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CONTENTS

THE POWER OF PROSECUTORIAL HEADS TO INTERVENE IN PRIVATE PROSECUTIONS IN COMMONWEALTH COUNTRIES

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ABSTRACT

In most countries public prosecutors are responsible for prosecuting offences. In Commonwealth countries, public prosecutors are headed by Directors of Public Prosecution (DPP), Prosecutors General (PG) or Attorneys-General (AG). However, for various reasons a public prosecutor may decline to prosecute a suspect even if there is evidence that the suspect committed the offence. It is against that background that private prosecutions are provided for in the constitutions and legislation in Commonwealth countries. In many commonwealth countries, the prosecutorial head is empowered to take over and continue with or to discontinue private prosecutions. The purposes of this article are: to highlight the relevant legal provisions governing the powers of the DPP, PG or AG to intervene in private prosecutions; and to discuss the circumstances in which the prosecutorial head's decision to intervene in private prosecutions may be reviewed and set aside by courts.

Keywords: Private prosecutions, Director of Public Prosecutions; Commonwealth; Prosecutor General; Attorney General

INTRODUCTION

The Commonwealth is made up of 53 countries[1] many of which were colonised by England. The constitutions and pieces of legislation in these countries establish the offices of the Directors of Public Prosecutions (DPP), Prosecutors-General or Attorneys-General (prosecutorial heads) and stipulate the powers or functions of the incumbents. One of the functions of a prosecutorial head is to intervene in private prosecutions. This is done by either taking over a private prosecution for the purpose of continuing with it or by discontinuing a private prosecution. In some of the Commonwealth countries, prosecutorial heads have intervened in private prosecutions. Some of

these interventions have shown that this power is open to abuse especially for the purpose of protecting influential individuals. Two approaches have been adopted to minimise such abuse: the involvement of the courts and/or private prosecutors in the proceeding leading to the prosecutorial head's intervention in a private prosecution; and courts' willingness to review the prosecutorial head's decision to intervene in a private prosecution.

The purposes of this article are to discuss the prosecutorial head's power to intervene in private prosecutions in some Commonwealth countries,[2] the mechanisms in place to ensure that such power is not abused, and suggest ways in which the prosecutorial head can be held more accountable in exercising his/her power to intervene in private prosecutions. I obtained the cases and pieces of legislation relied on in this article from the online case law and legislation databases of the relevant countries.[3] In order to put the discussion in context, I will first discuss some of the features of private prosecutions in some Commonwealth countries before dealing with the constitutional or legislative powers of the prosecutorial head to intervene in private prosecutions.

Private Prosecutions in Some Commonwealth Countries

Whenever an offence is committed, the general rule is that the suspect should be prosecuted by the state.[4] However, as the Supreme Court of Nigeria held, "an individual has no right to insist that a criminal offence should be prosecuted by the State" (*Attorney-General of Kaduna State v Mallam Umaru Hassan* (1985) LPELR-617(SC): 26). It is against that background, that the need for private prosecutions arises. As the Fiji High Court held, "the Director of Public Prosecutions does not have exclusive rights to prosecute" (*Fiji Independent Commission Against Corruption v Devo* [2008] FJHC 132 (27 June 2008): paras 30).'[5] A similar conclusion has been reached by the Supreme Court of Seychelles in *Anti-Corruption Commission* (E XP 2 of 2021) [2021] SCSC 776 (19 November 2021).[6] This explains why constitutions and legislation in most Commonwealth countries empower private persons, in some cases both natural and juristic, other government organs, for example anti-corruption commissions,[7] to institute prosecutions. A prosecution instituted by a government organ or other public authority other than the DPP/PG/AG is not a private prosecution. It is a public prosecution (*Fiji Independent Commission Against Corruption v Devo* [2008] FJHC 132 (27 June 2008): para 36). The right to institute a private prosecution is recognised in different Commonwealth countries (Mujuzi 2015). In some countries a private prosecution can be instituted by both natural and juristic persons

whereas in others it can only be instituted by natural persons (Mujuzi 2015).[8] In others, legislators or courts have recognised it as a statutory right,[9] common law right[10] or civil right.[11] The High Court of Solomon Islands referred to it as a privilege (*Premier of Isabel Province v Mas Solo Investment Ltd* [2022] SBHC 3 (1 April 2022) (High Court of Solomon Islands) para 90). Although the right to institute a private prosecution is recognised in many commonwealth countries, the prosecutorial head may intervene in such prosecutions by either taking over such a prosecution for the purpose of continuing with it or by discontinuing it. It is to this issue that we turn.

The Prosecutorial Head's Powers in Private Prosecutions

Constitutions and pieces of legislation provide for different powers or functions of prosecutorial heads and these include the powers to take over and continue with private prosecutions and to discontinue private prosecutions. This part of the article will illustrate the relevant constitutional and legislative provisions from different Commonwealth countries dealing with these powers. In particular, the author discusses the issues of whether the prosecutorial heads can delegate these powers and the measures in place to ensure that these powers are not abused. Legislation shows that countries have adopted different approaches with regards to the issue of the powers of the prosecutorial head to intervene in private prosecutions. The first approach is to provide for these powers in the Constitution. The second approach is to provide for these powers in a separate piece of legislation. And the third approach is to provide for these powers briefly in the Constitution and then explain them in detail in a piece of legislation. The discussion will start with the situation in which these powers are provided for in constitutions and later deal with cases where these powers are provided for in pieces of legislation.

Prosecutorial Head's Power to Intervene in Private Prosecutions: Constitutional Provisions

Relevant constitutional provisions in different Commonwealth countries provide for circumstances in which the prosecutorial head can take over a private prosecution and continue with it and also for a situation in which s/he can discontinue a private prosecution. Article 120(3) of the Constitution of Uganda (1995), for example, provides the following as some of the functions of the DPP:

"(c) to take over and continue any criminal proceedings instituted by any other person or authority; (d) to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority;

except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court."

As will be illustrated below, provisions similar to Article 120(3) of the Ugandan constitution have been included in constitutions of many Commonwealth countries. This means that the discussion on Article 120(3) of the Constitution of Uganda applies equally to other countries (and will be illustrated below) where similar constitutional provisions are provided for. Four points should be noted about Article 120(3). First, the Article provides that a prosecution may be instituted by three different persons: the DPP (and this includes officials in his or her office); "any other person", that is, a private prosecutor; and any other "authority." The 'authority' in question includes government bodies such as the police, local government and anti-corruption agencies. The DPP has to delegate his/her prosecutorial power to such a government authority before it can institute prosecutions and such prosecutions remain under the control of the DPP because, for example, the DPP approves the prosecutors appointed by such an authority and the DPP can always withdraw his/her consent.[12] The implication for this is that a prosecution instituted by another authority is not a private prosecution in the true sense of the word. It is a public prosecution (*Simba Properties Investment Co. Limited and Others v Vantage Mezzanine Fund 11 Partnership and Others* [2022] UGCommC 28 (24 May 2022): 9) which discussion falls outside the scope of this article.[13] Secondly, the DPP may take over a private prosecution to continue with it.[14] Thirdly, the DPP can discontinue a private prosecution. Literally interpreted, the difference between the two is that under Article 120(3), the DPP cannot take over a private prosecution for the purpose of discontinuing it. If he/she wishes to discontinue a private prosecution, he/she has to do so without taking it over.

However, jurisprudence emanating from other countries (discussed below) with similar constitutional provisions as Article 120 of the Constitution of Uganda shows that in practice, the prosecutorial head may first take over a private prosecution before discontinuing it. Section 64(2) of the Constitution of St. Vincent and the Grenadines provides for the following as some of the powers of the DPP:

"(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

The DPP has to exercise the above powers personally (section 64(4)). In *Michelle Andrews v DPP et al* [2008] ECarSC 5 (1 January 2008) the appellant, a police officer, was allegedly indecently assaulted and raped by the then Prime Minister of St. Vincent and the Grenadines while she was on duty at his residence. She reported the matter to the police but the police informed her that their investigation showed that there was no evidence that the Prime Minister had committed the offences in question (ibid, paras 1 – 4). Without making a statement to the DPP implicating the Prime Minister in the commission of the offence, the applicant instituted private prosecutions against the Prime Minister (ibid, paras 5 – 7). Immediately after instituting the private prosecutions:

"[T]he Director of Public Prosecutions wrote to the Chief Magistrate informing her that he was taking over the two private criminal complaints filed by the applicant and on the said day the Director of Public Prosecutions filed notice of discontinuance in relation to the said complaints" (ibid, para 8).

Subsequently, "the applicant applied for leave for an order for judicial review of the decisions of the DPPs to take over the said criminal complaints and to discontinue same" (ibid, para 9). In this case, the DPP took over a private prosecution before discontinuing it. The Court referred to section 64 and held that "it is clear and without question that the DPPS has the constitutional authority to discontinue private criminal complaints instituted in the Magistrate's Court" (ibid, para 6). The Court added that the DPP's decision may be reviewed if the applicant proves that the DPP had acted in excess of his/her constitutional power (ibid, para 11).

In *Steadroy Benjamin v Commissioner of Police et al* [2009] ECarSC 167 (31 July 2009) the police instituted a prosecution against the applicant although the DPP had instructed the police against doing so. The Eastern Caribbean Supreme Court referred to section 88 of the Constitution of Antigua and Barbuda, which empowers the DPP to take over and continue with or to discontinue prosecution instituted by another person or authority and held that "the police would have instituted these proceedings knowing full well that the DPP had the authority…to subsequently either take over and discontinue the criminal proceedings or simply discontinue the proceedings" (*Steadroy Benjamin v Commissioner of Police et al* [2009] ECarSC 167 (31 July 2009): para 68). The Supreme Court's holding indicates that the DPP has two options should s/he wish to stop a private prosecution. S/he may take over that prosecution and later discontinue it or s/he may simply discontinue it. In the latter scenario, the case does not first

have to be taken over. This distinction is important in the light of the fact that courts in countries or jurisdictions such Hong Kong[15] and Canada[16] have held that once the prosecutorial head takes over a private prosecution, it ceases to be a private prosecution and becomes a public prosecution. However, in some countries, legislation empowers the prosecutorial head to take over a private prosecution and continue with it.[17] It could thus be argued that once the prosecutorial head takes over a private prosecution and subsequently discontinues it, s/he has discontinued a public prosecution. However, if s/he discontinues a private prosecution without first taking it over, then a private prosecution has been discontinued.

Fourthly, a point to note about Article 120(3) of the Constitution of Uganda (and similarly worded provisions in the constitutions of some Commonwealth countries) is that the court's consent is a prerequisite for the prosecutorial head to discontinue a private prosecution. The rationale behind this is to ensure that the prosecutorial head does not abuse his/her power in discontinuing prosecutions (*Republic v Jared Wakhule Tubei & another* [2013] eKLR 1 para 8). This means that the court's consent is not needed for the DPP to take over and continue with a private prosecution. Should the DPP decide to take over a private prosecution or to discontinue a private prosecution, the private prosecutor's consent or participation is not required. In terms of Article 120(4)(a) of the Constitution of Uganda, the DPP may authorise any officer to take over and continue with a private prosecution.[18] However, under Article 120(b), the power to discontinue a private prosecution "shall…be exercised by [the DPP] exclusively." In other words, the DPP cannot delegate that power. In Mauritius, as is the case in Uganda, the DPP is allowed to take over a private prosecution and to discontinue a private prosecution. However, unlike in Uganda where the DPP can authorise another person to take over a private prosecution, in Mauritius both the power to take over a private prosecution and to discontinue a private prosecution have to be exercised by the DPP personally. This is because section 72(5) of the Constitution provides that these powers "shall be vested in him [the DPP] to the exclusion of any other person or authority." Provisions similar to section 72(5) of the Constitution of Mauritius appear in the constitutions of Antigua and Barbuda (section 88(2) of the Constitution of Antigua and Barbuda (1981)), Bahamas (Article 78(3) of the Constitution of Bahamas (1973), Barbados (section 79(4) of the Constitution of Barbados (2007), Belize (Section 50(4) of the Constitution (2011), Seychelles (Article 76 (6) of the Constitution of Seychelles), Dominica (section 72(4) of the Constitution of Dominica (2014), Grenada (section 71(4) of the Constitution of Grenada (1992), Guyana (section 187(3) of the

Constitution of Guyana (2016), Jamaica (section 94(5) of the Constitution of Jamaica (1962), Kiribati (section 42(7) of the Constitution of Kiribati (2013), Lesotho (section 99(4) of the Constitution of Lesotho (2011),[19] Solomon Islands (section 91 (6) of the Constitution of Solomon Islands (1978), St Lucia (section 73(4) of the Constitution of St Lucia (1978), St. Vincent and the Grenadines (section 64(4) of the Constitution of St Vincent and the Grenadines (1979) and Tuvalu (section 79(10) of the Constitution of Tuvalu (2010).

In addition, section 90(3) of the Constitution of Trinidad and Tobago provides that the DPP has the power to take over and continue with a private prosecution or to discontinue a private prosecution. It adds, under section 90(4) that these powers "shall be vested in him to the exclusion of the person or authority who instituted or undertook the criminal proceedings." It adds under section 90(6) that "[t]he functions of the DPPs under subsection (3) may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions." This implies that the DPP does not need the private prosecutor's involvement in steps s/he takes affecting a private prosecution. A provision to the same effect appears in the Constitution of Zanzibar (Article 56(5).

Under section 51A(4) of the Constitution of Botswana (2005), the power of the DPP to take over and continue with a private prosecution or to discontinue a private prosecution may be exercised by any officer in his/her office. Such a person has to act in accordance with the general or special instructions issued by the DPP. This is the same position in countries such as Fiji (section 117(9) of the Constitution of Fiji (2013), Sierra Leone (section 66(5) of the Constitution of Sierra Leone (2013), Swaziland (section 162(5) of the Constitution of Swaziland (2005), Kenya (Article 157(9) of the Constitution of Kenya (2010), Nigeria,[20] Zambia (Article 180(8) of the Constitution of Zambia), and Bermuda.[21] In countries where the prosecutorial head's powers may be exercised by another person, there is a difference with regards to the person(s) who may exercise these powers. Section 90(6) of the Constitution of Trinidad and Tobago provides that "[t]he functions of the Director of Public Prosecutions under subsection (3) may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions." A provision to the same effect appears in the constitutions of countries such as Sierra Leone (section 66(5) of the Constitution), and Fiji (section 117(9) of the Constitution). This in effect means that the person exercising the prosecutorial head's powers does not have to be one of his/her officers or a public official. This interpretation is reinforced by

Article 180(8) of the Constitution of Zambia which provides that "[t]he functions of the Director of Public Prosecutions may be exercised in person or by a public officer or legal practitioner, authorised by the Director of Public Prosecutions, acting under the general or special instructions of the Director of Public Prosecutions."

In Fiji, a practitioner appointed by the DPP could be from Fiji or another country.[22] In Kenya, if the DPP does not personally take over a private prosecution or discontinue a private prosecution, his/her power can only be exercised by his subordinate – that is, an officer in his office. This is because Article 157(9) of the Constitution provides that "[t]he powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions."[23]

However, even in cases where the prosecutorial head's powers have been exercised by another person, that power is deemed to be exercised by the DPP.[24] In *Fiji Independent Commission Against Corruption v Devo* [2008] FJHC 132 (27 June 2008) para 30, the High Court of Fiji held that the DPP "has exclusive rights to intervene in someone else's prosecution and to discontinue such a prosecution." It is argued that in case the prosecutorial head's powers are exercised by a private legal practitioner or any person who does not work as a prosecutor in the prosecutorial head's office,[25] the prosecutorial head would have to first specifically delegate such powers to him. In Tonga, although the Constitution does not state expressly that the Attorney-General has the power to take over and continue with or discontinue a private prosecution,[26] the Supreme Court of Tonga has held that s/he has those powers at common law and therefore, they are implied in the relevant constitutional provision (*Attorney General v Lavulavu* [2019] TOSC 35; AM 11 of 2019 (9 July 2019).[27]

Unlike in most of the countries where the prosecutorial head's powers to intervene in private prosecutions are provided for in constitutions, there are countries in which these powers are provided for in other pieces of legislation exclusively or in both the constitution and in other pieces of legislation. Our attention now shifts to the discussion of legislation from these countries.

Prosecutorial Head's Power to Intervene in Private Prosecutions: Legislative Provisions

In some countries, legislation provides for circumstances in which the prosecutorial head may intervene in private prosecutions. Section 20 of the Zimbabwe's Criminal Procedure and Evidence Act provides that:

"In the case of a prosecution at the instance of a private party, the Prosecutor-General or the local public prosecutor may apply by motion to any court before which the prosecution is pending to stop all further proceedings in the case, in order that prosecution for the offence may be instituted or continued at the public instance and such court shall, in every such case, make an order in terms of the motion."

A provision to the same effect appears in the relevant pieces of legislation in countries such as Botswana (section 22 of the Criminal Procedure and Evidence, Chapter 08:02), South Africa (section 13 of the Criminal Procedure Act 51 of 1977), Swaziland (section 17 of the Criminal Procedure and Evidence Act 67 of 1936), and Namibia (section 13 of the Criminal Procedure Act 51 of 1977).[28] There are at least three points to note about section 20 (and by implication similarly worded provisions in other countries). Firstly, before a public prosecutor takes over a private prosecution, s/he has to apply to court before which such a prosecution is pending for the court to make an order that the public prosecutor should take over the private prosecution. Secondly, the public prosecutor takes over a private prosecution for the purpose of instituting or continuing with it at the public instance. The provision is silent on the issue of whether the public prosecutor can withdraw or stop a private prosecution. However, in the light of the fact that once taken over, a private prosecution becomes a public prosecution, nothing prohibits a public prosecutor from withdrawing or stopping such a prosecution. Thirdly, once the public prosecutor has made an application, the court has no discretion but to make the order in question. The section is silent on the role of the private prosecutor in the process – s/he has no right to make any submission to oppose or support the public prosecutor's application. The section does not empower the court to question the public prosecutor to explain the reasons for the application. Although, as the discussion below illustrates, the constitutions of some Commonwealth countries discussed in this article provide for the independence of the office of the prosecutorial head, this does not mean that the prosecutorial head, in the exercise of his/her powers, is not accountable. In order to hold the prosecutorial head accountable for the exercise of the power to intervene in private prosecutions, constitutional, legislative and judicial safeguards have been put in place in different countries. The purpose of the next part of the article is to discuss these safeguards.

Preventing Prosecutorial Heads from Abusing Their Powers in Private Prosecutions

Safeguards have been put in place to prevent or stop the prosecutorial heads from exercising powers arbitrarily. These safeguards appear in

either constitutions or relevant pieces of legislation and will be discussed under this section of the article. They include the factors the prosecutorial head has to take into consideration in exercising his/her powers; and the need for the consent of the court or private prosecutor before the prosecutorial head can take over a private prosecution.

Factors for the prosecutorial head to consider in exercising powers

The constitutions of most Commonwealth countries discussed in this article do not stipulate the factors that the prosecutorial head should consider in exercising his/her power to take over a private prosecution or to continue with or discontinue a private prosecution. However, countries have taken different approaches. Section 162(6) of the Constitution of Swaziland (now Eswatini) provides that in the exercise of constitutional powers, the DPP shall "have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process." A provision to the same effect appears in the Constitutions of Nigeria[29] Kenya (Article 157(11)) and Uganda (Article 120(5)). The Constitution of Zambia has expanded this safeguard to include the integrity of the judicial system. Article 180(7) provides that in the performance of his/her functions, the DPP "shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to prevent and avoid abuse of the legal process."

Case law from African countries shows that courts have invoked or are willing to invoke the relevant constitutional provisions to prevent or stop the prosecutorial head from abusing his/her powers. For example, in *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR the Kenya's DPP commenced prosecution against one of the parties based on the facts which were pending before the High Court in a civil matter. One of the arguments made by the DPP was that he had the discretion to decide whether or not to prosecute. The Court of Appeal of Kenya held that although the DPP is independent from any person or authority, he is required to have "regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process" in exercising his powers (ibid paras 36 – 37). After outlining the powers of the DPP under Article 157 of the Constitution and the relevant case law (ibid paras 38 – 41), the Court of Appeal held that the High Court had "acted reasonably, fairly and rationally in arriving at his decision [of preventing the DPP from prosecuting the first respondent]" as this was in the "public interest and the need to avoid abuse of the criminal justice process" (ibid para 42).

The duty is on the applicant to convince the court that the DPP's conduct is not in line with Article 157(11) of the Constitution (*Kuna Tura Mamo v Anti-Corruption Commission & another* [2017] eKLR 1). In *Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another* (2018) eKRL 1) the applicant was being prosecuted for robbery and he and the complainant (the victim of the robbery) "reconciled" and the complainant requested the public prosecutor, who was prosecuting on behalf of the DPP, to withdraw the charges against the accused. The public prosecutor refused to withdraw the charges on the ground that it was not in the public interests to do so and the applicant challenged his decision before the High Court of Kenya. The Court held that although the DPP has the discretion to decide whether or not to prosecute, that discretion had to be exercised in line with the factors under Article 157(11) of the Constitution (ibid paras 9 – 10). The High Court concluded that for a person to succeed in challenging the DPP's decision, s/he must demonstrate that it was taken contrary to Article 157(11) of the Constitution (ibid, para 19).

The above case law shows clearly that in Kenya the DPP does not have a choice but to consider the factors under Article 157(11) in any decision he/she makes. This implies, inter alia, that the DPP's decision is not beyond judicial scrutiny and that parties affected by such decisions may challenge them and courts may set them aside.[30] The DPP must give reasons why s/he has decided to discontinue a prosecution (*Republic v Jared Wakhule Tubei & another* [2013] eKLR 1 para 8). These reasons have included the fact that the prosecution was instituted in contravention of the relevant legislation (ibid).[31] However, courts should always make sure that their decisions do not disregard the doctrine of separation of powers.

As is the case with Kenya, in Nigeria courts are likely to invoke the relevant constitutional provision to set aside the prosecutorial head's decision should there be evidence that s/he exercised powers contrary to "the public interest, the interest of justice and the need to prevent abuse of legal process." For many years, Nigerian courts had held that they did not have the jurisdiction to review the prosecutorial head's decisions even if s/he they had been exercised arbitrarily. For example, in *Col. Halilu Akilu & Anor v. Chief Gani Fawehinmi* (1989) LPELR-20424(CA): 8 - 9[32] the Court of Appeal held that the prosecutorial powers of the Attorney General had to be exercised in line with the factors laid down in the Constitution and "subject to his own conscience and good faith" and that the Attorney-General was "under no control whatsoever, judicial or otherwise, save the loss of his job if he offends his political master."[33] Similar conclusions had been reached by the Supreme Court in other decisions.[34] However, recent

jurisprudence from the Court of Appeal suggests that courts are likely to reconsider this approach. In *Ndi Okereke Onyuike v The People of Lagos State & Others* (2013) LPELR-24809(CA) the appellant argued that the Attorney-General had not complied with the factors under section 211 of the Constitution when he decided to intervene in a private prosecution. The Court of Appeal, in dismissing the appeal, held that the 'it has not been shown [by the appellant] that the A-G of Lagos State was not properly guided by the provision of Section 211(3) in preferring charges against the Appellant' (ibid, 24).

It is submitted that the Court of Appeal, by holding that the appellant had failed to prove the Attorney General of Lagos State "was not properly guided by the provision of Section 211(3) in preferring charges against" him, shows that there is room for the argument that in the future the Court is likely to assess prosecutors' decisions in the light of the factors enumerated in the relevant constitutional provision and that a court will set aside the prosecutor's decision should it be convinced that it was not in line with the factors under section 211(3). This is a major departure from previous cases where courts were unwilling to intervene in such cases.

Countries in which Constitutions Are Silent on the Factors to Be Considered By The Prosecutorial Head

In countries where constitutions do not require the prosecutorial head to consider some factors in exercising his/her powers, courts have had to find ways in which to assess whether or not the prosecutorial head exercised powers arbitrarily. In this regard, courts in some of these countries follow the test that was set down by the Privy Council in *Mohit v. The Director of Public Prosecutions of Mauritius (Mauritius)* [2006] UKPC 20 (25 April 2006)[35] to the effect that the prosecutorial head's "purported" exercise of power is reviewable if the decision was made:

"1. In excess of the DPP's constitutional or statutory grants of power such as an attempt to institute proceedings in a court established by a disciplinary law. 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion if the DPP were to act upon a political instruction the decision could be amenable to review. 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe. 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved. 5. Where the DPP has fettered his or her

discretion by a rigid policy eg one that precludes prosecution of a specific class of offences.

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice" (ibid, para 17).

Countries or jurisdictions in which courts have followed, endorsed or alluded to the above criteria as the basis to review the decisions of the prosecutorial heads include Mauritius, Seychelles,[36] St Vincent and the Grenadines,[37] New Zealand,[38] Northern Ireland,[39] Dominica Republic,[40] Hong Kong,[41] Malawi,[42] and England and Wales.[43] In order to enable the applicant to decide whether or not to challenge the decision not to prosecute, the prosecution should provide him/her "with sufficient information to enable him to clearly understand the reason that a prosecution…was not pursued" (*Kincaid, Re Application for Judicial Review* [2007] NIQB 26 (19 April 2007) para 19). In some jurisdictions, courts following this approach are of the view that although the prosecutorial head's decision 'is amendable to judicial review. It should only be disturbed in highly exceptional cases.'[44] In other words, it should only be reviewed in 'rare and extreme circumstances.'[45] In South African Supreme Court of Appeal have held that a prosecutor's decision not to prosecute will be reviewed if it is irrational, illegal or unreasonable (*National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (2) SACR 107 (SCA). This brings us to the question of whether or not the prosecutorial head is required to give reasons for taking over or discontinuing a private prosecution. For the court to be able to review the prosecutorial head's decision, it has to examine the reasons behind the decision.

Prosecutorial head providing reasons for *nolle prosequi*

As indicated above, the prosecutorial head may discontinue a private prosecution. In many countries the prosecutorial head has the power to enter a *nolle prosequi*.[46] This includes in respect of private prosecutions that s/he took over. The question that one has to answer is whether the prosecutorial head is obliged to give reasons for entering a *nolle prosequi*. Two approaches have been taken in different commonwealth countries. In countries such as Mauritius, where the

prosecutorial head does not need the court's consent to discontinue any prosecution, including a private prosecution, courts have held, in the absence of legislation, that s/he is not obliged to give reasons for entering a *nolle prosequi*. In *Mohit v The Director of Public Prosecutions of Mauritius (Mauritius)* [2006] UKPC 20 (25 April 2006),[47] the DPP discontinued the applicant's first private prosecution after giving reasons for doing so. However, the applicant instituted subsequent private prosecutions based on the same facts and against the same person and the DPP discontinued them without giving reasons. One of the issues before the Judicial Committee of the Privy Council was whether the DPP was required to give reasons before entering a *nolle prosequi*. The Privy Council held that in deciding whether or not to set aside the DPP's decision to discontinue a private prosecution, a court should consider different factors such as the reasons given by the DPP to discontinue a private prosecution if s/he decides to give such reasons. However, s/he is not obliged to give reasons (ibid para 22). The court should consider all the circumstances surrounding the case (ibid para 22). Likewise, the Supreme Court of Cyprus held that the Attorney General does not have to give reasons for discontinuing a private prosecution (*Police v Stephanos Athienitis* (1983) 2 CLR 194). A decision to the same effect was reached by the Supreme Court of New South Wales (*Moore v Commonwealth Director of Public Prosecutions* [2022] NSWSC 1458 (26 October 2022).

However, the Eastern Caribbean Supreme Court is of the view that although the prosecutorial head does not have to give reasons in every decision s/he makes, it is preferable to give reasons when s/he enters a *nolle prosequi* so that the basis for his/her reasons is known by the public (*Steadroy Benjamin v Commissioner of Police et al* [2009] ECarSC 167 (31 July 2009) para 65). Similarly, in *S v Kurotwi and Others* (CRB 35-39/11) [2011] ZWHHC 41 (07 February 2011): 2) the High Court of Zimbabwe held that if the prosecutorial head decides to withdraw charges against an accused, "no person or authority including the courts can question his decision in this respect." In Malawi, the High Court held that when the DPP discontinues a private prosecution, s/he is not required to give the reasons to the private prosecutor or the court. S/he has to give those reasons to the relevant parliamentary committee (*S & Anor Ex Parte: Trapence & Anor* (Constitutional Cause No. 1 of 2017) [2018] MWHC 799 (20 June 2018):11).

In countries where a court's consent is needed before the prosecutorial head may discontinue a prosecution, courts have held or are likely to hold that the prosecutorial head should give reasons. This is the case although the constitutions do not expressly provide that s/he should

give such reasons. For example, in *Republic v Jared Wakhule Tubei & another* eKLR 1 para 8, the High Court in Kenya held that the decision by the court whether or not to allow the DPP to discontinue a private prosecution will be made "depending on the circumstances of the case and the reasons given for the discontinuance."

It is argued that in order to enable the court and the private prosecutor to decide whether or not the prosecutorial head did not exercise powers arbitrarily, it would be appropriate for him/her to give reasons for taking over or discontinuing a private prosecution. It is these reasons that a private prosecutor will invoke to challenge the lawfulness of the prosecutorial head's decision. Put differently, without giving reasons, it may not be possible for a private prosecutor and the court to know why the prosecutorial head took over or discontinued a private prosecution and the lack of that information could make it very difficult, if not impossible, for the court to evaluate whether the prosecutorial head's decision was in line with the public interest and prevent the possible abuse of the legal process.

***Locus standi* to intervene in a private prosecution**

As illustrated above, the constitutions of different Commonwealth countries provide that the prosecutorial head may take over and continue with a private prosecution and that s/he may also discontinue a private prosecution. The question that arises in this regard is at what stage does the prosecutorial head have *locus standi* to intervene in a private prosecution. Two approaches in addressing this question have been adopted in different countries. Under the first approach, the prosecutorial head's power to discontinue a private prosecution is limited to prosecutions which have already been instituted. It does not extend to preventing the police or a private prosecutor from instituting a prosecution. In *Steadroy Benjamin v Commissioner of Police et al* [2009] ECarSC 167 (31 July 2009) para 64*,* in which the police instituted a prosecution against the applicant contrary to the DPP's order not to do so, the Court referred to section 88 of the Constitution of Antigua and Barbuda and held that the "power to terminate a prosecution is not triggered until a prosecution has been instituted by the DPP or other authorized entity."

It is submitted that the above judgement has merit because one cannot take over or discontinue something which does not exist. However, this situation should be distinguished from the second approach in terms of which legislation expressly empowers the prosecutorial head to prevent a potential private prosecutor from instituting a private prosecution. Section 15 of Zanzibar's Office of the Director of Public Prosecutions Act (No.2 of 2010) empowers the DPP to allow or prohibit

an application by a private individual to institute a private prosecution. Likewise, section 16(1) of the Zimbabwe's Criminal Procedure and Evidence Act (Chapter 9:07) empowers the Prosecutor-General, should s/he decline to prosecute a suspect, to issue a certificate empowering a victim of crime to institute a private prosecution. However, section 16(3) provides that the Prosecutor-General may refuse to issue the certificate in question on any of the following grounds:

"(a) that the conduct complained of by the private party does not disclose a criminal offence; or (b) that on the evidence available, there is no possibility (or only a remote possibility) of proving the charge against the accused beyond a reasonable doubt; or (c) whether the person to be prosecuted has adequate means to conduct a defence to the charge (in the case of any person who but for the fact that the Prosecutor-General has declined to prosecute him or her, would have qualified for legal assistance at the expense of the State); or (d) that it is not in the interests of national security or the public interest generally to grant the certificate to the private party."

In countries such as South Africa (section 7(2)(b) of the Criminal Procedure Act, No. 51 of 1977), Namibia (section 7(2)(b) of the Criminal Procedure Act, No. 51 of 1977), Botswana (section 18 of the Criminal Procedure and Evidence, Chapter 08:02) and Swaziland (section 13(2) of Criminal Law and Procedure, Act 67 of 1938), legislation provides that should the prosecutorial head decline to prosecute, s/he "shall" issue a certificate to the person who intends to institute a private prosecution. The question that arises in this context is whether the prosecutorial head can refuse to issue such a certificate to a person with locus standi to institute a private prosecution. Jurisprudence from some countries shows that courts have held that should the prosecutorial head decline to prosecute, s/he is obliged to issue a certificate *nolle prosequi* unless, as is the case in Zimbabwe, legislation provides for circumstances in which the prosecutorial head may decline to issue such a certificate (section 16 of the Criminal Procedure and Evidence Act Chapter 9:07). As a result, it has been held that where the prosecutorial head has refused to prosecute, a victim of crime is "entitled" to a certificate *nolle prosequi*.[48] In some countries such as Lesotho (*Mahlekeng and Another v Makamane and Another, Mahlekeng and Another v Makamane and Another, Mahlekeng and Another v Nepo and Another* [2006] LSCA 18 para 5), Nigeria (*Fawehinmi v Akilu* (1987) 4 N.W.L.R. (Pt.67) 797), and Zimbabwe (*Telecel Zimbabwe (Pvt) Ltd v AG of Zimbabwe N.O.* [2014] ZWSC 1), courts have ordered the prosecutorial head, when s/he declined to prosecute, to issue such a certificate. Courts in Nigeria (*Fawehinmi v Akilu* [1987] 4 N.W.L.R. [Pt.67] 797: 827 – 830) and South Africa (*Solomon v*

Magistrate, Pretoria, and Another 1950 (3) SA 603 (T): 613) have held that a private prosecutor does not have to prove to the prosecutorial head that he or she has a prima facie case before the prosecutorial head can issue such a certificate. The Nigerian Supreme Court held that if the Attorney General is of the view that a private prosecutor does not have a prima facie case, s/he should issue the certificate and then discontinue the private prosecution should it be instituted.[49]

Accountability to Parliament

Although the independence of the prosecutorial head is provided for in the constitutions of different Commonwealth countries, it does not mean s/he is not accountable at all. The constitutions and legislation of different countries provide that the prosecutorial head is accountable and this accountability takes different forms. S/he is accountable to Parliament (section 35 of the National Prosecuting Authority Act (South Africa) or to the relevant Minister (section 17(a) of the Office of the Director of Public Prosecutions Act (Zanzibar). Such accountability relates to the manner in which the prosecutorial head has exercised all his/her powers including intervening in private prosecutions. The Constitution of Malawi, compared to other constitutions, is unique in this respect. Section 99(3) provides that the powers to take over and continue with a private prosecution or to discontinue a private prosecution "shall be vested in him or her [the DPP] to the exclusion of any other person or authority and whenever exercised, reasons for the exercise shall be provided to the Legal Affairs Committee of the National Assembly." In addition, sections 100(2)(a) and 101(2) of the Constitution provide that the DPP is accountable to the Legal Affairs Committee of the National Assembly for the exercise of his/her powers. However, it is not clear whether the Legal Affairs Committee can order the DPP to reverse his decision in the light of the fact that the constitution guarantees the independence of the DPP. The fact that the DPP has to inform the Legal Affairs Committee of the reasons for decisions opens up the possibility of ensuring that s/he does not take over or discontinue a private prosecution without strong reasons.[50] There have been instances in which the DPP in Malawi has appeared before the Legal Affairs Committee to give reasons for discontinuing public prosecutions[51] and there is one reported case in which she has appeared before the same Committee to explain why she has discontinued private prosecutions. Even in this case, the reasons were not given to the private prosecutor or made public (*S & Anor Ex Parte: Trapence & Anor* (Constitutional Cause No. 1 of 2017) [2018] MWHC 799 (20 June 2018). The challenge is that in some Commonwealth countries such as Uganda, Mauritius and Kenya, the constitutions or

legislation are silent to the body or person to whom the prosecutorial head is accountable. The question that arises is whether, if a court or Parliament sets aside or disapproves the prosecutorial head's decision to discontinue a private prosecution, it can compel the prosecutorial head to prosecute. It is to this issue that we turn next.

Setting aside the prosecutorial head's decision

Related to the above issue is whether a court, upon setting aside the prosecutorial head's decision, can order him/her to prosecute. In *Belhaj & Anor v Director of Public Prosecutions & Anor* [2018] UKSC 33 (4 July 2018) para 6, the Supreme Court of the United Kingdom observed that "[i]t is a feature of English criminal procedure that many decisions made in the course of criminal proceedings or in relation to prospective criminal proceedings are subject to judicial review" and these include decisions made by the prosecutorial heads to intervene in private prosecutions. Likewise, in *Ramoepana v The Crown* [2021] LSCA 38 (12 November 2021) para 60, the Lesotho Court of Appeal held that although the DPP has "wide discretionary powers" his/her "exercise of discretion is not untrammelled" and "it must be within the confines of the law and in consonance with international prosecutorial standards."

The constitutions of different countries guarantee the independence of the prosecutorial head and provide specifically that in the exercise of his/her powers, the 'Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.'[52] However, as the discussion above has illustrated, the fact that his/her independence is constitutionally guaranteed does not mean that the prosecutorial head is above the law. In *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SACR 111 (GNP) para 241(e), the High Court of South Africa set aside the prosecutorial head's decision not to prosecute and ordered the National Prosecuting Authority "to take such steps as are necessary to ensure that criminal proceedings for the prosecution of the criminal charges under the aforesaid cases are re-enrolled and prosecuted diligently and without delay." On appeal to the Supreme Court of Appeal, the National Director of Public Prosecutions argued, inter alia, that this order violated the doctrine of separation of powers. The Supreme Court of Appeal agreed with the prosecutorial head and set aside the High Court's order and held that the doctrine of separation of powers:

"[P]recludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime…As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in

my view this is not one of those rare occasions and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings have the effect that the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them. The court below went too far" (*National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (2) SACR 107 (SCA) para 51).

The above judgement shows that "on rare occasions and for compelling reasons" a court may be prepared to order the prosecutorial head to prosecute. Experience from some African countries shows that if a court orders a prosecutorial head to prosecute, s/he may prosecute haphazardly even if there is strong evidence to secure a conviction hence leading to the dismissal of the case or the accused's acquittal.[53] This is so because a court cannot instruct the prosecutor on how to prosecute his/her case and which evidence s/he should adduce before court. The question is whether there are safeguards in place to ensure a prosecutorial head, who prosecutes recklessly or negligently, is held accountable. In an ideal world, the prosecutorial head should not prosecute recklessly or negligently should the court set aside the decision not to prosecute. This is because legislation guarantees the prosecutorial head's independence and requires him/her to prosecute without fear, favour or prejudice.[54] In some countries legislation also provides for circumstances in which the prosecutorial head may be removed from office if s/he is no longer fit and proper to execute his/her duties and on grounds such as "incapacity to carry out his or her duties of office efficiently."[55] It is argued that reckless prosecution shows that the prosecutor is incapable of carrying out his duties efficiently. It also shows that he/she has failed to exercise prosecutorial powers with "regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process." This should be a ground for his/her removal from office. The South African experience demonstrates that removing the National Director of Public Prosecution from office may be politicised especially if his/her office institutes prosecutions against politically powerful individuals.[56] South African experience also shows that if there is evidence that the prosecutorial head has conducted himself/herself unprofessionally, for example, by prosecuting recklessly, professional bodies such as law societies and bar councils could apply to court to have his/her name struck off the roll of advocates.[57]

Conclusion

In this article the author has dealt with the power of the prosecutorial head and/or public prosecutors to intervene in private prosecutions in

commonwealth countries. It has been demonstrated that in some countries these powers are provided for in constitutions and in others in pieces of legislation other than the constitutions. It was demonstrated that in case the prosecutorial head exercised powers contrary to the relevant legislation, courts are prepared to review and set aside his/her decision. However, it is unlikely that courts may compel the prosecutorial head to prosecute in the light of the doctrine of separation of powers. In some countries the constitutions provide for factors that the prosecutorial head has to consider in exercising his powers whereas in others these factors are not provided for. Even in cases where the constitutions are silent on those factors, courts can still review the prosecutorial head's decision. The discussion above shows that these are challenges which still have to be addressed to make the prosecutorial heads more accountable in some Commonwealth countries. Firstly, in all cases where the prosecutorial head takes over or discontinues a private prosecution, s/he should be required to give reasons. This will enable courts and private prosecutor to assess the rationality or otherwise of the prosecutorial head's decision. Secondly, in countries where legislation is silent on the criteria that courts should consider in assessing whether or not the prosecutorial head's decision complies with the constitution and legislation, the standard of review should not be too high. Courts should be able to review the prosecutorial head's decision if it is illegal, irrational or unreasonable. Thirdly, in countries where legislation is silent on the body or person to which or whom the prosecutorial head is accountable, there is a need to amend legislation to remove that lacuna. Otherwise, the prosecutorial head may end up assuming that s/he is not accountable at all. Finally, in countries where the prosecutorial head is accountable to a cabinet minister, this could affect the prosecutorial head's independence with regards to prosecuting politically influential individuals. The prosecutorial head could also be used by such a minister to trump up charges against members of the opposition or people presumed to be anti-government. It is therefore critical that the prosecutorial head is accountable to an institution such as Parliament to minimise the risk of exposing him/her to being abused/used by politicians.

Notes

[1] See 'Member countries' http://thecommonwealth.org/member-countries (accessed 09 January 2023).

[2] The discussion is limited to those countries where the author could easily find case law or legislation on the DPP's power to intervene in private prosecutions.

[3] Most of them can be accessed from http://www.worldlii.org/ or https://africanlii.org/

[4] That is why in *Mukapuli and Another v Swabou Investments (PTY) Limited* (49 of 2011) [2017] NASC 22 (23 June 2017) para 56, theSupreme Court of Namibia held that private prosecutions 'seldom occur' in that country.

[5] See also para 36. See also *Vaki v Damaru* [2016] PGSC 42; SC1523 (16 August 2016) para 10 [Supreme Court of Papua New Guinea].

[6] The High Court of Tanzania held that in a public prosecution, a victim of crime has no right to appeal against a court's decision acquitting the person who allegedly committed an offence against him/her because it is not a private prosecution (see *Fanuel Msengi v Peter Mtumba*[1992] TZHC 13; (19 May 1992). This implies that in cases of private prosecution, a prosecutor has a right to appeal against the acquittal of the accused.

[7] This is the case in countries such as Mauritius, the Prevention of Corruption Act 2002 (The Independent Commission Against Corruption); Nigeria,Economic and Financial Crimes Commission (Establishment) Act, 2004; Figi (section 115 of the Constitution).

[8] In Seychelles, it can be instituted by both natural and juristic persons, see *Ex Parte Eastern European Engineering Limited* (MA 13 of 2021) [2021] SCSC 190 (29 April 2021) (however, in this case, the application to institute a private prosecution was dismissed because the applicant did not prove that the would be accused had committed an offence)

[9] In *Mullins and Meyer v Pearlman* 1917 TPD 639, at 643, the South African court held that '[t]he right of private prosecution for criminal offences in South Africa is apparently the creature of statute. It did not exist under Roman-Dutch law so far as I am aware.' In *Otieno Clifford Richard v Republic* [2006] eKLR 1, p.21, the Kenyan High Court held that the right to institute a private prosecution is a constitutional right. See also the Nigerian Supreme Court decision of *Fawehinmi v Akilu* (1987)4N.W.L.R. (Pt.67) 797, p. 866.

[10] For example, in the United Kingdom, the right to institute a private prosecution is a common law right. See *Gujra, R (on the application of) v Crown Prosecution Service* [2012] UKSC 52 (14 November 2012) para 59; Jessop v Public Prosecutor [2010] VUSC 134; Civil Case 114 of 2009 (2 July 2010) para

[11] In *Fiji Independent Commission Against Corruption v Devo*[2008] FJHC 132; HAC177D.2007S (27 June 2008) para 40, the High Court of Figi held that, '[e]ven in the absence of statute (or a promulgation) any person or body has the right to institute prosecutions. Such a right is a civil right.' Emphasis removed.

[12] See for example, section 14 of the Office of the Director Of Public Prosecutions Act, No.2 of 2010 (Zanzibar); section 8 of the Criminal

Procedure Act (South Africa); section 8 of the Criminal Procedure Act (Namibia)

[13] As the South African Appellate Division (today known as the Supreme Court of Appeal) held in *Arenstein v Durban Corporation* 1952 (1) SA 279 (A), pp. 300–301, '[t]here is no real difference between a prosecution at the instance of the Crown and a prosecution at the instance of a public body which is empowered by Statute to prosecute in respect of particular offences: in each case the prosecutor acts on behalf of the public, in the one case on behalf of the public constituting the State and in the other on behalf of a smaller public.

[14] In *Lazarus v New South Wales Director of Public Prosecution* [2015] NSWSC 1116 (21 August 2015) para 76, the Supreme Court of New South Wales held that 'Section 9 of the Director of Public Prosecutions Act 1986 ("the DPP Act") permits the DPP to take over a prosecution or proceeding in respect of an offence (whether indictable or summary) which has been instituted by a person other than the director. Having taken over the matter, he may carry on the prosecution or the proceeding and prosecute any appeal.

[15] In *Ng Chi Keung v Secretary for Justice* [2016] HKCFI 668; [2016] 2 HKLRD 1330; [2017] 3 HKC 305 (21 April 2016) para 90, the High Court of Hong Kong held that 'once a private prosecution is taken over, it becomes a public prosecution.

[16] *Solicitor General of Canada, et al. v. Royal Commission (Health Records)*, [1981] 2 SCR 494, 1981 CanLII 33 (SCC), p.515

[17] See for example, section 10(1) of the Public Prosecutor Act, Cap 293 (Vanuatu) provides that 'If a prosecution in respect of an offence has been instituted by a person other than the Public Prosecutor, the Public Prosecutor may take over and assume the conduct of the prosecution. ' For a discussion of section 10 of the Act, see *Jessop v Public Prosecutor* [2010] VUSC 134; Civil Case 114 of 2009 (2 July 2010). See also *Miller v Commonwealth Director of Public Prosecutions* [2005] FCA 482 (22 April 2005) (for the position in Australia).

[18] In *Uganda v Nsubuga and three others* (HCT-00-AC-SC-0084-2012) [2013] UGHCCRD 13 (3 April 2013), the Ugandan High Court held that 'Article 120 clause (3) paragraph (b) gives one of the functions of the Director of Public Prosecutions as institution of criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial. Then there is clause (4) paragraph (a) of the Article which notably states that the functions conferred on the Director of Public Prosecution under clause (3) of the article cited…In the premises the signature of the person authorized to sign for the Director of Public Prosecution suffices and there should be nothing amiss. Needless to say where there is a requirement for the Director of Public Prosecutions to give his consent to a charge the law states so expressly.

[19] Although these powers may also be exercised by the Attorney General.

[20] Section 174(2) of the Constitution of Nigeria. However, the section does not provide that the delegate with exercise the powers in question in accordance with the instructions given by the Attorney General.

[21] Section 71 of the Constitution. For the interpretation of this provision, see *J Philpott v Juan Wolffe & A Cook* [2011] BMSC 54; [2011] SC (Bda) 56 Civ (15 December 2011), para 15 (Supreme Court of Bermuda).

[22] Section 117(11) of the Constitution provides that 'The Director of Public Prosecutions may appoint any legal practitioner whether from Fiji or from another country to be a public prosecutor for the purposes of any criminal proceeding.

'[23] However, the Kenyan Office of the Director of Public Prosecutions Act, Act No. 2 of 2013, appears to indicate that the DPP can deal with a private prosecution in three ways. Section 28 of this Act provides that"(1) Not with standing any provision under this Act or any other written law, any person may institute private prosecution. (2) Any person who institutes private prosecution shall, within thirty days of instituting such proceeding, notify the Director in writing of such prosecution. (3) In accordance with Article 157 of the Constitution and this Act, the Director may undertake, takeover or discontinue any private prosecution."

[24] See for example, section 29 of the Kenyan Office of the Director of Public Prosecutions Act, Act No. 2 of 2013.

[25] This is provided for in different pieces of legislation in Commonwealth countries such as Kenya, section 30 of the Office of the Director of Public Prosecutions Act, Act No. 2 of 2013; South Africa, section 38 of the National Prosecuting Authority Act, 32 of 1998; section 5(2) of the Zimbabwe Criminal Procedure and Evidence, Chapter 9:07.

[26] Article 31A(1) of the Constitution provides that '[t]he King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall appoint an Attorney General, who shall: (a) be the principal legal advisor to Cabinet and Government; (b) be in charge of all criminal proceedings on behalf of the Crown; and (c) perform any other functions and duties required under law.

'[27] See generally, *Attorney General v Lavulavu* [2019] TOSC 35; AM 11 of 2019 (9 July 2019).

[28] Section 13 of the Criminal Procedure Act 51 of 1977. In *S v Kennedy* (3) (CC 1 of 2018) [2019] NAHCMD 165 (23 May 2019) para 12 the High Court of Namibia held that "[i]n limited instances a private prosecution may be instituted but only once the Prosecutor-General has issued a certificate authorising a private person to institute a prosecution and even in that event the Prosecutor-General is empowered at any stage to intervene and take over the prosecution so to speak."

[29] Sections 174(3) (Federal Attorney General) and 211(3) (State Attorney General) of the Constitution provide that in exercising his powers, the Attorney General (whose prosecutorial powers are exercised by the DPP)'shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

[30] In *R v Ndlangamandla* (57/2001) [2005] SZHC 148 (15 December 2005) para 12, the High Court of Swaziland appears to be of the view that the DPP's decision may be set aside if the applicant adduces evidence to show that 'the Director of Public Prosecutions has either transgressed the legal limitations of her office or that her exercise of the discretion is not bona fide.

[31] The charges were brought in contravention of the Anti-corruption and Economic Crimes Act.

[32] *Col. Halilu Akilu & Anor v Chief Gani Fawehinmi* (1989) LPELR-20424(CA).

[33] In *Hanna v Director of Public Prosecutions of NSW* [2005] NSWSC 134 (24 February 2005) para 56, in which the DPP's decision to take over and discontinue sixty three private prosecutions was challenged in Court, the Supreme Court of New South Wales held that, 'the Director of Public Prosecutions is a prosecuting authority and the power of the Director of Public Prosecutions under s 9(1) of the Director of Public Prosecutions Act to terminate a prosecution which has been instituted by a person other than the Director and the power of the Director of Public Prosecutions under s 9(4)(b) of the Act to decline to proceed further in a prosecution which he has taken over are each powers falling within the discretionary powers of the Director as a prosecuting authority and decisions made by the Director of Public Prosecutions in the exercise of those powers are insusceptible of judicial review by the courts.

'[34] See for example, *M. U. O. Ezomo v Attorney-General, Bendel State* (1986) LPELR-1215(SC); *The State v. S.O. Ilori and 2 Others* (1983) 2 S.C. 155.

[35] In this case the Privy Council endorsed the view of the Supreme Court of Fiji in *Matalulu v DPP* [2003] 4 LRC 712.

[36] *Brioche & Ors v Attorney-General & Anor* (CP 6/2013) [2013] SCCC 2 (22 October 2013).

[37] Michelle Andrews v DPP et al [2008] ECarSC 17 (14 February 2008).

[38] Osborne v Worksafe New Zealand [2017] NZCA 11; [2017] 2 NZLR 513 (16 February 2017).

[39] *Kincaid, Re Application for Judicial Review*[2007] NIQB 26 (19 April 2007); *MacMahon's (Aine) Application* [2012] NIQB 60 (09 July 2012)

[40] *Henry Liu v The Attorney General of Dominica* [2008] ECarSC 106 (22 September 2008)

[41] *Matters related to Wu Xiwei* [2017] HKCA 66; [2017] 2 HKC 546; CACV 213/2016 (17 February 2017) para 56; *NG Chi Keung v Secretary*

for Justice [2016] HKCFI 668; [2016] 2 HKLRD 1330; [2017] 3 HKC 305; HCAL 27/2013 (21 April 2016) para 121.

[42] *S & Anor Ex Parte: Trapence & Anor* (Constitutional Cause No. 1 of 2017) [2018] MWHC 799 (20 June 2018) p. 13.

[43] *Lord Carlile & Ors v Secretary of State for the Home Department* [2012] EWHC 617 (Admin) (16 March 2012).

[44] *NG Chi Keung v Secretary for Justice* [2016] HKCFI 668; [2016] 2 HKLRD 1330; [2017] 3 HKC 305; HCAL 27/2013 (21 April 2016) para 121.

[45] *S & Anor Ex Parte: Trapence & Anor* (Constitutional Cause No. 1 of 2017) [2018] MWHC 799 (20 June 2018), p. 15. This is because the DPP's decision is an executive decision as opposed to an administrative action.

[46] Whether or not the insertion of the words 'nolle prosequi' on the police docket means that the prosecution has been stopped will depend on the circumstances of the case. See *Bekker v Minister of Safety And Security and Another* (7944/2010) [2014] ZAKZDHC 53 (31 July 2014).

[47] In Ghana, there is no known case in which the Attorney-General has ever entered a nolle prosequi in a private prosecution matter, see *Afoko v Attorney-General* (J1/8/2019) [2019] GHASC 41 (19 June 2019).

[48] *R v Ndlangamandla* [2005] SZHC 148 para 13 (High Court of Swaziland).

[49] In *Fawehinmi v Akilu* (1987) 4 N.W.L.R. (Pt.67) 797, p.829, the Nigerian Supreme Court held that once he the Attorney General has declined to prosecute, he has 'to endorse on the information presented to him by the private person with 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 the criminal proceedings instituted by the private person. The certificate will not bar him from discontinuing any such proceedings which have been instituted.'

[50] In *S & Anor Ex Parte: Trapence & Anor* (Constitutional Cause No. 1 of 2017) [2018] MWHC 799 (20 June 2018), p.8, the Malawian High Court referred to section 100(2) of the Constitution and held that '[o]n the face of it, first and foremost, the DPP is accountable to LAC and not to the known judicial review mechanism. Constitutional powers rest on the LAC to review the actions and decisions of the DPP. This shall therefore mean that if there are issues as to how the DPP has carried out her /his duties, the same shall be referred to the LAC which oversees the exercise of constitutional powers by the DPP. In this regard, Applicants should have respected this constitutional mechanism by inquiring first with the LAC as to how the DPP took-over and discontinued a case in which they had interest to prosecute. The answers are there with the LAC as the OPP furnished LAC with the reasons.

'[51] See for example, 'In Malawi, the Director of Public Prosecution is Summoned by the Legal Affairs Committee' 31 October 2009. Available athttps:/

/www.voanews.com/a/a-13-2006-08-10-voa42 318302. html[accessed 01 November 2018] in which the DPP was reportedly summoned by the Committee to explain why he had withdrawn corruption charges against the former President of Malawi, Mr Bakili Muluzi.

[52] See for example, section 72(6) of the Constitution of Seychelles; Article 117(10) of the Constitution of Fiji; Article 37(8) of the Constitution of Grenada; Article 94(6) of the Constitution of Jamaica.

[53] See for example the Nigerian Court of Appeal case of *Akilu v Fawehinmi* (1989) LPELR-20424(CA).

[54] See for example, section 32(1) of the National Prosecuting Authority Act (South Africa); section 260(1)(b) of the Constitution of Zimbabwe.

[55] Section 12(6)(a)(iii) of the South African National Prosecuting Authority Act.

[56] See *Pikoli v President and Others* 2010 (1) SA 400 (GNP); *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC).

[57] See *General Council of the Bar of South Africa v Jiba and Others* [2016] 4 All SA 443 (GP); 2017 (1) SACR 47 (GP); 2017 (2) SA 122 (GP); *Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa* [2018] 3 All SA 622 (SCA); 2019 (1) SA 130 (SCA).

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