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Private Prosecution in Nigeria under the Administration of Criminal Justice Act, 2015

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Abstract

Private prosecutions have been part of the Nigerian legal system for a long time. In 2015, the Administration of Criminal Justice Act (ACJA) came into force. The ACJA provides for, inter alia, circumstances in which a person may institute a private prosecution. In this article, relying on jurisprudence emanating from Nigerian courts before the ACJA came into force, the author suggests ways in which Nigerian courts could approach the right to institute a private prosecution under the act. To achieve this objective, the author discusses: the right to institute a private prosecution; *locus standi* to institute a private prosecution; and measures to prevent abuse of the right to institute a private prosecution.

Keywords

Private prosecution, Nigeria, Attorney General, constitution, *locus standi*, victim of crime

INTRODUCTION

In Nigeria, as in other countries, it is the state that has primary responsibility for prosecuting alleged offenders.[1] As the Nigerian Supreme Court put it, "an individual has no right to insist that a criminal offence should be prosecuted by the State".[2] This is the case whether the offence is committed against the complainant or there is no identifiable victim. The Nigerian Court of Appeal held in *Commissioner of Police v Tobin* that "any commission of a crime against

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1 For the meaning of the term "prosecute", see *Sunday D Bayam v Job Agana* (2010) LPELR-9159 (CA) at 5. LPELR stands for LawPavilion Electronic Law Report; these reports are published online by the Nigerian Law Firm, Law Pavilion at: <http://www.lawpavilionplus.com/> (last accessed 14 May 2019).

2 *AG of Kaduna State v Mallam Umaru Hassan* (1985) LPELR-617 (SC) at 26.

a citizen of the State, is deemed to have been perpetrated against the State itself. The State, as the Supreme protector of the citizens' lives and properties, imposes upon itself the fundamental duty of not only apprehending, but also prosecuting, of [sic] offenders before courts of law".[3] However, for various reasons, a public prosecutor may refuse to prosecute.[4] The public prosecutor's refusal to prosecute enables a private individual to institute a private prosecution. Private prosecutions have been known in Nigeria for many years.[5] However, it is beyond the scope of this article to discuss the history of private prosecutions in Nigeria, which has been discussed elsewhere.[6]

Nigeria's Administration of Criminal Justice Act (ACJA) came into force in 2015. The ACJA is federal legislation.[7] According to section 1 of the ACJA, "[t]he purpose of this Act is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim." The ACJA's provisions apply "to criminal trials for offences established by an Act of the National Assembly and other offences punishable in the Federal Capital Territory, Abuja".[8] However, according to the Nigerian Bar Association's website, by the end of September 2018, administration of

3 [2009] 10 NWLR 63 at 85. In *Mukapuli and Another v Swabou Investments (PTY) Limited* (SA 49/2011) [2017] NASC 22 (23 June 2017), the Namibian Supreme Court held (para 55): "In criminal proceedings, the State is, except in private prosecutions which seldom occur, always a party and is represented by its prosecutors to look after its interests and costs are not an issue".

4 For example, if he thinks that there is no evidence to secure a conviction. This was the reason that the Solicitor General invoked in his questionable attempt to dismiss the proceedings on behalf of the Attorney General in the case of *AG of Kaduna State v Mallam Umaru Hassan*, above at note 2. See also *HRH Igwe GO Umeonusulu Umeanadu v AG of Anambra State and Another* (2008) LPELR-3362 (SC), where the Director of Public Prosecutions refused to prosecute because he thought there was no prima facie case against the accused.

5 See generally, I Okagbue "Private prosecution in Nigeria: Recent developments and some proposals" (1990) 34/1 *Journal of African Law* 53.

6 Ibid.

7 Nigeria is a federal state, with a National Assembly and a House of Assembly in each state. Sec 4(2) of Nigeria's Constitution provides: "The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution." The legislative powers of the Houses of Assembly are provided for in the Concurrent Legislative List (see sec 4(4) of the constitution). In the light of the fact both lists are silent on matters to do with criminal law and criminal procedure, states have the power to enact their own criminal laws. However, in *Abiodun Adelaja v Olatunde Fanoiki and Another* [1990] NGSC 12; (1990) 3 NILR 23 (23 March 1990), the Supreme Court pointed out that matters of evidence are on the Exclusive Legislative List. For discussion of the relationship between federal and state criminal law, see ES Nwauche "The Nigerian police force and the enforcement of religious criminal law" (2014) 14/1 *African Human Rights Law Journal* 203 at 205–06.

8 ACJA, sec 2(1).

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access to justice legislation had been enacted in 13 states including the Federal Capital Territory of Abuja[9] and stakeholders had put in place strategies to ensure that the ACJA is domesticated in all 36 states in Nigeria.[10] Referring to Nigerian case law, Abdullahi has argued that, "[c]riminal law is neither under the exclusive or [sic] concurrent list. It was therefore a residual matter within the competency of the Houses of Assembly to legislate on".[11] As shown below, state legislation domesticating the ACJA shows that some state assemblies have not made substantial changes to the provisions on private prosecutions that are provided for in the ACJA. This means that the federal courts' interpretation of the relevant private prosecution provisions of the ACJA will be applicable to some state courts.

As mentioned above, the ACJA provides for circumstances in which a private person may institute a private prosecution. A private prosecution should be distinguished from a situation where the Attorney General delegates his power to private legal practitioners to prosecute on behalf of the state.[12] In such a case, the prosecution remains a public prosecution[13] and the private legal practitioner must obtain the Attorney General's fiat before he or she can prosecute on behalf of the state.[14] The fiat in question may be oral or written[15] and applies

9 These states are: Abuja FCT, Anambra, Cross River, Delta, Ekiti, Enugu, Lagos, Ondo, Oyo, Kaduna, Rivers, Akwa Ibom and Ogun. See "States with ACJ legislation (December, 2017)", available at: <http://www.nba-acj.org.ng/index.php?option=com_content&view=article&id=273&Itemid=232> (last accessed 14 October 2018). An email of 11 October 2018 (on file with the author) to the author from Dr Benson Chinedu Olugbuo, director of Cleen Foundation (a non-governmental organization based in Abuja), indicates that, in addition to these 13 states that have domesticated the ACJA, eight were in the process of domesticating it.

10 See B Madukwe "NBA inaugurates Administration of Criminal Justice Act Implementation C'ttee" (1 February 2018) *Vanguard*, available at: <https://www.vanguardngr.com/2018/02/nba-inaugurates-administration-criminal-justice-act-implementation-cttee/> (last accessed 14 May 2019).

11 I Abdullahi *Civil Litigation in Nigeria: A Quick Reference Guide to Practice and Procedure* (2018, Malthouse Press) at 69. See also AO Bello "Criminal law in Nigeria in the last 53 years: Trends and prospects for the future" (2013) 9/1 *Acta Universitatis Danubius: Juridica* 15.

12 See ACJA, sec 268(1). A similar provision appears in the relevant legislation of some of states. See for example: sec 267(1) of the Administration of Criminal Justice Law, 2016 (Oyo State); sec 70 of the Administration of Criminal Justice Bill No, 2013 (Ekiti State); and sec 70 of the Administration of Criminal Justice Law of Lagos (2011).

13 *Commissioner of Police v Tobin*, above at note 3; *Billy Ikpongette and Another v Commissioner of Police Akwa Ibom State* (2008) LPELR-3878 (CA); *Federal Republic of Nigeria v Senator Olawole Julius Adewunmi* (2007) LPELR-1273 (SC); *Mrs Mopelola Saidu v The State and Others* (2014) LPELR-22672(CA); *Engr Sola Akinwumi v The State* (2012) LPELR-9467 (CA).

14 *Ikpongette v Commissioner of Police Akwa Ibom State*, id at 6. The power could also be delegated to any government agency. See for example, *Serah Ekundayo Ezekiel v Attorney General of the Federation* (2017) LPELR-41908 (SC), where the Supreme Court held (para 8) that: "all Agencies charged with prosecutorial powers are qualified to initiate criminal charges in Court. Indeed, even legal practitioners briefed by the Attorney General are competent to initiate charges".

15 *Lucy Onwudinjo v The State* (2014) LPELR-24061 (CA).

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to the conduct of the prosecution before the trial court and to any appeal arising from the trial.[16] Before the ACJA came into force, Nigerian courts, especially the Supreme Court and the Court of Appeal, had developed rich jurisprudence relating to the right to institute a private prosecution. The purpose of this article is, where necessary, to refer to this jurisprudence and highlight the issues that courts are likely to encounter when interpreting the provisions in the ACJA relevant to private prosecutions. The author discusses the following issues: the right to institute a private prosecution; *locus standi* [legal capacity] to institute a private prosecution; and measures to prevent the abuse of the right to institute a private prosecution.

THE RIGHT TO INSTITUTE A PRIVATE PROSECUTION

The right to institute a private prosecution is a fundamental issue. This right is also closely linked to one of the objectives of private prosecutions: to fight impunity. As the Nigerian Court of Appeal observed in *Alhaji Salihu Wukari Sambo v Capt Yahaya Douglas Ndatse (Rtd) and Others*, evidence before it showed that:

> "It is clear that criminal matters involving high profile members of our society usually die naturally because they are never investigated to its [sic] logical conclusion. The police are hereby called upon to be alive to their responsibilities of thorough investigation of all matters … However, the Attorney General's Office is hereby exhorted if it so desires to ensure that they react to the public outcry and endeavour to initiate prosecution where there is enough evidence otherwise the Appellants should be at liberty to seek for Justice and not to be so hindered, for a party should not be esttopped [sic] or deprived from seeking for justice. Consequently justice deprived and delayed is justice denied."[17]

The Nigerian Constitution (the Constitution) provides for various different rights,[18] but the right to institute a private prosecution is not one of them. Although the ACJA expressly provides for some rights,[19] it is silent on the right to institute a private prosecution. Section 109(e) provides that criminal proceedings may be instituted, inter alia, "by information or charge filed by a private prosecutor subject to the provision of this Act". The right to institute a private prosecution was also not expressly provided for in the previous

16 *The State v Okoye and Others* [2007] 16 NWLR 607 at 644–45; *Marcel Nnakwe v The State* (2013) LPELR-20941 (SC).

17 (2013) LPELR-20857 (CA) at 13.

18 See the Constitution, chap IV.

19 See, for example, secs 88 (right to make a complaint), 258 (right of reply by a law officer for the prosecution), 304 (defence and prosecutor's right of reply) and 433 (right of person imprisoned in default to be released on making a payment and the effect of part payment).

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criminal procedure legislation that the ACJA repealed.[20] However, Nigerian courts interpreted these repealed pieces of legislation, whose provisions on private prosecutions are substantially the same as those in the ACJA, as providing for the right to institute a private prosecution. For example, in *Fawehinmi v Akilu*[21] the appellant's friend and client was allegedly murdered by the respondents and the Director of Public Prosecutions (DPP) of Lagos State refused to prosecute the respondents. The appellant argued that he had a statutory, as opposed to common law, right to institute a private prosecution against the respondents.[22] The Supreme Court interpreted the relevant sections of the now repealed Criminal Procedure Law of Lagos State, which were substantially a verbatim reproduction of the Criminal Procedure Act and section 191 of the 1979 Constitution of Nigeria, which was reproduced verbatim in section 211 of Nigeria's current (1999) Constitution, as conferring on the appellant the right to institute a private prosecution. The court held that the relevant section of the Criminal Procedure Law "puts the right and duty of a private person in the prosecution of crimes beyond doubt and in proper perspective".[23] Referring to sections under which a private person is allowed to arrest a person who has committed an offence, the court held that "[t]he law therefore imposes a duty on all persons not only to deprive criminals of all hiding places but to ensure that they are arrested, prosecuted and brought to justice".[24]

Whether or not a person has the right and power to institute a private prosecution is an issue that the judges approached differently. Justice Obaseki held that "[t]he power to initiate criminal prosecution whether by the Attorney General or by a private prosecutor or other authority is a right in the broad sense. It is recognized by the laws and the Constitution of the Federal Republic of Nigeria 1979".[25] Justice Bello observed that the different sections of the Criminal Procedure Law of Lagos State "confer the right or the power, depending on how one may look at it, on [a] private person to prefer and to prosecute before the High Court an information charging any person with an indictable offence".[26] The justice cited the relevant legal provisions[27] and concluded that, "[i]t follows from the foregoing that the Appellant, being a private person, has the statutory right or power to prefer information before the High Court charging the suspects with the murder of" his friend and client.[28] Emphasizing the appellant's right, Justice Uwais held that, "[t]here can be no doubt that by sections 342 and 343 of the Criminal Procedure Law, Cap 32

20 See Criminal Procedure Act, Cap C41 LFN 2004, secs 75(2), 255, 275(1)(i), 242 and 243.
21 (1987) 4 NWLR (pt 67) 797.
22 Id at 822.
23 Id at 826.
24 Ibid.
25 Id at 830.
26 Id at 834.
27 Criminal Procedure Law of Lagos State, secs 340 and 343.
28 *Fawehinmi v Akilu*, above at note 21 at 835.

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every citizen of Nigeria or any person for that matter, has a right to bring private prosecution in Lagos State if the Attorney General of Lagos State does not wish to do so".[29] Justice Wali[30] and Justice Craig also emphasized this right. Justice Craig, although dissenting on the issue of whether the appellant had a prima facie case for the court to make an order of mandamus against the DPP, made the following ruling on the issue of the right to institute a private prosecution:

> "It has been stated that the proceedings in the lower court were civil in nature and that the applicant still had to show his *locus standi* in applying for an order of mandamus. My view is that if a private prosecutor has a statutory right to initiate criminal proceedings in Court, it becomes part of his civil rights and obligations under section 6, sub-section 6(b) of the Constitution of [the] Federal Republic of Nigeria 1979, [which was reproduced verbatim as section 6(6)(b) in the 1999 Constitution] and he has the right to protect and enforce such civil rights by any legal process which he thinks appropriate. Indeed if such prosecutor thinks that another person (in this case, the DPP) is trying to prevent him from exercising his statutory right to prosecute, he may bring appropriate proceedings to remove the impediment. In the instant case, the applicant has applied to the High Court for leave to apply for an order of mandamus to compel the DPP to perform his public duty so that he could proceed to prosecute the suspected felons and I am of the view that he has every right so to do. It is for these reasons as well as for those stated in the lead judgment that I agree that the applicant has a locus standi to bring the present application."[31]

It is clear the Supreme Court agreed with the appellant's submission that the right to institute a private prosecution in Nigeria is a statutory, as opposed to common law, right. The Court of Appeal has emphasized this right in recent decisions.[32] However, one has to consider Justice Uwais's holding that, "[t]here can be no doubt that … every citizen of Nigeria or any person for that matter, has a right to bring private prosecution in Lagos State if the Attorney General of Lagos State does not wish to do so".[33] This brings us to the issue of locus standi for a person to institute a private prosecution.

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29 Id at 858.

30 Id at 864.

31 Id at 866.

32 *Oniyide v Oniyide* (2018) LPELR-44240 (CA), paras 19–22. See also *Sambo v Ndatse*, above at note 17, where the Court of Appeal held (at 12) that, "where as in the present case, a statute like Section 211(1)(b) and (c) of the constitution of the Federal Republic of Nigeria 1999 and Section 143(e) of the Criminal Procedure Act have vested any person (or authority) with the right to commence or institute Criminal Proceedings against any other person, a court of law does not have the jurisdiction to disqualify or limit the right by using the general common law principles on the subject".

33 *Fawehinmi v Akilu*, above at note 21 at 858.

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LOCUS STANDI TO INSTITUTE A PRIVATE PROSECUTION

In some countries, such as South Africa,[34] Zimbabwe,[35] Botswana[36] and Namibia,[37] legislation provides that a person must have *locus standi* to institute a private prosecution, by proving "some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence". Courts have held that this person must be a victim of crime.[38] In Nigeria, however, neither the ACJA nor any relevant state legislation stipulates that persons must have locus standi to institute private prosecutions. The repealed Criminal Procedure Code was also silent on this issue. The question therefore arises as to who has *locus standi* to initiate a private prosecution. In *AG of Kaduna State v Mallam Umaru Hassan* the Supreme Court held that, "[*l*]*ocus standi* literally means a place of standing. It is thus used to denote a right of appearance in a court of justice or before a legislative body on a given question".[39] Likewise, in *Sambo v Ndatse* the Court of Appeal held that "[t]he term *locus standi* denotes legal capacity to institute proceedings in a court of law and is used interchangeably with terms like 'standing' or 'title to sue'".[40]

The question to be answered is: who has *locus standi* to institute a private prosecution under the ACJA? Section 494(1) defines a private prosecutor by stating who is not a private prosecutor. It is to the effect that "'private prosecutor' does not include a person prosecuting on behalf of the State or a public officer prosecuting in his official capacity". Although the ACJA provides for circumstances in which a person may institute a private prosecution, unlike the legislation in other African countries such as South Africa, Botswana, Zimbabwe and Namibia, it is silent as to whether or not such a person has to be a victim of crime. It is argued that, in the light of this silence, Nigerian case law on the issue of private prosecutions before the enactment of the ACJA is relevant in resolving this issue. One of the issues in *Fawehinmi v Akilu*[41] was whether the appellant could bring a private prosecution against those who had allegedly murdered his friend and client. The respondents argued that the appellant had no *locus standi* to institute a private prosecution as his legal rights had not been infringed and he had no "personal and private interest in the case".[42] This submission should be understood against the background that these

34 Criminal Procedure Act, Act 51 of 1977, sec 7.
35 Criminal Procedure and Evidence Act, 2016, cap 9:07, secs 13–16.
36 Criminal Procedure and Evidence Act, 1939, cap 08:02, secs 14–22.
37 Criminal Procedure Act, Act 51 of 1977, sec 7.
38 *Telecel Zimbabwe (Pvt) Ltd v AG of Zimbabwe NO* [2014] ZWSC 1 (27 January 2014); *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (1) SACR 284 (CC).
39 Above at note 2 at 30.
40 *Sambo v Ndatse*, above at note 17 at 11.
41 Above at note 21 at 797.
42 Id at 823.

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criteria on *locus standi* had been developed by the Supreme Court. However, they were developed in the context of civil matters. It was the first time that the Supreme Court had dealt with the issue of *locus standi* in criminal matters.[43] In his response to the respondent's submission, Justice Obaseki held that:

> "It is a universal concept that all human beings are brothers and are assets to one another. All human beings living in the same country and being citizens of the same country are more closely related to one another and are in truth and in fact each other's keeper than those living in countries separated by great distances. The death of one is a loss to the other whether by natural or feloneous means. The provisions of … the Criminal Code Laws of Lagos State … leave one in no doubt as to the obligations on every person in Lagos State to see that any criminal or offender is brought to justice and that no one helps him to escape justice … Criminal Law is not like the law of procedure meant for lawyers only but is addressed to all classes of society as the rules that they are bound to obey on pain of punishment."[44]

On the same issue of *locus standi*, Justice Eso held that:

> "Being a lawyer of and friend of [the deceased], learned Solicitor-General submitted, could not be construed in whatever form, to be a personal and private interest. Even at this stage, I must say, with all respect to the Solicitor-General, that I find it difficult to follow his logic in this regard. I should have thought that a friend of a person *simpliciter* should have a personal and private interest in that person. A lawyer of that person may have only professional interest but when that lawyer is a personal friend I would not know what friendship stands for, if the friend would have no *personal* interest (after all he is a personal friend) or *private* interest (after all he has a friend because he could not really befriend the public at large) in that person."[45]

Justice Eso agreed with Justice Obaseki's reasoning on the issue of *locus standi* and emphasized that the fact "[t]hat we are all brothers is more so in this country where the socio-cultural concept of 'family' and 'extended family' transcend all barriers. Is it not right then for the court to take note of the concept of the loose use of the word 'brother' in this country? 'Brother' in the Nigerian context is completely different from the blood brother of the English language".[46]

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43 Justice Nnamani referred to the court's earlier jurisprudence on *locus standi*. Against that background, he held (id at 853) that: "It is therefore understandable that an applicant even for leave has to have *locus standi* to bring the application. It is clear that all the cases in which this Court has considered the issue of *locus standi* have been civil causes. In determining therefore whether the appellant herein has *locus standi* it is necessary to consider the nature of the cause he brought to court …".

44 Id at 825.

45 Id at 845 (emphasis original).

46 Id at 847.

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He concluded that the appellant had *locus standi* because the deceased had been his personal friend and client and "that consanguinity ought not to be the only acceptable ground for granting locus".[47] However, the court's subsequent definition of a private prosecutor in *Ezeanya v Okeke*[48] does not indicate that a private prosecutor must necessarily be a victim of crime. The court defined a private prosecutor as "one who sets in motion the machinery of criminal justice against a person whom he believes to be guilty of a crime by laying an accusation before the proper authorities and who is not himself an officer of Government".[49] The Supreme Court's holding in *Fawehinmi v Akilu* shows that the definition of a victim of crime is wider than that adopted in other African countries such as Kenya[50] and Mauritius[51] where, although the legislation is silent on which people may institute private prosecutions, courts have held that such people must be the primary victims of crime, that is, a person who has been directly affected by the crime. In *Sambo v Ndatse*[52] the issue was whether the appellant had *locus standi* to institute a private prosecution against the respondents for the alleged murder of the deceased (the appellants were paternal uncles of the deceased). The Court of Appeal referred to the Supreme Court's decision in *Fawehinmi v Akilu* to hold that the relevant constitutional[53] and criminal procedure[54] provisions "empower the Appellants to initiate the direct Criminal complaint against the Respondents and they need not show any special relationship with the deceased persons or demonstrate an interest more substantial than that of the general public to be enabled in that behalf".[55] The Nigerian Supreme Court's broad definition of *locus standi* also opens the door for people to institute private prosecutions for many offences. In Nigeria, a private prosecution may be instituted in either a magistrates' court or the High Court for serious and minor offences.[56] In the aftermath of the Supreme Court's judgment in *Fawehinmi v Akilu*, the law in Lagos was amended to restrict the right to institute a private prosecution to perjury.[57] However, this restriction does not appear in the state's latest administration of criminal justice legislation.

47 Id at 855.
48 [1995] 4 NWLR 142.
49 Id at 164.
50 *Kimani v Kahara* [1983] eKLR 1.
51 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409; *Hurnam D v AH Foon Chui Yew Cheong and Others* 2003 SCJ 26; 2003 MR 187, at 5.
52 Above at note 17.
53 The Constitution, sec 211.
54 Criminal Procedure Code, cap 39 Laws of Taraba State of Nigeria, 1997, sec 143(d) and (e).
55 *Sambo v Ndatse*, above at note 17 at 12.
56 However, sec 267(1) of the ACJA provides: "The complainant and defendant shall be entitled to conduct their cases by a legal practitioner or in person except in a trial for a capital offence or an offence punishable with life imprisonment." See also Administration of Criminal Justice Law of Oyo State, sec 266.
57 See *Akilu v Fawehinmi* (no 2) [1989] 2 NWLR 122 at 171. For a contrary view, see *Atake v Mene-Afejuku* [1996] 3 NWLR 483.

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The Court of Appeal appears to be leaning towards broadening *locus standi* in private prosecutions further. In *Sambo v Ndatse* Justice Agube referred to case law from countries such as India on the issue of *locus standi* and held that, "[a]lthough public interest litigation is still at [its] infancy in this country, recent decisions of the Supreme Court have tended to jettison the old concept of sufficiency of interest as the bases [sic] for conferment of *locus standi* in constitutional matters".[58] It appears that in the future Nigeria could allow people to institute private prosecutions in the public interest. This could be in line with practice from other countries, such as Ireland.[59]

Another issue relates to the question of whether both natural and legal (juristic) persons may institute private prosecutions.[60] There is no reported case in which a juristic person has successfully instituted a private prosecution in Nigeria.[61] However, it is argued that a juristic person, like a natural person, may also institute a private prosecution. Two reasons support this argument. First, the ACJA does not define the word "person" although it distinguishes between an individual and a corporate body.[62] Section 18(1) of the Interpretation Act[63] defines a person to mean "any body of persons corporate or unincorporated". In *DSA Agriculture Machinery Manufacturing Company Ltd v Lagos State Internal Revenue Board*,[64] in which the relevant tax legislation was silent on the definition of the word "person", the Court of Appeal referred, inter alia, to the definition of "person" in the Interpretation Act to hold that "person" included a company. More specifically, in *L Udeogaranya and Another v Alhaji Buari Adeyi* the Court of Appeal referred to jurisprudence from the United Kingdom and Australia and held that, "[i]t is beyond dispute that the word 'person' when used in legal practice, such as in a legislation or statute connotes both a 'natural person', that is to say, a 'human being' and an 'artificial person' such as corporation sole or public bodies corporate or incorporates".[65] The court added:

> "There is also the definition of the same word 'person' in Section 18(1) of the Interpretation Act, Cap 192, Laws of the Federation of Nigeria 1990 as follows: - ''Person' includes any body of persons corporate or unincorporated'. Without, therefore seeking guidance from anywhere else, it seems to me plain that the definition of the word 'person' in the legal sense under the Nigerian

58 Above at note 17 at 18.
59 *Modinos v Cyprus* (appln no 15070/89) (22 April 1993) at 19–20 (dissenting opinion of Judge Pikis).
60 For the definition of a juristic person, see *Ndi Okereke Onyuike v The People of Lagos State and Others* (2013) LPELR-24809 (CA) at 12–13.
61 In *DPP v Michael Akozor* (1962) 1 ANLR (reprint) 235, a lawyer instituted a private prosecution on behalf of a private company (Union Trading Company Limited), which was taken over and discontinued by the DPP.
62 See for example, secs 75, 123 and 484(2).
63 Interpretation Act, cap 192.
64 (2006) LPELR-11560 (CA).
65 (2010) LPELR-4415 (CA) at 3.

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> law is not limited to natural persons or human beings only … It clearly admits and includes artificial persons such as a corporation sole, company or any body of persons corporate or incorporate."[66]

In *MTN Nigeria Communications Limited v Barrister Emeka Emegano*, the Court of Appeal referred to judgments of the Supreme Court to the effect that:

> "In legal theory, a person is any being whom the law regard[s] as capable of rights and duties. There are two kinds of persons distinguishable as natural and legal. A natural person is a human being while a [legal or juristic person is a person in] legal contemplation such as a joint stock company or Municipal corporation. In jurisprudence, the term applies to corporation[s] such as limited liability companies or Municipal Corporation[s]; it may also apply to churches, hospitals, or Universities if they are in corporate [sic] or registered as such."[67]

In the light of these decisions, it is argued that a juristic person may institute a private prosecution if it proves that it has been a victim of crime. Secondly, although there have been cases in which Nigerian courts could have held, albeit obiter, that a juristic person cannot institute a private prosecution, this has not happened, thus creating room for the argument that a juristic person may also institute a private prosecution in Nigeria. For example, one of the issues in *Nigerian Telecommunications PLC v Emmanuel O Awala* was whether the applicant company had prosecuted the respondent. The Court of Appeal held that:

> "It is settled law and practice that the prosecution of a criminal trial in a court of law is by the Director of Public Prosecution[s] to whom the power of Attorney General is delegated to prosecute all criminal proceedings in this country. The DPP prosecutes the trial of offences on behalf of the State. In the Magistrate Court, the power to prosecute a criminal infraction of the law, is sometimes delegated to the Police whose function includes the investigation of [an] allegation made against a person, who is said to breach the law … An individual who complains to the police of a criminal offence committed by another does not unless he makes a special application and obtains a fiat of the Attorney General, prosecute the offence by himself, the offence he complained to the Police. The decision therefore, to prosecute an offence is done by the State. It is wrong therefore, to say that Nitel prosecuted the respondent. Consequently, it is the State agency on behalf of the people of Nigeria, who instituted the action in a criminal trial against the respondent. The complainant is only a witness, and not a party to the criminal proceedings."[68]

66 Id at 4.
67 (2016) LPELR-41090 (CA), paras 76–77.
68 (2001) LPELR-5973 (CA) at 8.

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The court added that "[t]he appellant did not obtain a fiat to prosecute the respondent. He is only allowed to have made a report of an alleged infraction of the law to the police" and concluded that "[t]he appellant did not prosecute the respondent in the criminal charge".[69] In this case the Court of Appeal does not rule out the possibility of the appellant instituting a prosecution should it acquire the requisite fiat from the Attorney General. In *Arab Contractors (OAO) Nigeria Ltd v Gillian Umanah*,[70] in which the appellant reported the respondent to the police for allegedly failing to pay some of the money she owed to it, resulting in her arrest, the Court of Appeal, while resolving the issue of whether or not the appellant could report a crime committed against it to the police, held that "[e]very private individual has the right to report a crime or a suspected crime to the police. This on its own cannot ground an action for false imprisonment against the private individual".[71] Relying on the reasoning in *Fawehinmi v Akilu*, it is argued that a person, like the appellant in this case, who has a right to report the commission of an offence also has an obligation "to see that any criminal or offender is brought to justice and that no one helps him to escape justice".[72] This includes the right to institute a private prosecution should the public prosecutor decline to prosecute. It is beyond doubt that juristic persons can also be victims of crime. Nigerian case law shows that companies have been victims of crimes such as fraud,[73] malicious damage to property[74] and theft.[75] However, if a juristic person institutes a private prosecution on behalf of a victim, it must make it very clear that this is the position. For example, in *Oniyide v Oniyide*,[76] the Court of Appeal held that the International Federation of Women Lawyers could institute a private prosecution on behalf of one of its clients.

MEASURES TO PREVENT THE ABUSE OF THE RIGHT TO INSTITUTE A PRIVATE PROSECUTION

Jurisprudence from different parts of the world shows that the right to institute a private prosecution may be and has been abused.[77] Case law from Nigeria also shows that the right to institute a private prosecution could be abused.[78] In *Fawehinmi v Akilu* the Supreme Court held that the different

69 Ibid.
70 [2013] 4 NWLR 323.
71 Id at 341.
72 Above at note 21 at 825.
73 *Pan Bisbilder Nigeria Ltd v FBN Ltd* (2000) LPELR-2900 (SC); *Prince Oil Ltd v GTB PLC* (2016) LPELR-40206 (CA).
74 *Incorporated Trustees of Roh Empire Mission v Opara* (2017) LPELR-42463 (CA).
75 *Samuel Isheno v Julius Berger Nig* PLC (2008) LPELR-1544 (SC); *Nicon Insurance Corporation v Mr Ayo Olowoofoyeku* (2005) LPELR-5946 (CA).
76 Above at note 32.
77 See JD Mujuzi "The right to institute a private prosecution: A comparative analysis" (2015) 4 *International Human Rights Law Review* 222 at 250–54.
78 In *Akilu v Fawehinmi* (1989) LPELR-20424 (CA), the respondent insisted on pursuing a

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conditions that have to be met before a private prosecution is instituted "have been imposed on private prosecutors in order to ensure that innocent citizens are not subjected to spurious prosecutions".[79] It is therefore necessary to discuss the measures that have been adopted in Nigeria to ensure that this right is not abused. One of the measures has already been discussed above: for a person to institute a private prosecution, he has to have *locus standi*. The additional measures discussed in this section are the need for the Attorney General's fiat to institute a private prosecution and the Attorney General's power to intervene in private prosecutions.

The Attorney General's fiat

Section 381(d) of the ACJA provides that an information may be filed by "a private person, provided the information is endorsed by a law officer that he has seen such information and declined to prosecute at the public instance and the private person enters into a bond to prosecute diligently and to a logical conclusion". Section 383(1) further provides:

> "The registrar shall receive an information from a private legal practitioner where: (a) the information is endorsed by the Attorney General of the Federation or a law officer acting on his behalf stating that he has seen the information and has declined to prosecute the offence set out in the information; and (b) the private legal practitioner shall enter into a recognizance in: (i)

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private prosecution for murder against the applicants, although he knew that in Lagos State the law had been amended to restrict the right to institute a private prosecution to the offence of perjury. Justice Nasir observed (at 9) that "it is an abuse of process to apply to the court for leave to issue mandamus to compel the Attorney General to prosecute or allow a person who has no statutory authority to prosecute". In *Abdulraheem Ishola v Sunday Aremu*, suit no KWS/37M/2016, the Kwara High Court held (at 28) that "any procedure which tends allows [sic] or permits a private person to lodge a direct criminal complaint and at the same time prosecute it under the provisions of section 143 or any other section of the Criminal Procedure Code is in breach of the fundamental right to a fair hearing of the accused person and clearly inconsistent and in conflict with the provisions of section 36 of the Constitution of the Federal Republic of Nigeria, 1999 and the principles of natural justice and therefore null and void to the extent of such inconsistence". However, this holding is debatable in light of the fact that courts in other countries have held that the fact that the prosecutor is also a witness in a case he / she is prosecuting does not violate the accused's right to a fair trial. See *Porritt and Another v National DPP and Others* [2015] 1 All SA 169 (SCA), 2015 (1) SACR 533 (SCA) (South Africa); *Albert Gacheru Kiarie T/A Wamaitu Productions v James Maina Munene and Seven Others* [2016] eKLR 1 (Kenya); *R (on the application of Haase) v Independent Adjudicator* [2008] EWCA Civ 1089 par 24 (United Kingdom); *Cisco et al v RL* [2016] LRSC 2 (22 January 2016); *Yeakula et al v RL* [2014] LRSC 48 (5 November 2014) (Liberia); *Strachan (Private Prosecutor) v Szewcyk* 2013 ONCJ 402 (CanLII) par 72 (Canada); and *The People v Paul Jeremiah Lungu* HNR/352/78 (30 June 1978), *The People v Paul Kankota* HPR/121/78 (4 August 1978) (Zambia).

79 Above at note 21 at 867.

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> such sum as may be fixed by the court, with a surety, to prosecute the information to conclusion from the time the defendant shall be required to appear, (ii) pay such costs as may be ordered by the court, or (iii) deposit in the registry of the court, such sum of money as the court may fix."

Section 384 provides that, "[w]here a private legal practitioner has complied with the provisions of section 383 of this Act, the information shall be signed by such private legal practitioner who shall be entitled to prosecute the information". Requirements similar to those in sections 383 and 384 are also included in the relevant state legislation.[80] The assurance the private prosecutor gives to the registrar of the High Court that he shall "prosecute diligently and to a logical conclusion" is meant to guarantee to the accused one of the fundamental elements of the right to a fair trial: the right to a fair hearing within a reasonable time.[81]

These sections raise very important issues with regard to the right to institute a private prosecution, which are examined below. Under section 381, a private person, who does not have to be a legal practitioner, is allowed to file an information with the registrar, provided that "the information is endorsed by a law officer that he has seen such information and declined to prosecute at the public instance and the private person enters into a bond to prosecute diligently and to a logical conclusion". Section 494 of the ACJA defines "law officer" to mean:

> "The Attorney General of the Federation and the Solicitor-General of the Federation and includes the Director of Public Prosecutions and such other qualified officers, by whatever names designated, to whom any of the powers of a law officer are delegated to [sic] by law and a private legal practitioner authorised by the Attorney General of the Federation to appear for and on behalf of the Attorney General of the Federation."

Thus, as the Supreme Court held in *Dr Olubukola Abubakar Saraki v Federal Republic of Nigeria*,[82] a fiat could be signed by any law officer and does not have to be signed by the Attorney General himself. A combined reading of sections 381 and 383 shows that the following issues have to be in place before a private prosecution may be instituted. First, section 381 provides that a private prosecution may be instituted by a person who is not a legal practitioner and in *Adebola Bakare v Segun Oladipo* the Court of Appeal held that "of course a

80 See for example, secs 384 and 385 of the Administration of Criminal Justice Law, 2016 (Oyo State), and secs 246 and 247 of the Enugu State Administration of Criminal Justice Law, 2017.

81 This right is guaranteed under secs 36(1) and (4) of the Constitution. For a detailed discussion of the meaning of this right, see *Chief Osigwe Egbo v Chief Titus Agbara and Others* (1997) LPELR-1036 (SC) and *Obiaso and Others v Okoye and Another* (1989) LPELR-21609 (CA).

82 (2016) LPELR-40013 (SC).

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private person who [institutes] a direct complaint in Court cannot seriously expect the police to prosecute it for him; he will ordinarily be expected to prosecute his complaint by himself or counsel of his choice";[83] however, in practice this may not be easy. This is because an information is a highly technical document that must meet strict requirements for it not to be rejected by the court.[84] In *Ndi Okereke Onyuike v The People of Lagos State and Others*, the Court of Appeal held that an information should comply with strict legal requirements and, in particular, should not be misleading, embarrassing or uncertain.[85] Nigerian reported case law also shows that, in practice, all private prosecutions have been instituted by legal practitioners. It is very unlikely that a person without legal training would be able to file an information and ultimately conduct a private prosecution.

Secondly, for a private prosecution to be instituted, a law officer must endorse the information and confirm that "he has declined to prosecute the offence set out in the information". This means that, for example, if the offence he has declined to prosecute is murder, the private prosecutor has to prosecute the accused for murder and not manslaughter, as these are two distinct offences. The law officer's endorsement is what is legally known as a fiat. In *Commissioner of Police v Tobin*, the Court of Appeal held that, "[t]he term fiat, in latin [sic], literally means 'let it be done'. It denotes an order or decree, especially an arbitrary one, as in judicial fiat; a court decree, etc. Thus, the term '*fiat justitia*' means let justice be done".[86] The court added that, "[i]t is indeed the law that under the Nigerian adversarial judicial system, any prospective private prosecutor must first and foremost apply for and obtain the authority or fiat of the Attorney General prior to the commencement of a private prosecution".[87] The court emphasized that "it's a trite fundamental principle that a private prosecutor has an onerous duty to first of all apply for and obtain the fiat of the Attorney General before he can commence the private prosecution of an accused person in a court of law".[88] The proof of the Attorney General's consent must be "cogent, express and unequivocal".[89] In *Chief Lere Adebayo v The State*, the Court of Appeal held that the fact that the DPP had declined to prosecute is one of the most important prerequisites of a private prosecution.[90] There are other cases in which the

83 (2017) LPELR-43152 (CA) at 13.
84 GP West "Charge and information" (paper presentation at the three-day legal department in-house training workshop on the Administration of Criminal Justice Act, 2015), available at: <http://icpc.gov.ng/wp-content/uploads/downloads/2015/10/Charge-and-Information-Under-ACJA-2015.pdf> (last accessed 14 May 2019).
85 (2013) LPELR-24809 (CA) at 21.
86 Above at note 3 at 88.
87 Ibid.
88 Id at 89.
89 Ibid.
90 (2012) LPELR-9464 (CA) at 10.

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Court of Appeal has emphasized the fact that the Attorney General's fiat must be given before a person may institute a private prosecution.[91]

However, at the state level, whether or not the Attorney General's fiat is a prerequisite for the institution of a private prosecution depends on the criminal procedure legislation of a given state. The Court of Appeal has held that this is not a requirement in states that have not yet domesticated the ACJA. For example, section 143 of the Criminal Procedure Code Law of Kwara State[92] provides:

> "Subject to the provisions of Chapters XIII and XIV, a Court may take cognisance of any offence committed within the local limits of its jurisdiction. (a) When an arrested person is brought before it under Section 40 or 41; (b) Upon receiving a First Information Report under Section 118, or from any other Court; (c) Upon receiving a complaint in writing from the Attorney General; (d) Upon receiving a complaint of facts which constitute the offence; (e) If from information received from any person other than a police officer it has reason to believe or suspect that an offence has been committed."

In *Bakare v Oladipo*,[93] in which the appellant was prosecuted by the respondent before a magistrates' court, without the Attorney General's fiat, for the offences of cheating and criminal breach of trust, the issue on appeal was whether the appellant's prosecution was valid. The Court of Appeal referred, inter alia, to section 143 and held:

> "There is thus no doubt that the Criminal Procedure Code Law of Kwara State, a reproduction of the Criminal Procedure Code Law of 1960 of Northern Nigeria, permits the initiation and prosecution of criminal proceedings by a private person as the respondent did in this case. Of course a private person who proceeds under the provisions of Section 143(d) and (e) above by instituting a direct complaint in Court cannot seriously expect the police to prosecute it for him; he will ordinarily be expected to prosecute his complaint by himself or counsel of his choice as the respondent did."[94]

Likewise, in *Oniyide v Oniyide*[95] (also a case from Kwara State in which the applicant, without the Attorney General's fiat, instituted a private prosecution against the respondent), the Court of Appeal referred to section 143 of the Criminal Procedure Code Law of Kwara State to find that the applicant did

91 See, for example, *Dr Erastus BO Akingbola v Federal Republic of Nigeria and Another* (2012) LPELR-8402 (CA) 6, where the court held (at 6): "Any body or authority is competent to initiate criminal proceedings against an offender, once he is granted the fiat to do as we are all our brothers' keepers."

92 Criminal Procedure Code Law, cap C23 of Kwara State.

93 Above at note 83.

94 Id at 13.

95 Above at note 32.

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not need the Attorney General's fiat to institute a private prosecution. The Court of Appeal has reached a similar decision in cases from states with an identical provision, such as Taraba[96] and Kaduna.[97] The position in Kwara State is unlikely to change in the near future. This is because the Kwara State Administration of Criminal Justice Bill,[98] the purpose of which is to domesticate the ACJA,[99] reproduces section 143 of the Criminal Procedure Code Law of Kwara State verbatim on the issue of the commencement of prosecutions.[100] This also means, following the reasoning in the Court of Appeal's decision of *Sambo v Ndatse*,[101] that a person does not have to be a victim of the offence to institute a private prosecution. As the Court of Appeal held in that case, "[e]very provision of the law has a purpose and the essence of Section 143 (d) and (e) of the Criminal Procedure Code to my mind is that criminality is one sensitive issue that everyone has special interest in respect thereof [sic]. As such any person can sue when there is a reasonable suspicion".[102] In the light of the fact that some states that have domesticated the ACJA have provided that the Attorney General's fiat is a prerequisite for the institution of a private prosecution and others have provided that it is not, it is inevitable that access to courts to institute private prosecutions will not be uniform across the federation.

Related to this issue is whether the Attorney General's decision not to endorse an information for the private prosecutor to institute a prosecution is beyond judicial scrutiny. Put differently, can a private legal practitioner approach a court and challenge the Attorney General's decision not to endorse an information? Section 383(2) of the ACJA provides that, "[w]here an application for consent to prosecute is made to the Attorney General of the Federation by a private legal practitioner and the Attorney General declines to grant such consent, he shall give his reasons for doing so in writing within 15 working days from the date of the receipt of the application". Similar provisions have been included in the legislation domesticating the act in some states.[103]

Section 383(2) shows that a private prosecutor has to make an application to the Attorney General for him to give his "consent" to the private prosecutor to

96 See *Sambo v Ndatse*, above at note 17.

97 *Aliyu N Salihu and Others v Road Transport Employers Association of Nigeria and Others* (2013) LPELR-21820 (CA).

98 See Kwara State Administration of Criminal Justice Bill 2017, available at: <http://kwha.gov.ng/Content/Images/pdfFiles/Administration-of-Criminal-Justice-Bill-2017.pdf> (last accessed 14 May 2019).

99 See id, clause 2.

100 See id, clause 142.

101 Above at note 17.

102 Id at 12.

103 See, for example, sec 384(2) of the Administration of Criminal Justice Law, 2016 (Oyo State). However, it was not included in the Enugu State Administration of Criminal Justice Law, 2017.

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prosecute. It has to be remembered that the Attorney General's consent is not mentioned under section 383(1). That subsection refers to his endorsement of the information that he declines to prosecute. It is submitted that a combined reading of sections 383(1) and 383(2) creates room for the argument that the Attorney General's consent is a prerequisite for the person to institute a private prosecution and that the consent has to be expressed through an endorsement of the information. According to section 383(1), two conditions must be in place for the Attorney General to grant his fiat: he must have seen the information and must decline to prosecute. These are the only factors that he must consider.

The fact that section 383(2) obliges[104] the Attorney General to give reasons within 15 days should be understood in the light of the history of the right to institute a private prosecution in Nigeria. For example, in one case, when the Attorney General refused to indicate whether or not he would prosecute murder suspects within three days of being approached by the deceased's lawyer, the lawyer instituted a private prosecution, hence attracting criticism from one of the Supreme Court judges.[105] Section 383(2) requires the Attorney General to give his reasons in writing.[106] The ACJA is silent on the factors that the Attorney General should consider in determining whether or not to endorse an information. It is argued that, in making his decision, the Attorney General may have to be guided by section 174 of the Constitution, with the effect that, in exercising his powers under section 174, he "shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process". The challenge though is that the endorsement or otherwise of an information is not one of the Attorney General's powers under section 174. He would have to explain why section 174 is applicable. The Attorney General's decision to refuse to endorse an information is not beyond judicial scrutiny. In *Fawehinmi v Akilu* the Supreme Court held that:

> "The appellant, as a person, a Nigerian, a friend and legal adviser to [the] … deceased, has a right … to see that a crime is not committed and if committed, to lay charge for the offence against anyone committing the offence in his view or whom he reasonably suspects to have committed the offence. The law has given every person that right in order to uproot crime from our society. The

104 The word "shall" is used in the section. However, in *HRH Igwe GO Umeonusulu Umeanadu v Attorney General of Anambra State and Another* (2008) LPELR-3362 (SC) at 3–4, the Supreme Court held that there are instances "where the word 'shall' can be reasonably interpreted to mean 'may'. It is not in every case that the word 'shall' imports a mandatory meaning into its use."

105 *Fawehinmi v Akilu*, above at note 21.

106 This is the same position as in sec 384(2) of the Oyo State Administration of Criminal Justice Law, 2016, which provides that, if the Attorney General declines to grant his consent, "he shall give his reasons for doing so in writing within 15 working days from the date of the receipt of the application".

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> respondent [the DPP] as a law officer who has seen the information drawn up by the appellant and has declined to prosecute the offence therein stated at public instance is under a clear duty to endorse a certificate to that effect on the information. Since the respondent has failed to carry out the statutory duty, the appellant is justified in bringing this application for the order of mandamus."[107]

The court added that, without the certificate from the DPP to the effect that he had seen the information and declined to prosecute, the appellant could not exercise his right and power to institute a private prosecution and therefore "the ex-parte application for leave to apply for the order of mandamus to compel the Director of Public Prosecutions to endorse the information is incidental to the exercise of the appellant's right or power to prefer and prosecute the information".[108] Although a court can order the Attorney General to endorse an information once he has seen it and declined to prosecute, it cannot order him to prosecute. This is because, under section 174(1)(a) of the Constitution, the Attorney General's powers include "to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly". In *Col Halilu Akilu and Another v Chief Gani Fawehinmi* the Court of Appeal held:

> "The power of the Attorney General to institute and undertake criminal proceedings or to discontinue one at any stage whether instituted or undertaken by him or any other authority or person is subject to his own conscience and good faith as he must have regard to the public interest, the interests of justice and the need to prevent an abuse of justice, for he is under no control whatsoever, judicial or otherwise, save the loss of his job if he offends his political master."[109]

However, if the Attorney General declines to endorse an information, he has to prosecute the suspects,[110] unless he has a compelling reason not to do so in line with the National Policy on Prosecution.[111] As mentioned above, the

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107 Above at note 21 at 833.

108 Id at 835.

109 (1989) LPELR-20424 (CA) at 8–9.

110 This is what happened in *Akilu v Fawehinmi*, above at note 57. However, the DPP's lack of interest in prosecuting the suspects could easily be discerned from her failure to follow basic procedural steps: getting the judge's direction before she could proceed with the prosecution and gathering enough evidence to establish a prima facie case against the accused. When the accused's lawyer raised these two objections, the DPP indicated that "she neither supported nor opposed the preliminary objections raised to the information she filed"; because of that the High Court quashed the information against the accused.

111 See National Policy on Prosecution (2016), para 9 (criteria governing the decision to

ACJA is silent on the factors that the Attorney General is required to take into consideration in deciding whether or not to consent to the institution of a private prosecution. Whether or not the Attorney General can decline to endorse an information on the ground that it does not disclose a prima facie case against the person to be prosecuted is open to debate. This is because in *Fawehinmi v Akilu* the Supreme Court held that, in deciding whether or not to endorse an information for the purpose of instituting a private prosecution, the issue of whether or not the applicant has a prima facie case is not for the Attorney General to decide. Rather, it is for the court to decide.[112] This judgment was based on the now repealed criminal procedure law of Lagos State, which provided, inter alia, that a judge has to consent to the institution of a private prosecution after being satisfied that there is a prima facie case against the accused; the Supreme Court highlighted this as one of the safeguards in place to prevent the abuse of the right to institute a private prosecution.[113] However, the ACJA does not include a similar provision. However, Nigerian case law shows that, in practice, there is a case in which the DPP declined to issue a fiat to a public prosecutor to prosecute on the basis that there was no prima facie case against the accused.[114] This is an issue that courts will have to resolve when the time is ripe. In resolving this issue, courts may find practice from other countries informative. Countries have addressed this issue differently. In some countries, a private prosecutor has to have a prima facie case before he can institute a private prosecution, whereas in other countries this is not a requirement.[115] In South Africa, for example, the High Court held that the law does not require a private prosecutor to have a prima facie case before he can institute a private prosecution. This is because:

> "The Legislature … must have contemplated that private prosecutors might in many cases have weak grounds for prosecution - a decision by the [DPP] not to prosecute would indicate this - but the policy of Parliament, no doubt, was to allow prosecution even in weak cases, in order to avoid the taking of the law by the complainant into his own hands. The Act contains no provision requiring that the private prosecutor shall satisfy anyone that he has a prima facie case.

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prosecute), available at: <http://www.justice.gov.ng/index.php/justice-sector-reform?task=document.viewdoc&id=77> (last accessed 14 May 2019).

112 Above at note 21 at 827–30.

113 Id at 866–67.

114 *HRH Igwe GO Umeonusulu Umeanadu v AG of Anambra State and Another* (2008) LPELR-3362 (SC). In this case the Attorney General of Anambra State refused to issue a fiat to the applicant to institute a private prosecution and the applicant challenged that decision before the High Court. However, before the High Court could hear that application, the applicant instituted a private prosecution against the accused in a magistrates' court and the accused took him to court for contempt of court. The High Court did not have the opportunity to finalize the application challenging the Attorney General's decision to refuse to issue a fiat to the applicant.

115 See Mujuzi "The right to institute a private prosecution", above at note 77 at 235–37.

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The penalty for vexatious and unfounded prosecution is liability for costs."[116]

Such an approach could be followed in Nigeria because the ACJA empowers a court to make costs orders against a private prosecutor. Section 108(4) provides that, "[w]here a private prosecutor withdraws from a prosecution for an offence under the provisions of this section, the court may, in its discretion, award costs against the prosecutor". In addition, section 322(1) provides that, "[t]he court may, in a proceeding instituted by a private prosecutor or on a summons or complaint of a private person, on acquittal of the defendant, order the private prosecutor or person to pay to the defendant such reasonable costs as the court may deem fit".[117] As the Supreme Court held in *John A Osagie v Alhaji SO Oyeyinka and Another*, in "a case of private prosecution … the prosecutor takes full responsibility for the arrest and prosecution of the accused".[118] The Supreme Court has also pointed out that a vexatious action to institute a private prosecution will be unacceptable as it amounts to an abuse of court process.[119] The ACJA also empowers a court to order a person to compensate another where he made a vexatious or frivolous accusation against him.[120] As the Court of Appeal held in *Bureau of Public Enterprises v Reinsurance Acquisition Group Ltd and Others*, "[i]t is better to allow a party to go to court and to be heard than to refuse him access to the court. This is so because Nigerian courts have inherent powers to deal with vexatious litigations or frivolous claims. Justice should not be rationed".[121]

Attorney General's intervention in private prosecutions

One of the measures to prevent or stop the abuse of the right to institute a private prosecution is the Attorney General's power to intervene and take over a private prosecution. Section 174 of the Constitution provides that:

> "(1) The Attorney General of the Federation shall have power - (a) … (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and (c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
>
> (2)…
>
> (3) In exercising his powers under this section, the Attorney General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process."

116 *Solomon v Magistrate, Pretoria, and Another* 1950 (3) SA 603 (T) at 613.

117 Sec 322(2) provides: "In this section, 'private prosecutor' does not include a person prosecuting on behalf of the State, a public officer prosecuting in his official capacity and a police officer."

118 (1987) LPELR-2786 (SC) at 3.

119 *Akilu v Fawehinmi* above at note 57 at 171–72.

120 Sec 323.

121 (2008) LPELR-8560 (CA) at 10.

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Similar powers are conferred upon the state Attorneys General.[122] Under section 174(1)(b) (which, according to the Court of Appeal, is only applicable in criminal cases),[123] the Attorney General can take over and continue a private prosecution, and under section 174(c) he can discontinue a private prosecution. In other words, unlike under the Kenyan Constitution where the DPP can take over and discontinue a private prosecution,[124] the Nigerian Constitution does not permit the Attorney General to take over a private prosecution for the purpose of discontinuing it. He can only take it over for the purpose of continuing with it. The moment the Attorney General takes over a private prosecution, it ceases to be a private prosecution and becomes a public prosecution.[125] The fact that a private prosecution was instituted on the basis of the Attorney General's fiat does not prevent him from taking it over. In *Fawehinmi v Akilu* the Supreme Court held that:

> "The powers exercisable by the Attorney General pursuant to section 191(1)(b) and (c) [the equivalent of section 211(1)(b) and (c) of the 1999 Constitution] are unfettered. They are not fettered by any action he may have taken pursuant to section 342 of the Criminal Procedure Law to endorse on the information presented to him by the private person with [sic] a certificate that he has seen the information and declines to prosecute the offence set forth therein at public instance. That certificate will not deter him from taking over and continue [sic] the criminal proceedings instituted by the private person. The certificate will not bar him from discontinuing any such proceedings which have been instituted."[126]

In an earlier decision of *AG of Kaduna State v Mallam Umaru Hassan* the Supreme Court emphasized the Attorney General's powers in the following terms:

> "I think it is not far-fetched to assume that any private prosecution which could have been brought by the respondent against the suspects, would

122 See the Constitution, sec 211.

123 *Major Ekundayo Awoyomi v Chief of Army Staff and Others* (2013) LPELR-22121 (CA).

124 Kenyan Constitution, art 157(6)(b) and (c).

125 In *Barkono v Commissioner of Police* [1971] 10 (12 July 1971), the High Court of Kano State held that, once the DPP has taken over a private prosecution, he takes the place of the person who had initiated that prosecution. The court also added that, although it is desirable for the DPP to notify that private prosecutor of his intention to take over a private prosecution, failure to do so does not invalidate his decision to take over the prosecution. In *Ng Chi Keung v Secretary for Justice* [2016] HKCFI 668; [2016] 2 HKLRD 1330; [2017] 3 HKC 305 (21 April 2016), the High Court of Hong Kong held (para 90) that "once a private prosecution is taken over, it becomes a public prosecution".

126 Above at note 21 at 829.

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> stand the chance of being terminated under the provisions of section 191 subsection (1)(c) of the 1979 Constitution [the equivalent of section 211 of the 1999 Constitution], since it was the opinion of the Solicitor-General that the case 'would be a waste of the time … of everyone connected with the administration of justice.'"[127]

Unlike in Kenya, where the DPP cannot take over a private prosecution without the consent of a private prosecutor,[128] in Nigeria a private prosecutor's consent is not needed. Unlike in Kenya[129] and Uganda,[130] where the DPP cannot discontinue a private prosecution without the consent of a court, in Nigeria a court's consent is not needed. In The Gambia, the DPP cannot take over a private prosecution without the consent of the private prosecutor and the court, and the DPP cannot discontinue a private prosecution without the consent of a private prosecutor.[131] In the light of the fact that in Nigeria the consent of neither the court nor the private prosecutor is needed before the Attorney General takes over or discontinues a private prosecution, the question is whether the Attorney General's decision may be reviewed by a court.

As mentioned above, section 174(3) of the Constitution provides that, "[i]n exercising his powers under this section, the Attorney General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process". In *AG of Kaduna State v Mallam Umaru Hassan* the Supreme Court held that "an individual has no right to insist that a criminal offence should be prosecuted by the State or that a private criminal prosecution brought by him cannot be terminated by the State".[132] The court added that:

> "[I]t is settled, that where a *nolle prosequi* is entered in a criminal case, by an Attorney General, under the provisions of either section 160 [the equivalent of section 174 of the 1999 Constitution] or 191 of the Constitution of the Federal Republic of Nigeria, 1979; the propriety of exercising the power may be questioned in a civil action which can be brought by a person whose civil rights and or obligations have thereby been affected. It follows a fortiori that the exercise of the same power by a legal officer employed in the Ministry of Justice … can be the subject of similar proceedings."[133]

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127 Above at note 2 at 23.
128 Art 157(6)(b) of the Constitution of Kenya (2010) provides that the DPP may "take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority".
129 Id, arts 157(6)(c) and (8).
130 Constitution of Uganda (1995), art 120(3)(c).
131 Constitution of The Gambia, art 85(1).
132 Above at note 2 at 26.
133 Id at 22.

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In *MUO Ezomo v Attorney General, Bendel State*, the Supreme Court cited with approval its earlier case law[134] to hold that:

> "The pre-eminent and incontestable position of the Attorney General, under the common law, as the Chief Law Officer of the State, either generally as a legal adviser or specially in all court proceedings to which the State is a party, has long been recognised by the courts. In regard to these powers, and subject only to ultimate control by public opinion and that of Parliament or the Legislature, the Attorney General has, at common law, been a master unto himself, law unto himself, and under no control whatsoever, judicial or otherwise, vis-a-vis his powers of instituting or discontinuing criminal proceedings. These powers of the Attorney General are not confined to cases where the State is a party. In the exercise of his powers to discontinue a criminal case or to enter a *nolle prosequi*, he can extend this to cases instituted by any other person or authority. This is a power vested in the Attorney General by the common law and it is not subject to review by any court of law. It is, no doubt, a great ministerial prerogative coupled with grave responsibilities."[135]

Recently, in the case of *Onyuike v Lagos State*, the Court of Appeal held that:

> "Section 211 of the Constitution endows a resourceful A-G [Attorney General] with limitless powers to institute and undertake, take over and continue and or to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaking [sic] by him or any other authority or person before any court except one before a court martial. Section 211(3) states the guiding principles for the exercise of this enormous powers [sic] reposed with the A-G these are: (i) public interest, (ii) the interest of justice and (iii) the need to prevent abuse of legal process – these must inform the manner in which the A-G exercise [sic] these powers. It has not been shown that the A-G of Lagos State was not properly guided by the provision of Section 211(3) in preferring charges against the Appellant."[136]

These judgments of the Supreme Court appear to suggest that under no circumstances may a court review the manner in which the Attorney General exercises his discretion. However, this decision by the Court of Appeal creates room for the argument that a court may review and set aside the Attorney General's decision if evidence is adduced to prove that it fell short of the guiding principles under section 211(3). It is submitted that the only requirement for a court to set aside the Attorney General's decision is for the applicant to prove that the decision was contrary to one of the three guiding principles.

134 *The State v SO Ilori and Two Others* (1983) 2 SC 155.
135 (1986) LPELR-1215 (SC) at 6 (quotation marks deleted).
136 Above at note 85 at 24.

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Invoking the doctrine of separation of powers[137] to contend that courts cannot review and set aside any decision by the Attorney General would not only render section 211(3) redundant but would also put the Attorney General above the law. His decisions have to be reviewed by the courts, which have the constitutional duty to protect the rights of citizens, and not be left to the discretion of politicians who may easily protect the Attorney General to achieve their political objectives. The courts' power to review decisions by Attorneys General or DPPs is also in line with international trends. In some African countries such as South Africa,[138] Seychelles,[139] Mauritius,[140] Malawi[141] and Kenya[142] where the DPP has the same constitutional powers as the DPP in Nigeria (who represents the Attorney General), courts have held that their decisions can be reviewed and set aside if they are unreasonable or irrational. The same approach has been taken by the Privy Council.[143] It is thus submitted that the Attorney General's decision to take over or discontinue a private prosecution should be scrutinized by the courts to establish compliance with the Constitution.

CONCLUSION

Although it does not expressly provide for the right to institute a private prosecution, the ACJA contains sections that regulate the manner in which a private prosecution may be instituted. Relying on cases from Nigerian courts that were decided before and after the ACJA came into force, the author has suggested ways in which Nigerian courts may interpret the ACJA. It is argued that, although the ACJA envisages a situation where a private person, who is not a legal practitioner, may institute a private prosecution, this is very unlikely to happen in practice, as the process of instituting a private prosecution is technical. It is recommended that, in order for people who are not legal practitioners and who do not have the means to afford the services of legal practitioners to be able to exercise fully their right to institute a private prosecution, the government may have to provide legal aid. It is also recommended that Nigerian courts need to revisit their reluctance to review the manner in which the Attorney General exercises his powers. Courts should be able to assess whether or not the Attorney General's conduct was in line with the guiding principles under section 174(3) of the Constitution. As this article has illustrated, this approach has been followed in other countries.

137 For discussion of this doctrine in Nigeria, see, inter alia, *Adeyemi (Alafin of Oyo) and Others v AG Oyo State and Others* (1984) LPELR-169 (SC) and *Kadiya v Lar and Others* (1983) LPELR-1643 (SC).

138 *NDPP and Others v Freedom Under Law* 2014 (2) SACR 107 (SCA); [2014] 4 All SA 147 (SCA).

139 *Brioche and Others v AG and Another* (CP 6/2013) [2013] SCCC 2 (22 October 2013).

140 *Malhotra KK v DPP* 2015 SCJ 261.

141 *S and Another Ex parte: Trapence and Another*, const cause no 1 of 2017, [2018] MWHC 799 (20 June 2018).

142 *Republic v AG and Another Ex parte Anne Mutahi and 11 Others* [2016] eKLR 1.

143 *Mohit Jeewan v DPP* 2005 PRV 31; 2006 MR 194.

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Courts' reluctance or failure to review the Attorney General's decisions could put him or her above the law. The liberal manner in which Nigerian courts have approached the issue of *locus standi* in private prosecution matters opens up opportunities for people to institute private prosecution in many cases, including regarding economic crimes such as corruption. This could be a lesson for other African countries to emulate.

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