ALTERNATIVE TO STATE DOMINATED CRIMINAL PROSECUTION IN NAMIBIA

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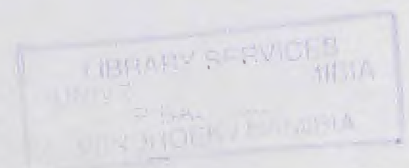

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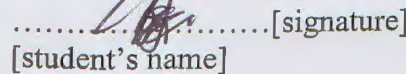

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Abstract

Criminal proceedings, in general, are proceedings which in substance are of a criminal nature, and not of a civil nature and include, inter alia, applications for a stay of prosecution and release from detention, etc.

The constitution of the Republic of Namibia protects the rights of all persons including the rights of victims of crime which are also recognised in the **United Nations Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in Resolution 40/34 of 29 November 1985.** This protection covers rights impaired by the State and/ or individual persons, acts or omissions that are in violation of criminal laws and/or any other law operative and enforceable in Namibia. These rights have to be respected and protected by all organs of government involved in the judicial process, from the moment of the commission of the crime or offence up to and including the completion of the judicial process and/or quasi-judicial process related thereto. Hence, the need to have checks and balance mechanisms with respect to state power and functions in the prosecution process. We have very often witnessed white-collar crimes not being prosecuted in Namibia.

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Introduction

The Namibian society is founded on democratic principles. Therefore, it will vigorously protect and promote adherence to democratic values.

The pivotal premise upon which our criminal prosecution service rests is expressed in article 12(1) (d) of the Constitution of the Republic of Namibia, Act 1, 1990. Article 12(1) (d) provides that:

> All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them[1].

This principle obliges the citizens of Namibia to have respect for the 'rule of law' and to conduct themselves in accordance with democratic principles and values. Despite the existence of these democratic values in our Constitution, the Supreme Law of the land, members of the public and politicians often conduct themselves to the contrary. A case in point is the famous Caprivi Secessionists treason trial, in which thirteen suspects petitioned the High Court of Namibia for release as their extradition by both the government of Zambia and Botswana circumvented both those countries' extradition laws. On February, 13th 2004 the High Court of Namibia ruled in their favour and ordered their release[2].

Ministers and members of the public critised both the judicial officers and the entire legal system. They recommended the dismissal of certain judicial officers and that others be reprimanded. Threats of violence against both suspected offenders and judicial officers were adopted as a

[1] **Constitution of Namibia, (1990),** Article 12(1) (d) , Act 1, 1990.
[2] *Moses Limbo Mushwena & 12 Others v State, 2003, unreported case of the High Court of Namibia. Case No. (P) A 268/2003, Windhoek.*

means to suddenly reform our criminal justice system. The demonstrations and threats of violence by members of the public and politicians against suspected offenders and judicial officers violated principles of fairness and seriously undermined the rule of law in Namibia.

The Supreme Court of Namibia, on appeal, found that there had been no proof that such informal requests from Namibian authorities had prompted the handing over of the thirteen suspects and the circumvention of Zambian and Botswana extradition laws. Further, the court found that the High Court of Namibia had jurisdiction to try the treason case and the handing over of the suspects was proper. Nevertheless, Menges quoted O'Linn AJA as saying:

> The continuation of conduct such as referred to, will not only negatively reflect on the true values of Namibians, but it is also out to discredit the Namibian legal system and the ability to secure a fair trial by an impartial and independent court[3].

Independent prosecution service

In a democratic society the prosecution service must operate freely and independently without any undue influence from the Executive, Legislature and the judicial arm of government. The Prosecutor General and the public prosecutors under his or her control must exercise their discretion to prosecute or not to prosecute without receiving instructions to do so from any other authority. In Namibia, however, the problem is that this discretion is not defined or circumscribed by law. The exercise of prosecutorial discretion usually depends on the personal perceptions of individual public prosecutors of their duties and functions. Due to this undefined wide discretionary

[3] Menges W.(2004), **Split Supreme Court Rules Caprivi 13 must face trial**, in the Namibian, July 22, 2004, Windhoek. Justice O'Linn gave a minority judgement, supported by Chief Justice J. Strydom.

power to prosecute or not to prosecute by public prosecutors, their decisions are often perceived by members of the public not to be in the best interest of the public. The prosecutorial decisions must be tested on review and on appeal processes. This innovation is expected to motivate prosecutors to act more responsibly, transparent, and accountable. It will at the same time motivate interest and increase confidence in our criminal justice system.

The education of members of the public and politicians in the functions of the prosecutorial service will enable them to understand the role of the prosecutorial service and allow them to distinguish between the prosecutorial services and the judiciary. Such lessons will play a critical role in the adjudication of criminal disputes and, further, enable society to have a broader understanding of the whole administration of criminal justice.

The aim of this research is to analyse the prosecutorial decision making process. Therefore, the issues can be coined as follow: What impact does the State dominated prosecutorial decision-making model have on victims of crime and/or ordinary citizens in general? Can private prosecution be seen as an adequate remedy for aggrieved complainants?

Private prosecution is viewed as a liberal idea which is meant to involve popular participation of aggrieved persons in the prosecutorial decision making process. The popular participation of aggrieved persons in this process will enhance our democratic values in the criminal justice system. However, the success of this noble idea is hindered by the expenses accompanied by it. Aggrieved complainants in Namibia are often discouraged by money they are required to pay to the Magistrate Court as security for private prosecution to commence.

Aggrieved complainants are, in addition required to pay for court processes and the service of such documents.

This research discourse will review the existing laws on the prosecuting authority in Namibia, propose amendments to these laws and explore whether the existing review and appeal procedure could be applied to the prosecutorial decision-making process in Namibia.

This research paper is divided into six chapters. The first chapter briefly discusses the concept of statehood, state accountability in criminal matters and the relationship between the Prosecutor General and Attorney General. The second chapter discusses the Judicial Service Commission and the appointment of the Prosecutor General. The third chapter looks at the tenure of office, the role of the Prosecution Service, power and functions of the Prosecutor General, discretion to prosecute, stopping prosecution, withdrawal, refusal to stop prosecution. The fourth chapter will discuss private prosecution, both under statutory right and by an individual on a nolle prosequi certificate and victims of crime. The fifth chapter will discuss the general constitutional developments and chapter six will be a summation of the conclusions on the issues discussed in the other chapters above.

CHAPTER 1

What is a State?

A state can be defined as:

> A political and territorial unit that is more or less autonomous in its internal affairs but with other, similar units form a sovereign nation. In international relations, the term state also refers to an independent country, that is, a sovereign nation[4].

The Namibian Constitution defines the State as:

> A sovereign, secular, democratic, and unitary State founded upon the principles of democracy, the rule of law and justice for all. All the power is vested in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State. The main organs of the State are the Executive, the Legislature, and the Judiciary[5].

The Executive consists of the President, the Prime Minister and other Ministers. Together they constitute the cabinet of Namibia. The Legislature consists of elected representatives of political parties, and the Judiciary consists of the Chief Justice, the Judge President, judges of the High Court and the Supreme Court and the Magistrates of the Lower Courts. These three organs of the State are the pillars upon which the government of Namibia rests.

Namibia inherited all of the old South African legislation; these include the Criminal Procedure Act of 1977; Road Traffic Ordinance of 1967, the Nature Conservation Ordinance of 1975, to mention a few relevant statutes. This South African legislation was inherited to prevent a legal vacuum which could have existed if the legislation was rejected on

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[4] Ferguson J.G., 1992, **New Standard Encyclopaedia, Vol 16 (Sma-Sz).** Chicago, Standard Educational Corporation.

[5] **Constitution of Namibia, (1990)**, Article 1, Act 1, 1990.

mere political consideration. It was inherited by virtue of article 140, Act 1, 1990, which states that:

> Subject to the provisions of this Constitution all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by an Act of parliament or until they are declared unconstitutional by a competent court[6].

State's accountability in Criminal matters.

The existence of a given State depends on its citizens' harmonious and cordial conduct. The State therefore must have a mechanism in place to persistently maintain this harmonious relationship. Some crimes are capable of odious results among citizens. Such crimes will descend to the root of State security and could cause civil war.

In view of the foregoing, state subjects have waived their right to prosecute in criminal disputes and entrusted this right in the State. It is on this basis that States usually appoints a person referred to as the Prosecutor General or the Attorney General or the Director of Public Prosecution, depending on the criminal justice system, to prosecute on its behalf in criminal cases. A State is not a living being. A state is a juristic person in terms of the law. In other words it can be sued and sue through its government apparatus.

The Criminal Procedure Act, Act 51, 1977 refers to the Attorney General as a prosecuting authority as opposed to the Prosecutor General. However, in Namibia the Constitution under article 88(2) states that:

> The prosecutorial authority in all criminal proceedings shall vest in the Prosecutor General who shall perform such duties and functions at the instance of the State[7].

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[6] **Constitution of Namibia, (1990)**, Article 140, Act1, 1990.
[7] **Constitution of Namibia, (1990),** Article 88(2), Act 1, 1990.

There is a need to have a legal guideline within which a prosecution service will exercise its discretion to prosecute or not to prosecute. This legal guideline will encourage prosecutors to act in a transparent, fair, consistent and accountable manner when exercising the prosecutorial decision making powers. The prosecution service has to adopt a clear and enforceable policy, explain to and consult with community leaders or representatives, victims of crime and/or dependants of such victims about crimes and their impact. In other words, the anticipated legal guidelines must inter alia, be able to articulate rules with respect to when the Prosecutor General will enter a *nolle prosequi* certificate permitting private prosecution to be instituted and conducted by a victim who suffered injuries as a result of the committal of an offence. In a democratic society the prosecution service ought always to be inclined to accord reasons for its decisions. The involvement of community representatives, victims and other stakeholders in the prosecutorial decision-making, however, limited it might be, would attract public confidence and respect in the whole administration of criminal justice.

In Namibia the Prosecutor General does not give reasons for his or her decision to prosecute or not to prosecute, nor is he or she expected to do so. Very often the prosecutor will insist, for example, to prosecute a pensioner who admits his or her guilt in a road traffic offences and who offers to compensate his or her victim. The Prosecutor General or a public prosecutor will insist equally to prosecute a poor man who admits his or her guilt for stealing a loaf of bread merely because the prosecutor secured a prima facie case to continue prosecution and ultimately to get a conviction.

The prosecution of Magret Malama-Kean is a case in point[8]. Margret Malama-Kean was arrested on 27th June 2000. The matter was then remanded until 30th June 2000 for bail application. On the above mentioned date the prosecutor informed the court that the State was unable to proceed with the bail application as the docket was voluminous. It was then agreed that the matter should be postponed to 4th July 2000 for a bail application. On the 4th July 2000 the prosecutor informed the court that a bail application was opposed on the basis that the investigation would take a long time. The accused's legal representative agreed that the case had to be remanded for a bail application to be held. On the 9th August 2000 the bail application was called. The State was represented by public prosecutor Ms Imalwa (now the Prosecutor General) and the accused was represented by Advocate Metcalfe. The court was informed that the State would not have any objection to an application for bail, and it was agreed that the accused would pay an amount of N$150 000.00 and deliver a Toyota Corolla motor vehicle to the police as security.

Additional bail conditions were, that the accused had to report twice a day to the Oshakati Police Station between 07h00 and 08h00 and between 19h00 and 20h00; the accused surrendered her passport to the Clerk of the Oshakati Court; the accused was not allowed leave the district of Oshakati without permission of the investigating officer or of the Station Commander; and that the accused would not visit the premises of the organization of 'Company CD' or interfere with the witnesses in any manner[9].

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[8] *Magret Malama-Kean v Magistrate of the District of Oshakati NO; ProsecutorGeneral NO, Supreme Court of Namibia, Registrar original Case no. (P) A 04/2002, unreported, 2003.*

[9] *Ibid.*

Despite the agreement on which the bail application was granted, on the 14th of August 2000, the public prosecutor changed her mind and objected to bail being granted due to the investigation being incomplete and the fact that the money in issue at that point was in excess of 'one million Namibian dollars and if the accused was convicted the sentence would be severe. The defense conceded that the investigation would be long, however, they argued that the matter was by its nature one of negotiation. Bail of N$150 000.00 on the above conditions was later granted and the matter was postponed for further investigation. Thereafter the matter was postponed on various occasions. On the 14th August 2000 it was postponed for further investigation because the investigation was incomplete. On the 12th September 2000 it was postponed to 16th October 2000 because the Prosecutor did not have the docket and she did not know how far investigations were. On the 16th October 2000 the matter was postponed again for further investigations to 23rd November 2000. On six occasions the matter was subsequently postponed for further investigation[10].

The defense counsel objected on the 9th April 2001 to a further postponement for the reason that the investigation was incomplete. The accused testified that she was a Zambian citizen. She told the court that on the 27th June 2000, she was arrested out of the blue. She further told the court that for six months she had not seen her children (who are twins, 6 years of age). She also told the court that she had informed the prosecutor that the victim (CD Company) wished to withdraw all criminal charges against her with immediate effect and that it did not desire any further prosecution against her. The accused then applied for the case to be withdrawn because the victim did not wish to proceed any longer.

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[10]*Ibid.*, *p. 13.*

The prosecutor insisted on proceeding with the matter because she believed that she would be able to establish a *prima facie* case against the accused. The prosecutor believed that she was likely to prove her case beyond a reasonable doubt in court. She anticipated a conviction and a harsh punishment to be imposed due to the amount of the money in question. The Prosecutor did not attempt to gather more information about the victim's wish because her desire was to continue to prosecute a serious offence.

What was the final outcome?

It was found, however, that a delay of sixteen months will in most cases, constitute an unreasonable delay provided the State is responsible for it. In this case, unfortunately, the applicant did not prove that the unreasonable delay was entirely caused by the State. The prejudice suffered by the appellant was not irreparable trial related prejudice. Further, that there was also no other exceptional circumstances entitling the appellant to permanent stay of prosecution, whether in terms of article 12(1) (b) or article 5 read with article 25 of the of the Constitution of Namibia. In other words, the applicant was not entitled to a permanent stay of prosecution in terms of article 12(1) (b) at all[11]. However due to other factors the Prosecutor General decided not to continue with prosecution.

The undefined prosecution policy in Namibia is not only unfortunate but it also defeats, to a certain extent, the purpose of the Prosecutor General's right to exercise his/her discretion properly. The Prosecutor General has to exercise his or her discretion without fear or favor. He

[11] *Ibid.*, *p. 13.*

or she has to exercise his or her discretion by balancing the interests of the victim, the offender and the community at large.

A public prosecutor, besides from his or her duty to prosecute, must pay heed to the expenses that the State is likely to incur in prosecuting an offence whether serious or minor. For example, in the case of Magret Malama-Kean the prosecutor insisted on prosecuting despite the victim's (CD Company) desire that the prosecution be stopped. The victim, amongst other things, indicated that it was an expensive exercise to bring its witnesses from Britain to Namibia to testify. This attitude by the victim in the end persuaded the Prosecutor General to instruct that the matter be withdrawn against the accused[12].

It is therefore disturbing for one to think that whenever a *prima facie* case is established, it must always be followed by prosecution. There might be factors which may not necessarily allow prosecution to continue. For example where it is clear that:

(a) It will adversely affect the health conditions of the accused;

(b) It will turn the illness of the accused into a sudden death;

(c) It will cause public disorder; or

(d) It will simply incur unnecessary expenses on the part of the State.

In this regard a similar view was expressed by a former Attorney-General of South Africa who described the discretion to prosecute as:

> A very valuable safeguard, because one has to take into account………… what the consequences to [an accused] may be, apart from any penalty, which a court of law might inflict. If, in our view, the consequences are out of all proportions to the gravity of the offence committed, we are permitted to exercise our discretion and decline to prosecute[13].

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[12] *Ibid. , p. 13.*

[13] Joubert J., et al,**Criminal Procedure, Handbook**, (1996), 2nd ed, Cape Town, Juta and Company Limited, p. 57.

The relationship between the Prosecutor General, and the Attorney General

The office of the Prosecutor General is distinguishable from that of the Attorney General in Namibia. The Constitution of the Republic of Namibia under article 86 establishes the office of the Attorney General and the latter is appointed by the President[14]. The Prosecutor General shall also be appointed by the President, however, on the recommendation of the Judicial Service Commission.

The Attorney General is the principal legal adviser to both the President and the government[15]. The Attorney General, as part of his or her duties, exercises the final responsibility for the office of the Prosecutor General[16]. The Attorney General in Namibia is a member of Cabinet, the National Assembly and the Judicial Service Commission.
The individual appointed by the President to the post of Attorney General does not need to have specific experience. He or she is a political appointee who is required to possess integrity and academic qualification to enable him or her to understand the scope of the government structure and functions. The Attorney General has a duty to exercise the final responsibility for the office of the Prosecutor General[17]. **Does this mean the Attorney General will instruct the Prosecutor General on whether to prosecute or not?**

Before we answer the question above, it will be vital to revisit the disputes experienced hitherto between the Prosecutor General and the Attorney General in Namibia. After independence the Attorney General in Namibia was of the opinion that in terms of the government structure he possessed the authority to give instructions to the

[14] **Constitution of Namibia, (1990),** Article 32(3) (i) (cc), Act 1, 1990.
[15] **Constitution of Namibia, (1990),** Article 87(b), Act 1, 1990.
[16] **Constitution of Namibia, (1990),** Article 87(b), Act 1, 1990.
[17] **Constitution of Namibia, (1990),** Article 87(a), Act 1, 1990.

Prosecutor General. The Attorney General held this opinion partly because of his interpretation of article 87(a) of the Constitution of Namibia. He believed that the British and/or the Commonwealth legal jurisprudence in this regard were entirely applicable to Namibia. Therefore he, in terms of the law, is entitled to give instructions to the Prosecutor General with respect to criminal prosecution (or the whole administration of criminal prosecution)[18].

This growing opinion in the mind and conduct of the Attorney General later turned into a legal conflict between the Attorney General and the Prosecutor General in Namibia. The conflict between the two started on the 1st July 1993, when the Attorney General requested a police docket from the Prosecutor General. The case involved some racial utterances or allegations contrary to the Racial Discrimination Prohibition Act of 1991, Act 26, 1991[19].

The Prosecutor General initially refused to give the requested police docket to the Attorney General. The Prosecutor General refused the request because he regarded the information in the police docket as exclusive and privileged to the public prosecutor, unless such prosecutor is compelled to disclose such information at the trial[20].

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[18] *Exparte Attorney General. In re: The Constitutional Relationship between the Attorney General and the Prosecutor General 1995 (8) BCLR 1070 (Nms).*

[19] *Ibid. See also State v Gorelick and others and the Magistrate Court of Windhoek, 1993, The High Court of Namibia. Case No C2/1993, unreported;* See also Horn J. N., 2000, **The Unique Constitutional position of the Prosecutor General of Namibia and the effect of independence of the office on the functioning of prosecuting Authority in relationship with the Ministry of Justice and the Attorney General,** March 2000, unpublished LLM dissertation, University of South Africa.

[20] *Exparte Attorney General. In re: The Constitutional Relationship between the Attorney General and the Prosecutor General* 1995 (8) BCLR 1070 (NmS).

Later on the 20th August 1993 the Prosecutor General changed his mind and forwarded the docket to the Attorney General. The latter after perusing through the police docket informed the former that he had decided that prosecution should be withdrawn. He instructed the Prosecutor General to inform the court and counsel for the defendant. The Prosecutor General then informed the Attorney General that he (former) considered himself not bound by the instruction. The Prosecutor General further instructed the public prosecutor to proceed with prosecution of the matter[21]. The Attorney General eventually petitioned the Supreme Court in terms of section 15 (1) of the Supreme Court Act of 1990 to settle the legal question[22].

The Prosecutor General formulated his legal questions as follow:

Whether the Attorney General, pursuant to Article 87 of the Constitution and in the exercise of the final responsibility for the Office of the Prosecutor General, has the authority:

(a) to instruct the Prosecutor General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any matter;

(b) to instruct the Prosecutor General to take on or to take any steps which the Attorney General may deem desirable in connection with the preparation, institution or conduct of any prosecution; and

(c) to require that the Prosecutor General keeps the Attorney General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial policy[23].

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[21] *Ibid., p. 18.*
[22] *Ibid., p. 18.*
[23] *Ibid., p. 18.*

The Attorney General based his case on three legal points:

(a) He maintained that **final responsibility** means that the ultimate prosecuting discretion or ultimate superintendence vests in the Attorney General;
(b) The Attorney General also submitted that section 3(5) of the Criminal Procedure Act, Act 51 of 1977, was still Namibian law and that the Prosecutor General must exercise his authority and perform his duties under the Act subject to the control and directions of the Attorney General (as the previous Attorney Generals since 1977 did under the control and direction of the Minister of Justice);
(c) In his main Heads of Argument, the Attorney General argued that section 3(5) of Act 51 of 1977 was still intact, and wherever the word Attorney General appears, one should read Prosecutor General (See article 141(2) of the Constitution) and where the word Minister appears, one should read Attorney General[24].

The Attorney General argued that the constitution of Namibia gave his office a duty of final responsibility for the office of the Prosecutor General. This duty can not be exercised without commensurate power of intervention, direction and control. In other words the Attorney General's final responsibility for the office of the Prosecutor General gives the Attorney General control over the Prosecutor General's office decision either to prosecute or not.

The Prosecutor General's argument was that attention must be given to the fundamental values and norms of the Namibian people upon which the legal system of the new nation is to be built. He went on to state that the fundamental function of prosecuting in criminal cases is accorded to the Prosecutor General. The Prosecutor General further argued that the doctrine of separation of power is a pivotal principle entrenched in the Constitution of Namibia and the decision to decide whether to prosecute or not is one of the fundamental functions of his

[24] *Ibid. , p. 18.*

or her office. No political functionary can be allowed to interfere in this fundamental discretion.

The Honourable Leon AJA who wrote the judgment in these proceedings, stated that the Prosecutor General in Namibia should not receive instruction from the Attorney General in respect of (a) and (b) above. The Attorney General in Namibia is a new creation. It is a political appointment. The new Attorney General is the Chief Legal Adviser to the President and the government and is also responsible for the office of the Prosecutor General. The latter now fulfills the functions of the erstwhile Attorney General but with more independence[25].

With this case the authority and independence of the Prosecutor General was established. The Prosecutor General makes the prosecutorial decisions without interference from the Attorney General.

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[25] *Ibid., p. 18.*

CHAPTER 2

Introduction

This Chapter will give us a brief insight into a constitutional body charged with the responsibility of recommending candidates for the appointment of the Prosecutor General by the President of the Republic of Namibia. It will further highlight problems already experienced in such appointment, and will ultimately reveal that the Judicial Service Commission is not absolutely exempted from political manipulation in Namibia. The issue of the Prosecutor General's independence is clearly stated under chapter 1 above. The remaining question is whether the Prosecutor General is accountable?

The Judicial Service Commission

The Judicial Service Commission is composed of the following persons

(a) The Chief Justice;
(b) A Judge;
(c) The Attorney-General; and
(d) Two other legal practitioners from the Namibian legal fraternity

Both the Constitution of Namibia and the provisions of the Judicial Service Commission Act, Act 18, 1995, provide that the commission will make recommendations to the President with regard to the appointment of persons to judicial offices, whether in a permanent or acting capacity. The Commission will further recommend the removal from office of persons holding or acting in such offices.

The Commission must also conduct disciplinary inquiries into the conduct of persons holding or acting in judicial offices, and receive and investigate complaints from the members of the public concerning the

conduct of such persons or the administration of justice at the Superior Court level[26].

An impressive factor about the Judicial Service Commission is that the Chief Justice and another judge are from the judiciary (third arm of the government, at least known to be impartial and independent). Two legal practitioners are either from the Namibian Law Society or the Namibian Law Association or from both (again bodies that are expected to be free from political manipulation by the executive elite). Undoubtedly these members of the Judicial Service Commission are expected to act freely, impartially and independent of any political influence in their duties as members of the Commission. The other member of the Commission is the Attorney General. He or she is a political appointee. He or she is from the Executive arm of government. Unfortunately even in post independence Namibia party politics play a greater role than nationalism ideals. Thus the Attorney General together with other member(s) may exercise political influence over the rest of the Commission's members to achieve their desired results.

The Judicial Service Commission was structured in such a way, that there could be no transformation of the bench at least for a substantial period of time. Both the bench and professional lawyers and advocates, were whites at independence.

This might have been a legitimate observation. But on the other hand once the composition changes by introducing foreign judges and professionals it can become an instrument in the hands of the government. It is more disturbing when the process of admission to practice of professionals is made easy for political manipulation.

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[26] **Judicial Service Commission Act (1995)**, s. 4 (1), Act 18, 1995.

Judicial Service Commission conducts its procedures and functions in accordance with the rules and regulations made under sub article (3) of article 85 of the Constitution, and the Chief Justice shall preside at all meetings of that Commission, but where he or she is absent, the judge appointed by the President shall preside. Subject to the provisions of this Act and of any other law, the Judicial Service Commission shall perform its functions independently and shall not be subject to the discretion or control of any person or authority[27].

It is clear, from the proposition above that the members of the Judicial Service Commission are independent and there is no immediate reason why they should not perform their duties independently, impartially and transparently to the best of their ability and integrity.

The President for a good cause may reject the recommendations of the Commission to him. He must in writing give his reasons for such rejection and submit the matter back to the Commission[28].

It is therefore difficult to infer a lack of fairness and impartiality on the part of the Judicial Service Commission from the mere composition of it. Impartiality and fairness of the Commission will therefore be or confirmed by its deeds on the ground.

In Namibia there are two gateways for admission to the bar as a legal practitioner. The first gate-way is that a magistrate, prosecutor or a legal aid counsel who serves in government service for five years or more will be eligible for admission to practice as a legal practitioner[29]. The second gateway is only for graduates with B Proc or LLB qualifications from universities who have followed a prescribed course

[27] **Judicial Service Commission Act (1995)**, s. 4 (2), Act 18, 1995.
[28] *Ibid.*
[29] **Legal Practitioners Amendments Act, (2002)**, Act 10, 2002.

at the Justice Training Centre at the University of Namibia and have completed an attachment period of 12 months. Upon passing their examination, they are eligible for admission to practice as a legal practitioner. However, the common denominator for the two gateways is that such persons must have legal qualification(s) from tertiary institutions. The procedure of entry differs and it is important to briefly elaborate on differences. A person with legal qualifications but who intends to take the second route has an opportunity to add more to his or her legal knowledge. This person will be trained in the following subjects – amongst others: The law of Insolvency, Labour Law, Practice Management and Bookkeeping[30]. This will be an advantage in the event that such a person did not obtain extensive training in these subjects during his or her tertiary education.

For a person who intends to go through the first gateway, members of the Board might be negatively influenced by a variety of factors. Because of such factors they may recommend such person for admission merely because they want to avoid offending either the Attorney General (in the case of a prosecutor) or the Minister of Justice (in the case of a magistrate). Conceivably a person who goes through the first gate-way for admission as a legal practitioner has an advantage and his or her appointment to a high office of either as a judge or an Office of the Prosecutor General will be easy and he or she will not wish to be seen as an adversary to either of the parties referred to above. He or she will be expected to study hard while in service to compensate for the knowledge he or she did not have the opportunity to cover during tertiary education.

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[30] *Olyvia Martha Ekandjo Imalwa v The Law Society of Namibia and; The Namibian Law Association and the Attorney General; The Prosecutor General of the Republic of Namibia; The Government of the Republic of Namibia; 2003, High Court Case No (P) A 11/2003, unreported.*

Appointment of the Prosecutor General

The Prosecutor General is a creation of the Constitution of the Republic of Namibia. The Prosecutor General is appointed by the President on recommendation of the Judicial Service Commission as stated above. In appointing the Prosecutor General the President therefore relies heavily on the expertise of the members of the Judicial Service Commission.

In Namibia no person shall be eligible for appointment as a Prosecutor General unless such person: (a) possesses legal qualifications that would entitle him or her to practice in all the courts of Namibia; (b) is by virtue of his or her experience and conscientiousness, a fit and proper person to be entrusted with the responsibilities of the office of the Prosecutor General (Constitution of Namibia article 88(1).

Thus in terms of the Legal Practitioners' Amendment Act, Act 10, 2002 a Magistrate, a prosecutor or counsel from Legal Aid Counsel who possesses legal qualification and who has served continuously for five years and more in the service of government is eligible for admission as a Legal Practitioner.

In this regard one will expects the Prosecutor General to be an admitted legal practitioner with the right to appear in all the courts including the Supreme Court of Namibia. Legal qualifications must not override the candidate's experience, his sense of duty and his honesty. In other words, the candidate's experience must not only be confined to his or her knowledge in the legal field but an evaluation must be done to find out whether such experience installed a high degree of confidence in the candidate. His or her performance must be investigated and ascertained from his colleagues. The input from his or her learned

colleagues must carefully be scrutinized by the Commission before forwarding its recommendations to the President for his or her appointment.

The impact of the Legal Practitioners Amendments Act on the office of the Prosecutor General was tested in the case below.

In the case of Olivia Ekandjo Imalwa[31], the Attorney General, the Prosecutor General of the Republic of Namibia and the Government of the Republic of Namibia were aware that the incumbent Prosecutor General was due to retire on the 31st July 2003. While the process of identifying his successor was underway, the Attorney General on the 3rd July 2002 introduced the Legal Practitioners Amendment Bill in the National Assembly. The Bill however lapsed at the end of the National Assembly session, during August 2002. The Attorney General then requested the incumbent Prosecutor General not to retire by the end of July 2002. The Bill was re-introduced in the National Assembly on the 24th September 2002 by the Attorney General. The Bill developed a second line of entrance into the legal profession[32].

The Legal Practitioner Amendments Bill was passed at its third reading by the National Assembly on the 30th October 2002. The National Council passed it on 30th October 2002. The President of the Republic of Namibia signed the Bill on 6th November 2002. It appeared in the Government Gazette of 7th November 2002.

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[31] *Ibid. , p. 25.*

[32] *Olyvia Martha Ekandjo Imalwa v The Law Society of Namibia and; The Namibian Law Association and the Attorney General; The Prosecutor General of the Republic of Namibia; The Government of the Republic of Namibia; 2003, High Court Case No (P) A 55/2003, unreported.*

On the 7th November 2002 the Board for Legal Education met and members were given a copy of the Legal Practitioners' Amendment Act of 2002. At the same time they were requested to consider Ms Imalwa's application for a certificate in terms of the Legal Practitioners' Amendments Act[33].

The Board found that Ms Imalwa held an appropriate qualification in law and was very experienced in the practice and procedures of criminal law. She was found to have the integrity and knowledge of the ethics of a legal practitioner.

However, the Board noted that Ms Imalwa lacked knowledge and experience in the areas of Practice Management and Bookkeeping, the law of insolvency, Labour Law, Administration of Estates and Legal drafting. Nevertheless it recommended that Ms Imalwa would benefit from instruction or practical experience in the said subjects.

The Attorney General issued the required certificate on the 26th November 2002. Later she announced the retirement of the incumbent Prosecutor General on the 30th November 2002. Another Prosecutor General was appointed in the acting capacity. Ms Imalwa's admission application was launched on the 11th December 2002, for consideration by the Board for legal education. It is clear that the Attorney General took all these steps to pave the way for Ms. Imalwa to be appointed as a legal practitioner and subsequently for her to be appointed as a Prosecutor General. If the Attorney General had no such intention she would not have timeously opted for the appointment of an Acting Prosecutor General.

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[33] Board for Legal Education of Namibia, **Meeting to consider Ms Olyvia Martha Ekandjo Imalwa for admission as a Legal Practitioner**, 2002, November 7th, Windhoek.
Ibid ., p 27

The Law Society of Namibia and The Namibia Law Association launched an application with the High Court of Namibia[34]. In their application they argued that the Legal Practitioners' Amendment Act, Act 10, 2002 was passed for the benefit of Ms Imalwa in order for her to be admitted as a legal practitioner, thus paving the way for her appointment as Prosecutor General. Mr. Henning for the applicants argued the Legal Practitioners' Amendment Act of 2002 constitutes executive action under the guise of legislation. Thus the Amendment Act was passed ad hominem and it was for this reason invalid.

Counsel relied on the judgment of the Privy Council in Libanage and others, in which the parliament of the then Ceylon passed two Acts especially in order to deal with the trial of persons who participated in the abortive coup on the 27th January 1962[35].

The High Court of Namibia stated that ad hominem legislation may, depending on the circumstances, be invalid for the reason that it is meant to regulate a specific overt act and to deal with a person(s) specifically who contravenes such legislation. The High Court ruled that the case the applicants' counsel relied upon is not authoritative or general proposition. The judgment nevertheless is of assistance in this case (present application) to the extent that it holds that legislation will be ad hominem if it is enacted for particular, identifiable individuals and not for the generality of the citizens.

The High Court further found that there was no concrete evidence that Ms Imalwa was the Attorney General's favorite candidate for appointment as Prosecutor General. Nor was there concrete evidence

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[34] *Ibid. , p. 27.*

[35] *Privy Council in Linabage and Others v R. (1966) 1 ALL ER 650 (PC). See Macu v Du Toit 1983 (4) SA 629 (AD) at 650 C-F.*

that the Attorney General introduced the Bill in order to qualify Ms Imalwa for appointment as Prosecutor General. It was also held that Mr. Henning's argument presupposed a second inference namely that the Legal Practitioners' Amendment Act of 2002 was passed so that Ms Imalwa could be admitted as a legal practitioner in order to pave the way for her ultimate appointment as Prosecutor General. An inference can only be drawn from proven facts and cannot be based on an assumption.

However, J.O Manyarara, A.J, who wrote the judgment in this application, stated that he nevertheless was prepared to assume that the Attorney General favoured Ms Imalwa for appointment as Prosecutor General and that she timed the introduction of the Bill so as to allow for Ms Imalwa to be admitted as a legal practitioner in time for nomination as Prosecutor General. He, however, submitted that there is no basis to assume that the members of the National Assembly and of the National Council who voted in favor of the Amendment Act did so to cater for the specific needs of Ms Imalwa. The court held that on this basis the Act could not be said to have been passed ad hominem. The Act was in any event held to be one of general application as it applies equally to all the people of Namibia[36].

Despite the judgment above in the Imalwa case the Board of Legal Education should have insisted on the issue of experience for her. However, the Board's actions were aimed at pleasing the Attorney General as opposed to advocating for a high legal standard in our criminal justice system in particular and the whole legal system in general. The Board for Legal Education correctly identified legal fields in which Ms. Imalwa needed more training.

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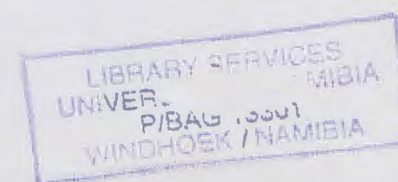
[36] *Olyvia Martha Ekandjo Imalwa v The Namibia Law Society and; The Namibian Law Association and The Attorney General and; The Prosecutor General of the Republic of Namibia; The Government of the Republic of Namibia*; 2003, High Court Case No. (P) A 55/2003, unreported.

However, it failed to recommend that she was not fit at that stage for the appointment to a position of Prosecutor General until such time as she received training in the subjects they identified her not to be knowledgeable in. The Prosecutor General is required to have audience in all the courts in Namibia and therefore it was vital that before she was appointed as the Prosecutor General, she must have been trained in such subjects. It seems it was clear in this incident that political manipulation played a big role in the appointment of the Prosecutor General and this aspect must be avoided in the appointment of persons to the prosecution service.

The Legal Practitioners' Amendment Act of 2002 opened the admission of legal candidates to political manipulation. It allows the Executive to introduce persons the Executive favors for positions, but for which such person's experience will not substantiate admission. In other words, for their admission the appointing authority will only consider their legal qualifications and the time period they served in the employ of government, but will neglect to ascertain their real performance in the legal field as a whole. After the implementation of the Act, one may ask if a person who never did the theoretical prescribed training of the Justice Training Centre, and has only prosecutorial experience, will have the ability to act in an objective manner.

The Prosecutor General who rises to his or her office, in terms of the Act, is likely to compromise the credibility and accountability of his or her office to the authority which facilitated his or her appointment. The authority which appointed him or her in this manner will always be tempted to persuade such Prosecutor General not to initiate prosecution of a particular person, because such authority is for instance of the opinion that such prosecution will embarrass government.

The Prosecutor General in these circumstances will feel more accountable to his or her individual appointing authority than to uphold the credibility of his or her office. Importantly to note is that this office should be more accountable to the public than the Executive.
A continuous attitude to ignore public complains is an unfortunate aspect of our criminal prosecution service. Public interest is ultimately more important than its allegiance to the Executive. In other words, the Prosecutor General's office must always strive to satisfy its public duty over and above its Executive attachment. The pivotal purpose for its establishment is to protect the public interest and public property. Despite this vivid striking importance of this service, the tenure of the Prosecutor General's office is left in the balance.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CHAPTER 3

Tenure of Office

The Prosecutor General's office is a creation of the Constitution of Namibia. However, the Constitution of Namibia does not explicitly or implicitly provide for the tenure of this office. It is therefore essential that we look at the tenure of office of other office bearers in the Constitution, without derogating from the tenure of the office of the Prosecutor General.

For example, in terms of article 82(4) all judges (except judges in acting capacity) will hold their offices until the age of sixty-five (65) and the President may extend such tenure up to seventy (70) years. In terms of article 90(2) the Ombudsman will hold office until the age of sixty-five (65) but the President may extend the retiring age of the Ombudsman to seventy (70) years. With respect to age of retirement for both the Attorney General and the Prosecutor General the Constitution of Namibia is silent. But the High Court Act of Namibia places the Prosecutor General on par with the Judges[37].

As already stated above, these two offices are distinguishable. The Prosecutor General, for example, is responsible to prosecute or not in all criminal matters on behalf of the State. He or she will never receive instructions from the Attorney General in this respect. However, as an office bearer the Attorney General's tenure of office is dependant on the will of the President. In other words, his or her tenure of office will end by a stroke of the President's pen. Whereas the Prosecutor General, although appointed by the President, his or her tenure of office will be terminated by the President on established facts and recommendations by the Judicial Service Commission. The Judges'

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[37] **High Court Act (1990),** Act 16, 1990.

and Ombudsman's tenure of offices may be extended from the age of 65 to seventy (70) by an Act of Parliament. Thus far we have not had such an Act of Parliament in Namibia for the Prosecutor General.

It is likely that the tenure of the Prosecutor General, just like any other office bearer both in terms of the Constitution of Namibia and the Public Service Act 1995, Act 13 of 1995, is sixty five (65) years of age. This interpretation does not preclude any Act of parliament to allow the President to extend such tenure to seventy (70) years or beyond.

While the adversarial system allows for a biased prosecutor, the same cannot be said of the decisions of the Prosecutor General to prosecute. Further, the possibility of political manipulation is undoubtedly possible if a Prosecutor General is admitted to the profession mainly on the issuing of a certificate by the Attorney General. It seems clear that under these circumstances the decision of the Prosecutor General is too important for both complainant and the general public. In this capacity the Prosecutor General should make decisions in the interest of society.

The Role of the Prosecution Service

The Prosecutor General and/or public prosecutors have a crucial role to play in the administration of criminal justice. The office of the Prosecutor General in Namibia does not have a clear definition of its role. It has not set any standard yet for the efficient exercise of its discretion.

The prosecutorial decision making process is unfair in that the parties who have particular interest in criminal matters are not properly consulted. Based on my observation as a presiding officer for 22 years, prosecutors seldom (if ever) consult with complainants before making a

decision. The decisions are solely based on the police dockets. If the police conceal evidence, the prosecutor will often be unaware of it. Very often decisions taken by the prosecution service are not explained. Lack of a clear definition of the prosecutor's role and principles guiding the prosecution service make it difficult for the public to understand how the office functions and how decisions are made. It is desirable that an Act of Parliament is promulgated to regulate the activities of the prosecution service. This Act must embody clauses which will stipulate the extent to which members of public would interact with the prosecution service. The Act must also provide the manner in which prosecution decisions may be taken on appeal or administrative review by an aggrieved complainant.

The usual role of the prosecution service is to instruct police officers to investigate alleged crimes. Prosecutors very often omit to set strategies as to how the police officials should gather the information. The prosecutors then evaluate the information from various sources. They will thereafter decide who to prosecute and arraign the offenders before competent courts. They will present evidence to courts with a view to securing a conviction.

Most common law prosecution services warn prosecutors against the pursuit of a conviction and stress that as officers of the courts they have to assist the court in reaching a just decision even if that decision is an acquittal. Lord Denning Mr., in the case of Dallison v. Caffery made the following observation:

> The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: If he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defense[38].

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[38] *Dallison v. Caffery (1964) 2 ALL ER 610 (CA).*

The Namibian prosecution service is not an exception to the above policy framework. In a democratic society prosecutors must strive to make sure that ultimately justice is done to both the victim and the offender. The public inability to understand the role of the prosecution service causes them to loose confidence in and respect for the prosecution decision-making process. The prosecution service must strive to gain its legitimacy by adopting fair and proactive procedures, and in increasing its efficiency and effectiveness. It must involve all the stakeholders in criminal justice and continuously train its officials. It must explain the advantages and disadvantages of its decisions. It is held that an Attorney General cannot be required to particularize or identify the charges on which he declines to prosecute[39]. This proposition is correct, desirably the Prosecutor General or the Attorney General, as the case may be, must exercise their discretion depending on the circumstances of each case before him or her.

The demand for a popular participatory prosecution service is a desire to achieve efficiency, expediency and flexibility in our criminal prosecution system, rather than to limit prosecutor to the current discretionary prosecution power of the Prosecutor General to prosecute. The purpose therefore is not to identify certain crimes or offences on which a prosecutor must enter a *nolle prosequi* certificate and decline to prosecute. A prosecutor must on reasonable grounds be able to exercise his or her discretion to prosecute or not, whether the offence is serious or less serious. An effective prosecution service must look at a variety of factors in the circumstances of each individual case and based on that decline to prosecute or continue with prosecution. In other words, after a careful perusal of the police docket a credible prosecution service must weigh the interest of the accused against those of the victim's and those of the public at large and decide whether

[39] *Solomon v Magistrate, Pretoria 1950 SA 603 (T) at 168.*

continuing or stopping prosecution of the alleged offence will ultimately be, worthwhile in other words, both in terms of a fair and democratic prosecution and cost effectiveness to the State (or Society).

Power and functions of the Prosecutor General

The Prosecutor General's principal functions under the Constitution of Namibia Article 88(2)[40] are as follows:

(a) To prosecute, subject to the provisions of the constitution, in the name of the people of Namibia all criminal matter [articles 88(2) (a)];
(b) To prosecute and defend appeals in Criminal proceedings in the High Court and the Supreme Court [article 88(2) (b)];
(c) To perform all functions relating to the exercise of such power [article 88(2) (c)];
(d) To delegate to other officials, subject to his/her control and direction, authority to conduct criminal proceedings in any court [article 88(2) (d)];
(e) To perform all such other functions as may be assigned to him/her in terms of any other law [article 88(2)(e)].

The discretion to prosecute

The discretion to prosecute by the Prosecutor General must be exercised constitutionally. These constitutional functions are complemented by the provisions of the Criminal Procedure Act, Act 51, 1977. In principle the discretion to prosecute is not compulsory in Namibia. The Prosecutor General, however, has a duty to prosecute if there is a prima facie case, and if there are compelling reasons to prosecute. A *prima facie* case means that the allegations, as well as the supporting statements of witnesses available to the prosecution, are of such nature that if proved in a court of law by the prosecution on the basis of admissible evidence the court should convict.

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[40] **Constitution of Namibia, (1990)**, Article 88(2) Act 1, 1990.

The Prosecutor, in exercising his or her discretion to prosecute, must respect an individual's right not to be harassed by a prosecution, which has no reasonable prospects of success. The Prosecutor must carefully consider the accused's defense and determine whether there is a reasonable and probable cause for prosecution.

It would be unfair and malicious if a prosecutor, after identifying a defense in favor of the accused, fixed an admission of guilt summons in terms of section 57(1) (a)[41]. Many accused persons pay admission of guilt fines to get rid of the worry, inconvenience and expense of fighting a trivial offence and not because they are guilty[42]. The exercise of the discretion to prosecute must be consistent and should not be compromised by the ineffectiveness of prosecutors and police officers. Secondly, discretionary prosecution must not be an excuse for discriminatory prosecution. This latter conduct on the part of the prosecutor will not only compromise standing criminal principles but will also be in conflict with article 19 of the Constitution of the Republic of Namibia.

A public prosecutor may withdraw a charge before the accused has pleaded to the charge according to section 6(a)[43]. In such a case the accused will not be entitled to an acquittal. Where the charge is withdrawn in terms of section 6(a) above, a prosecutor will be entitled to bring back the charge or any other charge(s) against the accused. In the above mentioned case, the decision of the Prosecutor General can be challenged. If a case has been delayed for an unreasonable period of time the defense can ask for a stay of prosecution and prevent the state to withdraw[44].

[41] **Criminal Procedure Act (1977)**, 57(1) (a), Act 51, 1977.
[42] *NGJ Trading Stores (Pty) Ltd v Guerreiro 1974 (1) SA 51 (O) at 53 H – 54 A*
[43] **Criminal Procedure Act (1977)**, s.6 (a), Act 51, 1977.
[44] *S v Heidenreich 1996 (2) SACR 71 (Nm). Ibid. , p. 13.*

A public prosecutor, on the other hand, is entitled in terms of section 6(b)[45] to stop prosecution after an accused has pleaded to the charge but before conviction. Where the prosecutor elects to do so, an accused is entitled to an acquittal. This means that in any subsequent prosecution in respect of the same facts and charge, the accused can rely on a plea of autrefois acquit in other words, he or she was previously acquitted of the same offence by a court of law. The Prosecutor General and a public prosecutor will have no title to prosecute in terms of section 106(1) (d)[46].

The Prosecutor General and/or the public prosecutor in Namibia have the right to appeal against any court's judgment whether on factual or on legal issues which are in favor of the accused[47]. This principle in our criminal prosecution system fits well within the ambit of the new democratic values and norms. A prosecutor like an accused must be entitled to exhaust all the provisions of due process. It is only fair that certain rights that accused persons enjoy are also enjoyed by a prosecutor. The disparity in treating the two parties to criminal prosecutions differently will result in inequality between them before the law. It is this wide discretionary power possessed by the Prosecutor General which must be exercised within the parameters of legislative, administrative and judicial guidelines. The prosecution's legal framework must be broadened enough to allow the smooth exercise of the prosecutorial discretion.

The right to prosecute always involves the maxim audi alteram partem (hear the other party's version). Wiechers[48] summarized the above rule as follow –

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[45] **Criminal Procedure Act (1977)**, s. 6(b), Act 51, 1977.
[46] **Criminal Procedure Act (1977)**, s 106 (1) (d), Act 51, 1977.
[47] **Criminal Procedure Act (1977)**, s. 310, Act 51, 1977.
[48] Wiechers, M (1985) **Administrative Law**, Durban: Butterworths, p. 17.

(a) All involved in a dispute must be given an opportunity to state their case;
(b) Communicate all potentially prejudicial facts to a person so affected in order for him/her to answer thereto;
(c) Provide reasons for their decisions and
(d) That the organ and/or an agency exerting this discretion acts impartially.

Clearly the Namibian Prosecutor General falls short of these requirements. He or she does not invite all involved in a dispute to give their input. The persons affected by the dispute are not given the opportunity to answer to any potential prejudicial facts. Nor do prosecutors give reasons for their decisions. They are also unable to express the prosecution service's impartiality or the manner in which such prosecution service exercises its discretion.

The general rule is that failure to comply with one of the above mentioned requirements will not amount to a breach of the rules of natural justice, but could acknowledge the presence of bad intention on the side of the prosecution service. The Prosecutor General in Namibia has a free discretion and he or she need not give reasons for his or her decisions. The rule of natural justice serves to ensure that administrative organs that perform judicial and quasi judicial functions duly apply their minds to the matter before them.

However, experience has taught us that the Prosecutor General, in Namibia, is reluctant to prosecute white-collar crimes. Theft of public funds is a common law crime. This crime is common among public institutions, but officials of these institutions have managed to get away with it thus far in Namibia. Legislation on corrupt practices and embezzlement of public funds by officials is being unnecessarily delayed. The delay of this legislation in Namibia contributed to the ineffectiveness of the prosecution service to promptly prosecute suspected offenders.

The delay of law in this respect is partly caused by the Executive's insensitivity towards white-collar crimes in public institutions thus far in Namibia. Further, the Executive in striving to save itself from internal and extra-territorial embarrassment, decided to keep all Presidential Commissions of Inquiry reports away from the Prosecutor General's office. Despite the fact that some of these incidents were extensively reported in our daily newspapers and radios, the Prosecutor General continues to keep a low profile on these issues partly because he or she fears being at loggerheads with the Executive.

It must be said that the Executive has not always had a trust in the Office of the Prosecutor General in the past. In 1999 the preparation of the Anti-Corruption Bill was entrusted to the Office of the Prosecutor General, who obtained the well-known Acts of Malaysia and Hong Kong. It also negotiated with a consultant to use these examples to draw up a Namibian Bill, then the mandate was taken away from the office was without any explanation[49].

If the public is not informed why the Prosecutor General declines to prosecute; it will always leave the door open for speculation. When white collar crime (and especially in the case of State funds) is involved, the public may also question the fairness of a system where petty thieves are prosecuted on a daily basis while the loss of millions does not lead to prosecution.

By not consulting with victims and complainants and not giving reasons for its decision not to prosecute, the Office of the Prosecutor General will always be distrusted by aggrieved members of the public.

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[49] Horn. J.N., **Personal interview**, Windhoek, October 2006.

Stopping Prosecution

In practice the authority to enter a *nolle prosequi* lies with the Prosecutor General in Namibia. Public Prosecutors will exercise this authority only with special consent from the Prosecutor General. For fifteen years, the researcher has been on the bench, and within that time frame criminal cases could only be stopped with special consent from the Prosecutor General by a prosecutor presenting a nolle prosequi certificate from the Prosecutor General. In other words, the authority to enter a nolle prosequi is not automatically delegated upon public prosecutors by virtue of their mere appointment by the Prosecutor General. This is important as it allows the Prosecutor General to exercise control over the decisions of individual prosecutors. This also gives the Prosecutor General a chance to have supervision on criminal matters that are reported to his or her office.

The Constitution of Namibia provides as follows:

> In the determination of… any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court… established by law:… (article 12(1)(a)). This trial … hereof shall take place within a reasonable time, failing of which the accused shall be released[50].

A refusal to prosecute by the Prosecutor General is usually followed by the Public Prosecutor withdrawing the case. However, once an accused has pleaded, the Prosecutor General can no longer withdraw the case. But he or she can instruct a Public Prosecutor to stop prosecution.

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[50] **Constitution of Namibia (1990)**, Article 12(1)(a) and (b), Act 1, 1990

Withdrawal

The Prosecutor General or/and his or her Public Prosecutor can withdraw a criminal case against an accused. The Prosecutor General will do so or instruct a Public Prosecutor to withdraw a case if he or she is satisfied that there is no prima facie case upon which to proceed with prosecution. The Prosecutor General or his or her Public Prosecutor will withdraw such a criminal case before an accused pleads to the charge. It is important to note that an accused against whom a charge is withdrawn, may be summoned for the same charge and arraigned before a court of law for the purposes of prosecution. More about the two actions by the Prosecutor General will be stated further in conclusion.

Refusal to stop prosecution

> The Prosecutor General at any time after an accused has pleaded, but before conviction, may stop prosecution, in which event the court trying the accused shall acquit the accused in respect of that charge: provided that where prosecution is conducted by a person other than the Prosecutor General or a body or person referred to in section 8, prosecution shall not be stopped unless the Prosecutor General or any person authorized by him or her, whether in general or in any particular case, has consented thereto[51].

A presiding officer in a criminal case does not have the authority to close the State's case. If the State prosecutor is not willing to do so, but if the State prosecutor after an application by him for the postponement of the trial has been refused, refuses to adduce evidence or to close the State case, it is presumed that the State's case is closed, and the judicial officer should continue with the proceedings as if the State prosecutor had indeed closed the State's case[52].

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[51] **Criminal Procedure Act (1977)**, s. 6(b), Act 51, 1977.
[52] *S v Magoda 1984(4) SA 462.*

In stopping proceedings, the court requires no solemn act on the part of the Prosecutor General. He is the sole arbiter whether or not he goes on with a case or stop proceedings; in this respect the court cannot control him. It does not matter whether he or she intimates his intention of stopping proceedings by formal intimation in court, or whether he takes other steps, which make his intention perfectly plain[53].

A judicial officer presiding over criminal proceedings must be independent, impartial and competent enough to note that the matter is between the State and the defense. He or she must by all means avoid entering into that arena without impunity. If need be to do so, such presiding officer should not take over the proceedings himself or herself. It is unfortunate for an unrepresented accused, who may conduct his or her defense from the position of ignorance and not being knowledgeable about the law. The general rule, though, is that the presiding officer must assist an unrepresented accused without sacrificing his or her impartiality in the trial.

It is clear from the case law above that the Prosecutor General has been placed above the court of law in as far as stopping prosecution is concerned. He or she is not obliged to give an explanation for his or her conduct of continuously refusing to close his or her case and/or to stop prosecution. Even where it will be clear that he or she miserably failed to continue prosecution, but refuses in contempt to stop prosecution he or she normally will escape being criminally charged, for contempt of court or even being administratively challenged.

This conduct of a prosecutor should be both criminal and an administrative reviewable action. A similar conduct from a witness in criminal prosecution, for example, who refuses to testify (after giving a

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[53] *Rex v Kelijana (1909) 30 NLR 437 at p. 445.*

statement to the police), will cause such a witness to face a criminal charge of contempt. A witness who gave a statement to the police and who decides under oath to give evidence to the contrary will face a charge of perjury, for example. An accused, who refuses to plead to a charge, will have a plea of not guilty entered on his or her behalf by the court. If he or she continues to refuse to take part in the proceeding, or to cross-examine witnesses called to testify against him or her, the trial may proceed. However, the court must advise an unrepresented accused to seek the services of a legal representative of his or her own choice. If he or she cannot afford the service of such legal representative he or she must apply for legal aid counsel before the trial continues.

Where a prosecutor refuses to stop prosecution or to close his or her case, and if it is clear that the evidence before the court does not disclose a *prima facie* case, the court will be entitled to acquit an accused in terms of the provisions of section 174 of Act 51 of 1977. This remedy counts in favor of the accused and it does not necessarily address the prosecutor's conduct with respect to the integrity of the court. Further the remedy does not in any respect address the victim's interest.

The court recently in the 1990's held that sub-article 12(1) (b) of The Constitution of Namibia, Act 1, 1990 meant to release the accused from incarceration and onerous conditions of bail, but prima facie did not seem to include a permanent quashing or stay of prosecution[54]. Three years later the High Court of Namibia disagreed with Strowitzki's interpretation of sub-article 12(1)(b) as having been a narrow interpretation of the tenor and aspirations of the Namibian people. The High Court held that sub-article 12(1)(b)'s main purposes was not to

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[54] *S v Strowitzki and Another 1995(1) BCLR 12 (Nm) at 35-6. (See also Van As and Another v. Prosecutor General 2000 NR 271).*

minimize the possibility of lengthy pre-trial incarceration and to curtail restrictions placed on an accused who is on bail, but to also reduce the inconvenience, social stigma and other pressures the accused was likely to suffer and to advance the prospects of a fair trial[55].

O'Linn AJA stated that:

> After carefully considering the decisions in S v Strowitzki, Heidenreich, and Van As …, I have reached the conclusion that all of them were wrongly decided in part in regard to the correct interpretation of the words 'shall be released' in art. 12(1) (b). Notwithstanding various pointers to the contrary in my analysis, this construction appears to me to be the most logical solution to the dilemma caused by the vague language of art 12(1)(b) and appears to be the interpretation which best reflect the probable intention of the author of the Namibian Constitution. It is also in line with a broad, liberal and purposive approach. The decisive consideration for the aforesaid construction however, is that the principle that those criminal courts, which are "competent" courts with the necessary jurisdiction, should have in their armory of sanctions, the power and the responsibility in an appropriate case of unreasonable delay, to order a permanent stay of prosecution as at least one of its discretionary powers. This is in accordance with principles and procedures in most of the advanced criminal justice systems in democratic countries. It must be assumed that the framers of the Namibia Constitution also had this objective in mind[56].

In Magret Malama-Kean's[57] case the Supreme Court identified what it referred to as peremptory requirements. It was noted that a competent court having jurisdiction will make an order to release the accused from the trial prior to a plea on the merits, which does not have the effect of a permanent stay of the prosecution and is broadly tantamount to a withdrawal of the charges by the State before the accused has pleaded. This form of release from the trial will encompass: (a) Unconditional release from detention if the accused is still in detention when the order is made for his/her release; (b) Release from the conditions of bail if the

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[55] *S v Heidenreich 1996 (2) SACR 71 (Nm).*
[56] *Ibid. , p. 45.*
[57] *Ibid. , p. 13.*

accused had already been released on bail prior to making the order; (c) release from any obligation to stand trial on a specific charge on a specified date and time if the accused had previously been summoned or warned to stand trial on a specified, charge, date and time; or an acquittal after plea on the merits.

A permanent stay of prosecution, either before or subsequent to a plea on the merits which form the order of 'release from the trial', will depend not only on the degree of prejudice caused by the failure of the trial to take place within a reasonable time, but also by the jurisdiction of the court considering the issue and making the order. The Supreme Court indicated in the discussion above that a Magistrates Court will not be able to as the law stands currently, order a permanent stay of prosecution before a plea. The remedy in S v.Strowitzki[58] and S v. Heidenrecht, is not clearly stated to fall within the options available before the magistrate's court. Courts making an order under art. 12(1)(b) must not merely state that the accused shall be released; but use one of the forms of order as tabulated above, so that the ambit of the order will be clearly understood by all concerned.

This new dimension in our criminal justice system allows an accused who is frustrated by sturdy prosecution to apply for a stay of prosecution by a court of law. This new legal principle does not only seek to free a frustrated accused from a sham prosecution, but it also enhances the provisions of article 10 of the Constitution which states that all persons shall be equal before the law[59]. Further this principle recognizes the accused's right to a fair trial which has to take place within a reasonable time, failing, which the accused shall be released in terms of the Constitution of Namibia.

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[58] *Ibid. , p. 45.*
[59] **Constitution of Namibia (1990),** Article 10, Act 1, 1990.

But the victim's right must equally be considered. A victim must be entitled to institute and conduct private prosecution, unless when it is established that a victim contributed to such a failure.

The onus of persuading the court that the delay complained of is unreasonable rests on the accused. The court, in deciding that the accused has been deprived of his/her constitutional right to be tried within a reasonable time, must have regard to the factors identified below.

The US Supreme Court describes trial prejudice as follows:

> Until there is a delay, which is presumptively prejudicial, there is no necessity for inquiry into other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. More neutral reasons such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant. Finally, a valid reason, such as a missing witness should serve to justify appropriate delay[60].

In this context a competent court will have jurisdiction to grant any of the orders stated in Magret Malama-Kean's case. The courts will be expected to consider each individual case on its own merits by taking into account the guidelines in as quoted from Barker versus Wingo. The court must endeavor to exercise its authority to interfere with a given prosecutorial process judicially. A careful consideration by our courts in this regard will always foster trust and respect between the judiciary and prosecution service in our criminal justice system.

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[60] *Barker v Wingo 407 US 514 (1972) at 519 – 20.*

The Constitutional Era has awarded accused new remedies against prolonged prosecutorial postponements. However, when it comes to the decision to prosecute, the Prosecutor General is a law unto himself.

The discretion to prosecute must be exercised fairly and transparently. Where a prosecutor has identified a defense in favour of the accused during the trial, he or she must be honest to bring such defense to forth in such proceedings. Even if it would mean that the end result of such proceedings will be a verdict of not guilty in favor of an accused. This discretion must be exercised in a consistent and non-discriminatory manner. The prosecution service must operate within a well-defined framework circumscribed by law. This legal framework, however limited it might be, must involve victims of crimes, the offenders and other stakeholders. A broader involvement of these persons in the prosecutorial decision making process will ultimately restore trust, confidence, and respect in our criminal prosecution system.

It is further evident in this Chapter that where a delay in prosecution is occasioned, and it is established that such delay is unreasonable and in violation of the accused' fundamental human rights and freedom, a court of law will be entitled to either stop prosecution temporarily or permanently in Namibia.

It is convenient to assume that the Prosecutor General's refusal to stop prosecution is now challengeable. Therefore, this is viable for either review or appeal procedure in Namibia. However, we have seen that some actions of the Prosecutor General are still neither open for review nor for appeal procedure. His actions to refuse prosecution and to withdraw prosecution are the factors in point.

The Prosecutor General may decide either to stop prosecution or to withdraw. Either of his action may be accepted by the defense as being in its interest. However, this may not necessarily be in the interest of the victim. For example, a Presiding Officer through issuing warrants and bail application proceedings may have enough evidence for which prosecution may not be stopped or withdrawn. But due to his or her role in the proceeding remains powerless to assist the victim.
In other words, the victim has no remedy to rely upon. The victim could rely on the wisdom of the Presiding Officer in the circumstances. But the Presiding Officer will have no meaningful role to play in this regard. The Presiding Officer, in the adversarial criminal prosecution system, can not draw himself or herself into this arena. In that his or her impartiality will be at stake.

It is in this regard that the Prosecutor General's actions either to stop or withdraw prosecution should also be made subject to either review or appeal procedure. Otherwise the Prosecutor General remains a man of straw in our criminal prosecution system.

Specific Emphasis

It is clear that in Namibia the Prosecutor General has a constitutionally prescribed post and is solely responsible for decisions concerning criminal prosecution. Neither the Attorney General nor the Minister of Justice can give instructions to the Prosecutor General. Further the Honourable Acting Supreme Court Judge stated that the Prosecutor General must keep the Attorney General properly informed so that the latter may be able to exercise ultimate responsibility for the office.

Final responsibility meant not only financial responsibility for the office of the Prosecutor General, but it would also be his duty to

account to the President, the Executive and the Legislature in respect thereof. In Namibia the Attorney General cannot take any disciplinary actions against the Prosecutor General. The Attorney General cannot legitimately recommend the removal of the Prosecutor General from office.

However, the Attorney General is a member of the Judicial Service Commission. Other members of the Commission are the Chief Justice, a judge and two legal practitioners from the legal fraternity in Namibia[61]. It is therefore desirable that any disciplinary action or matter against the Prosecutor General is handled at the level of the Judicial Service Commission. In an attempt to discipline the Prosecutor General, the Attorney General must report the allegations of misconduct against the Prosecutor General to the Judicial Service Commission.

The Commission will have to hold a disciplinary hearing in this respect. If the Commission subsequently finds the Prosecutor General guilty of a misconduct so alleged, it will make its recommendations to the President of the Republic of Namibia. The latter will either remove the Prosecutor General from office in terms of article 32 of the Constitution of Namibia or decide to deal with the matter in any other way as long as it is in conformity with his or her constitutional power. The Prosecutor General derives his or her power and functions from constitutional provisions specifically article 88(2)[62]. These powers and functions are complemented by the provisions of the Criminal Procedure Act, Act 51, 1977. In Namibia public prosecutors are employed in terms of the Public Service Act, Act 13, 1995. According to section 4 of Act 51, 1977 and/or article 88 (2) (d) of Act 1, 1990 the Prosecutor General should delegate his or her power and functions to

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[61] **Constitution of Namibia, (1990)**, Article 85(1), Act 1, 1990.
[62] **Constitution of Namibia, (1990)**, Article 88(2), Act 1, 1990.

public prosecutors. The public prosecutors will institute criminal prosecutions with regard to offences that fall within their area of jurisdiction[63].

It is unfortunate that the Supreme Court of Namibia (in the case Ex Parte Attorney-General, in re: The constitutional relationship between the Attorney General and the Prosecutor General above), dealt with the independence of the Prosecutor General but not of his or her staff. However, it is conceivable, that public prosecutors in exercising their delegated power and functions will do so with a great degree of independence without interference by any other authority, be it the Executive or the Legislature or the Judiciary.

[63] **Criminal Procedure Act, (1977)**, s. 2 (1), Act 51, 1977.

CHAPTER 4

Introduction

A system of private criminal prosecution demonstrates democratic values for victims, offenders and other citizens' participation in our criminal justice system. This popular participation serves to re-in force the integrity of our basic democratic values and norms. It has been stated in the preceding papers that because of the nature of some crimes and their odious results, citizens' trust the State with their desire for criminal prosecution. But after a long experience and related studies, it is conceivable that state dominated criminal prosecution's ultimate results have no favorable end in dealing with crimes.

For example, after an offender is found guilty and convicted, he or she will be sentenced to imprisonment. The citizens, including his or her victim(s) through tax-payments are still taking care of such prisoner(s) while in custody. These prisoners most certainly enjoy more security and relatively consistent feeding compared to their victim(s). These victims as a result of the offender's act might have lost his or her breadwinner. The immediate result is that he or she has no support and is therefore left destitute. This reality is rife in our criminal justice system. The overriding ignorance of our citizens and victims about this provision must vigorously be discussed to enable our citizens to use private prosecution to their benefit. This subject will only be confined to a few provisions of the Namibia Criminal Procedure Act 2004, Act 25, 2004.

Private Prosecutions

In terms of article 56 of the Constitution the National Assembly passed an Act, which is known as Namibia's Criminal Procedure Act of 2004, Act 25, 2004.

In 2005, the founding President served his terms of office and the current President of the Republic of Namibia was elected. Due to this change a new Minister of Justice was appointed. The change in government resulted in the above-mentioned Act not being put into operation, yet.

However, we will refer to some of its sections, which deal with private prosecution and victims of crime in this Chapter. Namibia's Criminal Procedure Act 25, 2004 differ on certain issues from the Criminal Procedure Act 51, of 1977. However, at this stage this paper will not consider these differences. This paper is concerned with the Prosecutor General's power that places him or her above other citizens when exercising this power.

Act 25, 2004 refers to two forms of private prosecution namely: (a) private prosecution on the basis of a nolle prosequi certificate[64] and (b) private prosecution under a statutory right[65]. The provisions of Act 25, 2004 on the issues mentioned above are similar to the provision of the Criminal Procedure Act, act 51, 1977 with regard to these issues. The only difference is the provision on victims of crime, which is not explicitly stated in Act 51, 1977. However, section 300, Act 51, 1977, is meant to look into the interests of victims of crime too. Section 5 of Act 25, 2004 is equivalent to section 7 of the Criminal Procedure Act, Act 51, 1977. Section 7 of Act 25, 2004 is equivalent to section 9 of Act 51, 1977 and they both deal with security by a private prosecutor.

In terms of section 5 of the Act the following persons will qualify to institute and conduct private prosecution in case the Prosecutor General declines to prosecute:

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[64] **Criminal Procedure Act, (2004),** s.5, Act 25, 2004.
[65] **Criminal Procedure Act, (2004),** s. 6, Act 25, 2004.

(a) Any private person who proves some substantial interest in the issue of the trial arising out of some injury that that person individually suffered in consequence of the commission of the said offence (section 5(a);

(b) A spouse, if the said offence was committed in respect of the other spouse (section 5(b));

(c) The spouse or child or, if there is no spouse or child, any of the next of kin of any deceased person, if the death of that person is alleged to have been caused by the said offence (section 5(c)); or

(d) The legal guardian or curator or lunatic, if the said offence was committed against his or her ward.

The request for private prosecution shall be made in writing to the Prosecutor General to issue a nolle prosequi certificate. The Prosecutor General has to decline to prosecute at the instance of the State. A certificate nolle prosequi will lapse, unless proceedings in respect of the offence in question are initiated by the issue of court processes within six months of the date of the certificate.

It is important that the Prosecutor General investigates whether the person requesting the certificate has interest in the trial. If the Prosecutor General is unable to make a decision whether to prosecute or not within six months, he has to give reasons to the person requesting a nolle prosequi certificate.

No private prosecutor may take out or issue any process commencing private prosecution unless he or she deposits an amount with the district court in whose jurisdiction the offence was committed. This amount will be determined by the court and will serve as security for the costs that may be incurred with respect to the accused' defense to the charge[66]. The accused with respect to whom a private prosecution is to be instituted may apply to the court hearing the charge to review the

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[66] **Criminal Procedure Act, (2004)**, s. 7, Act 25, 2004.

amount of money so determined[67]. In terms of section 5(4) a person authorized under section 5(1) to institute private prosecution, who feels aggrieved by any failure of the Prosecute General to comply with section 5(2)(b)(i) or (ii) or (3) (a) of (b) may apply to the High Court for an order compelling the Prosecutor General to comply therewith.

Private prosecution under statutory right

Section 8 of Act 51, 1977 is equivalent to section 6 of Namibia's Criminal Procedure Act 25, 2004. The sections refer to private prosecution conferred upon a person or a body by statutory law.

A person upon whom or a body upon which the right to prosecute in respect of any offence is expressly conferred by law may institute and conduct prosecution in respect of such offence in any court competent to try that offence[68]. This right of prosecution under section 6(1) shall be exercised only after consultation with the Prosecutor General.

The Prosecutor General may in this regard withdraw his or her right to prosecute on the following conditions; (a) that the appointment by such a body or a person of a prosecutor to institute and conduct prosecution shall be subject to his or her approval; (b) that he or she or a person on his or her instructions, may, intervene at any stage in such prosecution and continue it at the instance of the state as if he or she had not withdrawn his or her right of prosecution.

Under section 6 or section 8, referred to above, prosecution will be reported in the names of the parties who instituted such proceedings. It was held that a prosecution in terms of section 8 must be instituted and

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[67] **Criminal Procedure Act, (2004),** s. 7(2), Act 25, 2004.

[68] **Criminal Procedure Act, (2004),** s. 6(1) (2), Act 25, 2004.

conducted, and all processes in connection therewith be issued in the name of the prosecutor[69].

Private prosecution by an individual on a nolle prosequi

The Prosecutor General shall issue a certificate nolle prosequi and by so doing shall permit an individual with peculiar and substantial interest in the issue of the trial to institute and conduct private prosecution[70]. Private prosecution will be instituted and conducted in the name of the private prosecutor[71]. The court processes will be signed by such prosecutor or his or her legal representative[72]. Where prosecution is instituted under section 5 and the accused pleads guilty to the charge the prosecution may be continued at the instance of the State[73]. Section 12(2) of the Criminal Procedure Act, Act 51, 1977 provides the same, but in more peremptory language in that:

> Where an accused in a private prosecution pleads guilty to the charge, the prosecution must be continued at the instance of the State.[74].

The Prosecutor General's intervention under these circumstances is tantamount to an abuse of power by the State. It is a dereliction of duty on the part of the Prosecutor General and he or she must be required to show good cause why his or her intervention at that stage is necessary. The Prosecutor General and/or any person acting on his or her instruction should do so to assist both a private prosecutor and the court to arrive at an appropriate remedy and sanction.

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[69] *Claymore Court (Pty) Ltd v Durban City Council 1986 (H) SA 180 (N).*
[70] **Criminal Procedure Act,(2004),** s. 5(1) (a), Act 25, 2004.
[71] **Criminal Procedure Act,(2004),** s. 8(1), Act 25, 2004.
[72] **Criminal Procedure Act,(2004),** s. 8(2), Act 25, 2004.
[73] **Criminal Procedure Act,(2004)** s. 10, Act 25, 2004.
[74] **Criminal Procedure Act,(2004)** s.12 (2), Act 51, 1977.

It is clear, therefore, that private prosecution under statutory right remains under the ultimate control of the Prosecutor General. The system of private prosecution can be justified in terms of both society's interest in increased law enforcement and the individual's interest in vindication of personal grievances. Full participation by a citizen as a private prosecutor is needed to cope with the serious threat to society posed by the Prosecutor General's improper action and inaction. The State should not have the monopoly on the right to prosecute.

A system of private prosecutions demonstrates the value of citizen or victim participation in the criminal justice system and serves to reinforce the integrity of basic democratic values[75]. The general rule, states that for a citizen to privately prosecute, there must be a causal connection, between the injury suffered by him/her and the commission of the offence[76]. The full bench in the case of Mullins, Meyer and Pearlman held that only persons who can prove that they have suffered actual damage or injury as a result of the commission of the alleged offence are entitled to institute private prosecution. The mere apprehension of injury or of an invasion of rights, which may possibly cause damage or injury in the future, will be insufficient[77].

A private prosecutor who fails to appear on a day set down for appearance will have his or her case dismissed by the court. Unless the court has a reason to believe that a private prosecutor's failure to appear is due to factors beyond his or her control in which event it will adjourn the case to a later date[78]. In terms of section 9(2) of the same Act, where the charge is dismissed, the accused will immediately be

[75] Law Reform Commission of Canada, 1986, **Private Prosecutors Working Paper 52** of 1986, Ottawa.
[76] *Phillip v Botha 1995 (2) SACR 228 (N); See also Ellis v Visser 1954 (2) SA (T) at 438.*
[77] *Mullins and Meyer v Pearlman 1917 TPD 639.*
[78] **Criminal Procedure Act,(2004),** s. 9(1), Act 25, 2004.

discharged and he or she may not in respect of that offence be prosecuted privately. However, the Prosecutor General or a public prosecutor with the consent of the Prosecutor General may at the instance of the State prosecute the accused in respect of that offence. In post independence Namibia the right to private prosecution has not been exercised by any citizen. This is partly due to the fact that citizens are ignorant of the existence of this right in our law and that the Prosecutor General is always inclined to prosecute even in petty offences. The other factor, which discourages the citizens to exercise this right is the expense involved in instituting and conducting private prosecution. Not every citizen can afford the services of a legal practitioner for the purpose of instituting and conducting private prosecution or to make presentation on his or her behalf in terms of section 18(1), Act 25, 2004.

The legislator missed the opportunity to make private prosecutions more accessible to aggrieved victims of crime. As the history of the past fifteen years has shown private prosecutions will remain a paper tiger as long as the legislator expects of the private prosecutor to foot the bill of the prosecutions. Consequently, private prosecutions are not a viable remedy for complainants aggrieved by authoritarian prosecutorial decisions.

Victims of Crimes

Namibia's Criminal Procedure Act, Act 25, 2004 recognizes an important and novel factor in the criminal justice process. A victim of an offence against his or her person or against his or her property may appoint a legal practitioner at his or her expense[79].

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[79] **Criminal Procedure Act,(2004),** s. 18(2), Act 25, 2004.

A police officer charged with the investigation of an offence must obtain a victim impact statement. The impact statement must then be filed in the docket for the public prosecutor's attention[80]. A victim's legal representative must make presentations to the court before sentence. A victim legal representative has no right to give evidence, or to cross-examine witnesses or address the court, except when he or she is bringing an application on behalf of the victim[81].

A victim of crime has the right of complaint in a bail application where the accused is charged with rape[82] or a domestic violence offence[83].

It is clear, that a victim's legal representative in terms of section 18, Act 25, 2004 is not in a better position than a victim. It is assumed that since a victim's legal representative will be a person with legal qualification and knowledge, he or she will be able to promptly follow the court proceedings. However a victim may opt for a person, who may perform this duty without him or her being a legal practitioner.

Section 18 compels a victim to engage the services of a legal practitioner who may sell his or her services for an exorbitant price, instead of allowing a victim to have the freedom of choosing a representative of his or her own choice. A victim may want to choose a representative who is not a legal practitioner but who will be able to follow court proceedings promptly. Section 18 provisions only shifted a public prosecutor's traditional duty to request the court to order compensation when passing sentence.

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[80] **Criminal Procedure Act,(2004),** s. 39, Act 25, 2004.
[81] **Criminal Procedure Act,(2004),** s. 326, Act 25, 2004.
[82] **Combating of Rape Act,(2000),** Act 8, 2000.
[83] **Combating of Domestic Violence Act, (2003),** Act 4, 2003.

A victim's legal representative, however, must be given a chance to negotiate with the State and/or a public prosecutor, for what is best for the victim. A victim's legal representative must be allowed to tell the prosecutor what a victim feels in relation to the formal criminal prosecution process and/or civil litigation, with respect to the crime. While several new Acts compel the police investigators to take cognizance of the opinions of victims, it is not true of the Office of the Prosecutor General. The Prosecutor General can still make decisions without consultation.

Yet, even the recognition of the place of the victim, does not go far enough. The victim's legal representative cannot act independently, no legal aid is available to the victim and the prosecutor remains the major role player in the victim's case.

CHAPTER 5

Introduction

Pre-independent Namibian Law enforcement agencies exercise their discretion and performed their duties and functions without strict observation of fundamental human rights and freedom.

Post independence, however, the Constitution of Namibia of 1990 incorporated a Bill of Rights under chapter 3. The Bill of Rights is a new legal framework state functionaries are required to take into account in the maintenance of law and order.

The Bill of Rights had an immediate effect on the whole criminal justice system. Old authoritarian practices were replaced by democratic and humane rules to protect the rights of the accused.

General constitutional developments.

The decisions of the Superior courts as laid out above indicate the readiness of the courts to reform both our criminal law and procedure to conform to the Constitution. This reform is aimed at reshaping the attitude of law enforcement agencies and those of the entire community towards criminal law and offenders. It is further an operative lesson to the law enforcement agencies and the courts that in fulfillment of their duties and functions that they must acknowledge the fact that the maintenance of fundamental human rights and freedoms are indispensable.

These rights and freedoms are a safety net that the Prosecutor General and his or her public prosecutors must uphold in order to secure an acceptable prosecution service delivery. Prosecutors before commencing a prosecution (though not lawfully obliged) must remind

the court to explain to the offender his or her right to legal representation. The Public Prosecutor must be inclined to do so, in order for him or her to secure a safe prosecution and ultimately a safe conviction. It is important for him or her or the court because anyone's failure to critically observe any offender's fundamental human rights and freedoms may culminate in the offender's conviction being set aside or quashed in a subsequent proceeding.

The traditional inherent and unchallengeable authority of the Prosecutor General in our criminal justice prosecution service is gradually being democratized. The Judicial Service Commission is tasked with recommending a candidate for the Prosecutor General's position who will be accountable for upholding democratic values and norms. A candidate fit for this position must be anxious to intervene in any criminal allegations that justify his or her intervention without being instructed to do so by any other authority. This intervention though must be constitutional and lawful.

The Prosecutor General has an absolute power to decide whether to prosecute or not to prosecute. However, this power must be exercised in conformity with other constitutional rights. A trial Magistrate refused to allow the appellant access to the statements of State witnesses. The conviction was upheld in an appeal proceeding before the High Court.

In subsequent appeal proceedings before the Supreme Court, it was held that, the refusal by the magistrate breached the accused fundamental rights to a fair trial. The court held further, regarding the consequences of such an irregularity, that if the irregularity was of a

fundamental nature, the accused had not been afforded a fair trial and a failure of justice had occurred[84].

The accused were convicted in a Magistrate court for illegally hunting a giraffe. The magistrate failed to inform them of their right to legal representation. The Supreme Court held that this meant that they did not receive a fair trial. Conviction and sentence were quashed[85]. The attitude of the Supreme Court places a burden on both the bench and prosecuting authority to ensure that an accused knows and understands his or her right to legal representation before deciding to conduct his or her own defense.

It is also clear from the decisions above that both the High Court and the Supreme Court of Namibia take cognizance of the fact that the main role players in the Criminal justice system are the offender, the victim and the general public as well as the State. The legitimacy of the criminal justice system must not be characterized by abuse of the criminal law and the courts should not act as instruments of State oppression. In this regard strict observation of the role players' fundamental human rights cannot be overemphasized. As a result of these decisions, all the courts in Namibia were guided to exercise their discretion in a constitutional way.

A court of law is always expected to exercise its discretionary power in criminal cases within the framework of the law. In other words, the court must exercise its discretion within the parameters of both the Criminal Procedure Act 51 of 1977 and the Constitution of Namibia. The courts decisions must be in conformity with Chapter 3 of the Constitution of Namibia. The court orders and judgments are subject to

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[84] *S v Kandovazu 1998 NR 1(SC).*
[85] *S v Kau and Others 195 NR 1 (SC). See also S v Bruwer 1993 (2) SACR 306 (Nm); S v Mwamabazi 1990 NR 353 (HC).*

a review or appeal process. It only seems logical and fair that the Prosecutor General's decisions must be reviewed and/or placed before court on appeal if a complainant is aggrieved. This innovation in our criminal justice system will afford the victim and the offender an opportunity (however limited it might be) to challenge the accuracy of the prosecutor's decision. This innovation will not only bring the public prosecutors on par with other institutions and organs of the State in terms of the law, but, as stated earlier it will also manifestly encourage public prosecutors to act in a responsible, transparent and accountable manner.

An accused' right to legal representation is now an integral part of our prosecutorial process. An omission or a failure by the court to explain this right to the accused will not only be an irregularity but it will also render such proceedings unfair. The right to disclosure of the content of the police docket is no longer exclusive and privileged domain only to a prosecutor. However, a prosecutor will still have a chance to keep part of the police docket away from an accused, where he or she claims that such part is privileged due to being the correspondence between him or her and the police investigating team.

To keep prisoners or suspects, as the case may be, in chains while in custody is unlawful[86] unless a prison warder shows that there is an insurmountable problem justifying the chaining. For example, if it can be proved that a prisoner who is not chained would be a danger to the whole prison security or he or she will endanger the life of his or her fellow inmates. Even under these circumstances the chaining of such prisoners or suspects will be a temporary measure.

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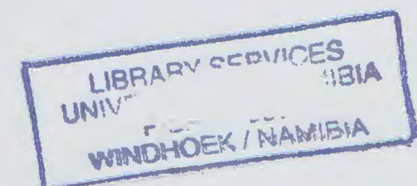
[86] *Namunjepo and Others v Commanding Officers, Windhoek Prison and Another 2000 (6) BCLR 671 (Nms).*



A cautionary rule in sexual offenses was said to be irrational and cannot apply in Namibia[87]. Because it was based on the stereotype that women as witness of sexual offenses are unreliable. This note was unjust as it discriminated against citizens on the basis of gender.

In the same manner one would expect the Prosecutor General to comply with constitutional principles. Yet, the decision to refuse to prosecute or withdraw prosecution only remains exclusively the prerogative of the Prosecuting Service making it possibly the only judicial institution not open for appeal and/or administrative review. The only remedy left to an aggrieved complainant then is private prosecution. However in chapter four I have indicated that private prosecution could be a viable option, but without guidelines private prosecution remains a vague right in our criminal prosecution process. In other words, private prosecution in Namibia has no tangible impact on victims of crime.

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[87] *S v Katamba 2000 (1) SACR 162 (NmS).*

CHAPTER 6

Conclusions:

Transparency

A free and an independent discretionary prosecution service is an ideal that will enhance democratic values and the aspirations of the people of Namibia. The exercise of this discretionary power must guard against irresponsible conduct and abuse of this power by the Prosecutor General and the State. A legal framework within which this discretionary power is to be exercised must be formulated. This legal framework must articulate simple and clear guidelines for the prosecutorial decision-making process. The guidelines inter alia must require the Prosecutor General to explain his or her decisions whether to prosecute or not to prosecute, to enable victims of crimes with substantial and peculiar interests in the issues of the trial to appreciate the activeness and efficiency of the prosecution service. The decisions of the prosecution service must be subject to judicial review and appeal procedures.

It is important to note that Namibia's criminal prosecution service has been used to maintain the status quo of the minority elite or government. The change in government therefore from that of minority to a popular majority government is not a guarantee that citizens will not again be forced to relinquish their fundamental human rights and freedoms for the sake of their survival.

Currently the Prosecutor General's decisions stand, even when such decisions are absurd. This is because there is no legal framework through which they can be challenged. A prosecuting authority with free discretionary powers must be held accountable for its actions. A

procedure must be set in the legal framework through which the public can lodge its complaints.

Accountability

It has already been stated that a prosecuting authority with a wide discretionary power to exercise must be held accountable for its actions. The legal position in Namibia is that the Prosecutor General keeps the Attorney General well informed on issues relating to criminal prosecution. The Attorney-General will then be accountable to both the Executive and parliament for the prosecutorial service's performance and needs. It is inconceivable that since the Attorney-General has no authority to instruct the Prosecutor General whether to prosecute or not, that he or she will account to the authorities above with respect to those powers. Therefore, if either the President and/or parliament wish to know more about specific activities of the prosecution service, they will have to appoint an ad hoc or standing committee to do a thorough investigation into the bulk of activities of the prosecution service. Evidently this is a good tool that the Executive and/or Parliament processes can use to control the prosecution service.

The prosecution service's accountability must not be limited to the Executive and parliament. The prosecution service's accountability should be extended to the public, victims and offenders. Section 18 of Act 25, 2004 disturbingly limits the victim's right to choose as earlier stated in the paper. The prosecution service should involve a victim legal representative more, to force the State to consider and compel it to negotiate whatever is best in the interest of a victim. This should be pursued with the view of balancing the victim interest, the offender and the public.

It is absurd that the State keeps its monopoly or prosecution in order to use taxpayer's money to maintain its authority over criminals. A

victim's legal representative should be given a chance to decide which legal process would benefit his or her client most. He or she should be able to choose between criminal prosecution proceedings and civil litigation to enable his or her client to gain equitable benefits.

Legal implications

The authority whether to prosecute or not in all criminal proceedings is vested in the Prosecutor General who will prosecute in the name of the Namibian people. The Prosecutor General shall delegate his authority to prosecute to public prosecutors, who will exercise their right to prosecute within their areas of jurisdiction. Public prosecutors will exercise the authority to prosecute under the control and directives of the Prosecutor General. The authority to prosecute should be exercised in accordance with fundamental human rights and freedoms guaranteed by the Constitution of Namibia (Chapter 3). The Prosecutor General and/or public prosecutors should take cognizance of the fact that all are equal before the law. All are entitled to a speedy and fair trial, which should take place within a reasonable time. Therefore, they should exercise their authority to prosecute within a reasonable time.

The circumstances of each case have to determine the unreasonableness of the delay caused. These circumstances must be considered with a view to distinguishing between the magnitudes of the crime and the complexity of the conspiracy involved in the committal of the offence. A trivial offence, from its own circumstances has to be disposed of within a short period of time.

A prosecutor's failure to prosecute within a reasonable time depending upon the circumstances of each case and the reasons advanced. Where

it is established that the delay is unreasonable, it should be because there is no ground to favour such a delay. Prosecution in Namibia will temporarily or permanently be terminated by a court of law.

In any event, the Prosecutor General and/or a public prosecutor have an equal right to have their authority restored either through review and/or appeal procedure by the judiciary.

This legal position in Namibia brings the prosecution service at par with other government agencies before the law.

The court's failure to inform an accused (unrepresented) of his or her right to legal representation is an irregularity which extends to the root of a fair trial. The result of which would lead to the quashing of both a conviction and sentence. Hence casting an indirect duty upon prosecuting authority to, consistently, remind the court to inform the accused his or her right to legal representation. An accused upon an application is entitled to a disclosure of the content of the prosecution's docket.

Where the Prosecutor General has withdrawn his or her authority to prosecute and issue a certificate nolle prosequi, he or she must not be allowed to intervene in private prosecution, unless the Prosecutor General's intervention is permitted by a court of law. Equally where an accused pleads guilty in a private prosecution, a private prosecutor must finalize such proceedings.

To allow the Prosecutor General to intervene in private prosecution without justifying his or her anticipated intervention is an abuse of power on the part of the State. Democratic values and principles demand for a justifiable approach in whatever a State and/or aggrieved

citizen intends to do. An aggrieved person must refrain from taking arbitrary actions, which may not suit his or her best interest.

A victim legal representative, as envisaged by section 18, Act 25 of 2004, must be afforded an opportunity to discuss the impact of a crime on a victim with an offender and/or a prosecutor. He or she must propose a cause of action the victim desires to take with regard to the offence. A victim's legal representative must request the Prosecutor General to issue a certificate nolle prosequi, for a private prosecution to be instituted and conducted on behalf of a victim.

This involvement of all stakeholders in the prosecution service will motivate and restore public interest and respect in our criminal prosecution system. This process will expedite resolution of criminal matters in the lower courts. It will further reduce the burden of caseload on the lower courts. The approach will minimize irregular procedural as well as legal defects that Magistrates are haunted with, due to the hectic schedules they encounter on a daily basis.

There is no doubt that the State dominated prosecution model promotes the notion of inequality of citizens before the law. The Prosecutor General is placed above other citizens and eventually above the courts. A prosecution service without a legal framework to guide it fosters uncertainty amongst public prosecutors who have to perform their national duties under the directives and control of the Prosecutor General. A prosecution service that is not accountable and transparent to the people it is meant to serve, is likely to bring anarchy. For example, people are already refusing to testify in court on behalf of the State. They are more inclined to protect offenders than to deliver them for prosecution. One of their arguments is that white-collar crimes are not prosecuted and they ask why a poor person should be subjected to a protracted State dominated prosecution process. Surely, popular

participation of all stakeholders in prosecutorial decision-making will be an ideal approach which will re-shape our prosecution service.

The discussions on the issues in this paper indicate that a gradual reform in our criminal law has taken place. It is our undoubted believe that a further reform in this respect will continue to unfold in the future and that will ultimately make our criminal prosecution service a popular forum for all of us to be proud of. The Prosecutor General's actions must further be brought within the ambit of democratic values and the aspiration of the Namibian people.

The Prosecution Service should be required to give reasons for its decision to stop or withdraw prosecution. The decision to withdraw or stop prosecution should be taken on appeal or should be administratively reviewed. Where prosecution is stopped or withdrawn, the prosecution service should allow private prosecution to be instituted and conducted. Prosecution Service should also accord professional expertise, where a victim is not legally represented in order for him or her to privately prosecute.

It is only when prosecution service becomes community friendly that we will be able to talk of justice. The assertion that justice must be done and seen to have been done nowadays acquired a selective application. This maxim is stressed to an extent that it ignores social economic reality among citizens. Those with high status in the community commit crimes and they get away with it, while the vulnerable poor citizens are often brought to justice.

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