PROSECUTORIAL INDEPENDENCE AND ACCOUNTABILITY IN POST-2010 KENYA: THE LAW AND ITS APPLICATION IN PRACTICE

UNIVERSITY OF NAIROBI

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G62/10907/2018

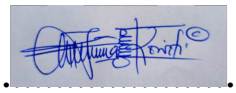
A Research Project Submitted to the University of Nairobi in Partial Fulfilment of the Requirements for the Degree of Master of Laws (LL.M)

Nairobi

November 2020

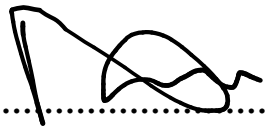
Declaration

I, **Owiti Victor Juma**, declare that this research project, submitted for the degree of Masters in Law (LL.M) in the University of Nairobi, is my own original and unaided work and which has not been submitted before for any other degree or examination at any other institution.

Signature……  …… **Date**10th November 2020……

Supervisor's Approval

This project has been presented for examination with my authority as the university supervisor.

Signature……  …… **Date**11/10/2020……

Dr. Nkatha Kabira

Dedication

To Achieng' mama Nyakodongo, and Amos baba wuod Abala.

In life, you struggled – did your best – to ensure we only lacked when there was nothing left you could do.

Even in death, you give me the reason to keep conquering the world. This study is part of my goal to immortalise you!

Acknowledgment

Foremost, I am most grateful to God, the giver of life and talent. I extend my utmost gratitude to Dr. Nkatha Kabira, my Project Supervisor, for accepting to guide me through this path despite being late in the journey. Without Dr. Nkatha, this project would have taken longer than it did. Her close supervision, guidance and encouragement and constant reminders did the miracle.

I must also mention my most sincere thanks to the senior leadership of the Office of the Director of Public Prosecutions (ODPP). Special mention to Mr. Noordin Haji, the Director of Public Prosecutions, for delegating your prosecutorial powers to me thereby granting me the opportunity to practice and live what I love most, Criminal Law from which I drew the wealth of knowledge that formed the source of this research.

I also am thankful to Mr. Alexander Muteti, my immediate supervisor, for being the most humble of men that I ever met and for being so generous with knowledge and guidance. Master, you are my guy. Special mention goes to madams Dorcas Oduor, Secretary, Public Prosecutions, and Emily Kamau, Senior Assistant Director of Public Prosecutions, both for giving me the opportunity to work with and under them.

I must not forget to say *asante* to my colleagues at the *ad hoc* Presidential Taskforce on Anti-Corruption Matters – Alex Akula, Anne Pertet, Annette Wangia, Esther Njuguna, Faith Mwila, Henry Kinyanjui, Wakio Mwamburi and Wesley Nyamache for allowing me to learn so much from you. You were the part of the foundation from which Masters of Law Degree found life. May they be blessed in all their endeavours.

Finally, to my immediate family - Rose, Loviance, James, Joseph, Armstrong and Brendan – and the greater Obunga community from whom I found support and inspiration and for giving me the reason and purpose to push on. To them I say *ero kamano*.

Table of Abbreviations

AAP	African Association of Prosecutors
ACECA	Anti-Corruption and Economic Crimes Act
AG	Attorney General
BBI	Building Bridges Initiative
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CPS	Crown Prosecutions Services of England and Wales
DCI	Directorate of Criminal Investigations
DDPP	Deputy Director of Public Prosecutions
DPA	Deferred Prosecutions
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
IAP	International Association of Prosecutors
ICJ	International Commission of Jurists
ICT	Information and Communication Technology
IG	Inspector-General of Police
JSC	Judicial Service Commission
KACC	Kenya Anti-Corruption Commission
KNCHR	Kenya National Commission on Human Rights
LSK	Law Society of Kenya
MLA	Mutual Legal Assistance
NCAJ	National Council for Administration of Justice
NCIC	National Cohesion and Integration Commission
NGEC	National Gender and Equality Commission
NPA	National Prosecution Authority of South Africa

NPP	National Prosecution Policy
NPS	National Police Service
OAG	Office of the Attorney General
ODPP	Office of the Director of Public Prosecutions
PSC	Public Service Commission
PTI	Prosecutions Training Institute
SPP	Secretary, Public Prosecutions
SRC	Salaries and Remuneration Commission
TNA	The National Assembly

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Republic v Director of Criminal Investigation Department & Others [2016] eKLR.

Republic v Director of Public Prosecutions & Another *ex parte* Communications Commission of Kenya [2014] eKLR.

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Constitution of Kenya, 2010.

Constitution of Kenya, 1963 (Repealed).

Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

Ethics and Anti-Corruption Commission Act, No. 22 of 2011.

Extradition (Commonwealth Countries) Act, Chapter 77 of the Laws of Kenya.

Fair Administrative Action Act, No. 4 of 2015.

Mutual Legal Assistance (MLA) Act, No. 36 of 2011.

National Police Service Act, No. 11A of 2011.

Office of the Director of Public Prosecutions Act, No. 11 of 2013.

Penal Code, Cap 63 Laws of Kenya.

Public Finance Management Act, 2012.

International Instruments

United Nations Guidelines on the Role of Prosecutors (UN Guidelines), 1990.

United Nations Office on Drugs and Crime, 'The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide.'

Abstract

This project examines the dissonance between the law on prosecutorial independence and accountability in Kenya and its application in practice. It argues that although the Constitution of Kenya established the Office of the Director of Public Prosecutions (ODPP) as an independent office with attendant accountability mechanisms to ensure checks and balances, nevertheless, a disconnect exists between the law as is and the application of the legal provisions relating to the independence and accountability of the ODPP. The study mainly employs the Doctrinal Research Methodology to argue that the dissonance arises primarily for three main reasons. Firstly, that historical positioning of the ODDP as a department under the Attorney General's made it impossible to attain institutional independence; secondly, that this historical fact continues to manifest itself in the post-2010 constitutional order even after separation from the Office of the Attorney General (hereafter the OAG) due to the resistance of other actors in the criminal justice system like the National Police Service to embrace the changes and thirdly, that the constitutional order is characterised by overlaps in the mandates of several government organs and agencies. The study relies on Roscoe Pound's Theory of the Law in Books versus the Law in Action to illustrate the variance between the law relating to the independence and accountability of the ODPP vis-à-vis the application of the relevant provisions in the Constitution and Statutes relating thereto.

Having examined the causes of this variance, the study makes a number of main findings including that the ODPP has a historical foundation which can be traced all the way to the colonial times; the Constitution of Kenya 2010 established the ODPP as an independent office that would not be under the direction of anyone in the exercise of the State powers of prosecution; despite the Constitution separating the ODPP from the OAG, there seem to be some overlap in the mandates of the two State organs; and that the ODPP can learn from the best

practices South Africa, England and Wales and Japan as far as prosecutorial independence and accountability mechanisms are concerned.

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CHAPTER ONE

INTRODUCTION

1.0 Introduction

The Criminal Justice System is a Critical Pillar of our Society whose proper functioning is at the core of the Rule of Law and Administration of Justice; the criminal law plays an important role in protecting constitutional rights and values. The constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework.[1] The pivotal role of the prosecution in any criminal justice system demands the prosecution service to provide neutral, non-political, non-arbitrary decision-making about the application of criminal law and policy to real cases.[2]

Prosecutorial independence and accountability are two key principles necessary for the just and successful operation of the criminal justice system. Finding the right balance between independence and accountability is the central challenge in ensuring just and effective operations.[3] Failures in independence and accountability in turn negatively influence effectiveness. The need for prosecutors in nation states to be both independent and accountable in carrying out their role is increasingly recognized in international instruments such as the United Nations (UN) Guidelines on the Role of Prosecutors,[4] but these tend to stop short of imposing binding commitments on nation states.

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[1] The Constitutional Court of South Africa in *S v Basson* (CCT 30/03) [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) (10 March 2004).

[2] Waters, T. (2008) 'Design and reform of public prosecution services' in Promoting Prosecutorial Independence, Accountability and Effectiveness: Comparative research, Sofia: Open Society Institute, p. 25.

[3] Schönteich, M. (2014) Strengthening Prosecutorial Accountability in South Africa, ISS Paper 255, p. 3.

[4] Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana Cuba, 27th August – 7th September 1990.

The promulgation of the Constitution of Kenya, 2010 on 28th August 2010 led to a radical restructuring and transformation of the Governance structures in the country. The Office of the Director of the Public Prosecutions (hereafter the ODPP) was one of the offices established under the new Constitution[5] and happens to be one of the independent offices therein.[6] This is a departure from the former constitution which placed the office of the prosecutor within the office of, and under, the Attorney General (hereafter the AG) who had the ultimate powers in respect of prosecutions. Prior to the new Constitution, the place and role of the prosecutor was as per the prosecutor model[7] that had been adopted from the British at independence in December 1963. The British model placed prosecution under the office of the AG by establishing a Crown Prosecution Service (CPS) superintended by the AG.

The office of the then DPP was merely a department under the State Law Office within the said OAG established under the old Constitution under which the Attorney General was the principal legal adviser to the government. The Constitution accorded the AG powers to institute and undertake criminal proceedings, to take over and continue criminal proceedings instituted by another person or authority, and to discontinue any criminal proceedings. The Deputy Director of Public Prosecutions was appointed by the AG to head the Department of Public Prosecutions and assist the AG in the exercise of the said powers: he discharged the responsibilities in the criminal jurisdiction on behalf of the AG and although he made decisions on what cases to prosecute, he had to seek the consent of the AG before preferring prosecutions.[8]

[5] Article 157 of the Constitution.

[6] The others being the Controller of Budget and the Auditor General.

[7] This model was adopted by many Commonwealth countries including See, for example, Uganda, Nigeria, Ghana, Australia although with time different countries have tinkered with the model to make it more responsive to their circumstances and needs.

[8] Section 26 of Constitution of Kenya, 1963.

Effective 1st June 2011, the ODPP delinked from the State Law Office with the DPP being exclusively vested with the State's powers of prosecution outside the control of the Attorney General.[9] The ODPP was accordingly established[10] with the DPP being empowered to exercise powers including the power to institute and undertake criminal proceedings against any person before any court[11] in respect of any offence alleged to have been committed[12] and take over and continue any criminal proceedings commenced in any court that have been instituted or undertaken by another person or authority.[13] Subsequently, Parliament enacted the ODPP Act[14] to give effect to the provisions of Articles 157 and 158 of the Constitution and for connected purposes.[15]

Both the Constitution and the ODPP Act emphasise on the Independence of the ODPP. Just like the Constitution is explicit that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority,[16] the ODPP Act reiterates that the DPP shall neither require the consent of any person or authority for the commencement of criminal proceedings[17], nor be under the direction or control of any person or authority in the exercise of his or her powers or functions[18], except be subject only to the Constitution and the law.[19]

[9] The AG however retained the primary function of giving legal advice to the government and of representing it in legal proceedings as per Article 156 of the Constitution.
[10] Article 157(1) of the Constitution.
[11] Except proceedings before Court Martials.
[12] Article 157(6) (a) of the Constitution.
[13] Article 157(6) (b) of the Constitution.
[14] Act No. 2 of 2013.
[15] Preamble of the ODPP Act.
[16] Article 157(10) of the Constitution.
[17] Section 6(a) of the ODPP Act.
[18] Section 6(b) of the ODPP Act.
[19] Section 6(c) of the ODPP Act.

On the flipside, while the ODPP is intended to be independent to effectively and efficiently function, there is also the need to have in place an accountability mechanism to ensure that the DPP and his officers operate within the Constitution and the law and that independence is not abused and that the exercise of the functions and the powers of the ODPP are in consonance with the dictates of the Constitution and the law. The DPP being a State Officer is, bound by the national values and principles of governance in the Constitution which among others include the rule of law, human rights, integrity, and transparency and, more importantly for this study, accountability.[20]

Although the text of both the Constitution and the ODPP Act stress on the independence of the ODPP, and despite the historical need of such independence which is captured later in Chapter 2 herein, there have arisen a number of cases of what would be considered apparent and or latent interference with the said independence from various quarters including the other agencies within the Executive, the Judiciary, other Law Enforcement Agencies among others. There are also a number of provisions in the law that may be considered gaps and a threat to the intended independence of the ODPP.

This study is accordingly intended to lay bare the various challenges to the Independence and Accountability of the ODPP which are two important edicts for the existence and performance thereof. The study will then look at the available opportunities in strengthening the prosecutorial independence and therefore intended to go down history line to trace the origin of the current ODPP, to address the importance of having the Office independent and to also address the need for Accountability.

[20] Article 10 of the Constitution.

The study shall identify the gaps in the law that may impede the true independence of the ODPP and make recommendations for considerations including legislative amendments and comparative studies with other jurisdictions such as South Africa and the United Kingdom. Towards this end, the study shall employ the doctrinal research method analyses the legal, policy and institutional framework on the Independence and Accountability of the ODPP.

This Chapter contains the Background to the Study, Statement of the Problem, Research Questions, Literature Review, Theoretical and Conceptual Framework, Justification of the Study and the Methodology used in the study.

1.1 Background of the Study

1.1.1 Pre-2010 Period

Before the promulgation of the current Constitution on 27th August 2010 the repealed Constitution vested the prosecutorial powers of the State in the Attorney General (hereinafter the AG)[21]. Just like the DPP under the current regime, the AG was not subject to the direction or control of any person or authority in the exercise of the functions vested upon him.[22] During that period, the ODPP existed under the repealed constitution as a department in the office of the AG. The DPP performed his duties under the superintendence of the AG.

1.1.2 Post-2010 Period

The current Constitution restructured the executive and other State offices. The prosecutorial powers were transferred from the AG and vested in the DPP who is nominated by a panel and appointed by the President with the approval of National Assembly. The Constitution has limited

[21] Section 26(3) of the repealed constitution gave powers to the AG to institute and undertake criminal proceedings, to take over and continue criminal proceedings instituted by another person or authority, and to discontinue any criminal proceedings.
[22] Section 26(8) of the Repealed Constitution of Kenya.

the tenure of DPP to an eight year non-renewable term. Article 157 of the Constitution establishes the ODPP and gives him similar powers regarding prosecutions as the repealed constitution gave to the AG, except that the DPP may not discontinue a prosecution without the permission of the court.[23]

Just like the AG under the repealed Constitution, the current Constitution provides that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.[24] This is the basis of the Prosecutorial independence which although grounded in the Constitution has been under increased attacks and undermining from the courts. This study is therefore intended to trace the causes and effects of judicial independence on prosecutorial independence which is a threat not only to the criminal justice system but also to the rule of law generally.

1.2 Problem Statement

Despite the fact that the Constitution of Kenya established the Office of the Director of Public Prosecutions (ODPP) as an independent office with attendant accountability mechanisms to ensure checks and balances, nevertheless, a disconnect exists between the law as is and the application of the legal provisions relating to the independence and accountability of the ODPP.

1.3 Justification of the Study

Until now, the existing literature has failed to assess the variance between the existing laws on the independence and accountability of the ODPP and the application of those provisions in practice. While this may easily be attributable to the ODPP being fairly new and or young as an

[23] Article 157(8) of the Constitution.
[24] Article 157(10) of the Constitution.

independent institution having been separated from the OAG, the study delves into the salient causes and makes recommendations for bridging the gap.

While prosecutorial independence and accountability may not be new concepts on the global arena, they are both relatively new within the Kenyan legal sphere. This study therefore purposes to examine the place of each of these two concepts within our criminal justice system.

There is an urgent need for the delineation between the functions and powers of the various actors in the criminal justice system including the ODPP, the NPS and the Judiciary in the spirit of the doctrine of separation of powers while at the same time acknowledging the need for checks and balances. This is the foundation of the twin subject of the study: prosecutorial independence and accountability.

Prosecutorial independence and accountability are key to the public confidence not only on the criminal justice system but on the general justice system thus having a key impact on the governance and development of the State as the free, fair, impartial and accountable exercise of the State powers of prosecution ensures that criminals are held accountable for their actions and the innocent are not unnecessarily intimidated thereby promoting investor confidence.

1.4 Objectives of the Study

1.4.1 Overall Objective

The overall objective of this study is to examine the dissonance between the law on prosecutorial independence and accountability in Kenya and its application in practice; to investigate the disconnect between the provisions of the constitutional, statutory other policy provisions on prosecutorial independence and accountability on the one hand, and the actual application of the

said provisions in practice, with the aim of suggesting interventions for the entrenchment of the said independence, and the enhancement of the accountability.

1.4.2 Specific Objectives

1. To trace the historical foundation of the ODPP in Kenya.
2. To analyse the legislative, institutional and policy framework providing for the establishment, duties and powers of the ODPP.
3. To undertake a situational analysis of the ODPP thereby evaluating the extent to which the law in practice converges or diverges from the constitutional and statutory provisions on the independence and accountability of the ODPP.
4. To document best practices as far as prosecutorial independence and accountability is concerned.

1.5 Research Questions

1. What is the genesis, historical and contextual foundation of the prosecutorial function of the State?
2. To what extent does the legislative, institutional and policy framework establishing and governing, the operations of the ODPP ensure the independence and accountability of the office?
3. What are the factors responsible for the disconnect between the relevant provisions of the law relating to prosecutorial independence and accountability, and the actual situation in practice?
4. What lessons can Kenya learn from the best practices of prosecutorial independence and accountability across the world?

1.6 Hypothesis

The study hypothesises that while post-2010 the Constitution established the ODPP as an independent office vested with State powers of prosecution to be exercised without the direction and or control of anyone, and despite the existence of constitutional, statutory and administrative mechanisms to ensure prosecutorial independence and accountability of the ODPP, there is yet to be seen real independence and accountability in practice. This is because:

1. Firstly, that historical positioning of the ODDP as a department under the OAG made it impossible to attain institutional independence;
2. Secondly, that this historical fact continues to manifest itself in the post-2010 constitutional order even after separation from the OAG due to the resistance of other actors in the criminal justice system like the National Police Service to embrace the changes; and
3. Finally, that the constitutional order is characterised by overlaps in the mandates of several government organs and agencies.

1.7 Theoretical Framework

The study is guided by two main theories: the Theory of the Law in Books versus the Law in Action, and the Fiduciary Theory of Prosecution. The Theory of the Law in the Books versus the Law in Action helps to argue that there is a distinction between the law relating to the independence and accountability of the ODPP vis-à-vis the application of the relevant provisions in the Constitution and Statutes relating thereto. On the other hand, the study employs the Fiduciary Theory of Prosecution to argue and prove not only that prosecutors in the ODPP are not just exercising delegated authority of the people of Kenya, but that as a result of the fiduciary relationship created by the Constitution, the said prosecutors are accountable to the people for the exercise of that delegated sovereign power of the people.

1.7.1 The Theory of the Law in Books versus the Law in Action

The theory of the Law in Books versus the Law in Action perfectly illustrates the dilemma in the study: the variance as between the law in the Constitution and the statute books on the one hand, and the law in action on the other. The main proponent of the theory is Roscoe Pound whose article made the first reference to the law in action in 1910.[25] The theory assumes the provisions the law in the books in favour of the actual application of the law. It is more concerned with the causes of the variance of the law as is provided in favour of the law as applied. The study uses this theory not only to prove that many times the implementation of the law may lead to a result that is not in the strict meaning of the applied provisions. The study in accordance with the theory asserts that the ODPP's exercise of State powers of prosecution is in dissonance with the actual intentions of the provisions of Article 157 on the independence and accountability of the ODPP and the various provisions of the ODPP Act and other statutory and policy provisions relating thereto.

1.7.2 The Fiduciary Theory of Prosecution

The Fiduciary Theory of Prosecution offers a new paradigm that grounds prosecutors' obligations in their historical role as fiduciaries. The main proponents of this fairly new theory are by Green, Bruce A. and Roiphe, Rebecca.[26] The theory is presumed on the assumption that as public officers, public prosecutors exercise delegated authority of the people and as such must only exercise the said powers according to the wishes of the people as espoused in the Constitution of Kenya. Accordingly, the public prosecutors must remain accountable to both the Constitution and the people. The theory fails to consider the fact that the people are not involved directly in the appointment of public prosecutors who are not elected. However, it is a good theory as it reminds the public prosecutors of the need for accountability for their actions and the

[25] https://law.wisc.edu/law-in-action/index.html [accessed on 24th September 2020].

[26] Green, Bruce A. and Roiphe, Rebecca (2020) "A Fiduciary Theory of Prosecution," American University Law Review: Vol. 69: Iss. 3, Article 2.

need to align their duties to the dictates of the Constitution and the law. The study employs this theory to argue that public prosecutors as public officers exercise delegated powers of the people and therefore are agents of the people who must then remain accountable to the people as the donors of all sovereign authority including State powers of prosecution. As fiduciaries, the study argues, prosecutors must aligning their interests to those of the public.

1.8 Literature Review

While there is a large body of scholarly work on judicial independence and accountability with substantial scholarly attention having been devoted to the study of judges and their relevance to the rule of law way before the promulgation of the new Constitution, surprisingly little is known about prosecutors. Giuseppe Di Federico[27] opines that jurists, political scientists and sociologists interested in the working of judicial systems have until now focused their attention primarily on the role of the judge. Voigt and Wulf[28] wonder why although the study of judicial independence is well-established, the study of the independence of prosecutors is not, despite its potential relevance for protecting the rule of law. Little attention has been paid to the role of public prosecutors - the role has not received the attention devoted by scholars to the role of the judges - in spite of the fact that this role has progressively acquired greater and greater political relevance in our society.

For the purposes of this study, the project is divided broadly into five main themes each corresponding, as much as possible, to each of the five Chapters of the study. Through the themes, the review of the relevant literature looks at the works of selected scholars on prosecutorial independence and accountability. The review investigates the relationship between

[27] Giuseppe Di Federico, "Prosecutorial Independence and the Democratic Requirement of Accountability in Italy: Analysis of a Deviant Case in a Comparative Perspective."

[28] Stefan Voigt and Alexander J. Wulf, (2015), 'What Makes Prosecutors Independent? Analysing the Institutional Determinants of Prosecutorial Independence' Institute of Law and Economics.

the law as is and the law in action with a view to making recommendations towards the entrenching of prosecutorial independence while concurrently enhancing prosecutorial accountability. The discussion sets off with a look at the place and importance of prosecutorial authorities in the criminal justice system. Through the works of Waikwa Wanyoike[29] and Migai Akech[30] the study then examines the exercise of prosecutorial powers pre-2010 era and how the challenges associated therewith necessitated and led to the establishment of the ODPP as an independent office distinct from the Office of the AG. The then section reviews the works of other non-Kenyan writers on the subject of prosecutorial independence and accountability generally. The section then concludes with a demonstration of the common thread of the study that there indeed exists a dissonance between the law in the books and the law in action as far as prosecutorial independence and accountability is concerned.

1.8.1 The Place and Role of the Public Prosecutor in the Criminal Justice System

In any criminal justice system, prosecution is a central component of the criminal justice process. Traditionally, the prosecutorial function entails taking legal action against individuals who are accused of violating a state's criminal laws and ensuring a fair trial for persons accused of criminal offenses. In referring to prosecutors as gatekeepers to the criminal justice system, Martin Schönteich opines that prosecutors are therefore the most powerful officials of the system as they decide whether criminal charges should be brought and what those charges should be.[31] In the words of Giuseppe Di Federico[32], public prosecutors wield a substantial amount of discretionary power in the daily performance of their official duties, actively participating in the actual definition of public policy in the criminal sphere. Depending on the history, culture, and

[29] Waikwa Wanyoike, 'The Director of Public Prosecutions and the Constitution: Inspiration, Challenges and Opportunities', in Yash Ghai & Jill Ghai (eds.), 'The Legal Profession and the New Constitutional Order in Kenya'.
[30] Akech, M. Institutional Reform in the New Constitution of Kenya; ICTJ: Nairobi, Kenya, 2010 accessed on https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf
[31] Martin Schönteich, Institute for Security Studies Papers, "Strengthening Prosecutorial Accountability in South Africa" (2014): 1–23.
[32] *Ibid*.

traditions of a given legal system, prosecutors are often afforded a measure of discretionary power to decide whether to initiate criminal proceedings or not.[33] Nicholas Cowdery[34] highlights the other discretionary powers to include deciding on plea agreements, offers of immunity, the role of witness testimony in trial strategy, and the content of sentencing recommendations. Given the numerous decisions that must be made to carry out the prosecutorial function, prosecutors exercise considerable power vis-à-vis citizens in the criminal justice system.

The role of public prosecutors has progressively acquired greater and greater political relevance in our society. As already noted, the role of public prosecutors has progressively acquired greater and greater political relevance in the society. Giuseppe Di Federico[35] attributes this to at least two reasons. Firstly, public prosecution plays a crucial function of crime sanctioning. Public prosecutors are the gate-keepers of criminal justice, because without their intervention judicial sanctions cannot occur. Furthermore, their role has acquired ever-growing importance due to the increase in the magnitude and complexity of crime experienced by all countries in recent decades. Secondly, undue, improper or partisan use of criminal proceedings may entail devastating consequences for protection of civil rights, to safeguard the social, economic, familial and political status of citizens and their equal protection in relation to criminal law; prosecution often is, de facto, a manifold sanction by itself, hardly ever remediable by a judicial acquittal that follows months or years later. Just like Voigt and Wulf[36] note that the independence of prosecutors has potential relevance for protecting the rule of law, other scholars like Jehle and Wade and Weigend[37] consider prosecutors to be potentially the most powerful

[33] https://www.ictj.org/sites/default/files/ICTJ_Report_GuidingProtectionProsecutors_Web.pdf
[34] Nicholas Cowdery, "Challenges to Prosecutorial Discretion," Commonwealth Law Bulletin 39, No. 1 (2013): 17–20.
[35] Giuseppe Di Federico, "Prosecutorial Independence and the Democratic Requirement of Accountability in Italy: Analysis of a Deviant Case in a Comparative Perspective."
[36] *Ibid.*
[37] Jörg-Martin Jehle and Marianne Wade, "Coping with overloaded criminal justice systems: The rise of prosecutorial power across Europe."

actors in the criminal justice system. As Luna and Wade[38] correctly point out, prosecutors are the link between police investigations and court adjudication and have far-reaching decision-making powers over each criminal case. It is the responsibility of prosecutors in the overwhelming majority of criminal justice systems to decide whether police investigations will lead to prosecution and thus whether courts will be able to try offenders at all. Weigend has also posited that prosecutors are, hence, agenda-setters for judges, as a result of which prosecutors have been referred to as the 'judge before the judge' and 'judge by another name'. The Study on the foregoing basis makes a case for the need for accountability in the exercise of the immense powers of public prosecutors.

1.8.2 The Varying Roles of Prosecutors in Different Jurisdictions

In contradiction to Brian Grossman[39] observation relating to the prosecutor in Canada who has come to resemble more his French, Scottish or American counterpart in that he plays little role in initiating criminal prosecutions, acts in non-political manner and is responsible for directing police investigations, the study observes that the Kenyan public prosecutor has a bigger role in the exercise of State powers of prosecution with wider discretionary powers to decide who to charge, and with what offence. The study observes that although Kenya and other Commonwealth countries adopted the British model, with time different countries have tinkered with the model to make it more responsive to their circumstances and needs.

[38] Erik Luna & Marianne L. Wade, "Introduction to Adversarial and Inquisitorial Systems - Distinctive Aspects and Convergent Trends, in The Prosecutor in Transnational Perspective 177 (Erik Luna & Marianne L. Wade eds., 2012)

[39] Brian A. Grossman, "The Role of the Prosecutor in Canada", (1970) 18 (3) American Journal of Comparative Law, 498, at pp. 499-500.

1.8.3 History of Criminal Justice System – Moving towards Public Prosecution

Kariuki Muigua[40] in discussing traditional conflict resolution mechanisms and institutions observed that before the advent of colonialism, African communities had their own conflict resolution mechanisms which were mainly geared toward fostering peaceful co-existence among the Africans. The various forms of punishment under the African customary criminal law such as self-help, and processes of reconciliation are comparable to the various alternatives to prosecution which have been adopted by the ODPP including plea bargaining, diversion and deferred prosecution. Brock-Utne[41] and Ajayi & Buhari, L.O.[42] opine that the existence of such traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Africa. Conflict resolution among the traditional African people was anchored on the ability of the people to negotiate. This study observes that the traditional conflict resolution mechanism laid foundation for the modern-day criminal justice system and the ODPP as adopted through the Reception Clause.

1.8.4 Reception of the ODPP in Kenya

Peter Onyango[43] points out that all English Statutes of General Application - including English Common Law and Equity - and certain laws of India passed before 12th August 1897 applied as part of Kenyan Law throughout the period of conquest and beyond. As observed by Peter Fitzpatrick local African customary laws continued to be applied the 'received' English law subject to certain conditions.[44] The study observes that these laws provided for the establishment

[40] Kariuki Muigua, "Traditional Conflict Resolution Mechanisms and Institutions."

[41] Brock-Utne, B., "Indigenous conflict resolution in Africa," *A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research*, 2001, pp. 23-24.

[42] Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," *African research review*, Vol.8, No. 2, 2014, pp.138-157.

[43] Peter Onyango, African Customary Law: An Introduction [Africa Books Collective]

[44] Peter Fitzpatrick, 'Terminal legality: imperialism and the (de)composition of law', in Diane Kirkby and Catharine Coleborne, eds.,Law, history, colonialism: the reach of empire, Manchester: Manchester University Press, 2001, p. 21.

of the ODPP in its earlier form under the OAG and later as established as an independent office under the Constitution of Kenya, 2010.

1.8.5 The Exercise of Prosecutorial Powers in Kenya Pre-2020

Waikwa Wanyoike[45] observes that the DPP's powers to prosecute was historically variously abused to victimize persons who did not deserve to be subjected to criminal processes as well as failing to prosecute those who have committed crimes because of their social or other extraneous status and uses this to justify judicial interference with prosecutorial independence in the exercise of the DPP's powers on account of historical abuse. On the other hand, Migai Akech posits that while the old Constitution[46] gave the AG the power to decide if and when an individual should be prosecuted for a criminal offense, and to take over and continue criminal proceedings that had been instituted or undertaken by persons or authorities, and to terminate any prosecution, this power was often abused and led to prosecutions that got dropped along the way. The failure to regulate this power resulted in the law being used to persecute innocent citizens, to the detriment of the legitimacy of the criminal justice system. The power was also was often applied selectively with the perpetrators of the crimes hardly prosecuted.[47]

Drawing a parallel from Waikwa's and Mikai Akech's observation, the study establishes that post-2020, the Constitution and the various other statutory provisions provide sufficient mechanisms for prosecutorial accountability in terms of checks and balances against the ODPP to ensure that State powers of prosecution under the Constitution are exercised in accordance with the Constitution and the law.

[45] Waikwa Wanyoike, 'The Director of Public Prosecutions and the Constitution: Inspiration, Challenges and Opportunities', in Yash Ghai & Jill Ghai (eds.), 'The Legal Profession and the New Constitutional Order in Kenya'.
[46] Section 26 of the 1969 Kenyan Constitution.

[47] CIPEV Report, 455.

1.8.6 Prosecutorial Independence in Kenya

African Centre for Open Governance[48] observed as regards independence of the DPP under the OAG that while the 1986 amendments to the 1963 Constitution still maintained that the AG was to exercise his powers without direction or control from anyone, that largely remained a legal fallacy in the absence of the security of tenure which resulted in the politicization and significant compromise of the work of the AG in relation to prosecution.

The study submits that the establishment of the ODPP under the Constitution of Kenya, 2010 – and the subsequent separation of the ODPP from the OAG – coupled with the security of tenure for the DPP has led to the entrenchment of prosecutorial independence albeit much more still needs to be done: the ODPP is now an independent office distinct from the OAG in which the past DPPs had been based as mere departments. The Constitution 2010 is therefore a clear departure from the past, and a move in the right direction towards the entrenchment of prosecutorial independence and enhancement of prosecutorial accountability. As Migai Akech[49] observed, the Constitution 2010 sought to enhance objectivity and accountability in investigations and prosecutions. The task of exercising the State powers of prosecution now belongs to the office of an independent DPP.[5051] The DPP is also from external influence in the exercise of his mandate as he does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, neither shall he be under the direction or control of any person or authority.[52]

[48] See generally, African Centre for Open Governance, "Assessing Amos Wako's Performance: A Poisoned Legacy) (Nairobi: Africog, August 2011) available at http://www.africog.org/reports/Poisoned_Legacy.pdf. See also Nowrojee and Mutunga in this volume.
[49] *Ibid*.
[50] Article 157(6) of the Constitution.
[51] Article 156 of the Constitution. The primary functions of the AG being to give legal advice to the government and represent it in legal proceedings
[52] Article 157(10) of the Constitution.

As noted further by Mikai Akech, further accountability is provided by the requirement that the DPP can only take over a criminal suit with the permission of the person or authority who instituted it.[53] In addition, the DPP can only discontinue a prosecution with the permission of the court.[54] And to preclude the abuse of the power to prosecute, the new Constitution requires that its exercise shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.[55]

1.8.7 Accountability and the Exercise of Public Power

Modern democratic states have developed a range of mechanisms through which government is held accountable and its actions are scrutinized - not just at election times, but on an ongoing basis. The growth in oversight, review, and inspection mechanisms to strengthen the accountability and performance of public services has been called a 'fourth arm of governance'[56] to reflect both the growing influence of such accountability mechanisms and their complementary role to other public sector accountability structures. Accountability as such attracts agency relationship, assigned responsibilities, an institution to account to and the right for the agent to give the rationale for his actions and the principal to sanction unaccounted responsibility.

1.8.8 Regulation and Accountability of Prosecutors

As gatekeepers to the criminal justice system, prosecutors are its most powerful officials. Prosecutors' considerable discretion – about whom to charge and for which crimes – affects the lives and fate of thousands of criminal suspects, and the safety and security of all citizens. Accountability ensures that those that exercise State power like the DPP do so responsibly,

[53] Article 157(6) (b) of the Constitution.
[54] Article 157(8) of the Constitution.
[55] Article 157(11) of the Constitution.
[56] C Grace, The rapidly changing world of audit and inspection, Public Net, 20 May 2005, www.publicnet.co.uk/features/2005/05/20/the-rapidly-changing-world-of-audit-and-inspection/ accessed on 13th August 2020.

justifiably and in the interest of the people. Mechanisms to ensure accountability include requirements relating to right to access to information, separation of powers, checks and balances and creation of strong independent institutions to check the exercise of powers delegated to each other.[57]

One of the ways of achieving Prosecutorial independence is by way of regulating prosecutors. One of the challenges of such regulation according to Bruce Green & Ellen Yaroshefsky[58] is achieving a proper balance between prosecutorial accountability and independence by holding prosecutors accountable when they fail to fulfill their obligations because the potential for harm is so grave. For example, prosecutors at times fail to comply with the constitutional duty to provide exculpatory evidence to the defense or abuse their authority in deciding whether to institute criminal charges or to plea bargain. Rachel E. Barkow[59] observes that critics call for greater accountability to address these abuses of power adding arguing that prosecutors' offices should take their cue from administrative law by separating functions and increasing supervision. Bruce A. Green & Rebecca Roiphe[60] add that it is essential that prosecutors, like judges, are independent of those who might otherwise hold them accountable adding that prosecutors are - and must be - independent of the President and the Executive.

1.8.9 Balance between Prosecutorial Independence and Accountability

Green, Bruce A. and Roiphe, Rebecca[61] have observed that it is particularly difficult to strike a balance between prosecutorial accountability and independence when it comes to charging and

[57] Articles 96, 169 and 248 of the Constitution.
[58] Bruce Green & Ellen Yaroshefsky, Prosecutorial Accountability 2.0, 92 NOTRE DAME L.REV.51, 59–60 (2016).
[59] Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 STAN.L.REV.869, 876–78 (2009).
[60] Bruce A. Green & Rebecca Roiphe, "Can the President Control the Department of Justice?" 70 ALA.L.REV.1 (2018).
[61] Green, Bruce A. and Roiphe, Rebecca (2020) "A Fiduciary Theory of Prosecution," American University Law Review: Vol. 69: Iss. 3, Article 2.

plea bargaining because these decisions are both momentous and by nature discretionary. All is not lost, however, as when prosecutors as trial lawyers act unlawfully or abusively in the manner in which they conduct criminal proceedings, courts have constitutional and inherent authority to hold them accountable.[62] Prosecutorial independence also requires some distance from factions of citizens with well-articulated interests, and it even requires that prosecutors be insulated from (although perhaps not oblivious to) a public consensus in favor of a particular act or outcome.[63]

1.8.10 The Identified Gaps in the Literature

The available literature ignores the need and importance of prosecutorial independence and accountability despite the prosecution services being an integral part of any country's justice system. Ideally, prosecutors - together with the police and judges - are central actors in implementing the rule of law. In recognition of the inadequate, near non-existent, literature on the twin issues of independence and accountability, this study attempts to contribute to, and in effect, fill the lacuna in the literature relating to the subject not just in Kenya, but regionally in Africa and across the globe. The study therefore addresses:

(a) The lack of literature on prosecutorial independence and accountability globally, with a closer and more specific look at the situation in Kenya.
(b) A look at prosecutorial independence and accountability as complimenting, rather than competing, one another.
(c) The perfect balance – the equilibrium - between prosecutorial independence and accountability.

[62] See, e.g., Massameno v. Statewide Grievance Comm., 663A.2d 317, 322 (Conn. 1995) & State v. Davis, 972 P.2d 1099, 1105 (Kan. 1999)
[63] Robert W. Gordon, "The Independence of Lawyers," 68 B.U.L.REV.1, 9–30 (1988).

(d) The mechanisms for entrenching prosecutorial independence and enhancing accountability in the socio-economic and political economic circumstances special and unique to Kenya.

1.9 Research Methodology

The study employs a mixed research methodology with doctrinal, historical and comparative methodologies. The research is majorly doctrinal[64] to the extent that it relies on the analysis of legal provisions using the reasoning power to study the legal proposition in the problem statement. Essentially, doctrinal research is concerned with the analytical approach to legal issues and provisions. In this study, it will be useful in the analysis of the legislative, institutional and policy framework including the Constitution, the ODPP Act, other statutes, international conventions, and judicial decisions, judicial texts and opinions, books, articles, journals and relevant reports. The historical research methodology - which involves the systematic study of events in a contextual background to appreciate the contexts within which events operate[65] - will help trace the place of the prosecution function from the precolonial times through the colonial, independence and post-independence eras, as is seen in Chapter 2 of this study. The comparative research methodology[66] will help to study and compare the best practices of prosecutorial independence and accountability in other jurisdictions. It will particularly be useful in identifying, analysing and explaining the differences of the practices in South Africa, England and Wales, and Japan in Chapter 5, and to make the recommendations in Chapter 6.

[64] Salim I. Ali et al., "Legal Research of Doctrinal and Non-Doctrinal " (2017) Volume 4(1) International Journal of Trend in Research and Development.
[65] Johnson, R. et al., "Toward a definition of mixed methods research" (2007) 1, no. 2 Journal of mixed methods research 112-133
[66] Frank Esser et al., "Comparative Research Methods" (2017) the International Encyclopedia of Communication Research Methods.

1.10 Chapter Breakdown

The study is divided into six Chapters. Chapter One introduces the study. Chapter Two then retraces the historical foundation of the ODPP from the colonial period - the establishment of the ODPP and the appointment and the powers of the DPP. Chapter Three then examines the legislative, institutional and policy framework underpinning the establishment of the ODPP and the importance of prosecutorial independence and accountability to the performance of prosecutorial functions. Chapter Four then delves into the situational analysis of prosecutorial independence and accountability in Kenya: the DPP's exercise of his independence, his relationship with other institutions within the criminal justice system and how the ODPP despite being independent is kept in check to ensure that the powers of the DPP are exercised in tandem with the law. Chapter Five then takes a tour of the subject of prosecutorial independence and accountability in other jurisdictions including South Africa, England and Wales, and Japan. Chapter 6 is a wrap of the study. It makes recommendations before giving a conclusion thereto.

1.11 Conclusion

The re-establishment of the ODPP as an independent office marked the start of a new are in the administration of the criminal justice by shielding the office from the control and or direction of any person and or authority in the exercise of its powers and performance of its prosecutorial duties. However, while the progressive and transformative Constitution intended the ODPP to be independent, and while that is true at least on paper, it's already clear from this introductory Chapter not only that such independence needs to be checked – thus the need for accountability mechanisms – but also that that till exist challenges to the intended Prosecutorial Independence in the form of various gaps in the law and in practice that still make it difficult for the ODPP and its officers to exercise the objectivity that is paramount for the discharge of their duties as the custodians of the State powers of prosecution. This is discussed in further detail in the subsequent Chapters of this study.

CHAPTER 2

HISTORICAL FOUNDATION OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.0 Introduction

Having laid the foundation of the study by identifying the research problem and setting the objectives thereof, this Chapter traces the historical foundation of the ODPP. The central argument in this chapter is that the establishment of the ODPP and the exercise of State powers of prosecution has a colonial foundation and was therefore affected by the laws of the colonial masters from which the office was borrowed. In order to understand the need for an independent and accountable ODPP, the Chapter traces the history and work which preceded its creation: a consideration of the history of prosecutions in England and Wales in chronological order.[67]

The Chapter accordingly is divided into Until the last half of the 20th Century, in England and Wales, criminal offences were prosecuted by a curious mix of private individuals, police officers or police solicitors, county prosecutors and, oftentimes, local firms of solicitors. However, before getting into the birth of prosecutorial authority in England and Wales, the study takes a look into the practice of the African Customary Criminal Law before the coming of the colonialists.

2.1 Pre-Colonial Era [1887-1920]

Before 1879, most prosecutions were in the hands of private individuals. As a result there were many acquittals, several frivolous and vexatious prosecutions, corruption and collusion between the parties, and other related abuses.

[67] Speech on Reform of Prosecution Policy by the AG Dominic Grieve QC MP delivered on 13th March 2013.

2.1.1 African Customary Criminal Law

Before the advent of colonialism, African communities had their own conflict resolution mechanisms which were mainly geared toward fostering peaceful co-existence among the Africans[68]. Most African societies viewed crime socially and a crime or a wrong was any act or omission having a detrimental effect on social relations. The individual was viewed as but of the kin, if he was injured, it is the kin which is injured. "If he be slain, it is the blood of the kin that has been shed and the kin is entitled to compensation or vengeance. If he commit a wrong, the whole kin is involve and every member is liable not as an individual but as part of the kin."[69]

African communities also had in place Customary Criminal Law; set rules and standards of behavior to which every member of the society was expected to conform and ensure that social order was maintained. There were traditional ways of punishing individuals who failed to live up to the expected standards. Punishment included various forms of self-help, with religious and supernatural sanctions and processes of reconciliation playing their parts. Existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Africa.[70] Conflict resolution among the traditional African people was anchored on the ability of the people to negotiate.[71]

The Kenyan Customary Criminal Law reflected the fact the Kenyan society was predominantly peasants and to some extent pastoralist society who had over the years developed a legal system and methods which suited their needs and aspirations and were to a large extent fair and

[68] Kariuki Muigua, "Traditional Conflict Resolution Mechanisms and Institutions."

[69] Hartland, E.S., (1924), "Primitive Law", London: Methuen. Hayford, Coast.

[70] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," *A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research*, 2001, pp. 23-24; See also Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," *African research review*, Vol.8, No. 2, 2014, pp.138-157.

[71] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit.; See also generally, Mwenda, W.S., "Paradigms of alternative dispute resolution and justice delivery in Zambia," PhD diss., (University of South Africa, 2009). Available at uir.unisa.ac.za/bitstream/handle/10500/2163/thesis.pdf [Accessed on 12/09/2017].

democratic. African communities believed strongly in restitution of the wronged party as opposed to English penal sanction for criminal wrongs whereby the person who commits a crime would be imprisoned. Customary law would in this situation order compensation to be paid for the wrong done, which compensation would go to the wronged victim. Compensation was mainly in terms of livestock which was highly valued.

African Customary Law was civil rather than criminal; all criminal cases were treated almost in the same way as civil cases. The gravest and most unusual crimes were dealt with on a system which resembled arbitration rather than punishment, and as long as the harm done as far as possible made good, society was not expected to take further action.[72]

Wrongful behavior was met with punishment but imprisonment was unheard of and instead: The chief aim in proceeding was to get compensation for individual or the group against whom the crime was committed since there was no system of imprisonment[73], the offenders were punished by being made to pay heavy fines[74]. African communities strongly believed in restitution of the wronged person. The system sought to restore the wronged person back to the position he was before the wrong. For more serious crimes, the offender would be executed.

While African Customary Criminal Law was since then prohibited where it was found to be repugnant to justice and morality, [75] there have been arguments for and against the restoration of the African Criminal Law in Africa. The proponents of this proposal suggest that English embraced post-colonial era has failed to preserve and conserve the people's culture law and

[72] Major G. St. J. Orde Browne, O.B.E., (1933), "The African Labourer", African Affairs, Volume XXXII, Issue CXXVIII, Pages 299–305.

[73] Kinanga, Z.M. (1982), 'The Place of African Customary Law: The Need for Reform', being a Dissertation Submitted in Partial Fulfilment of the Requirements for the Award of the Bachelors of Law (LL.B) Degree of the University of Nairobi.

[74] Jomo Kenyatta Referring to the Kikuyu Customary Law.

[75] African Customary Criminal Law only qualifies for application if it does not contradict the written law which in essence is foreign law.

customs; failed to consider African traditions and culture in treatment of offences so as to arrive at just trials as under African customary criminal law. Most Africans do not understand the course of modern criminal law and procedure.

2.2 Colonial Era

With the conquest of the British Imperial authority and with the establishment of the East African Order in Privy Council, Kenya became *de jure* part of British East Africa. Kenya was declared a British colony and therefore a part of the British East African Protectorate in 1920[76]: In 1895 the British government took over the administration of the territory. With their arrival, the colonialists introduced western notions of justice such as the application of the common law of England in Kenya. The East African Order-in-Council[77] (hereafter the Ordinance) provided the legislative basis for the exercise of authority in the territory, with subsequent Orders expanding legislative powers. The common law brought the court system which, being adversarial, greatly eroded the traditional conflict resolution mechanisms.[78]

2.2.1 The Reception Clause - The East African Ordinance in Council, 1897

Pursuant to the East Africa Order-in-Council[79], all English Statutes of General Application[80] - including English Common Law and Equity - and certain laws of India passed before the

[76] Rutten, M.M.E.M, & Ombongi, K (2005) Kenya: Pre-colonial, Nineteenth Century New York: Fitzroy Dearborn p. 4.

[77] The East Africa Order-in-Council of 12th August 1897.

[78] See generally, Penal reform international, *Access to Justice in Sub-Saharan Africa: the role of traditional and informal justice systems*, (Penal reform international, 2000). Available at http://www.gsdrc.org/docs/open/ssaj4.pdf [Accessed on 12/09/2017]; See also See generally, Mac Ginty, R., "Indigenous peace-making versus the liberal peace," *Cooperation and conflict*, Vol.43, No. 2, 2008, pp.139-163.

[79] The East Africa Order-in-Council of 12th August 1897.

[80] A statute of general application, if repealed by a later English statute would still be law in Kenya. Statutes of general application included public Acts of Parliament, that is, those which apply to the inhabitants at large and which are not limited in their application to prescribed persons or areas. The statutes were also applicable in Kenya in the form that they had at the reception date. Any subsequent amendments of such statutes in England have no effect in Kenya. The only way to alter such statutes is for the Kenya Parliament to amend these by independent legislation.

reception date[81], became law in Kenya, unless a Kenyan statute, or a latter English statute made applicable in Kenya, as repealed any such Statute. The said laws applied as part of Kenyan Law throughout the period of conquest and beyond.[82] The Ordinance also established the British type courts in Africa. It provided *inter alia*:

> "In all cases, civil and criminal to which natives are parties, every court… shall be guided by native law and custom, as far as it is applicable and is not repugnant to justice and morality or inconsistent with any order in council or ordinance or any regulation or rule made under any order in council or ordinance."[83]

Although the primary law administered in most British colonial courts was English, local African customary laws were often allowed to exist alongside, if they met certain conditions. Customs were recognized but only in subordination to colonial law, and were denied such recognition where they were considered 'repugnant to natural justice, equity and good conscience', or contrary to the 'general principles of humanity.[84] African Customary Criminal Laws were therefore inadmissible if they conflicted with any legislation in force in each territory, and could thus be expressly overwritten even when they met the 'repugnancy test'.[85] Later, the Constitution[86] and the Judicature Act[87] provided that no person shall be convicted of any criminal offence unless that offence is defined and a penalty therefore presented in a written law.

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[81] 12th August 1897.

[82] Peter Onyango, African Customary Law: An Introduction [Africa Books Collective]

[83] Article 20 of the East Africa Order-in-Council.

[84] Peter Fitzpatrick, 'Terminal legality: imperialism and the (de)composition of law', in Diane Kirkby and Catharine Coleborne, eds.,Law, history, colonialism: the reach of empire, Manchester: Manchester University Press, 2001, p. 21.

[85] This was later reproduced in section 3 of the Judicature Act of 1967. See Sally Falk Moore, 'Treating law as knowledge: telling colonial officers what to say to Africans about running ''their own'' native courts', Law and Society Review, 26, 1992, p. 18.13

[86] Section 77(8) of the 1963 Constitution.

[87] Section 3(8) of the Judicature Act.

2.3 The Prosecution of Offences Act 1879

One of the English Statutes of General Application that became law in Kenya as a result of the Reception Clause was the Prosecution of Offences Act 1879. The Act was the first to establish the ODPP as part of the OAG with the aim of controlling, if not the elimination of abuses arising out, of private prosecutions.[88] It also provided for the appointment of a DPP charged with the duty to act in cases of 'importance and difficulty'[89]. However, the right of the private individual to initiate a criminal prosecution was retained.

2.3.1 The Initial Clamour for Independent Prosecution Service [1790-1800]

The proposals to create an independent and central government funded prosecution service in England and Wales started in the 1700s. In 1790, Jeremy Bentham criticized the absence of system and order in the bringing of criminal prosecutions in England and Wales. Bentham's view was reiterated in the 8th Report of the Criminal Law Commission.

2.3.2 The Eighth Report of the Criminal Law Commission [1845-1856]

The Criminal Law Commission reported that prosecutions were conducted 'in a loose and unsatisfactory manner' and that the duty of prosecution was frequently performed unwillingly and carelessly… the direct and obvious course for remedying such defects would consist in the appointment of public prosecutors.[90] The Commission, in the 8th Report, in reiterating Bentham's views pointed out that private prosecutions facilitated "bribery, collusion and illegal compromises" and recommended "the direct and obvious course for remedying such defects would consist in the appointment of public prosecutors."[91]

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[88] *Ibid* at 44.

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[90] 8th Report of the Criminal Law Commission, 1845.

[91] https://journals.sagepub.com/doi/abs/10.1177/002201838404800310?journalCode=clja#

2.3.4 The Select Committee on Public Prosecutors

In 1856, the Select Committee on Public Prosecutors set up in part as a result of the Criminal Law Commission's report, recommended the appointment by the Home Secretary of District agents who were to be Attorneys of not less than seven years' standing. These full-time officials were to be responsible for bringing before the magistrates persons suspected of criminal offences if this had not already been done. In cases of difficulty and importance, they were to be empowered to take over the conduct of the prosecution. District agents were to instruct counsel and on each circuit advising counsel were to be appointed by the AG. The whole scheme was to be administered by the AG.

Whether it was the result of opposition from those who feared concentration of power and patronage in central government, pressure from existing legal bodies, particularly the Bar, or simply the inertia which appears to affect movements for law reform in this country, may be a matter of doubt but nothing substantial was done until 1879 when the Prosecution of Offences Act was passed.

2.4 Post-Colonial Era

2.4.1 The 1963 Constitution

Prior to the new Constitution, Kenya adopted the British prosecutor model at independence which places prosecution under the OAG by establishing a Crown Prosecution Service (hereafter the CPS) superintended by the AG. Under the model, the AG appointed the DPP, the departmental head responsible for public prosecution. Although the DPP made decisions on what cases to prosecute, he sometimes needed the consent of the AG before prosecution. The British

model was adopted by many Commonwealth countries,[92] although with time different countries have tinkered with the model to make it more responsive to their circumstances and needs.[93]

2.4.2 Prosecutions under the AG in the Pre-2010 Era

In the old Constitution, the AG's consent[94] was required before a prosecution could be mounted for a number of offences including murder, sedition, incest, false claims and abuse of office.[95] For such offences, plea could not be taken until the consent was given and any trial which proceeded in the absence of the consent from the AG or any authorized officer was a nullity.[96] The AG also had to give directions in certain cases of public importance and interest. Where a prosecution required the consent of the AG, the investigating agency had to send the investigation file to the OAG who, after perusal of the same would direct further investigations, grant consent or direct a withdrawal of the charge against the accused.

2.4.3 1986 Amendments

In 1986, a far–reaching amendment removed the security of tenure of the AG: the AG could be dismissed by the President. The exercise of the functions of the OAG, including impartial prosecution, were henceforth exposed to political influence.[97] Third, in 1986, a far–reaching amendment removed the security of tenure of the AG. Hence the AG could be dismissed by the President. However, even the constitutional amendments may not have been necessary since

[92] See, for example, Uganda, Nigeria, Ghana, Australia.

[93] For example, Brian Grossman argues the Prosecutor in Canada has come to resemble more his French, Scottish or American counterpart in that he plays little role in initiating criminal prosecutions, acts in non-political manner and is responsible for directing police investigations. See Brian A. Grossman, "The Role of the Prosecutor in Canada", (1970) 18 (3) American Journal of Comparative Law, 498, at pp. 499-500.

[94] The purpose of requiring the consent from the AG was to ensure that there was *prima facie* evidence to warrant a prosecution and also that the charge was properly drawn out since such charges were technical and therefore needed technical expertise.

[95] Sections 204, 58, 169, 100 and 101 of the Penal Code, Cap 63 Laws of Kenya.

[96] R v. Telenga (1967) E.A. 407 (HCT).

[97] Constitution of Kenya Review Commission, the Final Report of the Constitution of Kenya Review Commission (CKRC 2002).

President Daniel arap Moi had removed the AGs whenever they had acted in a manner that did not please him.[98]

While the constitution still maintained that the AG was to exercise his powers without direction or control from anyone that largely remained a legal fallacy in the absence of the security of tenure. Because of lack of tenure and the complete politicization of all senior government positions, the work of the AG in relation to prosecution was significantly compromised. The AG became an agent of repression, initiating or allowing for initiation of many unmeritorious criminal cases against persons perceived to be opposed to the political regime, while terminating or failing to prosecute many meritorious criminal cases for persons considered to be supportive of the regime.[99] Criminal law in many ways became a tool not for procuring criminal justice but for punishing political dissent. The objectivity expected of the AG in making prosecutorial decisions was substituted by subjective and partisan considerations.[100] A dangerous culture of the exercise of prosecutorial authority was established.

2.5 The Constitution of Kenya Review Commission [CKRC]

The Constitution of Kenya Review Commission (hereafter the CKRC) was so concerned with the dismal past performance of the OAG in regard to prosecutions that the issue received a lot of prominence when the CKRC sought people's views on what they wanted reflected in the new

[98] In fact, this was the fate that befell AG James B. Karugu, who criticized a decision of a judge who had passed an uncharacteristically lenient sentence but which was favored by President Moi. The AG was soon dismissed from office.

[99] See generally, African Centre for Open Governance, "Assessing Amos Wako's Performance: A Poisoned Legacy) (Nairobi: Africog, August 2011) available at http://www.africog.org/reports/Poisoned_Legacy.pdf. See also Nowrojee and Mutunga in this volume.

[100] See, for example, the admonishment of the AG by the Kenya Section of International Commission of Jurists relating to his entering a *nolle prosequi* in the case against the then first lady Lucy Kibaki which was initiated by a journalist Clifford Derrick and the case of Tom Gilbert Cholmondley available online at http://www.icjkenya.org/index.php/media-centre/press-releases/219-attorney-generals-exercise-of-powers-to-enter-nolle-prosequi. The ICJ, in the press statement dated May 24, 2005 states that "in proceeding as he has, the Attorney General has sought to frustrate the Administration of Criminal Justice by applying differential standards, and protecting select individuals from the law." See Ghai's chapter for a detailed analysis of the abuse of prosecutorial and other state powers by the AGs.

Constitution.[101] There were concerns that the AG was performing too many roles – that of Member of Parliament and a member of the Cabinet – and this compromised his ability to act as an independent prosecutor. There were concerns about the ability of the AG to take over private prosecutions since over the years AGs had used this powers to frustrate the abilities of individuals to prosecute cases that the political establishment was unwilling to undertake.

Concerns were also raised about skewed prosecutorial practices with suggestions being made that the problem could be addressed through separating fully the office of the AG from that of the DPP, giving the DPP security of tenure, providing the DPP with powers to require police to conduct investigations in certain circumstances and by expressly stating that the IG had to comply; and by providing the ODPP with complete independence and insulating it from external influences.

These recommendations were eventually adopted when the CKRC drafted its proposed constitution.[102] Luckily, the text of the provision on the DPP developed by CKRC did not change much during the other stages of constitution-making.[103] Even where there were minor changes,[104] those did not derogate from the core principles spelt out by the people during the CKRC constitution-making process, including the separation of the office of the DPP from that of AG, tenure of office, prosecutorial independence, power to direct Inspector General of police to conduct investigations and the requirement that the DPP could only withdraw charges with the leave of the Court.

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[101] See Constitution of Kenya Review Commission, The National Constitution Conference, Verbatim Report of Plenary Proceedings – Presentation of the Draft Bill, Chapter 9 – Judicial and Legal Systems, held at the Bomas of Kenya on 20th May 2003 at pp. 11-12 (on file with author).

[102] See Recommendations 138 and 140 in CKRC Main Report, Volume One, p. 327.

[103] Other constitution-making process followed that of CKRC. They were the National Constitutional Conference in 2004 and later the Committee of Experts (COE) process of 2009-2010 that eventually resulted in the passage of the Constitution of Kenya 2010.

[104] For example the CKRC draft Constitution proposed that the DPP should hold the office for a single term of ten years, whereas the Constitution of Kenya 2010 provides for a term of eight years.

As part of its recommendations for a new structure in the Executive, the Commission adopted the suggestion that there be established the ODPP with the DPP being appointed by the President on recommendation by the Public Service Commission.[105] The Commission suggested that the functions of the DPP would include, among other things, directing investigations of a criminal nature; instituting criminal proceedings and taking over and continuing any proceedings.

2.6 Post-2010 Era: Establishment of the ODPP

As has already been discussed in Chapter 1 of this study, the promulgation of the new Constitution led to the establishment of the ODPP as an independent office[106] distinct from the OAG.[107] Under the new dispensation, the DPP is appointed the President with the approval of the National Assembly.[108]

2.7 The Office of the Director of Public Prosecutions Act[109]

The ODPP Act was enacted with the main object of giving effect to the provisions of Articles 157 and 158 and other relevant Articles of the Constitution both of which are discussed in more detail in Chapter 4 herein. The Act elaborates and regulates the operations of the office of the DPP.

2.8 Holders of the Office of the DPP

There have been various holders of the Office of the DPP, from its times under the Office of the AG, to-date. Kenneth Clive Brookes was appointed to act as the first DPP under the Ministry of Legal Affairs with effect from 12th June 1962 by the then Minister for Legal Affairs, A.M.

[105] Clause 13.4 of the Constitution of Kenya Review Commission, the Final Report of the Constitution of Kenya Review Commission (CKRC 2002)
[106] Article 157 of the Constitution.
[107] See Article 156 of the Constitution of Kenya 2010 which limits the role of the AG being the principal legal advisor to the government and to represent the national government in legal proceedings.
[108] Article 157(2) of the Constitution.
[109] Act No. 2 of 2013. Section 3 states the object of the Act is to give effect to the provisions of Articles 157 and 158 and other relevant Articles of the Constitution.

Webb[110]. He was a Barrister-at-Law having graduated with an M.A from Canterbury. John Richard Hobbs, Barrister-at-Law (Gray's Inn) took over from Mr. Brookes with effect from 1st January 1967[111]. Mr. Hobbs was appointed by the Public Service Commission (hereafter the PSC), having risen from the position of a Senior State Counsel, AG's Department from 15th April 1964.[112] He had also previously worked as a Resident Magistrate from 30th June 1960[113] before being appointed a Crown Counsel on 21st November 1960,[114] and later promoted to a Senior State Counsel, AG's Department with effect from 15th April 1964.[115] In 1970, James Boro Karugu was appointed and took over as DPP by the then AG, Hon. Charles Mugane Njonjo, having been previously appointed on 24th March 1965.[116] On April 21, 1980, President Daniel Toroitich Arap Moi appointed Mr. Karugu as AG[117] taking over substantively from Mr. Njonjo who had quit the civil service.[118] On June 30, 1980, Sharadkumar Sadashiv Rao took over as the until September 1983 when he was named chairman of the Business Premises Rent Tribunal. He had previously worked as an Assistant DPP, OAG by the PSC with effect from 1st July 1971.[119] Mr. Rao was succeeded by Benjamin Patrick Kubo whose term ran from 1983 to 1987. Mr. Kubo was appointed as DPP by the then President Daniel Toroitich Arap Moi with effect from 1st October 1983.[120] On 9th December 1987, the President promoted him to the position of Solicitor-General with effect from 25th November 1987.[121] He had previously served as a Provincial State Counsel, OAG, Central Province.[122] On 25th November 1987 President Moi,

[110] Kenya Gazette Notice No. 3002 in Gazette Issue Vol. LXIV – No. 28 dated 3rd July 1962.
[111] Kenya Gazette Notice No. 70 in Gazette Issue Vol. LXVIX – No. 2 dated 10th January 1967.
[112] Kenya Gazette Notice No. 1399 in Gazette Issue Vol. LXVII – No. 17 dated 20th April 1965.
[113] Kenya Gazette Notice No. 3049 in Gazette Issue Vol. LXII – No. 34 dated 5th July 1960.
[114] Kenya Gazette Notice No. 5753 in Gazette Issue Vol. LXII – No. 59 dated 6th December 1960.
[115] Kenya Gazette Notice No. 1399 in Gazette Issue Vol. LXVII – No. 17 dated 20th April 1965.
[116] Kenya Gazette Notice No. 1126 in Gazette Issue Vol. LXVII – No. 13 dated 30th March 1965.
[117] Kenya Gazette Notice No. 1159 in Gazette Issue Vol. LXXXII – No. 17 dated 24th April 1980.
[118] https://www.nation.co.ke/news/The-paradox-thats-Sharad-Rao--/1056-1470636-ukt7jcz/index.html
[119] Kenya Gazette Notice No. 1914 in Gazette Issue Vol. LXXIII – No. 33 dated 23rd July 1971.
[120] Kenya Gazette Notice No. 3781 in Gazette Issue Vol. LXXXV – No. 51 dated 7th October 1983.
[121] Kenya Gazette Notice No. 5696 in Gazette Issue Vol. LXXXIX – No. 51 dated 11th December 1987.
[122] Kenya Gazette Notice No. 1914 in Gazette Issue Vol. LXXIII – No. 33 dated 23rd July 1971.

appointed Bernard Chunga to lead the then Department of Public Prosecutions.[123] Mr. Chunga's appointment resulted from the concurrent appointment of Mr. Kubo to the position of a Solicitor-General. He had initially served as the Assistant DPP with effect from 1st October 1983.[124] In 1999, Uniter Pamela Kidula took over from Mr. Chunga. Prior to her becoming DPP, she was a senior magistrate in Nairobi. Five years later, Kidullah would be among the casualties of regime change following KANU ouster, which led to her redeployment to the Judiciary. She was later removed as DPP and redeployed as Chief Magistrate and posted to Mombasa, a move that was deemed a demotion in legal circles.[125] In 2003, President Kibaki appointed Philip Murgor as the new DPP on an anti-corruption platform to help fight the Goldenberg and other corruption-related scandals.[126] Mr. Murgor's tenure ran from time of appointment to 2005 when Mr. Keriako Tobiko took over the reins under the old Constitution. Mr. Tobiko was the last DPP under the old Constitutional order before the restructuring of the office having been first appointed in 2005, and also the first DPP to be appointed vide the provisions of the 2010 Constitution. He was appointed under the new order by President Mwai Kibaki on 16th June 2011.[127] He resigned from the office giving way to his nomination and appointment as the Cabinet Secretary for the Ministry of Environment and Forestry in Kenya.[128] The current DPP, Noordin Haji, CBS, OGW was appointed on the 28th March, 2018 following an interview by the PSC and vetting by National Assembly. Mr. Haji had joined public service in January 2000 as a State Counsel at the OAG. Prior to his appointment as the DPP, he was the Deputy Director, Counter Organized Crime Unit of the National Intelligence Service (hereafter the NIS) where his

[123] Kenya Gazette Notice No. 5696 in Gazette Issue Vol. LXXXIX – No. 51 dated 11th December 1987.
[124] Kenya Gazette Notice No. 3782 in Gazette Issue Vol. LXXXV – No. 51 dated 7th October 1983.
[125] https://www.standardmedia.co.ke/article/2000032007/a-look-at-previous-dpp-office-holders
[126] His appointment to the position of the DPP came just one month after the President had re-appointed him to the Goldenberg Scandal cases.
[127] Kenya Gazette Notice No. 5087 in Special Issue Gazette Vol. CXI – No. 55 dated 16th June 2011.
[128] Kenya Gazette Notice No. 551 in Special Issue Gazette Vol. CXX – No. 9 dated 19th June 2018.

duties included providing legal counsel to the Director General NIS, IG of Police, the DCI and other non-law enforcement agencies.[129]

2.9 Conclusion

This Chapter set out to trace the origins of the ODPP way before the coming of the colonialists, through to the colonial times to the current ODPP under the Constitution 2010. The Chapter has established how Africans exercised what is akin to criminal procedure during the pre-colonial era, the reception of the English Prosecution of Offences Act and the entrenchment of the ODPP as part of the OAG, the clamor for an independent prosecutorial authority and thereafter concludes with current independent ODPP in our progressive Constitution. Prosecutorial Independence comes out as the most important change from the old era to the current era.

[129] https://www.odpp.go.ke/odpp-management/.

CHAPTER 3

LEGISLATIVE, INSTITUTIONAL AND POLICY FRAMEWORK

3.0 Introduction

Chapter 2 has traced the historical origins and foundation of the prosecutorial authority in Kenya, apart from highlighting the establishment of the ODPP as a constitutional office post-2010. In order to underscore the importance of prosecutorial independence in today's ODPP and the equally important accountability thereof, this Chapter examines the legislative, institutional and policy framework enabling the establishment of the ODPP as an independent and accountable institution and highlights the important departure from the old order in which the ODPP was a mere department of the OAG without the requisite independence. More specifically, the Chapter examines the various constitutional, statutory and policy provisions on the establishment of the ODPP, the independence, and the accountability of the ODPP: the local legal framework and the various institutions created therein, the regional legal and institutional framework, and finally the international legal framework including international guidelines on the establishment, roles and independence and accountability of prosecutors.

3.1 Independence of the ODPP

The DPP does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, nor shall he be under the direction or control of any person or authority.[130] This provision lays the basis of the independence of the ODPP, the DPP and the individual prosecutors in the ODPP. Flowing from this, the ODPP Act, a normative derivative of the Constitution[131] emphasizes the independence of the DPP: the DPP shall neither require the consent of any person or authority for the

[130] Article 157(10) of the Constitution.
[131] Article 157 of the Constitution.

commencement of criminal proceedings[132], nor be under the direction or control of any person or authority in the exercise of his or her powers or functions[133], except be subject only to the Constitution and the law.[134] Accordingly therefore, the DPP is insulated, at least in the law, from external forces including political influence. It is essential that prosecutors have sufficient independence or autonomy to take their decisions regardless of any outside pressure, in particular from the executive power of the State. Where such pressures can be and are brought the prosecutor will not be able to protect the interests of justice, will not be able to respect the rule of law or human rights, and will be powerless to deal effectively with cases of corruption or abuse of State power.[135] The independence of the DPP in exercising State powers of prosecution was asserted in the case of ***Uwe Meixner & Another v Attorney General***[136]in which the Court of Appeal at Mombasa (Omolo, Tunoi & Githinji, JJA) expressed itself as hereunder:

> "… The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully." [Emphasis mine]

This position has been followed by several subsequent decisions of superior courts in Kenya. For example, in ***Kenya Commercial Bank Limited & 2 Others v Commissioner of Police and Another***[137] **Majanja J**. in reiterating this independence of the DPP held that:

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[132] Section 6(a) of the ODPP Act.
[133] Section 6(b) of the ODPP Act.
[134] Section 6(c) of the ODPP Act.
[135] Speech of the President of the International Association of Prosecutors, James Hamilton, at the opening ceremony of the 18th Annual Conference of the International Association of Prosecutors, on the theme "The Prosecutor and the Rule of Law", held in Moscow from 8th to 12th September 2013.
[136] Civil Appeal No. 131 of 2005; [2005] eKLR; [2005] 2 KLR 189 (being an Appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Maraga J) dated 20th April, 2005 in Misc. Civil Application Nos. 222 of 2005 and 223 of 2005
[137] Nairobi Petition No. 218 of 2012; [2013] eKLR.

> "The office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution." [Emphasis mine]

An independent prosecution authority that is free from political interference is fundamental to any democracy's criminal justice system. This is because the prosecution authority wields substantial power and discretion to prosecute cases, or not, and are required to provide objective, a-political, non-arbitrary decision-making in the application of criminal law and policy to real cases.[138] In its essence, the prosecution service is responsible for law enforcement and upholding the rule of law. A weak or compromised prosecution service can place the rule of law in grave danger and those that head up the prosecution service must be without doubt above reproach. Thus, in order for prosecution services to operate justly, the legislation and policy they are bound by, which ultimately determines its structure and functions, should guarantee its independence.[139]

The independence of the ODPP is central to the criminal justice system in Kenya. Indeed the ODPP is independent from any person, natural and or juristic. As already discussed in Chapter 3, the independence of the DPP is expressly entrenched in the Constitution: the DPP shall not be shall not be under the direction or control of any person or authority; neither shall he require the consent of any person or authority for the commencement of criminal proceedings, nor be under

[138] Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, Muntingh, L., Redpath, J. & Petersen, K. (2017) 'An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future,' Bellville: ACJR, p.9.

[139] Muntingh, L., Redpath, J. & Petersen, K. (2017) 'An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future,' Bellville: ACJR, p.7.

the direction or control of any person or authority in the exercise of his or her powers or functions.[140] This independence of the DPP under the [current] Constitution is an important departure from the Old Constitution under which State powers of prosecution were vested in the AG.[141] While the AG was expected to act independently, he was not immune to the centralization of the government around the presidency that incrementally took place from 1963 to the late 1990s. In fact, while the independence Constitution had provided for security of tenure for the AG, the 1986 and 1988 Constitutional amendments deleted that security of tenure.[142] Kenya's political practices made real independence impossible. In furtherance of the constitutional provision, the ODPP Act gives the ODPP the requisite operational, administrative and financial autonomy to secure its constitutional independence.

3.1.1 Process of Appointment of the DPP

Just like appointment procedures impact directly upon the independence and impartiality of the judiciary, such procedures go to the root of the independence of the DPP and the ODPP. An appointment process involving the executive branch and representation of the legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in view of the risks of politicization of the prosecution service, it is important to provide transparency in the appointment process. Clear criteria for appointment to office should be established. Vacancies should be advertised and suitable candidates invited to

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[140] Article 157(10) of the Constitution and section 6 of the ODPP Act.

[141] Section 26 of the Old Constitution vested State powers of prosecution in the AG including the powers to institute criminal proceedings, to take over prosecutions initiated privately, to enter *nolle prosequi* on any matters instituted or being prosecuted by him or by any other person or authority, and to require the Police Commissioner to investigate any matter which related to the commission of a criminal offence – the AG, though

[142] See Korwa Adar and Isaac Munyae, "Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001" (2001) 5(1) African Studies Quarterly 1. Adar and Munyae write:

> The 1986 and 1988 constitutional amendments provided for the removal of the security and tenure of the Attorney General, the Controller and Auditor General, the judges of the High Court and the Court of Appeal. Parliament, which at this time was under the control of the executive arm of the government, did not resist these amendments. The control of parliament and the judiciary meant that the office of the president was in a position to manipulate the functions of the two branches of the government. Both Parliament and the Judiciary ceased to have the constitutional rights to control the excesses of the executive. There were no checks and balances on Moi's personal authority.

apply. There should be input into the selection process from suitably qualified persons with suitable expertise and of high reputation.[143] It is imperative that the appointment procedures for the DPP conform to, and are seen to conform to, international standards on prosecutorial independence since the legitimacy and credibility of the ODPP depends upon public confidence in its independence.[144] This calls for compliance with the set objective and transparent criteria based on proper professional qualification[145] to ensure that the DPP appointed has the requisite skills and abilities to discharge his mandate. Compliant recruitment procedures help to protect the independence of prosecutors.[146]

The Constitution[147] and the ODPP Act[148] provide for a robust and rigorous process for the appointment of the DPP. The process starts off with the nomination of the DPP, with the approval of the National Assembly (hereafter TNA) and finally formal appointment by the President.[149] Whenever a vacancy arises in the ODPP, the President shall within 14 days constitute a selection panel comprising one person from the Office of the President, the OAG, the Ministry responsible for Public Service, the Kenya National Commission on Human Rights (hereafter the KNCHR), the Law Society of Kenya (hereafter the LSK), the Central Organizations of Trade Unions (COTU), and the Ethics and Anti-corruption Commission (EACC).[150] The PSC shall kick off the process by convening the first meeting of the selection panel, at which the members of the selection panel shall elect a chairperson from among their

[143] The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide.
[144] "Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights" accessed at https://www.corteidh.or.cr/tablas/32795.pdf on 17th October 2020.
[145] Article 157(3) of the Constitution: to be eligible for appointment as a DPP, the prospective DPP must have the qualifications similar to those for the appointment as a judge of the High Court. These include at least 10 years' experience as a superior court judge or professionally qualified magistrate, or at least 10 years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field, or having had experience both as a superior court judge or professionally qualified magistrate and as a distinguished academic or legal practitioner or other relevant legal for a cumulative period of ten years.
[146] *Ibid*.
[147] Article 157(2) of the Constitution.
[148] Section 8 of the ODPP Act.
[149] Article 157(2) of the Constitution.
[150] Section 8(1) of the ODPP Act.

number and providing the selection panel with such facilities and other support as it may require for the discharge of its functions.[151]

The selection panel shall, within 7 days of convening, by advertisement in at least 2 daily newspapers of national circulation, invite applications from persons who qualify for nomination and appointment for the position of the DPP.[152] The selection panel shall within 14 days consider the applications received to determine compliance with the Constitution, shortlist the applicants; publish the names of the shortlisted applicants and qualified applicants in at least two daily newspapers of national circulation; conduct interviews of the short listed applicants; shortlist three successful applicants in the order of merit; and forward the names to the President.[153]

The President shall, within 14 days of receipt of the names of successful applicants, select one candidate and forward the name of the person so selected to the National Assembly (hereafter the NA) for approval.[154] TNA shall, within 21 days of the day it next sits after receipt of the name of the applicant, vet and consider the nominee, and may approve or reject him or her.[155] Where TNA approves of the nominee, the Speaker of TNA shall forward the name of the approved nominee to the President for appointment.[156] The President shall, within 7 days of receipt of the approved nominee's name from TNA, by notice in the Gazette, appoint the DPP approved by TNA.[157] Where however TNA rejects the nomination, the Speaker shall within 3 days communicate its decision to the President and request the President to submit a fresh nomination within 21 days.[158]

[151] Section 8(2) of the ODPP Act.
[152] Section 8(3) of the ODPP Act.
[153] Section 8(4) of the ODPP Act.
[154] Section 8(5) of the ODPP Act.
[155] Section 8(6) of the ODPP Act.
[156] Section 8(7) of the ODPP Act.
[157] Section 8(8) of the ODPP Act.
[158] Section 8(9) of the ODPP Act.

The BBI[159] proposes that the qualifications for appointment as DPP be raised from the equivalence of those of a Judge of the High Court to those of appointment of a judge of the Court of Appeal.[160] Accordingly therefore, the BBI proposes that for a person to be appointed as a DPP, the person will have to be a holder of a law degree from a recognized university, or be an advocate of the High Court of Kenya, or a person possessing an equivalent qualification in a common-law jurisdiction[161]; have at least 10 years' experience as a superior court judge[162] or at least 10 years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field[163], or have experience as a superior court judge[164] and as a distinguished academic or legal practitioner or such experience in other relevant legal field the qualifications for a period amounting, in the aggregate, to 10 years[165]; and have a high moral character, integrity and impartiality.[166] This recommendation, while not much different from the current qualifications, puts the DPP at a higher pedestal than High Court judges in the pecking order.

3.1.2 Security of Tenure for the DPP

The DPP shall hold office for a term of 8 years and shall not be eligible for re-appointment.[167] The import of this is that once appointed, the DPP shall remain in office for the entire term of office being the period of 8 years. The DPP can therefore not be removed from office except on proof of the grounds permissible by law. The DPP can only be removed from office on the grounds of inability to perform the functions of office arising from mental or physical incapacity, non-compliance with Chapter 6, bankruptcy, incompetence or gross misconduct or

[159] The Report of the Steering Committee on the Implementation of Recommendations of the Building Bridges to a United Kenya Taskforce.
[160] Clause 30 of the Bill.
[161] Article 165(2) (a) of the Constitution of Kenya.
[162] Article 166(4) (a) of the Constitution of Kenya.
[163] Article 166(4) (b) of the Constitution of Kenya.
[164] Article 166(4) (a) of the Constitution of Kenya.
[165] Article 166(4) (c) of the Constitution of Kenya.
[166] Article 166(2) (c) of the Constitution of Kenya.
[167] Article 157(5) of the Constitution.

misbehaviour.[168] With this legal security of tenure, the DPP can make his decisions without the fear of removal resulting from those that are not happy with his decisions whether or not to charge.

One of the problematic results of the recommendation by the BBI Bill to establish the ODPP as an independent office is that while the Constitution as is provides the DPP a term of office of 8 years[169], categorizing him as an independent officeholder would raise questions as to whether the DPP retains the 8 year term or is then subject to the term of office for independent office holders which is pegged at a single term of 6 years without eligibility for re-appointment.[170] Hopefully, this is a matter that the BBI team shall pick up or further consideration for harmonization.

3.1.3 Remuneration of the DPP and Officers of the ODPP

The Guidelines on the Role of Prosecutors recommend that reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.[171] In compliance, the ODPP Act prescribe the conditions of service of the DPP[172] to the effect that the remuneration, allowances and other terms and conditions of service of the DPP shall be determined by the Salaries and Remuneration Commission (SRC).[173] Relatedly, the DPP is has the power to determine the terms of service for the other members of staff of the ODPP subject only to the advice of the SRC. More importantly, the law prohibits the variation and or review of the remuneration and benefits

[168] Article 158(1)) of the Constitution. A person desiring the removal of the DPP may present a petition to the PSC which, shall be in writing, setting out the alleged facts constituting the grounds for the removal of the DPP. The PSC shall consider the petition and, if it is satisfied that it discloses the existence of a ground, it shall send the petition to the President.

[169] Article 157(5) of the Constitution.

[170] Article 250(6) (a) of the Constitution of Kenya

[171] Guidelines on the role of the public prosecutor adopted at the 8th Congress of United Nations for prevention of the criminality and the treatment of perpetrators, Havana, Cuba27 August –7 September 1990.

[172] Section 35 of the ODPP Act.

[173] The SRC is established under Article 230 of the Constitution.

payable to the DPP, Prosecution Counsel and other Staff and their retirement benefits to their disadvantage during their lifetime.[174]

3.1.4 State Powers of Prosecution

By vesting on the DPP the State powers of prosecution including the power to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed[175], to 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[176], and to discontinue[177] at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP,[178] the Constitution cements the independence of the DPP and the ODPP as the decision on who to charge with what offence in Kenya. As a result, the DPP has full control of all criminal proceedings in Kenya and does not rely on the advice of anyone.

In a move that is reported to be intended to enhance the independence and budgetary autonomy of the ODPP,[179] the BBI Bill proposes to amend the Constitution[180] to add the ODPP as an independent office alongside the offices of the Auditor-General and the Controller of Budget. With the BBI recommendation, not only will the DPP be independent in the commencement of criminal proceedings and in the exercise of his or her powers or functions but will also be 'structurally' independent by dint of institutional independence. As a holder of an independent

[174] Section 36 of the ODPP Act.
[175] Article 157(6) (a) of the Constitution.
[176] Article 157(6) (b) of the Constitution.
[177] Subject to Article 157(7) and (8) of the Constitution.
[178] Article 157(6) (c) of the Constitution.
[179] Clause 62 of the Bill.
[180] Article 248(3) of the Constitution.

office, the DPP shall be subject only to the Constitution and the law[181], and shall be independent and not subject to direction or control by any person or authority.[182] This is in tandem with, and is a restatement of, the independence of the DPP under the Constitution, as is currently.[183]

3.1.5 Power to Make Appointments and Delegate Prosecutorial Authority

The DPP may exercise his powers in person or by subordinate officers acting in accordance with general or special instructions.[184] Further, the ODPP obligated to ensure reasonable access to its services in all parts of the Republic.[185] Accordingly, the ODPP has power to appoint[186], control and supervise its staff in a manner and for such purposes as may be necessary for the promotion of the purpose and the object for which the ODPP is established.[187] The DPP has the power to appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases; and or to appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case all of whom shall be subject to his express directions.[188] The DPP has also appointed regional and county heads to head the various stations of the ODPP: Regional Heads of the ODPP representing the former Regions equivalent to the former provinces[189] and County and Sub-County Heads who are in charge of the respective county and sub-county ODPP offices.[190] This power of appointment enables the DPP to be in control and updated of all the criminal prosecutions across the country thus promoting the DPP's independence.

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[181] Article 249(2) (a) of the Constitution of Kenya.
[182] Article 249(2) (b) of the Constitution of Kenya
[183] Section 6(c) of the ODPP Act.
[184] Article 157(9) of the Constitution and section 20 of the ODPP Act.
[185] Article 6(3) of the Constitution as read with section 14(1) of the ODPP Act.
[186] All public prosecutors appointed under the ODPP Act are under the immediate superintendence and control of the DPP or such other officer as the DPP may designate for better management and coordination of prosecution services. The DPP may, by a directive under his hand designate an officer subordinate to him to be in charge of prosecution services in one or more counties as the DPP may specify which officer shall have jurisdiction throughout the counties specified by the DPP.
[187] Section 13(2) of the ODPP Act.
[188] Section 85 of the Criminal Procedure Code.
[189] The ODPP Regional Offices include
[190] See Chapter 4 for more details on the principles under both the Constitution and Statute.

3.1.6 Power to Direct the Inspector General of Police

The DPP has the power to direct the IG of the NPS to investigate any information or allegation of criminal conduct and the IG shall comply with any such direction.[191] Upon receipt of such directions, the IG may direct the DCI to execute the directions given to the IG by the DPP.[192] There is therefore a clear chain of command set out hereinabove. The power grants the DPP an investigatory role in terms of directing the DCI on the areas to cover during investigations and the nature of evidence needed to prove a particular fact or case beyond reasonable doubt. Relatedly, the DPP and other public prosecutors are required to, in order to ensure the fairness and effectiveness of prosecution, cooperate with the NPS, the courts, the legal profession and other government agencies or institutions.[193] The IG of the NPS and other investigative agencies also have a duty of disclosure to the DPP as regards all material facts and information collected in the course of an investigation that may be reasonably expected to assist the case of prosecution or defence.[194] The DPP accordingly has independence as far as the review of the facts and material facts in the inquiry files are concerned. The DPP is not bound by any of the recommendations by the investigative agencies. Not all such investigations shall lead to a prosecution. The DPP reserves the right to make the decision to charge or not.

3.1.7 Duty to Cooperate

All State and public organs and the officers therein are obligated to cooperate with the DPP in the exercise of his powers and discharge of functions including the obligation to respond to any inquiry by the DPP, to comply with his lawful directions and to furnish him with such

[191] Article 157(4) of the Constitution.
[192] Section 35(h) of the NPS Act.
[193] Section 14(6) of the ODPP Act.
[194] Section 26 of the ODPP Act.

information as the DPP may require to discharge his or her functions. It is actually criminal[195] not to cooperate to the extent identified.[196]

3.1.8 Insulation from Undue Influence

The ODPP Act expressly criminalizes the exercise of undue influence over the DPP and or any other member of staff of the ODPP. Any person who exercises or attempts so to exercise such undue influence which is calculated to prevent the DPP or other officer or member of staff from carrying out his duties or encouraging him or her to perform any act which is in conflict with his duties commits an offence punishable by upto 3 years imprisonment.

3.1.9 The Prosecutions Fund

There is established the Prosecutions Fund[197] within the ODPP whose sources of finance for the Fund include allocations by National Assembly, grants and donations and any other source as may be approved from time to time by the DPP and which is utilized for purposes including the enhancement of the operational capacity of the ODPP, the welfare of the personnel and any activity approved by the ODPP. This then helps to promote the financial independence of the ODPP.[198][199]

3.1.10 Protection from Personal Liability

Neither the DPP nor any member of the staff of the ODPP may be rendered personally liable to any action, claim or demand whatsoever for any matter and or thing done as long as the same

[195] Any public officer or State officer who fails to cooperate as prescribed is liable on conviction, to imprisonment for a term not exceeding one year or to a fine not exceeding three hundred thousand shillings or to both; and the such officer may in addition be subjected to the relevant disciplinary procedures.
[196] Section 27 of the ODPP Act.
[197] Section 45 of the ODPP Act.
[198] Section 45 of the ODPP Act.
[199] The Fund shall be administered and managed in accordance with the law regulating matters of public finance.

was done in good faith in the execution of the functions, powers or duties of the ODPP.[200] It's therefore interesting to see how the High Court shall determine the case in ***Okiya Omtatah Okoiti v The Director of Public & 4 Others***[201] in which the Petitioner has included the DPP in two capacities: the 1st Respondent in his capacity as the DPP and 2nd Respondent in his private capacity for allegedly abusing his powers by entering secret deals with commercial banks, and fining and setting them free outside the court process. He has also been sued for misusing public funds by donating two (2) billion shillings to the Covid-19 Emergency Fund. It's my view that the joinder of the DPP in his personal capacity is a legal misadventure considering the protection from personal liability. Such immunity is intended to allow the DPP to carry out his mandate without the fear of possible suits against him in his private capacity.

3.1.11 Rigorous Process for Removal

Prosecutorial independence is entrenched where there exist protections in relation to removability and promotion, discipline and dismissal.[202] The President shall**,** on receipt and examination of the petition, within 14 days, suspend the DPP from office pending action by the President and shall, acting in accordance with the advice of the PSC, appoint a tribunal consisting of four members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such[203], one advocate of at least fifteen years' standing nominated by the statutory body responsible for the professional regulation of advocates[204]; and two other persons with experience in public affairs.[205] The tribunal shall inquire into the matter expeditiously and report on the facts and make recommendations to the President, who shall act in accordance with the recommendations of the tribunal.[206] The tribunal

[200] Section 15 of the ODPP Act.
[201] Petition E293 of 2020.
[202] *Ibid*.
[203] Article 158(4)(a) of the Constitution.
[204] Article 158(4)(b) of the Constitution.
[205] Article 158(4) (c) of the Constitution.
[206] Article 158(5) of the Constitution.

shall elect a chairperson from among its members[207], and be responsible for the regulation of its proceedings.[208] A DPP who is suspended from office is entitled to half of their remuneration until removed from, or reinstated in, office.[209] The DPP may resign from office by giving notice, in writing, to the President.[210] The notice shall be for a period of 1 month.[211] The resignation shall only take effect upon receipt and acceptance, in writing, by the President.[212]

The BBI Bill for the amendment of the Constitution of Kenya, 2010 proposes to repeal Article 158 of the Constitution which deals with the removal and resignation of DPP to align the same with the removal and or resignation of holders of other independent offices – the Auditor-General and the Controller of Budget.[213] With the Bill recommending that the ODPP becomes an independent office, the process for removal of the DPP would then be that provided for the removal of holders of independent officers under Article 251 of the Constitution. A holder of an independent office may be removed from office only for serious violation of this Constitution or any other law, including a contravention of Chapter 6,[214] gross misconduct, whether in the performance of the office holder's functions or otherwise,[215] physical or mental incapacity to perform the functions of office holder's functions of office,[216] incompetence[217] and or bankruptcy.[218] Under the BBI proposals, a person desiring the removal of the DPP – an independent office holder - may present a petition to TNA setting out the alleged facts constituting that ground.[219] TNA would then consider the petition and, if it is satisfied that it

[207] Article 158(7) of the Constitution.
[208] Article 158(8) of the Constitution.
[209] Article 158(6) of the Constitution.
[210] Article 158(9) of the Constitution.
[211] Section 10(1) of the ODPP Act.
[212] Section 10(2) of the ODPP Act.
[213] Clause 31 of the Bill.
[214] Article 251(1) (a) of the Constitution of Kenya.
[215] Article 251(1) (b) of the Constitution of Kenya.
[216] Article 251(1) (c) of the Constitution of Kenya.
[217] Article 251(1) (d) of the Constitution of Kenya.
[218] Article 251(1) (e) of the Constitution of Kenya.
[219] Article 251(2) of the Constitution of Kenya.

discloses a ground for removal, shall send the petition to the President.[220] On receiving such a petition, the President may suspend the DPP pending the outcome of the complaint and shall appoint a tribunal[221] which shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within 30 days.[222]

3.2 Prosecutorial Accountability of the ODPP

The DPP in exercising the powers conferred on the ODPP shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.[223] In as much as the constitution decrees the independence of the DPP and the ODPP to be able to function effectively and efficiently, there is also the equal need to have in place an accountability mechanism to ensure that the DPP and his officers operate within the Constitution and the law and that independence is not abused and that the exercise of the functions and the powers of the ODPP are in consonance with the dictates of the constitution and the law. Effective prosecutorial accountability contributes to the empowerment of the public. Accountability is an acknowledgement that prosecution services derive their powers from the state, which in turn derives its powers from the people.

3.2.1 Accountability to the Constitution and the Law

The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.[224] State authority – including State powers of prosecutions - must

[220] Article 251(3) of the Constitution of Kenya.
[221] Article 251(4) of the Constitution of Kenya.
[222] Article 251(6) of the Constitution of Kenya. The tribunal shall consist of a person who holds or has held office as a judge of a superior court, who shall be the chairperson; at least 2 persons who are qualified to be appointed as High Court judges; and one other member who is qualified to assess the facts in respect of the particular ground for removal.
[223] Article 157(11) of the Constitution.
[224] Article 2(1) of the Constitution.

only be exercised as authorized under Constitution.[225] The DPP, being a State officer, is in the exercise of the State powers of prosecution, indeed bound by the national values and principles of governance including the rule of law, human rights, integrity, and transparency and, more importantly for this study, accountability.[226] However, it must be stressed that the DPP is only subject to the Constitution and the law.[227] Accordingly, the DPP and officers under him must always weigh any of their actions in the performance of their functions against the provisions of the Constitution and the law. Any such act or omission in contravention of the Constitution would accordingly be invalid.[228] The DPP is obligated to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.[229]

3.2.2 Accountability to the People of Kenya

Prosecutors must strive to see themselves as 'lawyers for the people'.[230] The DPP must also be accountable to the people of Kenya in the exercise of his mandate as all sovereign power belongs to the people which power must be exercised only in accordance with the Constitution.[231] As regards the State powers of prosecution relating to the taking over and discontinuance of cases, the DPP, in contrast to the old order, can only take over a criminal suit with the permission of the person or authority who instituted it.[232] In addition, the DPP can only discontinue a prosecution with the permission of the court.[233]

[225] Article 2(2) of the Constitution.
[226] Article 10 of the Constitution.
[227] Section 6(c) of the ODPP Act.
[228] Article 2(4) of the Constitution.
[229] Article 157(11) of the Constitution of Kenya, 2010.
[230] B Ngcuka, NDPP, speaking at South Africa's first National Public Prosecutors' Conference, August 1998.
[231] Article 1(1) of the Constitution.
[232] Article 157(6) (b) of the Constitution.
[233] Article 157(6) (c) of the Constitution.

3.2.3 Financial Accountability

3.2.3.1 Financial Estimates to the National Assembly

At least three months before the commencement of each financial year, the ODPP must prepare, review and forward to the National Assembly its estimates of the revenue and expenditure for that year for tabling and approval.[234] The annual estimates shall make provision for all the estimated expenditure for the financial year including the payment of the salaries, allowances and other charges in respect of staff, the payment of pensions, gratuities and other charges and in respect of benefits which are payable out of its funds, the maintenance of its buildings and grounds, the funding of training, research and development of activities, the creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the ODPP may think fit.[235]

3.2.3.2 ODPP's Accounts and Audit

The ODPP is by law obligated to keep all proper books and records of account of its income, expenditure, assets and liabilities.[236] The ODPP must, within a period of three months after the end of each financial year, submit to the Auditor-General its accounts in respect of that year together with a statement of the income and expenditure during that year[237], and a statement of the assets and liabilities on the last day of that financial year.[238] The annual accounts of the ODPP must be prepared, audited and reported upon in accordance with the provisions of the Constitution and the Public Audit Act.[239]

[234] Section 43(1) of the ODPP Act.
[235] Section 43(2) of the ODPP Act.
[236] Section 44(1) of the ODPP Act.
[237] Section 44(2) (a) of the ODPP Act.
[238] Section 44(2) (b) of the ODPP Act.
[239] Section 44(3) of the ODPP Act.

3.2.4 Reports to the President and Parliament

3.2.4.1 General Annual Reports to the President and Parliament

As part of the ODPP's accountability requirements, the DPP is obligated to submit a report to the President and Parliament on the performance and overall fulfilment of the object and purpose of the office under the Constitution, the ODPP Act and any other written law soon as practicable after the end of each financial year.[240] In addition, the President, the National Assembly and or the Senate may at any time require the DPP to submit a report on a particular issue; on a need basis to present a report to Parliament on a matter of national or public interest.[241] Every such report required from the DPP shall be published and publicized.[242][243] The DPP is also required to prepare such other reports as may be required under any other written law.[244]

3.2.4.2 Annual Reports under the Anti-Corruption and Economic Crimes Act[245]

The Anti-Corruption and Economic Crimes Act[246] (hereafter the ACECA) obligates the DPP to prepare an annual report with respect to prosecutions of corruption or economic crime[247] which report shall include a summary of the steps taken, during the year, in each prosecution and the status, at the end of the year, of each prosecution.[248] The report shall also indicate if a recommendation of the Ethics and Anti-Corruption Commission (EACC)[249] to prosecute a

[240] Section 7(1) of the ODPP Act.
[241] Section 7(2) of the ODPP Act.
[242] Section 7(3) of the ODPP Act.
[243] Examples of compliance by the DPP include on 5th December 2018, when the DPP and DCI appeared before the Senate Justice and Legal Affairs Committee to shed light on the war against Corruption at Parliament; on 13th June 2018, the DPP appeared before the Senate Committee on Justice, Legal Affairs and Human Rights regarding the rampant corruption in the country; on 27th June 2019; and on 25th March 2020, the DPP appeared before the Senate Justice and Legal Affairs Committee alongside the DCI and the IGP for an audit of the perceived or real breakdown between the DCI and DPP following a standoff in court between the DPP and the DCI relating to the KPA Managing Director.
[244] Section 7(4) of the ODPP Act.
[245] Anti-Corruption and Economic Crimes Act, No. 3 of 2003.
[246] Act No. 3 of 2003
[247] Section 37(1) of the ACECA.
[248] Section 37(3) of the ACECA.
[249] Section 36 of the ACECA obligates the EACC to prepare quarterly reports setting out the number of reports made to the DPP under section 35 of the Act and such other statistical information relating to those reports as the

person for corruption or economic crime was not accepted in which case the reasons for not accepting the recommendation shall be set out succinctly.[250]

3.2.5 Accountability in the Exercise of State Powers of Prosecution

As already indicated in the early stages of this study, State powers of prosecution vested in the AG prior to 2010.[251] Many prosecutions were dropped along the way as there was no regulation of the State powers of prosecution. This resulted in the law being used to persecute innocent citizens, to the detriment of the legitimacy of the criminal justice system. Many times the power was applied selectively with perpetrators of crimes including against human rights hardly ever prosecuted.[252] This position has changed with the new Constitution putting in place mechanisms to enhance objectivity and accountability in the exercise of State powers of prosecutions. Of course the DPP in making the decision to charge must ensure that such prosecution is in the public interest, the interests of the administration of justice and does not amount to an abuse of the legal process.[253] The ODPP Decision to Charge[254] gives the guidelines for making the decision to institute charges. In addition, presently, the DPP can only take over a prosecution or appeal with the permission of the person or authority who instituted it[255] in addition to the legal requirement to give notice in writing to the Magistrate before whom the matters is being heard or the Registrar and the affected persons, indicating his intention to take over the matter.[256] Finally, as regards discontinuance, the DPP must seek the permission of the court to discontinue a prosecution.[257]

Commission considers appropriate. The report shall indicate if a recommendation of the EACC to prosecute a person for corruption or economic crime was not accepted.

[250] Section 37(4) of the ACECA.

[251] Akech, M. Institutional Reform in the New Constitution of Kenya; ICTJ: Nairobi, Kenya, 2010 accessed on https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf

[252] CIPEV Report, 455.

[253] Article 157(11) of the Constitution.

[254] The DTC was launched together with the ODPP e-Case Management on the 28th July 2020.

[255] Article 157(6) (b) of the Constitution.

[256] Section 24(1) of the ODPP Act.

[257] Article 157(8) of the Constitution and section 25 (1) of the ODPP Act.

3.2.6 National Values and Principles of Governance

The DPP and the ODPP, just like other State Officers and organs, are subject to the authority of the constitution. The DPP is accountable to the people and the Constitution and is bound by the national values and principles of governance whenever he applies or interprets the constitution, the law and or implements public policy decisions.[258] These values and principles include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and most importantly accountability. Further, the DPP must have due regard to public interest, promote the interest of justice, apply national values and principles of good governance, promote the rule of law.[259] He is expected to work diligently without any discrimination, abuse of power/office and free from any direction, control or influence from any quarters.

3.2.7 Guiding Principles

The ODPP is in the fulfilling of its mandate guided by the Constitution and a number of fundamental principles including the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the ODPP, the need to discharge its functions on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and the promotion of constitutionalism.[260][261] A public prosecutor shall, in the performance of his duties, observe the

[258] Article 10 of the Constitution.

[259] Article 157(10) of the Constitution.

[260] Section 4 of the ODPP Act, No. 2 of 2013.

[261] These principles are amplified in the ODPP Strategic Plan 2016 – 2021 which reiterates that in discharging its mandate, the ODPP is guided by the Constitution the fundamental principles including diversity of the people of Kenya; impartiality and gender parity; observance of the rules of natural justice; promotion of public confidence in the integrity of the Office; the discharge of functions of the Office on behalf of the people of Kenya; the need to

guiding principles[262], carry out his functions impartially and avoid discrimination on any ground including race, gender, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth, protect the public interest, act with objectivity, take account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect, keep matters in the possession of the prosecutor confidential, unless the performance of a duty or the needs of justice require otherwise; and consider the views and concerns of a victim where necessary.[263]

3.2.8 Hierarchy in the ODPP

The hierarchy of officers in the ODPP ensures a reporting structure in which junior officers are under the supervision of senior officers. Such junior officers are therefore expected to work under the guidance of the senior officers which then creates an accountability mechanism as the junior officers have to meet the tasks as set by their supervisors. The hierarchy is comprised of the DPP at the very top, the Secretary of Prosecution Services (hereafter the SPP), the Deputy Directors of Public Prosecutions (DDPPs), Prosecution Counsel (PC), technical staff, and such other members of staff of the ODPP as the DPP may appoint from time to time.[264] These officers assist the DPP in the execution of his powers and functions perform their functions subject to superintendence, directions and control of the DPP.[265]

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serve the cause of justice, prevention of abuse of the legal process and public interest; protection of the sovereignty of the people; secure the observance of democratic values and principles; and promotion of constitutionalism.

[262] Section 4 of the ODPP Act.

[263] Section 14(5) of the ODPP Act.

[264] Section 13(1) of the ODPP Act.

[265] Section 12 of the ODPP Act.

3.2.9 The ODPP Advisory Board

There is established an advisory Board to the Office[266][267] whose functions include advising the ODPP on recruitment and appointment of members of staff, promotions, discipline, and any other matters that may be referred to the Board by the DPP.[268] Accordingly therefore, the Board is an important cog in the accountability mechanism of the ODPP.

3.2.10 The ODPP Inspectorate

On 20th June 2019, the DPP, pursuant to the provisions of the ODPP Act,[269] appointed a Taskforce[270] on the establishment and operationalization of the ODPP Inspectorate with the mandate to, among others, make recommendations on the establishment and operationalization of the ODPP Inspectorate and formulate guidelines for inspection of the ODPP operations. The Inspectorate is intended to provide an independent expert assessment of the activities of the ODPP and its quality of work. The Inspectorate shall support the DPP by monitoring and reviewing its performance by taking an independent view of the activities thereof thereby enhancing the performance. The Inspectorate shall advise the DPP on the implementation of its recommendations and make follow ups, as appropriate, to ensure that the recommendations are fully addressed and that the ODPP has full regard to the recommendations of the Inspectorate and that the quality of prosecution operations is of the highest standards possible. By making sure that the information made available to the public and other stakeholders is reliable, the Inspectorate shall enable them to make informed judgements about the quality of prosecution operations and the future prospects for better service delivery. The overall objective is to make individual prosecutors and the ODPP collectively accountable and responsible to the needs of the

[266] Section 16(1) of the ODPP Act.
[267] The Board consist of the Principal Secretary for the time being responsible for matters relating to public service, the DPP as the chairperson[267] thereto, the AG, the Principal Secretary for the time being responsible for Treasury, the Chief Registrar of the Judiciary, LSK chairperson, the Director, Witness Protection Agency (WPA), KNCHR chairperson, and the IG of the NPS.
[268] Section 17(1) of the ODPP Act.
[269] Section 52 of the ODPP Act.
[270] Kenya Gazette Notice No. 5718 dated 28th June 2019.

public.[271] The appointment of the Taskforce was however challenged before the High Court by Chama Cha Mawakili Company Limited[272] for reasons *inter alia* that the appointment of Bernard Chunga as the Taskforce Chairperson was an insult to Kenyans and a plain violation of the Constitution.[273] Mr. Chunga later turned down his said appointment to the Taskforce.[274] The Inspectorate

3.2.11 The ODPP Internal Policy Framework

Towards the continued professionalization of the prosecution services and to promote accountability among individual prosecutors, the ODPP has developed and continues to develop, review and or operationalize a number of policy documents including the National Prosecution Policy (hereafter the NPP), the Guidelines on the Decision to Charge, the ODPP Excellence Charter[275], the General Prosecution Guidelines, the Plea Bargaining and Diversion Guidelines, the Guidelines on Deferred Prosecutions (DPAs), the Organizational Structure Manual[276], the ODPP Career Progression Guidelines[277], Strategic Plans[278], Human Resource Manual[279], the Code of Conduct and Ethics for Public Prosecutors, the ODPP Communication Strategy[280], the ODPP ICT Strategy Framework[281], and the various ODPP Guidelines on specific thematic areas touching on the ODPP's mandate including the Corruption and Economic Crimes Prosecution Guidelines, Sexual Offences among others.[282]

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[271] Section 5 of the proposed Prosecution Operations Inspectorate and Guidelines Regulations 14th April, 2020.
[272] *Chama Cha Mawakili Limited v Noordin Haji, Director of Public Prosecutions & 4 Others*, Nairobi High Court Constitutional Petition No. 267 of 2019
[273] https://kenyainsights.com/lawyers-moves-to-block-bernard-chungas-appointment/.
[274] https://www.nation.co.ke/news/Chunga-declines-DPP-Haji-job-offer/1056-5188198-psnx5/index.html.
[275] "The Excellence Charter: *Our Strategic Commitments*" developed to drive fundamental reforms in the ODPP for the period between 2020 – 2023 and with the aim to transform the ODPP into a prosecution service which is more responsive to the needs of *Mwananchi*.
[276] The ODPP Organizational Structure Manual, 2012.
[277] The ODPP Career Progression Guidelines, 2012.
[278] ODPP Strategic Plans 2011 – 2015; and 2016 – 2021.
[279] The ODPP Human Resource Manual, 2012.
[280] The ODPP Communication Strategy, 2012.
[281] The ODPP ICT Strategy Framework, 2013.
[282] Clause 3.2.3 of the ODPP Strategic Plan, 2016 -2021.

3.2.13 The Prosecutions Training Institute (PTI)[283]

The 21st Century prosecution service depends on highly trained and adaptable workforce. It is therefore important to re-engineer ODPP operations by equipping staff with the requisite skills and capabilities for delivery of our mandate within a global context. Staff will be expected to learn how to build on internal strengths and to adopt international best practices. The Prosecutions Training Institute (PTI) was established to provide continuous professional training, education and development to the members of staff in all aspects in Kenya and in the region. Relearning encompasses learning and culture change required to prepare for the future. In this regard ODPP staff will be equipped with the requisite skills necessary to deliver its mandate within a global context. The aim is to offer continuous professional development and adopt international best practices, principles and standards. In the long run, prosecutors are kept abreast of the changing trends in prosecutions and updated on the law and principles guiding prosecutions. This helps to improve accountability of individual prosecutors.

3.3 Conclusion

This Chapter has examined the legal, institutional and policy framework providing for the independence and accountability of the ODPP. The Chapter mainly argued and established that there are generally sufficient legal and policy provisions for the entrenchment of prosecutorial independence and enhancement of prosecutorial accountability of the ODPP. Having analysed the framework, the study makes a number of findings including that the Constitution of Kenya 2010 established the ODPP as an independent office that would not be under the direction of anyone in the exercise of the State powers of prosecution; the ODPP Act was enacted to give effect to Article 157 of the Constitution and it emphasises on the independence of the ODPP;

[283] The ODPP Excellence Charter identifies the Prosecutions Training Institute is one of the Strategic Focus of the ODPP between 2021 and 2023. Others include the fight against corruption, quality prosecutions, the Internal Compliance Unit, the Inspectorate Unit, Organized Crime and Counter Terrorism, facilitation of Victims of Crime and Witnesses, Case Management, Central Intake System, Research and Development and Inter Agency Collaboration. This Excellence Charter seeks to coordinate the implementation and realization of the strategic focus.

both the Constitution of Kenya 2010 under Article 157(11) and the ODPP Act have provisions aimed at ensuring the accountability of the officers of the ODPP in the exercise of their powers; and that there are also sufficient internal policy documents aimed at entrenching prosecutorial independence and enhancing prosecutorial accountability.

CHAPTER FOUR

SITUATIONAL ANALYSIS OF THE INDEPENDENCE AND ACCOUNTABILITY OF THE ODPP KENYA

4.0 Introduction

Having established that the application of the relevant constitutional and statutory provisions on prosecutorial independence and accountability is in variance with the actual situation in practice in Chapter 4, this chapter then identifies the various challenges to prosecutorial independence and accountability in Kenya. The main argument in this chapter is that the application of the law is in dissonance with the provisions of the law on the subject. The chapter identifies a number of situations in which the independence and accountability of the ODPP has been threatened including cases of overlap of mandates between the ODPP and the various other actors in the criminal justice system, the refusal of some actors in the criminal justice system to give up powers that have been vested to the ODPP post-2010 among other reasons. The Chapter concludes with the determination as to whether or not on the basis of the analysis in the chapter, the ODPP is indeed independent and or accountable and not just not on paper.

4.1 Challenges to the Independence of the ODPP

4.1.1 Appointment of the DPP

The appointment of the DPP by the President poses significant risks for the ODPP's independence: the President is many times more likely to appoint a person who is unwilling, where necessary, to prosecute members of the executive or the ruling party, or persons politically connected to them. The Constitution requires the president to nominate the DPP for approval by Parliament without establishing clear criteria for determining the suitability of nominees except

for the general qualifications in the Constitution.[284] The Constitution assumes that members of Parliament will actually play their roles and rigorously vet nominees for public office. But the absence of nomination criteria encourages horse-trading among the key political parties. Should this happen, it would greatly undermine the objective of the constitution of giving Kenya public servants who pass the integrity test.[285]

4.1.2 Political Interference: Are Prosecutions a Political Tool?

There have been, since 2010, situations when investigations and or prosecutions have been seen to be at worst politically instigated and at best politically aligned with members of a given section of the political divide loudly accusing the DPP (and or the investigative agencies including the DCI and or the EACC) of being used to push political agendas. For example, in 2019, some politicians allied to the Deputy President Dr. William Ruto dismissed the war on graft saying it was political witch-hunt meant to kill the Deputy President's 2022 political ambitions. The Deputy President was himself reported to have dismissed the prosecutions relating to the Arror and Kimwarer Multipurpose Dams' Projects[286] to be selective and targeting predetermined individuals and projects, and steamrolled by a narrative of convenient lies and falsehood and propaganda adding that the prosecution was not a fight against corruption but rather amounted to impunity and politics headed in the wrong direction. On the other hand, Senator Kipchumba Murkomen was reported to have termed the war against graft a charade; project that was being weaponized as a tool for 2022 political fights.[287] Of course such utterances impact negatively not only on the independence but also on the general performance of the ODPP as it negatively impacts on the public perception of the Office.

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[284] See Article 157(3) of the Constitution of Kenya, 2020.

[285] Akech, M. Institutional Reform in the New Constitution of Kenya; ICTJ: Nairobi, Kenya, 2010.

[286] The prosecutions relating to the dams were brought vide Nairobi Chief Magistrate Anti-Corruption Cases No. 18, 19, 20 and 21 of 2019: *Republic v Henry Rotich & Others* for charges relating to alleged governance and operation challenges and more specifically the procurement process, award and construction of the said Kimwarer and Arror Multipurpose Dam Projects.

[287] https://www.the-star.co.ke/news/2019-03-11-ruto-rebellion-in-the-open-and-going-full-bore/ accessed on 7th July 2020.

There have been instances when the judicial arm of government has been seen to unjustifiably intervene in the exercise of the ODPP's mandate thereby amounting to an interference with the independence of the office. The judiciary must exercise restraint in giving what may amount to "directions to charge" as these would be go against the letter and spirit of the Constitution. In the case of ***Daniel Baru Nyamohanga & Another v AG, IG & OCS Kehancha***[288] in which the High Court (Hon. A.C. Mrima, J) *inter alia* directed that DPP shall forthwith charge the said Chief Inspector Kipsaina Serem with the murder of Daniel Baru Nyamohanga; and shall further investigate and bring to book all other offices culpable towards the death of. The Court to the extent of directing the ODPP to charge and investigate threatened the independence of the ODPP by going against the constitutional provision against anyone directing the DPP. While the relationship between the ODPP and the Judiciary is covered in more detail in subsequent parts of this Chapter, it must be at the onset stated unequivocally that where there is basis, however, the Courts can and must intervene and interfere with the decisions and actions of the ODPP and other government institutions subject to the doctrine of separation of powers.[289]

4.1.3 DPP versus the Attorney General

4.1.3.1 The Okemo and Gichuru Extradition Case[290]

The issue as to who is the competent authority for purposes of issuance of the authority to proceed in cases of extradition has been at the centre of the tussle between the DPP and the AG. The legal battle staged by Samuel Gichuru and Chris Okemo to avoid their extradition to the

[288] Migori High Court Petition No. 2 of 2017 (Judgment dated 30th July 2018):
Daniel Nyamohanga disappeared from the police cells on 17th January 2017 having been last seen with the then OCS Kehancha Police Station, Chief Inspector Kipsania Serem. As a result, on 3rd February 2017, the Kenya National Commission on Human Rights filed for an order of *habeas corpus*.

[289] Under the Doctrine of Separation entrenched vide Article 1(3) of the Constitution, each state organ – the Executive, the Legislature and the Judiciary - is given certain powers so as to check and balance the other branches.

[290] https://www.standardmedia.co.ke/ktnnews/video/2000170365/-ag-dpp-shove-over-extradition-mandate-of-okemo-and-gichuru-to-jersey-island-over-fraud-case accessed on 8th July 2020.

island of Jersey to face money laundering charges [291] brought to the fore a battle of supremacy between former DPP[292] and the AG[293] with the two disagreeing fundamentally on whose mandate it was to extradite the duo. The AG insisted that the extradition process was a diplomatic issue. The DPP on the other hand held that the same was in the DPP's docket. The difference between the two offices over the matter has led to the appeal to the Supreme Court thus further stalling the extradition process of the duo since 6th June 2017 when the AG received the Note Verbal from the AG of Jersey. The conflict arose after The duo however questioned the role played by DPP in their intended extradition arguing that the extradition proceedings were invalid in law in the absence of "authority to proceed" under the hand of the AG. The DPP had issued an "authority to proceed" on 6th July 2017. The Court of Appeal overturned the decision of the High Court[294] that had held that the extradition was a criminal matter and within the province of the DPP's mandate. The Court of Appeal agreed with the AG and quashed the "authority to proceed" issued by the DPP holding that it was not in the DPP's docket to issue the said "authority to proceed". The Court of Appeal held that extradition proceedings are not criminal, but special international legal proceedings that only recognize OAG as the authority to undertake them.[295] The matter is pending before the Supreme Court.

[291] Gichuru and Okemo are wanted in the island of Jersey where they stashed millions of dollars that, the authorities say, they received as kickbacks from contractors when they were the KPLC Managing Director and the country's Finance minister respectively. Gichuru's offshore company, Windward Trading Ltd, pleaded guilty in a Jersey court to crediting £1 million and $2.9 million to its bank accounts on July 29, 1999, knowing the money was from Gichuru's corrupt dealings. The company also pleaded guilty to transferring £449,988 to its bank account on May 12, 2000, and £450,000 on August 15, 2000. Another £599,994 was transferred to its bank account on October 19, 2000.

[292] At the time Keriako Tobiko, now Environment Cabinet Secretary.

[293] At the time the AG was Amos Wako.

[294] Hon. Isaac Lenaola, J as he then was.

[295] The Court of Appeal further held that ODPP Act does not give the DPP powers to conduct extradition or provide mutual legal assistance extradition proceedings or proceedings for committal as described in the Extradition Act are not criminal proceedings but rather *sui generis* having been brought into being by the Extradition Act, which is itself a *sui generis* legislation," ruled the Court of Appeal; and that the Authority to Proceed should be understood in its international law context in that it is not a consent by a State to prosecute any person but an expression of the consent of the requested State to be bound by the treaty or other extradition arrangement entered by Kenya and other Commonwealth countries. See https://www.nation.co.ke/kenya/news/honeymoon-over-for-okemo-gichuru-in-jersey-graft-case-21128 accessed on 8th July 2020.

4.1.4 Interference by Investigative Agencies

4.1.4.1 Interference by the DCI

Despite the clear chain of command between the functions of the DPP, the IG of NPS and the DCI in terms of prosecutorial powers to the effect that the DPP has powers to direct the IG of NPS to investigate and the IG having powers to direct the DCI to execute the directions given to the IG by the DPP[296], there has been an apparent conflict between the DPP and the DCI which has frequently played out in a number of cases. While the DPP and the DCI have a few times tried to publicly play down reports of a fallout, the conflicts which some have read as an indication of a rapidly deteriorating relationship between the DPP and the DCI have been blamed on a clash of egos, perceived pressure from the Executive and conflicting interests. The DCI has been reported at some point to have ordered his staff not to share the police files of cases on allegations that the ODPP had been slowing down investigations. The staff had allegedly been told to only furnish the DPP with duplicate files of the cases and only after a written request.[297]

4.1.4.1.1 The KPA Matter

In March 2020, the conflict between the DPP was the most pronounced when the DCI purported to file charges in court against the then Kenya Ports Authority (KPA) Managing Director Daniel Manduku and Mr. Kevin Safari Lewis, the Kenya Revenue Authority (KRA) Commissioner of Customs and Border Control despite that fact the DPP had neither reviewed nor approved the charges[298] as is the intention of the Constitution: the institution (and or undertaking of criminal proceedings) against any person before any court (other than a court martial), being one of the State powers of prosecutions, is the exclusive mandate of the DPP.[299] The Assistant DPP present

[296] Section 35(h) of the NPS Act, No. 11A of 2011.

[297] https://www.nation.co.ke/kenya/news/haji-kinoti-split-plays-out-again-in-graft-case-287928 accessed on 7th July 2020.

[298] The DCI had in the Charge Sheet preferred charges against the suspects for allegedly unlawfully awarding tenders for the construction of cargo storage facilities at the Nairobi Inland Container Depot (ICD).

[299] Article 157(6) (a) of the Constitution

informed court that the DPP had called for the subject police file for independent review and prayed that the duo be freed on a police bond. Not only had the DCI had arrested the duo without prior approval of the DPP, but Mr. Gituathi Njoroge the investigating officer had also produced a charge sheet purported to have been authorized by the DCI in an attempt to bypass the ODPP's requisite approval.[300] The ADPP disowned the charge sheet with the apparent public clash at the Milimani Courts left the Court (Hon. Kennedy Cheruiyot, PM) with no choice but to release the suspects.[301]

4.1.4.1.2 The NWHSA Matter

In May 2020, the DCI arrested an another tiff between the two offices, had arrested Mr. Geoffrey Sang, the National Water Harvesting and Storage Authority (NWHSA) Chief Executive Officer over allegations of corruption.[302] Similarly in this matter, the DPP declined to prosecute with a resultant embarrassing standoff in court. The DPP refused to approve the charge sheets prepared by the DCI and insisted that subject police files had to be submitted to the ODPP for independent review before the decision to charge could be made. The DCI had to release Mr. Sang' from the Pangani Police Station.

As the tussle was unfolding, Mr. Sang' petitioned the Court vide ***Eng. Geoffrey K. Sang v The Director of Public Prosecutions & 4 Others***[303] in which he sought orders and the High Court agreed and granted the same *inter alia* a declaration that the DCI has no power and authority to institute criminal proceedings before a Court of law without the prior consent of the DPP and any

[300] https://www.businessdailyafrica.com/economy/Manduku-free-as-DPP-and-DCI-offices-clash-in-court/3946234-5477862-6vu6nsz/index.html accessed on 6th July 2020.
[301] https://www.capitalfm.co.ke/news/2020/03/kinoti-haji-clash-in-court-over-kpa-md-manduku-fraud-probe/; https://nairobinews.nation.co.ke/editors-picks/dci-kinoti-noordin-haji-differences-spill-over-to-court accessed on 7th July 2020.
[302] https://www.nation.co.ke/kenya/news/haji-kinoti-split-plays-out-again-in-graft-case-287928 accessed on 7th July 2020.
[303] Machakos High Court Petition No. 19 of 2020.

proceedings so commenced are unconstitutional, illegal, unlawful, null and void *ab initio*. This decision is addressed further in the subsequent parts of this Chapter.

4.1.4.1.3 The UNESCO Matter

In June 2020 in a matter relating to officers[304] of Kenya National Commissions for United Nations Educational, Scientific and Cultural Organizations (UNESCO), while the DPP declined to approve charges for insufficiency of evidence[305], the DCI insisted that the evidence was sufficient to sustain a criminal charge against the officers. Despite the DPP advising the DCI that the matter fell within the purview of employment and labour laws to which the best recourse was a civil suit[306], the DCI wrote back to the DPP maintaining that the DCI had a watertight case against the officers. The DCI through the Kasarani DCI in the response requested that the case be transferred from the Makadara court to any other court in what can be interpreted as protest against the decision of the DPP. This is in clear contravention of the DPP's constitutional power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.[307]

The row between the DPP and the NPS, and more specifically the DCI would most likely be worsened if the BBI recommendations to have the DPP as an independent office holder were to be passed as they are. The DPP as an independent office holder would by law have power under

[304] The DCI recommended charges including forgery contrary to Section 349 of the Penal Code against Catherine Nyaboke Nyang'au and David Gerishom Otiato, the UNESCO Chief Accountant and Director of Corporate Support Services respectively for having allegedly conspired to defraud UNESCO of Kshs. 10 million in form of salaries between August 2018 and March 2020.

[305] In a letter dated 15th May 2020, the Senior Assistant Director of Public Prosecutions heading the ODPP Makadara Office to which the file had been submitted, informed the DCI, on behalf of DPP, that the investigation file did not contain evidence of the purported forged letter of appointment and as such it would be difficult to prove the charge of uttering false documents because the second suspect would be expected to testify against the first suspect.

[306] https://www.the-star.co.ke/counties/nairobi/2020-06-09-dci-and-dpp-clash-over-prosecution-of-senior-unesco-officials/ assessed on 6th July 2020.

[307] Article 157(4) of the Constitution.

the Constitution[308] to among others conduct investigations on its own initiative or on a complaint made by a member of the public.[309] There is a likely conflict between the DPP in the exercise of the proposed investigative powers vis-à-vis the powers of the DPP to direct IG of the NPS[310] and the general powers of investigations of the NPS. This in cognizance of the need to ensure that an investigator can also not be the prosecutor.[311] There thus is the need for further Constitutional amendments to ensure a clear separation of powers as regards prosecution and investigations.

4.1.5 Judicial Pronouncements on the Independence of the DPP

4.1.5.1 Pronouncements on the State Powers Prosecution

In ***Evans Odhiambo Kidero & another v. Director of Public Prosecutions & 2 others***,[312] the High Court agreed with the DPP's assertiveness in protecting his power to decide what cases must be prosecuted. The DPP had, in the case argued that it was the preserve of the ODPP to decide whether or not to prosecute a matter despite parties' consent to withdraw complaints of criminal behaviour against each other. The Court agreed was follows:

> "I agree with the respondents that the proper order is to mark the matter as withdrawn. The settlement of the parties cannot bind the DPP, an independent office, established under Article 157 of the Constitution unless he consents to the settlement. He is entitled to assert his authority to reconsider his decision in light of the accord between the petitioners and the withdrawn proceedings having regard to public interest and other factors outlined in Article 157(11).

[308] Article 252 (1) of the Constitution of Kenya.
[309] Article 252 (1) (a) of the Constitution of Kenya.
[310] Article 157(4) of the Constitution.
[311] See the decision of G.V. Odunga, J in *EACC v James Makura M'abira* [Civil Appeal No. 27 of 2013].
[312] Nairobi High Court Petition 11 and 14 of 2014; [2014 eKLR].

Similarly in ***Republic v. Director of Public Prosecutions & another Ex-Parte Communications Commission of Kenya***,[313] the DPP in exercising his powers to decide on whether to prosecute, declined an invitation by the Communication Commission of Kenya (CCK) to prosecute Royal Media Services (RMS) and its directors for use of unauthorized broadcasting frequencies. The commission sued the DPP for allegedly having abdicated his constitutional obligation in failing to prosecute and had acted in excess of his constitutional and statutory powers in ordering the police to cease further investigative action against RMS. The court held that the Constitution bestowed upon the DPP the discretion to determine when or not to prosecute and unless it was shown that he acted illegally or in abuse of his discretion, the court will not interfere with the DPP's decision. On the DPP's duty to prosecute, the court held:

The duty to prosecute or not to prosecute lies with the Respondent [DPP]. Kenyans through the Constitution and Parliament specifically assigned that power to the Respondent. The Respondent, it is assumed, is equipped with the skills and tools of analyzing a case and deciding whether the same has a realistic prospect of conviction.

4.1.5.2 Judicial Settlement of the 'Tussle' between the DPP and the DCI

The issue of the purported tussle between the roles of the DPP and the DCI as far as prosecutions are concerned has very recently received judicial consideration both at the High Court and the Court of Appeal. Starting with a decision across the border, the High Court of Uganda in ***Uganda v Jackline Uwera Nsenga***[314]seized of this issue addressed itself thus:

> "...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her

[313] Judicial Review No. 221 of 2013 (Nairobi High Court) http://kenyalaw.org/caselaw/cases/view/95112/ (accessed April 20, 2014)
[314] Criminal Session Case No. 0312 of 2013.

expeditiously…Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP…such opinion is merely advisory and not binding on the DPP …. Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP."

Similarly **Mumbi Ngugi, J** in ***Charles Okello Mwanda v Ethics and Anti-Corruption Commission & 3 Others***[315] in which held that:

"…However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent [DPP] set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to 'absolve' a person from criminal liability… so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) …".

The discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. As such, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he believes that he has in his possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions the Constitution and the law. The mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. In the words of Sir Elwyn Jones in *Cambridge Law Journal* – April 1969 at page 49[316]:

[315] (Nairobi High Court Petition No. 221 of 2013); (2014) eKLR.
[316] Sir Elwyn Jones in *Cambridge Law Journal*, April 1969 at page 49.

> "The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration."

In ***R. v Director of Criminal Investigation Department & Others***[317] the Court held thus:

> "I am however concerned that it would seem that the Applicants were taken to Court before the D.P.P. made a decision on whether they should be charged or not. That haste on the part of the police is clearly deplorable and cannot escape condemnation."

In a judgment delivered on the 16th July 2020 in ***Eng. Geoffrey K. Sang v The Director of Public Prosecutions & 4 Others (supra)***, the Court was emphatic that when it comes to the exercise of prosecutorial powers, as between the DPP, the IG of Police and the DCI, the DPP has the last word, and in expressly pronouncing that the DCI has no powers under the current constitutional dispensation to resent any charges before a court of Law without the Consent of the DPP pronounced himself expressly as follows *in extenso*:

> "126… In other words, no public prosecution may be undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions.

[317] [2016] eKLR.

127. …In simple term an attempt by the Directorate of Criminal Investigations to charge a person with a criminal offence without the consent of the Director of Public Prosecutions is ultra vires the power and authority of the Director of Criminal Investigations and amounts to abuse of his powers. It is therefore null and void ab initio.

144. "Accordingly, I must make it clear that the 2nd Respondent herein, the Director of Criminal Investigations has no powers at all under our current legal frame work to present any charges before a court of law particularly where the Director of Public Prosecutions, the 1st Respondent has not consented to the same." [Emphasis mine]

A few days later, on the 24th of July 2020, the the Court of Appeal of Kenya at Nyeri[318] in ***Ethics and Anti-Corruption Commission v James Makura M'abira***[319] restated that the mandate to institute all criminal proceedings for all offences including under the ACECA belongs to the DPP in the following terms:

"The question we have asked ourselves is whether this section is what mutated to Sections 35, 36 and 37 to mean that a 'written consent' to prosecute offences under ACECA was required when the investigative report is furnished to the AG. We appreciate that the Kangangi's case was decided under a different regime when prosecution was carried out under the direction of the AG and the DPP was part of that office. For that reason, we think we need not belabour the issue of written consent to prosecute so much as the mandate of the DPP is now settled by the Constitution itself that spells it out under Article 157 (6) (b) and (c). It is the DPP who institutes all criminal

[318] W. Ouko (P) M.K. Koome, A. Makhandia, A.K. Murgor & J. Mohammed, JJ.A.
[319] Civil Appeal No. 27 of 2013) (being an Appeal from the Ruling of the High Court of Kenya at Nyeri (Wakiaga, J.) dated 25th October, 2012 in Const. Pet. No. 3 of 2012).

proceedings for all the offences including offences under ACECA so that the DPP cannot give consent to him/herself."[320] [Emphasis mine]

4.2 Judicial Intervention

As already discussed herein, the ODPP in fulfilling its mandate, must be guided by the Constitution and a number of fundamental principles including the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the office, the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and the promotion of constitutionalism.[321] In the case of ***Republic v Kombo & 3 Others ex parte Waweru***[322] the High Court addressing itself as to the powers of the Court to intervene in cases where acts of government authorities are found to lack a legal pedigree:

> "The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong…or which infringes a man's liberty…must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of

[320] Paragraph 28 of the decision.
[321] Section 4 of the ODPP Act, No. 2 of 2013.
[322] Nairobi High Court Misc. Civil Application No. 1648 of 2005; [2008] 3 KLR (EP) 478.

law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."

The net effect is that under the current prosecutorial regime, the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ODPP Act. Where it is alleged that the DPP has failed to adhere to these standards, then the High Court must step in to investigate the allegations and make a determination thereon. Accordingly, the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system. The High Court in ***Nakusa v Tororei & 2 Others***[323] acknowledged this need for the High Court to intervene where appropriate as follows:

> "The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system… In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend.

This position was amplified by **G.V. Odunga, J** in ***International Centre for Policy and Conflict v Attorney General & Others***[324], this Court expressed itself as follows:

[323] (No. 2) Nairobi High Court Election Petition No. 4 of 2003 [2008] 2 KLR (EP) 565.
[324] Nairobi Misc. Civil Cause No. 226 of 2013; [2014] eKLR.

> "Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud."

The High Court in its role as "a sentinel" of fundamental rights and freedoms of the citizen must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.[325] It is in this wavelength that **Hon. G.V. Odunga, J** in ***Eng. Geoffrey K. Sang v The Director of Public Prosecutions & 4 Others (supra)*** held thus**:**

> "Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself…"

4.2.1 Circumstances Justifying Judicial Intervention

Whereas the Constitution guarantees the independence of the DPP in the terms that the DPP does not require the consent of any person or authority for the commencement of criminal proceedings

[325] Prof. M.V. Plyee, "Constitution of the World."

and shall, in the exercise of his or her powers or functions, not be under the direction or control of any person or authority, in exercising his constitutional and statutory powers, the DPP is obligated to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.[326]

Superior courts have repeatedly held that, while they will safeguard the independence of the DPP to decide on what cases to prosecute, they will not hesitate to interfere where it is shown that the prosecution is an abuse of process or is inspired by factors that are inimical to public interest or where the nature of prosecution would bring the administration of justice into disrepute.[327] By way of judicial pronouncement in various decisions, the courts have set various parameters that would justify judicial intervention in the DPP's exercise of prosecutorial powers, which intervention would otherwise amount to interfering with the independence of the DPP and or the ODPP. For example. **R.P.V. Wendoh, J** in ***Lenah Catherine Koinange v Attorney General & Others***[328], set such parameters to include the following:

> "But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) whether the person against whom the criminal proceedings are commenced has been deprived of his

[326] Article 157(11) of the Constitution.
[327] See for example, Musyoki Kimanthi v Inspector General of Police & 2 others [2014] eKLR, Petition 442 of 2013 (http://kenyalaw.org/caselaw/cases/view/96823/); Stanley Munga Githunguri v Republic [1985] KLR 91; Josephine Akoth Onyango & another v Director of Public Prosecutions & 4 others [2014] eKLR, Petition No. 471 of 2013 (http://kenyalaw.org/caselaw/cases/view/95332/).
[328] Nairobi High Court Misc Appli 1492 of 2005); [2007] eKLR; [2007] 2 EA 256.

fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) whether the prosecution is against public policy."

More recently, **J.M. Mativo, J** in ***Republic v Chief Magistrate's Court at Milimani Law Courts & 3 Others ex parte Pravin Galot***[329] quoting Chris Corns[330] stated that:

"The grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:-

i. When the continuation of the proceedings would constitute an 'abuse of process,'

ii. When any resultant trial would be 'unfair' to the accused, and

iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system."

4.2.1.1 Violation of the Rights and Fundamental Freedoms

The Court of Appeal in ***Meixner & Another v Attorney General*** **(supra)** addressing the powers of the High Court to intervene in the DPP's exercise of prosecutorial powers highlighted the need for the High Court to intervene and interfere with the DPP's powers where the exercise thereof amounts to a contravention of the rights and fundamental freedoms of the petitioner. The Court was emphatic:

"…The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in …the Constitution…." [Emphasis mine]

[329] Miscellaneous Civil Application No. 622 of 2018); [2020] eKLR.

[330] Chris Corns, Judicial Termination of Defective Criminal Prosecutions: Stay Applications, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977.

Upholding the foregoing position **Majanja J.** in ***Kenya Commercial Bank Limited & 2 Others v Commissioner of Police and Another***[331] while emphasizing the independence of the DPP nonetheless added that the DPP is subject to the Constitution and the law:

> "The office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution."

In ***Republic v The Judicial Commission into the Goldenberg Affair and 2 Others ex parte George Saitoti***[332] the three judge bench of **J.G. Nyamu**, **R. Wendoh** and **Anyara Emukule** emphasized the need for the court to intervene where fundamental rights were threatened with violation:

> "It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants' fundamental rights."

[331] Nairobi Petition No. 218 of 2012; [2012] eKLR.
[332] Nairobi High Court Misc Appl. 102 of 2006; [2006] eKLR.

4.2.1.2 Departure from the Rules of Natural Justice

The Court of Appeal in ***Joram Mwenda Guantai v The Chief Magistrate***[333] held that "it is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. *It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice*.

4.2.1.3 Abuse of the Legal Process

The High Court will also be justified to intervene and interfere with the exercise of DPP's powers of prosecutions where there is established that the same has amounted to an abuse of the court legal process. As regards abuse of the process, the Court in ***Kuria & 3 Others v Attorney General (supra)***, the High Court was emphatic that:

> "It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused…"

Similarly, in ***Eng. Geoffrey K. Sang v The Director of Public Prosecutions & 4 Others (supra)***, the Court held further that**:**

> "Where therefore it is clear that the DPP has exercised his discretion with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the *Office of the Director of Public Prosecutions Act*, that would, in my

[333] Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170.

view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion."[334] [Emphasis mine]

4.2.1.4 Abuse of Discretion

As regards abuse of discretion, while quoting the foregoing decision with approval, **G.V. Odunga, J** in ***Eng. Geoffrey K. Sang v The Director of Public Prosecutions & 4 Others (supra)*** held thus**:**

> "It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable."

The court held emphasised that whereas the discretion given to the respondents to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt.

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[334] *See also Jared Benson Kangwana v Attorney (General Nairobi High Court Misc. Application No. 446 of 1995) (Unreported).*

4.2.1.5 Institution of Prosecution without Proper Factual and or Legal Basis

A prosecutor must ensure that he has sufficient evidence with a reasonable prospect of a conviction before making the decision to charge[335]; he must have in his possession material that discloses the existence of a prosecutable case. This evidence should be available at the time of making the decision to charge since a prosecution is not to be made good by what it turns up. It is good or bad when it starts.[336] This was the basis of the High Court's finding in ***R v Attorney General ex parte Kipng'eno Arap Ngeny***:[337]

> "A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

4.2.1.6 Prosecution intended to Achieve Extraneous Goals

The High Court in while stressing on the need for the High Court to stay and or prohibit criminal proceedings thereby justifiably interfering with the powers of the DPP held in ***Kuria & 3 Others v Attorney General***[338], the High Court was emphatic that:

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[335] "Reasonable prospect of conviction" is the test that the DPP should use in deciding whether to undertake or continue prosecution. This test was elaborated by the Divisional Court of the Queen's Bench Division in *R v DPP Ex p Manning [2001] QB 330:21*.

[336] See the decision of the High Court (Madan Ag. CJ, and Aganyanya and Gicheru JJA) in *Stanley Munga Githunguri v R* [1986] eKLR at pages 18 and 19.

[337] High Court Civil Application No. 406 of 2001.

[338] [2002] 2 KLR 69.

"the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform....."

4.2.1.7 Vexatious Proceedings

A prosecution commenced in violation of a court order will no doubt undermine the integrity of the criminal justice system. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word "vexatious" means "harassment by the process of law,'' "lacking justification" or with "intention to harass." It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.[339]

4.2.2 Limits to Judicial Intervention

While courts as has been exhibited above have the power to intervene and quash the actions of the ODPP by way of judicial review orders, judicial review is limited. Judicial review is conducted on a case-by-case basis, although findings made in any one case can affect the way in which the prosecuting authority conducts itself. Judicial review is by its nature retrospective; it occurs after the fact and only once a complaint has been filed in court. Using the courts to review the actions of the ODPP thus typically occurs only after something has already gone wrong.

[339] *Republic v Chief Magistrate's Court at Milimani Law Courts & 3 Others ex parte Pravin Galot (supra).*

Using the courts is also an expensive and time-consuming process and is consequently not a realistic option for most people.

4.3 Challenges to Prosecutorial Accountability

4.3.1 Inadequate Capacity of Accountability Institutions

Members of parliamentary committees dealing with the ODPP's reporting and response to summons often fail to understand their roles and the issues they oversee, and have limited capacity to draft reports or track recommendations made to government officials.[340] Members of parliament may also lack a fine understanding of the role and operation of the ODPP. Even members of the Justice and Legal Affairs Committee, while often lawyers, typically do not have a prosecutorial background. Moreover, members of parliament hold their positions by virtue of being loyal members of a political party thereby having their oversight role vis-à-vis the prosecution service being tainted by partisan loyalties and is neither independent nor motivated by objective criteria. This is apart from the fact that members of the relevant parliamentary committees have a broad range of responsibilities covering a wide range of justice-related issues and institutions.

4.4 Conclusion

While the Constitution of Kenya is almost 10 years old since its promulgation, the reality is yet to dawn to a number of institutions that the state powers of prosecution were since delinked from the AG and are currently vested in the DPP who exercises them either directly in person, or indirectly as delegated to his officers generally and or specifically. There legal and institutional framework is however sound and clear and what is left is the interpretation and or implementation in accordance with the Constitution and the law. This will help to curb the

[340] A du Plessis, J Redpath and M Schönteich,Report on the South African National Prosecuting Authority, in Promoting prosecutorial accountability, independence and effectiveness: comparative research, Sofia: Open Society Institute, 2008, 374.

tussles that have been highlighted in this Chapter and which are clearly a hindrance to the operations of the ODPP but the access to criminal justice generally.

CHAPTER FIVE

CASE STUDIES: PROSECUTORIAL INDEPENDENCE AND ACCOUNTABILITY ACROSS THE WORLD

5.0 Introduction

Chapter 4 has demonstrated the conflict between the law on prosecutorial independence and accountability and the application thereof by enumerating a number of examples of the dissonance especially the encroachment of the mandate of the ODPP by other actors in the criminal justice system. This Chapter then undertakes a case study of the various mechanisms that have been employed by other prosecutorial authorities across the globe to strengthening prosecutorial independence and enhance prosecutorial accountability. The Chapter is dedicated to an exploration of these various mechanisms from which Kenya and the ODPP can learn a few lessons to make the ODPP more independent and accountable both in law and practice.

5.1 The National Prosecuting Authority of South Africa (NPA)[341]

5.1.1 General Opinions on the National Prosecuting Authority (NPA)

In South Africa, the National Prosecuting Authority (hereafter the NPA)[342] has to account to a variety of institutions, including the legislature and a number of executive bodies such as the AG's Office. The NPA is also endowed with a broad range of internal monitoring, oversight and standard-setting mechanisms. However, unlike the police or prison service, the NPA's policies and performance are not subject to review or scrutiny by any independent and dedicated entity. The NPA must exercise its functions without fear, favour or prejudice:[343] no one, including any

[341] Martin Schönteich, 'Strengthening Prosecutorial Accountability in South Africa'.

[342] The office of the National Prosecuting Authority (NPA), formally established through the National Prosecuting Authority Act on 1st August 1998, replacing the former provincial Attorneys-General is established by the Constitution of South Africa as a single, independent national prosecution authority with powers similar to those of the ODPP among others to institute and conduct criminal proceedings on behalf of the state; carry out any necessary functions incidental to instituting and conducting such criminal proceedings, and discontinue criminal proceedings.

[343] Section 179(4) of the Constitution of the Republic of South Africa.

organ of state, may improperly interfere with, hinder, or obstruct the NPA in the exercise or performance of its powers and functions.[344] The importance of prosecutorial independence in South Africa, just like in common-law jurisdictions, applies primarily to decisions to investigate, to prosecute, or not to do so in individual cases. The head of the NPA must determine prosecution policy with the concurrence of the Minister of Justice and Constitutional Development;[345] the minister's agreement is indispensable for the prosecution policy to come into effect. Moreover, the NPA is already subject to external review and oversight. The NPA's budget, for example, like that of all entities funded by the taxpayer, is controlled by parliament and regularly reviewed and audited by other executive government bodies.

5.1.2 General Accountability Mechanisms in South Africa

The NPA is held to account by parliament in particular the parliamentary Portfolio Committee on Justice and Constitutional Development[346], the Auditor-General, the National Treasury,[347] and the Minister of Justice and Constitutional Development, who exercises final responsibility over the prosecuting authority.[348] Moreover, on occasion, the judiciary has reviewed and overturned NPA decisions.[349] The oversight and accountability mechanisms which operate under significant limitations in respect of the NPA and are by and large adequate for the purposes for which they are designed, are staffed primarily by people who are not experts on prosecutorial issues. Employees from the Auditor-General's Office and the National Treasury, while highly skilled in terms of financial and budgetary issues, do not generally have a good understanding of the role,

[344] Section 32(1) of the National Prosecuting Authority Act (Act 32 of 1998) as amended.
[345] Section 179(5) (a) of the Constitution of the Republic of South Africa.
[346] Section 35 of the South African National Prosecuting Authority Act.
[347] In terms of the Public Finance Management Act (Act 1 of 1999) and the Public Finance Management Amendment Act (Act 29 of 1999); see National Treasury, Legislation - Public Finance Management Act (PFMA), http://www.treasury.gov.za/legislation/PFMA/ accessed on 6th August 2020.
[348] Section 179(6) of the Constitution of the Republic of South Africa.
[349] See, for example, *Freedom Under Law v National Director of Public Prosecutions and Others [2013] 26912/12, ZAGPPHC 271, 23 September 2013*, in which the North Gauteng High Court ordered the NPA to reinstitute charges it had previously dropped against a high-profile accused and ensure the case is 'prosecuted diligently and without delay'.

function and performance of the NPA. Moreover, their oversight role is statutorily narrowly defined around financial management and compliance issues.

5.1.3 Role of Parliament

Parliament exercises its power of holding the executive accountable, by requiring public accountability for funding and performance, and by reinforcing the distinction between the responsibility of a minister for policy and outcomes and of the accounting officer for implementing the policy and achieving defined outputs.[350] Accounting officers report regularly to both the minister and the National Treasury.[351] More effective parliamentary oversight is achieved by use of performance goals.

5.2 Crown Prosecution Service (CPS) in England and Wales

The Crown Prosecution Service (hereafter the CPS)[352] is responsible for public prosecutions of persons charged with criminal offences in England and Wales. The CPS is headed by the DPP, who answers to the AG for England and Wales.[353] The AG is accountable to parliament for the functioning of the CPS.

5.2.1 Accountability Mechanisms in England and Wales

The CPS's means of accountability include the two newest mechanisms - the inspectorates and complaints assessors – which were first developed in the in the United Kingdom (UK) where some experience of their impact has developed.

[350] The CEO of the NPA serves as the organisation's accounting officer on the basis of a delegation of authority from the Director-General of the Department of Justice and Constitutional Development.
[351] National Treasury, Guide for accounting officers: Public Finance Management Act, Pretoria: National Treasury, October 2000, 21.
[352] Established in 1986.
[353] The DPP is 'superintended' by the AG.

5.2.2 CPS Quality Assurance Unit

In 1995 the CPS established a quality assurance unit whose head and all its staff were all members of or on secondment to the CPS. The head of the inspectorate reported to the DPP.[354] The unit was in 2000 changed into the Crown Prosecution Service Inspectorate (CPSI) an independent statutory body,[355] towards ensuring that the CPS was not only independent in practice but demonstrably independent.[356]

5.2.3 The Crown Prosecution Service Inspectorate (CPSI)

The CPSI seeks to enhance the quality of justice through independent inspection and assessment of the CPS, and in so doing improve the prosecution service's effectiveness and efficiency and promote greater public confidence in the CPS.[357] The CPSI's approach to inspection *takes account of the business needs of the CPS as well as the expectations of the general public as to whether the CPS provides an efficient service and gives value for money*.[358] The CPSI is headed by an independent Chief Inspector (hereafter the CI) appointed by and reporting to the AG. The CI is appointed for a five-year term with a fixed salary, providing a measure of functional independence to the position.[359] The CPSI is staffed with thematic experts, including previous senior prosecutorial staff. The CI has the obligation of submitting annual reports to the AG, for onward laying before parliament. The CI's roles include leading and developing an independent, robust, creative and innovative Inspectorate whose work enhances public confidence in

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[354] M Zander, The English Prosecutions System, a paper prepared for the Conference on the Prosecution System, 29 - 30 September 2008, Rome, 20, www.radicali.it/download/pdf/zender.pdf accessed on 6th August 2020.

[355] Crown Prosecution Service Inspectorate Act 2000, London: HMSO, www.legislation.gov.uk/ukpga/2000/10/pdfs/ukpga_20000010_en.pdf accessed on 6th August 2020.

[356] Solicitor-general (Mr. Ross Cranston), Crown Prosecution Service Inspectorate Bill [Lords], HC Deb 23 May 2000 Vol. 350 cc880-7, Hansard, 23 May 2000, London: House of Commons. In England and Wales the Solicitor-General is also the deputy attorney-general.

[357] HM Crown Prosecution Service Inspectorate.

[358] HM Chief Inspector of the Crown Prosecution Service, Improvement through inspection: HM Chief Inspector of the Crown Prosecution Service annual report 2012-2013, London: HM Crown Prosecution Service Inspectorate, 2013, 4, www.hmcpsi.gov.uk/documents/plans/PLAN/HMCPSI_CIAR_2012-13.pdf accessed on 6th August 2020.

[359] In 2010 the Chief Inspector of the CPSI received a salary of £150,000; see House of Commons Justice Committee, Appointment of HM CPS chief inspector, Third Report of Session 2009–10, London: UK Parliament, 2010, 23.

prosecution services. The ability to demonstrate sound judgement and independence is a key criterion for the appointment of the CI. The CPSI collaborates with the CPS in developing an inspection framework and common performance measures, but reserves the right to reject a standard or performance measure that does not meet the public interest. An inspectorate can research, objectively report on and provide constructive commentary on particular themes or issues affecting the performance or credibility of a prosecution service.

5.2.4 CPSI's Budget and Staff

The CI appoints the CPSI staff from a wide range of backgrounds including both lawyers and nonlawyers.[360] The CPSI's budget is independent of that of the CPS. The CPSI's budget is appropriated by parliament.[361] To further underscore the CPSI's functional independence, its offices are located in separate premises from those of the CPS.

5.2.5 Nature of Oversight

A key CPSI priority is assisting the CPS to improve the quality of service it offers to the public is. It does so by, among other things, assuring the quality of the CPS's casework. Every year CPSI inspectors review a sample of case files from across all geographic regions of the CPS's operations.[362] Among other things, this annual review examines the quality of prosecutorial decisions, case preparation and progress, victims' and witnesses' experiences of the criminal justice system, and prosecutors' adherence to custody time limits for detained accused

[360] The lawyers come from both a CPS and non-CPS background – 'enough of each to know what stones to turn over and also provide wider perspective'. The CPSI's staff includes both legal and business management inspectors. In 2001, lay inspectors were introduced to enable members of the public to participate in aspects of the inspection process. For example, lay inspectors look at the way the CPS relates to the public through its external communications, its dealings with victims and witnesses, and its complaints handling procedures.

[361] The CSPI's budget comes from the Treasury Solicitor's Department.

[362] In 2012/13 CPSI inspectors examined over 2,800 case files as part of the CPSI's Annual Casework Examination Programme.

persons.[363] The CPSI also undertakes joint inspections with other criminal justice sector inspectorates.

5.2.6 Independent Assessor of Complaints (IAC) in England and Wales

In 2013 the CPS adopted the model of an Independent Assessor of Complaints (hereafter the IAC)[364] with a three-tiered complaint procedure.[365] The first tier is managed by the local CPS Office where the complaint originated. If the complainant remains dissatisfied with the response, he may refer the complaint to a Chief Crown Prosecutor or a similarly high-ranking official where this ends for complaints relating to legal decisions.[366] If the complaint is service-related and the complainant remains dissatisfied following the first two stages of the complaints procedure, he can refer his complaint to the IAC for review. The IAC operates independently from the CPS and is responsible for handling and investigating complaints from members of the public in relation to the quality of the service provided by the CPS and adherence to its published complaints procedure. The IAC aims to ensure that the CPS conforms to its mandate to be transparent, accountable, and fair by providing an independent and accessible process for reviewing service complaints that have exhausted the CPS's internal process.[367]

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[363] For information on the methodology of the CPSI's Annual Casework Examination Programme, the performance indicators used in the examination, and the findings of the 2012/13 examination, see HM Chief Inspector of the Crown Prosecution Service, Improvement through inspection, Annexes 2 and 3.

[364] The CPSI is not the complaints authority for the CPS. While awareness of complaints about the CPS may spur the CPSI to undertake an inspection or audit of a specific aspect of the CPS's work, the CPSI does not have the mandate to receive and respond to specific complaints.

[365] CPS, Feedback and complaints guidance: how to provide feedback or make a complaint to the Crown Prosecution Service, London: CPS, www.cps.gov.uk/contact/feedback_and_complaints/complaints_guidance.html accessed on 6th August 2020.

[366] Victims who wish to exercise their right to request a review of the CPS's decision not to bring charges or discontinue proceedings can utilise the CPS's Victims' Right to Review Scheme. See CPS, Victims' Right to Review Scheme, www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html accessed on 6th August 2020.

[367] CPS, Independent assessor of complaints, Crown Prosecution Service, www.cps.gov.uk/contact/feedback_and_complaints/independent_assessor_of_complaints.html accessed on 6th August 2020.

5.3 The Public Prosecutor's Office of Japan

In Japan, there exist where prosecutors enjoy wide-ranging institutional discretion to prosecute, not to prosecute, or suspend a prosecution, there exist some legislative controls to check prosecutors' abuse of the discretion not to prosecute.

5.3.1 Financial Compensation for Non-Prosecution

A prosecutor who declines to prosecute an accused person must provide written notice of such action to the victim(s) of the crime who lodged the initial complaint. If a prosecutor does not prosecute an accused person who has been detained or arrested, the accused person may receive financial compensation from the state.[368]

5.3.2 Objection to Non-Prosecution

Another check on prosecutors' decision not to prosecute or to suspend prosecution is 'quasi-prosecution through judicial action'. This process allows those who object to non-prosecution, in cases of the abuse of state authority or the use of violence by a police official, to request that the courts institute criminal proceedings against the accused through a special court appointed prosecutor. The successful use of this mechanism is rare, however.

5.3.3 Japanese Prosecution Review Commissions (PRC)[369]

The Japanese public prosecution office has more frequently employed the use of Prosecution Review Commissions (hereafter PRC) to curb prosecutorial discretion. PRCs are lay advisory bodies that review a public prosecutor's exercise of discretion in decisions not to prosecute. The review process by the PRCs may be initiated by an application for a commission hearing by a

[368] M.D. West, Prosecution Review Commissions: Japan's answer to the problem of prosecutorial discretion, Columbia Law Review 92 (1992), 693.

[369] Commissions are composed of 11 members who are chosen at random from public voting lists for six-month terms. Meetings are held quarterly or on special call of the chairperson of the commission, who is elected by its members. There is at least one commission for each district court area in Japan. Politicians, elected officials, and those who perform vital political and criminal justice functions are disqualified from participating in PRCs.

victim, and or carry out an investigation *suo moto*, upon a majority vote to that effect.[370] PRCs investigate claims in private by summoning witnesses for examination[371], questioning the prosecutor and asking for expert advice. The PRCs' recommendations have been 'non-prosecution is proper, non-prosecution is improper, or prosecution is proper'[372]. These recommendations were advisory and not binding on the prosecution.[373] However, more recently, the PRCs have been provided with significantly greater powers.[374]

5.4 Conclusion

All three of the prosecutorial accountability mechanisms reviewed in this Chapter have been tested in the real world of criminal justice practice in the respective jurisdictions. Indeed, there is much that can be learnt from such comparative experiences. However, while the utility of comparative criminal justice research lies in its ability to provide helpful and practical advice to practitioners on practices and learning, foreign experiences are not automatically a panacea for national criminal justice reformers. Criminal justice remains a local and varied phenomenon despite the pressure of uniformity embedded in processes of globalisation. Whatever we learn from the comparison must be grounded in the country's local realities and context.

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[370] M.D. West, Prosecution review commissions: Japan's answer to the problem of prosecutorial discretion, Columbia Law Review 92 (1992), 697.

[371] PRCs have the power to subpoena and interrogate witnesses.

[372] For the first two options only a majority vote was necessary, but for the third option a super-majority consisting of eight of the 11 members of a commission was required.

[373] M.D. West, Prosecution review commissions: Japan's answer to the problem of prosecutorial discretion, Columbia Law Review 92 (1992), 698.

[374] Since 2009, after a supermajority determines that a prosecutor should have prosecuted a case, the PRC's decision is sent to the prosecutor's office for it to re-examine its decision. If the prosecutor, after review, determines to prosecute, then a prosecution will follow and the PRC will be so advised. If the prosecution continues to decline to prosecute, it must advise the PRC as to why it refused to accede to the PRC's determination. The PRC then reconvenes to consider the matter. While doing so it may call witnesses, review facts and receive legal advice from private attorneys. If the PRC decides, again by a super-majority a second time that the case should be prosecuted, then it will report this to the court. Thereupon the court must appoint a lawyer to perform the prosecution's role until a verdict is reached.

CHAPTER 6

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

6.0 Introduction

This Chapter marks a culmination of the discussions and reflections that have been the discoveries in the preceding chapters. The chapter starts off recapping the journey we set out to travel through this research, prosecutorial independence and accountability in Kenya, the inquiries made into the current legal and institutional status thereof, the findings, and the discoveries made. More importantly, the Chapter makes recommendations for improvement – the enhancement of prosecutorial independence and the entrenchment of accountability and thereafter makes concluding remarks to sum up the interesting journey.

6.1 Findings of the Study

6.2.1. Historical Foundations of ODPP

The following are the key findings from Chapter 2 of the Study:

(a) The ODPP has a historical foundation which can be traced all the way to the colonial times;

(b) The establishment of the ODPP pre-2010 was influenced by the reception clause vide which Kenya received the laws that were applicable in England at the time.

(c) The first ODPP was established in Kenya vide the Prosecution of Offences Act 1879 which established the ODPP as part of the OAG with the aim of controlling, if not the elimination of abuses arising out, of private prosecutions.

(d) The Prosecution of Offences Act 1879 provided for the appointment of a DPP and charged him with the duty to act in cases of ‘importance and difficulty’.

(e) Post-2010, the Constitution of Kenya separated the ODPP from the OAG and vested State powers of prosecution in the DPP thereby establishing the ODPP as an independent office.

6.1.2. The Legislative, Institutional and Policy Framework relating to the ODPP

The following are the key findings in Chapter 3 of the Study:

(a) The Constitution of Kenya 2010 established the ODPP as an independent office that would not be under the direction of anyone in the exercise of the State powers of prosecution.
(b) The ODPP Act was enacted to give effect to Article 157 of the Constitution and it emphasises on the independence of the ODPP.
(c) Both the Constitution of Kenya 2010, under Article 157(11) and the ODPP Act have provisions aimed at ensuring the accountability of the officers of the ODPP in the exercise of their powers.
(d) The ODPP has also come up with internal policy documents aimed at entrenching prosecutorial independence and enhancing prosecutorial accountability.

6.1.3 To undertake a situational analysis of the independence and accountability of the ODPP

The main findings of Chapter 4 of the Study include:

(a) Despite the Constitution separating the ODPP from the OAG, there seem to be some overlap in the mandates of the two State organs.
(b) Despite the clear constitutional and statutory provisions providing for prosecutorial independence, other actors in the criminal justice system have threatened the independence of the ODPP by overreaching into the ODPP's mandate.

(c) Despite the independence of the ODPP, the office has to exercise its mandate in accordance with the Constitution and the law.

6.1.4. To Document the Best Practices in Prosecutorial Independence and Accountability

The following are the key findings in Chapter 5 of the Study:

(a) With prosecutorial independence, comes prosecutorial accountability.

(b) While prosecutorial independence and accountability in Kenya still faces a lot of challenges, not all hope is lost.

(c) The ODPP can learn from the best practices South Africa, England and Wales and Japan as far as prosecutorial independence and accountability mechanisms are concerned.

6.2 Conclusions

An independent and accountable ODPP is to succeed in its mission and gain the public trust and confidence. The ODPP's tremendous authority, its indispensable role in the criminal justice process and its essential function in upholding the rule of law underscore the need for the ODPP to be accountable to the people it serves. In practical terms this demands accountability of a standard and quality that enhances public confidence in the ODPP while helping the organization improve its performance. Having gone through all the substantive Chapters of this study, I am convinced that the discussion has not only covered all the identified relevant areas, but that the study has adequately answered all the questions identified in Chapter 1 thereby meeting the overall objective of the study: an assessment of the need and importance of prosecutorial independence and accountability to the exercise of the powers and functions of the DPP, the challenges thereto, and the opportunities available in strengthening the non-interference and objectivity of the DPP improving on the performance of the ODPP thereby improving the efficiency and effectiveness of the criminal justice system. The study has endeavoured and in my

assessment successfully answered all the questions we set to find answers to some of which are presented as the recommendations herein.

6.3 Recommendations

The study makes a number of recommendations which are discussed under the short term, medium term and long term headings as follows:

6.3.1 Short Term Recommendations

6.3.1.1 Judicial Interpretation of Statutory Provisions

As part of its transition provisions, the Constitution demands that all laws in force immediately before the effective date of the Constitution, must construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with of the Constitution.[375] Accordingly, courts should always interpret the statutory provisions, which are yet to be amended to bring them in conformity with the Constitution, in a manner that respects and is in consonance with the independence of the ODPP under the Constitution.

6.3.1.2 Judicial Restraint

The proper functioning of the criminal justice system, underpinned by the Constitution as a critical pillar of our society, is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.[376] As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court

[375] Section 7(1) of the Sixth Schedule to the Constitution. See the decision of the High Court of Kenya at Kisumu (D.S. Majanja, J) in *Republic v S.O.M Criminal Case 6 of 2011; [2018] eKLR*.
[376] Mumbi Ngugi, J in *Kipoki Oreu Tasur v Inspector General of Police & 5 Others [2014] eKLR.*

would be reluctant to intervene.[377] However, while the High Court cannot interfere with the exercise of the discretion if the DPP, in exercising his discretion is acting lawfully, the Court must interfere with the exercise of the discretion if the DPP, in exercising the powers, is contravening the fundamental rights and freedoms of the subjects of such powers.[378] The ODPP although independent is subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution.[379]

6.3.2 Medium Term Recommendations

6.3.2.1 Continuous Training of Prosecutors

The ODPP should invest in lifelong learning aimed at equipping staff with requisite skills and capabilities necessary to deliver their mandate and to adopt international best practices within the country. This can be achieved through sufficient funding and capacity building of the PTI to enable it achieve its mandate of providing continuous professional training and education to the members of staff in all aspects. Continuous professional development and adoption of international best practices, principles and standards will without a doubt enable the prosecutors understand their mandate and the need to revolutionize towards prosecutorial constitutionalism where independence and accountability is key to the realization of the office's overall mandate.

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[377] *Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR.*

[378] Court of Appeal in *Uwe Meixner & Another v Attorney General* (Civil Appeal No. 131 of 2005); [2005] eKLR; [2005] 2 KLR 189.

[379] See the decision of Majanja J in *Kenya Commercial Bank Limited & 2 Others v Commissioner of Police and Another (HC Misc. Civil Application No. 179 of 2012)*. See also *Republic v Chief Magistrate Milimani & Another ex parte Tusker Mattresses Ltd & 3 Other [2013] eKLR.*

6.3.2.2 Integration of e-Case Management System with Other Actors

A just and expeditious disposal of criminal cases, which is a function of the independence and accountability of the ODPP calls for a collective effort of all the actors in the criminal justice system: the investigative agencies including the ODPP, the Judiciary, the NPS, the Independent Policing Oversight Authority (IPOA), the EACC and the Prison Services. Accordingly, the ODPP e-Case Management System needs to be quickly integrated and linked with the Judiciary e-Filing System. Accordingly, and other corresponding systems by the other actors such that the NPS. Once achieved, the NPS will be able to upload evidence to the system which will then be available to the ODPP for independent review towards making the decision to charge. Once a decision to charge has been made and a charge sheet prepared, the charge sheet is then electronically filed to the Judiciary through the Judiciary e-Filing System.

6.3.2.3 Regular Review of Existing Policy Documents

The various ODPP prosecution policy documents need to be constantly and frequently reviewed and where necessary revised to ensure that they are not only in conformity with the Constitution, the ODPP and other laws, but also that they are in line with the ODPP's strategic commitments towards the ODPP's vision, mission, strategic commitments and activities aimed at realizing the ODPP's mandate and serve our diverse stakeholders better. In this line, the National Prosecution Policy, whose first and second editions were published in 2007 and 2015 respectively, and which guides prosecutors on what they should consider in the conduct of public prosecutions, institutional development and to mirror international standards and best practices and on the manner in which prosecutorial decision-making is undertaken, showcasing how prosecutorial discretion should be exercised based on clear, rational and principled examination of the sufficiency of evidence and the public interest, is ripe for review and possible amendments.

6.3.3 Long Term Recommendations

6.3.3.1 Relooking Executive Appointment and Dismissal Process of the DPP

The ODPP Act may needs to be amended to establish a more suitable nomination and appointment criteria that would facilitate the realization of the new Constitution, especially its provisions on leadership and integrity.[380] The appointment process should as of necessity be more inclusive, transparent and more rigorous to ensure an independent and accountable DPP. The Venice Commission significantly emphasizes on the appointment of the DPP and his equivalents:

> "It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government."[381]

6.3.3.2 Amendment of the Criminal Procedure Code

Section 83 of the CPC should be amended to replace the Solicitor General, the Deputy Public Prosecutor, Assistant Deputy Public Prosecutor and State Counsel which positions are not provided for under the current legal and institutional framework of the ODPP with the current

[380] Akech, M. Institutional Reform in the New Constitution of Kenya; ICTJ: Nairobi, Kenya, 2010.

[381] Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, para 34. Citing from CDL(1995) 073 rev. Chapter 11.

positions including the SPP, the DDPP, the SADPP, the ADPP, the Senior Principal Prosecution Counsel (SPPC), the Principal Prosecution Counsel (PPC), Senior Prosecution Counsel (SPC) and the Prosecution Counsel (PC).[382] This will reflect the delinking of the ODPP from the OAG under the current Constitution. Further, the misconception that section 89[383] of the CPC allows the DCI or magistrates to draft charge sheets as was in the old order[384] needs to be corrected once and for all by way of amendment to the Code. It is noteworthy that the last amendment to section 89 of the Code was in 1983.[385] Pursuant to the requirements of Section 7(1) of the Sixth Schedule to the Constitution discussed above, section 89 of the CPC must be read in a manner that brings it into conformity with Article 157 of the Constitution which vests the exclusive powers to institute charges in the ODPP.

6.3.3.3 Amendment of the Extradition (Commonwealth Countries) Act[386]

Section 7[387] of the Extradition (Commonwealth Countries) Act on the issuance of authority to proceed as regards the extradition of a convict resulting from the criminal trial process, should be

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[382] Section 83 of the CPC provides:

> "The Director of Public Prosecutions may order in writing that all or any of the powers vested in him by sections 81 and 82, and by Part VIII, be vested for the time being in the Solicitor-General, the Deputy Public Prosecutor, the Assistant Deputy Public Prosecutor or a state counsel, and the exercise of those powers by the Solicitor-General, the Deputy Public Prosecutor, the Assistant Deputy Public Prosecutor or a state counsel shall then operate as if they had been exercised by the Director of Public Prosecutions."

[383] Section 89 provides *inter alia* that:

> "(4) The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer."

[384] See for example the Article by Mr. Suyinka Lempaa titled "*Prosecutors are going beyond their Mandate"* published in the Standard Digital https://www.standardmedia.co.ke/article/2001367515/prosecutors-encroaching-on-dci-s-functions accessed on 14th July 2020.

[385] Act No. 10 of 1983, Sch.

[386] Cap 77 Laws of Kenya.

[387] Section 7 provides:

> "(1) Subject to the provisions of this Act relating to provisional warrants, a fugitive shall not be dealt with in any manner under this Act except in pursuance of the written authority of the Attorney-General, issued in pursuance of a request made to the Attorney-General by or on behalf of the government of the designated Commonwealth country in which such person is accused or was convicted.
>
> (2) There shall be furnished with any request-
>
> (a) in the case of a fugitive accused of an extradition offence, an overseas warrant issued in the requesting country;

amended to give the power to issue the Authority to Proceed to the DPP. While the matter is pending before the Supreme Court for determination, it is my considered belief that extradition proceedings and or proceedings for committal are criminal proceedings and thus the DPP should have the responsibility to conduct extradition in Kenya. The section as it is currently is constitutionally invalid as it contradicts the provisions of Article 157 of the Constitution.

6.3.3.4 Amendment of the Mutual Legal Assistance Act[388]

The definition of 'competent authority' in section 2 of the Mutual Legal Assistance Act should be amended to expressly include the DPP without the need for designation as such by the AG[389]. The amendment would help uphold the independence of the ODPP as enshrined under the Constitution and the ODPP Act. The express designation by law of the DPP as a competent authority also promotes ease of cooperation and collaboration of the DPP and other actors in international criminal law and thus promotes the fight against cross-border crimes by making mutual legal assistance more efficient and less-bureaucratic.

In what may have been a recognition of this need, the BBI Bill proposes to amend the Mutual Legal Assistance Act[390] to harmonize the list of mainstream competent authorities with the provisions of section 7(2) of the Act which provides that a request for legal assistance from Kenya may be initiated by any law enforcement agency, or prosecution or judicial authority

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(b) in the case of a fugitive unlawfully at large after conviction of an extradition offence, a certificate of the conviction and sentence in the requesting country, and a statement of the amount (if any) of that sentence which has been served, together (in each case) with particulars of the fugitive concerned and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant of arrest.

(3) On receiving a request, the Attorney-General may issue an authority to proceed, unless it appears to him that a warrant of surrender in that case could not lawfully be made, or would not in fact be made, under this Act."

[388] No. 36 of 2011.

[389] The DPP was designated by the AG as a competent Authority pursuant to powers conferred under section 2 of the Mutual Legal Assistance Act vide Gazette Notice No. 1847 dated 7th February 2013 in Kenya Gazette Vol. CXV-No. 22 dated 15th February, 2013.

[390] Act No. 36 of 2011.

competent under Kenyan law. The Bill accordingly recommends, among others, an amendment to section 2 of the Act as far as the definition of a *'Competent Authority'* is concerned to expand the definition to include among others 'prosecutorial authority'. The result is that the ODPP will then be a competent authority by Statute not requiring designation as such by the AG.[391]

6.3.3.5 Amendment of the ACECA

It is also hereby recommended that section 56B (3) of the ACECA which provides for out-of-court settlement to remove the power of the Independent Ethics and Anti-Corruption Commission[392] to enter into undertakings not to institute criminal proceedings against persons. While the section generally refers to civil proceedings and applications, it overlaps into possible criminal proceedings and therefore the powers of the DPP of prosecution by empowering the Commission to enter into undertakings not to institute criminal proceedings against persons. This contravenes the spirit of Article 157 of the Constitution.

6.3.3.6 Establishment of an Independent Prosecution Service Inspectorate

As already highlighted in Chapter 3, the ODPP Act provides for the establishment of a team of inspectors and issue guidelines on inspection of prosecution operations within Kenya.[393] It is my hope that the pending case[394] against the appointment of the Taskforce on the establishment and operationalization of the Inspectorate is expeditiously settled to give way for the establishment of the Inspectorate. At establishment, the inspectorate should be staffed with thematic experts, including previous senior prosecutorial staff to enable it enjoy greater insight into the workings of the ODPP. The inspectorate will without a doubt strengthen the ODPP's accountability as it

[391] The AG however remains the Central Authority by dint of section 5 of the Act which has not been proposed for amendment.
[392] The commission is established under section 3 of the Independent Ethics and Anti-Corruption Commission Act, No. 22 of 2011 pursuant to Article 79 of the Constitution.
[393] Section 52 of the ODPP Act.
[394] *Chama Cha Mawakili Limited v Noordin Haji, Director of Public Prosecutions & 4 Others*, Nairobi High Court Constitutional Petition No. 267 of 2019.

will help objectively scrutinize the ODPP's work as it will provide constructive input and recommendations on the ODPP's performance, and follow up with re-inspections to verify that its recommendations have been taken seriously. The inspectorate will on one hand provides assurance on the operation of the prosecution service, and which is on the other hand aligned with the business needs of the ODPP and one that provides a direct contribution to that service's performance improvement. Objectivity rather than independence is likely to be a greater asset in this context.[395]

6.3.3.7 Independent Prosecutorial Complaints Assessor

An independent complaint assessor will reassure the public that their complaints against any individual prosecutor or the ODPP will receive a fair hearing. Such an assessor mechanism would have a number of benefits: it is private and free for the complainant; it is independent of the prosecution service; it can lead to a complaint being further investigated; it can result in improvements to the way in which the prosecution service operates, including the handling of complaints; and the annual report of the complaints assessor provides an important measure of public accountability for the prosecution service. This is important as the ODPP must be a particularly daunting institution from the point of view of the average Kenyan. The assessor would also be useful in undertaking annual audits of the ODPP's complaint-handling procedures. A first step would be to establish the assessor to initially deal only with non-legal complaints that the ODPP has been unable to resolve to the complainants' satisfaction. The office can then later be empowered to oversee the development and refinement of guidelines and protocols relating to the process of complaints handling in the ODPP and later be able undertake an annual audit of complaints handled by the ODPP.

[395] Lord Advocate, Establishing an Independent Inspectorate for the Crown Office and Procurator Fiscal Service: Proposals from the Lord Advocate, September 2003, para 21, www.scotland.gov.uk/Topics/Justice/ipis/bg (accessed 28 October 2019).

6.3.3.8 Prosecutorial Review Commissions[396]

The proposed PRC would review the ODPP's exercise of discretion in decisions not to prosecute. The PRC would provide an indirect check on abuses of prosecutorial powers thereby serving as watchdog over the ODPP, the DPP and individual prosecutors. The PRC will entrench the need to give reasons especially where the decision not to prosecute is made. This may be done in the form of an obligation to provide a written notice of such decision not to prosecute to the victims of the supposed crime. This will be in compliance with the dictates of Articles 47 and 157(11) of the Constitution, and section 4 of the Fair Administrative Action Act.[397][398]

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[396] West, M.D., Prosecution Review Commissions: Japan's Answer to the problem of Prosecutorial Discretion, Columbia Law Review 92 (1992), 693.
[397] Act No. 4 of 2015.
[398] The Act was enacted to give effect to Article 47 of the Constitution, and for connected purposes.

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