Public prosecutors all over the world play a significant role in the criminal justice system. Given their important role almost everyone will agree that unlike other lawyers, public prosecutors need to be impartial and free from political interference. Indeed, many countries have created offices where at least in theory, prosecutors are able to operate independent of political interference.

Ireland has followed that model; in 1974 it established the office of Director of Public Prosecutions as an independent office. Their website claims, ‘The Director makes decisions independently of all other bodies and institutions, including both the Government and the Garda Síochána, and decisions are taken free from political or other influence.’ The Crown Prosecution Service in England and Wales is structured similarly and also supposed to be independent. In fact, such independence is legally enshrined in most countries across the globe.

Yet, theory and practice may well differ. Whether or not the Irish DPP office has been independent has been debated. Certainly, it has had its share of controversies. Integrity Ireland has been critical both of the method by which the Director of Public Prosecutions is appointed and it also points to alleged examples of its failure to prosecute actions by the gardai.

There have been other high-profile cases where the DPP’s office has been criticised. As an example, the Jobstown trial has been much criticised in the press as an example of prosecutorial overreach because of political pressure. It was also felt that people were improperly excluded from the jury to stack it against the defendants. Against that, of course others have defended the prosecution and accused the defence supporters of intimidation, including the inappropriate use of social media during the trial.

This brings to the fore a key difficulty in institutional design: how do we balance the need for prosecutors to be independent and yet accountable to the public?”
While a somewhat unusual concept in most parts of the world, prosecutors are indeed elected in the US; where 46 out of 50 states select their chief prosecutor via popular elections (the four states in the US that do not elect prosecutors are Alaska, Connecticut, New Jersey, and Rhode Island). Such elections are meant to make prosecutors directly accountable to the general population.

Yet, the preponderance of scholarly research in this area suggests that prosecutorial elections have been a failure, leading to over-criminalisation of the justice system and not led to much by way of actual electoral competition. While the empirical evidence for this is limited, a series of recent papers using data in North Carolina show that electoral pressures lead to prosecutors taking too many cases to trial; this comes not from their putting in increased effort but by taking time away from processing of cases which increases the backlog. This is significant as an increase in backlogs is harmful for the justice system, and unfair both to the victim and defendant. Even from the point of deterring crime, ‘celerity’ in the justice system is mentioned as one of the three important factors (certainty and severity are the other two).

Additionally, US prosecutors have enormous discretion in what charges to file (if at all), what sort of plea bargains to offer and do not seem to follow either broad social norms nor any internal norms in how they prosecute cases. Finding the optimal incentives is in general a problem for any agent (or organisation) that performs complex tasks. Prosecutors have to balance a variety of competing legal arguments as well as consider the resource implications of each case. Further, being human, they cannot be immune to political pressure and public opinion and have their ideological biases as well as career concerns. Indeed, there is convincing research showing how lawyers’ career concerns can affect their decision to litigate and there is no reason to believe that public prosecutors at various levels are immune to that.

To expect any one system to produce the perfect blend of accountability and independence is unrealistic. Nor is it easy for prosecutors to actually carry out the ‘will of the people’ given how difficult it is to find desirable ways to aggregate the preferences of a diverse group of citizens. Indeed, there is a vast body of research within the field of social choice that points out this precise problem i.e. the general impossibility of finding desirable (and hence non-dictatorial) rule to construct a social cohesive rule from individual preferences. Instead, prosecutors should articulate a transparent set of principles outlining their philosophy behind how they approach their cases.

The principles should have some grounding in social harm. The idea of social harm is implicitly recognised in the criminal justice system when we talk about ‘making the punishment fit the crime’. Each crime is not the same and prosecutors need to be better equipped to understand the consequences of prosecuting as well as the implications of filing particular charges should they decide to prosecute. This will use the same principles surrounding evidence-based policy making that medicine has successfully applied and policing is beginning to recognise. But we need more than that; we must also have some accountability mechanism that ensures prosecutors impartially apply such principles. The biggest check would be a rational legal system that recognises the need for social harm to explicitly feature in how cases are handled. Judges sometimes do that but many of them believe that their job is to apply the law, not create socially optimal policy.

In fact, the conservative judicial revolution has taken the view that the judge’s role should be limited and many do not agree with Judge Posner, ‘that judges should focus on the right and wrong in every case’. Thus, there needs to be a recognition that without criminal justice reform that explicitly incorporates social harm in prosecuting and sentencing, there is no magic bullet to ensure prosecutors pursue the social good.

Dr. Siddhartha Bandyopadhyay is a Reader in Economics and Director, Centre for Crime, Justice and Policing at the University of Birmingham

“To expect any system to produce the perfect blend of accountability and independence is unrealistic...”