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Clarifying the Roles of the Director of Public Prosecutions and the Director of Criminal Investigations in Kenya: A Proposal for Legal Reform

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Abstract

The Office of the Director of Public Prosecution and the Directorate of Criminal Investigations are two key offices in Kenya's criminal justice system. Their roles are outlined in the Constitution and various statutes. However, their effective operationalization has been a tough nut to crack, with both institutions at loggerheads as to who is tasked with performing what roles. This has led to supremacy battles between the two institutions, thereby hampering an efficacious criminal justice system. This study critically interrogates the distinguishing unique roles between the two offices, while referring to legislative mechanisms and judicial precedents. Using a desktop review methodology, it examines laws and programmes and postulates that a distinction between their roles is pertinent. The study will demonstrate that criminal investigations are a preserve of the DCI while the ODPP is mandated with bringing charges. The study brings to the fore legislative proposals to address the prevalent conflict. The study will draw from best practices in South Africa and the UK to show that a system of complementarity between these two institutions is the best way to avoid abuse of office. Collaboration between the two, while understanding their distinct roles is vital to enhance administration of justice.

Key Words: *Office of Director of Public Prosecution, Directorate of Criminal Investigations, legal reform, criminal justice system.*

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1. Introduction

The Kenyan criminal justice system is composed of institutional agencies and actors that are involved in ensuring the delivery of effective and equitable justice.¹ The criminal justice apparatus in Kenya is systematic, with distinct law enforcement agencies tasked with the responsibility of investigating, arresting and arraigning suspected criminals in court.² Once a conviction is entered, the criminal justice process will incorporate either the probation department or the prison department.³ Two prominent institutional actors who are critical to discharging essential functions in the Kenyan criminal justice system are: the Office of the Director of Public Prosecutions (ODPP) and the Directorate of Criminal Investigations (DCI).⁴

Despite the relatively clear delineation of their respective functions, there have been periodic supremacy battles between the ODPP and the DCI.⁵ It is imperative to underscore the fact that these two agencies are critical in the operationalization of our criminal justice system as a country. Ideally, the two institutions that are the focus of this study ought to complement each other in realizing a perfect criminal justice system that fits a just Kenyan legal system. However, the reality is far from that ideal vision. In fact, the theoretical projection of cooperation between the two agencies has not been in place for a couple of years.

The conflicts and overlap of jurisdiction between the DCI and the DPP indicate the unsatisfactory nature of the inter-agency interactions between them, which necessitates the inquiry in this paper. This paper seeks to clarify

¹ Roselyine Aburili: Access to Criminal Justice in Kenya; an Assessment of Legal, Policy and Institutional Frameworks. Available at <http://erepository.uonbi.ac.ke/handle/11295/101848> accessed 4 December 2022

² Ibid

³ Ibid

⁴ Ibid

⁵ The Standard: Endless war between DCI, Haji hurting Kenya. Available at <https://www.standardmedia.co.ke/editorial/article/2001446850/endless-war-between-dci-haji-hurting-kenya> accessed 4 December 2022

the roles of the Director of Public Prosecutions and the Director of Criminal Investigations with a view to resolve the jurisdictional conflict between these two agencies. The objective of the paper is to make proposals for legal reform in a bid to develop an improved criminal justice system that is conducive for the full realization of the interests of justice.

2. The Roles of the DPP and DCI in Kenya: Legal and Institutional Framework

Both the ODPP and the DCI are criminal justice institutions established under Kenyan law, the institutions have both constitutional and statutory basis that supports their operationalization. Within this segment the discourse is one that is shaped by the legal and institutional framework for the DCI and the DPP. This section clarifies the roles of the two institutions while drawing from their respective legislative frameworks. It interrogates the effectiveness of these mechanisms put in place.

2.1 The ODPP

The ODPP is mandated by article 157 of the Constitution of Kenya, 2010 and the ODPP Act to perform the following legal functions: First and foremost, the Director of Public Prosecutions is mandated to decide to charge which is the decision whether to prefer criminal charges against a suspected person.⁶ The decision to charge is an exclusive remit of the DPP and not any other actor within the criminal justice system, the functionality is under protection by the constitution within article 157 and the DPP act.⁷

The institutional guidance on the decision to charge was launched on 30 July 2020 and is part of norm generation by ODPP in the criminal justice enterprise. There are a variety of factors that the ODPP considers in making their decision to charge against a person.⁸ Generally, the decision to charge

⁶ Article 157 of the COK

⁷ Ibid

⁸ “Guidelines on Decision to Charge and Case Management System Speech” (*The Office of the Director of Public Prosecutions (ODPP)* July 13, 2021) <https://www.odpp.go.ke/dtc-and-case-management-speech/> accessed 27 August 2022

is the prosecution counsel's determination of whether there is sufficient evidence by an investigator or investigative agencies to warrant criminal proceedings against an accused person before a court of law.⁹

This paper opines that the decision to charge is a positive attribute that shows DPP's firm resolve toward a culture of professionalized, intelligent prosecutorial system in Kenya. The decision to charge may also be interpreted as enhancing the normative frameworks of criminal accountability praxis in Kenya's CJS. The decision to charge is the most intrusive decision on a person's liberty, life and property that sound rules and principles must guide. Therefore, a compelling necessity for due and utmost care in deciding to charge is required.

In discharging their duties and obligations in the decision to charge, the DPP has to consider the authorization in some instances of corruption, terrorism, treason, sedition, and offences under the Anti-Counterfeit Act and offences involving aircraft. After that, there is not much to be considered other than ensuring that the applicable standards are enforced in line with the DPP's authorization under the law. In applying the applicable standard, the Prosecution Counsel must determine by considering two factors: the KEY evidence; and the minimum requirements of a file based either on a two-stage test or threshold test.¹⁰ Evidence, either alone (being of one witness) or taken together with other evidence, establishes, first, elements for each offence, and second, reveals the person or persons to be charged for the offence(s).¹¹

The two-stage test is composed of the evidential and the public interest tests. The evidential test essentially points to evidence as an alleged set of facts, the truth before an investigator is proved or disproved and includes statements, admissions, confessions or observations by the court.¹² The

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

¹² Section 80 of the Evidence Act

prosecutor must be satisfied that ‘sufficient evidence’ assures ‘a realistic chance of conviction’ of the accused. To decide whether there is sufficient evidence, the Prosecution counsel has first to identify the elements of the offence by thoroughly reviewing the law and judicial precedents. Once this is done, the prosecutor has to look at the evidentiary material in terms of Relevance i.e. does it add any probative value, or does it prove or disprove the elements of the crime.¹³ In *R v Mark Lloyd Stevenson*,¹⁴ it was held that the relevance of evidence in a criminal case is determined by the probative value of the evidence adduced.

The public interest aspect presents the elements of the second part of the two-stage test.¹⁵ In the determination of the public interest, the following are considered: (i) seriousness of the offence; (ii) culpability of the suspect (tendency towards guilt or blameworthiness): suspects level of involvement, premeditation or planning, any benefits to the suspect, previous criminal conduct, suspect’s position of trust about victim or offence; (iii) impact or harm to victim or community; (iv) status of the victim, suspect’s age; and (v) whether prosecution is a proportionate response.¹⁶ Apart from the decision to charge, other functions of the ODPP include: taking over and continuing with criminal proceedings instituted by another authority or individual. The ODPP is also tasked with directing criminal investigations and guiding the conduct of the said investigations.

The ODPP has the power to discontinue criminal proceedings at any point before the court gives a decision. This is essentially the power of nolle

¹³ “Guidelines on Decision to Charge and Case Management System Speech” (*The Office of the Director of Public Prosecutions (ODPP)* July 13, 2021) <https://www.odpp.go.ke/dtc-and-case-management-speech/> accessed 27 August 2022

¹⁴ [2016] eKLR

¹⁵ “Guidelines on Decision to Charge and Case Management System Speech” (*The Office of the Director of Public Prosecutions (ODPP)* July 13, 2021) <https://www.odpp.go.ke/dtc-and-case-management-speech/> accessed 27 August 2022

¹⁶ *Ibid*

prosequi provided under Article 157 (6) (c) of the Constitution and section 82 and 87 of the Criminal Procedure Code. There are certain attributes related to the discontinuation of any proceedings from court by the office of the DPP. It is imperative to be cognizant of the fact that the discontinuation is procedural in order to protect the rule of law and therefore the prosecutor has to obtain the permission of the court before implementing the action, this condition is anchored under article 157 (8) of the Constitution of Kenya 2010.¹⁷

In the case *R v Enock Wekesa and Another* the court addressed the question as to the power to discontinue a trial.¹⁸ The Court declared that the requirement to seek permission before the discontinuation of a case is to be applied in all cases that are under the purview of the DPP. It was adjudged that when exercising the procedures and powers spelt out by the law the DPP should consider issues in the administration of justice due to the need to prevent and avoid abuse of legal powers.¹⁹ This case points to the fact that it is vital to ensure constitutional values and principles are upheld to prevent abuse of power by the DPP.

Similarly in the case of *Helmuth Rame v R*²⁰ the Court held that on matters discontinuation of cases, the court is required to interrogate the reasons given by the prosecutor to withdraw the cases to determine whether the threshold set under article 157 (11) of the constitution are met.²¹ According to the set conditions the courts may thwart the withdrawal of the cases if: the process is oppressive to the victims, if the DPP is seen to be acting in bad faith or in any malicious manner whatsoever.

Finally, in the case *R v Muneh Wanjiku Ikigu* the court stated that if there is wind of the abuse of the court process then the power of the DPP to

¹⁷ Article 157 (8) of the COK

¹⁸ Misc App 267 of 2010.

¹⁹ *R v Enock Wekesa and Another* Misc. 267 of 2010

²⁰ Misc. 530 of 2012.

²¹ Article 157 (11) of the COK

discontinue criminal cases might become unenforceable. In the *Ikigu* case, the prosecution is reported to have conducted the case in question for about 4 years and 10 months and during the whole time the accused was in custody.²² The key witness to the case could not be found which led to a request to withdraw the case by the prosecution. The court saw that there would be no reasonable way the witness could be traced and instead of just discontinuing the case through a withdrawal the court ended up acquitting the accused. These cases demonstrate the important role courts play in avoiding abuse of power and the court process. In this way, courts play an important role in administration of justice, and must only allow withdrawal of cases upon a hawk-eyed analysis of the evidence presented in its totality.

In Magistrate Courts, the prosecution can withdraw a case any time before the judgment is delivered with the permission of the court. This is further supported by section 87 of the Criminal Procedure Code (CPC).²³ Normally the law provides that if the case is discontinued after the close of the prosecution's case the accused person is to be acquitted. Alternatively, if a case is discontinued before the accused presents his defense then the accused person is supposed to be discharged.²⁴ It should be noted that according to the Kenyan law a discharge does not preclude the prosecution from bringing in a subsequent case on the same grounds against the accused person on the same facts as before if new evidence has been discovered.²⁵ It is very possible for a discharged person to be criminally prosecuted and found guilty later on. However, this presents an opportunity for the accused person to plead *autrefois acquit* as captured under Article 50 (2) (o).

In practice the ODPP in can invoke the power that is expressed by the principles of *nolle prosequi*. *Nolle prosequi* can be entered before the court by oral or written means for approval in regards to the discontinuation of a

²² *R v Muneh Wanjiku Ikigu* [2016] eKLR

²³ Section 87 CPC

²⁴ *Ibid*

²⁵ Section 82 (1) of the CPC

case.²⁶ Section 82 of the CPC and article 157 of the constitution provide for the power of *nolle prosequi*. In *nolle prosequi* the accused is usually discharged from the case.²⁷ If the accused person is in custody he is supposed to be released, this is similar to the accused persons on bail and bond and in instances where the accused person is not present in court they ought to be served with a notice of the exercise of the power of *nolle prosequi*.²⁸

Another imperative role of the ODPP is to facilitate witnesses and victims of crime during criminal proceedings. Monitoring, training and appointing new public prosecution counsels is the mandate of the ODPP. The ODPP handles international relations, such as mutual legal assistance and extradition requests. The ODPP has a role in influencing policy on law reform, advising the government and its agencies while also responding to complaints against public prosecutors.

Procedurally there are a lot of aspects that may come up in a criminal case; such a procedure is the pre-trial and the disclosure of evidence by the ODPP. This is a function that is required by the DPP. Under the provisions of article 50 (2) of the constitution the prosecutor is required to disclose evidence against an accused during the pre-trial period and across the entire period of the case.²⁹ This principle and requirement is not only theoretical in nature but one that has been effectively practised. In the case *Hussein Khalid and 16 others v AG and 2 others*,³⁰ as well as the case of *Thomas Patrick Gilbert Cholmondeley v R* whereby the disclosure of evidence by the prosecution was upheld.³¹ Disclosure of evidence by the prosecution is a protected fundamental right under the Constitution as captured under Article 50 (2) (j) and Article 25. It therefore cannot be derogated.

²⁶ Judiciary, ‘Criminal Procedure Bench Book – the Judiciary of Kenya’ <https://www.judiciary.go.ke/?wpdmpro=criminal-procedure-bench-book> accessed 3 December 2022

²⁷ Section 82 of the CPC

²⁸ *Ibid* 5

²⁹ Article 50 of the COK

³⁰ *Hussein Khalid and 16 others v AG and 2 others* [2020] eKLR

³¹ *Thomas Patrick Gilbert Cholmondeley v R* [2006] eKLR.

In time where the evidence in a case is only given during the hearing of the case the accused must be given proper and ample time to prepare for the defense against the evidence presented. The rationale behind the giving of ample time for the preparation of the defense is to practise the law under the right of the provision of article 48 of the Kenyan Constitution, which provides for the rights to access to justice.³² The case of *Felix Mwova Vaasya v R*³³ examined the aspect of being given ample time after the disclosure of evidence by the prosecution during the hearing in a case. In the case the court held that providing accused persons with copies of statements by witnesses only a day before the trial of a case does not amount to sufficient time for the preparation of a defense.³⁴ These cases are proof that fair trial is a fundamental right under the Constitution and the ODPP should take necessary steps to ensure full realization and protection of this right. The aforementioned legal roles of the DPP point to the fact that the decision to charge in criminal prosecutions is entirely a function of the DPP.

2.2 The DCI

The importance of conducting thorough investigations cannot be overstated, and both witnesses and victims of crime rely significantly on the DCI in this regard.³⁵ Kenya mainly relies on traditional methods of gathering evidence, including confessions and witness testimonies.³⁶ Investigations occasionally rely on forensic science evidence because the usage of technology is so prevalent today. Since the Constitution of Kenya, 2010 does guarantee human rights in the criminal justice system³⁷ and certain means of information collection are permitted under the law, all these elements are

³² Article 48 of the COK

³³ Misc. 48 of 2016.

³⁴ Ibid.

³⁵ Office of the Directorate of Criminal Investigations. Available at <https://www.cid.go.ke/index.php/aboutus/our-functions.html> accessed 4 December 2022

³⁶ Joseph Peterson, Ira Sommers, Deborah Baskin, and Donald Johnson, 'The Role and Impact of Forensic Evidence in the Criminal Justice Process' [September 2010]. Available at <https://www.ojp.gov/pdffiles1/nij/grants/231977.pdf> retrieved 4 December 2022

³⁷ Reference can be made to Article 49 and 50 of the Constitution of Kenya 2010

under the purview of the DCI. This section highlights the legal functions of the DCI.

The DCI, being Kenya's principal investigative agency in the criminal justice system, covers the following areas in terms of functions and jurisdiction. According to sections 28 and 35 of the National Police Service Act, 2011, the DCI's current duties include: gathering and providing criminal intelligence; conducting investigations into serious crimes like murder, drug-related offences, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime, among others uphold law and order.³⁸ The Constitution of Kenya, 2010 also pronounces itself on the functions of the DCI through the provisions under article 247 of the Kenyan Constitution.

Other functions of the DCI may include finding and stopping criminal activity, apprehending offenders, keeping track of criminal history, forensic investigation, and obeying the instructions that the Director of Public Prosecutions gave the Inspector General by dint of Article 157(4) of the Constitution.³⁹ Under Article 157(4), the Director of Public Prosecutions has the authority to order the Inspector General of the National Police Service to look into any information or allegation of criminal activity, and the latter is required to abide by any such written instructions.⁴⁰ The DCI may coordinate with national Interpol activities, perform any other task assigned to it by another written law, including any investigation into a subject that the Independent Police Oversight Authority may refer to it. Lastly, the powers of the DPP are performed in person or in a subsidiary manner through the prosecution attorneys working under the office.

3. Jurisdictional Conflict Between The DPP And DCI

As highlighted earlier on, the ODPP is given authority under article 157(6) to institute criminal proceedings through its prosecutorial powers.

³⁸ National Police Service Act of 2011

³⁹ Article 157(4) of the COK

⁴⁰ Ibid

Obviously from the provision it is concluded that the powers of prosecution in Kenya are vested in the ODPP. The provision places a mandatory obligation for the ODPP to deal with direct prosecutions.

It appears that Article 245(4)(a) of the Constitution,⁴¹ which states that no person may direct the Inspector General with respect to the investigation of any specific offence or offences, directly conflicts with the Director of Public Prosecutions' authority to give the Inspector General mandatory instructions as discussed within article 157(4) of the Constitution. As long as the two opposing viewpoints in the Constitution remain unchanged, it is not improbable to envision a scenario in which there is a constitutional impasse. Giving instructions to the police during criminal investigations by the director of public prosecutions is not inappropriate. Such provisions show the jurisdictional conflict between the DPP and the DCI, who is under the authority of the Inspector General.

There is further confusion still on the issue of initiating criminal proceedings. The ODPP Act recognizes private prosecution and provides that any person who brings private prosecution under the provisions of section 28 of the ODPP Act should inform the DPP in writing within 30 days and the ODPP has the discretion of taking over or discontinuing the prosecutions. This raises the question as to whether the DCI may fall under the components of private prosecution as 'any person'. This is a ground for conflict between the DCI and the DPP, however, going with the literal interpretation of the constitution and the statutes the DCI cannot bring criminal proceedings against an accused person in court.⁴²

Arguments on the qualification of the DCI to institute private prosecutions cannot succeed since there are conditions to be met for admissibility of such

⁴¹ Article 245(4)(a) of the COK

⁴² Charles Gatonye and Wilfred Nderitu: 'Does DCI have legal powers to start and sustain a criminal prosecution?' Available at <https://www.the-star.co.ke/news/big-read/2020-07-27-does-dci-have-legal-powers-to-start-and-sustain-a-criminal-prosecution/> accessed 4 December 2022

prosecutions.⁴³ These include the approval by the court after it is proved beyond reasonable grounds that the DPP was presented with the case but failed to act on the case. If that is not shown then the DCI cannot institute any private prosecution.⁴⁴ It is evident that even in cases where a private prosecutor may have the option, the law finds it highly desirable for the DPP to initiate, undertake, conduct, and, if necessary, take over criminal prosecutions. Without the DPP's approval, there is little room for other individuals or organizations to initiate and sustain prosecutions.⁴⁵

The highlighted provisions on the roles of the DCI and the DPP create a deadlock on the operations of the criminal justice system which is risky and may impede access to justice since there will be never ending court battles that try to seek a favorable interpretation for each of them. All the procedural and substantive battles on the issues only create an impasse on the decision to charge. Section 2 of the ODPP Act recognizes the National Police where the DCI is anchored as an investigative unit and this strips the DCI of any prosecutorial roles.⁴⁶

Finally, providing a way forward on the impasse, the DCI does not have the authority to decide whether or not to prosecute, and he also does not have the authority to institute, conduct, or supervise a prosecution, according to the provisions under section 23(1) of the ODPP Act, which outline the functions of the DPP.⁴⁷

4. The Kenyan Courts' Position on the DPP–DCI Conflict

Basing my evaluation on the Montesquieu's theory of separation of powers,⁴⁸ some Kenyan courts have failed to pronounce themselves clearly on the

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Section 2 of the ODPP Act

⁴⁷ Section 23(1) of the ODPP Act

⁴⁸ Montesquieu's Doctrine of Separation of Powers. Available at <https://www.scholarshipsads.com/montesquieus-doctrine-of-separation-of-powers/> accessed 4 December 2022

jurisdictional roles of the ODPP and the DCI that have given rise to conflicts between the two constitutional institutions. However, to a more significant extent, Kenyan courts have reiterated through their decisions that there is an established separation of powers between the DPP and the DCI and the functionalities as to prosecutions and the decision to charge have been awarded to the DPP.

The ruling delivered in the *Geoffrey Kaaria Kinoti v The Chief Magistrates' Court and Others*⁴⁹ ended up becoming a blow to the DPP, which had mostly enjoyed favorable decisions from the courts in relation to elements related with the decision to charge and the drafting of charge sheets. In fact in the case the court held that, prosecution of criminal offences in Kenya must only be undertaken by lawful prosecutors (being either the Director of Public Prosecutions or such other persons exercising the delegated powers of the Director of Public Prosecutions under Article 157(9) of the Constitution⁵⁰ or the entities conferred with powers of prosecution pursuant to Article 157(12) of the Constitution)⁵¹ and as long as such prosecutions are in keeping with (a) above. The decision was stayed following an appeal on the matter to the court of appeal.⁵² The status quo of the involvement of DCI in prosecution and the decision to charge still remains till the case is determined.

The Court of Appeal ruled that the Prosecution should not be stopped in its functions on initiating criminal charges unless the ODPP abuses its authority as was held in the case of *Director of Prosecutions v Crossly Holdings Limited & 2 Others*.⁵³ This case involved the constitutional right to bring criminal charges against anyone.⁵⁴ Additionally, in the case *Chibungu Sanga v Republic*⁵⁵ the court stated that once it receives recommendations from any

⁴⁹ Constitutional Petition E451 of 2021.

⁵⁰ Article 157(9) of the COK

⁵¹ Article 157(12) of the COK

⁵² Constitutional Petition No. E495 of 2021

⁵³ Civil Appeal No. 1 of 2013.

⁵⁴ *Director of Prosecutions v Crossly Holdings Limited & 2 Others*, Civil Appeal No.1 of 2013

⁵⁵ [2017] eKLR.

investigating body and has evaluated the evidence, the ODPP is free to select the best evidence that can support a conviction, so long as this discretion is applied legally and is not driven by ill will or ill motive.⁵⁶

In the case of *Okiya Omtatah Okoiti v The DPP and others E266 Of 2020*,⁵⁷ the ODPP received an affirmation from the High Court when Korir J held that the ODPP's 2019 Decision to Charge Guidelines, which are an internal guide for prosecutors, are constitutional and valid.⁵⁸ The judge also held that: The power to file charges before courts belong to the DPP and not the Inspector General of Police; the police have no power to draft charges and take them to court without the authority of the DPP; the DPP has the power to direct all investigative agencies to conduct an investigation; to guide and assist such investigation agencies in such investigation; to expect and receive a report of such investigations; and to control the related applications and orders, including miscellaneous applications.

In *Geoffrey K. Sang v Director of Public Prosecutions & 4 Others*,⁵⁹ the issue of whether the DCI may choose to press charges against someone without the DPP's approval arose. The principal legislation in the case presented itself within Article 157 of the Constitution of Kenya, 2010.⁶⁰ The decision concluded that the DCI and the police are not entitled to initiate criminal cases as against the DPP's roles. Odunga J's decision in the *Geoffrey K. Sang* case directed the DCI to restrict itself to its mandate and indicated that everything relating to prosecution, including the decision to charge, rests with the ODPP.⁶¹ Korir J's decision emphasized that the decision to charge belongs to the ODPP, and the investigating agencies must present their files to the ODPP.⁶²

⁵⁶ *Chibungu Sanga v Republic* [2017] eKLR.

⁵⁷ E266 of 2020

⁵⁸ *Ibid* at paragraph 186

⁵⁹ [2020] eKLR.

⁶⁰ *Ibid*.

⁶¹ *Ibid* at paragraph 205 (a)

⁶² *Ibid* at paragraph 220, 221

Clearly, the roles between the two entities have been spelt out by various judicial decisions. It therefore means that what happens in practice is the bone of contention. The two entities are not willing to stick to their outlined statutory and constitutional provisions. It would be satisfactory if the Judiciary were able to provide guidelines for the roles of the two entities for the interests of justice and a solid criminal justice system. Clarity is needed on the complementary roles of the DCI and ODPP, the questions as to who drafts a charge sheet and who makes the decision to charge in a court of law need to be ironed out properly.

5. A Proposal for Legislative Reform-Lessons Drawn from other Jurisdictions

This section examines the ways in which the legal frameworks of South Africa and the United Kingdom have overcome the problem of jurisdictional conflict between their prosecution and investigative authorities. Specific lessons from the comparative practices in South Africa and the United Kingdom that can be used to inform law reform in Kenya are identified.

5.1 South Africa

The criminal justice system in South Africa is similar to the Kenyan system, with the spearheading institutions being the South African Police Service and the National Prosecuting Authority. The Institutions both have a constitutional basis supported by statutory provisions.⁶³ The principles of separation of powers within the statutory bodies in the criminal justice system of South Africa are perfect and one with no overlap to report since the Police service is mandated with crime prevention, investigation and apprehending of suspects. Once this is accomplished, the findings of the said investigations are forwarded to the National Prosecuting Authority, which is

⁶³South African Police Service Official Site. Available at <https://www.gov.za/about-government/contactdirectory/departments/departments/south-african-police-service-saps> ; National Prosecuting Authority Official Site. Available at <https://nationalgovernment.co.za/units/view/66/national-prosecuting-authority-of-south-africa> npa#:~:text=The%20mission%20of%20the%20National,to%20solve%20and%20prevent%20crime. Accessed 4 December 2022

tasked with deciding whether to charge or not, depending on the crime committed and evidence presented by the investigative agency.

The operations between the two agencies in South Africa are complementary, one with no incidences to report on wrangles as to the functionality. Reports are usually made on the partnerships and cooperation between the National Prosecuting Authority and the Police service. Before the current system, there was a hybrid system that also seemed to work well but was criticized by activists interested in the criminal justice system reform. The Directorate of Special Operations, also called "Scorpions," was established in September 1999.⁶⁴ The International Convention against Transnational Organized Crime was signed in 2000, and the Scorpions were established simultaneously.⁶⁵

Raising public trust in the government's capacity to combat crime appears to be one of the driving forces behind the formation of the Scorpions. The Directorate investigated particularly serious organized crime to bring cases against those responsible. The goal was to establish a law enforcement organization like the FBI that would significantly increase the state's capacity to combat organized crime and high-profile corruption. The disturbingly high rates of severe and violent crime in South Africa led to the creation of this program. A legislative and operational mandate for the DSO existed.

5.2 The United Kingdom

In the UK, the primary duties of the police are described, along with the constitutional standing of the various police authorities. Police processes and powers within and outside the police station are outlined within the existing legal framework, including the legal foundation for detention, police

⁶⁴ Ibid

⁶⁵ Admin and others, "Prosecutors vs Investigators: Demarcating Legal Functional Autonomy" (*Nairobi Law Monthly* May 6, 2020) <https://nairobiawmonthly.com/index.php/2020/05/06/prosecutors-vs-investigators-demarcating-legal-functional-autonomy/> accessed 27 August 2022

interrogation and the right of silence, identification procedures, and stop, search, entry, and search of premises powers.⁶⁶ There are legal provisions on civil and criminal proceedings, police complaints and disciplinary actions, and the exclusion of illegally obtained evidence is, all factors considered, within provisions of the criminal justice system.

In the UK, the prosecution process includes both Prosecutions by the Director of Public Prosecutions and Prosecution by the police; this includes the official responsibility for Prosecution, police choices about Prosecution, limitations on police discretion in the decision to prosecute, and cautioning. Additional information is given on the functions of law officers concerning the prosecution system, private prosecutions, and prosecutions by non-police agencies. The procedures involved in commencing proceedings, committing cases, and the laws also highlight disclosing evidence by the defense and Prosecution.⁶⁷ Compared to the Kenyan system, this is a hybrid system that capitalizes on specialization and the division of roles between the Prosecution and the police, who are also investigators.

5.3 Lessons for Kenya

It is incorrect to equate role confusion with integration or close collaboration between the prosecutor and the investigator. Maintaining clear lines between the prosecutor and investigator's responsibilities is essential. The best individual to carry out the task of gathering the evidence is still the investigator. The prosecutor may evaluate, counsel, and guide the investigator, but at all times, keep in mind that he or she is still a court officer subject to specific ethical requirements. To ensure that these ethical

⁶⁶ Brown DK, Turner JI and Weisser B, *The Oxford Handbook of Criminal Process* (Oxford University Press 2019)

⁶⁷ Corporate Author Royal Commission on Criminal Procedure Address 8 Cleveland Row, "Investigation and Prosecution of Criminal Offences in England and Wales - the Law and Procedure" (*Investigation and Prosecution of Criminal Offences in England and Wales - The Law and Procedure | Office of Justice Programs*) <https://www.ojp.gov/ncjrs/virtual-library/abstracts/investigation-and-prosecution-criminal-offences-england-and-wales> accessed 27 August 2022

commitments are upheld, the prosecutor must keep a healthy distance from the actual gathering of evidence. The prosecutor's role is to direct the inquiry, not to carry out the investigator's duties.

A criminal investigation and prosecution's goal is to further justice, not to get a conviction. The prosecutor's duty is unique from the investigators, and the investigator dramatically benefits from the prosecutor's professional objectivity and detachment. The office of the director of public prosecutions is unquestionably not one of the investigatory agencies, although the Constitution does not stipulate that the prevention, Prosecution, or investigation of crime is the sole responsibility of any one institution. DCI is the organization tasked with the primary responsibility of leading the fight against crime and collaborating closely with the ODPP and other criminal justice organizations.

5.4 Proposed Amendments

Identical amendments should be made on the clarity of drafting charge sheets. This should be provided for since it has been identified as an area in which the two agencies find common ground in the conflict. The ODPP Act should exclusively delegate the drafting and signing of the charge sheets to the ODPP, and the NPS Act should not be concerned whatsoever with the issues around the drafting of charge sheets. The two acts also do not clearly state the extent to which the two entities should cooperate and the levels of interactions with cases.

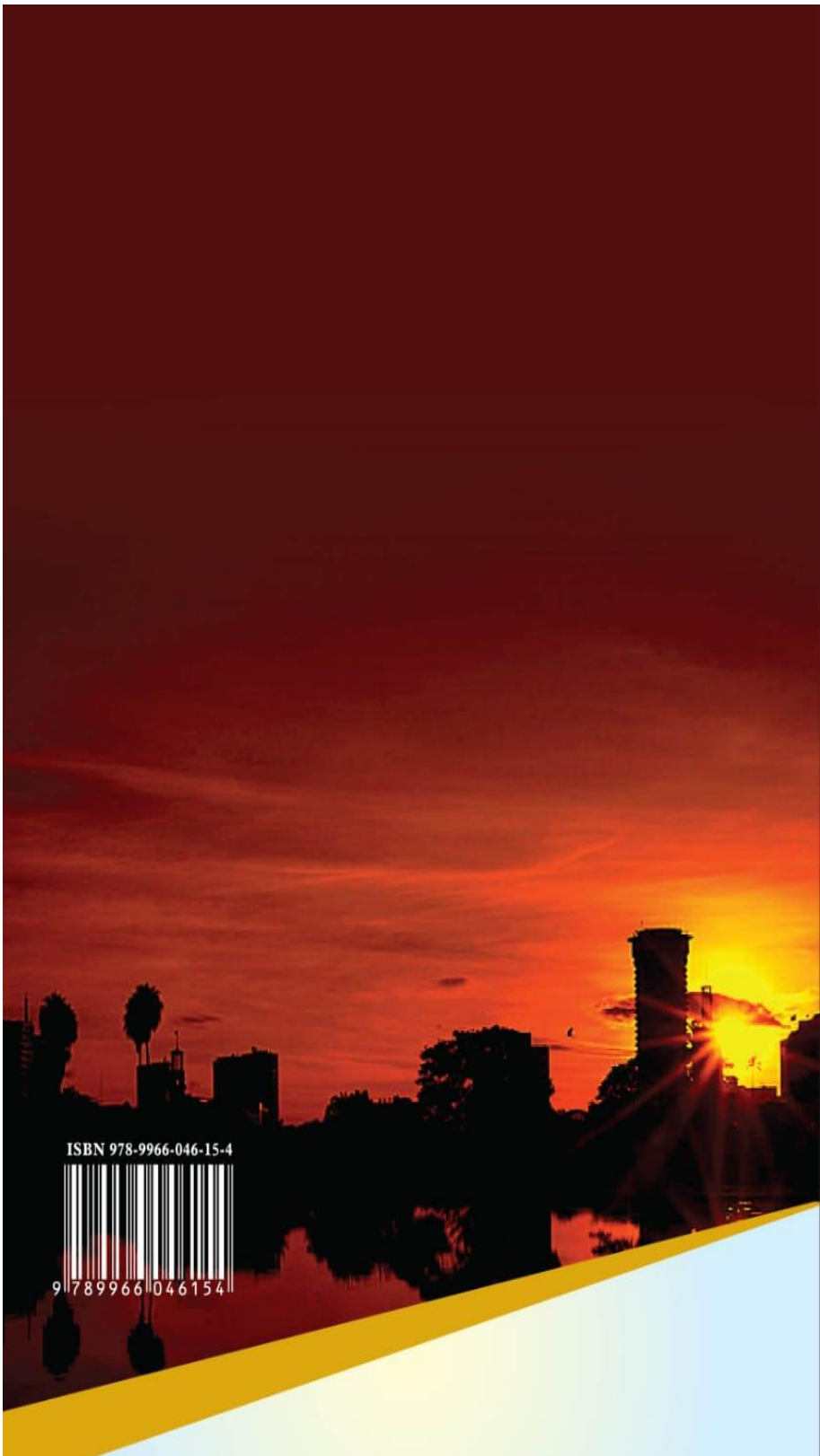
The identified conflict between Article 245(4) (a) of the Constitution and article 157 on elements of the DPP giving the Inspector General directions on matters related to investigations should be reflected on both the NPS act and the ODPP act in a clear manner to avoid confusions. Section 29 and 30 of the ODPP Act should be amended to rightly strike off the DCI from qualifying as private prosecutors. Section 23(1) of the ODPP Act is perhaps the clearest indication that the DCI cannot prosecute criminal offences and this should be amended to the NPS act for uniformity.

6. Conclusion

Universally, the purpose of criminal justice in a particular jurisdiction is to help realize and attain the rule of law. The rule of law operating within the criminal justice system ensures that the criminals are put in their place while protecting the due process of the law to achieve sustainability within our society. Investigative agencies such as the DCI are mandated to conduct investigations to bring justice to suspected criminals. The role of the Prosecution is to normally counter-check the investigations done to mount prosecutions within the due process of the law.

A criminal case launched by the DCI would, in this article's opinion, not only constitute an abuse of the legal system but would also be intrinsically unjust and a barrier to an accused individual receiving a fair trial because it would not be within the DCI's constitutional or statutory authority to do so. The opinion is based on the claim that only a prosecutor who is legitimately in office would be able to adhere to the principles of a fair prosecution process because he would be directed by the legal and constitutional requirements that give him the authority to act. Second, the DCI lacks the legal and constitutional grounds necessary to file a criminal complaint.

Going forward, there needs to be a series of amendments of the ODPP Act and NPS Act by inserting identical clauses, which (i) clarify the respective roles of DPP and DCI, and (ii) emphasize the need for complementarity as opposed to competition. Once the amendments are effected, the criminal justice system is expected to shift positively since no energy and resources would be wasted on competition and supremacy battles between the DCI and the ODPP, rather the two entities will work together to ensure an efficacious criminal justice system.



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