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Preserving the Prosecutorial Integrity of the Office of the Director of Public Prosecutions (D.P.P) in Commonwealth Africa: A Case Study of The Gambia, Kenya and Mauritius

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Table of Contents

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Abstract

This thesis observes that the Executive arm of the state in the three African commonwealth countries of The Gambia, Kenya, and Mauritius has engaged in the abuse of constitutional powers of prosecution granted to the Office of the Director of Public Prosecutions (D.P.P) for mainly political and corrupt purposes. This abuse of power led to erosion of public trust in the Office of the D.P.P in these countries. Using comparative analysis of constitutional texts of the three aforementioned countries, and some secondary literature, this thesis identifies the constitutional design related factors responsible for this phenomenon, which primarily are a lack of independence of the Office of the D.P.P and the absence of accountability mechanisms for the abuse of prosecutorial powers by the Office of the D.P.P. The thesis recognises that the 2020 Draft Constitution of The Gambia, the 2010 Kenyan Constitution, and the 1968 Mauritian contain provisions on the independence and accountability of the D.P.P. It however finds that there are gaps in these provisions, and in order to better protect the independence and promote the accountability of the D.P.P in these countries, proposes recommendations to address these gaps, drawing from the experiences of all three countries.

Introduction

The institution of the Office of the Director of Public Prosecutions (D.P.P.) plays an important judicial role as the entity primarily responsible for the initiating and discontinuing of criminal prosecutions in The Gambia, Kenya and Mauritius respectively. This judicial role, which is for all intents and purposes, established in the constitutions of all three countries in order to serve the public interest, has to a great extent facilitated the dictatorship, corruption and abuse of power that has occurred to varying degrees in all three countries.

In the Gambia, the office of the D.P.P aided in entrenching the ruling government of Yahya Jammeh, who between 1997 and 2017 ruled the Gambia with an iron fist, and used the Office of the D.P.P as a major tool to repress persons and groups perceived as threats to his authoritarian regime. Journalists critical of the ruling government were usually charged on repressive laws such as "providing false information," and using the internet to spread "false news" on the ruling government, in order to silence them.[1] Civil Servants and other government officials, who had fallen out of favour with the ruling government, were also indicted on manufactured "embezzlement" and/or "corruption" charges.[2] Further, political opponents of the ruling government of Jammeh and other civil society actors had charges levied against them for actions they took that aimed at challenging the excessive and arbitrary use of power by the ruling government.[3]

In Kenya, the Office of the D.P.P had been involved in a number of corruption related scandals especially during the regime of Arap Moi. These include the Goldenberg scandal in which the

[1] Human Rights Watch "State of Fear Arbitrary Arrests, Torture, and Killings" SEPTEMBER 16, 2015 available at https://www.hrw.org/node/281046/printable/print accessed 26 March 2021
[2] Ibid
[3] Ibid

government of Kenya subsidised exports of gold and diamonds, paying exporters huge percentages, which resulted in a loss of $600 million in compensation paid to Goldenberg International for non-existent gold and diamond exports.[4] The Office of the D.P.P failed to prosecute and obtain convictions for members of Arap Moi's government who were implicated in the corruption scandal, leading to questions regarding the credibility and integrity of the Office.

Questions of credibility and integrity have also been raised in Mauritius wherein the powers of the D.P.P to prosecute and discontinue criminal prosecutions have been abused to prevent senior government officials from being held accountable for their illegal actions and corrupt practices. This is in spite of the fact that Mauritius, unlike The Gambia and Kenya, had never experienced a dictatorship or any major political crises.[5]

The overall effect of these, as this thesis will show, is the significant erosion of public trust in the exercise of prosecutorial powers by Office of the D.P.P in all three respective countries.

This thesis therefore seeks to establish the constitutional design related factors that may lead to the abuse of the prosecutorial powers of the D.P.P, as seen in all three countries respectively, and proffer constitutional design related solutions to the problem. In doing so, the thesis takes cognizance of the fact that both 2010 Kenyan Constitution and the 2020 Draft Constitution of The Gambia make an attempt to rectify the problem of prosecutorial integrity of the D.P.P in their constitutional texts. As such, the thesis would examine these texts to identify gaps in their design and how they could be addressed to better preserve the prosecutorial integrity of the D.P.P in commonwealth Africa. The

[4] BBC News, "Moi 'ordered' Goldenberg payment" available at http://news.bbc.co.uk/2/hi/africa/3495689.stm last accessed 4 April 2021

[5] D Pelz "*Mauritius turns 50: How far has it come?*" available at https://www.dw.com/en/mauritius-turns-50-how-far-has-it-come/a-42937614 last accessed 7th May, 2021

thesis would also examine the *de facto* conditions necessary for ensuring the prosecutorial integrity of the D.P.P, and determine if constitutional designs could be a tool to address these *de facto* conditions.

It is the author's hope that this thesis would further serve as a policy guide for such African commonwealth countries seeking (or who may in the future seek) to reform their constitutions to optimize standards of independence and state accountability for the use of prosecutorial powers by Office of the D.P.P. In total there are nineteen commonwealth countries in Africa,[6] most of which have established the Office of the D.P.P in their constitutions to carry out criminal prosecutions. These include countries currently going through dictatorships like Uganda, and countries with a long history of corruption and unaccountability such as Sierra Leone.[7] Finally, this thesis would also serve as a brief account of how the prosecutorial powers of the Office of the D.P.P could be abused especially in the event of a dictatorship (The Gambia); the reign of a corrupt government (Kenya), or even a thriving democracy (Mauritius).

The first chapter of this thesis will discuss the conceptual framework of the Office of the D.P.P and highlight the history and development of the Office of the D.P.P in the commonwealth world, and its relevance in the African context. The second chapter will detail the factors (both de jure and de facto) that have led to the abuse of the prosecutorial powers of the Office of the D.P.P in The Gambia, Kenya and Mauritius. The third chapter will analyse the 2020 Draft Constitution of The Gambia together with the 2010 Kenyan Constitution and examine the implications the provisions relating to the Office of the D.P.P. This would help in identifying relevant gaps and making recommendations on the way forward for The Gambia, Kenya, Mauritius and the rest of Commonwealth Africa. The

[6] Commonwealth-Network "*Africa*" available at https://www.commonwealthofnations.org/country/africa/ last accessed 7th May, 2021

[7] Transparency International "*Overview of corruption and anti-corruption in Sierra Leone"* available https://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-sierra-leone last accessed 7th May, 2021

fourth chapter will contain the summary of key findings, a final analysis and the conclusion of the research.

Methodology

This thesis takes the approach of reviewing and analysing primary literature such as the Constitutions of The Gambia, Kenya, and Mauritius, as well as other Statutes and Court Judgements to tease out the relevant provisions for analysis with regards the history and operation of the Office of the D.P.P. Secondary Literature such as books, journal articles, and reports will also be examined for comparative purposes. The thesis will also utilise the socio-legal methods to evaluate the social and political implications of the constitutional designs of the office of the D.P.P and its effects on promoting the prosecutorial integrity of the Office.

Research Questions

a) What are the De Jure (constitutional design related) and De Facto reasons that led to the abuse of prosecutorial powers of the D.P.P in The Gambia, Kenya and Mauritius?

b) How can the constitutional design ensure the independence and accountability of the D.P.P?

c) Are the designs of the 2020 Draft Constitution of The Gambia, the 2010 Kenyan Constitution, and the 1968 Mauritian Constitution sufficient? If not, what are the gaps?

d) How can the gaps be addressed to better protect the independence and promote the accountability of the Office of the D.P.P?

Chapter 1

1.1 The Office of the Director of Public Prosecutions as a common law institution

The Office of the D.P.P. can be traced back to 19th Century England and Wales, when it was first established by the Prosecution of Offenses Act of 1879.[8] The office was created as a result of several attempts to reform prosecution processes, which were prior to 1879 carried out by Police Officers or by a private prosecutor hired by the injured party.[9] The problem with this system however was that when it in many cases, the police prosecutors were not specifically trained to carry out the prosecutions and were usually overzealous in the prosecution of defendants because their promotions depended upon the success of the prosecutions they conducted.[10] On the other hand, private prosecutions would usually fail due to want of money by the injured parties to pay private prosecutors.[11] There was thus consensus among a number of jurists, practitioners and law-makers that there was need for a system of public prosecutions supervised by a 'man of higher intelligence' who would see that the persons employed for such purposes of prosecution do not exceed their duty.[12] This led to the creation of the Office of the D.P.P in 1879 for the principal purposes of carrying out prosecutions in the territory of England and Wales.[13]

Today, the office of the D.P.P is an institution found all over the world in common law jurisdictions such as Canada, Australia, Hong Kong, Jamaica and much of former British colonised Africa.[14] Its

[8] Rozenberg, Joshua (1987). The Case for the Crown: the inside story of the Director of Public Prosecutions, p. 17
[9] Public Prosecutions in England, 1854-79: An Essay in English Legislative History, Duke Law Journal, p. 514 available at https://core.ac.uk/download/pdf/62552542.pdf accessed 26 March 2021
[10] Ibid, p. 516
[11] Ibid, p. 514
[12] Ibid, p. 516, para 114
[13] Supra no. 15
[14] J McKechnie QC, "Independent and Accountable" [Dec. 1996] Vol. 26, p. 268, p. 269

historical function in all the aforementioned countries has primarily been to prosecute criminal offences. However its functions extends to –

a) providing advice to the police and other investigative agencies;[15]
b) institute and respond to appeals of criminal case decisions;[16]
c) investigate and to gather evidence;[17] and
d) to give to a person an undertaking that specified evidence will not be used against them, or that they will not be prosecuted for a specified offence,[18] among other things.

1.2 Independence of the Office of the D.P.P

The Office of the D.P.P has since its inception had to deal with issues of Independence and accountability, as a means to protect its integrity. In many commonwealth countries, the Office of the D.P.P. has been granted some independence. The independent status of the Director reflects the principle of the separation of powers between the executive, legislature and the judiciary, a crucial doctrine of the Westminster system of government.[19]

As the Attorney General is a more of a political figure, taking up ministerial responsibilities such as advising the government on its legal affairs as well as sitting in cabinet, it was important that actual prosecutorial decisions be removed from the perception or reality of political expediency and placed in more independent hands.[20] As Rowena Johns argues in her 2001 Briefing Paper, the DPP should

[15] The Functions of the Director available at https://www.dpp.act.gov.au/about_the_dpp/the_functions_of_the_director last accessed 24th March 2021.
[16] Ibid
[17] J H Langbein "The Origins of Prosecution at Common Law", The American Journal of Legal History, Vol. XVII, p. 313
[18] Ibid
[19] R Johns "Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey" Briefing Paper No 9/2001, p. 1
[20] Supra no. 21, p. 271

be accountable to Parliament, but independent from Government as Politicians must not run the judicial process.[21] Thus, the separation of the prosecution service from other Law Departments has been a necessary reaction to the changed responsibilities and increased political engagements of Attorneys-General in many commonwealth countries.

This was first reflected in England and Wales wherein the D.P.P has been independent in its prosecutorial functions since the passing of Prosecution of Offences Act of 1908, which separated the office of the DPP from that of the Treasury Solicitor, and gave the D.P.P an office of his own.[22] This devolution of prosecutorial powers to the Office of the D.P.P has however been approached differently in several commonwealth jurisdictions, with some jurisdictions granting more autonomy to this office with regards its functions and operations than other jurisdictions. The constitutional issues of the autonomy of the D.P.P. or lack thereof may extend to issues of approval of prosecutorial decisions, appointment procedures, tenure of office, budgetary decisions, as well as general administrative policy decisions of the Office.

1.3 Accountability of the Office of the D.P.P

With independence, however, comes the need for accountability in order to prevent the abuse of the D.P.P's prosecutorial discretion. This is because the function of public prosecutions was viewed as a matter of public interest, and as such, the person or institution carrying out this function must be held responsible for prosecutions that go against such public interest or violate public trust.[23] As J Mckhennie argues in his paper "Independent and Accountable" that a statutory office can be entirely

[21] Supra no. 26, p. 18
[22] Supra no. 15, p. 22
[23] D Bugg QC "The Role of the DPP In The 20th Century" p. 12

independent in respect of its decision-making and, nonetheless, be held accountable for the quality and the consequences of its decision-making."[24]

Balancing these tenets of independence and accountability has proven difficult for many commonwealth nations, and has led to the diverse approaches in the set-up of public prosecution systems in several commonwealth countries. In Australia, for example, the DPP is required to provide the Attorney-General with information to enable the proper conduct of the Attorney's public business, including the answering of questions in the House. Thus, there is a measure of accountability to Parliament by the DPP, albeit indirectly, in respect of decisions after they have been made. No one may influence a decision before it is made, but Parliament may seek an explanation afterwards.[25] The A.G in Australia also has conjoint prosecutorial powers, and may, in an extreme case, exercise those powers. In such a case, an Attorney-General's decision takes precedence over that of a Director, and the Attorney-General rather than the D.P.P would be politically accountability for such decision.[26]

1.4 Case Selection

The choice of comparators is limited to countries that practice the common law legal and judicial system, as opposed to the civil law system. While public prosecutions occur in both common law and civil law systems, the respective systems differ. Common law countries use an adversarial system, wherein the prosecution and the defence compete against each other to determine facts in their respective favours in the adjudication process,[27] while the judge acts as a referee to ensure fairness to the accused, and that the rules of procedure are adhered to.[28] Civil law countries, on the other hand,

[24] Supra no. 21, p.
[25] Ibid, p.
[26] Ibid, p.
[27] Adversarial v. inquisitorial legal systems available at https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html last accessed 28 March 2021
[28] Ibid

are associated with the inquisitorial system that is characterised by extensive pre-trial investigation and interrogations with the objective to avoid bringing an innocent person to trial.[29] As the adversarial common law system seeks to reveal the facts via competition, the prosecutor has a personal incentive to win, whereas this incentive is not as apparent for the prosecutor in the inquisitorial civil law system.[30]

Literature analysing the prosecutorial integrity of the D.P.P can be found in most of the Commonwealth world. It must however be borne in mind that this thesis seeks to specifically analyse the issues of prosecutorial integrity (such as its independence and accountability) in Commonwealth Africa, and how the constitution can be used to protect or abuse it. The Gambia is thus an important comparator in this thesis. It is a country that has recently experienced a dictatorship that directly affected the independence and accountability of this Office, with recent revelations from witness testimonies at the Truth Reconciliation and Reparations Commission (TRRC) providing a detailed account of how the office's powers were abused. The Gambia is also now in the process of passing a new Constitution - the 2020 Draft Constitution - to restore some semblance of democracy and restore the prosecutorial integrity of the Office of the D.P.P.

A comparative study of two other commonwealth prosecution systems is however necessary to provide the recommendations needed to improve the prosecutorial integrity of the Office of the D.P.P in not only The Gambia but the rest of commonwealth Africa. The choice of comparators is thus limited to African countries that practice the common law legal and judicial system, as opposed to the civil law system.

[29] Ibid
[30] "Inquisitorial system" available at https://law.jrank.org/pages/7663/Inquisitorial-System.html last accessed 26 March 2021

The two other comparators chosen are thus Kenya and Mauritius, primarily because they are both commonwealth countries who practice the common law system adversarial system with the Office of the D.P.P primarily responsible for the prosecutorial processes.[31] Historically, The Gambia, Kenya and Mauritius were all colonised by the British and gained their independence from the British,[32] although Mauritius was also previously colonised by the Dutch, the French, before being colonised by the British.[33] Kenya is however specifically relevant to the analysis because just like The Gambia, it had undergone an authoritarian regime in which the Office of the D.P.P was a major contributor to the corrupt practices of the ruling government.

Unlike The Gambia, however, Kenya is much ahead in its democratic transition having passed a new Constitution in 2010, which altered the face and modus operandi of public prosecutions in Kenya. After ten years in force, the examination of the Office of the D.P.P in Kenya is essential in determining whether the improved constitutional design in Kenya, which has arguably influenced the improved design in The Gambia Draft Constitution, adequately protects the integrity of the Office of the D.P.P in practice. This analysis would inform some of the recommendations made in chapter 3 of this thesis.

Mauritius is the only comparator with a parliamentary system of government, however this is not a factor in the analysis of this thesis, as all state institutions concerned with the independence of the D.P.P, including appointing authorities, exist in all three countries, and perform similar functions. Mauritius has specifically been chosen because it is the only comparator that has not experienced a dictatorship or government that has been manifestly authoritarian or corrupt. Mauritius has for

[31] D.P.P of Mauritius available at https://dpp.govmu.org/Pages/About%20Us/The-DPP.aspx ; and D.P.P of Kenya available at https://www.klrc.go.ke/index.php/constitution-of-kenya/132-chapter-nine-the-executive/part-4-other-offices/325-157-director-of-public-prosecutions last accessed 29 March 2021

[32] The Gambia gained its independence in 1965; Kenya gained its independence in 1963; and Mauritius gained its independence from the British in 1968.

[33] History of Mauritius, available at http://www.govmu.org/English/ExploreMauritius/Pages/History.aspx last accessed 29 March 2021

decades, been held up as a symbol of good governance in Africa.[34] The country has consistently ranked high in Rule of Law and Good Governance indexes.[35] In spite of this, the prosecutorial powers of the Office of the D.P.P. in Mauritius has been the subject of corrupt practices that have brought into question the prosecutorial integrity of the Office. Mauritius would thus serve as an example as to why the independence and accountability of the Office of the D.P.P can be impacted in spite of any prevailing political climate, and thus justifies the argument for the protection of the independence of the Office of the D.P.P in all constitutions of commonwealth African nations.

[34] J Frankel "An African Success Story" Harvard Kennedy School (2012) p. 1 and 2 available at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/MRCBG_FWP_2012_06-Frankel_Mauritius.pdf last accessed 4th May, 2021

[35] Ibid, p. 2

Chapter 2

2.1 History of prosecution in The Gambia, Kenya and Mauritius

After The Gambia gained its independence in 1965, it adopted the adversarial system from the British in its independence constitution, with the D.P.P bestowed with the public duty of public prosecutions.[36] The D.P.P under the Independence constitution of The Gambia had the power to institute, take over, and discontinue criminal proceedings. The D.P.P could exercise his powers in person or through other persons acting under and in accordance with his general or special instructions.[37] While it is not clear from the constitution whether the D.P.P functioned under the Office of the Attorney-General or in a separate office, the constitution did make it clear that the D.P.P in the exercise of the functions vested in him by the Constitution, shall not be subject to the direction or control of any other person or authority.[38]

These constitutional provisions granted the D.P.P independence with regards his prosecutorial decision-making, and not administrative independence with regards its office, staff, or finances. This is similar to Mauritius whose Constitution of 1968 established the public position of the D.P.P to carry out the duty of instituting, taking over and discontinuing public prosecutions in Mauritius, and to make prosecutorial decisions independent from any person or authority.[39] The history of prosecution in Kenya differs slightly from that of The Gambia and Mauritius, even though after Kenya gained independence from the British, it also gradually adopted the adversarial system of adjudication. Unlike the Gambian and Mauritian independence constitutions however, the Kenyan independence

[36] Article 76, The 1965 Independence Order (The Gambia) available at https://static1.squarespace.com/static/5a7c2ca18a02c7a46149331c/t/5a82ffcd8165f52c4091785b/1518534627787/The+Gambia+Independence+Order%2C+1965.pdf accessed 27 March 2021
[37] Ibid, Article 76 (3)
[38] Ibid, Article 76 (4) and (6)
[39] Article 72 (5) and (6), 1968 Constitution of Mauritius

constitution placed the Attorney-General at the top of the prosecutions department.[40] The A.G at the time of Kenyan independence had the power to institute, take over, and discontinue criminal proceedings before any court (other than the court martial) in respect of any offence alleged to have been committed by a person.[41] Similar to the D.P.P in The Gambia and Mauritius, the A.G. in Kenya could also exercise his powers in person or through officers subordinate to him/her in accordance with his/her general or special directions.[42]

Public prosecutions in all three countries however evolved over time due to constitutional developments that occurred in all respective countries. In the Gambia, the Republican constitution of 1970 (which abrogated the 1965 constitution) maintained the office of the D.P.P and its prosecutorial functions,[43] but removed the independence regarding its decision making with regards the institution, taking over, and discontinuation of criminal proceedings. These decisions were now to be subject to the approval of the A.G, who was Minister of Justice.[44] The 1997 Constitution of the Gambia (which abrogated the 1970 republican constitution) maintained this status quo, and is currently the provisions in force regarding prosecutorial authority in The Gambia.[45] While The Gambia regressed with regards the prosecutorial independence in the 1970 and 1997 constitutional iterations of prosecutorial authority, Kenya took significant steps in establishing this independence, in 2010, by absolving the A.G. of the responsibility and power of criminal prosecutions, which it had held exercised since 1963.[46]

[40] Article 86 (3), 1963 Constitution of Kenya
[41] Article 86 (3), 1963 Constitution of Kenya
[42] Ibid, Article 86 (4)
[43] Article 48 (1), 1970 Constitution of The Gambia available at https://static1.squarespace.com/static/5a7c2ca18a02c7a46149331c/t/5a8302bb085229c5eae80d37/1518535455345/1970+constiution+%28as+amended+to+1987%29.pdf last accessed 29 March 2021
[44] Ibid, Article 48 (2)
[45] Article 84 and 85, 1997 Constitution of The Gambia
[46] Article 86 (3), 1963 Constitution of Kenya

The 2010 Constitution of Kenya created the Office of the D.P.P to carry out the prosecutions of criminal offences, independent from the A.G's influence.[47] Mauritius on the other hand, maintained its provisions from the 1968 Constitution, which had already guaranteed the independence of the D.P.P from the influence and direction of every other person or authority with regards its prosecutorial decisions.[48] It is important to note that unlike The Gambia and Kenya, Mauritius never abrogated its independence constitution, which continues to be in force albeit with a number of revisions.[49]In the next chapter, the current iteration of the Office of the D.P.P as contained in the 1997 Constitution of The Gambia that will be critiqued in relation to human rights abuses and politically motivated prosecutions that occurred between 1997 and 2017.

2.2 The Gambia: The Dictatorship of Yahya Jammeh and the Office of the D.P.P

The 1997 Constitution of The Gambia, which establishes the Office of the D.P.P, whose prosecutorial powers are to be exercised subject to the approval of the A.G,[50] also prescribes the appointment and dismissal procedures for both. As the A.G doubles as the Minister of Justice who sits in the President's cabinet, he is appointed and dismissed at the whim of the President.[51] The President, as per the Constitution, is also the sole appointee of the D.P.P.[52] The President could also dismiss the D.P.P at any time and for reasons of incompetence, incapacity or misbehaviour.[53]

This thesis argues that these appointments powers of the President, in addition to the A.G's control of the D.P.P's prosecutorial functions led to the series of criminal persecutions of persons for politically motivated reasons during the Jammeh regime. This argument is supported by human rights

[47] Article 157(6), 2010 Constitution of Kenya
[48] Supra no. 44
[49] 1968 Constitution of Mauritius available at https://www.constituteproject.org/constitution/Mauritius_2016?lang=en last accessed 3 April 2021
[50] Article 85, 1997 Constitution of The Gambia
[51] Article 71 (1) and (3), 1997 Constitution of The Gambia
[52] Article 84 (2), 1997 Constitution of The Gambia
[53] Article 84 (5), 1997 Constitution of The Gambia

reports, and various testimonies from persons who had worked at the criminal division of the Ministry of Justice, and had witnessed prosecutorial misconduct by the D.P.P upon the direction of the A.G. This was confirmed in the testimony of former Solicitor General and Legal Secretary, Cherno Marenah, who had served the Ministry of Justice from 2003 to 2021.[54] Mr Marenah testified before the Truth, Reconciliation and Reparations Commission (TRRC), which was set up to investigate the human rights abuses of Yahya Jammeh that occurred between 1994 and 2017.[55] When questioned by the Lead Counsel of the TRRC as to whether he believed that the Office of the D.P.P should enjoy quasi-independence,[56] Mr Marenah agreed that the Office of the D.P.P should, stating further that during the Jammeh era, the Office of the D.P.P was used as the main tool for politically motivated prosecutions.[57] He stated that during his time as prosecutor, there were some instances when the decision to prosecute was not entirely based on legal reasoning.[58] According to Mr. Marenah, if President Jammeh was adamant that an individual was to be prosecuted, he would give instructions to the A.G. which would be passed on to the D.P.P to carry out the prosecutions.[59] He further stated that unfortunately both the A.G and D.P.Ps would follow these orders as their jobs depended on them satisfying the demands of the person who hired them – the president.[60]

It is not strange that the A.G. would follow the orders handed down to him/her by the President, even when controversial. This is because the Attorney General in the Gambia doubles as Minister of Justice, [61] a political appointee who is for the most part appointed on partisan political consideration.

[54] Cherno Marenah https://thepoint.gm/africa/gambia/headlines/justice-ministry-pays-tribute-to-outgoing-solicitor-general last accessed 29 March 2021
[55] What is the TRRC, available at http://www.trrc.gm/ last accessed 3rd April 2021
[56] TRRC testimony of Mr. Marenah at https://yiutu.be/XxiwMcqUCxA (Min 4:00 to 4:08) last accessed 4th April 2021
[57] TRRC testimony of Mr. Marenah at https://yiutu.be/XxiwMcqUCxA (Min 17:00 to 19:00)accessed 4th April 2021
[58] TRRC testimony of Mr. Marenah at https://yiutu.be/XxiwMcqUCxA (Min 17:00 to 19:00) accessed 4th April 2021
[59] TRRC testimony of Mr. Marenah at https://yiutu.be/XxiwMcqUCxA (Min 17:00 to 19:00) accessed 4th April 2021
[60] TRRC testimony of Mr. Marenah at https://yiutu.be/XxiwMcqUCxA (Min 17:00 to 19:00) accessed 4th April 2021
[61] Article 71 (1), (2) and (3), 1997 Constitution of The Gambia

He or she will usually be a member of the ruling political party and is a very important member of the Cabinet,[62] as the principal legal adviser of the government. Mr. Marenah also pointed out, the A.G and the D.P.P could be hired and fired at the whim of the President, and in such a scenario, it becomes feasible that the threat of dismissal from these respective positions would coerce the A.G and the D.P.P to bend to will of the President and carry out politically motivated prosecutions.

One example of such politically motivated prosecutions can be traced back to April 2016, when some members of the opposition United Democratic Party (UDP), including Ousainou Darboe, marched into the streets protesting for electoral reform.[63] This protest was in response to President Jammeh successfully passing, through the National Assembly, and without political dialogue, a law amending the electoral code increasing the required deposit for presidential candidates from 10,000 Dalasis (approx. $230USD) to 500,000 Dalasis (approx. $11,500US Dalasis) and restricting the conditions of participation for candidates in the elections of 2016.[64]

Eighteen of the protesters were arrested on April 14 were eventually brought to court on April 20, charged with public order and unlawful assembly offenses and later sentenced to three years' imprisonment on the 20th of July, 2016.[65] Bubacarr Drammeh, a former State Prosecutor who until June 2016 worked in Office of the Director of Public Prosecutions (DPP), stated in a Human Rights Watch report that it was clear to him that the April 14 and 16 prosecutions began because the executive wanted Ousainou Darboe convicted as they saw him as a challenge to their power.[66] Several

[62] Between 1997 and 2017, all Attorney-Generals were at the time of their appointments members of the ruling APRC party available at https://en.wikipedia.org/wiki/Attorney_General_of_the_Gambia last accessed 4th April 2021
[63] Supra no. 6
[64] Ibid
[65] RefWorld World Report 2017, Crackdown on Political Opposition available at https://www.refworld.org/docid/587b58453d.html last accessed 3rd April 2021
[66] Human Rights Watch, *"More Fear than Fair"* available at https://www.hrw.org/report/2016/11/02/more-fear-fair/gambias-2016-presidential-election last accessed 29 March 2021

independent media outlets, including Gainako online media outlet, further confirmed this position. In a July 2016 article, Gainako reported that a source close to the Justice Department had informed them that the President had given the Attorney General a high-level order to "inform the presiding Judge and the D.P.P. to prepare the file for conviction of all April 14th detainees."[67]

Amnesty International also published a report in 2008 titled *"Fear Rules"*, which documented the human rights violations that took place following the March 2006 foiled coup attempt, when at least 63 perceived and real opponents were rounded up, with some facing trial.[68] It is disclosed in the report that when 14 defendants were charged with treason in June 2006, their defense counsel questioned the impartiality and independence of the judge assigned to the case.[69] This is because the judge had been the D.P.P for four years prior to his appointment as the High Court judge overseeing the treason trial.[70] Given the sensitivity of the case, and the fact that the judge had been so closely associated with the government immediately prior to this appointment, the defense teams raised doubts that he could rule impartially.[71] When no action was taken in response to their concerns, the lawyers withdrew from the case, leaving the defendants temporarily without legal representation.[72]

The report also disclosed that the DPP, during this period, had failed to bring charges against some of the arrested and accused persons within the specified 72 hours prescribed in constitution within which an individual must be brought before court to face charges.[73] According to the report, such persons were either charged well beyond the 72 hour period; released sometime beyond the 72 hours

[67] Gainako, *'Breaking News: Gambian President Yahya Jammeh Issued Executive Order to Convict and Sentence Darboe and Co.'* available at https://gainako.com/breaking-news-jammeh-issued-executive-order-convict-sentence-darboe-co/ last accessed 29 March 2021
[68] Amnesty International, *"Fear Rules"* p. 5 and p. 8 available at https://www.amnesty.org/en/documents/afr27/003/2008/en/ last accessed 29 March 2021
[69] Ibid, p. 28
[70] Ibid, p. 28
[71] Ibid p. 28
[72] Ibid p. 28
[73] Article 19 (3) (b), 1997 Constitution of The Gambia

without charge; or kept indefinitely in remand without charge.[74] All of these were in violation of the 1997 Constitution of The Gambia.[75] Some of the victims of this practice by the Office of the D.P.P were detained for many years without trial, including Abdourahmani Baldeh and Abdoulie Sonko who were detained for at least twelve and nine years respectively.[76]

It is thus clear from the foregoing that the Office of the D.P.P under the direction of the A.G had been a tool for political persecution aimed at eliminating any deemed threat or opposition to the reign of former President Yahya Jammeh. The former president had succeeded in turning the office into his own personal machinery thanks to the provisions of the 1997 constitution, which allowed him to appoint the D.P.P, whose prosecutorial authority was subject to the control of the A.G/Minister of Justice who was answerable to Jammeh. In essence, the A.G, just like the D.P.P also exercised prosecutorial functions, by being the constitutional authority responsible for approving the prosecutorial decisions of the D.P.P. The abuse of the Office of the D.P.P inevitably led to an erosion of trust in the Office, especially in legal and judicial circles as seen in the criminal case of the 14 alleged coup plotters, whose lawyers redrew from their defense when the alleged compromised judge failed to recuse himself.

As another testimony at the TRRC revealed, these events would not have occurred if only the constitutional design was different. Gaye Sowe, a human rights lawyer informed the TRRC that the initial drafts of the 1997 constitution had been altered by the ruling Junta government (1994-1996) to suit Yahya Jammeh, or whoever eventually became the President.[77] Mr Sowe stated that the

[74] Supra no. 74, p. 12
[75] Supra no. 79
[76] Ibid, p. 13
[77] K. Jawo "Lawyer Gaye Sowe to TRRC – "1997 Constitution Worst in Gambian History" available at https://www.chronicle.gm/lawyer-gaye-sowe-to-trrc-1997-constitution-worst-in-gambian-history/ last accessed 5th May, 2021

constitutional review commission setup in March, 1995 to draft a new constitution for The Gambia had been wary of the executive excesses that had characterised the previous regime (1970 – 1994).[78] The drafters thus ensured a parliamentary approval of major appointments, a security of tenure for key positions like judges, a two-term limit for presidency, an independent Office of the D.P.P, an independent Judicial Service Commission, among others.[79] These provisions were however removed by the ruling Junta government, and replaced with the provisions now seen in the 1997 Constitution of The Gambia that grant the President excessive executive powers including powers over the Office of the D.P.P.

As far back as 1979, Gambian constitutional law scholar Ousainou Darboe argued that it was desirable that the responsibility for criminal prosecutions in the 1970 constitution must be beyond the control of cabinet to ensure the unbiased administration of criminal justice.[80] This desirability is arguably why the Attorney-General at the time of the coming into force of the 1970 Constitution, Momadu Lamin Saho, on his own accord abdicated all of his prosecutorial powers under section 48 of the 1970 Constitution to the D.P.P, and focused mainly on his cabinet duties.[81] This move by Mr. Saho aptly termed "the Saho Policy" was made in good faith to ensure that public prosecutions were insulated from political influence, contrary to what the 1970 Constitution had provided.[82]

[78] M.K. Darboe "*Gambia: How Jammeh Weaponized the Law*" para. 3 and 4 JusticeInfo.net available at https://www.justiceinfo.net/en/75825-gambia-how-jammeh-weaponized-the-law.html last accessed on the 5th May 2021

[79] Ibid, para. 4

[80] A.N.M O. Darboe, *"Gambia's Long Journey to Republicanism: A Study in the Development of The Constitution and Government of The Gambia"* Master Thesis submitted to the University of Ottawa (1979) p. 239 available at https://ruor.uottawa.ca/handle/10393/8003 last accessed 5th May 2021.

[81] Ibid, p. 240

[82] Ibid, p.240; Supra no. 44 and 45

It is unclear whether his successors continued with this policy after Mr. Saho departed from the office of A.G in 1982.[83] What is clear however is that it would have been more suitable to amend the 1970 Constitution to reflect Mr. Saho's policy, as the failure to do this left the possibility for future political influence on criminal prosecutions by his successors. As per Mr. Sowe's TRRC testimony, the drafters of the 1997 Constitution attempted to eliminate this possibility by making the Office of the D.P.P independent from the control of the A.G, only to be faced with resistance from the ruling government who, is now clear, had nefarious purposes for keeping the Office of the D.P.P subject to control of the A.G. as it were in the 1970 Constitution.

Restoring the trust and the prosecutorial integrity of the Office of the D.P.P would first require an amendment of the 1997 Constitution to the reflect the elements of independence and accountability necessary for such an important judicial office. In the next sub-chapters, this thesis will carry out a comparative analysis of Kenya and Mauritius in relation to the Gambia by examining the factors that led to the adoption of models of independence for the Office of the D.P.P in Kenya and Mauritius respectively, and how this independence works in their respective constitutions.

2.3 Kenya: Amos Wako and the Abuse of Prosecutorial Powers

As previously detailed, an independent office of the D.P.P in Kenya was an innovation by the 2010 Constitution of Kenya,[84] after the A.G had between 1963 and 2010, been the individual responsible for public prosecutions in Kenya.[85] During this constitutional period, the independence of public prosecution was affected due to political influence from ruling governments. This can be traced back to the 1963 Constitution that provided for the A.G, in addition to his/her prosecutorial functions, to

[83] Momodu Lamin: a Gambian politician, available at https://prabook.com/web/momodu.saho_(alhaji)/1461039 last accessed 5th May 2021
[84] Supra no. 52
[85] Supra no. 46; and Article 26 (3) of the 1969 Constitution of Kenya

act as the principal legal advisor to the government and an ex-officio member of parliament.[86] In addition to this, the A.G as a public office in Kenya, was subject to the appointment powers of the President, and the holder of this office held it at the pleasure of the President.[87]

The similarities between the 1997 Constitution of The Gambia and the 1963 and 1969 Constitutions of Kenya are clear, especially with regards the A.G playing both a prosecutorial function and a political one, although the Office of the D.P.P came into existence much earlier in The Gambia albeit under the control of the A.G.[88]

The similarities also extend to the powers of the President to appoint and dismiss the A.G – a power, which has arguably been used in the case of The Gambia, to politically influence prosecutorial decisions. The 1969 Constitution of Kenya however provide that in the exercise of his/her prosecutorial functions, he/her shall not be subject to the control of any person or authority.[89] While that may have been the case, this paper argues that the most effective form of control may be the President's power to appoint and dismiss the authority responsible for public prosecutions, even though the constitution may guarantee the D.P.P's independence with regards the exercise of prosecutorial powers. This is because, just like in case of The Gambia, the threat of termination of employment may coerce the prosecuting authority to act or fail to act in a certain manner in the execution of his/her prosecutorial functions. As such, the provisions as contained in Article 26 (8) of the 1969 Constitution, while necessary, may be ineffective if the threat of arbitrary dismissal of the prosecutorial authority by the President exists.

[86] Ibid
[87] Ibid, Article 26 (2) (1969 Constitution of Kenya)
[88] Supra no. 55
[89] Article 26 (8), 1969 Constitution of Kenya

In Kenya, the A.G had been found to abuse his/her constitutional power to prosecute criminal offenses. This occurred largely in the context of corruption, when this power was often applied selectively, with the result that the perpetrators of corrupt practices were hardly ever punished. One such example of the A.G being implicated in corrupt prosecutorial practices in Kenya is the Goldenberg scandal.[90] The scandal, which took place during the regime of Daniel Arap Moi was a scam in which the government subsidised exports of gold and diamonds, paying exporters huge percentages (35% more in Kenyan shillings) over their foreign currency earnings.[91] Although it notionally appears that the scheme was intended to earn hard currency for the country, it is estimated that Kenya lost $600 million in compensation paid to Goldenberg International for non-existent gold and diamond exports.[92] The Goldenberg scandal cost Kenya the equivalent of more than 10% of the country's annual GDP, and resulted in the IMF cutting aid worth over $500 million.[93]

The government of Kenya was accused of thwarting attempts to investigate and prosecute those suspected of involvement in the Goldenberg Scandal.[94] First, Raila Odinga, the leader of an opposition politician, had filed suit against Vice President George Saitoti and six other senior officials for conspiracy to defraud the government in the scandal, however this was discontinued by the A.G using his constitutional powers to discontinue criminal proceedings commonly known as a *"nolle prosequi"*.[95] This was clearly an abuse of the A.G's prosecutorial powers as while the A.G is granted the constitutional power to discontinue criminal prosecutions, this power is not meant to be used to

[90] The New Humanitarian "*Report on graft scandal made public*" available at https://www.thenewhumanitarian.org/fr/node/225429 last accessed 4 April 2021
[91] Ibid
[92] BBC News, "Moi 'ordered' Goldenberg payment" available at http://news.bbc.co.uk/2/hi/africa/3495689.stm last accessed 4 April 2021
[93] Ibid
[94] M Mutua, *"Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya"* available at https://anthkb.sitehost.iu.edu/a104/kenya/justice%20under%20siege.htm last accessed 4 April 2021
[95] Ibid

conceal or prevent the punishment of a crime by public officials or to subvert the rule of law and due process. In the other, the A.G stopped an effort by the Law Society of Kenya to privately prosecute senior government officials implicated in the scandal.[96] It was only after a parliamentary committee investigation and the insistence of the foreign donors that the Attorney General initiated a half-hearted prosecution, due to blunt domestic and international pressures from institutions such as IMF.[97] The A.G chose to institute several cases against the perpetrators of the fraud, instead of instituting a single case, which would have been more efficient as all cases related to the same offenses and the accused persons were the same.[98] The A.G consolidated some of the cases, terminated others, and then instituted new ones, creating a "pointless merry go round resulting in serious delay."[99] In light of these circumstances, it is plausible that the selective exercise of the prosecutorial power was "part of an orchestrated cover-up."[100] None of the cases ever proceeded to a full hearing or to a conviction for the crimes committed.[101]

Amos Wako, who was A.G at between 1991 and 2011, and who oversaw the Goldenberg investigations and prosecutions under the Moi regime was accused of botching the trials in order to protect the senior government officials including the President and Vice President who had been implicated in the scandal.[102] In 2019, Amos Wako was barred from entering the U.S for not doing enough to halt corruption during his 20-year tenure as attorney general.[103] While the abuse of

[96] Ibid
[97] Ibid;
[98] M Akech, *"Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability"* p. 23 available at https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1447&context=ijgls last accessed 4 April 2021
[99] Ibid
[100] Ibid
[101] Ibid
[102] R Ombour "*Kenya's Former Attorney General Challenges US Entry Ban*" available at https://www.voanews.com/africa/kenyas-former-attorney-general-challenges-us-entry-ban last accessed 4 April 2021
[103] Ibid

prosecutorial powers in The Gambia had arguably had to do with the consolidation of power and the elimination of deemed threats to the President's reign, the abuse of prosecutorial powers in Kenya were primarily aimed at concealing corrupt practices by senior government officials and preventing the prosecutions of these officials. In both cases however, it resulted in the erosion of public trust in the prosecutorial authority of the State.

The Constitution of Kenya Review Commission (CKRC) sought to rectify the ills of the design of the 1969 Kenyan Constitution.[104] This included the insulation of public prosecutions from the influence of executive power. The Commission in their report recommended the creation of the Office of the Director of Public Prosecutor that would be responsible for the investigation and prosecution of criminal offences and would be independent from the Attorney General.[105] The Kenya Bomas Draft of 2004 established the new Office of the D.P.P in reflection of the recommendations of the CKRC.[106]

The provisions of the Bomas Draft would serve as the blueprint for 2010 Constitution of Kenya in relation to the prosecutorial authority of Kenya. In the Constitution, the task of exercising the state's powers of prosecution will now be exercised by the office of an independent DPP.[107] The primary functions of the attorney general however, will be to give legal advice to the government and represent it in legal proceedings.[108] It is worth noting that the 2010 Constitution required the A.G at the time of the passing of the constitution, Amos Wako, to leave the office not later than twelve months after the

[104] Final Report of the Constitution of Kenya Review Commission, p. 9 available at http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf last accessed 9th May, 2021
[105] Ibid, p. 202
[106] Draft Constitution of Kenya [Bomas Draft], 15 March 2004.[Constitution of Kenya Review Commission. Adopted by the National Constitution Conference on 15 March 2004], Article 203 available at https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/118273/Kenya-4-Draft-Constitution-Bomas-Draft-2004.pdf last accessed 9th May 2021
[107] Article 157, 2010 Constitution of Kenya
[108] Article 156, 2010 Constitution of Kenya

2010 constitution comes into force.[109] This was because the A.G, Amos Wako, was considered "not just complicit in, but absolutely indispensable to a system which had institutionalized impunity in Kenya."[110]

The new Kenyan constitution also provided that the DPP can only take over a criminal suit with the permission of the person or authority who instituted it.[111] This provision seems to be a direct response to the actions of the previous A.G Amos Wako, who had discontinued a private criminal suit filed against Vice President George Saitoti and six other senior officials for conspiracy to defraud the government in the Goldenberg scandal. It ensures that where the D.P.P is reluctant or fails to institute criminal proceedings against certain individuals (especially political figures), and private individuals step in to carry out the prosecution, then these prosecutions cannot be forcefully terminated by the D.P.P.

In addition, to preclude the abuse of the power to prosecute, the new Constitution requires that its exercise "shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."[112] Most importantly, the 2010 Constitution adds a check to the President's appointment powers over the DPP, which will be exercised subject to the approval of parliament.[113] It also prescribes a term limit for the holder of the office of the DPP, while also prescribing the grounds under which a DPP could be removed as well as the procedure to be followed for the removal to occur.[114] This would in turn remedy the arbitrary abuse of appointment

[109] M Akech "Institutional Reform in the New Constitution of Kenya" p. 30 available at https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf last accessed 8 April 2021
[110] Ibid, p. 30
[111] Article 157 (6) (b), 2010 Constitution of Kenya
[112] Article 157 (11), 2010 Constitution of Kenya
[113] Article 157 (2), 2010 Constitution of Kenya
[114] Article 158, 2010 Constitution of Kenya

and dismissal powers by the President, and eliminate the threat of dismissal for failure to comply with the wishes of the appointing authority- a threat that exists in the case of The Gambia and existed pre-2010 in the case of Kenya.

2.4 Mauritius: The Abuse of Prosecutorial Powers in a Model Democratic State

The Office of the DPP is established in the 1968 Constitution of Mauritius,[115] and is conferred independent powers in relation to criminal prosecutions,[116] which may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.[117] The Office of the D.P.P has *de jure* been independent since the 1964 pre- independence constitution, which first established the Office,[118] and has continued to be constitutionally independent since then by virtue of the 1968 Constitution.

The 1968 Constitution states that the D.P.P shall not be "subject to the direction or control of any other person or authority",[119] which is a feature seen in the current constitution of Kenya.[120] Uniquely, the appointing authority for the D.P.P. Mauritius is the Judicial and Legal Service Commission, and not the President as in The Gambia and in Kenya (albeit with the added requirement of parliamentary approval in Kenya).[121] The effect of this is that the appointment of the D.P.P is hived off completely from the political sphere, and placed in the hands of a non-political authority that is in the best position to assess the competence and suitability of potential candidates for the position. The commission

[115] Article 72 (1), 1968 Constitution of Mauritius
[116] Article 72 (3) and (5), 1968 Constitution of Mauritius
[117] Article 72 (4), 1968 Constitution of Mauritius
[118] LAW REFORM COMMISSION Issue Paper The Office of Director of Public Prosecutions [DPP] and the Constitutional Requirement for its Operational Autonomy [March 2009] available at http://lrc.govmu.org/English/Documents/Reports%20and%20Papers/44%20iss-dpp250909.pdf last accessed 8 April 2021
[119] Article 72 (6), 1968 Constitution of Mauritius
[120] Article 157 (10), 2010 Constitution of Kenya
[121] Supra no. 56 and 111

would also provide a security of tenure for the D.P.P similar to that of Judge,[122] and as seen in the case of 2010 Kenyan Constitution. This removes the threat of termination of employment for failure to comply with executive directives with regards prosecutorial decisions.

When considering the establishment of the Office of the D.P.P, Professor Stanley A. De Smith as Constitutional Commissioner of Mauritius explained the main rationale behind the decision to grant independent Constitutional status to the Office of the D.P.P. when establishing it for the first time in the 1964 Constitution of Mauritius.[123] He stated in his 1964 report that the decision stemmed from the need "to safeguard the stream of criminal justice from being polluted by the inflow of noxious political contamination and to segregate the process of prosecution entirely from general political considerations".[124] Professor S.A. De Smith had also recommended that Director of Public Prosecutions be given the judicial security of tenure, which he enjoys under a number of other constitutions.[125] This was to include the protection of the D.P.Ps salary and conditions of services, just as it was to be done for Judges of the Supreme Court.[126]

While these provisions have in the opinion of the author, guaranteed to a great extent the independence of the D.P.P in Mauritius, and could serve as a model for other commonwealth countries, questions have still been raised regarding the prosecutorial integrity of the D.P.P in Mauritius. These questions have primarily revolved around the abuse of the prosecutor's power to take over and continue any such criminal proceedings that may have been instituted by any other

[122] Mauritius Legislative Assembly, Sessional Paper No. 6 of 1965 – Report of the Mauritius Constitutional Conference (September 1965), Annex D, para. 27.
[123] Supra no. 116
[124] S.A. De Smith, The New Commonwealth and its Constitutions (London: Stevens & Sons, 1964), at p. 144-145.
[125] Mauritius Legislative Assembly, Sessional Paper No. 2 of 1965 – Report of the Constitutional Commissioner, Professor S.A. De Smith (November 1964).
[126] Mauritius Legislative Assembly, Sessional Paper No. 6 of 1965 – Report of the Mauritius Constitutional Conference (September 1965), Annex D, para. 42

person or authority; and to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.[127]

An example of such abuse is the case of Hon Paul Berenger, a senior political figure in Mauritius, who was charged in a private prosecution by the widow of one of the victims of a triple murder, with harbouring one of the accomplices to the murders, Mahmad Bissessur.[128] This accused person had earlier confessed that Berenger had assisted in him leaving Mauritius in order to escape punishment for his crimes.[129] Hon. Berenger, who was at the time Prime Minister and Minister of Finance of Mauritius,[130] had also admitted at public meetings and to journalists that he had assisted in helping Bissessur leave Mauritius.[131] The case was heard on 7th June 2001, but on 19 July 2001, the D.P.P entered a *nolle prosequi* and brought the proceedings to an end.[132] Two other private prosecutions on the same issue were initiated against Mr. Berenger, and on those proceedings were again brought to an end by the D.P.Ps *nolle prosequi*.[133] This led to an application to the Supreme Court for leave to apply for judicial review of the DPP's decision to enter the *nolle prosequi*, however the Supreme Court dismissed this application holding that the DPP's decisions to file a *nolle prosequi* or not to prosecute are not amenable to judicial review.[134]

This decision by the Mauritian Supreme Court's judgement hinted that the Office of the D.P.P cannot be held accountable for its prosecutorial decisions- whether good or bad. It goes against Mckhennie's notion, which this thesis concurs with, that the Office of the D.P.P should be held accountable for

[127] Article 72 (3) (b) and (c)
[128] Mohit v. The Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20 (25 April 2006) Privy Council Appeal No 31 of 2005 available at http://www.saflii.org/mu/cases/UKPC/2006/20.html last accessed 8 April 2021
[129] Ibid, para 3
[130] Ibid, para 3
[131] Ibid, para 3
[132] Ibid, para 4
[133] Ibid, para 5 and 6
[134] Ibid, para 12 to 17

the quality and the consequences of its decision-making in spite of the fact that it should independently make these prosecutorial decisions.[135] A brief look into the Mauritian Constitution shows the existence of very little, if any, accountability mechanisms for the prosecutorial decisions of the Office of the D.P.P, and the decision by the Mauritian Supreme Court further highlights this gap.

The Supreme Court decision was challenged at the Privy Council,[136] which was asked to determine whether the decision of the director to discontinue a private prosecution was a decision capable of review by the courts under the constitution of Mauritius.[137] In its final decision, the Privy Council quashed the Supreme Court's decision and stated that the exercise of the D.P.Ps actions would be subjected to review if—

(a) the actions were in excess of the D.P.Ps constitutional or statutory powers;

(b) the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion;

(c) the DPP were to act upon a political instruction; and

(d) the actions or decisions of the D.P.P were in bad faith, for example, dishonesty, such as in consideration of the payment of a bribe;

(e) in abuse of the process of the court; and

(f) the DPP has fettered his or her discretion by a rigid policy— e.g. one that precludes prosecution of a specific class of offences.[138]

[135] Supra no. 21, p.
[136] The Judicial Committee of the Privy Council (JCPC) is the court of final appeal for the UK overseas territories and Crown dependencies. It also serves those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of republics, to the Judicial Committee available at https://www.jcpc.uk/ last accessed 8 April 2021
[137] Supra no. 126, para 1
[138] Ibid, para 17

The Privy Council set aside the judgement of the Supreme Court of Mauritius and further requested that the Supreme Court of Mauritius reconsider the appellant's application for a review of the D.P.Ps actions.[139] While this decision did not lead to an amendment of the Constitution of Mauritius, it highlighted the need for a check on the powers of the D.P.P to interfere with private prosecutions, especially where the D.P.P has failed to carry out its duty to prosecute criminal offences.

Parallels can be drawn with the 1969 Constitution of Kenya wherein the power of the A.G to discontinue private prosecutions had been abused to protect senior public figures who had been charged in private criminal proceedings.[140] This is in spite of the fact that unlike Kenya, Mauritius had never experienced an authoritarian or manifestly corrupt regime, and has for many decades ranked highly in many Rule of Law and Good governance indexes, usually taking the title of best-governed state in Africa.[141]

Mauritius as an example also serves to argue against the temptation to presume that the Office of the D.P.P is only prone to abuse in a poor political climate such as those that were present in The Gambia and Kenya at the time the powers of this Office of the D.P.P. was abused in both countries. It shows that even in a supposedly good political climate, the powers of the Office of the D.P.P could be abused to the detriment of the citizenry, and as such emphasizes the necessity to protect the independence and accountability of the ODPP regardless of the prevailing or historical political context of a nation.

These factors as highlighted above in the cases of The Gambia, Kenya and Mauritius provide an adequate foundation for recommendations that would be made in the next chapter regarding the

[139] Ibid, para 22
[140] Supra no. 95 and 96
[141] Supra no. 35 and 36

preservation of the prosecutorial integrity of the Office of the D.P.P by ensuring its independence and accountability in the commonwealth constitutions of Africa.

Chapter 3

3.1 Constitutional designs to ensure the independence and accountability

The situations in The Gambia, Kenya and Mauritius with regards the abuse of prosecutorial powers as highlighted above establish the importance of creating an independent an accountable Office of the D.P.P in a constitution. While there may exist an argument that independence and accountability could be judged by subjective standards premised on the unique circumstances of the country, there are however objective standards to determine the level of independence and accountability for the Office of the D.P.P in any given country. These include the appointing authority and appointing procedures for the D.P.P; security of tenure; exercise of prosecutorial powers; reporting and accountability mechanisms; and personnel and budgetary independence.

This chapter will explore these factors as captured in the designs of the 2020 draft Constitution of The Gambia, the 2010 Kenyan Constitution and the 1968 Constitution of Mauritius to determine whether either, all or none are adequate to guarantee the independence and accountability of the Office of the D.P.P. In doing so, the thesis would identify the gaps, if any, in the constitutional designs of all three countries. This chapter would attempt to address these gaps and conclude with recommendations on the way forward for all three countries, as well as for the many countries in commonwealth Africa who have established in their constitutions a public authority to carry out public prosecutions.

3.2 Independence of the Office of the D.P.P

The independence of the Office of the D.P.P is a major factor in protecting its integrity, as illustrated in the two previous chapters. The independence of this Office is determined by several factors, which include—

a) the appointing powers, procedures, and security of tenure for the Office; and

b) operational autonomy of the Office of the D.P.P (management, finances, and personnel)

3.2.1 Appointing powers, procedures, and security of tenure for the Office.

The biggest factors that affect the independence of the Office of the D.P.P are the appointing powers, procedures and security of tenure of the D.P.P. As argued in chapter 2, the abuse of prosecutorial powers in both Kenya and The Gambia occurred because the President exercised appointment and dismissal powers over the D.P.P. This, as explained in chapter 2, allowed the President to appoint persons who he could control and direct in making prosecutorial decisions that were usually politically motivated rather than founded on legal principle.

This however is not the case in Mauritius, where the appointment of the D.P.P, as per the 1968 Constitution, is in the hands of the Judicial and Legal Service Commission, and not the head of the Executive arm of the state.[142] The Commission is made up of the Chief Justice, a Senior Puisne Judge; the chairman of the Public Service Commission; and a member appointed by the President.[143] In making the appointments for the position of D.P.P the Commission may consider officers at the Office of the D.P.P for promotion, or may interview candidates for such appointments and shall in respect of each candidate consider, amongst other things, the candidate's –

a. qualifications (which the constitution has prescribed must be at the level fit to be appointed as a Judge of the Supreme Court);
b. general fitness; and

[142] 1968 Mauritian Constitution, Article 72 (1)
[143] Ibid, Article 85 (1)

c. any previous employment of the candidate in the public service or in private practice.[144]

The person appointed into the position of D.P.P in Mauritius by the Commission holds the post until their age of retirement.[145] The constitution however provides that the D.P.P may be removed before his/her retirement only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except for these reasons.[146] The determination of the removal of the D.P.P is carried out by a tribunal set up for the purpose upon the recommendation of the Judicial and Legal Services Commission.[147] The tribunal is established by the President, and they enquire into the infirmity and/or misbehaviour of the D.P.P, and report on the facts to the President with recommendations as to whether he ought to be removed under this section.[148]

This thesis posits that the Mauritian Constitution provides an excellent safeguard for the independence of the Office of the D.P.P from executive interference as a result of its positive provisions on the appointment and/or dismissal powers, procedures and tenure of office of the D.P.P. Firstly, the power to appoint and dismiss is not in the hands of the executive, which in the cases of The Gambia and Kenya, led to the abuse of prosecutorial power for corrupt and illegitimate purposes. The Mauritian Constitution also provides a defined process for appointment and dismissal, which is prescribed in law, with certain conditions to be met. The D.P.P also has a prescribed tenure of office, which in the case of Mauritius lasts until retirement. In addition, the Judicial and Legal Services Commission, as earlier highlighted, comprises of experienced legal and judicial experts such as the

[144] Mauritian Judicial and Legal Service Commission Regulations, 1967, Regulation 7
[145] Supra no. 150, Article 93 (1) and (6)
[146] Ibid, Article 93 (2)
[147] Ibid, Article 93 (4)
[148] Ibid, Article 93 (5)

Chief Justice, who are in the best position to assess the qualifications and suitability of a candidate for the quasi-judicial position of D.P.P.

This is all unlike the arbitrary nature of appointment and dismissals of the D.P.P that characterised the Office of the D.P.P in The Gambia during the authoritarian regime. It is also unlike the lack of security of tenure as D.P.P in The Gambia, which has been argued, led to the coercion of appointed D.P.Ps to bend to the will of the ruling government in order to keep their jobs.

Both the 2010 Kenyan Constitution and the 2020 Draft Constitution take a slightly different approach to securing the independence of the O.D.P.P. While the institution of the Judicial Service Commission does exist in both Kenya and The Gambia, the powers to appoint the D.P.P continue to be vested in the President who shall nominate and then appoint a candidate, only with the approval of parliament.[149] The Kenyan Office of the Director of Public Prosecutions Act, 2013 provides greater clarity on the appointment process. This includes the constitution of a selection panel by the President; a call for applications for the position by the panel; the selection and submission of the three most suitable candidates to the President; and the nomination of one of those three candidates for vetting by parliament.[150]

The 2010 Kenyan Constitution and the 2020 Draft Gambian Constitution mirror the 1968 Mauritian Constitution in providing that the D.P.P can only be dismissed by the President on grounds of misconduct or incapacity, which has to be verified by a tribunal set up for that purpose.[151] Both

[149] 2010 Kenyan Constitution, Article 157 (2); 2020 Draft Constitution of The Gambia, Article 131 (2)
[150] 2013 The Kenyan Office of the Director of Public Prosecutions Act, Article 8
[151] Kenyan Constitution 2010, Article 158 (1) and (4); 2020 Draft Gambian Constitution, Article 194 (1) and (8)

constitutions also provide for tenures in office with Kenya providing for a non-renewable term of 8 years,[152] and the Gambia providing for a life tenure for the D.P.P.[153]

While this thesis concurs that, the appointment and dismissal procedures for the D.P.P as prescribed in the 2010 Kenyan Constitution and in The Gambian Draft Constitution are to a certain degree sufficient to protect the independence of the D.P.P in the performance of its prosecutorial functions, it also observes that there is a major flaw. This is the fact the appointment process remains a political one, now dictated by two political institutions (the Executive and the Legislature), as opposed to just one (the Executive) as had previously occurred. This was also the opinion of Professor Mtende Mhango in his position paper to the South African Parliament who had proposed to amend the South African Constitution to allow the President to appoint the National D.P.P upon confirmation by parliament, which is similar to what is proposed in The 2010 Kenyan and 2020 Draft Gambian Constitution.[154]

He had argued that the process spelt out in the proposed constitutional amendment was "too politicised and cumbersome" and would discourage potential good candidates from applying for the post.[155] While the thesis does not believe that the appointment processes would discourage candidates from applying, it does agree that the process could turn out to be highly political, as both the President and Parliamentarians are usually members of a political party who are elected into political offices to primarily achieve political objectives. As such, it becomes naïve to assume that political persons would not make political considerations when making appointments such as that of the D.P.P and that these

[152] 2010 Kenyan Constitution, Article 157 (5)
[153] 2020 Draft Constitution of The Gambia, Article 197 (1)
[154] M Mhango, Position Paper on the Eighteenth Amendment Bill 2013 on the Unnecessary Constitutional Amendment to the NPA Provisions, p.3 available at https://static.pmg.org.za/160415mhango.pdf last accessed 21st June 2021
[155] Ibid, p. 3

political considerations would not potentially infringe on the independent work of the appointed D.P.P.

The appointment process prescribed in both the Kenyan and Draft Gambian Constitutions is also cumbersome because it goes through three stages, which includes a constituted panel selecting and submitting a list of candidates to the President; the president nominating one member to be vetted by parliament; and finally parliament voting on that member. It is also cumbersome because if parliament disapproves of a nominated member through a vote, then this already laborious process starts all over again to find another suitable candidate for the position of D.P.P. This is unlike in Mauritius where there exists a more efficient and less cumbersome one stage process wherein the Judicial and Legal Services Commission evaluates candidates and appoints the most suitable one for the position. In addition, Parliamentarians, unlike members of the Judicial and Legal Services Commission, may not possess the legal and judicial background and experience to effectively evaluate the qualifications and competence of candidates vying for a legal and quasi-judicial position of D.P.P. thus increasing the risk for the appointment of unfit persons.

In spite of this, Professor Mhango does state his support for Parliament's involvement in the appointment of the D.P.P by the President stating that this is sufficient because it will among other things, provide the necessary checks and balances on the President to prevent the appointment of unfit persons.[156] This argument however fails to acknowledge that checks on executive power by parliament is only possible with the existence of a strong opposition in parliament. That is, wherein a substantial majority of parliamentarians are members of the ruling party, they tend to rubber stamp

[156] Ibid, p.3, para 1.6

whatever position the Executive takes thereby eliminating whatever small possibility for checks in the appointment of persons into public offices such as the D.P.P.

Lise Rakner and Nicolas van de Walle in their Journal article "Opposition weakness in Africa"[157] confirmed that "the third wave of democratization in Africa has resulted in only a limited increase in political competition" and that the poor performance of opposition parties had led them to question whether Africa's multiparty systems really are progressing.[158] As such, in a continent characterised by weak oppositions in the political domain, the process of appointment as prescribed in the Kenyan and Draft Gambian Constitution are unlikely to compel the necessary checks on the appointment powers of the president, and will instead create a new and more cumbersome politicised appointment process, involving two political arms of the state.

The solution, this thesis suggests, is to adopt the Mauritian constitutional model on the appointment of the D.P.P, which removes the process in its entirety from the political domain and places it in the hands of judicial and legal experts. This is in line the Rule of Law principles of separation of powers and eliminates the possibility of either the Executive or the Legislature, which are political institutions, from influencing the work of the D.P.P for nefarious political purposes. As earlier explained, a bonus of adopting the Mauritian appointment model is that it is also less cumbersome and more efficient than the models proposed by the Kenyan Constitutions and the Draft Gambian Constitution.

As the Judicial Service Commission is an institution that exists within the framework of both the Kenyan Constitution, the Draft Gambian Constitution, and many other constitutions in

[157] L Rakner and N V D Walle (2009), Journal of Democracy vol. 20 no. 3 pp. 108-121
[158] Ibid

commonwealth Africa, the adoption of the Mauritian model is thus possible, even if done with some adjustments.

3.2.2 Operational and Managerial Independence of the Office of the D.P.P

This thesis argues that in order to protect the independence of the Office of the D.P.P, the Constitution must establish a separate and distinct public office completely divorced from that of the Attorney-General not only in the exercise of prosecutorial powers but also in terms of office operations. This thesis further argues that this thorough separation must be spelt out in black letter in the Constitution. A quick glance at both the 2010 Kenyan Constitution and 1968 Mauritian Constitution reveal the establishment of a separate and distinct Office of the D.P.P.[159]

The provisions in these two constitutions also spell out the D.P.P's exclusive prosecutorial powers, and the exclusion of all other persons and authorities from the exercise of these powers.[160] Aside these, the two Constitutions however do not detail other aspects of how the establishment of a new Office of the D.P.P would occur in practice especially concerning issues of management and operations. An examination of Mauritius show why this is important. Between 1964, when the Office of the D.P.P. was first established in Mauritius, and 2009, the Office operated within the establishment of the Attorney-General.[161]

This meant that while the D.P.P was responsible for prosecutorial decisions, the Attorney-General was responsible for the administrative processes that enabled the D.P.P to perform his prosecutorial functions. The A.G. determined and administered the budget allocated to the D.P.P, and personnel

[159] Article 72, 1968 Mauritius Constitution; Article 157, 2010 Kenyan Constitution
[160] Ibid
[161] **Brief History** of the Office of the D.P.P in Mauritius https://dpp.govmu.org/Pages/About%20Us/Who-We-Are.aspx last accessed 28 June 2021

serving prosecutorial functions under the D.P.P. were State Lawyers hired by the Attorney-General to primarily perform functions under the A.G's office.

The effect of this dual function of state lawyers is that not only did the state lawyers have to juggle dual loyalties between the Attorney-General and the D.P.P. This created the avenue through which the A.G, a political appointee, could influence the work of the D.P.P. as the officers of the D.P.P were also answerable to the A.G. It also created a system that overwhelmed the state lawyers who were unable to carry out their prosecutorial functions efficiently, leading to a backlog of criminal prosecutions at the D.P.P's Office.[162]

Since the Office of the D.P.P operated within the structure of the A.G., its budget and financial undertakings were determined and managed by the A.G. This is problematic because, as the Institute for Security Studies (ISS) had suggested in a paper on criminal justice delivery in Zambia;[163] "it is less likely that a DPP would be keen to support, let alone spearhead, investigation of a government minister who is involved in funding of his/her office." This thesis concurs with this premise and even goes further to argue that a D.P.P is less likely to investigate or prosecute any member of a cabinet to which the A.G who funds his/her office is also a member. This includes the President, Vice President and Ministers, who, as chapter 2 has shown, may very well be involved in illicit transactions worthy of investigation and prosecution.

Lord Mackay observed in his 1998 report on the Structure and Operation of the Judicial System and Legal professions of Mauritius [also known as Mackay Report], that there is need for the Office of

[162] National Report Submitted In Accordance With Paragraph 15 (A) Of The Annex To Human Rights Council Resolution 5/1 (Mauritius, 2009) A/HRC/WG.6/4/MUS/1, p.16, para 87

[163] ISS, THE CRIMINAL JUSTICE SYSTEM IN ZAMBIA: Enhancing the Delivery of Security in Africa, African Human Security Initiative (Monograph No 159, April 2009) available at https://issafrica.org/chapter-4-prosecutorial-services last accessed 29th June 2021

DPP to be manned by staff not working at the same time for the Office of the Attorney-General, and having the D.P.P as Responsible Officer.[164] He stated in his 2006 updated report that: "since the Attorney-General in Mauritius is a member of Cabinet, it was not appropriate therefore that the DPP (or his officers) should be part of his Office."[165]

The Law reform commission had also observed in a 2009 report that since independence, the salary and other allowances of the DPP appear in Appropriation Acts as a vote item under the A.G's Office.[166] The Commission recommended, in response, that in Appropriation Acts the budget of the Office of the DPP should appear as a vote item for an independent body, as is that of the Judiciary.[167] They also recommended that posts for law officers involved in criminal prosecutions must be established under the Office of the DPP and not under the A.G. as had occurred since 1964.[168]

It thus took more than four decades since the promulgation of the 1968 constitution, and the publication of recommendations in several reports, for the Office of the D.P.P in Mauritius to finally get its own establishment, allocated budget and personnel.[169] This paper argues that it took this long for the Office of the D.P.P to gain complete autonomy from the A.G in Mauritius, especially concerning management, budget and personnel, because those aspects were not spelt out in black letter in the 1968 Constitution. It also argues that not providing this in black letter would also give the impression that the Office of the D.P.P should only be independent in so far as its prosecutorial functions, and not with regards to its operations.

[164] Law Reform Commission Issue Paper The Office of Director of Public Prosecutions [DPP] and the Constitutional Requirement for its Operational Autonomy[March 2009] p. 3, para 6
[165] Ibid, p. 4, para 7
[166] Ibid, p. 5, para 9
[167] Ibid, p. 5, para 9
[168] Ibid, p.5, para 10
[169] Supra no. 166

There is a possibility that including provisions on the independent management and operations of the D.P.P in a Constitution could potentially make a constitution unnecessarily bulky and long. As such, in the alternative, the constitution could stipulate that issues relating to the management and operations of the Office of the D.P.P shall be catered for in an Act to be passed by Parliament within a stipulated period. In Kenya, the Office of the Director of Public Prosecutions Act of 2013, which was passed to give effect to the provisions on the Office of the D.P.P in the Kenyan constitution, details the modus operandi of the Office of the D.P.P in Kenya. It makes provision for issues such as management, operations, budget and appropriation of funds for the office, as well as recruitment and retention of personnel.

For example the Act provides that "Parliament shall allocate adequate funds to the Office to enable the Office perform its functions under the Constitution, this Act and any other written law and the budget shall be a separate vote in accordance with article 249 (3) of the Constitution."[170] It also provides that the "Office shall have power to appoint, control and supervise its staff in a manner and for such purposes as may be necessary for the promotion of the purpose and the object for which the Office is established."[171] These two provisions cater for the problems earlier highlighted in the Mauritian example, and the Kenyan Act goes into further detail into other aspects of operations and management.

This thesis posits however that in order to use an Act to provide for the independent operations and management of the Office of the D.P.P, the constitution must provide that a legislation will be passed by parliament within a stipulated period, to give effect to the constitutional provisions on the

[170] Article 40, Kenya Office of the D.P.P Act, 2013
[171] Ibid, Article 13 (2)

independence of the D.P.P. The Kenyan Constitution however fails to do so,[172] and this is a major flaw. Providing a timeline for the passage of legislation on the independence of the D.P.P in a constitution would provide clarity and eliminates the possibility of an indefinite period within which the Office D.P.P lacks operational and managerial autonomy as seen in Mauritius, where it took over four decades since the promulgation of the Constitution before the Office of the D.P.P gained operational independence.

This thesis thus recommends that Constitutions in commonwealth Africa including the 2020 Draft Constitution of The Gambia should must either provide in black letter provisions that guarantee the operational independence of the Office of the D.P.P particularly provisions on its personnel management and financial autonomy. In the alternative, this thesis recommends that constitutions must include a provision that requires parliament to pass legislation on the operational independence of the Office of the D.P.P akin to the Kenya Office of the D.P.P Act, within a specific period after the promulgation of the constitution.

3.3 Accountability for the Office of the D.P.P

The accountability of the Office of the D.P.P for the quality of its decisions in the exercise of its prosecutorial decisions is also an important factor in preserving its integrity. This part will examine two possible accountability mechanisms to determine which works bests and why. These mechanisms include parliamentary reporting and judicial review.

Both Kenya and The Gambia have sought to hold the Office of the D.P.P accountable by employing parliamentary reporting mechanisms. The Draft Gambian Constitution spells out what seems like an

[172] See Fifth Schedule of the 2010 Kenyan Constitution

accountability measure. It states that the D.P.P shall prepare and present an annual report to parliament regarding the exercise of his or her powers and the report shall include statistics on the number of–

a) criminal cases received for purposes of prosecution;
b) prosecutions undertaken and completed;
c) prosecutions undertaken but not completed;
d) prosecutions yet to commence;
e) cases in respect of which prosecution was undertaken and discontinued;
f) prosecutions taken over by him or her; and
g) any other cases for which statistical data may be developed to assist the National Assembly in understanding and having a fuller picture on the state of criminality in the country.[173]

The 2020 Draft Constitution also provides that in reviewing and debating the D.P.P's annual report, parliament shall not give any direction to the D.P.P, but may make recommendations of an administrative or policy nature.[174] While the Kenyan Constitution does not spell out any accountability measures for the Office of the D.P.P, the Office of the D.P.P Act does provide similar provisions to that in the Draft Gambian Constitution. The Act provides that a report on the overall performance of the Office of the D.P.P must be presented by the D.P.P to parliament at the end of the financial year.[175] The Act also provides that at any time, the President, the National Assembly or the Senate may require the Director to submit a report on a particular issue, to be debated in the National Assembly.[176] The Kenyan O.D.P.P Act, unlike the Draft Gambian Constitution, fails to disclose what

[173] Draft Gambian Constitution 2020, Article 131 (11)
[174] Ibid, Article 131 (13)
[175] Kenya Office of the D.P.P Act, 2013, Article 7(1)
[176] Kenya Office of the D.P.P Act, 2013, Article 7(2)

ought to happen after such a report is submitted and debated. As such, it can be inferred that all the National Assembly is to do is debate the report but not give any directions to the D.P.P as regards his prosecutorial functions.

The question thus is if the Kenyan and Gambian parliaments cannot give directions to the D.P.P in relation to the reports submitted on the performance of the Office of the D.P.P, then how can they hold the Office of the D.P.P accountable for the quality of its decisions? This could be characterised better as a reporting mechanism rather than an accountability measure, as the performance of the D.P.P, for better or worse, does not result in actions taken by parliament to either sustain good performance or rectify poor performance.

A better accountability measure has emerged from Mauritius albeit not from the 1968 Mauritian Constitution. The measure is judicial review of prosecutorial decisions, which was prescribed by the Privy Council in the case of *Mohit v. The Director of Public Prosecutions of Mauritius,*[177] wherein the Council stated that the actions of the D.P.P could be subject to judicial review particularly when the actions are in excess of the D.P.Ps constitutional powers; the DPP could be shown to have acted under the direction or control of another person or authority; the DPP were to act upon a political instruction; and the actions or decisions of the D.P.P were in bad faith, for example, dishonesty, such as in consideration of the payment of a bribe.

All of these listed actions fall foul of the object and purpose for the establishment of an independent Office of the D.P.P, and could even constitute misconduct by the D.P.P, which is a ground for dismissal under the Kenyan and Gambian Constitutions. As such, this thesis agrees with the decision

[177] Supra no. 133

of the Privy Council that such wrongful actions should be subject to review as an accountability measure.

Unlike the parliamentary reporting mechanism employed by Kenya and the draft Gambian constitution, which this thesis has argued cannot be classified as an accountability measure, the effect of judicial review is that the appropriate court provides the avenue through which aggrieved persons could challenge the ill actions of the D.P.P. Through this, the D.P.P could also be questioned on the reasoning behind his actions or decisions. The appropriate court could then overrule the actions of the D.P.P or lead to direct the D.P.P to take certain actions to rectify his ill actions.

The one potential flaw of using judicial review as an accountability measure for the Office of the D.P.P, is that it could further clog an already overburdened judicial system with more cases for the court to hear. It is foreseeable that defence counsels when defending their clients will plead that the prosecution was not founded on legal reasoning leading to multiple appeals for judicial review of the D.P.Ps actions, further clogging a stressed judicial system. This is especially true in the cases of The Gambia and Kenya where for many years courts have struggled to cope with huge number of cases brought before them. In Kenya, for example, some courts are scheduled to hear up to 30 cases a day,[178] some of which may end up being adjourned for continuation of hearing. In The Gambia, the courts continue to suffer from inefficiency at all levels, as cases continued to be delayed because the judicial system is overburdened.[179] The government of The Gambia as a result, continues to recruit judges and

[178] S F Joireman, The Evolution of the Common Law: Legal Development in Kenya and India (2006) available at https://core.ac.uk/download/pdf/232765761.pdf last accessed 28 June 2021
[179] U.S State Department Gambia Profile, p. 9 available at https://2009-2017.state.gov/documents/organization/160123.pdf last accessed 28 June 2021

magistrates from other commonwealth countries with similar legal systems, in order to reduce the backlog of cases.[180]

Surprisingly however, in Mauritius where judicial review has been employed as an accountability measure, there have only been two cases of judicial review of the actions or decisions of the D.P.P since the Privy Council decision in the case of *Mohit v. The Director of Public Prosecutions of Mauritius*[181] was passed in 2006. These cases were Jeekarajee v DPP, and Malhotra v DPP, both of which were unsuccessful.[182] This thesis cannot adequately identify a reason why there has been so few judicial review challenges of the D.P.Ps actions or decisions, but it may be because ever since the judgement in Mohit, the ODPP has been furnishing reasons for its decisions to enable potential litigants to challenge its decisions.[183] And that the D.P.P's reasons for the most part have been legitimate leading to no appropriate reason for a judicial review challenge of the D.P.Ps actions or decisions. It could thus be argued from the evidence in Mauritius that employing judicial review as an accountability mechanism for the D.P.P will not lead to a clogging of the judicial system, as has been suggested. A key to achieving this, as seen in Mauritius, would be the D.P.P furnishing reasons for its prosecutorial decisions to provide clarity, transparency and enable potential litigants to make an informed choice as to whether or not to challenge the decisions of the D.P.P through judicial review mechanisms.

This thesis thus recommends that the Kenyan, Gambian, and other commonwealth African Constitutions make provision to allow for the judicial review of the decisions of the D.P.P as prescribed by the Privy Council in *Mohit*. The thesis also recommends that Mauritius Constitution

[180] Ibid
[181] Supra no. 133
[182] Lexpress "*Seven reasons why the setting up of a Prosecution Commission is irrational*" available at https://www.lexpress.mu/idee/295609/seven-reasons-why-setting-prosecution-commission-irrational last accessed 21st May 2021
[183] Ibid

makes provision for this in its constitution because it has, since 2006, failed to amend its constitution to reflect the Privy Council decision in *Mohit*. Further, the thesis recommends that a constitution should provide that a D.P.P in making a prosecutorial decision must furnish reasons for that prosecutorial decision. All of these, this thesis suggests would act as an adequate accountability mechanism for the D.P.Ps decisions in commonwealth Africa.

It is important to note however, that while this thesis does not consider the parliamentary reporting mechanism contained in the 2010 Kenyan Constitution and 2020 Draft Gambian Constitution as accountability measures, it is not arguing for it to be done away with in these respective constitutions. Instead, it is arguing that an actual accountability measure, which is judicial review, be included in both constitutions and other constitutions in commonwealth Africa, while the reporting mechanism be maintained in order to inform the public either through their representatives or through publications of reports, on the overall performance of the public office of the D.P.P.

Conclusion & Summary of Findings

It is clear that the abuse of prosecutorial powers of the Office of the D.P.P by the Executive arm of the state is more likely to occur when the independence of the D.P.P is not guaranteed in the constitutional text of a country. The thesis found that previously in Kenya and currently in The Gambia, the prosecutorial decisions are subject to the approval of the Attorney-General who is a political appointee of the President. This led to direct control of prosecutorial decisions by executive resulting in favourable political outcomes with regards criminal prosecutions for the ruling government. Beyond executive control of prosecutorial decisions, this thesis found that operational independence of the Office of the D.P.P may prove just as important as prosecutorial independence in promoting the integrity of the Office of the D.P.P. Mauritius served as an example of how executive control over the finances, personnel and operations of the D.P.P could still hamper the independence of the D.P.P even if guaranteed prosecutorial independence by the Constitution.

The appointing and dismissal powers of the Executive, particularly the President, over the position of D.P.P must also be curtailed in order to guarantee the independence of the Office of the D.P.P. These appointing and dismissal powers were particularly influential in making the Office of the D.P.P in The Gambia an oppressive machinery of the ruling authoritarian government. This thesis thus finds that the best solution is hiving off the appointing and dismissal powers from the political domain, which includes the legislature, and placing it in the hands of judicial and legal experts, as seen in Mauritius.

The thesis also finds that the constitutions of all three comparators are absent of an accountability mechanism to hold the Office of the D.P.P for its past unconstitutional or unethical decisions. These measures are essential in ensuring that the Office of the D.P.P does not abuse its prosecutorial discretion. Judicial review emerged as the most suitable accountability mechanism for the Office of the D.P.P in commonwealth Africa, having emanated from a Privy Council decision on the review of

prosecutorial discretion in Mauritius. The decision established conditions on which judicial review could be applied, with the thesis confirming that the use of judicial review as an accountability mechanism will not lead to the clogging of the court systems, but would rather lead to the D.P.P furnishing reasons for his prosecutorial decisions leading to greater transparency and accountability in criminal prosecutions.

Opportunity for further Research

As the police carry out prosecutions for misdemeanours and other minor offences,[184] in many commonwealth African countries including Mauritius, and The Gambia, it would be interesting to research the impact of police prosecutorial powers in commonwealth Africa on the D.P.P's accountability for prosecutions. Potential questions could examine the necessity for police prosecutors in a system that seeks to hold the D.P.P accountable for all prosecutorial decisions, or whether accountability could be shifted to the Police when they carry out prosecutions. Other questions could examine whether officers answerable to a political appointee- the Inspector General of Police- should even be in the business of carrying out prosecutions, based on the principles established in this thesis.

[184] Mauritius: The Prosecution Process, the decision whether to prosecute available at https://dpp.govmu.org/Documents/The%20Prosecution%20Process/process.pdf last accessed 29th June 2021

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