respectively: society; the legislature; the Director of Public Prosecutions; An Garda Síochána; the trial judge; the jury and the accused – the prosecutors' powers would seem to be paramount. They decide whether or not to charge, they choose the charge and they choose the trial venue. When that choice of trial venue is a court of summary jurisdiction, *i.e.* the District Court, the reasons behind the choice are not always clearly identifiable.

The classification of offences which, although indictable may be tried summarily if they are minor, is far from clear. The seriousness of an offence is the notion of what has been described by the courts as "the moral quality" of an action or omission. This was considered a criterion of gravity in the cases of *Melling v. O Mathghamhna*[1] and *Conroy v. Attorney-General*,[2] but appears to have been displaced by the consideration of the likely penalty in the court of trial as expressed in *Rollinson v. Kelly*[3] and *Mallon v. Minister for Agriculture*,[4] where the High Court *per* Costello J. held that an offence carrying a sentence of two years could not be considered minor.

The Constitution does not distinguish between indictable and summary offences – it refers only to minor offences, without

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[1] [1962] I.R. 1.

[2] [1965] I.R. 411.

[3] [1984] I.R. 248, at 260.

[4] [1996] 1 I.R. 517

definition, and to their exemption from the constitutional imperative of jury trial.[5] A custom has emerged in England and Wales, and latterly in Ireland, of describing as "either-way", those indictable offences that are triable summarily with the informed consent of the accused and with the consent of the D.P.P. and the acceptance of jurisdiction by the District Judge. Those indictable offences which are triable summarily with the consent only of the D.P.P. and the District Judge are often described as "hybrid". These terms, it seems, were adopted *faute de mieux* by the Working Group on the Jurisdiction of the Courts.[6]

The ambiguity of the existence of indictable offences in the District Court is perhaps reflected in the inelegance and confusion of the language used to describe them. O'Malley, for instance, distinguishes between those offences triable summarily by virtue of the Criminal Justice Act, 1951, s. 2, from those which are created expressly by statute so as to allow for "either-way" prosecution.[7] The latter do not provide for the election of the accused, yet, although popularly known as "hybrid",[8] may also be described as "either-way".

I. HIERARCHY OF INTERESTS IN THE PROSECUTION SYSTEM

O'Malley has described the criminal process as "[a] continuum beginning with a report of discovery of an offence and ending with a verdict or conclusion of an appeal/review".[9]

Along this continuum there are key points at which the prosecution may make decisions which can have an impact on the eventual sentence.[10] If an offence is hybrid and the D.P.P. elects

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[5] Bunreacht na hÉireann, Article 38.5.

[6] Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Dublin: Stationery Office, 2003) pp. 51-79.

[7] O'Malley, *The Criminal Process* (Dublin: Thompson Round Hall, forthcoming) ch. 9, para. 9.12.

[8] Law Reform Commission, *Consultation Paper on Penalties for Minor Offences* (LRC-CP 18, 2002) p. 19, n. 26. Woods, *Court Practice and Procedure in Criminal Cases* (Limerick, 1994), p. 268.

[9] O'Malley, "Sentencing and the Prosecutor", paper presented to the Annual Prosecutors' Conference, Dublin, 24 May 2008, pp.1-3, available at http://dppireland.ie.

[10] O'Malley, "Sentencing and the Prosecutor" (previous note).

for summary trial, he is effectively determining the upper limit of punishment possible[11] (subject, of course, to the District Judge's acceptance of jurisdiction). The difficulty which can arise where the prosecutor's prior knowledge of circumstances results in his electing for summary trial, and the District Judge, having accepted jurisdiction in ignorance of these circumstances, proceeds to convict or hear a plea of guilty, was highlighted in the case of *Feeney v. District Judge Clifford.*[12] In this case the accused pleaded guilty, the D.P.P. elected for summary trial, and the District Judge accepted jurisdiction. Having heard the facts and before sentencing, the judge was informed of the accused's previous convictions, including two current custodial sentences. The judge then reversed his earlier decision to accept jurisdiction, deemed that the facts disclosed did not constitute a minor offence and proceeded to send the matter forward to the Circuit Criminal Court. The High Court and Supreme Court on appeal held that the District Judge was precluded from changing his mind once he had embarked upon an enquiry as to the penalty appropriate to the offence.

The prosecutor is not obliged to charge an accused with the most serious offence that the evidence may appear to support.[13] He is, however, bound by the duty, not to secure a conviction at any cost, but to put before the Court credible and relevant evidence in support of the prosecution.

O'Malley refers to the almost canonical status conferred on the statement of the Canadian Supreme Court in *R. v. Boucher:*[14]

> It cannot be overemphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must

[11] O'Malley, "Sentencing and the Prosecutor" (n. 10).
[12] [1989] I.R. 668
[13] [1989] I.R. 668
[14] [1954] S.C.R. 16, 23-24.

> also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings.

The Supreme Court in *D.P.P. v. Special Criminal Court*, following the *dicta* in the *Boucher* case, held that prosecutors must always be "ministers of justice".[15]

With the growth of hybrid offences and the apparent diminution of either-way offences, the co-existence of prosecutorial discretion, defendants' rights to jury trial and District Judges' evaluation of minor offences might reasonably be expected to give rise to tensions of a legal, constitutional, political and hierarchical nature.

Hanly refers to the practice, in modern statutes, of distinguishing between offences not in terms of seriousness but rather on the basis of the manner in which they will be tried.[16] All summary offences are deemed to be minor, and triable only in the District Court. The only recourse open to the defendant who questions the seriousness of such offences is a challenge, in the High Court, to the constitutionality of the creating statute. Not all indictable offences, on the other hand, are deemed to be serious enough to warrant a jury trial, and therein lies the difficulty of definition.

The history of indictable offences tried in the District Court will show that the term "indictable" implies only that such an offence is capable of being tried before a jury, but does not contain an inherent obligation on the part of the State to provide a jury trial, nor an inherent right on the part of the defendant to exercise his/her entitlement to same.

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[15] [1999] 1 I.R. 60, at 87.

[16] Hanly, *An Introduction to Irish Criminal Law* (2nd edn, Gill and MacMillan, 2006), p.18.

II. INDEPENDENCE AND ACCOUNTABILITY

In Ireland, prior to 1974, the responsibility for criminal prosecutions on indictment lay with the Attorney-General, while summary matters were prosecuted by the Gardaí. The office of the D.P.P. was established by statute in 1974,[17] and the functions previously exercised by the Attorney-General in relation to criminal matters (with some few exceptions[18]) were transferred to the D.P.P.[19] The Director is appointed by the government and is to be independent in the performance of his functions.[20] Mr. Kelly T.D. (Parliamentary Secretary to the Taoiseach), in proposing the Bill for the establishment of the office of the D.P.P., said that the system for the prosecution of offences should not only be impartial, but should be seen to be so and should remove any suspicion or fear that political considerations might influence the Attorney-General in carrying out his functions in criminal prosecutions.[21] Mr. Fitzpatrick T.D. (Minister for Lands) stressed the seriousness of criminal prosecutions: "they affect the liberty of the individual, his character, his reputation and his very living". The conduct of such prosecutions should, he said, be scrupulously impartial.[22]

In the Senate, the same Minister referred to the provisions of Section 6 of the Bill, which purported, he said, to prohibit people from communicating with the D.P.P., or the Attorney-General, or other people in charge of prosecutions, with a view to influencing the withdrawal or the non-initiation of a prosecution.[23] Mr. Andrews T.D. and Mr. O'Malley T.D. both referred to the ineffectual and hypocritical nature of such provisions which, while describing any such attempt at

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[17] Prosecution of Offences Act, 1974, s. 3.
[18] Prosecution of Offences Act, 1974, ss. 3(4) and 5(1).
[19] Prosecution of Offences Act, 1974, ss. 3(1) and 3(2).
[20] Prosecution of Offences Act, 1974, s. 2(5). The D.P.P. in England and Wales is appointed by the Attorney-General and discharges his/her functions under the supervision of the Attorney-General: Prosecution of Offences Act, 1985, ss. 2-3. From the establishment of the office in 1879 up to 1985, the appointment of the D.P.P. had been a function of the Home Secretary: see Prosecution of Offences Act, 1879.
[21] 273 *Dáil Debates* 803 (Second Stage).
[22] 273 *Dáil Debates* 838-845 (Second Stage).
[23] 78 *Senate Debates* 1131 (Second Stage).

communication as unlawful, do not provide for any sanctions, and expressly exempt the complainant and defendant in a prosecution, and members of their families and professionals who are advising in the matter.[24] Mr. Esmonde T.D. referred to the power of the D.P.P. to decide whether a prosecution should be taken at all. He alluded to his personal experience as a court prosecutor and said that, in numerous cases which had no hope of securing a conviction, all of those cases had proceeded in the Circuit Court because "the recommendation came up from the local area".[25]

What is notable from the Dáil and Senate Debates is the absence of any consideration of the accountability of the D.P.P. as something separate from his independence. It would seem, too, that where before, in many prosecutions, the Attorney-General was nothing more than a rubber stamp to Garda decisions, the role of the D.P.P. was to be perceived as distinct from that of the Garda Síochána.

O'Higgins describes as absolutist the attitude of judges to the unreviewability of prosecutorial discretion.[26] In *The State (McCormack) v. Curran*,[27] Barr J. held that the D.P.P.'s decision was an executive function and not reviewable. The Supreme Court, on the other hand, found that the D.P.P.'s decisions were reviewable but only in limited circumstances, *e.g.* where *mala fides* could be shown or improper motive or policy be proved.

The independence of the D.P.P. was also considered in *Linda Eviston v. D.P.P.*[28] where the D.P.P. reversed his original decision not to prosecute in a fatal road traffic accident as a result of representations made to him by the father of the deceased person. The High Court, in allowing the appeal and prohibiting the prosecution held *inter alia* that, where the impugned decision of the D.P.P. was the reversal of an earlier decision, the court should assess the reason for the decision but would only intervene on rare occasions. In this regard Kearns J. in the High Court

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[24] 273 *Dáil Debates* 810 and 856.
[25] 273 *Dáil Debates* 863.
[26] O'Higgins, "Reviewing Prosecution Decisions", Paper presented to the *Annual Prosecutors" Conference*, Dublin, 24 May 2008, available at http://dppireland.ie.
[27] [1987] I.L.R.M. 225.
[28] [2002] 3 I.R. 260.

referred to the prosecutorial discretion as being considered almost completely immune from judicial scrutiny except in extremely limited circumstances.[29] Noting that the case concerned not a decision to prosecute, but a reversal of an earlier decision, he found *inter alia* that the reversal, in the absence of any new fact, material, witness or factor, was arbitrary and perverse.[30] The Supreme Court held that the D.P.P was entitled to review an earlier decision, even in the absence of new evidence, and was not obliged to give reasons for any different decision. It dismissed the appeal of the D.P.P. in the case, however, on the grounds of fair procedures, noting that the Director had initially informed the applicant, without any *caveat*, that no prosecution would issue against her.[31]

In *Monaghan v. D.P.P.*[32] Charleton J. referred to the extra administrative burden that would be put on the D.P.P. if he were to explain and/or defend all his decisions. O'Higgins sets out four reasons for preserving the immovability of prosecutorial decisions:[33]

1. The doctrine of the separation powers – the D.P.P. is the prosecutorial role of the executive.
2. The limits of court resources.
3. The facilitation of legal enforcement *i.e.* if the D.P.P. feels his decisions are to be scrutinised he may second guess his charging decision – what Americans call "chilling of legal enforcement".
4. Law enforcement strategies may be revealed, thereby undermining effective crime control.

The Law Society of Ireland has expressed its strong opposition to any suggestion that the D.P.P. should consider giving reasons for his decisions. Its reservations appear to relate mainly to the D.P.P.'s decision not to prosecute. The Society distinguishes the role of the D.P.P. in a "contemporary framework of openness" because he "occupies a highly-specialised and

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[29] [2002] 3 I.R. 260, at 269.
[30] [2002] 3 I.R. 260
[31] (2002] 3 I.R. 260, at 320.
[32] High Court, unreported, Charleton, J., 14 March 2007.
[33] O'Higgins, "Reviewing Prosecution Decisions", Paper presented to the Annual Prosecutors' Conference, Dublin, 24 May 2008.

sensitive position and more subtle considerations must apply".[34] It describes the presumption of innocence as the ultimate cornerstone of its objections, and one which should not be eroded in the interest of the public which, it suggests, may not be justifiable in many cases but rather prurient and media-driven.[35] In what appears to be a contingency view, the Society considers that if a decision is taken to give reasons to victims and/or victims' families, the Gardaí should be used as a conduit to pass on those reasons.[36]

The D.P.P. has recently initiated a pilot scheme under which his office will give reasons for prosecutorial decisions in certain circumstances.[37] Reasons will be given only for decisions not to prosecute or to withdraw prosecutions; they will be confined to alleged offences where death has occurred; they will be given, only in writing, to parties closely connected, personally or professionally, with the deceased; they will be sufficiently detailed and will only be considered where it is possible to do so without creating injustice. The pilot scheme, which is due to end in January, 2010, may, if it proves satisfactory, be extended to sexual crimes.

It seems unlikely that the D.P.P. will be called on to give reasons for withdrawing Circuit Court prosecutions which would have proceeded in the District Court save for the refusal of jurisdiction by a District Judge or the exercise of the accused's discretion to choose trial by jury. The articulation of such reasons might be seen to reduce public confidence in the prosecutorial system in the District Court Jurisdiction.

III. THE GARDAI – INVESTIGATORS AND PROSECUTORS

The Garda Síochána are generally authorised to instigate summary proceedings in the District Court without reference to the D.P.P.[38] In deciding to opt for summary disposal of indictable

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[34] *Law Society Gazette*, June 2008, pp. 12-13.
[35] *Law Society Gazette*, June 2008, pp. 12-13.
[36] *Law Society Gazette*, June 2008, pp. 12-13.
[37] See http://dppireland.ie/victims_and_witnesses/reasons-for-decisions.
[38] *Guidelines for Prosecutors* (Office of the D.P.P., 2007), p. 58, 13.1: "Cases other than those in which the Commissioner of An Garda Síochána or the

matters, the prosecutors are advised to consider the adequacy of the sentencing jurisdiction of the District Court. A general consent to proceed in the District Court with certain either-way offences has been issued to the Garda Síochána by the D.P.P., for example: burglary in an unoccupied house, larceny where the value of the property involved is below a certain value[39] (at present, that value is €7,000).

The great majority of cases prosecuted in the District Court by the gardaí are done so without express reference to the Director. It would seem, therefore, that in these cases the distinction between the investigation and prosecution of offences is not as clear as it might otherwise be.

The Philips Report, released in England and Wales in 1981, expressed criticism of the role of the police in prosecuting offences.[40] The three main criticisms of the report have been identified by Ashworth:[41]

1. Police should not investigate offences and decide whether to prosecute. The officer who investigates a case cannot be relied on to make a fair decision whether to prosecute.
2. Different police forces around the country use different criteria for prosecution decisions.
3. Too many weak cases come to court.

As a result of the Philips Report the Crown Prosecution Service was established in 1985.[42] The Service, under the direction of the D.P.P. is obliged to "take over" all prosecutions instituted by the police, except for certain minor offences.[43] Ashworth notes that the Crown Prosecution Service has thereby been given a status independent of the police.[44] O'Doherty, on the

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Director has issued detailed instructions or advices not to do so or to do so only after seeking a direction from the Office of the D.P.P.". Available at http://dppireland.ie.

[39] *Guide for Prosecutors* (previous note), p. 59, 13.9.

[40] Philips Commission, *Report of the Royal Commission on Criminal Procedure*. Cmnd. 8092 (London: HMSO 1981).

[41] Ashworth, *The Criminal Process* (Oxford: Clarendon Press, 1994) p. 160.

[42] Prosecution of Offences Act, 1985.

[43] Prosecution of Offences Act, 1985, ss. 1 and 3.

[44] Ashworth, *The Criminal Process* (note 41), p. 160.

other hand, notes that the Crown Prosecution Service only receives files from the police after proceedings have been issued. He considers that this procedure, by denying the C.P.S. the power to initiate prosecutions, fails to separate the C.P.S. from the police.[45] He quotes Sanders: "By failing to provide prosecutors with the sole power to initiate prosecutions the government has failed to make prosecutors independent of the police".[46]

The power of the prosecution to put people on trial should not be understated. As Bennion says, being put on trial is a painful affair and requires close regulation.[47] He quotes Jackson, who has characterised the dispensing power of the state prosecutor as one denied to the Monarch by the Bill of Rights.[48]

In broad terms, the prosecutorial power is exercised by the gardaí without reference to the D.P.P., in respect of summary offences and minor indictable offences.[49]

The police are often held responsible by the public for rising crime rates and for failing to control and detect many offences.[50] Ashworth believes that they are expected by politicians and the media to be primarily responsible for crime control.[51] If the Garda Síochána are viewed in a similar light in Ireland, their discretion as to investigation, charging, choice of charges and choice of venue for certain indictable offences, is considerable. Before 1924, the right of policemen (as they then were) in Ireland to act as law officers and prosecutors/advocates was established. Dwyer cites the circular referenced by O'Higgins C.J. in his dissenting judgment in *People v. Roddy:*[52]

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[45] O'Doherty, "A Comparative Note on the Prosecution Services of France and of England and Wales" (2002) 12 I.C.L.J. 21.

[46] Sanders, "An Independent Crown Prosecution Service?" [1986] *Criminal Law Review* 16, at 27.

[47] Bennion, "The New Prosecution Arrangements: (1) The Crown Prosecution Service" [1986] *Criminal Law Review* 3.

[48] Bennion, "The New Prosecution Arrangements: (1) The Crown Prosecution Service", at p. 7 n. 24; Jackson (1985) 53 *Scottish Law Gazette* 22.

[49] *Guidelines for Prosecutors* (note 38), p. 58.

[50] Ashworth, "Crime, Community and Creeping Consequentialism" [1996] *Criminal Law Review* 220.

[51] Ashworth, "Crime, Community and Creeping Consequentialism" (previous note).

[52] [1977] I.R. 177, at 183.

> A question having arisen respecting the right of a member of the Royal Irish Constabulary Force, without professional help, to conduct cases before the magistrates and to examine and cross-examine witnesses, I am directed by the Lords-Justices to inform you that the law officers of the Crown are of the opinion that in cases of summary proceedings the constabulary have such right when they are themselves the complainants, but not otherwise.[53]

Dwyer believes that legislation is necessary to place all public prosecutions on what he calls a proper footing, *i.e.* initiated in the name of and prosecuted by the D.P.P. He considers that the Gardai currently enjoy virtually total freedom in deciding who is to be prosecuted for summary offences.[54] He notes, too, the immunity enjoyed by prosecuting gardaí in relation to costs.[55] The Supreme Court has upheld a garda's right to such immunity on the ground of "social function", so as to discriminate between one kind of common informer and another, *viz.* a garda acting in the course of his duty.[56]

The case presented in court by the prosecuting garda, or the file sent by the investigating garda to the D.P.P. for directions, cannot avoid being tendentious. Ashworth has described the prosecution's version of facts in court as being a selection.[57] He refers to the Fischer Report[58] and to the Royal Commission on Criminal Justice,[59] both of which noted the "tendency of police

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[53] Dwyer, "The Garda as Prosecuting Advocate in the District Court" (1991) 9 *Irish Law Times* 89.
[54] Dwyer (note 53) at 91.
[55] Dwyer (note 53) at 91.
[56] *Dillane v. Attorney General for Ireland* [1980] I.L.R.M. 167.
[57] Ashworth, "Crime, Community and Creeping Consequentialism" (note 50) at 227.
[58] Ashworth, "Crime, Community and Creeping Consequentialism" (note 50), at n. 33: *The Confait Inquiry* (1977), discussed at [1978] *Criminal Law Review* 117.
[59] Ashworth, "Crime, Community and Creeping Consequentialism" (note 50), at n. 34: *Royal Commission on Criminal Justice* (1993) ch. 2.

enquiries to neglect some lines of investigation and to view evidence in the light of one particular hypothesis".[60]

IV. CHOICE OF TRIAL VENUE

English prosecutors, unlike their Irish counterparts, do not have the right to elect for mode of trial. Ashworth argues, however, that they may have considerable influence on a magistrate's decision to accept or refuse jurisdiction in a case. He considers it likely that magistrates are influenced by what prosecutors say.[61]

A lay magistrate might well be presumed to be influenced by a legally trained prosecutor. It would seem unreasonable to make the same presumption with regard to legally trained District Judges in the District Court.

Ashworth considers, further, that the less obvious means by which the Crown Prosecution Service can influence mode of trial is in its choice of charge, *i.e.* indictable only or summary only.[62] The Crown Prosecution Service is, in turn, influenced by the type of charge originally laid by the police and by the file forwarded to it. Ashworth refers to the *Code of Crown Prosecutors* paragraph 12(iii), which states that the charges "should adequately reflect the gravity of the defendant's conduct" and should "normally be the most serious revealed by the evidence". It also provides, however, that the charge may be less than the most serious possible if the trial court's sentencing powers are adequate. This, Ashworth suggests, may indicate that a summary charge may be preferred where speed of trial is a factor and the summary court's sentencing powers are adequate, even though the evidence points to a more serious offence.[63]

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[60] Ashworth, "Crime, Community and Creeping Consequentialism" (note 50) at 227.
[61] Ashworth, *The Criminal Process* (note 41) at 236.
[62] Ashworth, *The Criminal Process* (note 41) at 236-237.
[63] Ashworth, *The Criminal Process* (note 41) at 237. Cf. *The Code for Crown Prosecutors* (CPS, 2004), 9.2, which states that speed must never be the only reason for preferring a summary charge, available at www.cps.gov.uk/publications.

Various views have been expressed as to the reasons for the prosecution's apparent proclivity for summary disposal of indictable offences. As Judge O'Donnell opines, as long as the D.P.P. is permitted to avoid any obligation to explain the rationale behind his decisions, it is almost impossible to prevent assumptions, albeit erroneous, being made.[64] White believes that the system is structured so as to encourage guilty pleas in the lowest level of court possible.[65] Jackson and Doran believe that decisions by the D.P.P. as to where cases should be heard not only have serious implications for the accused but also have considerable resource implications for the court system.[66]

In an address to a District Court Judge's conference in October, 2002, however, the Director, while accepting that trial on indictment necessarily increases the cost to the State, is adamant that fiscal concerns have never influenced his office's choice of trial venue.[67]

V. NOLLE PROSEQUI

O'Malley appears convinced of the D.P.P.'s well-nigh-impregnable position. He describes it as difficult to conceive of circumstances in which a court would be willing to review the D.P.P.'s decision on whether to proceed summarily or on indictment, subject, always, to the District Judge's acceptance or rejection of jurisdiction.[68] O'Malley is also satisfied that no court can compel the D.P.P. to prosecute in a particular way. He writes: "A District Judge who decides to relinquish jurisdiction having formed the opinion that an offence being prosecuted summarily is not a minor one faces considerable difficulty. If the offence may

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[64] O'Donnell, "Summary v. Indictable: Choices in the Disposal of Criminal Cases" (2006) 6(1) J.S.I.J. 15 at 29-30.

[65] White, *The English Legal System in Action* (3rd edn, 1999), pp. 170-171.

[66] Jackson and Doran, "A Study of the jurisdiction of the Criminal Courts in Ireland" in *The Criminal Jurisdiction of the Courts* (Dublin: Stationery Office, 2003) Appendix V. Available at www.courts.ie.

[67] Hamilton, "The Summary Trial of Indictable Offences" (2004) 4(2) J.S.I.J. 154 at 181.

[68] O'Malley, *Sentencing Law and Practice* (2nd edn, 2006) at 547.

be prosecuted either way the prosecutor may decide to proceed on indictment or drop the charge".[69]

The power of the D.P.P. to "drop the charge", *i.e.* enter a *nolle prosequi*, arises by virtue of The Criminal Justice (Administration) Act, 1924,[70] which provides that a *nolle prosequi* may be entered by the Attorney-General "at any time after the indictment is preferred and before a verdict is found thereon". The functions of the Attorney-General in criminal matters were transferred to the D.P.P. by statute in 1974. A *nolle prosequi* (literally "not wanting to continue") does not amount to an acquittal. As Woods says, it operates to stay the proceedings and does not prevent a fresh indictment for the same offence,[71] although any such further prosecution may be prohibited if not in accordance with fair procedures.[72] Although the Criminal Justice (Administration) Act 1924, s. 12, provides for the entry of a *nolle prosequi* after the indictment is preferred to the jury, the practice of entering it before the indictment is preferred has been recognised and endorsed by the courts.[73] In the *O'Callaghan* case[74] the trial judge in the District Court accepted jurisdiction on one only of several charges. The prosecution entered a *nolle prosequi* in respect of the remaining charges and subsequently re-charged the accused on identical counts. Finlay P. held that the D.P.P. did not have the right to re-institute a prosecution in these circumstances. As O'Malley has pointed out, Finlay P. did not find that a fresh prosecution was never permissible,[75] but seems to have based his decision in this case on the basis of equality and fairness.[76] The D.P.P., on encountering an obstacle, *e.g.* in his method of prosecution or sufficiency of evidence, had the option of staying the proceedings and starting afresh. The accused did not enjoy the same advantage.[77] In a later case,[78] however,

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[69] O'Malley, *The Criminal Process* (note 7), ch. 9 para 9.11.
[70] Criminal Justice (Administration) Act, 1924, s. 12.
[71] Woods, *District Court Practice and Procedure in Criminal Cases* (note 8), at 304.
[72] *The State (O'Callaghan) v. O'hUadhaigh* [1977] I.R. 42.
[73] *The State (O'Callaghan) v. O'hUadhaigh* [1977] I.R. 42
[74] *The State (O'Callaghan) v. O'hUadhaigh* [1977] I.R. 42
[75] O'Malley, *The Criminal Process* (note 7), chapter 12 para 12.3.6.
[76] O'Malley, *The Criminal Process* (note 7), chapter 12 para. 12.3.6.
[77] O'Malley, *The Criminal Process* (note 7), chapter 12, para. 12.3.6.

Finlay P. did accept that in certain circumstances a fresh prosecution was permissible, following a Supreme Court decision in *The State (Walsh) v. Lennon.*[79] O'Malley cites examples of these circumstances, *e.g.* where prosecution witnesses refuse to give evidence or give evidence which is at variance with their original statements to the Gardai and the prosecution is forced to enter a *nolle prosequi* in order to avoid an acquittal by direction of the judge.[80]

The inscrutability attaching to the D.P.P.'s decision to prosecute or not and to his choice of trial for either-way or hybrid offences would also seem to apply to his decision to withdraw a prosecution in the Circuit Criminal Court by entering a *nolle prosequi* and making no further attempt to reissue proceedings. When such cases have transferred to the Circuit Court in spite of the D.P.P.'s direction for summary trial, *i.e.* where the accused has exercised his right of election for jury trial, if available, or where a District Judge has refused to accept jurisdiction, the dropping of the charges has given rise to some disquiet.

The Working Group on the Jurisdiction of the Courts describes as significant the number of instances of *nolle prosequi* entered in the Circuit Criminal Court where cases are sent forward[81] because the District Judge refuses jurisdiction.[82] It suggests that this may occur as a result of weaknesses in the file prepared by the Garda Síochána, and that the D.P.P. may, on review of the file, decide that there is insufficient evidence to proceed with a prosecution.[83] The question remains: what criteria

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[78] O'Malley, *The Criminal Process* (note 7), ch. 12, para. 12.3.6., at n. 127: *The State (Coveney) v. Special Criminal Court* [1982] I.L.R.M. 284.

[79] O'Malley, *The Criminal Process*, ch. 12 para. 12.3.6 at n. 128; *The State (Walsh) v. Lennon* [1942] I.R. 112.

[80] O'Malley, *The Criminal Process*, ch. 12 para 12.37.

[81] In *Aidan Reade and Judge Reilly and the D.P.P.* (Supreme Court, unreported, Macken J., 31 July 2009), the Supreme Court *per* Macken J. found that in the absence of specific statutory provision, a District Judge does not have power to send an accused forward for trial or direct service of a Book of Evidence in circumstances where s/he has refused to accept jurisdiction. The Court held that once a District Judge has declined jurisdiction, in the absence of a statutory provision to do anything further, s/he is obliged to strike out the proceedings.

[82] *The Criminal Jurisdiction of the Courts* (note 66), p. 69.

[83] *The Criminal Jurisdiction of the Courts* (note 66), p. 69.

are used to direct a prosecution in the District Court yet withdraw the same prosecution in the Circuit Court? The prosecutor's discretion in relation to choice of charges is "within the exclusive domain of the prosecutor".[84]

The central stakeholder in a criminal prosecution is the offender. It is his/her action that triggers the establishment of common law principles or the enactment of appropriate criminal statutes and sets in motion the criminal justice procedure. Thereafter, the other players assume their roles: the lawmaker attempts to reflect society's best interests in statute; the garda carries out enforcement of the laws and, in many cases, acts as prosecutor; the D.P.P. guides and controls the prosecution; the trial judge interprets and applies legal principles and, in the District Court, decides on the facts; the jury in the Circuit Court determines which version of facts they wish to accept. It is an imperfect system, imperfect of necessity, because it involves fallible humanity. It is, however, a transparent and accountable system, with the exception of the unaccountability enjoyed by the prosecution in its decision-making.

[84] *Guidelines for Prosecutors* (note 38) p. 26, 6.1.