THE DECISION TO PROSECUTE

Memorandum by the Commonwealth Secretariat
and a Discussion Paper by Mr. A.N.E. AMISSAH,
a former Attorney-General of Ghana

To complement the views of Professor John LI.J. Edwards contained in LMM(83)5, a distinguished academic and well-known writer on the role of Law Officers, the Commonwealth Secretariat invited Mr Austin Amissah, a former Attorney-General, Director of Public Prosecutions and Justice of Appeal of Ghana, to write on the slightly broader topic, "The decision to prosecute".

2. Mr Amissah is the author of Criminal Procedure in Ghana, 1982 (Sedco, Accra) and The Contribution of the Courts to Government: A West African Viewpoint, 1981 (Clarendon Press, Oxford).

3. The paper is annexed.

ANNEX TO LMM(83)28

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Introduction

The basic problem with the decision to prosecute is a problem which besets the exercise of all discretions: in whom should the discretion be reposed; and what control, if any, should be imposed over the authority given the power to ensure that the discretion is properly exercised? The exercise of a discretion involves the exercise of human judgement. As such, it is liable to error. Often, however, when a mistake occurs, some of the criticism levelled, proceed on the assumption that any authority with such power, to be worth its salt, must be infallible. Recognising the limitations of man, the question is whether the discretion is better exercised if it is reposed in someone without responsibility to anyone else except his conscience and sense of duty, like a judge, or should the repository owe responsibility to some other authority. If so, then to whom? Should the repository be someone with tenure of office like a judge or with a fixed term without liability to removal during that period? Or should it be a person who holds office at pleasure, like a Minister or civil servant? The answer to this question leads to other questions on organisation of the machinery for taking the decision, for minimising the chances of error, for correction of mistakes and for accounting for the decision taken so as to preserve public confidence in the system.

2. The discretion under discussion is not confined to the decision to proceed with a prosecution. It is not exhausted when the decision to bring a case before the court or not to do so is taken. Its exercise is called for at the conclusion of investigations; and where the decision is to prosecute, may be called for at various stages of the whole trial. Thus, at different phases, the authority with the discretion may be called upon to decide whether or not to discontinue the prosecution commenced, whether or not to change the mode of trial, whether or not to accept a plea of guilty for a lesser offence than the one charged, or some other matter in connection with the trial. Who should be entrusted with these wide powers?

The Authority Exercising the Discretion

(a) The Attorney-General:

3. In Britain, the oldest Member of the Commonwealth, the discretion is by tradition placed in the hands of the Attorney-General. Having regard to the fact that he is the first legal adviser to the Crown, his claim to this power is as valid and strong as

that of any other person. He is the holder of political office. That solution is the result of historical development and, therefore, amenable to organic change through practice, even though such changes may take time, or otherwise through ordinary legislation. But such a system is difficult to reproduce. And the new Commonwealth countries have taken the course of providing their solution by constitutional regulation. That means change can come only through constitutional amendment; a process which may be difficult or easy, depending on the provisions for the amendment of the constitution. Further, the mechanism laid down by the constitution for prosecutions may make it impossible to subject the power to take decisions on prosecutions to control which is not recognised by the constitution. This point is of some relevance when considering the question of possible controls or changes of the authority exercising the discretion to prosecute.

4. In Britain, the Attorney-General, though a Minister, owes no responsibility to his colleagues in the Government in the manner of the exercise of this power. And though its unacceptable exercise has been known to affect a whole government adversely, the Attorney-General may be singled out for censure if any improper exercise can be laid solely at his door, or at the door of a subordinate for whom he is responsible. As is well known, his responsibility, and that of other Law Officers, for the exercise of this discretion is to Parliament. Of this, there has been recent powerful exemplification in the Scottish rape case, the decision in which led to a statement by Solicitor-General Fairbairn and questions in Parliament, and subsequently followed by his resignation from office. But not all Commonwealth countries follow this model.

5. Professor Edwards, in his paper entitled Emerging Problems in Defining the Modern Role of the Office of Attorney-General in Commonwealth Countries (hereafter referred to, with due apologies, as The Modern Role of the Office of the Attorney-General),[2] identifies no less than six different models in the institutions responsible for prosecutions in the various Commonwealth countries. This paper for convenience divides the types into two broad categories, namely, those cases where the authority for decision ultimately rests with a political appointee on the one hand, and the other cases where the responsibility lies with a public servant who is not subject to the direction or control of any other person or authority. For this purpose, the Solicitor-General or Director of Public Prosecutions or other officer, who takes decisions on prosecutions but, is under the direction or control of some superior like an Attorney-General or any other authority in the exercise of his powers, is in the end result not the ultimate authority determining the issue of prosecutions. The category under which that officer falls depends on the character of the ultimate authority in that particular country. In the various countries, the discretion is exercised by the Minister of Justice, the Attorney-General, the Solicitor-General, the Director of Public Prosecutions or a Crown or State Attorney, whether as the final authority or not. In this paper, for the sake of brevity and simplicity, unless the context otherwise justifies, the expression "Attorney-General" will be used as a generic term to cover all the other officers of State mentioned.

6. In spite of the British constitution, when its Government came to grant independence to Ghana, the first of its African colonies south of the Sahara to attain this status, it created an Attorney-General who was a public servant who was free from answering to any Cabinet as to the manner of the discharge of his function of the "initiation, conduct and discontinuance of prosecutions for criminal offences". As the Attorney-General was then not a member of Parliament, presumably, he was not answerable to that body either. Part of the explanation for this arrangement may have been historical. Up to the time of independence, the office of Attorney-General in the country was that of a public servant. And this must, to some extent, have influenced the type of Attorney-General chosen for independent Ghana. But it appears that the more substantial reason for the choice was to isolate the decisions of the Attorney-General from political influence. Ghana was not the only country which began with such an Attorney-General. But others who opted for a political Attorney-General created a different office, for example, a Director of Public Prosecutions, who was a public servant and who was made independent of political control. Whatever the title of this independent officer, such an arrangement, however well-intentioned, in a newly independent State with political authority vested in a strong majority party is likely to lead to friction, especially in politically flavoured cases. In a political atmosphere of newly acquired power, there may be pressures to bring prosecutions against political opponents against whom an Attorney-General may feel that there is insufficient evidence. Pressures may be brought not to proceed against supporters or allies against whom the evidence appears to the Attorney-General to be overwhelming. As long as the Attorney-General is a public servant with no particular terms as to tenure he will be in a weak position in case of serious conflict with the political authority. A displeased government can, if it is determined so to do, always ensure a resolution of the

argument in its favour by arranging an early compulsory retirement or by making the position of the officer so untenable as to cause him to voluntarily retire or to resign. How long a government can continue forcing the departure of a quick succession of Attorneys-General on the ground of incompatibility in the manner of the exercise of powers conferred by constitution on the officer is an open question. But apart from that, there is the question, to be raised again later, whether an Attorney-General whose decisions may sometimes result in political consequences of national import ought to be a person who does not have the political confidence of the government in power, is not a political appointee and is deliberately made independent of all political control or responsibility.

7. In the case of Ghana, it was not long after independence that strains were felt in the relationship of Attorney-General and Government. The first Attorney-General, who had achieved his position through service in the Colonial Civil Service, was replaced temporarily by another public servant, but one who had no such antecedents. The new Attorney-General supervised the drafting of a constitution which made the conduct of the Attorney-General's responsibilities, however he was appointed and whether he was a public servant or a political appointee, "subject to the directions of the President". Obviously, the political authority rightly or wrongly thought that the situation created by the independence constitution was intolerable. In a constitutional framework where the effective authority for appointment and removal of public servants and political appointees is the political head, the constitutional provision gave public expression to the realities of the time, stating what may otherwise have been the practice anyway, and relieving the head from adopting devious methods to achieve a desired objective.

8. When the office of Director of Public Prosecutions was subsequently created in Ghana, it was not because of thinking that there should be some officer other than the Attorney-General who should be finally responsible for all criminal prosecutions. It was more or less a revival of the old office which existed under name during the colonial administration as the most senior officer under the Attorney-General responsible for prosecutions. It gave the Attorney-General once more, an assistant, the highest assistant, in the discharge of his manifold functions on the criminal side. The new office of Director of Public Prosecutions was not created by constitution, Act of Parliament or instrument. It was just an administrative arrangement. Of course, it subsequently involved the expansion in the relevant Law Officers Act of the definition of a Law Officer to include the Director of Public Prosecutions. But that was another matter. The constitutional power of the Attorney-General to initiate, conduct and discontinue prosecutions remained with the Attorney-General, subject to the President's directions.

9. Under this constitutional arrangement, the prosecution of former Ministers Tawia Adamafio and Ako Adjei and former Party General-Secretary Cofie Crabbe was undertaken. A prosecution which led to a political upheaval in 1963 and further constitutional changes in 1964. No prosecution of such a highly sensitive political nature involving persons already detained could be started, whatever the powers of the Attorney-General or Director of Public Prosecutions at the time, without the instruction of the President. In any case, the prevailing constitution made him the ultimate authority on prosecutions. In the great majority of cases, the decisions on criminal prosecutions were, indeed, taken by the Attorney-General or the Director of Public Prosecutions. But in cases having political overtones, the President may step in with his directions. The atmosphere generated by and the consequences of this trial, including the dismissal of the Chief Justice who had presided over the panel of judges who tried the case, the taking of powers by the President through changes in the constitution to dismiss judges at pleasure, the nullification of the trial result by Act and the subsequent re-trial, were, two years later, when the regime was overthrown, given as some of the reasons for the coup d'etat.

10. Subsequent constitutions have removed the subjection of the Attorney-General's control over prosecutions to the directions of the President. Whether this is more than an expression of displeasure with things under the Nkrumah regime and involves a real change in outlook on the exercise of political power in relation to the important function of deciding on criminal prosecutions is a different question. Even under the other constitutions, it is difficult to imagine a prosecution of such political sensitivity, namely, alleged treason in conspiring to assassinate the President, being left entirely to the decision of the Attorney-General.

11. In none of the constitutional changes which have taken place in Ghana has it ever been suggested that the decision to prosecute should be taken out of the hands of the Attorney-General altogether and given to some other authority. Nor is the writer aware of

such a suggestion being made in other Commonwealth countries, except where the substitution of Director of Public Prosecutions or other institutional legal officer is substituted for a political Attorney-General. And yet there must be some competitors for consideration for this honour.

(b) Possible Alternatives:

(i) The Police

12. The Police conduct the investigations into reports of crime. A possible solution could be to extend their power so as to give them the ultimate responsibility for deciding which cases should be prosecuted or not. They already have some power in this respect when taking the initial decision on which cases have been successfully detected and should proceed to court. But it has not been suggested that their power be increased to make them exclusively responsible for the decision to prosecute. Perhaps their disqualifying feature lies in their close involvement in the investigation and identification of the alleged offender which often detracts from their ability to make an impartial assessment of the evidence, and in some cases, leads to the adoption of methods and practices calculated to secure a conviction of the accused person at all costs. The desirability for the separation of the investigation from the prosecution machinery which this observation suggests is strongly argued by a statement made by the Attorney-General of Ontario which is quoted in Professor Edwards' paper earlier referred to [3] The Attorney-General said:-

> "...it is a contradiction, an incongruity to have a Minister of Justice charged with the administration of justice, who is expected to rule or act with an even, impartial attitude and to let no other attitude than impartiality, objectivity play a part, and to have him also with the other hand directing the investigating forces and the enforcement side which is necessary in the administration of justice."

The statement focuses attention on the degree of objectivity and impartiality which should go with the Attorney-General's decision to prosecute. And it underscores the undesirability in having this function discharged together with the function of investigation which may not require the same standard of objectivity and impartiality. And to that extent, illustrates the weakness of a body like the Police with their commitment to a case which they think they have solved being given the ultimate responsibility to decide on prosecutions. But that does not necessarily mean that ministerial responsiblity for the Police as well as for the body dealing with prosecutions cannot be held by the same person. Assignment of responsibility for the Police to the Minister in charge of home or internal affairs rather than to the Attorney-General or Minister responsible for Justice is often a matter of tradition or practical management and not of principle.

13. This view draws some support from the Report of the Royal Commission on Criminal Procedure[4] which recommends the establishment of a local prosecuting service for England and Wales. That recommendation, if accepted, would mean the creation of prosecution departments headed by "Crown Prosecutors" charged with the prosecution function in the local areas, while the Police is confined mainly to the investigative role. By that means, the roles of investigation and prosecution would be kept separate, although the roles of the Police and prosecutor would be interdependent. Recognising that there must be ministerial responsibility for the local prosecuting service recommended, the Commission considered which Minister should have it: the Home Secretary with his responsibilities for the Police, or the Attorney-General? The Commission's view was that the arguments in favour of each Minister were evenly balanced. Having the Attorney-General would mark the prosecution services' independence of the Police. But the Home Secretary could more easily absorb new responsibilities into his department. Principle would have ruled without question in favour of the Attorney-General. Putting the argument for the other side at all is evidence of the fact that the matter is capable of a solution which would combine the responsibilities in the hands of one Minister.

14. For most Commonwealth countries, the Attorney-General, or his counterpart of today, has developed from the colonial Attorney-General whose sole responsibility was for legal matters. Police duties encompass functions relating to aspects of internal security which do not come within that portfolio. Putting all home or internal affairs as well as the legal matters under one person may constitute too large a burden for him to carry. But it is not unknown to happen. Further, that those exercising the impartial judgement required for prosecution can properly direct and control the Police in their investigation of crime is evidenced by the call made by Attorneys-General and Directors of Public Prosecutions for

the involvement from an early stage of investigations of their officers to direct the Police on the nature and weight of evidence to be sought, if the case is to be successfully prosecuted in court. And if conflicts are to be avoided as to what must be done at any particular time in connection with a prosecution, it is necessary to indicate with clarity who has the overall authority in the sphere. Otherwise, the situation would occur, for example, where the Attorney-General's decision to proceed with or withdraw a case could be countermanded by the person responsible for the Police.

15. It is doubtful, therefore, that a proper exercise of the discretion to prosecute depends on the rigid separation of the investigative from the prosecutive machinery. What should be kept separate as far as possible are the actual functions of investigation and prosecution, with each function being allocated to different personnel.

16. The control by the Police of all prosecutions would also raise objections inspired by sensitivity to the dangers posed by the already wide powers of the Police and complaints about their abuse. It is sometimes heard that the Police improperly close case dockets on grounds such as "undetected", or "insufficient evidence", "no criminal offence disclosed", "offence trifling", or "complaint civil". Such complaints are coupled with a demand that better control ought to be exercised over the Police in these matters. These demands are not met not because they fall on unsympathetic ears but because of the sheer volume of work any system of outside control would produce.

17. Already, in some Commonwealth countries, the Police prosecute the bulk of cases tried by Magistrates' and Circuit Courts. Although they are, while doing so, acting on behalf of the Attorney-General, and subject to his directions, neither the Attorney-General nor his staff see the papers on most of these cases. The Attorney-General's control being exercised through his power to enter a nolle prosequi and call for the papers for advice and direction, if any error or wrongdoing is drawn to his attention. The argument may be put that if Police involvement in the investigation detracts from their objectivity and impartiality, and therefore disqualifies them from holding the ultimate responsibility for prosecutions, then why are they given such a substantial role in prosecutions? The answer is because of expediency and convenience. Countries which give this power to the Police do not, usually, have enough lawyers in the Attorney-General's department or at all to conduct the numerous prosecutions which have to be done. The cases prosecuted by the Police are of less serious nature. The Police carry on their prosecutions in court under the watchful eye of the presiding judge who is obliged to ensure that the processes of the court are not abused. Further, the control of the Attorney-General, however remote, means that if his attention is drawn to any irregularity or situation requiring intervention, he would exercise his powers of correction.

18. Some problems, however, could arise in connection with the relations of the Attorney-General and the Police. In countries with military-cum-police governments, for example, the enhancement of the political power of the Police may put them in a position to over-rule the Attorney-General in the higher councils of State. And they could defy, refuse to co-operate with or to subject their decisions on prosecutions to, the Attorney-General with impunity. That, of course, does great harm to the proper discharge of the objective function in the national interest. On another level, the desire of the Attorney-General's office to be put in the investigative picture at an early stage has led, in some cases, to schemes to have the Attorney-General's physical presence at the Police headquarters. The Attorney-General's representative so placed is thus on ready call to advise on matters when needed. But this may also create a problem of command when the representative becomes so identified with the Police that they may, when it suits them, want to run his opinion against the more detached view from the Attorney-General's office. The proper functioning of the machinery for prosecutions depend on the strict observance of relative powers of the Attorney-General and the Police.

(ii) The Courts

19. The courts' challenge to the Attorney-General is not really directed to becoming an alternative body performing the decision-making function. Their claim is to have the right to supervise the Attorney-General in his exercise of the discretion. Of this, more will be said later. But at this point, it is worth noting that the courts' general control over trials could raise a claim for an extension of functions to include the power to decide who should be brought before them. And indeed, there is one aspect of the prosecution function where the courts exercise a substantial influence, if not always a decisive one, on the decision of the Attorney-General or prosecutor before them with regard to the continuation of the case. Even though the Attorney-General's power to enter a nolle prosequi is unfettered, the

withdrawal or discontinuance of cases before the courts by prosecutors may be made subject to the court's consent. Sometimes, the courts refuse this consent. In Regina v. Emmanual[5], for example, the Court of Appeal in England held that when a trial judge who was told by counsel that the prosecution was prepared to accept a plea of not guilty to a serious charge but guilty to a lesser offence had approved of that course, and the accused had so pleaded, there was not a material irregularity in the trial if the judge, on subsequently hearing of the background to the charges ordered that he would not accept the plea of guilty and that the trial of both offences should continue. And in the famous Yorkshire Ripper trial the judge declined to accept the plea of manslaughter by reason of diminished responsibility even though the Attorney-General was prepared to agree to it.

20. The courts' action in this respect is based on the inherent jurisdiction to prevent an abuse of their own processes. A jurisdiction which in the New Zealand case of Moevao v. Immigration Department[6], Woodhouse J. described as "the independent strength of the judiciary to protect the law by protecting its own purposes and function", and Richardson J. said was a jurisdiction founded on two related aspects of the public interest: "ensuring that the courts' processes are used fairly by State and citizen alike" and "maintenance of public confidence in the administration of justice". But this broad jurisdiction has not been used to determine who should be brought before the courts.

21. In spite of the relations with prosecutions as described, the courts position as impartial arbiters between the State and the accused person is considered in the Commonwealth to be inconsistent with a role of active participation in the investigation or conduct of the State's case. As such the courts have not been put forward as an alternative to the Attorney-General as the authority to decide on the issues of prosecution.

(iii) The Ombudsman

22. The Ombudsman now poses a challenge to the Attorney-General's role of protecting the public interest. But that challenge does not really extend to the field of prosecution of offences. The Ombudsman was created not because of deficiencies in the Attorney-General's exercise of the discretion to prosecute. His office remedies deficiencies in the public administration system and supplements the forms of judicial redress by way of prerogative writs and orders available. He may have powers to order the prosecution of defaulting public servants. But this cannot be taken as serious competition to the powers of the Attorney-General.

(iv) The Jury

23. In the course of questioning the Attorney-General in the British Parliament over the decision not to prosecute in the Scottish rape case, one member (Mr. English) asked him, "Will he (the Attorney-General) also consider that it might be a good idea if we reverted to the ancient British system, which is still the American system, and allowed prosecution ultimately to be decided upon by a jury?" This may be a serious proposal where juries have discharged such functions before and may be relied upon to give satisfaction if given back the function. But in most of the new Commonwealth countries, juries have never performed such function. Indeed with even those limited functions which have been open to them, they have been attacked for not being the bulwarks of justice which British tradition makes them out to be. In these countries, this suggestion made by Mr. English would receive no serious consideration.

24. No viable alternative appears from the foregoing examination to the Attorney-General as the repository of the discretion to prosecute. A new office could be created to perform his functions. But such a creation would be no more than the Attorney-General by another name. The problems faced by the new office will not be dissimilar to the present problems of the Attorney-General. If that is so, then the question now deserving of examination is,if the discretion must be reposed in the Attorney-General, how can its proper exercise be ensured?

Control of the Discretion

(a) The Independent Attorney-General

25. The Attorney-General exercises his power on behalf of the people. And the democratic concept requires that he should be answerable to the people for that exercise. Britain fashioned the system of answering to the people through Parliament, their elected representatives. The test that the Attorney-General there has to meet is whether or not the power has been exercised properly in the public interest. And public interest must not

be confused with narrow political party advantage. The independence constitutions of the younger Commonwealth countries did not always conform to this machinery of accountability. While the test was the same, the attempt was made in these constitutions to avoid answering to Parliament or other representatives of the people. To begin with, the Attorney-General was a public officer, which may have been just a continuation of an office existing in the prior colonial administration. He was not a member of the legislature and therefore not normally present at its meetings to answer questions, unless there was a system of summoning public officers to answer before Parliament. But further, as is demonstrated by the case of Ghana, he was not answerable to the Cabinet which was the political body collectively answerable to Parliament for the administration of the country. In some countries, when the Attorney-General became a political appointee, his functions with regard to the conduct of prosecutions were handed over to a Director of Public Prosecutions or equivalent who was, like the public servant Attorney-General, protected from answering for his actions to the Cabinet or any other person. Thus, the Attorney-General appeared insulated from politics in the narrow sense of the word. There is no doubt about the wisdom and importance of conducting the prosecution function without fear or regard for political consequences of the kind discouraged. And any attempt to achieve this end is to be applauded. But as pointed out earlier, it is doubtful whether the devise adopted provided this shield to the Attorney-General, so long as he had no tenure of office and could be removed by or through the instrumentality of the political authority. If that system is to be continued, a matter for consideration is whether the protection given the public officer would not be enhanced by putting him in the position of a judge with tenure, or some other tenure provisions be specifically devised for him. But such consideration ought to be given in the full awareness of the fact that conferment of tenure could amount to the conferment of absolute power on the officer. And whereas judges enjoy the same privileges, it must be remembered that the judicial system is designed to minimise errors through its appellate system which gives a greater number of judges the opportunity of pronouncing on the correctness of a decision, the higher it goes. And in any case judges normally give reasons for their decisions. All of which are safeguards which will not be present in the case of the independent Attorney-General. It must also be pointed out that the conferment of tenure does not do away altogether with other weaknesses as for example, where the public officer is interested in further preferment within the gift of the political authority.

26. Failing constitutional protection against removal, whether the public servant Attorney-General or Director of Public Prosecutions carries out his duties independently of the political authority depends on factors like the depth of respect paid for the independence of his office. For it is important not only that the Attorney-General or Director of Public Prosecutions should want to conduct the office without regard for political consequences but that it be appreciated by the government in power and the people that that is the way and manner in which the office should be conducted. Other factors would include how often interference had been resorted to before and with what consequences, how strong would public disapproval for the contemplated interference possibly be, how important to the political authority the case promoting interference is, the value or otherwise of the holder of the office to the political authority, and, last but not least, the character and integrity of the officer. For it is only this last factor which will determine whether considerations of personal advancement or cost will be cast aside when a decision, unpopular with the political authority, has to be taken.

27. But in any case, the question arises whether a person exercising a power on behalf of the people should not be answerable to anyone for the manner of exercise of the power. It puts great power in the hands of the authority concerned. A power which he may abuse, like any other human institution is liable to do. Then how does the State which gave him such power discipline him or correct the fault for the future? This argues for some degree of public accountability and explains why several countries have moved away from the system which confers the ultimate power of the decision to prosecute on a public servant.

(b) Responsiblity to Parliament:

28. This or its equivalent is the usual control where there is a Parliament, and the Attorney-General is a political officer. That system was classically and most effectively demonstrated in the recent Scottish rape case mentioned earlier. Crown Counsel for whom the Solicitor-General was responsible had decided not to proceed with the prosecution of a case of rape and serious violence to the person against a number of youths. The reason for his decision was that he had considered a psychiatrist's report on the consequences to her health. Against that was the suggestion that there was adequate evidence otherwise available which implicated the youths and which ought to have been submitted for trial.

29. Solicitor-General Fairbairn was obliged to explain the circumstances and considerations for the decision to Parliament. In the course of the statement he had to apologise for making a statement to the press before his parliamentary statement. The answers he gave to members' questions were obviously found unsatisfactory because the decision in the case resulted in his resignation. A few days after the Solicitor-General's statement, the Attorney-General was himself questioned in Parliament about the wider implications of the exercise of the discretion. Concern was expressed by members for the possible consequences of recent decisions relating to prosecutions. One exchange was as follows:-

> Mr. Nelson: Does my Right Honourable and learned Friend agree that it is of the utmost importance that the Director of Public Prosecutions should enjoy the full public confidence? Is there not a danger that, after recent cases, there may be a doubt on the part of the DPP and his officials about when to prosecute? If that were to be the case, would it not be regrettable? Will he give the House an assurance that the DPP will continue to base his policy on a careful analysis of the evidence and a balanced assessment of where the public interest lies?
>
> The Attorney-General: I am sure that the Director of Public Prosecutions always applies those principles. The criticism that is levelled at him is that he does not prosecute in enough cases.[7]

Then later:

> Mr Stokes: In any discussions that my Right Honourable and learned Friend has with the Director of Public Prosecutions, will he bear in mind that protection of the public from violent crime must be one of the foremost considerations in his mind if the Government are to continue to have the confidence of ordinary law-abiding citizens?
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> The Attorney-General: I have always taken the view that violence is one of the worst crimes in the calendar. When I sat in a judicial capacity I always made certain, so far as I could, that the sentence reflected my views about the crime.[8]

This last exchange is significant when related to the previous questioning of the Solicitor-General of Scotland during which it had been suggested that the manner of the exercise of the discretion in the rape case would encourage the commission of crimes of that nature, and expecially to the taunt of Miss Jo Richardson (Barking) that the decision gave rapists licence to rape and cut up their victims, because they may then go scot-free. A charge which moved Mr. Fairbairn to reply that. "This is a unique case, unique in all my experience of such cases in the High Court".[9]

30. The case shows Parliament, the representatives of the people, anxious to understand the underlying reasons for the exercise of the discretion, expressing opinion as to what they thought some of the considerations which should guide the Law Officers should be. And their view of the possible consequences of a decision if that decision is wrongly taken. That is one form of control of the discretion found in parliamentary democracies.

(c) Responsibility through the Press:

31. It will be recalled that Parliament, in the Scottish rape case, expressed its displeasure of the Solicitor-General for making a statement to the press on the case before his statement to the House. But it is not unknown, even in parliamentary democracies, for a statement on the exercise of the power to be made by the responsible Law Officer to the press. The New Zealand Attorney-General in one such statement (see the Appendix) gave comprehensive reasons for declining to intervene to stop prosecutions before the courts involving industrial action taken by the accused. And presumably if there is no Parliament, as is the case from time to time in some Commonwealth countries, calls for explanation and statements to the press become the only effective alternative for keeping check on the exercise of the discretion. Such was the situation when the Attorney-General of Ghana, Mr Koranteng Addow, felt obliged in October 1976 to explain why he had withdrawn the case against the accused persons in the Republic v. El Helou and Others.[10]

32. The volume of decisions makes it impossible to comtemplate the explanation of any significant number of instances of the exercise of the discretion. But the above examples show that there are situations when it would be unavoidable that the Attorney-General should explain. Situations where there is doubt or suspicion about the decision would make

this necessary. Pressure for the explanation may come from the press, or if there is a Parliament, from that source. And it may be advisable that in the types of cases which are likely to arouse this suspicion or doubt, the Attorney-General be prepared in advance with his explanation if it should be called for. Cases where members of the prosecutor's own department, for example in the Police, are involved, cases involving persons connected with the administration of justice, for example lawyers, cases involving high ranking officers of State or public figures or politicians supporting government, cases involving the rich, indeed, all cases which might give rise to the charge of protection of one's kind, the powerful or the rich. Cases in which the Attorney-General should be anxious in reassuring the public that the decision, especially if it is a decision not to prosecute, was taken fairly and without favour or prejudice.

(d) The Attorney-General and the Courts:

33. Parliament and the press are not the only institutions which seek to represent the public interest in calling for explanation of the Attorney-General's decisions. Some recent pronouncements of the judges have been directed towards that end. They have gone as far as to claim a power to exercise some supervision over the Attorney-General. The pronouncements have not been aimed particularly at the discretion to prosecute. But they have been wide enough to apply to it. Lord Denning who has led this assault on the Attorney-General's powers put the position with regard to relator actions in Attorney-General (on the relation of McWhiter) v. Independent Broadcasting Authority,[11] this way:

> "... I am of the opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself."

It was a statement advocating the circumscription of the Attorney-General's hitherto unfettered discretion to grant or refuse consent in these matters. But earlier on in that same judgment, Lord Denning, in examining previous authority, had said this:

> "It is settled in our constitutional law that in matters which concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. As the guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law."

And later:[12]

> "In exercising his functions, the Attorney-General is not subject to the control of the courts. It was so laid down by the Earl of Halsbury LC., in London County Council v. Attorney-General,[13] when he said: '... but the initiation of the litigation, and determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.'"

The Master of the Rolls pressed on with his claim for the control of the Attorney-General's powers by the courts in the famous case of Gouriet v. Union of Post Office Workers and Others.[14] After Attorney-General Silkin had stated the position of the Law Officers as independent of control or supervision by anyone including the courts, Lord Denning said:[15]

> "It has been submitted that the discretion of the Attorney-General is an absolute discretion which will not be enquired into by the courts. I agree with this when he has exercised it by granting his consent to his name being used. Even if he gave his consent in a trifling or unsuitable matter, the courts will not review it. That was made clear by Lord Halsbury LC., in his oft-quoted dictum in London County Council v. Attorney-General [16] in the House of Lords. But that dictum does not cover a case when he has refused his consent. I am sure that Lord Halsbury LC., did not have such a case in mind, for the simple reason

that it had never arisen for consideration at that time, and it has never arisen since until now. So it falls to us to consider it. The Attorney-General tells us that, when he refuses his consent, his refusal is final. It cannot be over-ridden by the courts. He is answerable to Parliament, and to Parliament alone. This is, to my mind, a direct challenge to the rule of the law."

The right of the citizen to question the exercise of the Attorney-General's discretion before the courts is so widely stated here that had it prevailed it could have been used to question every exercise of the discretion. If it results in the case coming before the courts, then the courts would be satisfied that it had been properly exercised. But if the result is against bringing the action before the courts, then the courts must know why in order to determine for themselves whether the discretion had been properly exercised. It would have left little of the discretion in the hands of the Attorney-General. However, Lord Denning's view on this did not prevail in Britain. Gouriet's case as decided by the Court of Appeal was reversed by the House of Lords and the Attorney-General's position vindicated.

34. An attempt to subject the exercise of the Attorney-General's discretion to the direction of the courts was also made in Ghana in the case of the Republic v. T.O. Asare.[17] Section 179 of the Ghana Criminal Procedure Code provides that if it appears to any court at any stage of a summary trial of an offence which is also punishable upon indictment that the case is unsuitable for summary trial, the court has to inform the Attorney-General of this opinion, and adjourn the proceedings for 15 days to await his reply. If within that time the court is informed by or on behalf of the Attorney-General that it is proposed to prosecute the accused upon indictment, the court will switch over to the procedure laid down for preliminary enquiries into cases to be tried upon indictment. For this purpose all trial courts are given the power to hold preliminary enquiries. Should the Attorney-General not notify the trial court of his intention to take the case on indictment, the court upon resumption of the hearing has to proceed with the summary trial of the offence. The trial judge in Asare's Case, Anterkyi J., had taken the view that when the court informs the Attorney-General of its opinion, the Attorney-General, as an officer of the court, "must accept the opinion of the court and must proceed to the alternative procedure by indictment as borne by the opinion of the court and communicated to him;... it is, in this respect, the opinion of the court that carries, and not the desire of the Attorney-General." On appeal,[18] the Ghana Court of Appeal held that the learned judge was wrong.

35. The Australian courts have also had recent opportunity to take a stand on the right of the courts to review the Attorney-General's decision to prosecute or not in a criminal case where those powers are dealt with by statute. In Alexander Barton and Another v. The Queen and Another,[19] the High Court in the case where the appellants had alleged that the exercise of the Attorney-General's power had been for an improper and unlawful purpose, capricious or arbitrary, or at the direction of the Prime Minister of New South Wales, held, amongst other things, that the purpose of section 5 of the Australian Courts Act 1828, which authorised the prosecution of criminal offence by information in the name of the Attorney-General, was to arm the Attorney-General of New South Wales and Crown Prosecutors appointed by him with a power in all respects similar to that enjoyed by the Attorney-General in England and to extend the exercise of that power to all offences; that in cases where a statute confers an administrative discretion which is unlimited in its terms, the Court must concede to the repository a discretion unlimited by anything but the scope and object of the statute; that the courts cannot review the Attorney-General's exercise of the prerogative power to enter or refuse a nolle prosequi; that it cannot be said that the existence of judicial review of the Attorney-General's decision to prosecute by way of ex officio indictments is essential to the proper administration of justice, for the courts have other powers, such as the power to prevent an abuse of process, to ensure a fair trial.

36. Whether based on a better protection of the public interest, on natural justice or the fact that the Attorney-General as an officer of the court ought to carry out the wishes of the court, the judicial campaign to extend the control of the courts over the Attorney-General in the exercise of his discretion had not prospered. It has been killed by the courts' own hands. And indeed, there are questions which make the assumption by the courts of a supervisory role over the Attorney-General, difficult to justify. Who in turn is to supervise the courts in the exercise of this power? The fact that they criticise the Attorney-General is an admission that the Attorney-General like all human institutions, including the courts, is liable to err. That the

exercise of judicial discretion is allowed to rest finally with the highest court of appeal in the country is not an argument in favour of judicial infallibility, but an expression of the national interest in all litigation ending somewhere. What better justification, therefore, would the courts have for the supervision of an Attorney-General exercising a power on behalf of the people, when the institution of the courts is usually based on the premises that they should be independent of the people and not be subject to the opinions and pressures of the day?

(e) The Private Prosecution:

37. This could be put forward as the means whereby a case which the Attorney-General refuses to bring before the courts could nevertheless be prosecuted. But its use is limited. The difficulty of a private individual bringing a case before the courts by relator action where the Attorney-General refuses himself to take action or to lend his name to the individual's court proceeding has been exposed by the British House of Lords in Gouriet's case. Although it was said that the private prosecution had been used only three times this century before in Scotland, the rape case eventually took this route. But private prosecutions may be started in some countries only with the permission of the courts, a measure, no doubt, taken as a safeguard against frivolous prosecutions. Some other Commonwealth countries, however, give the right to the aggrieved person to proceed by way of private prosecution without permission either of the Attorney-General or the court. Even then, the procedure has its limitations. It may be confined by the law to summary trials and, therefore, in effect, only to less serious crime, simply by the fact that the indictment must be presented by the Attorney-General. And the more serious offences should be tried upon indictment. Further, even though the private prosecution may be started without permission of the Attorney-General, he has the right to step in at any time and take over the prosecution. Upon entering into the proceedings, he may determine it.

38. This recently happened in Raymond v. Attorney-General.[20] A person having changed his plea, was convicted with others of conspiring to pervert the course of justice, and was sentenced to imprisonment. After the committal proceedings and before the trial he laid informations alleging perjury against one of the Crown witnesses. The Director of Public Prosecutions was notified, and exercising his statutory powers, a member of his office appeared in court, explained that the evidence had already been canvassed at the committal proceedings, that the Director of Public Prosecutions was satisfied that the proceedings were vexatious and offered no evidence. The private prosecution, therefore, hardly affords a sure resort if the Attorney-General refuses to prosecute a case in court.

The Discretion Itself

39. What, then, is the substance of this discretion? Broadly speaking, it is to consider evidence collected through investigation and to decide whether in the public interest any crime disclosed should be prosecuted in court. The public interest requires that crimes be suppressed and that criminals be punished. The determination of guilt and the punishment therefore has been assigned to the courts. The question which causes difficulty is whether public interest also requires that all crimes disclosed must go through this court process, and if not which should be withheld. Do circumstances ever exist which would make the harm done to the national interest by a prosecution greater than the identification and punishment of the criminal?

40. The first point considered by the prosecutor is whether on the evidence discovered, there is a case to be put before a trial at all. Is the law satisfied as to the ingredients of the crime? Is the evidence sufficient to justify a prosecution? If the answer to these questions is a definite no, then no matter how reprehensible the conduct of the person involved, no court of criminal justice will convict him, and, therefore, there is no point in sanctioning a prosecution. Cases do occur where the law is not so clear. In which case the prosecutor has to take a hard decision whether to proceed with the prosecution or not. When the Attorney-General of Ghana made his press statement on the Helou case, this was the basis of his decision not to prosecute. As he said: [21]

> "Looking at the evidence which the prosecution had to tender and having regard to the law as it stands, and all other relevant factors, I decided that the prosecution would be inadvisable. I accordingly endorsed the recommendations of the Director of Public Prosecutions that the case be withdrawn."

The statement shows the decision being taken at the highest level. That press criticism of the decision continued after the explanation indicates that even on a question of law, on which the Attorney-General can claim superior expertise, his decision must command acceptance by the public. On this account, and because a Law Officer may feel that he would be open to unjustifiable and uninformed criticism if he followed his better judgement and ruled against prosecution, he is sometimes disposed to let a case proceed so that the court takes the responsibility of acquitting the accused.

41. In considering the evidence, there are at least two standards of satisfaction which a prosecutor may apply. These are brought out in the Report of the Royal Commission on Criminal Procedure, when it stated that under the present practice, the prosecutor, when deciding whether or not to launch criminal proceedings, has to satisfy himself that there was at least a prima facie case, the existence of which, if believed by a jury or magistrate's court, would justify a verdict of guilty. The Director of Public Prosecutions in England, however, applied a somewhat more stringent test, which was, whether there was more than a 50 per cent chance of conviction; that is, that it was more likely that there would be a conviction than an acquittal. The Commission recommmended the adoption by all prosecutors of the latter test.

42. The "51 percent rule", as the Director of Public Prosecution's test has come to be known, may be more easy to state than to apply. But questions of sufficiency of evidence either to determine the factual issue or to satisfy the legal requirement of the commission of a crime may not be the most difficult questions the prosecutor has to decide. Take the Scottish rape case. It was quite obvious from Mr. Fairbairn's statement that the state or standard of the evidence was not the foremost consideration which led to the decision not to prosecute. And some of the most difficult problems likely to arise are those in which two equally conscientious officers may take different views of the public interest in the particular case.

43. The basic principle which governs the decision to prosecute was, as pointed out by Professor Edwards, stated by Sir Hartley Shawcross when Attorney-General in a speech to the British House of Commons in 1951. He then said, "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 ... prosecute ... whenever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration." This would be the position of Commonwealth countries both old and new which have followed the British tradition in prosecutions. But what constitutes the public interest? That is the nub of the problem. There are certain basic considerations which every right thinking citizen would agree qualify as in the public interest. Considerations involving the protection of national security, relations of the State with a foreign State which may be harmed by a prosecution, protection of the constitution, are examples of this kind. Beyond these certain matters, argument develops over which course of conduct is or is not in the national interest. Such considerations as the staleness of the case, the youth or old age or mental age of the offender, and the relationship between the offender and the victim, all of which are legitimate considerations, may turn out to be relative factors, depending on their weight in the scales tilting a decision one way or the other on the attitude and make-up of the particular officer responsible for the case. The factors taken into account in arriving at the decision may also vary with the individual officer.

44. Public reaction and the known attitude of the courts to particular crimes may influence the decision. In a country where polygamy is the norm rather than the exception, the offence of bigamy may remain on the statute book as a dead letter. That juries almost invariably bring in a verdict of not guilty in a rape charge unless the evidence of violence to the victim is incontrovertible and of the strongest may raise the percentage certainty which the prosecutor may require before proceeding with the case. Confidence in the courts to return a fair and proper verdict on the evidence in a particular type of offence will naturally colour the consideration given to whether or not the charge be brought before a court. In some countries, such lack of confidence in security cases has been used as "justification of the institution of preventive detention."

45. But whatever the considerations taken into account, the rule is widely accepted, at least in countries with a multi-party system of government, that the national interest should not be construed to include the narrow political interests of persons or the party in power. Professor Edwards in the Modern Role of the Attorney-General puts the point nicely when he draws the distinction between the types of political considerations in the following passages:[22]

"...anything savouring of personal advancement of sympathy felt by an Attorney-General towards a political colleague or which relates to the political fortunes of his party and government in power should not be countenanced if adherence to the principles of impartiality and integrity are to be publicly manifested. This does not mean that the Attorney-General or the Director of Public Prosecutions should not have regard to political considerations in the non-party political interpretation of the term "politics". For example, the maintenance of harmonious international relations between states, the reduction of strife between ethnic groups, the maintenance of industrial peace, and generally the interests of the public at large are legitimate political considerations in deciding whether (or when) to initiate criminal proceedings and, an even more sensitive question, whether (or when) to discontinue a criminal prosecution."

And then later:

"The basic question... is who should be the final arbiter of legitimate political considerations affecting prosecutions, the Cabinet, the Prime Minister or Chief Executive, or the Attorney-General (or Director of Public Prosecutions if the constitution has made the office truly independent). In my view, it is not only proper but desirable that the Attorney-General (or the DPP) should exercise both legal judgement and an appropriate degree of political sensibilities when assessing the weight to be given to relevant political considerations of the legitimate kind to which I have referred earlier. Where matters of high state or the general public interest are involved it makes eminent sense for the Attorney-General to consult his ministerial colleagues, including, if necessary, the Chief Executive, with a view to estimating their particular contributions to an understanding of the wider issues that may be involved."

Incidentally, these passages also go towards explaining why some countries object to a public service Attorney-General or Director of Public Prosecutions who is not accountable to any authority as the repository of the discretion under discussion. What sanction would there be, they would ask, if the Attorney-General or Director of Public Prosecutions refuses or omits to consult? Who has the responsibility for dealing with the political consequences of a wrong decision? The political authority whose responsibility it is to cope with whatever results flow from the decision may complain with some justification that it is made to carry a burden which is not of its making. And even where the Attorney-General is disposed to consulting on these matters, there may be some truth in the further complaint that if he is a public servant, he may not be so nicely attuned to recognising with sufficient alacrity and effectiveness a case with potential for damaging political consequences in a wider sense.

46. Another point which arises from the perceptive observations of Professor Edwards takes us back to the argument being made earlier on in this paper that however well the general rules are stated, their application has to be by individual personalities who may legitimately arrive at different conclusions after a proper consideration of the same problem. Professor Edwards mentions the consideration of maintenance of industrial peace as a proper subject to take into account. The New Zealand Attorney-General had this concrete problem in the cases which resulted in his press statement attached in the Appendix to this paper. Recalling the information that discussion by the Cabinet of the initiation and extent of criminal prosecutions was a common occurrence in New Zealand,[23] the press statement is of interest otherwise, because it says, amongst other things, "As required by such cases, my Cabinet colleagues have left it entirely to me to make the decision and have not interfered in any way; particularly bearing in mind the obvious overtones of this issue I am very grateful for that fact." But the relevant question at issue at this point is, would every Attorney-General faced with this particular type of problem mindful of the threat of further industrial strife, have decided the matter as the Attorney-General for New Zealand did? And if not, could an equally well-argued statement not be made for the opposite decision?

47. Few countries, it is surmised, have any guidelines issued on the various factors and the degree in which they weigh in the decision-making scales to the officers

dealing with the problem or to the public. Even though the Police conduct the bulk of prosecutions as agents of the Attorney-General, it is unlikely that any such guidelines, or guidelines on their relations with the Attorney-General, or on how to conduct the cases for the prosecution, would ever have been issued to them by the Attorney-General. And, although precise and comprehensive rules may be difficult, if not impossible to state, some general rules and observations are possible and necessary.

48. For example, it is believed that the public expects that the more difficult the decision, the higher the rank of the officer who should take the decision. But, presumably, in many cases the level of consultation leading to a decision is not a matter of written rule but of convention and intuition. Here again, it may be argued that not all problems announce their depth or complexity in advance. Nevertheless, a great majority can be regulated to some extent by rules. At the risk of being tedious, one more lesson may be drawn from the Scottish rape case. It would appear that a substantial reason for the attack of Members of Parliament on the Solicitor-General lay in the fact that the decision not to prosecute on the grounds given, namely, a ground not related to a usual legal question, especially having regard to the circumstances and gravity of the case, was taken not by himself or someone even higher, if that is possible, but by the Crown Counsel. The further implication in the Solicitor-General's statement that even more serious offences, such as murder, had been dropped without reference to the Law Officers, was in the circumstances bound to cause more anxiety to his inter-locutors. To them, it was quite disquieting that the system was such that very serious cases could be withdrawn without the reasons ever being known or approved by the responsible political officer.

49. This raises the question of how much of the day to day work of the Attorney-General's department ought to be known to him personally or to the highest officer responsible for prosecutions. No doubt the volume of work would make personal knowledge of the majority of cases impossible. The complaint implied in fact that Crown Counsel may take this most serious decision, may be levelled in many countries where prosecutions for the most serious cases, even murder cases are disrecommended, withdrawn or ended by the acceptance of a plea for a lesser offence, regularly by officers of that rank without prior reference to higher authority. The charges themselves may be the most serious in the criminal calendar. But if the reasons for the decision are more or less technical and non-controversial, this can hardly raise much public concern. Where, on the other hand, the reasons for the decision are "unique" or even unusual, then some system ought to be devised to ensure that the decision is taken or has the approval of the highest responsible authority.

50. This argues for the formulation and dissemination amongst prosecutors of a set of guidelines giving the types of cases and the considerations which should alert them to referring the matter to higher authority for decision. And in view of the public interest in the matter, consideration should be given by all Attorneys-General to the publication generally of a full statement on prosecution policy. The (1982) 8 Commonwealth Law Bulletin at page 826 notes the announcement of the Federal Attorney-General of Australia that he will be tabling in the Senate a statement setting out the Australian Government's prosecution policy, which will spell out the general principles which the Attorney-General and the officers of his department would apply in the institution and conduct of prosecutions. "The policy will deal with such questions as the decision to prosecute, the conduct of cases, questions of indemnities for witnesses and private prosecutions."[24] Unfortunately, the policy statement was not available to the writer before the completion of the paper. It is, however, hoped that the statement will be available to the participants of the Meeting. The idea behind the statement is laudable, and should be recommended to other Commonwealth Law Ministers. The Australian Federal Attorney-General thought it advisable to discuss aspects of the policy with legal authorities in the United Kingdom and the United States. It is suggested that a Law Ministers' Meeting would afford an ideal forum for consultations of this kind to determine the need for and the contents of such a document. The belief expressed by the Attorney-General that it was important that Federal Officers engaged in prosecutions should have clear guidelines before initiating prosecution proceedings, and equally important that every citizen should be aware of these matters, has validity far beyond the shores of Australia. In saying that, "I do not expect that the policy guidelines will cover every possible situation. However, I hope that by making the prosecution policy public, people will better understand why these decisions are made," the objectives and limitations which the Attorney-General recognised, are, it is submitted, realisable and realistic.

Conclusion

51. The case for the education of the public, law students and secondary school students on the nature and the office of the Attorney-General has been made in Professor Edwards paper earlier mentioned. That case is emphasised by the discussion in this paper. With particular reference to the decision to prosecute, one of the means open is the publication of the guidelines on prosecution policy. It is necessary not only to educate the ordinary citizen on this matter but also members of the government. Further, there is the need to inform and educate all subordinate officers, the Police and other personnel conducting prosecutions on their duties and their relations with the Attorney-General. The guidelines to these assistants and agents must attack the problem of sensitivity to the types of cases which need to be referred to higher authority and anticipation of public anxiety over particular decisions. The guidelines issued to the prosecutors will necessarily have to be more detailed and cover a wider field than the policy statement which is issued to the public. If the decision to prosecute is based on the public interest then everything must be done in getting the public to appreciate what is being done on their behalf. For it is through that that public confidence in the system can be retained.

FOOTNOTES

1. For the statement and questions, see Hansard Vol. 16 No. 40, 21 January 1982.
2. 1977 Meeting of Commonwealth Law Ministers, Minutes and Memoranda (1977 Meeting) p. 196.
3. Ibid p. 199, para 11.
4. Published, January 1981; Cmnd.8092.
5. The Times, 20 October, 1981. (1982)8 Commonwealth Law Bulletin 102. But see The Times, 31 July 1975, the report entitled "Judge and Prosecution in Dispute over Rape Plea" in which in spite of protests from the judge, the plea of not guilty of rape but guilty of unlawful sexual intercourse was accepted by the prosecutor. And see also the Ohene Djan Case in Ghana, Amissah, Criminal Procedure in Ghana, pp. 111-113 and the notes at pp. 165 and 166.
6. (1981) 7 CLB 96.
7. Hansard Vol. 16 No. 42, 25 January 1982, pp. 611-612.
8. Ibid, p. 612.
9. Hansard Vol. 16 No. 40, 21 January 1982, p. 428.
10. See Amissah, op. cit. p. 23.
11. [1973] 1 All E.R. 689 at 698.
12. Ibid at 697.
13. [1902] A.C. 165 at 169.
14. [1977] 1 All E.R. 696.
15. Ibid p. 715.
16. See note 12 above.
17. (1968) G.L.R. 93.
18. (1968) G.L.R. 727.
19. (1981) 7 CLB 527, 5 December 1980.
20. [1982] 2 W.L.R. 849 (C.A), (1982) 8 CLB 977-978.

21. See note 10 above.

22. See note 2 above, pp. 201 and 202.

23. Ibid p. 202.

24. (1982) 8 CLB 826.

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New Zealand

Exercise of Attorney-General's discretion to stay proceedings

Two industrial disputes resulted in a number of arrests and prosecutions. Several interested parties asked the Attorney-General to intervene. In a press statement he gave his reasons for declining to do so—

> I have carefully considered the requests that I should stop the prosecutions in the Ravensdown and Mangere Airport cases; and I have this afternoon notified both the Federation of Labour and Ravensdown Fertilizer Cooperative Ltd. that in neither case am I prepared to stay the proceedings.
>
> The result of this decision is that each prosecution will continue, the law will follow its course and that matters of innocence or guilt will be decided by the appropriate court.
>
> Because of the very widespread public interest in the matter I am taking the unusual step of giving the reasons for my decision. I want to emphasise that in so doing I am in no way commenting upon, or prejudging, the merits of any of the prosecutions. That judgment is for our Courts; it is one of the cornerstones of our democratic system that they are, and must be seen to be, completely independent of any outside agency.
>
> In reaching my decision I have considered very full reports given to me by the Police and the Aviation Security Service and the advice of the Solicitor-General. Naturally, I have also listened to the views of the Federation of Labour, the Employers Federation, my colleagues and advisers and, of course, the many members of the general public who have been in touch with my office. However, the final decision on the matter has been mine alone. As is required in such cases, my Cabinet colleagues have left it entirely to me to make the decision and have not interfered in any way; particularly bearing in mind the obvious political overtones of this issue I am very grateful for that fact.
>
> Before dealing briefly with each of the two cases it is appropriate that I should make some general comments as to the circumstances in which stays of prosecution might be granted. The Attorney-General as a Law Officer of the Crown has wide powers to stay a criminal prosecution; in practice these powers are exercised infrequently by the Attorney himself—more often by the Solicitor-General. A good example is where a person has been tried on several occasions and the jury has not been able unanimously to agree on a verdict. In such situations it is commonly accepted that after several trials (usually two or three) the interests of justice are not served by putting the accused on trial yet again. Disagreements by successive juries might well be taken as an indication that the charges against the accused cannot be proved beyond reasonable doubt, and thus the common practice is to stay any further prosecution.
>
> Such stays are entered only if it is in the interests of justice to do so and the action is never taken without careful consideration. The same approach must apply in respect of those thankfully rare cases that are regarded as more properly to be decided by the Attorney-General.
>
> Clearly the interests of justice touching as they do the interests of the whole community involve something more than the mere convenience of two parties who, for whatever reason, now find it more to their preference that the rules of law and the ordinary principles of the legal process should not apply to them. In general terms I do not regard seeking to avoid the consequences of the law as a satisfactory way of resolving an industrial dispute. If I were to accept the proposition underlying that approach the general public might well conclude that every time the law is broken in the name of industrial action or of other protest action those who so act will be able to have their prosecutions stayed merely by threatening or exerting further pressure on the community.
>
> The real ground which has been urged upon me for staying these prosecutions is that the Unions and the FOL disagree with the law under which the prosecutions have been brought. In the airport case even that may not be so. The FOL does not disagree with rules to preserve airport safety and security—it merely does not want them to apply to picketers.
>
> Some public statements have indicated that industrial action would only be withdrawn if I stayed these prosecutions. I must say that that is not, and never could be, an acceptable proposition. It was made very clear by the Prime Minister following the meeting with the Federation of Labour on Tuesday that any decision by me was entirely separate from the issue of peaceful and legal picketing or any possibility that the law relating to this activity might be changed. In short, the decision that I make in this matter as Attorney-General is not and never could be the subject of a "deal".

In the Ravensdown case 33 people have been charged under s. 33 of the Police Offences Act which makes it an offence to use unlawful intimidation or violence with a view to restricting the freedom of another. The specific circumstances to which the prosecution are related involve an allegation that engineers were prevented from entering the Ravensdown works to attend to a sulphuric acid plant said to be potentially dangerous to life and property.

In this case the request that I should stay the proceedings has in fact been made by the Ravensdown company itself but is put forward not for any reason associated with the general interests of justice, but rather because the company has achieved its immediate purpose of obtaining access for its employees to the premises; it has in fact made its request to me in terms of the subsequent settlement bargain entered into with the Union. In other words, it now suits the convenience of both company and Union that the prosecutions should be stayed. As I have made clear, the interests of justice go well beyond such considerations.

I am also mindful of the fact that even if s. 33 of the Police Offences Act was not part of our law such action on the part of picketers could well still constitute an offence against the general criminal law.To stay a prosecution in those circumstances would to my mind be most inappropriate.

The 48 prosecutions arising from the arrests at Mangere Airport on Tuesday have been brought under regulation 15(2) of the Civil Aviation Regulations which make it an offence to "trespass on any part of an aerodrome beyond the areas set aside for public use".

New Zealand as a signatory to the conventions of the International Civil Aviation Organisation is required to take all practical measures to prevent unlawful interference with aircraft and facilities. Similarly the role of the Aviation Security Service which was involved in the Auckland arrests is to maintain airport security. The Federation of Labour clearly understands those facts.

The allegation on which these prosecutions are based (which again must be finally tested in Court) is that those arrested were in a place beyond the areas set aside for public use. The charges can therefore be seen to be directly related to the important purposes which the regulations are meant to achieve.

Although it has been suggested to me that those arrested were not hindering normal airport activities and that alternative measures to remove them from the area were not used by the authorities, neither claim is confirmed either by the Police and Aviation Security reports or from my viewing of a lengthy television film of the events leading up to the arrests (which particularly showed first where they took place and secondly made clear the warnings that were given prior to the action being taken). Obviously an incomplete television film would be an insufficient basis for any decision as to innocence or guilt; however it is one of a number of factors which would make it very difficult if not impossible for me to grant any stay of prosecution, because what it shows is directly at variance with the claims made to me on behalf of the arrested persons. I am also informed that the arrival of at least one flight at Mangere Airport was impeded by the actions of picketers.

Quite apart from that I have information which indicates that at least some of the picketers started out with the knowledge that they might well be arrested and that they appeared to be not unwilling that that should happen. It is hard to suggest that to stay prosecutions in such circumstances would be in the interests of justice. I can in fact find no good reason on which I could base a decision to stay these prosecutions. In those circumstances to do so would be the most transparent expediency.

The role of Attorney-General carries with it many difficult responsibilities, some of which require that I separate myself from the normal process of collective Cabinet decision-making but which nonetheless have very real political overtones. Thus the decision that I have made today has not been easy. However I do not intend to allow the office of, or the powers given to, the Attorney-General to be used whether by employers or employees or anyone else as a convenient means of avoiding the proper legal consequences of their own actions. These are criminal proceedings. There must be no place to which the criminal law and its consequences cannot reach—whether it be to Parliament, the streets, the homes of New Zealanders, the boardroom or the picket line. To seek to have the law changed is one thing; to break it with impunity, for whatever reason, is another.