

Private Prosecutions: A Potential Anticorruption Tool in English Law

Tamlyn Edmonds & David Jugnarain

May 2016

This paper is the fourth in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

Tamlyn Edmonds is a founding director at Edmonds Marshall McMahon (EMM), the first and only specialist private prosecution law firm in the UK. David Jugnarain is a barrister at EMM.

Published by Open Society Foundations
224 West 57th Street
New York, New York, 10019 USA

Contact:
Ken Hurwitz
Senior Legal Officer
Anticorruption
Open Society Justice Initiative
Ken.Hurwitz@opensocietyfoundations.org

Introduction

The right to bring a private criminal prosecution, rather than a civil claim for damages, is exceptional, even in common law jurisdictions; the majority of jurisdictions around the world treat the criminal justice system as a function of the state.

Yet private prosecutions have deep roots in the common law system: England and Wales retain this right (Scotland and Northern Ireland have separate legal systems), as do Canada and some other common law jurisdictions. As the Irish High Court found in the private prosecution case of *Kelly & Anor v. District Court Judge Ryan*, “the existence of a private prosecutor acts as an external check against the risk of a rare lapse or oversight on the part of the Director [of Public Prosecutions].”¹

By allowing prosecution when the state chooses not to act, private prosecution may offer particular opportunities in combatting corruption, when the criminal actor is part of the state, and state actors may be reluctant to bring cases.

The courts in England and Wales permit any entity to bring a private prosecution, if there is evidence that a person or entity has committed a criminal offense. This includes any “legal personality” and therefore also includes corporate entities as well as individuals. Cases involving corporate entities implicate the “mind” of the corporation—typically individuals near, or at, board level. If there is sufficient evidence to demonstrate that a corporate entity has committed a criminal offense through its “directing mind and will,” both the company and the individual can be prosecuted, as they have separate and distinct legal personalities.

At other times the corporate entity escapes sanction because it is difficult to prove the involvement of its “directing mind,” particularly in cases involving the actions of large multinational corporations. Cases may involve any criminal offense the law recognizes as such.

The individual or organization bringing the prosecution need not be the victim of the crime or have any connection to it. Entities that have brought private prosecutions before the courts include the Royal Society for the Prevention of Cruelty to Animals, the Federation against Copyright Theft, broadcaster SKY plc, and England’s Premier League.

¹ *Kelly & Anor v. District Court Judge Ryan* [2013] IEHC 321. A private prosecution was brought against two bankers for fraud.

Jurisdiction limits the cases eligible for private prosecution to crimes committed (or substantially committed) within England and Wales, unless a specific statutory provision creates an extra-territorial jurisdiction for a particular offense. These include:

- Specified crimes (such as fraud, dishonesty offenses, blackmail, and computer misuse²), which can be prosecuted if one of the constituent elements of the offense occurred in England or Wales.
- Crimes of “universal jurisdiction” (including war crimes³ and torture committed by public officials⁴), irrespective of the nationality of the accused and of the jurisdiction where any such criminal acts are alleged to have taken place.
- Murder and manslaughter by a British national, regardless of the place in which it occurred.⁵

The Legal History of Private Prosecutions

From the sixteenth to the nineteenth centuries, the English legal system treated crime as a private matter. Victims and their families who wanted to secure justice would commence a private prosecution against the accused. Unpaid constables were responsible for keeping the peace and bringing anyone accused of a felony before the courts, but they had no duty to investigate crimes, and no one had an obligation to prosecute, except in instances of a crime against the state, such as treason. A system of “thief takers” developed, in which individuals obtained public rewards for capturing those who committed certain offenses, such as highwaymen, who held up travelers at gunpoint.

This private system was rife with unjustified demands for reward, and, as in other areas of the justice system, victims of little means had less access to justice through it than wealthier complainants, although it did offer an avenue for people whose complaints had been dismissed by the police.

England’s organized, paid state police force dates from 1829. This force bore the burden of investigating crimes and prosecuting individuals on behalf of the public, although they did so in their legal status as private citizens, not as representatives of the state.

² See the Criminal Justice Act 1993.

³ Pursuant to the Geneva Conventions Act 1957 and the International Criminal Court Act 2001.

⁴ Pursuant to the Criminal Justice Act 1988.

⁵ S.9 Offences Against the Person Act 1861.

A case from the 1860s illustrates the utility and necessity of such prosecutions at the time. In what became known as the “Saffron Hill Murder,” a stabbing occurred in the Golden Anchor pub in Clerkenwell, London, an area occupied mainly by Italian migrants, on the afternoon of December 26, 1864. Immediately after the murder patrons allied with the murderer, Mr Mogni, identified Mr Pellizoni, a bystander, as the attacker. The police arrived and arrested him despite the protests of witnesses. During Pellizoni’s trial, the police suppressed evidence that the murder weapon had been found some distance away from the incident, which would have vindicated Mr. Pellizoni. Pellizoni was convicted and sentenced to death, but a group of migrants commenced a private prosecution against Mogni, who had confessed to wielding the knife. His conviction led to Pellizoni’s release. If not for the right to bring a private prosecution against such corruption and partiality, a grave miscarriage of justice would have occurred.

In 1879, the government created the office of the Director of Public Prosecutions (DPP), establishing a public prosecutor who would prosecute the most serious cases in England and Wales, while leaving the police and private citizens to prosecute the bulk of other cases. In 1985 a major legal reform led to the creation of the Crown Prosecution Service (CPS), headed by the DPP, which now handles the bulk of public prosecutions in England and Wales; other specialised bodies such as the Environment Agency and the Serious Fraud Office can also bring prosecutions. From 1985 to the present day the role of the police has been to receive allegations and complaints, which they investigate and thereafter refer to the CPS, which reviews the cases and decides whether or not to prosecute.

The same law that established the CPS, the Prosecution of Offences Act 1985, expressly preserves individuals’ right to a private prosecution. In the 1975 case of *Gouriet v. Union of Post Office Workers*⁶ Lord Wilberforce described the right to bring a private prosecution in the following terms: “the individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system...remains a valuable constitutional safeguard against inertia or partiality on the part of authority.” In the same case, Lord Diplock said that private prosecutions are “a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.”

While some argue that private prosecutions can lead to malicious complaints and false allegations being pursued by vexatious litigants, there are protections in place that prevent the abuse of the criminal justice system in this way. In particular, the DPP has the power to intervene and take over any private prosecution,⁷ for the purposes of continuing with it themselves or stopping it

⁶ (1975) AC 435

⁸ *Regina (Virgin Media Ltd) v. Zinga* (2014) EWCA Crim 52, <http://www.bailii.org/ew/cases/EWCA/Crim/2014/52.html>.

In 2012 the Lord Chief Justice of England and Wales commented that private prosecutions had increased in the country because of “retrenchment of state activity” wherein the state had not been pursuing claims it might have in wealthier times.⁸ This was certainly an issue in the *Trafigura* case, which involved the illegal dumping of toxic waste off the Ivory Coast in 2006, affecting the health of large numbers of the local community. Amnesty International submitted a dossier of evidence to the Environment Agency relating to the alleged involvement of individuals based in the U.K., hoping to spur a public prosecution. The Environment Agency conceded that the allegations constituted a serious offense but stated that it lacked the resources, capacity, and expertise to investigate such a large and powerful company as Trafigura.⁹ A civil suit brought on behalf of 31,000 victims eventually led to a settlement in 2009.¹⁰

The mere threat of a private prosecution may also pressure a public agency into bringing a public prosecution. For example, following the *Sea Empress* oil spill off the Pembrokeshire coast in 1996, the global activist group Friends of the Earth made clear that if the Environment Agency would not prosecute, they would. This pressure is assumed to have influenced the Agency’s decision to commence a public prosecution against Milford Haven Port Authority (MHPA).

If state agencies can be reluctant to prosecute corporate entities such as Trafigura and MHPA, they may be doubly reluctant to investigate allegations of state corruption. Allegations against the police in particular may never see a public trial without the instrument of private prosecutions.

Constraints on Public Prosecutions

What then are the constraints that would affect the ability of activists to bring private prosecutions in corruption cases before the courts in England and Wales?

By their nature, the gravity of corruption charges means they are most likely to require a Crown Court jury trial. Such indictable offences are not subject to time limits, although of course a defendant’s attorney might bring a legal argument based on prejudice caused by delay (summary charges for minor offences heard before a magistrate’s court must be brought within six months of the offence taking place).

⁸ *Regina (Virgin Media Ltd) v. Zinga* (2014) EWCA Crim 52, <http://www.bailii.org/ew/cases/EWCA/Crim/2014/52.html>.

⁹ <http://www.theguardian.com/world/2015/jul/23/uk-authorities-lack-resources-to-investigate-trafigura-over-toxic-waste>; <https://www.amnesty.org/en/latest/news/2015/07/trafigura-toxic-disaster-shows-the-uk-needs-to-get-tough-on-corporate-crime>

¹⁰ <http://www.theguardian.com/world/2009/sep/16/trafigura-oil-ivory-coast>

As noted above, the DPP has the power to intervene and take over any private prosecution, or the purposes of continuing with it themselves or stopping it. Private proceedings for some offenses may also require consent before being allowed to advance; either from the DPP (as the head of the CPS), the Attorney General (the Government's principal legal advisor), or in some circumstances a relevant minister with responsibility for a particular regulatory agency.¹¹

Generally speaking, the consent of the Attorney General is required for issues related to public policy, especially foreign relations or issues related to national security.¹² This includes offenses under the Official Secrets Act 1911, war crimes, and certain terrorist offenses. The Attorney General also retains a power to enter a *nolle prosequi* (unwilling to pursue), bringing any private prosecution already commenced to an end.

DPP consent is required for cases, broadly speaking, in which the discretionary factors to be taken into account in deciding whether or not to prosecute are likely to be particularly sensitive. These include offenses such as bribery, conspiracy to commit an offense abroad, offenses under the Terrorism Act 2000, and assisted suicide.

In general, consent relies on the same test that the state uses to determine whether to bring a public prosecution: the Full Code Test.¹³ This test comprises two standards. The first determines whether the evidence reveals a reasonable prospect of conviction, sometimes known as the 51% chance test, or the "greater than evens chance test," on the grounds that a case that passes this test has a 51% chance of conviction.¹⁴ The second standard requires that the prosecution be in the public interest. When a private actor wishes to bring a case and must obtain consent to prosecute, the agency or entity empowered to give consent generally requires the presentation of evidence showing that the case passes the Full Code Test.

Where consent to prosecute is sought from the DPP, CPS policy states that passing the Full Code Test automatically leads to the CPS taking over the prosecution; failing the test bars consent, and leads to the termination of the case.¹⁵ Thus, the primary purpose of bringing such private prosecutions is to compel the police, to whom the CPS will apply for assistance, to pursue an investigation. This principle applies to the case of two sex workers who reported to the police that they had been raped in 1995. The police declined to investigate, challenging their credibility, but the women brought a private prosecution with the assistance of the NGOs Women Against Rape

¹¹ A full list of the offenses requiring consent can be found at http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/#b01.

¹² *Blackstone's Criminal Practice* (2015). [Need to complete this citation with author/editor, publisher, etc.]

¹³ https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf

¹⁴ *R (on the application of Gujra) (FC) (Appellant) v. Crown Prosecution Service (Respondent)* (2012) UKSC52, para 1 per Lord Wilson.

¹⁵ http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/-a10

and the English Collective of Prostitutes. Ultimately the men were convicted and sentenced to fourteen years in prison.

The policy by which the CPS can discontinue a prosecution can frustrate the efforts of private prosecution. The case of *R (Gujra) v. CPS* (2012) challenged the lawfulness of the DPP's decision to discontinue a private prosecution against three defendants for common assault and using threatening words.¹⁶ Gujra argued the discontinuation had frustrated the kind of private prosecution envisioned by section 6 of the Prosecution of Offences Act 1985. The Supreme Court disagreed. However, the dissenting judgments of Lady Hale and Lord Mance expressed concern over the application of the "51% chance test". Lady Hale argued that there could be two reasonable but different views on whether a reasonable court would convict. She went on to say that the standard in place could raise issues under the European Convention on Human Rights.

The DPP is also allowed to discontinue proceedings, even if they meet the Full Code Test on the grounds that the prosecution is likely to damage the interests of justice. This would include cases where the prosecution interferes with the investigation of another criminal offense; where the prosecution is malicious or vexatious; and where the CPS or police have promised the defendant he or she will not be prosecuted. When the DPP discontinues a private prosecution, a request can be made for a review under the CPS Victims' Right to Review scheme in the first instance,¹⁷ which can lead to judicial review. Lady Hale's dissent in *R (Gujra) v. CPS* argued that this possibility is not a sufficient safeguard of the right to a private prosecution.

The Attorney General has never routinely taken over prosecutions to which it consents in the same way as the CPS does. For example, in 1976 Mary Whitehouse, an activist campaigner opposed to social liberalism, obtained consent from the Attorney General to prosecute Gay News and others for the crime of blasphemous libel (a charge England and Wales abolished in 2008) following the publication of a poem by James Kirkup ("The Love that Dares to Speak its Name") that portrayed a Roman Centurion having sex with Jesus following his crucifixion. This proceeded as a private prosecution and was ultimately successful.

Common Motives for Bringing a Private Prosecution

The courts have considered whether the motives of a private prosecutor can taint or should otherwise affect the prosecution. As the City of Westminster Magistrates' Court has acknowledged, "it is inevitable that many private prosecutions will be brought with mixed motives."¹⁸ However, this does not mean that a prosecution has been improperly brought. In 1993 the English courts dealt with a private prosecution arising from the collision between a dredger and a pleasure boat (the Marchioness)

¹⁶ *R (Gujra) v. CPS* (2012) 1 WLR 254.

¹⁷ http://www.cps.gov.uk/publications/docs/vrr_guidance_2014.pdf

¹⁸ *Dacre v. City of Westminster Magistrates' Court* (2008) EWHC 1667, per LJ Latham.

on the River Thames in which 51 people died (the *South Coast Shipping* case)¹⁹. Mr. Glogg, the husband of one of the victims, sought a public inquiry, and when this failed he commenced a private prosecution for manslaughter against the owners of the dredger. The owners alleged that Mr Glogg's motives were improper and as such the proceedings were an abuse of the process. Lord Justice Lloyd disagreed, stating: The fact that a public inquiry has been ruled out does not mean that his motive in instituting the prosecution should now be regarded as improper. If there is evidence that a defendant has been guilty of an offence, then a desire to see him prosecuted and, if found guilty, punished is not an improper motive, especially where the prosecutor is one of the bereaved. Even if Mr Glogg's motives were mixed, the courts should be slow to halt a prosecution unless the conduct of the prosecution is truly oppressive.

Where there is evidence that demonstrates that an individual or entity is guilty of a criminal offense, the courts are unlikely to interfere with a private prosecution. The desire to see justice achieved clearly applies in many cases where a victim or victim's relative is the private prosecutor. Any entity may have an interest in deterring ongoing criminal conduct. Deterrence can serve the private good as well as the public good, as when private companies use private prosecutions to protect their intellectual property rights, such as in the case of *Zinga* (2014) (*ante.*). In this case, Virgin Media brought a prosecution against an individual who sold equipment that allowed users to access a pay TV service for free. Insurers have brought private prosecutions against individuals who have made false insurance claims to promote deterrence.²⁰

Where state enforcement agencies have failed to take action against those who consistently flout the law, a private prosecution can send a clear signal that such activity will not be tolerated by civil society. This has been seen particularly in relation to environmental crime where there have been a number of successful private prosecutions. For example, in 1991 Greenpeace pursued a successful private prosecution against the chemical company Albright & Wilson under the Water Act 1989 for discharging excessive amounts of heavy metal into the Irish Sea in circumstances where the National Rivers Authority was aware of the offense but was not willing to take any action.

Private prosecutions may also pursue restitution. Given the cost and delays civil proceedings generally impose, a private prosecution can be attractive. Following conviction, the criminal courts have the power to make a compensation order,²¹ dependent on the means of the offender. However, the court is unlikely to embark on any detailed analysis of causation for damages.

¹⁹ *R v. Bow Street Stipendiary Magistrates, ex P. South Coast Shipping co. Ltd* (1993) Cr. App. Rep. 405.

²⁰ *R (Axa) v. Gately* (2014) and *R (Axa) v. Paul Havert* (2015).

²¹ S.130-133 Powers of Criminal Courts (Sentencing) Act 2000.

A private prosecutor is also entitled to pursue confiscation proceedings against a convicted defendant under the Proceeds of Crime Act 2002.²² This allows the court to undertake a detailed analysis of how a defendant has benefitted from a crime and whether he or she has a “criminal lifestyle.” In certain circumstances, the court can make assumptions that money/property held by a defendant has been obtained from criminal conduct, unless the contrary is proved. These draconian measures allow the court to confiscate the proceeds of crime, which will not necessarily be limited to the proceeds of the particular offense for which the defendant has been convicted. The courts can order a victim to pay compensation from the confiscated proceeds of crime. A failure to pay an amount due under a confiscation order will lead to a prison sentence.

Other potential benefits of private prosecution include:

- Private prosecutors may also seek to draw attention to issues or gain publicity. The media will often report prosecution results and the public will readily understand what the results mean. This can draw attention to issues generally and strengthen deterrence.
- Greater control can also be an advantage of private prosecutions. Police processes can deny victims a role. Complaints levied at the CPS by victims often involve failures to communicate and the way in which cases are handled, particularly in times of austerity.
- A private prosecution necessarily allows greater control over the process. Often, a private prosecutor will have greater resources to deploy in respect to the investigation and prosecution of an offense than a public prosecutor. This can mean that a case is better prepared from an early stage, which might result in an early guilty plea prior to the CPS taking over the case.
- Private prosecution can be quicker and/or more focused than a public one, once the evidence is available.

How to Bring a Private Prosecution

A private prosecution does not require the reporting of a crime to the state prior to commencing or seeking consent to commence, nor can the fact that a complaint has been made to the police bar its proceeding.

Often, a private prosecutor will already be in possession of the evidence required to start a private prosecution; he or she need only put that evidence into an admissible form. However, in some cases there may be parts of the evidence that are still

²² The ability of a private prosecutor to make use of such proceedings was confirmed in the case of *R (Virgin Media Ltd) v. Zinga* (2014) EWCA Crim.

required before proceedings can commence. A private prosecutor does not have the powers of the police available to him or her; therefore, he or she must think creatively (and within the confines of the law) in order to obtain the evidence necessary to institute criminal proceedings. Private prosecutors must obtain as much evidence as possible to avoid a risk of the DPP discontinuing their prosecutions.

In order for a witness statement to be used in criminal proceedings, it must contain evidence relevant to the issues in the proceedings, and the person who makes it must sign to confirm its veracity. All witness statements forming part of the prosecution case will need to be served on the defendant once proceedings have been commenced.²³ Private prosecutors often use private investigators to obtain such statements or seek documents or objects that form part of the evidence gathered from witnesses or publicly available sources (like Land Registry or Companies House documents), or through surveillance. Private investigators can be of particular importance where evidence is held outside the jurisdiction and key witnesses may also be scattered across different international locations. It is important to utilize private investigators who know their legal obligations, as evidence obtained illegally is generally inadmissible.

The Data Protection Act 1998 (DPA) can present a barrier when gathering evidence for a private prosecution: organizations such as banks or the police hold information that may be pertinent but constitutes protected personal data under the law. However, the DPA exempts the release of data required for the purposes of prosecuting an offender or for the exercise or defense of legal rights.²⁴ Private prosecutors can seek what the law terms a Norwich Pharmacal Order,²⁵ (derived from the name of the case that established the principle), when an entity refuses to provide information under these exemptions. If the High Court grants the order the information will be released, and many foreign jurisdictions have similar provisions to compel the production of personal data.

Private prosecutions are empowered to summon witnesses and use professional experts, just as public prosecutions are. They are also subject to the disclosure principles under the Criminal Procedure and Investigations Act 1996 (CPIA). That is, a private prosecutor has a duty to retain and record all relevant material that does not form part of the prosecution evidence in the case, if it has any bearing on the case. He or she also must provide to the defense any material that undermines the prosecution or would assist the defense. Failure to do so will likely lead a court to deem the proceedings an abuse of the court process.

If the case is to proceed in the magistrates court, as with public prosecutions, the proceedings start with the bringing of an allegation describing the offense, the

²⁴ S.25(2) Data Protection Act 1998.

²⁴ S.25(2) Data Protection Act 1998.

²⁵ *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133.

relevant legislation, and the particulars of the offending.²⁶ The court may issue a summons or arrest warrant in response.²⁷ Its determination reflects, at a minimum, whether the essential ingredients of the offense are present; whether the claim meets time and jurisdiction requirements; and whether the informant has the necessary authority to prosecute.²⁸ The court also considers whether the allegation is vexatious. If the claim fulfils all these requirements, it will issue a summons in most cases, and an arrest warrant if the offense is indictable, or punishable with imprisonment, or where the defendant's address is unknown.²⁹ If the court issues a summons, the prosecutor serves it on the defendant. The summons specifies the offense and instructs the defendant to appear in court at a particular time. The private prosecutor typically seeks assistance from the police to execute arrest warrants.

Costs and Risks

A defendant can sue a private prosecutor for malicious prosecution. While notoriously difficult to prove, such suits would hinge on a claim such as fabrication of evidence or that the private prosecutor had acted with malice—with no legitimate desire to bring the person to justice.³⁰

One of the most important aspects of private prosecutions concerns costs. A court may in any proceedings in respect of an indictable offense order the payment out of central funds (from the Ministry of Justice budget) of such amount as the court considers reasonably sufficient to compensate a private prosecutor for any expenses properly incurred by him or her in the proceedings.³¹ The court typically makes an order for costs unless it finds a good reason for not doing so, such as the institution or continuation of proceedings without good cause, or when the prosecutor has committed misconduct. This potentially includes both legal and investigative costs and any expert fees that were necessary for the prosecution. The law also directs the court to assess a “just and reasonable” amount the prosecution may recover, if it deems it inappropriate to provide for recovery of the full amount. The amount may come out of state funds, and courts can award the recovery of costs even if the defendant is convicted or acquitted. In cases where the CPS took over the private prosecution, the private prosecutor can still apply for his or her costs up to the point in the proceedings where the CPS took over.

²⁶ Rule 7.3 Criminal Procedure Rules 2014.

²⁷ Section 1 Magistrates' Courts Act 1980.

²⁸ *R v. West London Justices, ex parte Klahn* (1979) 2 All ER 221.

²⁹ Section 1(4) Magistrates' Courts Act 1980.

³⁰ *Molton v. Chief Constable of West Midlands* (2010) All ER (D).

³¹ S.17 Prosecution of Offences Act 1985.

However, an order for costs is applied for only at the conclusion of the proceedings. Therefore, private prosecutors have to cover the cost of the investigation, preparation of the case, and the subsequent proceedings until this conclusion.

Conclusion

The right of an individual or entity to pursue a private prosecution continues to be of fundamental importance in ensuring access to justice and in seeing that those responsible for committing criminal acts are punished. This right is a powerful tool in the arsenal of litigation, which can often be quicker and more effective than other civil legal remedies that are available to victims, or those who seek to take action on their behalf.

A private prosecutor is, rightly, not afforded any more leeway than a public prosecutor in bringing a prosecution. Where the liberty of a subject is at stake it remains of fundamental importance that the fairness of the proceedings is maintained and that the private prosecutor proves any allegation beyond reasonable doubt. Nonetheless, private prosecutions represent a crucial tool in the fight against corruption and abuse by multinational corporations.

For More Information

To find out more about the Open Society Justice Initiative and our anticorruption work, please visit:

<https://www.opensocietyfoundations.org/topics/anticorruption>

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.
