

**A CRITIQUE ON PROSECUTORIAL INDEPENDENCE IN KENYA: THE  
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS AND ITS  
EFFECTS ON THE ATTAINMENT OF THE RULE OF LAW**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School

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FEBRUARY 2018

Word count 12600

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## **Acknowledgment**

I would like to express my sincere gratitude to the Almighty God for the endurance through this process. I would also like to extend this gratitude to my supervisor, Madam Mukami Wangai for the ceaseless assistance during the entire period of this research. Her tremendous knowledge, regard for structure and direction have been indispensable to the completion of this dissertation.

## Declaration

I, DIANA MADINA DIDO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....D.M.D. ....

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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ..... .....

MUKAMI WANGAI

## **Abstract**

Prosecution is a key role within the criminal justice system. In Kenya the Office of the Director of Public Prosecutions (ODPP) is responsible for prosecution. The ODPP being a relatively new institution that is critical within the criminal justice system, makes it important to gauge its progress early enough to ensure it operates optimally. Therefore, the main aim of this paper is to analyse the effects of prosecutorial independence to the ODPP's role in the attainment of the rule of law. The study gives a critical analysis of the development of prosecutorial independence in Kenya. It goes further to analyse the effects of this independence to the functions of the ODPP in a bid to assess the consequent impact on the attainment of the rule of law. The study is undertaken through a comprehensive data analysis of cases and reports. The study hence finds that prosecutorial independence has facilitated the attainment of the rule of law through the ODPP's mandate. The study further goes ahead and gives recommendations aimed at improving the ODPP's operations consequently facilitating the attainment of the rule of law.

## **List of Abbreviations**

AG	Attorney General
COK	Constitution of Kenya
CPC	Criminal Procedure Code
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Committee
NOCK	National Olympic Committee of Kenya
NPA	National Prosecuting Authority
NPS	National Police Service
ODPP	Office of the Director of Public Prosecutions
ODPP Act	Office of the Director of Public Prosecutions Act

## **List of Cases**

*A K Kraipak and Ors v Union of India and Ors* (1969), Supreme Court of India.

*Morris Kinyalili Liema v R*, Criminal Appeal No. 58 of 2010.

*R v Ainsworth Maragara Kithinji*, CMCR No. 1373 of 2016.

*R v Francis Kanyili Paul and 4 others*, CMCR No. 1483 of 2016.

*R v Sussex Justices ex parte McCarthy* (1924), The United Kingdom House of Lords.

*R v Thomas Gilbert Cholmondeley* (2009) eKLR.

*Youth Enterprise Development Fund Case*, EACC/FI/INQ/59/2015.

## **List of Legal Instruments**

*Constitution of Ireland (1937).*

*Constitution of Kenya (1963).*

*Constitution of Kenya (2010).*

*Constitution of Zimbabwe (2013).*

*Criminal Procedure Code (No. 20 of 1989).*

*Criminal Procedure Code (No. 27 of 2015).*

*National Prosecuting Act (Zimbabwe).*

*Office of Director of Public Prosecutions Act (No. 2 of 2013).*

*Prosecution of Offences Act (Ireland).*

## CHAPTER 1: INTRODUCTION

### 1.1 Background of the study

In Kenya before the promulgation of the Constitution of Kenya 2010 (COK), prosecution was carried out as a mandate of the Attorney General's office (AG).<sup>1</sup> The AG was a constitutional officer under the public service.<sup>2</sup> He was the principal advisor to the government of Kenya and was also the chief Public Prosecutor.<sup>3</sup> The AG had the authority to delegate this power through the appointment of public prosecutors.<sup>4</sup> However, in Kenya save for the major cases, the police investigated cases, prepared them and finally prosecuted them.<sup>5</sup> This practice did not change the fact that police officers were not trained for prosecution. This was one of the key problems affecting the prosecution function thus necessitating the reform to an independent prosecution organ.

The promulgation of the COK was a milestone change for the prosecution function. Currently, prosecution is a function carried out by the Office of the Director of Public Prosecutions (ODPP). Its mandate is provided under the COK article 157.<sup>6</sup> The ODPP was instituted in July 2011 as an independent constitutional office.<sup>7</sup> The Office Of The Director Of Public Prosecutions Act (ODPP Act) was passed to this effect and it commenced operation in January of 2013. The ODPP is responsible for instituting and undertaking criminal proceedings against any person before any court in Kenya (except the Courts Martial) with respect to any offences alleged to have been committed. The ODPP's mandate is carried out through four departments namely: Offences Against the Person, Economic, International and Emerging Crimes, County Affairs and Regulatory Prosecutions and the Central Facilitation Services.<sup>8</sup> A deputy director leads each department except for the Central Facilitation Services department that is led by

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<sup>1</sup> Article 86(3), *Constitution of Kenya* (1963).

<sup>2</sup> Article 86(3), *Constitution of Kenya* (1963).

<sup>3</sup> Article 86(3), *Constitution of Kenya* (1963).

<sup>4</sup> Article 86(4), *Constitution of Kenya* (1963).

<sup>5</sup> Mukuha G, 'The role of police prosecutors in Kenya' Unpublished LLB Thesis, University of Nairobi, Nairobi, 1990, 3.

<sup>6</sup> Article 157, *Constitution of Kenya* (2010).

<sup>7</sup> <<https://softkenya.com/law/director-of-public-prosecutions-in-kenya>> on 24 January 2017.

<sup>8</sup> <<http://www.odpp.go.ke/index.php/about-us/mandate.html>> on 24 January 2017.

Secretary of Public Prosecutions.<sup>9</sup> The overall head of the office is the Director of Public Prosecutions (DPP). The DPP is empowered under the ODPP Act to appoint public prosecutors.<sup>10</sup> However, persisting factors such as low salary scale offered to state counsel did not incentivize lawyers to take up the position leading to a shortage of state prosecutors.<sup>11</sup> Consequently, this necessitated the appointment of police officers as public prosecutors.

Following this, one of the major reforms of the ODPP was the need to have state counsel take up the duty of prosecution and not the police.<sup>12</sup> In a press interview, the former DPP Keriako Tobiko stated, 'Police prosecutors are not adequately conversant with legal procedures, leading to miscarriage of justice. In the recent times, these prosecutors have been dogged by glaring problems such as the inability to bring sufficient evidence to warrant a conviction'.<sup>13</sup> In 2012 the process began to replace police prosecutors with state counsel<sup>14</sup> and since then the ODPP has managed to phase out police prosecutors.<sup>15</sup> This is one of its major developments as shall be depicted through this study.

This study aims to give a critical analysis on prosecutorial independence as seen through the functions and operations of the ODPP and its effects to the attainment of the rule of law. The study is also important as it analyses the relatively new institution.

## 1.2 Statement of the problem

The overall research problem addressed in this study is the effects of prosecutorial independence to the role of prosecution in the attainment of the rule of law. The study

<sup>9</sup> <<http://www.odpp.go.ke/index.php/about-us/mandate.html>> on 24 January 2017.

<sup>10</sup> Section 29, *Office of the Director of Public Prosecutions Act* (No. 2 of 2013).

<sup>11</sup> Conrad Bosire, 'Kenya needs broader justice sector reforms' Open Society Initiative for Southern Africa, 12 September 2012 <<http://www.osisa.org/law/blog/kenya-needs-broader-justice-sector-reforms>> on 24 January 2017.

<sup>12</sup> Allan Olingo, 'DPP's dilemma on police prosecution' Standard digital news, 4 April 2012, <<http://www.standardmedia.co.ke/article/2000055491/dpp-s-dilemma-on-police-prosecution>> on 5 December 2016.

<sup>13</sup> Allan Olingo, 'DPP's dilemma on police prosecution' Standard digital news, 4 April 2012 <<http://www.standardmedia.co.ke/article/2000055491/dpp-s-dilemma-on-police-prosecution>> on 5 December 2016.

<sup>14</sup> Allan Olingo, 'DPP's dilemma on police prosecution' Standard digital news, 4 April 2012 <<http://www.standardmedia.co.ke/article/2000055491/dpp-s-dilemma-on-police-prosecution>> on 5 December 2016.

<sup>15</sup> Office of the Director of Public Prosecutions, *1<sup>st</sup> Progress report*, July 2013, 20.

provides a coherent analysis on the ODPP's mandates and its implications to the attainment of the rule of law.

### **1.3 Justification of the study**

Prosecutors are agents of the administration of justice and specifically to this study, have a role in the attainment of the rule of law. Their role is essential as they are the institutors of suits before courts. Therefore, it is important that there exists prosecutorial independence for the optimal execution of the prosecution's mandate. This in turn facilitates the attainment of the rule of law by the prosecution, which is the sole purpose of having such institutions in the first place. As democracy requires, the sovereign vests its power on these institutions such as the ODPP and in turn they have to serve the public interest.

### **1.4 Aim and objectives**

#### **1.4.1 Aim of the study**

The aim of the paper is to analyse the effects of prosecutorial independence to the functions of prosecution and specifically its role in the attainment of the rule of law.

#### **1.4.2 Specific objectives of the study**

- a) Analyze the factors necessitating the creation of an independent prosecution office, the ODPP.
- b) Analyze whether prosecutorial independence of the ODPP exists in practice.
- c) Identify the effects of the ODPP's independence to the function of prosecution in Kenya and specifically with regards to the attainment of the rule of law.
- d) Identify the shortcomings of the ODPP, an analysis of where they could be going wrong.
- e) Identify and suggest recommendations useful to the functioning of the ODPP in criminal procedure to ensure the rule of law is not prejudiced.

### **1.5 Research questions**

- a) What necessitated the creation of an independent prosecution organ in Kenya?

- b) Is the ODPP's independence existent in practice?
- c) What are the effects of the ODPP's independence to the prosecution function?
- d) What are the effects of the ODPP's mandate and functions to the attainment and furtherance of the rule of law in criminal justice?
- e) What further actions ought to be taken to guarantee the prosecution's role in upholding the rule of law notwithstanding the current position of the ODPP?

## 1.6 Literature review

Several documents have been written on the topic of prosecutorial independence and its importance to the mandate of prosecution, specifically in the attainment of the rule of law. Below this paper refers to six that guided the research.

The first document is '*The status and role of prosecutors*' by the United Nations Office on Drugs and Crime and International Association of Prosecutors Guide.<sup>16</sup> The guide assists all the member states to achieve uniformity in prosecution to guarantee criminal justice.<sup>17</sup> The document provides requirements for prosecution departments that will ensure the prosecution organ operates optimally and effectively within the criminal justice system. It also emphasizes on the importance of this institution as an agent of the administration of criminal justice.

A report published by The Open Society Initiative for Eastern Africa authored by Patricia Kameri Mbote and Migai Akech, '*Kenya: justice sector and the rule of law*' made a critical assessment on the impact of the criminal justice system to the attainment of the rule of law.<sup>18</sup> The overall objective of the report was to assess the efficacy, accountability, responsiveness and legitimacy of the justice sector in Kenya and suggest policy and legislative interventions for its improvement. One of the elements assessed included the technical capacity of the actors within the justice sector such as the prosecution organ. The report emphasizes that the independence of the prosecution

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<sup>16</sup> *The status and role of prosecutors*, United Nations office on Drugs and Crime and international Association of Prosecutors, December 2014.

<sup>17</sup> *The status and role of prosecutors*, United Nations office on Drugs and Crime and international Association of Prosecutors, December 2014.

<sup>18</sup> Open Society Initiative for Eastern Africa, *Kenya: justice sector and the rule of law*, March 2011, 4.

system is vital to its optimal operation including its role in the attainment of the rule of law.<sup>19</sup> The report went ahead and analysed the powers granted to the prosecution function and put across the duty to check on such powers. The main idea espoused is the importance of public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.<sup>20</sup>

A paper by Geoffrey Flatman, '*Prosecuting justice; independence of the prosecutor*' sets forth a similar argument. He argues that independence of the prosecutor is not simply founded in a self-governance system independent of authority or control. He puts across the idea that the public interest can only be upheld through an independent and accountable prosecutorial system.<sup>21</sup>

A dissertation by Mukuha G titled, '*The role of the police in prosecution*' highlights the disadvantages posed by police prosecutors as they are not qualified and trained as prosecutors.<sup>22</sup> This by itself is prejudice to criminal procedure because they are not conversant with the law. Another issue raised in the paper is on the mental intention behind prosecution and in contrast that of the police especially because of their double roles; prosecution and investigation.<sup>23</sup> His argument is premised on the idea that impartiality of the police is questionable due to the two roles they take up and the two aims they desire to achieve on pursuing these roles. Following this and many other arguments put across, he recommends the separation of the function of prosecution from that of investigation.<sup>24</sup>

Another document that guided the research was a paper presented at the Human Dimension Seminar in Warsaw titled, '*Upholding the rule of law and due process in*

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<sup>19</sup> Open Society Initiative for Eastern Africa, *Kenya: justice sector and the rule of law*, March 2011, 14.

<sup>20</sup> Open Society Initiative for Eastern Africa, *Kenya: justice sector and the rule of law*, March 2011, 14.

<sup>21</sup> Geoffrey F, '*Prosecuting justice; independence of the prosecutor*' Australian Institute of Criminology, 1996, 9.

<sup>22</sup> Mukuha G, '*The role of police prosecutors in Kenya*' unpublished LLB Theses, University of Nairobi, March 1990.

<sup>23</sup> Mukuha G, '*The role of police prosecutors in Kenya*' unpublished LLB Theses, University of Nairobi, March 1990.

<sup>24</sup> Mukuha G, '*The role of police prosecutors in Kenya*' unpublished LLB Theses, University of Nairobi, March 1990.

*criminal justice systems*'.<sup>25</sup> The paper elaborates on the role of public prosecutions in upholding the rule of law. It focuses on the relationship between prosecution and other players in the criminal justice system. This is important for this study especially because it showcases the theoretical framework applied by emphasizing on the importance of the prosecution function within the criminal justice sector.

Last but not least are the *ODPP's progress report* and *strategic plan*. These reports are prepared by the ODPP following the requirement provided within the ODPP Act.<sup>26</sup> They are important to this study as they provided the data that were analysed to answer the research questions.

However, the literature review does not extensively and specifically cover prosecutorial independence in Kenya post 2010 and the COK, which is the question the study aims to answer.

### **1.7 Hypothesis**

The ODPP has prosecutorial independence. This has positively impacted the prosecution function consequently facilitating their role in the attainment of the rule of law in Kenya.

### **1.8 Research methodology**

The research used a qualitative approach. It was carried out wholly through desktop research. The study made use of relevant statutes and international regulations and thoroughly analysed cases and reports to give a conclusive critique on the role of the ODPP in the attainment of the rule of law in Kenya. A comparative study with two prosecution systems was used to make recommendations necessary and relevant to the operation of the ODPP.

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<sup>25</sup> Adams R, 'Upholding the rule of law and due process in criminal justice systems' Human Dimension Seminar, Warsaw, 10-12 May 2006, 15.

<sup>26</sup> Section 53, *Office of Director of Public Prosecutions Act* (No. 2 of 2013).

## **1.9 Limitations of the study**

Some of the methodology used like reference to interviews may not give rise to an outright objective and reliable finding.

International standards used as guidelines may have different effects when applied to different states because of the uniqueness in criminal justice systems.

## **1.10 Chapter breakdown**

Chapter one introduces the research by giving a clear insight on the intention of the study. It consists of the background of the problem, the statement of the problem, the justification of the study, hypotheses, methodology, limitations and chapter summaries.

Chapter two elaborates on the structural functionalism theory as applied to the study. It goes ahead to depict the relevance of the theory through the historical development of the prosecution system in Kenya. It analyses the factors that necessitated the institution of the ODPP as an independent office.

Chapter three consists of the data analysis. It discusses the effects of prosecutorial independence on the mandate of the ODPP. The data is further interpreted with regards to its implications to the attainment of the rule of law by the prosecution.

Chapter four is a comparative study with Zimbabwe and Ireland. It includes a summary of the effects of prosecutorial independence in these countries and consequently lessons important to Kenya.

Chapter five gives a concise conclusion of the study. It goes ahead to give recommendations on actions that may be taken to improve the ODPP's operations thus facilitating the attainment of the rule of law through the ODPP's mandate.

## CHAPTER 2: THEORETICAL FRAMEWORK

The theoretical framework applied to this research is the *structural functionalism theory*. This chapter elaborates on the relevance of this theory as seen through the historical development of the prosecution system in Kenya. This is done specifically assessing the independence of the prosecution system.

### 2.1 Structural Functionalism theory

The research is based on the argument set forth by Emile Durkheim in the structural functionalism theory. Durkheim's major justification for this theory was to understand why societies were formed and what held them together which for him the ultimate answer was solidarity obtained through division of labour.<sup>27</sup> He began by explaining how social institutions are a shared way for individuals in society to meet their own biological needs.<sup>28</sup> He gave this definition to justify the value of social traits and to explain their contribution to the overall system of society.<sup>29</sup> Later on he developed the study of structural functionalism to be more on, the ways social institutions within the society meet the needs of the individuals forming that society. He made this clear with his statement that centered his whole theory and argument, '*the individual is born of society and not the society of individuals*'.<sup>30</sup>

His argument began by making a clear distinction between two categories of solidarity: mechanic solidarity and organic solidarity. Mechanic solidarity refers to where everyone takes up similar tasks and as Durkheim put it, the solidarity of resemblance. According to him, this society is coherent because the individuals are not differentiated, they are members of the same collectivity, they feel the same emotions, cherish same values and hold similar things sacred.<sup>31</sup> On the other hand, he referred to organic solidarity as where the coherent unity of the collectivity is obtained through differentiation.<sup>32</sup> Consequently, there is a stronger sense of individuals being dependent on one another to aid the

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<sup>27</sup> Durkheim E, *The division of labour in society*, 2<sup>nd</sup> ed, Macmillan, New York, 1933, 32.

<sup>28</sup> Durkheim E, *The division of labour in society*, 2<sup>nd</sup> ed, Macmillan, New York, 1933, 33.

<sup>29</sup> Durkheim E, *The division of labour in society*, 2<sup>nd</sup> ed, Macmillan, New York, 1933, 35.

<sup>30</sup> Durkheim E, *The division of labour in society*, 2<sup>nd</sup> ed, Macmillan, New York, 1933, 36.

<sup>31</sup> Durkheim E, *The division of labour in society*, 2<sup>nd</sup> ed, Macmillan, New York, 1933, 36.

<sup>32</sup> Durkheim E, *The division of labour in society*, 2<sup>nd</sup> ed, Macmillan, New York, 1933, 40.

functioning of the whole society. This was obtained through a collective consciousness, which he defines as, 'the body of beliefs and sentiments common to the average members of a society'.<sup>33</sup> This can be linked to the whole purpose of having government and institutions serving on behalf of the citizens. The rule of law is a principle of governance requiring the law to be upheld no matter what the circumstance. It is a principle enshrined through democracy where public interest is the sole purpose for having a government.

The theory therefore proposes that the human society is like an organism and is made up of structures called social institutions.<sup>34</sup> These institutions are specially structured so that they perform different functions for the society.<sup>35</sup> The distinctive function of every institution is the whole purpose justifying the existence of that institution.<sup>36</sup> Following this theory, as a result of being inter-dependent, one organ can affect the others and ultimately the whole or the reverse; the whole can affect either institution.

A criminal justice system is a set of legal and social institutions for enforcing criminal law using a defined set of procedural rules and limitations.<sup>37</sup> Therefore, in applying the theory, prosecution is a core function whose mandate has direct impact on the criminal justice system and specifically the attainment of the rule of law.

In Kenya, there are many institutions forming the criminal justice system: the court system, the prosecution department and the police department. They all have to work interdependently to ensure justice is achieved at all costs. The ODPP has distinct functions within the criminal justice system. It can be inferred that when institutions do not perform their distinct functions optimally or perform other functions other than that which they are structurally instituted for, the system is interfered with consequently

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<sup>33</sup> Durkheim E, *The division of labour in society*, 2<sup>nd</sup> ed, Macmillan, New York, 1933, 40.

<sup>34</sup> [\\_<http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html>](http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html) on 9 February 2017.

<sup>35</sup> [\\_<http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html>](http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html) on 9 February 2017.

<sup>36</sup> [\\_<http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html>](http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html) on 9 February 2017.

<sup>37</sup> Richard Frase and Robert Weidner, 'The importance of viewing criminal justice as a system' *American Law and legal information, criminal justice systems*, 2011 [\\_<http://law.jrank.org/pages/858/Criminal-Justice-System.html>](http://law.jrank.org/pages/858/Criminal-Justice-System.html) on 23 January 2017.

affecting the societal order. Inasmuch as there exists interdependence of the institutions within a society, their independence is a critical factor aiding optimal functioning.

The study is meant to display the effects of the institution of the ODPP, which currently is an independent office under the COK forming part of the criminal justice system.<sup>38</sup> The effects of the institution of the ODPP shall be analysed with reference to prosecutorial independence and in turn the impact this has on the attainment of the rule of law.

A comprehensive discussion on the history of prosecution in Kenya is used to depict a clear picture of the importance of the structural functionalism theory. This is analysed with regards to the functions and interdependence of institutions and the limits to this interdependence through the principle of independence and accountability.

## **2.2 History of prosecution in Kenya**

Kenya gained its independence from Great Britain gradually adopting the adversarial system of prosecution with the AG at the top of the prosecution department.<sup>39</sup> The AG had the power to: institute and undertake criminal proceedings against any person and before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person, to take over and continue any such criminal proceedings that have been instituted and undertaken by any other person or authority and to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself, any other person or authority.<sup>40</sup>

The above powers could be exercised by the AG in person or by officers subordinate to him/her in accordance with his/her general or special instructions.<sup>41</sup> Public prosecutors appointed by the AG conducted public prosecutions.<sup>42</sup> The persons who could be appointed as public prosecutors included advocates of the High Court or persons employed in the public service not being public officers below the rank of sub-inspector of police.<sup>43</sup> All public prosecutors were subject to the express directions of the AG.<sup>44</sup> These public prosecutors had the power to appear and plead without any written authority

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<sup>38</sup> Article 157, *Constitution of Kenya* (2010).

<sup>39</sup> Article 86(3), *Constitution of Kenya* (1963).

<sup>40</sup> Article 86(3), *Constitution of Kenya* (1963).

<sup>41</sup> Article 86(4), *Constitution of Kenya* (1963).

<sup>42</sup> Section 85(1), *Criminal Procedure Code* (No. 20 of 1989).

<sup>43</sup> Section 85(2), *Criminal Procedure Code* (No. 20 of 1989).

<sup>44</sup> Section 85(3), *Criminal procedure Code* (No. 20 of 1989).

before any court, any case of which they had charge and were under trial or appeal.<sup>45</sup> The role of the prosecution was to ensure that the prosecution's case was properly presented and that the weaknesses of the defense case were identified and fairly exposed before the court.<sup>46</sup> Therefore, the main aim of prosecution was not to get a conviction unless justice required it. The police were part and parcel of the function of prosecution through investigation and preparation of the evidence to be used.<sup>47</sup> However, save for the serious cases, the police investigated the cases, prepared them and finally prosecuted them in most courts.<sup>48</sup>

## 2.3 Factors leading to the institution of the ODP

### 2.3.1 The need for an independent and accountable prosecution

Prosecution is a core function to the dispensation of criminal justice.<sup>49</sup> Prosecutors act as agents within the criminal justice system, owing a duty both to the State and the public. Striking a balance between these two may pose a difficulty in the absence of the prosecution's independence.<sup>50</sup> Therefore, prosecutors have a special role of representing the public interest.<sup>51</sup> In order to ensure the rule of law the prosecution organ ought to be assured of its independence.

Independence is the state or condition of being free from dependence, subjection or control.<sup>52</sup> James Hamilton in a seminar on prosecutorial independence made the following remark, '*Prosecutors should have sufficient independence or autonomy to take their decisions regardless of any outside pressures including from the executive arm of the government. Where such pressures can be and are brought the prosecutor will not be able to prosecute in the interest of justice, will not be able to respect the rule of law or*

<sup>45</sup> Section 86, *Criminal Procedure Code* (No. 20 of 1989).

<sup>46</sup> Mukuha G, 'The role of police prosecutors in Kenya' Unpublished LLB Thesis, University of Nairobi, Nairobi, 1990, 3.

<sup>47</sup> Mukuha G, 'The role of police prosecutors in Kenya' Unpublished LLB Thesis, University of Nairobi, Nairobi, 1990, 3.

<sup>48</sup> Mukuha G, 'The role of police prosecutors in Kenya' Unpublished LLB Thesis, University of Nairobi, Nairobi, 1990, 3.

<sup>49</sup> *The status and role of prosecutors*, United Nations Office on Drugs and Crime and international Association of Prosecutors, December 2014, 1.

<sup>50</sup> *The status and role of prosecutors*, United Nations Office on Drugs and Crime and international Association of Prosecutors, December 2014, 1.

<sup>51</sup> *The status and role of prosecutors*, United Nations Office on Drugs and Crime and international Association of Prosecutors, December 2014, 1.

<sup>52</sup> Black's law Dictionary 2<sup>nd</sup> ed.

human rights and will be powerless to deal effectively with cases of corruption or abuse of state power'.<sup>53</sup> He thoroughly emphasized on the importance of giving sufficient independence to the prosecution to ensure it performs its functions and fulfills its objectives optimally.<sup>54</sup>

In Kenya, the prosecution function needed independence both in constitution and operation.

As seen earlier, under the mandate of the AG, the independence of the prosecution function was affected due to government influence. The AG being the principal legal advisor to the government and an ex-officio member of the cabinet and parliament biased his role in prosecution.<sup>55</sup> The AG was required to provide legal advice to the government and to represent the government in any legal proceedings. The AG having several roles within the government and concurrently being the head of prosecution affected his impartiality and consequently greatly diluted the autonomy required for an effective prosecutorial organ. 'Justice need not only be done but must manifestly and undoubtedly be seen to be done', this was a statement made by Lord Hewart CJ in the judgment delivered in the case of *R v Sussex Justices Ex parte McCarthy*.<sup>56</sup> Following this often-quoted aphorism, it is a rightly inferred conclusion that the AG could not be impartial as is required of the head of any prosecution department and therefore, an independent prosecution office was necessary. In order to ensure the independence of the prosecution function, states need to put in place measures that guarantee that their activities are protected from outside influences whether political, legislative, executive powers or any other powers or influence.<sup>57</sup>

This structure of the prosecution department brought yet another difficulty when determining accountability for actions. The AG having other functions within the government could not be solely held accountable for actions made in fulfilling his

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<sup>53</sup> Hamilton J, 'Prosecutorial independence and accountability" UNIDEM Campus Trieste Seminar, Trieste, 28 February - 3 March 2011, 2.

<sup>54</sup> *The status and role of prosecutors*, United Nations Office on Drugs and Crime and international Association of Prosecutors, December 2014, 8.

<sup>55</sup> Article 86(2), *Constitution of Kenya* (1963).

<sup>56</sup> *R v Sussex Justices ex parte McCarthy* (1924), The United Kingdom House of Lords.

<sup>57</sup> *Independence and accountability of the prosecution*, European Network for Councils for the Judiciary, 2014-2016, 11.

mandate as head of prosecution. He had several functions and interests that needed fulfillment and consequently could not be held liable pursuing these despite the fact that many times there would be a conflict of interests. There was no valid system of checks and balances as the head was also part of other organs within the same government consequently affecting the accountability of the office. The above mirrors one of the principles of natural justice developed through the maxim of '*nemo iudex in sua causa*' meaning that no man should be a judge in their own case.<sup>58</sup> In a case decided by the supreme court of India, *A.K. Kraipak v Union of India*, the court applied this maxim and found that a person who sits on the committee for selection of candidates for an employment position must not be a candidate himself or herself for that position.<sup>59</sup> The logic behind the maxim is that in order for the judge or person in question to be impartial and neutral, he must be free from any controversy and suspicion of bias in rendering justice. The fair, independent and impartial administration of justice requires the prosecution to be held to account should it not fulfill its functions in accordance with its professional duties. In this vein, the prosecution's autonomy should not exist to the detriment of accountability.<sup>60</sup>

The prosecution function also needed independence in its constitution. The prosecution team ought to be properly constituted and basing on the history, this majorly emphasized on the need for separation of the functions of police and prosecutors in criminal procedure. It is a just conclusion that police officers were not fit for the role of prosecution.<sup>61</sup> There are several arguments in favour of the above proposition. These are:

- a) The police were not trained to take up the role of prosecution, they lacked the legal knowledge in form and process. Police prosecutors were not educated on matters of the law and consequently were not conversant with substantive law or procedural law which consequently led to the lack of due process.

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<sup>58</sup> The Legal Glossary\_< <http://www.legal-glossary.org/2013/03/23/nemo-iudex-in-sua-causa/>> on 15 September 2017.

<sup>59</sup> *A. K. Kraipak & Ors v Union Of India & Ors* (1969), Supreme Court of India.

<sup>60</sup> *The status and role of prosecutors*, United Nations Office on Drugs and Crime and International Association of Prosecutors, December 2014, 13.

<sup>61</sup> Mukuha G, 'The role of police prosecutors in Kenya' Unpublished LLB Thesis, University of Nairobi, Nairobi, 1990, 25.

- b) Police officers' intention and discretion in prosecution. Police officers underwent a different type of simulation and consequently could not be forced to align themselves with the prosecutions' aims, objectives and goals. The police being under-equipped with the subject matter of the law were unable to objectively carry out prosecution based on legal factors.<sup>62</sup>
- c) Need to separate the functions of investigation, charging and prosecution as they have different end goals. The structural functionalism theory proposes that institutions are specially structured so that they perform different functions on behalf of the society.<sup>63</sup> The distinctive function of every institution is the whole purpose justifying the existence of that institution.<sup>64</sup>
- d) Need to maintain public perception and confidence in criminal prosecution. Prosecutorial decision-making should be in the hands of a department that is not only independent and impartial as a matter of fact but one that is also seen to be independent and impartial. As seen through the Sussex judgment, '*Justice need not only be done but must manifestly and undoubtedly be seen to be done*', the conduct of the prosecution is very important in maintaining the public's image and faith in it.

It is important to note that even after the promulgation of the 2010 constitution<sup>65</sup> and the institution of the ODPP<sup>66</sup> some police officers still prosecuted on cases.<sup>67</sup> This was majorly due to factors such as lack of sufficient funding for the ODPP leading to a critical shortage of state prosecutors.<sup>68</sup> The Chief Justice then Dr Willy Mutunga, in his address to an annual convention of prosecutors stated, 'the perennial failure of the state to

<sup>62</sup> Mukuha G, 'The role of police prosecutors in Kenya' Unpublished LLB Thesis, University of Nairobi, Nairobi, 1990, 21.

<sup>63</sup> [\\_<http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html>](http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html) on 30 August 2017.

<sup>64</sup> [\\_<http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html>](http://study.com/academy/lesson/emile-durkheims-theories-functionalism-anomie-and-division-of-labor.html) on 30 August 2017.

<sup>65</sup> Article 157, *Constitution of Kenya* (2010).

<sup>66</sup> *Office of Director of Public Prosecutions Act* (No. 2 of 2013).

<sup>67</sup> Trevor Analo, 'Kenya justice system in dire need of funds' The East African news, 19 April 2014\_<<http://www.theeastafrican.co.ke/news/2558-2285454-tu07ocz/index.html>> on 16 September 2017.

<sup>68</sup> Trevor Analo, 'Kenya justice system in dire need of funds' The East African news, 19 April 2014\_<<http://www.theeastafrican.co.ke/news/2558-2285454-tu07ocz/index.html>> on 10 February 2017.

adequately fund public defender services affects the entire criminal justice system'.<sup>69</sup> This was in an attempt to address the reasons why we have some police officers prosecuting cases before the courts. He went ahead and made the statement, '*the delivery of justice is an assembly line, and every institution is chain-linked in the pursuit and attainment of justice*'.<sup>70</sup> From the above, it is a just conclusion that the malfunction of any institution within the criminal justice system affects the functionality of the whole system and consequently the dispensation of justice.

However the ODPP has been able to phase out police prosecutors as one of its major steps in protecting the prosecution's independence.<sup>71</sup>

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<sup>69</sup> Trevor Analo, 'Kenya justice system in dire need of funds' The East African news, 19 April 2014 <http://www.theeastafrican.co.ke/news/2558-2285454-tu07ocz/index.html> on 10 February 2017.

<sup>70</sup> Trevor Analo, 'Kenya justice system in dire need of funds' The East African news, 19 April 2014 <http://www.theeastafrican.co.ke/news/2558-2285454-tu07ocz/index.html> on 10 February 2017.

<sup>71</sup> Office of the Director of Public Prosecutions, *Strategic Plan 2016-2021*, 12.

## **CHAPTER 3: DOES THE INDEPENDENCE OF THE ODPP FACILITATE THE ATTAINMENT OF THE RULE OF LAW BY THE PROSECUTION?**

This chapter answers the questions posed by the research. It elaborates on the authorities within Kenya's legislative framework justifying the independence of the ODPP. The chapter also describes the role of prosecution in upholding the rule of law. It then goes ahead to show how the existence of the ODPP's prosecutorial independence in practice and how this assists in the attainment and furtherance of the rule of law through the exercise of its mandates. It does this by analysing the data collected, on the developments made by the ODPP to the prosecution function and specifically those functions that have a direct bearing in the furtherance of the rule of law.

### **3.1 Legal provisions guaranteeing independence of the prosecution**

Through historical development of the prosecution service in Kenya, the need for an independent prosecution service was dire. Therefore, with the promulgation of the constitution of Kenya 2010,<sup>72</sup> the independent ODPP was instituted.<sup>73</sup> Other statutes were also put in place to complement and further the independence of the ODPP. This is seen as discussed below.

#### **3.1.1 Constitution of Kenya (2010)**

The COK establishes the ODPP.<sup>74</sup> This is a milestone change with regards to the validity of the independence of the prosecution in Kenya. The provisions of the COK under the same article shed light on elements of this independence.<sup>75</sup> These are:

- a) The DPP being an individual nominated and appointed by the President and with the approval of the national Assembly

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<sup>72</sup> *Constitution of Kenya (2010).*

<sup>73</sup> Article 157, *Constitution of Kenya (2010).*

<sup>74</sup> Article 157, *Constitution of Kenya (2010).*

<sup>75</sup> Article 157, *Constitution of Kenya (2010).*

The DPP being the head prosecutor should have a formal process in place that clearly stipulates the appointment procedure. This assures security of the position to the person holding this office, which in turn affects how this person carries out their mandate. The prosecution should not be in fear of jeopardy especially from the government because this affects the dispensation of their functions and consequently the rule of law is hindered.

b) The provisions for the removal of the director from office<sup>76</sup>

Following the principle of the rule of law the director being the head of the prosecution office needs some form of security from arbitrary exercise of government powers. Legal justification and procedure for removal from office is quite essential. The absence of such legal securities increases the vulnerability of the prosecution and places them at the mercy of the government. This ensures the prosecution function is not intimidated by threats of loss of employment or positions in the dispensation of their functions.

c) The tenure of office for the DPP

In furtherance of the argument above, the DPP being the head of the prosecution function symbolises the whole department and protects the independence of the department. Therefore, in order to protect the independence of the institution, measures should be put in place to provide for tenure of office such as the one provided in the COK.<sup>77</sup> This ensures that the dispensation of his/her functions and the exercise of his/her mandates is not affected or even influenced by any other factor other than the principles guiding performance of the ODPP.<sup>78</sup>

d) The qualifications for appointment as DPP being the same as that for a judge of the High Court

The head of the prosecution department should be equipped with the educational and ethical requirements needed for the position. This requirement ensures that the individual taking up the position of DPP is a person who has the expertise required to be part of the

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<sup>76</sup> Article 158, *Constitution of Kenya* (2010).

<sup>77</sup> Article 158, *Constitution of Kenya* (2010).

<sup>78</sup> Section 4, *Office of Director of Public Prosecutions Act* (No. 2 of 2013).

department which is essential for proper governance and management of the independent office.

- e) The DPP does not need the consent or direction of any other person or body when instituting a criminal proceeding or exercising any of the mandates provided by the COK

This provision specifically emphasizes on the independence of the prosecution and the rights and powers that come with it. The COK under this article ensures that the mandate of the DPP is not subject to question or review by any other office or person.<sup>79</sup> He/she has the authority by law. Therefore, following the principle of the rule of law, this provision enables him/her to exercise his/her mandate without the consent of any other office or person.

### **3.1.2 Criminal Procedure Code (CPC) (2012)**

The CPC empowers the DPP to have certain powers for example to enter a *nolle prosequi*.<sup>80</sup> This means that the DPP has the power to discharge a person of the charges they are facing before a court. This goes to show the authority vested on the DPP. However, this power is subject to certain limitations and this is a sign of the existence of accountability. Among the limitations put in place is that the *nolle prosequi* entered by the DPP does not lead to an acquittal but rather a discharge from the charges against the accused person.<sup>81</sup> The discharge of an accused person does not operate as a bar to subsequent proceedings against them on account of the same facts.<sup>82</sup>

### **3.1.3 Office of Director of Public Prosecutions Act (ODPP act) (2013)**

The ODPP act was legislated in furtherance of articles 158 and 159 of the COK. The guiding principles of the office are specifically relevant to this paper and they include: the rules of natural justice, promotion of public confidence in the integrity of the office, the need to discharge the functions of the office on behalf of the people, the need to serve the cause of justice, to avoid abuse of the legal process and protect public interest, to protect

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<sup>79</sup> Article 158, *Constitution of Kenya* (2010).

<sup>80</sup> Section 82, *Criminal Procedure Code* (No. 27 of 2015).

<sup>81</sup> Section 82(1), *Criminal Procedure Code* (No. 27 of 2015).

<sup>82</sup> Section 82(1), *Criminal Procedure Code* (No. 27 of 2015).

the sovereignty of the people, to secure the observance of democratic values and principles and to promote constitutionalism.<sup>83</sup> The ODPP act further goes on from where the COK left at to validate the independence of the prosecution function and consequently the department. The ODPP act has clearly outlined its objects that can be seen through the following provisions:

a) Appointment and removal from office of the director

As also provided by the COK,<sup>84</sup> the ODPP act further goes ahead and provides for the steps to be taken during the appointment and removal of the director from office.<sup>85</sup> This protects the position of the director from arbitrary exercise of power by the government.

b) Powers of the DPP

One of the key factors showing the independence of the ODPP is through the powers granted to the director. The ODPP act provides that the director, at his/her discretion, may perform all that is necessary to be done for the purpose of performing his/her functions.<sup>86</sup> This provisions gives the director legal power to operate freely without any interference in order to perform the functions of the office.

c) Independence of the DPP

The act provides that the director in exercising his/her functions and powers under the COK and any other written law, is not subject to the direction or control of any authority or person rather is only subject to the COK and the law.<sup>87</sup>

d) Protection from personal liability

This provision protects members, staff, employees or agents of the office with regards to matters or actions that they take up in good faith in the execution of the powers, mandate and duties of the office from personal liability through any action, claim or demand.<sup>88</sup>

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<sup>83</sup> Section 4, *Office of Director of Public Prosecutions Act* (No. 2 of 2013).

<sup>84</sup> Article 158, *Constitution of Kenya* (2010).

<sup>85</sup> Section 8,9, *Office of Director of Public Prosecutions Act* (No. 2 of 2013).

<sup>86</sup> Section 5(2a), *Office of Director of Public Prosecution Act* (No. 2 of 2013).

<sup>87</sup> Section 6, *Office of Director of Public Prosecutions Act* (No. 2 of 2013).

<sup>88</sup> Section 15, *Office of Director of Public Prosecutions Act* (No. 2 of 2013).

### 3.2 Mandate of the ODPP

The mandate of the ODPP is to institute and undertake prosecution of criminal matters and all other aspects incidental thereto. In exercising prosecutorial authority, the DPP has due regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.<sup>89</sup> In doing so, the ODPP strives to provide quality, impartial and timely services in a manner that is professional, efficient and fair.

The mandates of the ODPP analysed in this chapter are those that have a direct implication to the prosecution's role in the attainment of the rule of law. These are the ODPP's duties in *the right to a fair trial* and in *prosecution of 'high-profile' crimes*. The principle of the rule of law is very crucial for the right to a fair trial.<sup>90</sup> It is one of the fundamental rights espoused through the Kenyan bill of rights that cannot be limited.<sup>91</sup> The right to a fair trial is relevant to the study also because the prosecution plays a major role in its exercise as the right is accorded to any person facing criminal charges before a court.<sup>92</sup> These charges are instituted by the prosecution and therefore, they play a major role in ensuring that every party is accorded the right to a fair trial. Finally, as shall also be seen in the data analysis, the prosecution of 'high-profile' crimes is an evident development of prosecutorial powers majorly rooted in the creation of an independent prosecutorial organ. The prosecutions of these crimes as shall be seen, have positively impacted the rule of law.

### 3.3 Prosecution and the rule of law

Generally, the rule of law is a principle of governance in which all persons, institutions and entities both public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are

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<sup>89</sup> Article 158, *Constitution of Kenya* (2010).

<sup>90</sup> <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/the-rule-of-law/> on 17 January 2018.

<sup>91</sup> Article 25(c), *Constitution of Kenya* (2010).

<sup>92</sup> Article 50(2), *Constitution of Kenya* (2010).