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RESEARCH ARTICLE

Professional identity, legitimacy and managerialism at the Crown Prosecution Service

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Abstract
Tasked with enforcing criminal law, public prosecutors worldwide enjoy broad discretion. Existing literature on prosecutorial discretion and accountability tends to discuss the regulation of prosecutorial discretion or analyse the influence of the procedural environment in which public prosecutors operate. This paper focuses on occupational culture as an important factor affecting prosecutorial decisions. It draws particular attention to an understudied aspect of prosecutors' professional identity: legitimacy and, specifically, self-legitimacy, ie the belief public prosecutors have in their own legitimacy to make decisions in individual cases. The paper presents research findings from direct observations and interviews which reveal a sense of a loss of self-legitimacy amongst Crown Prosecution Service (CPS) staff due to the constant monitoring of their decisions by colleagues and managers. This all-pervasive managerialism, paradoxically, undermines the very legitimacy (and, relatedly, transparency) which the CPS has had to work so hard to develop since its inception.

Keywords: criminal justice; public prosecutors; discretion; McDonaldisation; self-legitimacy; legitimacy

Introduction

Instituted by the Prosecution of Offences Act 1985 to establish a neutral filter between the police and the courts, the CPS is still a relatively new institution in the context of the English and Welsh criminal justice system.[1] From its inception, the establishment of a prosecuting agency, independent from the police, was perceived as an attempt – destined to fail – to introduce inquisitorial elements into a largely adversarial procedure.[2] Police officers resented the new agency whose attempts at asserting its independence translated into bureaucratic isolation and misunderstandings.[3] Most recently, the CPS has been criticised for low prosecution and conviction rates for sexual offences.[4]

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[1]For a short history of the CPS see A Sanders 'The CPS – 30 years on' (2016) Criminal Law Review 82.

[2]M McConville 'Prosecuting criminal cases in England and Wales: reflections of an inquisitorial adversary' (1984) 6 Liverpool Law Review 15; A Sanders 'Arrest, charge and prosecution' (1986) Legal Studies 257 at 268.

[3]Sanders, above n 1, at 84.

[4]A Topping and C Barr 'Prosecution Service under fire over record low rape convictions' (*The Guardian*, 30 July 2020) https://www.theguardian.com/society/2020/jul/30/prosecution-service-under-fire-over-record-low-convictions (accessed 16 December 2022).

Public prosecutors generally enjoy broad discretion and the way this discretion is exercised understandably attracts scrutiny, given the impact of prosecutorial decisions on the lives of defendants, victims, and wider communities. This paper contributes to our understanding of CPS decision-making by focusing on occupational culture as an important aspect of the context in which prosecutorial decisions are made. It draws particular attention to an understudied facet of prosecutors' professional identity: legitimacy and, specifically, self-legitimacy, ie the belief public prosecutors have in their own legitimacy to make decisions in individual cases.

An important notion underlying this contribution is the idea that decisions to prosecute, like other kinds of decision, are not made in a vacuum, but are taken in a specific social, political, cultural, and organisational context. As argued by Hawkins, 'decisions can only be understood by reference to their broad environment and particular context'.[5] Hawkins also points out that criminal justice decisions are generally the result of a series of decisions taken by different actors at different points in the process: 'the whole criminal process is shaped from its earliest stages by decisions taken about the creation, handling and discarding of cases'.[6] Indeed, existing scholarship tends to focus on the relationship between the CPS and the police.[7] With the police remaining responsible for the investigation of criminal offences and retaining the power to charge suspects – ie to initiate prosecutions,[8] CPS decision-making remains framed and shaped by police decisions.[9]

This paper adds to the existing scholarship on CPS decision-making, by focusing on another aspect of the context in which the CPS takes its decisions: legitimacy and self-legitimacy. How their decisions will be perceived by audiences is anticipated by decision-makers and therefore part of the context in which decisions are made.[10] Public prosecutors must balance competing interests. Although their decisions are open to judicial review, courts are generally reluctant to interfere with prosecutorial discretion.[11] Special trust is thus afforded to Crown Prosecutors, and it is therefore particularly important that Crown Prosecutors have confidence in their own ability to make the correct decision in individual cases. They must themselves be convinced of their capacity in making the right decisions before trying to persuade the public to trust the CPS to make these difficult decisions. As argued by Bottoms and Tankebe, '[u]nless those who exercise power are convinced that there is an adequate moral justification for their continuation in office, they are unlikely to be effective'.[12]

In this paper, I draw on empirical data collected during fieldwork conducted in 2012. I carried out observations at a large CPS office (covering three magistrates' courts and one large Crown Court centre) in England for four months in late 2012. I was given unprecedented access to observe the work of prosecutors daily, access case files, and complement my observations with discussion of cases and decisions with participants. Towards the end of the observation period, I conducted 31 semi-structured interviews with CPS staff members (Crown Prosecutors, Associate Prosecutors, paralegal

[5]K Hawkins *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, 2002) p 47.

[6]K Hawkins 'Order, rationality and silence: some reflections on criminal justice decision-making' in L Gelsthorpe and N Padfield (eds) *Exercising Discretion: Decision Making in the Criminal Justice System and Beyond* (Willan, 2003) p 196.

[7]M McConville et al *The Case for the Prosecution* (Routledge, 1991); J Fionda 'The Crown Prosecution Service and the police: a loveless marriage?' (1994) 110 Law Quarterly Review 376; A Hunt and J Baldwin 'Prosecutors advising in police stations' (1998) Criminal Law Review 521; A Mackie 'Preparing the prosecution case' (1999) Criminal Law Review 460; I Brownlee 'The statutory charging scheme in England and Wales: towards a unified prosecution system?' (2004) Criminal Law Review 896; P Roberts and C Saunders 'Introducing pre-trial witness interviews: a flexible new fixture in the Crown Prosecutor's toolkit' (2008) Criminal Law Review 831.

[8]Charging decisions are made by the police without input from the CPS in most cases: HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary 'Joint inspection of the provision of charging decisions' (2015) p 13, https://www.justiceinspectorates.gov.uk/cjji/inspections/joint-inspection-of-the-provision-of-statutory-charging/ (accessed 16 December 2022).

[9]Sanders, above n 1, at 85–89.

[10]Hawkins, above n 6, p 203.

[11]See eg *R v DPP, ex p C* [1995] 1 Cr App R 136; *R v DPP, ex p Manning and Another* [2000] 3 WLR 463.

[12]A Bottoms and Justice Tankebe 'Beyond procedural justice: a dialogic approach to legitimacy in criminal justice' (2012) 102 Journal of Criminal Law and Criminology 119.

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officers, Crown Advocates and CPS managers). This meant that the questions asked to interviewees were informed by the observations. Ethical approval was obtained from my institution: all data was anonymised at the point of collection, full information was provided to participants, and consent forms were signed by interview respondents.

Notwithstanding the passage of time – the fieldwork for this paper was conducted 10 years ago – the data collected for this project is still valuable. First, it is rare for researchers to gain this level of access to CPS files and to directly observe the work of Crown Prosecutors over several months. Secondly, shifts in culture, including professional culture, do not occur suddenly. Instead, professional culture evolves gradually, for instance under the influence of reforms and policies.[13] Finally, these findings have been complemented by, and compared with, those of more recent empirical studies[14] and official reports.

The research investigated the extent to which the discretion afforded to CPS public prosecutors in making decisions is regulated and what other elements influence prosecutorial decisions in practice. The decision to prosecute or not is a 'low visibility' decision,[15] ie these decisions are rarely subject to reviews and prosecutors usually do not have to make public detailed reasons for their decisions. This 'low visibility' means that very little information can be found in court cases about how the decision to prosecute was reached and even less information with regard to decisions not to prosecute, since these cases rarely reach the courts.[16] The choice of ethnography as method allowed for an in-depth exploration of prosecutorial decision-making and the emergence of new themes, such as legitimacy (of both prosecution authorities and individual prosecutors themselves).

This paper begins by outlining the context in which the CPS was established – the new prosecution service started life with a weak legitimacy bedrock in English/Welsh legal culture – and shows how the CPS has attempted to gain the public's trust through the publication of official policies and guidance explaining how Crown Prosecutors make their decisions. However, whilst the CPS has diligently tried to enhance its legitimacy and transparency, these efforts have paradoxically been thwarted by problems of self-legitimacy of its individual public prosecutors.

In Part 2, I present my empirical findings, which suggest that the work of public prosecutors has been transformed by the introduction of an organisational model which exhibits all the characteristics of 'McDonaldisation', a concept developed by Ritzer: namely, efficiency, predictability, calculability, and control.[17] The introduction of market principles and private sector managerial methods to the public sector (termed 'New Public Management') led to rationalisation processes ostensibly justified by 'efficiency' concerns. The analysis of the CPS through the lens of McDonaldisation allows the identification of characteristics which structure the professional experience of CPS staff and, through this analysis, a better evaluation of the cumulative impact of rationalisation processes on public prosecutors' occupational culture. I argue that, although the publication of prosecution policies and guidance might have increased CPS institutional legitimacy through greater transparency, the belief of its prosecutors in their own authority to make decisions in individual cases has been undermined by a crisis in legal professional identity and rise of managerialism in the new institution.

[13]See for example J Tapley 'Politics, policies and professional cultures: creating space for a victim perspective in the Crown Prosecution Service' in J Tapley and P Davies (eds) *Victimology* (Springer International, 2020).

[14]A Porter *Prosecuting Domestic Abuse in Neoliberal Times: Amplifying the Survivor's Voice* (Palgrave Macmillan, 2020) based on interviews with public prosecutors carried out in 2017 and complemented with interviews and focus groups with domestic abuse survivors and support workers.

[15]J Goldstein 'Police discretion not to invoke the criminal process: low-visibility decisions in the administration of justice' (1960) 69 The Yale Law Journal 543.

[16]English courts are more and more willing to review public prosecutors' decisions. In these circumstances, court decisions detailing the decision-making process of prosecutors become available. However, it has been observed that '[t]he level of accountability to the court for decisions not to prosecute is likely to remain low': M Burton 'Reviewing Crown Prosecution Service decisions not to prosecute' (2001) Criminal Law Review 374 at 383.

[17]G Ritzer *The McDonaldization of Society* (Sage, 8th edn, 2015).

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Finally, Part 3 is concerned with the practical consequences of this weak self-legitimacy for individual prosecutors on the relationship between the CPS and the police. This paper argues that the diminished belief of Crown Prosecutors in their own authority to make decisions in individual cases could undermine the very purpose for which the CPS was established – to act as a filter between the police and the courts. Crown Prosecutors are expected to be robust against police investigators who only refer cases that they want to see prosecuted to the CPS. In this context, it is crucial that public prosecutors have full confidence in their own authority to make decisions which might go against the wishes of police investigators.

1. CPS policies and institutional legitimacy

As a new and contested institution, the CPS has used its policy-making power to explain and justify its decision-making, and thereby boost its legitimacy. Criminal justice scholarship on legitimacy has tended to focus on the everyday interactions between authority figures (eg police or prison officers) and members of the public, looking at how the quality of these interactions impacts perceptions of legitimacy of these powerholders and, in turn, the public's compliance or willingness to cooperate with them.[18] In this paper, legitimacy is understood more broadly as the quality conferred on powerholders if the authority they exercise is justified in terms of shared beliefs and values.[19] Furthermore, a relational approach to legitimacy is adopted where legitimacy involves a perpetual dialogue between powerholders who make legitimacy claims and audiences who evaluate those claims.[20] CPS audiences comprise the police, the courts, defence lawyers, suspects/defendants, complainants, and so on, but also government/parliament, and the public at large, through the media.

Public prosecutors are expected to act in the public interest and, as such, need a solid legitimacy basis for their decisions. Acting in the public interest requires the balancing of several goals and interests which can be in tension or even in direct conflict.[21] This is particularly true in systems with an adversarial tradition where public prosecutors can be torn between opposing expectations – to represent the prosecution side and to act in the public interest. Given the inherent difficulties of the role, public prosecution services need a strong legitimacy basis on which to establish their position as representatives of the public interest and thus ensure public confidence in their decisions.

The CPS has a weak legitimacy basis, historically and culturally. In a purely adversarial system, the victim, or any other private citizen – not the state – prosecutes the defendant at court. Whereas jurisdictions based on the inquisitorial tradition regard the state as representing the public interest, the public interest is perceived as distinct from the interest of the state in England and Wales, often even in conflict with the interest of the government.[22] Although the police progressively took over criminal prosecutions from the creation of police forces in the nineteenth century,[23] the reluctance to grant the power to prosecute to the state remained strong in England and Wales.[24] As a result, in law, prosecutions remained private affairs[25] and the doctrine of constabulary independence prevented any

[18]Tyler's work has been particularly influential: see TR Tyler *Why People Obey the Law* (Yale University Press, 1990).

[19]D Beetham *The Legitimation of Power* (Palgrave Macmillan, 2nd edn, 2013) p 11.

[20]Bottoms and Tankebe, above n 12.

[21]See eg S Sun Beale 'Prosecutorial discretion in three systems: balancing conflicting goals and providing mechanisms for control' in M Caianiello and J Hodgson (eds) *Discretionary Criminal Justice in a Comparative Context* (Carolina Academic Press 2015); DA Sklansky 'The nature and function of prosecutorial power' (2016) 106 Journal of Criminal Law and Criminology 473.

[22]V Langer 'Public interest in civil law, socialist law, and common law systems: the role of the Public Prosecutor' (1988) 36 The American Journal of Comparative Law 279 at 280.

[23]See for example A Cusack 'From exculpatory to inculpatory justice: a history of due process in the adversarial trial' (2015) 5 Law, Crime and History 1; R White 'Investigators and prosecutors or, desperately seeking Scotland: re-formulation of the Philips Principle' (2006) 69 Modern Law Review 143 at 147–148; JH Langbein 'The origins of public prosecution at common law' (1973) 17 The American Journal of Legal History 313.

[24]C Brants and A Ringnalda *Issues of Convergence: Inquisitorial Prosecution in England and Wales?* (Wolf Legal Publishers, 2011). See also S Uglow 'Independent prosecutions' (1984) 11 Journal of Law and Society 233.

[25]A Sanders 'An independent Crown Prosecution Service?' (1986) Criminal Law Review 16 at 16.

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interference from central government into the investigation and prosecution of cases by the police,[26] in effect shielding the police from further regulation of their discretion to prosecute.[27] The move to 'true' state prosecutions with the creation of the CPS in 1985 was not accompanied by a public debate on the role of the state in public prosecutions and what prosecutorial discretion should look like. This has left the CPS with an uncertain legitimacy basis for exercising discretion.[28]

Given the weak legitimacy and associated uncertain normative underpinning of the role of public prosecutors in the criminal justice system, it was crucial for the CPS to show that the way it exercises power is justified to secure people's consent in the new institution.[29] The CPS had to develop its own regulatory framework in an effort to be transparent in order to demonstrate its credibility in representing the public interest. The concept of legitimacy in criminal justice scholarship has been shaped by the work of Tom Tyler.[30] Tyler has shown that 'procedural fairness', ie whether legal authorities exercise their powers fairly or not, affects public confidence and therefore their legitimacy in exercising those powers.[31] In particular, Tyler highlights the importance of the value of transparency, ie 'of making decisions in ways that make clear that authorities are acting neutrally'.[32]

The publication of prosecutorial policies is seen as making prosecutorial decision-making more transparent and consistent.[33] Section 10 of the Prosecution of Offences Act 1985 provides for the publication of a Code for Crown Prosecutors by the Director of Public Prosecutions (DPP), the head of the CPS.[34] The Code presents the general principles guiding prosecutorial decision-making. It defines a two-stage test for the decision to prosecute and presents guidelines on the selection of charges, out-of-court disposals, mode of trial, acceptance of guilty pleas and reconsiderations of any decision to prosecute. In recent years, the Code has been complemented by the publication of numerous policy documents providing guidelines on a wide range of matters. There are policies on specific themes (assisted suicide, domestic violence, football-related offences, homophobic and transphobic hate crime, rape, racist and religious crime and the intentional or reckless transmission of infection), as well as legal guidance on particular offences (homicide, intellectual property crime, money laundering, etc), evidential issues (adverse inferences, alibi evidence, bad character evidence, confessions, DNA, hearsay, identification of suspects, etc) and procedural rules (disclosure, appeals, proceeds of crime, etc). These policies are all published on the CPS website and are easily accessible to the public.

Although consistency was the first justification for a national prosecution service in England and Wales, the need to establish legitimacy through certainty and transparency was also fundamental. As a relatively new institution, the CPS has been the subject of many criticisms since it was set up, not least by the police who saw some of their powers taken away and given to the new organisation. The CPS was blamed for the discontinuance of cases referred to the CPS by the police, despite several

[26]The Court of Appeal judgment of Lord Denning in the case of *Blackburn* in 1968 is often cited as the key authority for the principle of constabulary independence: *R v Commissioner of Police of the Metropolis, ex p Blackburn (No 1)* [1968] 2 QB 118 (CA).

[27]R Reiner *The Politics of the Police* (Oxford University Press, 4th edn, 2010) ch 2; McConville et al, above n 7, ch 1.

[28]See, for instance, on the constitutional positioning (as part of the judicial or the executive branch of government) of the newly created public prosecution service, J Fionda *Public Prosecutors and Discretion: A Comparative Study* (Clarendon Press, 1995) p 46; and contra J Rogers 'Restructuring the exercise of prosecutorial discretion in England' (2006) 26 Oxford Journal of Legal Studies 775 at 799; see also House of Commons – Justice Committee 'The Crown Prosecution Service: gatekeeper of the criminal justice system' (Stationery Office, 2009), http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/186/186.pdf (accessed 16 December 2022) regretting the piecemeal approach to the CPS role.

[29]Consent, alongside legality and moral justification, is a central component of legitimacy according to Beetham, above n 19, pp 18–19.

[30]Tyler, above n 18.

[31]TR Tyler 'Procedural justice, legitimacy, and the effective rule of law' (2003) 30 Crime and Justice 283.

[32]Ibid, at 341.

[33]A Ashworth 'The "public interest" element in prosecutions' (1987) Criminal Law Review 595; J Fionda and A Ashworth 'The new code for Crown Prosecutors: part 1: prosecution, accountability and the public interest' (1994) Criminal Law Review 894.

[34]The eighth edition of the Code for Crown Prosecutors was published by the DPP in October 2018, https://www.cps.gov.uk/publication/code-crown-prosecutors (accessed 16 December 2022).

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official reports showing the weakness of certain police files sent for prosecution.[35] As a new institution having to establish its legitimacy, the CPS opted for a transparent approach by explaining to its audiences – both the general public and other criminal justice agencies – how its prosecutors make their decisions.

Although the main concern when the Code was introduced was to guarantee a certain uniformity in prosecutorial decision-making, the objective of transparency made its appearance as soon as the first Code was published: the first annual report of the CPS to the Attorney General states that '[t]he purpose of the Code (…) is both to provide a basis for efficient and consistent decision-making and, by describing and explaining the criteria which prosecutors must take into account, to develop and maintain public confidence in the quality of the decisions made'.[36] Later on, the aim of the Code's third edition was set out by the Attorney General in a statement to the House of Commons in December 1993 as 'to simplify the language of the Code and to put it into plain English to make it a document more easily understood by police officers and members of the public who are not lawyers'.[37]

Prosecutors I interviewed were also aware of the importance of transparency, seeing policies and guidance as useful not only to regulate prosecutorial discretion, but to explain how decisions are made.

> [Policies] are good to inform the public of what we think of things, I think. It's good that the public know that we are addressing issues that are of concern, so DV [Domestic Violence], hate crime, other things like that. [Interview respondent EW25][38]

> [I]t's also not just for lawyers and internal people, but it's for external people, the public and external agencies, they know what we're sort of supposed to do and what our priorities are. [Interview respondent EW21]

Having demonstrated the dialogical dimension of legitimacy, Bottoms and Tankebe argue that 'when engaging in legitimation practices power-holders are not only addressing audiences, they are also speaking to themselves – that is, legitimating themselves in their own eyes as holders of legitimate authority'.[39] The CPS's publication of detailed policy and guidance could be understood as the CPS putting forward legitimacy claims which are then responded to by the public, causing the CPS to revise its claims. These claims are also important in terms of institutional self-legitimation.

Yet, at the same time as the CPS has been trying to build up its institutional legitimacy, the self-legitimacy of its individual prosecutors – ie their self-belief that they are best placed to make the decisions they are asked to make – was undermined by two parallel developments: a crisis in legal professional identity and the rise of managerialism in criminal justice agencies.

2. The crisis of professionalism and the rise of managerialism

Since the CPS was established, two parallel evolutions affecting individual prosecutors' perceptions of their own authority to make decisions have taken place. At the time the CPS was created, professionalism – which had traditionally framed lawyers' individual discretion – was in crisis and managerialism (through what has been termed 'New Public Management') was on the rise in public services. In addition, one of the main purposes for which the CPS was created was to ensure greater

[35]In 2008, the Police Federation reported that many police officers thought the CPS were 'risk-averse' in their decisions and this was corroborated by the Criminal Bar Association as well as the Magistrates' Association: House of Commons – Justice Committee, above n 28, pp 17–18.

[36]Crown Prosecution Service 'Annual Report for the period April 1986 to March 1987' (Stationery Office, 1987) p 32.

[37]*Hansard* HC Deb, vol 234, col 1049, 14 December 1993.

[38]Participants and cases are coded by the letters EW (for England and Wales) and a number (eg EW-3).

[39]Justice Tankebe and A Bottoms '"A voice within": power-holders' perspectives on authority and legitimacy' in Justice Tankebe and A Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press, 2013) p 68.

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consistency in prosecutorial decision-making. These historical circumstances inevitably affected the way the newly created national prosecution agency envisaged the regulation of prosecutorial discretion. The CPS quest for legitimacy based on demonstrating credibility as the main public prosecuting agency has resulted in strict management oversight of compliance with policy and guidance, at the expense of much discretion for individual CPS prosecutors, eroding their sense of self-legitimacy.

Traditionally, an important aspect of lawyers' self-legitimacy is that they are professionals. Law, alongside the Church, the army and medicine, is classically described as one of the 'true' professions.[40] Sociological studies of these traditional professions show how they claimed expert knowledge and skills to establish their legitimacy and justify broad professional autonomy.[41] The idea of discretion itself can be linked to the theory of professionalism. Classically, the only form of regulation of professions is ethical standards drawn up by the professions themselves and enforced by way of self-regulation.[42] As explained by Flynn:

> [u]ltimately, professionals assert the authority of expertise and claim disinterested integrity. Their ability to sustain these claims rests on the indeterminacy of the knowledge and skills that they possess, and the necessarily *discretionary* content of their work. (…) the particularity of individual cases and clients requires professional discretion, in both senses.[43]

In 1981, the Royal Commission on Criminal Procedure (RCCP) recommended the introduction of a new independent prosecution authority 'to make the conduct of prosecution the responsibility of someone who is both legally qualified and is not identified with the investigative process' and underlined 'the importance of independent legal expertise in the decision to prosecute'.[44] It was clearly expected that the newly created prosecution authority would be staffed by qualified lawyers. The reference to 'independent legal expertise' can be linked to the idea that lawyers are professionals who have specific expertise which they can apply impartially – or in Flynn's words 'disinterested integrity' – to individual cases. Lawyers were therefore seen as perfectly placed to create a neutral filter between the police and the courts. As barristers or solicitors, Crown Prosecutors and Crown Advocates have passed the entry examinations and served the apprenticeships defined by those legal professions. Their expertise, officially recognised by their membership to the legal professions, allowed them to be seen and perceive themselves as legitimate to make decisions to prosecute or not, ie to exercise their professional judgment.

However, the CPS was established in the context of a crisis of professionalism and rising bureaucracy in law firms. Many research studies have documented the rise of the professions and their subsequent evolutions, in part due to demands for transparency and accountability.[45] In the late 1980s, Abel described how solicitors and barristers were pushed to accept external regulation and how law firms became increasingly hierarchical and bureaucratic, impinging on the control professionals traditionally had on their work.[46] As Kritzer has argued, '[l]awyers increasingly find themselves working not as independent professionals but as employees of bureaucratically organized law firms, corporations, and government'.[47]

[40]Reviewing Larson's influential book, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977), see RL Abel 'The rise of professionalism' (1979) 6 British Journal of Law and Society 82.

[41]Ibid.

[42]R Young and A Sanders 'The ethics of prosecution lawyers' (2004) 7 Legal Ethics 190; A Ashworth and M Blake 'Some ethical issues in prosecuting and defending criminal cases' (1998) Criminal Law Review 16.

[43]R Flynn 'Managerialism, professionalism and quasi-markets' in M Exworthy and S Halford (eds) *Professionals and the New Managerialism in the Public Sector* (Open University Press, 1999) p 34.

[44]Sir Cyril Philips 'Royal Commission on Criminal Procedure. Report' (1981) Cm 8092 p 144.

[45]KM Macdonald *The Sociology of the Professions* (Sage, 1995); J Evetts 'A new professionalism? Challenges and opportunities' (2011) 59 Current Sociology 406; J Evetts 'Professionalism: value and ideology' (2013) 61 Current Sociology 778; MFD Young and J Muller (eds) *Knowledge, Expertise and the Professions* (Routledge, 2014).

[46]RL Abel 'Between market and state: the legal profession in turmoil' (1989) 52 The Modern Law Review 285.

[47]HM Kritzer 'The professions are dead, long live the professions: legal practice in a postprofessional world' (1999) 33 Law & Society Review 713 at 713–714.

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In parallel to the crisis of professionalism, the 1980s and 1990s also saw the rise of 'New Public Management'. Market principles and the private sector's managerial methods were introduced to the public sector, usually at the expense of professional discretion. Again, demands for greater transparency, accountability, and value for money of public services were driving these reforms. Efficiency was placed at the heart of public services, including the criminal justice system.[48] The rationalisation processes which have taken place following the extension of corporate managerial methods to much of the public sector have also been termed 'McDonaldization'.[49] Scholars have pointed out the tensions between the objectives of efficiency and fairness in the criminal justice system.[50] The debate was reignited by austerity policies launched by the government from 2010.[51] My empirical findings show that the prosecution process at the CPS bears all the main characteristics of McDonaldisation: efficiency (every aspect of the organisation or process is reviewed to minimise time and resources), predictability (this refers to standardised and uniform practices), calculability (the objectives of the organisation should be quantifiable rather than subjective) and control (the organisation is able to get employees and customers to follow specific rules and regulations).[52] No doubt intended to improve transparency and accountability to enhance CPS legitimacy, the introduction and development of managerial methods at the CPS reinforced hierarchical centralisation and further reduced the scope for prosecutors' individual discretion. As a result, public prosecutors' self-perception has also been challenged.

(a) Fragmentation of the decision-making process

The segmentation of the prosecution process in the CPS means that decisions are constantly reviewed by different members of staff. Somewhat reminiscent of an assembly line (or a fast-food restaurant), the prosecution process has been divided into smaller tasks (pre-charge advice, prosecutions at first hearings, preparation for trial, prosecutions at trial) and staff carry out the same narrowly defined routine tasks on files that enter the system, without an overview of the whole process.[53] For instance, Crown Prosecutors on the charging team described in interviews how they only make decisions whether to authorise charges:

> As a charging lawyer, I spend the day, 9 to 5, almost from dot to dot, in front of the computer and at the end of the telephone. I receive calls from 9 o'clock onwards in the morning from police

[48]See eg C Jones 'Auditing criminal justice' (1993) 33 British Journal of Criminology 187; N Lacey 'Government as manager, citizen as consumer: the case of the Criminal Justice Act 1991' (1994) 57 The Modern Law Review 534; S Field and PA Thomas 'Justice and efficiency? The Royal Commission on Criminal Justice' (1994) 21 Journal of Law and Society 1; JW Raine and MJ Willson 'Beyond managerialism in criminal justice' (1997) 36 The Howard Journal of Criminal Justice 80; I Brownlee 'New Labour – new penology – punitive rhetoric and the limits of managerialism in criminal justice policy' (1998) 25 Journal of Law and Society 313; J McEwan 'From adversarialism to managerialism: criminal justice in transition' (2011) 31 Legal Studies 519.

[49]Ritzer, above n 17; see eg RM Bohm '"McJustice": on the McDonaldization of criminal justice' (2006) 23 Justice Quarterly 127 (US criminal justice); R Heslop 'The British Police service: professionalisation or "McDonaldization"?' (2011) 13 International Journal of Police Science & Management 312 (policing); G Robinson 'Delivering McJustice? The probation factory at the magistrates' court' (2019) 19 Criminology & Criminal Justice 605 (probation).

[50]See references at nn 48 and 49 , and J Hodgson *The Metamorphosis of Criminal Justice: A Comparative Account* (Oxford University Press, 2020); J Ward 'Transforming "summary justice" through police-led prosecution and "virtual courts": is "procedural due process" being undermined?' (2015) 55 British Journal of Criminology 341.

[51]Eg Ward, above n 50; L Soubise 'Prosecuting in the magistrates' courts in a time of austerity' (2017) Criminal Law Review 847; Hodgson, above n 50.

[52]Ritzer, above n 17.

[53]This segmentation of the prosecution process applied to most cases (ie mass offences). Some cases were submitted by the police as 'advice files' to the District Crown Prosecutors heading the Crown Court or the Rape and Serious Sexual Offences (RASSO) teams who then allocated them to specific lawyers. In those instances, the lawyer doing the pre-charge advice could follow her case all the way to trial, ie the same lawyer will be giving pre-charge advice and setting up the case for the Crown Court (where it would be prosecuted by a barrister). However, this continuous representation concerned only cases of rape, serious sexual assaults or child abuse cases, or cases that were too complex or too voluminous to be dealt with in a short period of time.

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> officers who want advice about charging suspects they either have in custody or have bailed or have otherwise interviewed in connection with criminal offences. Certain offences have to come to CPS to charge and it's my role to assess the evidence, discuss with the officer, consider whether, first of all, there is currently enough evidence on which I can charge, if not, to either ask for more evidence or, if there's not enough evidence and never will be, to refuse charge. That's essentially it. [EW4][54]

Other members of staff are tasked with reviewing the case in the office or representing the CPS at court. This specialisation of CPS staff leads to a loss of expertise. Crown Prosecutors who do not regularly prosecute cases at court make charging decisions. This could mean a more objective decision in line with the requirement in the Code for Crown Prosecutors that the evidential test 'means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged'.[55] However, it also means that there is a growing disconnect between CPS charging lawyers and local court culture and practice. In turn, this may also impact on the confidence of these Crown Prosecutors in their ability to make those decisions. Given their lack of experience in court, they might start to doubt themselves as to whether a jury or a magistrate bench is likely to convict a defendant based on the evidence in the file.

The fragmentation of CPS casework into several differentiated tasks has also allowed for the delegation of some of these tasks to less qualified personnel. Preliminary hearings at the magistrates' court can thus be attended by Crown Prosecutors or solicitors in private practice, but also Associate Prosecutors who merely undertake a two-week training programme and pass an independent assessment of competence before being authorised to practise.[56] Crown Prosecutors, Crown Advocates, or barristers at the independent bar represent the CPS at trial and at the Crown Court. Each review of the case is completed by a different member of staff. Efficiency and predictability through staff specialisation and atomisation of tasks are key features of McDonaldisation (itself inspired by Fordism and Taylorism).[57]

Although changes have been implemented since the completion of the fieldwork on which this paper is based, the fragmentation of the CPS decision-making process still subsists. In response to the Leveson review of the criminal justice system in 2015,[58] the 'Better Case Management' initiative required that the CPS (and the defence) nominate an identifiable person responsible for the case for all Crown Court cases, with case ownership hailed as one of the key principles underpinning this judicially led national initiative. Yet, a review by HMCPSI in November 2016 revealed that, although cases appeared to be allocated to a named lawyer early, this did not guarantee case ownership in practice, with many subsequent changes of allocated lawyers and limited engagement by named CPS staff in practice.[59] In 2018, defence lawyers still reported difficulties in communicating with the CPS on evidence disclosure due to no CPS lawyer being allocated to the case or only very shortly before the trial.[60] Any potential progress made by the CPS in 'having the same lawyer charging and progressing the case was mostly lost' due to the CPS having to re-allocate Crown Advocates who did

[54]Similarly, EW2.

[55]Code for Crown Prosecutors, above n 34, para. 4.7.

[56]Soubise, above n 51.

[57]See Robinson, above n 49, at 610.

[58]B Leveson 'Review of efficiency in criminal proceedings' (Judiciary of England and Wales 2015) p 9.

[59]For instance, the report revealed that a 'proper and proportionate initial case review' took place in only 41.8% of cases. Effective engagement of the CPS with the defence prior to the first hearing took place in only 9.7% of cases. See HM Crown Prosecution Service Inspectorate 'Better case management: a snapshot' (2016) https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/better-case-management/ (accessed 16 December 2022).

[60]See written evidence from Defence Practitioners' Working Group to the Justice Select Committee Inquiry on Disclosure of Evidence in Criminal Cases.

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not go to court during the Covid-19 lockdown to charging advice.[61] Finally, although the 'Transforming Summary Justice' initiative was also implemented in response to the Leveson review, case ownership is not a characteristic of this judicially led initiative, which applies to magistrates' courts. Although the CPS requires that magistrates' court cases where a not guilty plea is anticipated are allocated to a specific lawyer,[62] CPS area structures are varied, with some areas splitting advocacy and review, whilst in other areas prosecutors review then present their own cases in court.[63]

(b) Standardised recording of decisions

This segmentation of the prosecution process into several micro-decisions results in its bureaucratisation, with the written recording of all decisions in order that the file can be picked up by another member of staff later in the process. This bureaucratisation is structured into the prosecution process centrally, by requiring reviewing lawyers to write up their decision following a set format. Decisions are saved on the CPS national database to be read by colleagues who will deal with the file at a later stage in the process. At court too, advocates must fill out a Hearing Result Sheet to record what happened in the hearing.

This standardised recording of decisions also reinforces predictability – another characteristic of McDonaldisation – by uniformising decision-making. It forces prosecutors to demonstrate on file that they have followed the decision-making process defined in the Code for Crown Prosecutors and to justify their decision carefully, especially for matters regulated by a specific policy. In their decisions, Crown Prosecutors I observed discussed at length what evidence was available and whether it was admissible in court, reliable and credible. As the Code for Crown Prosecutors is not the only document guiding prosecutorial discretion in the CPS, I observed on numerous occasions prosecutors mentioning in their recorded decisions that they had applied the relevant policy: 'I have considered and applied the CPS DV [Domestic Violence] Policy, the CPS DV Guidance and the DV Aide Mémoire'; 'as a perceived racist incident I apply CPS policy of dealing with Race Crimes'; 'I have assessed the manner of driving in line with the objective criteria set out in CPS policy and guidelines re "prosecuting cases of bad driving"'. Significantly, I rarely witnessed Crown Prosecutors reading said policies or legal guidance. Although this does not necessarily mean merely token compliance with the policies – Crown Prosecutors might already be familiar with the rules defined by the policies – it nevertheless indicates a perceived need to mention the policies to satisfy a potential reviewer.

(c) Enforcing policies and audit culture

The multiplication of policies and the standardisation of decision-making at the CPS seem an attempt to erase – or at least to severely limit – discretion in prosecutorial decisions. For some CPS prosecutors I interviewed, policies provide ready-made justifications if their decision is being questioned.

> The reality is if you adhere to a policy then if something subsequently goes majorly wrong, at least you know that you've done things in accordance with policy. If you were to step outside the policy and something were to go wrong, that's when you would find yourself in difficulties. [Interview respondent EW28]

[61]HM Crown Prosecution Service Inspectorate 'CPS response to COVID-19: dealing with backlogs – the impact of COVID-19 on the CPS to 31 December 2020' (2021) p 17, https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/cps-response-to-covid-19-dealing-with-backlogs/ (accessed 16 December 2022).

[62]HM Crown Prosecution Service Inspectorate 'Transforming summary justice' (2016) p 41, https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/transforming-summary-justice/ (accessed 16 December 2022).

[63]HM Crown Prosecution Service Inspectorate 'Business as usual? A follow-up review of the effectiveness of the Crown Prosecution Service contribution to the Transforming Summary Justice initiative' (2017) https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/business-as-usual-transforming-summary-justice-follow-up-report/ (accessed 16 December 2022).

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> I think [CPS policies] are good, especially the Charging Standards around things like assaults (…) If we then get further down the line and the judge says 'well, this should have been section 18, not section 47', we can say 'well, actually we have done this in line with our Charging Standards which is a nationwide document' and it just gives some clarity. [Interview respondent EW20]

Although many interviewees declared that they did not feel constrained by the policies, or that policies were only common-sense, a slightly different point of view was put forward by a prosecutor I interviewed when she was asked about CPS policies and guidance:

> It's very micro-managed. It's almost like you're kind of boxed in by it, in the sense that it removes your discretion. A lot of cases, as a lawyer, are intuitive. You're dealing with human nature after all. And the thing about policies is they tend to kind of channel down a certain aspect and you have to do everything one particular way. And it removes to a degree your discretion, to use your own judgment on a case and say 'look, from personal experience, I can intuitively say this case is going nowhere'. (…) It does produce consistency, that's one thing, and I suppose that's something important in the criminal justice system. But I think you will always have some decisions that fall outside the guidance, which would be an intuitive decision, which would probably be a correct estimation of where the case is going but, at the end of the day, because it doesn't fit within the policy, it will be considered the wrong decision. [Interview respondent EW1]

This Crown Prosecutor put forward a more traditional conception of professional decision-making as 'intuitive', ie prosecutorial decision-making is here described as discretionary by nature and impossible to regulate. The constraints felt by Crown Prosecutors in their decision-making are also illustrated by staff comments in a 2018 survey conducted by HMCPSI about CPS assessment of casework quality. Some of the staff surveyed considered that quality assessments by CPS managers were merely a 'box-ticking' exercise, commenting that 'there was an undue focus by managers in how casework should be carried out, and therefore in [assessments by managers], on getting the processes right rather than the substance'.[64]

The CPS monitors the exercise of discretion in individual cases closely. Yet, in my observations, the checks carried out by line managers primarily focused on quantitative measures (in line with the McDonaldisation's principle of calculability)[65] and there were few checks related to the quality of prosecutorial decisions. Although CPS managers ostensibly evaluated the quality of casework on a dip-sample of case files against CPS Core Quality Standards (CQS),[66] they did not always check the full file of evidence when reviewing decisions made by their subordinates. In the area where I carried out my fieldwork, the charging team was managed remotely by shift managers who did not have access to the file of evidence, but only the charging lawyer's decision when assessing such decision against CQS. To mitigate this lack of information, charging lawyers were asked to copy and paste the police summary of the case at the start of their advice. Given the potential bias in reading only the police summary, this is problematic.[67]

Crown Prosecutors receive feedback on each case reviewed by a manager (one or two per month in the individual record I could consult, although a more recent report from HMCPSI indicates a much

[64]HM Crown Prosecution Service Inspectorate 'The operation of individual quality assessments in the CPS' (2018) p 35, https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/the-operation-of-individual-quality-assessments-in-the-cps-mar-18/ (accessed 16 December 2022).

[65]Ritzer, above n 17.

[66]CQS were introduced in 2010, under the leadership of the former DPP, Keir Starmer KC. An amended set of CQS were published by the DPP in October 2014, https://www.cps.gov.uk/publication/casework-quality-standards (accessed 16 December 2022).

[67]McConville et al, above n 7, pp 133–136.

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lower expectation of four assessments a year for each member of staff).[68] Crown Prosecutors are also given a monthly 'individual performance record' which compares each lawyer's CQS assessments and other targets (eg average consultation time for charging decisions) with the 'Area Lawyer Average' and, as such, focuses on merely quantitative measures of their performance. The CPS also monitors its performance on a more macro-level, through a list of key priority targets and indicators followed by special audits. Again, this focuses on a purely quantitative measure of performance. The control of workers, for instance through targets, is the final characteristic of McDonaldisation (after efficiency, predictability, and calculability).

This tightening of central control over individual prosecution decisions via both increased guidance and performance metrics can be linked to the attempt to reinforce CPS legitimacy through transparency and consistency. The 'audit explosion' – which not only affects the CPS but is a much broader, cultural phenomenon[69] – is linked to New Public Management reforms and again driven by demands for greater accountability and transparency.[70] For the CPS, there would be no sense in issuing detailed prosecution guidelines if there was no control over their implementation on the ground. Moreover, the statistics collected by the CPS are made available in CPS reports which are presented to Parliament and published on its website, easily accessible by the public at large and the media.[71] Their importance should not be underestimated, as the CPS regularly uses those statistics to demonstrate its capacity to obtain effective results and thereby boost its legitimacy. However, the potential disciplining and controlling effect of this audit culture on workers has long been pointed out.[72]

(d) Routinisation and loss of professional autonomy

As shown by Ritzer, McDonaldised institutions are rational organisations which produce irrationalities which ultimately can undermine their rationality.[73] Greater accountability, efficiency, and consistency of prosecutorial decision-making are clearly laudable objectives. However, the cumulative effects of New Public Management reforms have had unintended consequences on prosecutorial decision-making and the self-perception of individual prosecutors.

In his 2015 review of the criminal justice system, Leveson called for case ownership, claiming that this would allow for greater engagement between defence and prosecution to attempt to identify and resolve issues at an early stage.[74] I argue that the segmentation of the prosecution process into individual tasks and the allocation of these tasks to different members of staff lead to broader issues, including routinisation. Individual files lose their specificity, as prosecutors concentrate on the task at hand (charging, review for trial, reply to a letter from the defence, etc), rather than on the outcome. It promotes staff dedication to case progression, rather than successful prosecutions, as no one has an overview of the system and a clear vision of the case journey through it.

Some Crown Prosecutors I interviewed were also very critical of the fact that they could not follow cases from start to finish, pointing out some of the resulting inefficiencies.

> I think the time we dealt with things best was at what they called the 'cradle to grave' stage. (…) If you were the charging lawyer, you kept that case all the way through, doing the trial if necessary. It was allocated to you, so somebody always knew what was going on. Unfortunately, that fell by the wayside. (…) So you end up with files which have been looked at by five different lawyers, nobody's really got a full grasp of it or if they have it's moved on so much since they last saw it, they can't just pick it up again. (…)

[68]HM Crown Prosecution Service Inspectorate, above n 64, p 9.

[69]See eg M Strathern 'Introduction: new accountabilities' in M Strathern (ed) *Audit Cultures: Anthropological Studies in Accountability, Ethics, and the Academy* (Routledge, 2000).

[70]M Power 'The audit society – second thoughts' (2000) 4 International Journal of Auditing 111 at 112–113.

[71]See https://www.cps.gov.uk/publications (accessed 16 December 2022).

[72]Power, above n 70, at 114.

[73]'The irrationality of rationality': Ritzer, above n 17; see also Bohm, above n 49, at 133–134.

[74]Leveson, above n 58, p 9.

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> One of the other unfortunate side-effects of that is that you do end up with situations where things just get shunted: they get put to the bottom of the pile, because they're complicated and they'll take a long time, so at the end of the day, the lawyer just says 'oh, I haven't had time to deal with that one' and everybody does it, I've done it. Then a week later, it's still sitting there on the list because nobody wants to deal with it, it's become… you know, almost psychologically too heavy for anybody to want to pick up. I'd rather that we were in a position to say 'okay, this is yours, you have to deal with it' (…). [Interview respondent EW16][75]

Instead of creating a strong culture of accountability, the discontinuity in case management results in prosecutors feeling little ownership or responsibility for a decision that may be displaced by the person dealing with the case at the next stage in the process. It might be anticipated that the constant reviewing of cases by different members of staff would create a strong culture of cross-checking and so result in weak cases being weeded out and only strong cases being brought to court. In fact, the division of work and the constant reviewing of their decisions created a feeling of disempowerment among Crown Prosecutors. This discontinuity of case management means that prosecutors lack a holistic view of cases and so any clear appreciation of the impact of their own decision-making. They enjoy little control over the whole prosecution process, being restricted to defined points in the case pathway, and the limitations of their role cause them to minimise this role even more. Thus, a charging lawyer told me: 'We only give opinions in this job', referring to their decisions being reviewed later in the process by other lawyers who might take a different view.

However, this underestimates the importance of early decisions: lawyers reviewing decisions made earlier in the process were wary about reversing a decision made by one of their colleagues. This was expressed clearly by a Crown Advocate I interviewed:

> If it's a finely balanced decision, of course, you need to bear in mind that a different lawyer at pre-charge stage has said the case was good, the lawyer who reviewed it for committal has said the case was okay, you know, why am I making a different decision? Just because I disagree with somebody doesn't necessarily mean the case is not good. In those circumstances, I'll do what I can to sort of bolster the case and see if the police can come up with something else. [Interview respondent EW24][76]

This comment underlines the subjectivity of prosecutorial decision-making in that there is not always one clear choice, but several that could equally be acceptable. The fact that earlier prosecutors took a different view does not mean that they are necessarily wrong. However, it could also indicate a general reluctance to discontinue cases that have already been reviewed by CPS colleagues.

This possibility of a certain momentum building once a decision is made is further reinforced by an official target: the attrition rate. The attrition rate includes cases which have been charged and are later dropped by prosecutors before trial. The rate does not normally include cases in which prosecution witnesses are absent or withdrawn, but purely cases which have gone all the way to trial without the CPS realising that there was not enough evidence. It is a 'key priority target' for the CPS to demonstrate that the service is 'good value for money compared to police prosecutions' as one District Crown Prosecutor explained. As one Crown Prosecutor put it to me: 'why should the government bother paying for the CPS to review cases when the police could just make charging decisions themselves for the same result?' The attrition rate target appears in reports which are used by national and local management to monitor the performance of the CPS. The attrition rate for the area is set against the national average and the national target. Staff were reminded of this target at a magistrates' court team meeting I attended where the manager told them that the attrition rate in the area was up again and that all discontinuances therefore had to be authorised by a District Crown Prosecutor. The

[75]EW1 offered similar views, referring to the 'silo mentality' which resulted from the segmentation of the process.
[76]Similarly, EW12.

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manager mentioned that there would be an audit of all discontinued files or files which resulted in cracked trials[77] to check what had happened.[78]

This auditing of discontinued cases was experienced as a form of disciplining by Crown Prosecutors and so served as a disincentive from dropping obviously weak cases. The presumption against discontinuance is indicated by the categorisation of such cases as having an 'adverse outcome'. On several occasions, I witnessed Crown Prosecutors being reluctant to discontinue a weak case because it had already been reviewed by another CPS lawyer. One Crown Prosecutor explained to me that it would be viewed as an 'adverse outcome' for the CPS and his decision might be flagged up to managers and they might get 'a telling off'. He explained that managers look at adverse outcome cases at random to determine what went wrong. He said the temptation was to carry on with weak cases 'which is morally wrong' but that he had to 'cover his back'. In his opinion, the CPS was probably running too many weak cases at the time for this reason. Another Crown Prosecutor referred to 'managers who prefer to waste court time in trials they know they are going to lose than drop a case'.

Although prosecuting weak cases at all costs runs against any efficiency considerations, losing a case at trial does not seem to attract the same stigma as discontinuing that case, as long as it does not result in a judge-directed acquittal. The possibility that the defendant might plead guilty at the last minute also serves as an incentive to keep a case going for longer despite obvious weaknesses.

> In case EW-263, a juvenile defendant was charged with common assault and criminal damage. The 17-year-old boy was alleged to have assaulted a shopkeeper and one of his staff and to have caused some damage in the shop. The defence account was that the defendant had been assaulted by the shop staff.
>
> While the complainants did not have any visible injury, the file included more than 40 photos of the defendant's injuries: large bruises and scratches, mainly on his arms and legs, but also on his lower back, stomach, and face. Furthermore, the incident was captured by the shop's CCTV, but they failed to release it and were described as 'obstructive' by the police.
>
> Although the charge had not been authorised by the CPS originally, the case was reviewed by the CPS at the first hearing and again afterwards and sent for trial.
>
> A Crown Prosecutor reviewed the case in preparation on the day before the trial. At first, he told me that he was not sure what to do with the case but admitted that it would probably result in a not guilty verdict. Confronted with the impossibility of requesting further evidence from the police to bolster the case at such a late stage, the obvious choice seemed to be for the case to be dropped and the trial vacated.
>
> Despite the lack of evidence, he rang the defence firm and asked them whether they would plead to the criminal damage only, but they refused. A guilty plea for criminal damage would have dispensed the CPS from bringing any evidence of guilt and it was deemed preferable to a pure and simple discontinuance which required the authorisation of a hierarchical superior.
>
> Faced with the refusal of the defence, the prosecutor finally decided to discuss the possibility of discontinuing the case with a manager and attempted to convince her of the merits of a discontinuance, emphasising that there had been no CPS pre-charge advice and that the defence risked

[77]A cracked trial is a trial at which a guilty plea is entered, or the prosecution offer no evidence. The trial therefore becomes unnecessary as there is no issue for the judge to adjudicate upon.

[78]The attrition rate, at least for magistrates' court cases, still appears as a 'key measure' for the CPS as the number of cases dropped after more than two hearings in the magistrates' courts is monitored. See https://www.cps.gov.uk/publication/key-measures (accessed 16 December 2022).

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> claiming abuse of process. The manager gave him authorisation to drop the case. The Crown Prosecutor commented that he had 'to jump through hoops' to discontinue the case.

Decisions are taken out of the hands of public prosecutors and given to managers. Similarly, Porter observed how prosecutors making decisions in domestic abuse cases were required to request the authorisation of their manager before discontinuing proceedings.[79] She points out that '[r]estricting or even depriving employees of decision-making powers results in a de-skilling or downgrading of the professional or skilled worker's role'.[80] It underlines the lack of trust in Crown Prosecutors' professional judgment and, as such, undermines their own perception of their authority to make decisions.

Charging lawyers do not feel that their decisions are particularly important, as they know they will be reviewed by somebody else later in the process. Yet, staff who review those decisions are reluctant to correct them, acting under the supervision of managers constrained by official targets. The nature of the division of work can lead to a dilution of a sense of accountability, with staff not feeling responsible for failures which result from the decisions of several members of staff, rather than being attributed personally to a single individual. Encouraged by the perverse incentives created by the implementation of targets controlled through audits, these failures thus become systemic rather than personal. For example, the Crown Prosecutor prosecuting case EW-298 at trial had not been involved in the preparation of the case for trial. When she lost the case, she said that she had done the best she could with what she had but that she would have prepared the case differently, for example filing a bad character application, if she had overseen it from the start. Crown Prosecutors are at risk of becoming accomplished technicians – simply applying policies and following standardised procedures – rather than independent legal professionals.

3. Crown Prosecutors' deference to the police

The lack of self-legitimacy felt by Crown Prosecutors could compound the existing imbalance in the relationship between police investigators and public prosecutors in England and Wales. The CPS was established to 'make the conduct of prosecution the responsibility of someone who is both legally qualified and is not identified with the investigative process' in the interests of fairness.[81] Following the adoption of the Prosecution of Offences Act 1985, the police remained in charge of investigations but lost the power to prosecute cases in court to the newly created CPS. In practice, however, the prosecution decision remains largely determined by the police. Despite formal independence from the police, previous empirical studies have demonstrated that the CPS is powerless to challenge the police-constructed case.[82] Having complete control over what evidence is collected and which questions are asked, the police remain able to define the prosecution decision for the most part.

Police investigators are also able to formally challenge decisions made by Crown Prosecutors, such as charging and plea decisions. In those appeal cases, the case is escalated within both institutions: police investigators can query the CPS decision with their line manager who can then ask a District Crown Prosecutor to review the decision. Thus, a CPS manager explained to me:

> On pre-charge advice cases, if the police don't like the decision by the lawyer, then they will appeal to me, either [about] the level of charge or if they're not charging at all. (…) I don't get that many appeals for charges really. I do get a lot of appeals for decisions over at the Crown Court when we're accepting pleas. (…) [The police] can't appeal, but if it's at court, they'll ring and say 'we're not happy about something' or 'we don't really want this to happen', etc (…). [Interview respondent EW20]

[79]A Porter 'Prosecuting domestic abuse in England and Wales: Crown Prosecution Service "working practice" and new public managerialism' (2019) 28 Social & Legal Studies 493 at 504–505.

[80]Ibid, at 497.

[81]Philips, above n 44, para 7.3.

[82]McConville et al, above n 7.

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As a result, Crown Prosecutors constantly need to justify their decisions to the police. In effect, this leaves the CPS accountable to the police in a way the police are not accountable to the CPS, further altering the balance of the relationship between the two institutions. Although the practical dependence of the CPS on the police can be traced back to historical and institutional causes,[83] the fact that Crown Prosecutors lack confidence in their own authority to make decisions could make it even more difficult for them to provide the truly impartial review of the evidence in individual cases the CPS was established for.

Crown Prosecutors I observed displayed a lack of confidence in their interactions with the police which could be partly linked to their diminished sense of self-legitimacy. They appeared keenly aware of the possibility for the police to appeal their decisions and often pre-empted it by consulting their line manager beforehand if they believed that their decision might antagonise the police. They were usually very diplomatic in their interactions with the police, employing a soothing tone and trying to diffuse tensions, often emphasising that they did not blame the police for their mistakes: 'it's not your fault', 'the police, through no fault of their own I hasten to say', 'I mean no disrespect to the officer in charge in saying this. We all make mistakes'.

These commendable efforts to foster good working relationships with the police – given the CPS dependence on police cooperation to carry out their role effectively – can, however, undermine the independence of the prosecution authority in cases where the individual Crown Prosecutor is not robust enough. In the following snippet of conversation with a police officer, a CPS charging lawyer dithered and failed to take a clear line; she spent a lot of time on the phone attempting to convince the officer that there was no case, but also suggested leaving the door open for the police to charge a lower offence themselves:

> I just don't think we can get to the bottom of what actually happened (…) I can write up that there is not enough evidence for dangerous driving. Can you charge due care without coming to us? (…) I don't think there is enough evidence for due care. (…) I can't see how we can prove that anyone was driving dangerously or even that anyone was driving without due care. (…) I'm going to say there isn't enough evidence for dangerous driving. (…) Do I also add that I wouldn't charge due care? (…) What I'll do is write it up and say that there isn't enough evidence for dangerous driving and then you can consider whether or not you want to charge for due care. (…) No, I suppose you probably can't charge due care then, that would be abuse of process, wouldn't it? (…) I'll write it up and you can speak to me if you think I've missed anything or you can speak to my line manager (…) if we perhaps could have a statement about exactly where the road markings are (…) and then you could re-interview [X] about due care (…). I'm sorry about this (…). [Case EW-78]

In some cases I witnessed, this timidity led to an abdication of responsibility by some Crown Prosecutors who declared that the police were better placed to assess the guilt of the suspect and suggested that their own decisions could be appealed:

> 'Can you not see where I am coming from? The prosecution case is undermined (…) Bad character on its own is not enough (…). *You know them all and you have a better feeling of the case. I only come at it from an evidential point of view* (…). You can appeal, I won't take it personally (…) I'm sorry about it, I did take another opinion (…). You can bail him again; you have seven days or so to appeal'. [Case EW-95, emphasis added]

> 'I won't take it personally if you want to appeal. We will agree to disagree'. [Case EW-32].

[83]This dependence seems inherent to the function of public prosecutors and exists in other jurisdictions too, including in jurisdictions where public prosecutors have supervisory powers over police investigations, such as in France: see J Hodgson *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart Publishing, 2005).

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Previous research studies have shown that the task of neutrally reviewing police investigations in order to decide whether or not to prosecute cases is only imperfectly performed by Crown Prosecutors, as police investigators are largely able to influence the prosecution decision since they control the collection of evidence. This institutional imbalance can only be made worse by the lack of self-legitimacy of Crown Prosecutors who do not always have the necessary confidence to stand against police wishes to prosecute a case.

Conclusion

Sun Beale observes that German, French, and US systems all responded to heavy caseloads and the need for efficiency by an increase in prosecutorial discretion.[84] Similarly, Hodgson notes the power shift from judges to public prosecutors both in France, and in England and Wales.[85] Yet, Hodgson also points out that, at the same time that their powers have been expanded, the professional discretion of prosecutors has been limited through routinisation and standardisation.[86] In this paper, I have shown how, starting off with a weak legitimacy basis, the CPS has attempted to improve public confidence in its decision-making over recent decades by regulating and monitoring prosecutorial decision-making. Publishing policies and guidance might inspire growing public confidence by promoting transparency and consistency. Yet, this road towards greater institutional legitimacy has neglected, and can be in tension with, the self-legitimacy of individual prosecutors. Individual prosecutors' perception of their own authority to make decisions has been undermined by a crisis of professionalism, a traditional source of self-legitimacy, and further challenged by the rise of managerialism at the CPS.

The findings of this study are limited in scope due to the nature of qualitative research. However, they corroborate those of other small-scale qualitative studies. For instance, in a 2019 article, Porter shows how managerialism contributed to the emergence of a 'working practice' at the CPS in dealing with cases of domestic abuse in which the victim refuses to testify.[87] Moreover, she found that the 'working practice' goes against the official CPS guidance on prosecuting domestic abuse cases. As such, managerialism not only challenges Crown Prosecutors' self-confidence, but it could also undermine efforts to improve public confidence in institutional decision-making through the publication of policies and guidance. One particularity of the guidance to prosecuting domestic abuse cases is the recommendation to make decisions on a case-by-case basis: 'prosecutors must weigh up the practical, personal and safety reasons outlined in the victim's retraction statement and contained within the police "risk assessment" before deciding how to proceed'.[88] In short, the guidance requires prosecutors to exercise their discretion to tailor their decisions to individual cases. Yet, instead of empowering prosecutors to make those difficult, highly individualised decisions required by the official guidance, the managerialist environment pushes them to conform to a 'working practice' of systematically summoning the victim to court to testify.

There is an inherent tension between the necessity of consistency in the application of the law and the need for an individualised decision where there is more scope for professionals to exercise discretion. There is also a limit to the regulation of prosecutorial discretion through policies and guidelines. As noted by Sklansky, discussions of public prosecutors often raise the ambiguity of their role.[89] He argues that the role of public prosecutors is inherently mediating between important divides such as between adversarial and inquisitorial justice, between the police and the courts, and between law and

[84]Sun Beale, above n 21.

[85]Hodgson, above n 50, pp 144–150; see also the contributions in E Luna and M Wade (eds) *The Prosecutor in Transnational Perspective* (Oxford University Press, 2012).

[86]Hodgson, above n 50, pp 150–171.

[87]Porter, above n 79.

[88]Ibid, at 498.

[89]See eg the sources cited by Sklansky, above n 21, at 498; but also eg Fionda, above n 28, p 46; Rogers, above n 28, at 799; J Hodgson and L Soubise 'Prosecution in France' (2016) Oxford Handbooks Online.

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discretion.[90] Sklansky further contends that 'boundary-blurring is central rather than incidental to the prosecutor's role and a critical part of the explanation for the growth of prosecutorial power'.[91] This suggests that prosecutorial discretion cannot be eliminated because it is the 'raison d'être' of the public prosecution function. Crown Prosecutors themselves thus need to be convinced of their legitimacy to exercise this discretion, to foster public confidence in CPS decision-making.

In light of my findings as outlined in this paper, Crown Prosecutors need new sources of self-legitimacy. Having legal expertise, as demonstrated by meeting the requirements defined by the Bar Standards Board or the Solicitors Regulation Authority, appears not to be enough for Crown Prosecutors to feel fully legitimate in making their decisions. This self-legitimacy has been further challenged by the McDonaldisation of the prosecution process and the resulting loss of autonomy and de-skilling. Tankebe has found that police officers' self-legitimacy is boosted by the perception that their police department is doing well in controlling crime.[92] The perception that the CPS is doing well in prosecuting crime could therefore be associated with greater self-legitimacy for Crown Prosecutors. This suggests that the publication of policies and guidance and a greater effort at transparency to enhance the CPS institutional legitimacy could also improve Crown Prosecutors' self-legitimacy. Another of Tankebe's findings is that peer recognition is an important factor in predicting self-legitimacy.[93] Greater peer recognition could be enhanced at the CPS through more team working and peer reviews of decisions. Reviews of decisions by pluri-disciplinary teams (including external stakeholders, such as police officers, defence lawyers, probation officers, charities, etc.) could also take place.[94] Importantly, these reviews should be used to support Crown Prosecutors' self-legitimacy, rather than undermine it. Although decisions are constantly reviewed by different members of staff as a case progresses through the process, Crown Prosecutors do not receive any feedback on the outcome of cases at the moment. Reviews could therefore be used to improve the quality of decision-making in ensuring that Crown Prosecutors receive regular qualitative feedback on their decisions.

Given the specific purpose for which the CPS was established – to act as a filter between the police and the courts – Crown Prosecutors are expected to be robust against police investigators who only refer cases that they want to see prosecuted to the CPS. Yet, existing research shows that public prosecutors are adopting the police informal guidelines in making their decisions. In this context, it is crucial that public prosecutors have full confidence in their own authority to make decisions which might go against the wishes of police investigators. Public prosecutors need to be trusted and empowered to make those decisions, rather than constantly monitored, and their ability to reach the correct decision being undermined.

[90]Sklansky, above n 21, at 498–510.

[91]Ibid, at 499.

[92]Justice Tankebe 'In their own eyes: an empirical examination of police self-legitimacy' (2019) 43 International Journal of Comparative and Applied Criminal Justice 99 at 110.

[93]Ibid.

[94]See suggestions in WH Simon 'The organization of prosecutorial discretion' in M Langer and DA Sklansky (eds) *Prosecutors and Democracy: A Cross-National Study* (Cambridge University Press, 2017).

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